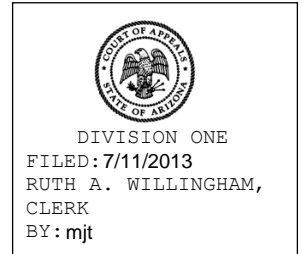


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:) 1 CA-CV 12-0500
)
DUMITRU STEFANIGA,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
EUNICE STEFANIGA,)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-053114

The Honorable Gerald Porter, Judge

VACATED IN PART AND REMANDED

Daniel J. Siegel, P.C.
By Daniel J. Siegel
Attorney for Petitioner/Appellant

Phoenix

Gerald D. Sherrill
Attorney for Respondent/Appellee

Scottsdale

B R O W N, Judge

¶1 Dumitru Stefaniga ("Husband") appeals the superior court's dissolution decree characterizing the marital home as community property and awarding the home to Eunice Stefaniga

("Wife"). For the following reasons, we vacate that portion of the decree as well as the court's award of attorney's fees and remand for proceedings consistent with this decision.

BACKGROUND

¶12 Husband and Wife married on April 7, 1998. Three months before their marriage, Husband purchased a house (the marital residence) with a down payment of \$2800.

¶13 In July 2011, Wife obtained an order of protection that granted her exclusive use of the marital residence.¹ On October 3, 2011, Husband filed a petition for dissolution of marriage asserting he acquired the marital residence as his sole and separate property and therefore he should be awarded the residence upon dissolution. On October 14, 2011, after Husband filed the petition for dissolution, Wife obtained a subsequent order of protection, which again granted her exclusive use and possession of the residence.

¶14 In Wife's response to the petition for dissolution, she admitted that Husband purchased the marital residence as his sole and separate property. Likewise, in the parties' joint prehearing statement, Wife again acknowledged that the marital residence is "technically" Husband's sole and separate property. Wife requested, however, that the equity in the marital home "be

¹ In August 2011, Wife voluntarily dismissed the July order of protection, although she remained in the residence.

considered community property" and that she be awarded the residence and ordered to pay Husband his one-half interest of the equity in the home. For reasons not clear from the record,² at trial Wife took the position that the residence is community property. Thus, both parties asked the court to award them the residence.

¶15 The superior court subsequently issued its decree dissolving the marriage. As pertinent here, the court found that the marital residence was community property, "with the exception of the down payment of \$2800" which the court found to be Husband's sole and separate property. The court awarded Wife the residence and ordered her to pay Husband \$14,987.50³ for his one-half interest in the community equity. The court also ordered Wife to refinance the home to remove Husband's name from the mortgages or sell the home at Wife's expense. The court ordered Husband to pay \$4000 to Wife for her attorneys' fees and costs.

² Husband has not provided a transcript of the trial proceedings. It is the appellant's obligation to provide all necessary portions of the record, including transcripts, and we presume that the missing transcripts support the superior court's rulings. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

³ The superior court calculated the community's share of the equity in the home by subtracting Husband's \$2800 down payment from the property's undisputed appraisal valuation, \$110,000, and then further subtracting the outstanding mortgage balances, which totaled \$77,225.

¶16 Following the superior court's denial of Wife's motion for a new trial, Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2).

DISCUSSION

¶17 Husband contends the superior court erred by characterizing the marital residence as community property and awarding the property to Wife. Specifically, Husband argues the marital residence is his sole and separate property and Wife is therefore entitled only to a one-half interest in the community's equitable lien on the property.

¶18 "In Arizona, property owned or acquired by either spouse prior to marriage is separate property and does not change its character after the marriage except by agreement or operation of law." *Drahos v. Rens*, 149 Ariz. 248, 249, 717 P.2d 927, 928 (App. 1985); see also A.R.S. § 25-213. "[A] residence which is separate property does not change its character because it is used as a family home and mortgage payments are made from community funds." *Drahos*, 149 Ariz. at 249, 717 P.2d at 928. We review de novo the characterization of property as community or separate. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶19 Here, Wife concedes that Husband purchased the marital residence before marriage using his sole and separate funds for

the down payment. The record is undisputed that Husband never transferred any title interest in the residence to Wife during the marriage. Therefore, as acknowledged by Wife on appeal, the residence is Husband's separate property and the superior court erred by awarding the property to Wife.

