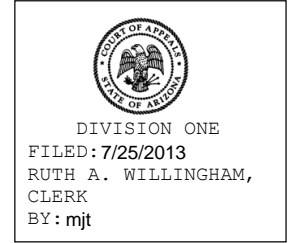


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



JEFF WASSERMAN,) No. 1 CA-CV 12-0509
)
Petitioner/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CRYSTAL MOYA,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Respondent/Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2011-092048

The Honorable James P. Beene, Judge

AFFIRMED

Owens & Perkins, P.C. Scottsdale
by Max Nicholas Hanson
Attorneys for Petitioner/Appellee

Law Offices of Stone & Davis, P.C. Scottsdale
by Kiilu Davis
Attorneys for Respondent/Appellant

T H U M M A, Judge

¶1 Crystal Moya (Wife) appeals from the superior court's decree of dissolution of her marriage to Jeff Wasserman (Husband). Finding no error, the decree is affirmed.

FACTS AND PROCEDURAL HISTORY

¶12 Wife and Husband married on October 17, 2008. Husband filed for divorce in May 2011, serving Wife on June 8, 2011. They have no children and the sole issues raised on appeal are financial.

¶13 Wife was in a car accident in 2006, which resulted in allegations of numerous health issues, including nerve damage, neurological disorders, diabetes and hypothyroidism. Wife has an extensive pre-accident work history as a dental assistant and office manager, but has not worked since November 2008 and contends she has not been cleared to work by her treating physicians. Wife applied for disability insurance benefits with the Social Security Administration, and in a mid-2011 decision issued following an evidentiary hearing, the Administrative Law Judge (ALJ) found "the functional limitations resulting from [Wife's] impairments are less serious than she has alleged" and "do not prevent her from engaging in all work related activities."

¶14 Husband is an account manager earning, on average, \$76,000 per year.

¶15 Wife sought temporary orders that she be awarded exclusive possession of the marital home and that Husband pay all community obligations for the home as well as Wife's living expenses, \$2,500 in monthly spousal maintenance and Wife's

attorneys' fees. After a hearing, the superior court issued temporary orders providing Wife exclusive possession of the home and ordering Husband to pay all community obligations for the home and \$500 in monthly spousal maintenance to Wife.

¶16 After a March 2012 trial, the superior court entered a detailed, 10-page dissolution decree that includes the orders Wife challenges on appeal. This court has jurisdiction of Wife's timely appeal pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (West 2013).¹

DISCUSSION

A. Disposition of Community Assets.

1. Sports memorabilia.

¶17 Husband possessed sports memorabilia, most of which he acquired prior to the marriage. At trial, the superior court received an exhibit inventorying items Husband claimed were sole and separate property. Husband testified that only three of the items on the five-page list were purchased during the marriage: a wrestling ring toy, a wrestling hat and a bubble hockey table. The total value of those three items was \$135. The superior court awarded Husband all of the items listed, including the three purchased during the marriage.

¹ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

¶18 Pursuant to A.R.S. § 25-211(A), “[a]ll property acquired by either husband or wife during the marriage is the community property of the husband and wife,” except property acquired by gift, devise or descent or after service of a petition for dissolution. Clear and convincing evidence is required to rebut this presumption of community property. *Sommerfield v. Sommerfield*, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979). Wife argues the court erred in distributing the sports memorabilia collection to Husband.

¶19 To the extent Wife argues the superior court erred in finding any of the items of sports memorabilia were Husband’s sole and separate property, the record amply supports the court’s finding. As to the three items Husband testified were purchased during the marriage and valued at \$135, the superior “court is accorded great discretion in the apportionment of community assets.” *Standage v. Standage*, 147 Ariz. 473, 476, 711 P.2d 612, 615 (App. 1985). The “court is not required to make an absolutely equal distribution of the community property as long as it does not appear that the [] court’s disposition of the community estate is inequitable or unfair.” *Nesmith v. Nesmith*, 112 Ariz. 248, 252, 540 P.2d 1229, 1233 (1975) (quotation omitted); see also A.R.S. § 25-318(A) (court shall divide community property equitably). This discretionary power will not

be disturbed on appeal unless it clearly has been abused. *Neely v. Neely*, 115 Ariz. 47, 49, 563 P.2d 302, 304 (App. 1977).

¶10 Here, Wife has not shown how the superior court abused its discretion in awarding Husband the entire collection of memorabilia. Wife did not contest the values attributed to various items by Husband (which, as relevant to this aspect of the sports memorabilia, were comparatively insignificant) but, instead, testified to a belief that there were more memorabilia items that were community property. Given the other community assets Wife received, including an equalization payment of more than \$20,000, distributing the whole collection to Husband (including three items valued at \$135 that were purchased during the marriage) did not render the division of community property inequitable or unfair.

¶11 Viewed in context, even if the superior court erred in finding that the three sports memorabilia items Husband purchased during the marriage were his sole and separate property, the court is accorded great discretion in distributing community assets. Not awarding Wife a one-half community interest in \$135 worth of collectibles fails to render the division of assets inequitable and therefore was not an abuse of discretion. *Id.* at 49, 563 P.2d at 304.

2. 2009 Toyota Corolla.

¶12 Before Wife was served with the dissolution petition, Husband used \$2,000 of community funds as a down payment to buy a 2009 Toyota Corolla. See A.R.S. § 25-211(A)(2) (property acquired *after* service of a petition for dissolution is that spouse's sole and separate property). Husband took out a \$14,000 loan to purchase the Corolla. The decree awarded Husband the Corolla "subject to him being solely responsible for any loans or financial obligations associated therewith."

¶13 Wife contends she is entitled to reimbursement of one-half of the community funds used to purchase the Corolla. Husband counters that the decree properly awarded the Corolla to him because there was no value or equity to divide, given the \$14,000 loan Husband was ordered to pay.

¶14 Sufficient evidence supports the superior court's ruling regarding the Corolla. "Assets and obligations are reciprocally related and there can be no complete and equitable disposition of property without a corresponding consideration and disposition of obligations." *Cadwell v. Cadwell*, 126 Ariz. 460, 462, 616 P.2d 920, 922 (App. 1980). On this record, because Husband was awarded the Corolla subject to the loan, the court did not abuse its broad discretion in achieving an equitable division of the community assets. See *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007).

3. 2006 Scion TC.

¶15 During the marriage, Husband bought and then sold a 2006 Scion TC. Husband sold the Scion as-is for \$7,500 to a private party, paid off the loan on the vehicle and divided the remainder of the proceeds with Wife. Wife claims Husband sold the Scion for less than fair market value and that the court erred in failing to award Wife one-half of the difference between the higher fair market value and the \$7,500 sale price.

¶16 This court views the evidence "in a light most favorable to upholding the trial court's ruling and will sustain that ruling if the evidence reasonably supports it." *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005). While Wife introduced an objective valuation of \$9,445 for a 2006 Scion TC in fair condition, the trial evidence showed that the vehicle sold by Husband needed new tires, brake pads and seat upholstery, the windshield was cracked and the wheels were scratched. Husband testified he sold the Scion as-is because "it would have been a wash" to repair it simply to recoup the repair costs in a higher sale price. Although Wife claims the Scion should have been sold for a higher price, the court did not abuse its discretion in finding Wife was entitled to no more than the one-half of the sale proceeds she had already received.

4. 1997 Toyota Paseo.

¶17 In 2009, shortly after Husband and Wife were married, Husband purchased a 1997 Toyota Paseo for approximately \$1,600 as a gift for his parents. The decree states the superior court "was not provided with sufficient evidence to support a ruling on this issue, therefore, no action shall be taken on this vehicle." The effect of this ruling was to treat the Paseo as a gift during the marriage. Wife argues that because Husband purchased the vehicle with community funds, the court erred in failing to award her one-half of the value of the vehicle. Husband asserts that under Arizona law, he had the right to use community funds during the marriage to give his parents a gift.²

¶18 By statute, as applicable here (including where there is no claim or showing of waste),

B. The spouses have equal management, control and disposition rights over their community property and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community

A.R.S. § 25-214(B)-(C). Although Wife argues Husband could not gift property bought with community funds, this statute clearly vested Husband with the equal right and authority to do so.

² Wife argues waiver by Husband failing to raise the Paseo issue in the parties' pre-trial statement. Wife, however, raised the issue in the pre-trial statement and Husband presented trial evidence on the issue, meaning Wife's waiver argument fails.

Thus, the court acted within its discretion in maintaining the status quo and taking no action with respect to the vehicle gifted to Husband's parents at the beginning of the marriage.

B. Award of Spousal Maintenance.

1. Background.

¶19 Before the superior court, Wife argued that she was entitled to \$2,500 to \$3,500 per month in spousal maintenance for an indefinite period of time, subject to modification should she be awarded disability benefits. Husband argued neither party qualified for spousal maintenance. In the decree, the court found Wife qualified for spousal maintenance and ordered Husband to pay Wife \$500 per month for 15 months commencing retroactively on September 1, 2011, the effective date of the temporary orders. On appeal, Wife claims the court erred in making that award and seeks a remand with instructions that she be awarded "a reasonable amount of spousal maintenance."

¶20 We review the superior court's award for an abuse of discretion, viewing the evidence in the light most favorable to the court's order, and will affirm if there is any reasonable evidence to support the award. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998); *Martin v. Martin*, 156 Ariz. 440, 450, 752 P.2d 1026, 1036 (App. 1986). An award of spousal maintenance is governed by A.R.S. § 25-319 and the court has substantial discretion in considering a claim for such an

award. *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993). In deciding spousal maintenance, the superior court first considers whether the spouse meets the eligibility requirements of A.R.S. § 25-319(A) and, if so, then applies the factors in A.R.S. § 25-319(B) to set the amount and duration of an award. *Gutierrez*, 193 Ariz. at 348, ¶ 15, 972 P.2d at 681.

2. Basis For Wife's Spousal Maintenance Award.

¶21 Wife sought spousal maintenance claiming she (1) lacks sufficient property to provide for her reasonable needs; and (2) is unable to be self-sufficient through employment. See A.R.S. § 25-319(A)(1)-(2). The superior court awarded Wife spousal maintenance, finding she "lacks sufficient property, including property apportioned to [her], to provide for [her] reasonable needs." See A.R.S. § 25-319(A)(1). In awarding Wife spousal maintenance pursuant to A.R.S. § 25-319(A)(1), and not (A)(2), the court acknowledged Wife's belief that "she is unable to work at this time. However, the Court respectfully disagrees." Wife argues the court erred in not also finding spousal maintenance was justified under A.R.S. § 25-319(A)(2) because she was unable to be self-sufficient through employment "due to her physical disabilities and ongoing medical conditions." See A.R.S. § 25-319(A)(2).

¶22 On appeal, Wife reiterates much of the evidence she presented regarding her health and ability to work, including

her own testimony and testimony from her primary care physician, Dr. Molly Finley, who provided a "no-work status" note to Wife. Although evidence was presented to the superior court supporting Wife's position, the court also received contrary evidence.

¶23 Husband's expert witness, Dr. Zoran Maric, performed an independent examination of Wife and testified that there was "no objective substantiation" of Wife's pain complaints, meaning nothing "preclude[d] her from being able to work." The superior court ultimately agreed with Maric's conclusion, which was consistent with the ALJ's finding that Wife was capable of working as an office manager.³

¶24 Wife's argument that the court erred because Maric was a "paid expert witness[]" who has "proven to be unreliable" asks this court to re-weigh the evidence, which this court will not do. *See Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009). Instead, this court defers to the superior court's determination of credibility and the proper weight to give conflicting evidence. *See Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680; *see also State v. Martinez*, 196 Ariz. 451, 463-64, ¶ 53, 999 P.2d 795, 807-08 (2000) (deferring to superior court's

³ Wife correctly notes that Husband submitted an affidavit to the Social Security Administration substantiating her health issues by stating he helped Wife perform everyday activities. Husband testified, however, that he wrote the affidavit at Wife's direction.

evaluation of medical experts' credibility). Here, although acknowledging conflicting evidence, reasonable evidence supports the finding that Wife could be self-sufficient through employment and therefore did not qualify for spousal maintenance pursuant to A.R.S. § 25-319(A)(2).⁴

3. The Amount And Duration Of Wife's Spousal Maintenance Award.

¶125 Applying the relevant A.R.S. § 25-319(B) factors, the superior court awarded Wife spousal maintenance of \$500 per month for fifteen months. Wife argues the "court abused its discretion in failing to award [her] an adequate amount and duration in spousal maintenance for a sufficient time to meet her reasonable needs," specifically at least \$2,500 per month (\$30,000 per year) for an unlimited time. Viewing the evidence in the light most favorable to sustaining the award, the court did not abuse its discretion.

¶126 First, Wife challenges the superior court's analysis of her earning ability and her ability to meet her needs independently. See A.R.S. § 25-319(B)(3) ("[t]he age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance"), (9) ("[t]he

⁴ Notwithstanding the court's finding after the temporary orders hearing that Wife's health impairments precluded her from being self-sufficient through appropriate employment, the more fully-developed record at the dissolution trial supports the court's finding that Wife was entitled to spousal maintenance only pursuant to A.R.S. § 25-319(A)(1).

financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently"). Wife claims substantial evidence shows she "is not able to work due to her physical disabilities and ongoing medical conditions." Having weighed and assessed conflicting evidence, the court found (as did the ALJ) that Wife could return to work and meet her needs independent of spousal maintenance. Resolution of that issue of fact was for the superior court, which heard testimony and was in the best position to evaluate credibility. *Brevick v. Brevick*, 129 Ariz. 51, 53, 628 P.2d 599, 601 (App. 1981).

¶127 Wife challenges the superior court's reliance on the short duration of the marriage, arguing duration is not dispositive. See A.R.S. § 25-319(B)(2). It is clear from the decree, however, that the court did not treat the short duration of the marriage as dispositive. Although finding the two year and seven month marriage was "of short duration," the court properly analyzed all other applicable A.R.S. § 25-319(B) factors.

¶128 Wife next argues the superior court "clearly did not account for" the property awarded Husband in "the Decree, as well as, his yearly income amount. . . . Both of these factors are demonstrative of an ability to provide maintenance for [Wife, while still being able to provide for himself." See

A.R.S. § 25-319(B)(4) (“[t]he ability of the spouse from whom maintenance is sought to meet that spouse’s needs while meeting those of the spouse seeking maintenance”), (5) (“[t]he comparative financial resources of the spouses, including their comparative earning abilities”). But the court acknowledged Husband “earned on average [] approximately \$76,000.00 over the past three (3) years,” while Wife “has not worked for approximately three and one-half (3.5) years.” The court also found “Husband is able to pay” the award ordered. Although Wife argues the court did not place sufficient emphasis on Husband’s earning capacity, this court does not re-weigh the evidence. On this record, the court properly took into account Husband’s earning capacity.

¶29 Wife’s final argument on this point is that the “court should have taken more consideration of []Wife’s new expense of monthly health insurance” of \$450, especially because Husband will experience a savings given he no longer covers this cost through his employer. See A.R.S. § 25-319(B)(12) (“[t]he cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought”). Again, this court defers to the superior court’s determination of the appropriate weight to give the evidence. See *Gutierrez*, 193 Ariz. at 347, ¶

13, 972 P.2d at 680. Wife has not shown that the court improperly considered this factor.

¶30 Given the discretion vested in the superior court, and the evidence of record, there was no abuse of discretion in awarding Wife spousal maintenance of \$500 for fifteen months pursuant to A.R.S. § 25-319(A)(1).

C. Reimbursement of Husband's Temporary Orders Obligations.

¶31 The decree credited Husband \$9,642.93 against Wife's equalization payment for one-half share of the community obligations Husband paid pursuant to the temporary orders during the pendency of the dissolution proceedings. The court stated,

Wife argues that because the Court did not state that Husband would be reimbursed for the monies paid toward the community obligations, [Husband] is not entitled to reimbursement relating to these community obligations. Wife is incorrect. As previously stated, [Husband] was ordered on a temporary basis to pay the mortgage an[d] all other *community obligations* until further order of the Court. Wife is not relieved of her obligation to pay for her one-half share of all debt incurred on behalf of the community because [Husband] was ordered to make temporary payments on behalf of the community.

On appeal, Wife argues the court erred because Husband failed to demonstrate any facts necessary to modify the temporary orders. The superior court's determination is reviewed for an abuse of discretion. *Maximov v. Maximov*, 220 Ariz. 299, 300, ¶ 2, 205 P.3d 1146, 1147 (App. 2009).

¶132 A temporary order is always subject to reassessment. A temporary order “[d]oes not prejudice the rights of the parties . . . that are to be adjudicated at the subsequent hearings in the proceeding.” A.R.S. § 25-315(F)(1). A temporary order also “[t]erminates when the final decree is entered” A.R.S. § 25-315(F)(4). Even before the final decree, a temporary order “may be revoked or modified . . . on a showing by affidavit of the facts necessary to revocation or modification of a final decree under § 25-327,” (i.e. changed circumstances). A.R.S. § 25-315(F)(2).

¶133 Wife contends that reimbursing Husband for one-half of the community obligations he paid constitutes a revocation or modification under A.R.S. § 25-315(F)(2) without Husband providing an affidavit or otherwise demonstrating changed circumstances. That statute, however, does not prohibit the superior court’s authority to consider anew the parties’ obligations and property division, even if the temporary order was silent on the matter. *See Green v. Nygaard*, 213 Ariz. 460, 465, ¶ 15, 143 P.3d 393, 398 (App. 2006) (applying A.R.S. § 25-315(F)(1) and (3), and concluding “[t]he value of assets and distribution of property will be considered anew before a final decree is issued”).

¶134 Essentially, Wife seeks to make the temporary orders permanent, ignoring the direction in A.R.S. § 25-315(F)(1) that

temporary orders do not prejudice the rights of the parties. See *Maximov*, 220 Ariz. at 301, ¶ 7, 205 P.3d at 1148 (noting unlike A.R.S. § 25-327, A.R.S. § 25-315 does not prohibit retroactively modifying temporary orders). While Wife argues it is “unjust and inequitable” to reimburse Husband “for monies he was ordered to pay after [Wife demonstrated, on a showing of good cause, her need for assistance,” the court clearly retained authority to do so pursuant to A.R.S. § 25-315(F)(1) and (4). *Id.*⁵

¶135 Wife further argues that awarding Husband reimbursement for the community obligations he paid “is essentially requesting [Wife to repay support that she received.” This argument fails to acknowledge that the court’s temporary orders specifically required Husband to pay \$500 per month to Wife in spousal maintenance, and separately ordered that he “pay the mortgage and all other community obligations for the marital residence” in which Wife was residing during the pendency of the proceedings. Although Wife attempts to categorize the community obligations as additional spousal maintenance, the order clearly distinguished the two temporary obligations. Husband was reimbursed only one-half of the community obligations he paid; the monthly spousal maintenance

⁵ Wife’s argument that “there is no indication that the provisions of A.R.S. § 25-315(F) must be considered together” is unavailing. Arizona courts “ordinarily do not construe statutes so as to render portions of them superfluous.” *Grand v. Nacchio*, 225 Ariz. 171, 175-76, ¶ 22, 236 P.3d 398, 402-03 (2010).

award Wife received pursuant to the temporary orders was left intact.

¶136 Given credible evidence Husband spent \$19,287.86 on community obligations pending trial, the superior court acted within its discretion in reimbursing Husband half of those payments as a credit against Wife's equalization payment.⁶

D. Denial of Attorneys' Fees.

¶137 Wife challenges the denial of her request for attorneys' fees. As applicable here, the superior court had the discretion to award fees "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).⁷ The denial of attorneys' fees under A.R.S. § 25-324 is reviewed for an abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999).

¶138 Wife argues the superior court failed "to acknowledge the financial disparity between the parties." Contrary to Wife's argument, however, the court expressly acknowledged the

⁶ Because Husband clearly presented the issue in the pre-trial statement, contrary to Wife's argument, there was no waiver.

⁷ Several cases Wife cites in arguing this issue were decided before the "reasonableness of the positions" portion of A.R.S. § 25-324(A) was added in 1996, meaning those cases are superseded, at least in part, by that statutory amendment. *See, e.g., Gore v. Gore*, 169 Ariz. 593, 595-96, 821 P.2d 254, 256-57 (App. 1991); *Edsall v. Superior Court*, 143 Ariz. 240, 247-48, 693 P.2d 895, 902-03 (1984).

financial disparity between the parties, noting that "Husband's financial resources are more than [Wife's] financial resources."

¶139 As to the reasonableness of the parties' positions, the superior court stated,

[Wife's] request for \$2,500.00 to \$3,500.00 per month in spousal maintenance for an indefinite period of time, for a marriage of less than three (3) years in duration, is a patently unreasonable position. The Court also finds that [Wife's] unreasonable position regarding the spousal maintenance issue unnecessarily protracted the litigation in this case. Therefore, based upon the totality of circumstances regarding the issue of attorney fees and costs,

IT IS ORDERED that each party shall be responsible for their respective attorney fees and costs.

Wife claims this was an abuse of discretion, arguing that because she was awarded spousal maintenance of \$500 per month for fifteen months, Husband acted unreasonably in opposing any spousal maintenance award. But \$500 per month for fifteen months (totaling \$7,500) is far closer to zero than Wife's requested award of \$2,500 to \$3,500 per month (up to \$42,000 annually) for an indefinite period of time. Additionally, while Wife maintains her request was reasonable because it could be modified upon her receipt of disability benefits, the Social Security Administration rejected her application for benefits three times for the same reasons the superior court awarded her far less than she requested.

¶140 Finally, Wife argues "it is unclear why the trial court determined that [she] prolonged litigation based upon her request for spousal maintenance." But the record indicates that the most significant issue at trial was spousal maintenance. In fact, the testimony of all the witnesses other than Husband and Wife were solely focused on the issue of Wife's medical condition and her requested spousal maintenance. On this record, the court did not abuse its discretion in denying Wife's fees request.

CONCLUSION

¶141 The superior court's decree of dissolution is affirmed. In exercising this court's discretion, the requests by both parties for attorneys' fees incurred on appeal are denied. As the prevailing party on appeal, however, Husband is entitled to recover his costs upon compliance with ARCAP 21.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
DONN KESSLER, Judge