¶10 Nonetheless, the community is entitled to an equitable lien against the property "even though the character of that property has not changed." *Drahos*, 149 Ariz. at 249, 717 P.2d at 928. When mortgage payments have been made using community funds, we apply the "value-at-dissolution/enhanced-value formula" set forth in *Drahos* to determine the amount of the community's equitable lien. *Id.* at 250, 717 P.2d at 929; *Valento v. Valento*, 225 Ariz. 477, 481, ¶ 13, 240 P.3d 1239, 1243 (App. 2010) (explaining the "value-at-dissolution" approach is generally "appropriate to value a community lien").

¶11 Husband does not dispute that all mortgage payments were made with community funds nor does he contend that the property appreciated before marriage. Therefore, applying the simplified *Drahos* formulation set forth in *Barnett v. Jedynak*, 219 Ariz. 550, 554, ¶ 16, 200 P.3d 1047, 1051 (App. 2009), the community's equitable lien on the property equals \$15,794.12 (\$13,425 (community contributions to the principal) + [(\$13,425 (community contributions to the principal/\$93,500 (purchase price)) x \$16,500 (appreciation in value of the property since

purchase)]. Each party is therefore entitled to a one-half interest in the community lien, \$7,897.06, unless the superior court determines that the equitable principles governing the allocation of property demand an alternative division.⁴

¶12 Next, Husband argues the superior court erred by awarding wife attorneys' fees. Husband contends that his positions in the superior court were reasonable and correct, and therefore an award of attorneys' fees to Wife pursuant to A.R.S. § 25-324 is not justified.

⁴ Husband contends the marital residence should be valued as of the date service of the petition for dissolution was filed (October 2011) rather than the date of trial. In their joint pretrial statement, Husband and Wife each adopted and applied the December 2011 appraisal valuation for the marital residence, \$110,000, to calculate the community's equity in the property. Therefore, because Husband raises this claim for the first time in his reply brief, the issue is waived. *Varsity Gold, Inc. v. Porzio*, 202 Ariz. 355, 357, ¶ 9, 45 P.3d 352, 354 (App. 2002) (explaining that arguments raised for the first time in a reply brief deprive the other party of the opportunity to respond and are therefore deemed waived). Wife, on the other hand, argues that the marital residence should be reappraised and its current value should be used to calculate the community's equitable lien interest. Specifically, Wife asserts that she should share in any appreciation in the property since trial because she has made the mortgage payments with her sole and separate property. But for the erroneous award of the marital residence to Wife in the decree, Husband would have been entitled to ownership of the property and therefore controlled its use. Instead, Wife was permitted exclusive use of the property. Accordingly, we reject Wife's argument. However, in determining an equitable division of the community's equitable lien on remand, the superior court may consider (1) Wife's argument that she is entitled to a community credit for payments on the mortgage she made prior to the decree out of her sole and separate property; and (2) Husband's assertion that he lost the use of the property during the same time period.

¶13 We review the superior court's decision to award attorneys' fees for an abuse of discretion. *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995). A court may order a party to pay the other party's reasonable costs and expenses incurred in defending a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A).

¶14 The superior court in this case entered the fee award based on "the positions taken by the parties, in particular [Husband's] position on the home and his failure to comply with the temporary orders of [the] Court and the relative financial resources of the parties." Because the court's fee award was based, at least in part, on Husband's correct assertion that the marital residence is his sole and separate property, we set aside the fee award and remand to allow the court to reevaluate the factors of § 25-324 and determine whether a fee award is nonetheless justified.

¶15 Both parties request an award of their attorneys' fees incurred on appeal under § 25-324. In our discretion, we deny both fee requests. As the prevailing party, however, Husband is entitled to his taxable costs on appeal subject to his compliance with Arizona Rule of Civil Appellate Procedure 21(a).

CONCLUSION

¶16 For the foregoing reasons, we vacate the portion of the dissolution decree characterizing and allocating the marital residence, set aside the attorneys' fee award, and remand for proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge