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See Ariz. R. Supreme Court 111(c)

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

TIMOTHY EDWARD BROWN, *Petitioner/Appellee/Cross-Appellant*,

v.

KATHLEEN JEANNINE DOONER, *Respondent/Appellant/Cross-Appellee*.

No. 1 CA-CV 12-0582
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. FN2011-090209
The Honorable Teresa A. Sanders, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

COUNSEL

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By Christy C. Brown

Counsel for Petitioner/Appellee/Cross-Appellant

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By Kellie N. Wells

Counsel for Respondent/Appellant/Cross-Appellee

MEMORANDUM DECISION

Presiding Judge Peter B. Swann authored the decision of the Court, in which Judge Patricia K. Norris and Judge Samuel A. Thumma joined.

S W A N N, Judge:

¶1 Kathleen Jeannine Dooner (“Wife”) and Timothy Edward Brown (“Husband”) appeal and cross-appeal, respectively, from several property awards in the decree dissolving their marriage. We hold that the superior court erred by delegating its obligation to decide the character of funds in Husband’s retirement account and by finding that Husband was not entitled to an equalization payment for separate property he expended to pay for Wife’s health insurance coverage. Finding no other reversible error, we affirm in part, and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife married in 2003. In 2011, Husband filed a petition for dissolution of the marriage. The parties then divided much of their property by written agreement under ARFLP 69. At trial, the parties’ disputes were limited to the distribution of an engagement ring, an individual retirement account and a savings account, possession of a dog, and the propriety of equalization payments to Husband for Wife’s alleged waste of community property and Husband’s payment of health insurance premiums and rent.

¶3 After considering the evidence, the superior court awarded the engagement ring to Husband and the dog to Wife, ordered equal division of the funds remaining in the savings account as of the date of trial, and ordered equal division of the community interest in the retirement account. The court further ordered that the division of the retirement account would be effected by a qualified domestic relations order (“QDRO”) or the parties’ agreement. It ruled that the entire account would be presumed to be community property unless the value of Husband’s premarital contributions to the account could be discerned after trial by the attorney tasked with preparing the QDRO. The court also found that Husband was not entitled to any equalization payments, and ordered both parties to bear their own attorney’s fees and costs.

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¶4 The court entered a decree of dissolution that incorporated its findings and the parties' ARFLP 69 agreements. Wife timely filed a notice of appeal and Husband timely filed a notice of cross-appeal.

DISCUSSION

I. WIFE'S APPEAL

¶5 Wife contends that the superior court erred by awarding the engagement ring to Husband, by failing to decide the community interest in the retirement account, and by denying her request for attorney's fees and costs. We address these arguments in turn.

A. The Superior Court's Finding that the Engagement Ring Was a Conditional Gift Was Not Clearly Erroneous.

¶6 Husband testified that he used a family ring to propose to Wife and had told Wife that the ring was "a family heirloom [that] needed to stay inside the Brown family, no questions asked." Wife, by contrast, testified that Husband never told her that he expected the ring to be returned to him. Wife also testified that she was 43 years old when she married Husband and the couple had never planned on having children to whom the ring could be passed. The court found that "the ring is a family heirloom, which Husband did not intend to give to Wife as an unconditional gift, but for her to retain so long as they were married."

¶7 Wife contends that the ring is her sole and separate property because Husband gifted it to her before the marriage. Whether a gift has been made is a question of fact, and we will not disturb the superior court's findings of fact unless they are clearly erroneous. *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995). A valid gift requires, *inter alia*, donative intent. *Id.* at 93, 919 P.2d at 188. "Donative intent is ascertained in light of all surrounding circumstances." *In re Marriage of Berger*, 140 Ariz. 156, 162, 680 P.2d 1217, 1223 (App. 1983). The donor may expressly or impliedly condition the donee's retention of the gift on the continuation of the parties' relationship. *See Hellyer v. Hellyer*, 119 Ariz. 365, 367, 580 P.2d 1219, 1221 (App. 1978).

¶8 On this record, we cannot say that the superior court erred by finding that Husband conditioned his gift of the ring to Wife on the parties' continued marriage. Husband's testimony provided sufficient evidence to support the court's conclusion. We defer to the superior court's determination of the parties' credibility and the weight to give

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their conflicting testimony. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 372 P.2d 676, 680 (App. 1998).

- B. The Superior Court Erred by Delegating Its Obligation to Determine the Community Interest in Husband's Retirement Account.

¶9 Husband testified that he opened an individual retirement account in 1997 and "regularly deposited . . . the maximum [amount] as allowed by the government." He provided statements showing that in 2004, the year after the parties' marriage, the account had a positive balance and he made no contributions. He did not provide any statements showing the account's status before 2004, and Wife testified that she did not know what the balance was when the parties married. According to Husband, he had attempted to obtain statements that predated the marriage but was told by the bank that those records were unavailable. He admitted that he had not subpoenaed the bank.

¶10 The court ruled:

Wife is entitled to one-half of the community share of this account, which shall be divided pursuant to a Qualified Domestic Relations Order, unless otherwise agreed to by the parties.

Based upon the evidence presented, the Court cannot determine conclusively what the value of the account was on the date of the marriage. The Court does believe that Husband's position makes sense, and is probably accurate, however, the Court cannot adopt his position and reasons for it as "nearly conclusive evidence."

Unless additional documentation can be obtained reflecting what the balance was as of the date of the marriage, or [the attorney tasked with preparing the QDRO] is of the opinion that he can determine the value, it must be presumed to be community property.

¶11 Although agreeing with the court's stated presumption, Wife contends that the court erred by delegating the authority to determine the community share of the account to the QDRO attorney. We agree. The court was statutorily obligated to determine the parties' separate property and divide their community property. A.R.S. § 25-318(A). By delegating the decision of the community share's value to the

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QDRO attorney, and by not resolving the question in the final decree, the court erred.¹

C. The Superior Court Did Not Abuse Its Discretion by Denying Wife's Request for Attorney's Fees and Costs.

¶12 Wife and Husband each requested an award of attorney's fees and costs. The superior court declined to award fees and costs to either party. Wife contends that she was entitled to an award because Husband sought possession of the parties' dog solely to harass her, unreasonably claimed offsets for insurance premiums and rent, unreasonably listed a settled matter as disputed in a pretrial filing, and failed to timely comply with disclosure obligations.

¶13 A.R.S. § 25-324 gives the court discretion to award attorney's fees and costs based on the parties' financial resources and the reasonableness of their positions, and requires an award when the court finds that a petition was filed in bad faith, filed for an improper purpose, or not grounded in fact or based on law. We review the denial of a request for attorney's fees and costs for abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999). We find no abuse of discretion here. The court observed the parties' conduct and reviewed their financial information, and Wife has failed to show an abuse of discretion on appeal. *See id.* Contrary to Wife's suggestion, Husband's claims were not per se unreasonable merely because he did not prevail on them or because he modified them as the litigation developed and the parties reached a partial settlement.

II. HUSBAND'S CROSS-APPEAL

¶14 Husband contends that the superior court abused its discretion by declining to award him equalization payments. He contends that Wife wasted community property by continuously giving gifts to her

¹ We further note that to the extent the court's ruling could be considered to be a finding of fact regarding the account's characterization, the court abused its discretion by "presum[ing]" the entire account to be community property when the parties did not dispute that Husband established and made contributions to the account before the marriage. Indeed, because the evidence showed that the account had value in 2004, and that no contributions had been made in that year (the first full year of the marriage), the only evidence appears to support a contrary conclusion.

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relatives from a community checking account, and by making expenditures from a community savings account after he filed his petition for dissolution. Husband also contends that he was entitled to reimbursement for paying for Wife's health insurance coverage and his rent. We address these arguments in turn.

- A. The Superior Court Did Not Abuse Its Discretion by Finding that Husband Failed to Establish a Prima Facie Claim for Waste.

¶15 Husband testified that from 2008 to the time of trial, Wife transferred more than \$10,000 from a community checking account to her relatives. According to Husband, during the marriage Wife would periodically advise him that she was sending money to her family but he did not realize that she was using the community checking account or that the gifts were substantial. Wife testified that the account was reported on the parties' joint tax returns, and though she acknowledged that she did not discuss every gift with Husband, she and her sister both testified that from their discussions with Husband he had known of the family's need for and Wife's provision of financial aid. Wife further testified that she and Husband had agreed to pay her other sister's rent for six months after the sister suffered an injury.

¶16 Wife acknowledged that she spent approximately \$8,500 from a community savings account after Husband filed for dissolution. She testified that approximately half of that sum was used to pay for the parties' last joint telephone bill, preparation of the parties' income tax returns, and expenses related to an ultimately unsuccessful attempt to short-sell the marital home.² According to Wife, when Husband moved out of the marital home and petitioned for dissolution, the amount owed on the mortgage for the marital home was far more than the home's value and the parties had agreed to attempt a short-sale. Husband did not dispute these facts, but he claimed that Wife had provided him with only one \$600 receipt for her expenditures in connection with the attempted short-sale.

² Wife admitted that she spent the remainder of the \$8,500 for her attorney's fees and other personal expenses. In view of the undisputed evidence that Husband withdrew and kept \$5,000 from the savings account shortly before he filed for dissolution, the court did not abuse its discretion by declining to award an equalization payment to Husband based on Wife's admission.

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¶17 We review the superior court's apportionment of community property for abuse of discretion. *Gutierrez*, 193 Ariz. at 346, ¶ 5, 972 P.2d at 679. The court may consider "excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common" when apportioning community property. A.R.S. § 25-318(C). When one spouse has wastefully dissipated marital property, the value of the dissipated property should be added to the value of the existing marital property and the sum equitably divided, by distribution in kind or by a monetary award. *See Martin v. Martin*, 156 Ariz. 452, 458, 752 P.2d 1038, 1044 (1988). "The spouse alleging abnormal or excessive expenditures by the other spouse has the burden of making a prima facie showing of waste. It is then the burden of the spending spouse to go forward with evidence to rebut the showing of waste" by proving that the expenditures benefitted the community. *Gutierrez*, 193 Ariz. at 346-47, ¶ 7, 972 P.2d at 679-80.

¶18 Here, the superior court found that "Husband ha[d] not established a claim for marital waste." This finding was not an abuse of discretion. The undisputed evidence showed that Wife advised Husband of her family's ongoing need for financial assistance and did not conceal her gifts from him, nor did he object to her conduct. Further, Husband presented no evidence or argument that the expenditures to prepare the marital home for the agreed-upon sale were excessive or abnormal. The court did not abuse its discretion by finding that Husband failed to meet his prima facie burden to show waste.

B. The Superior Court Erred by Denying an Equalization Payment for the Funds that Husband Expended for Wife's Health Insurance Coverage.

¶19 Husband testified that after filing for dissolution, he continued to pay the premiums for Wife's coverage under the health insurance plan offered by his employer. Wife acknowledged that she was covered by Husband's plan and that she received "opt out" payments from her employer as a result. The superior court ruled that Husband was "not entitled to reimbursement" for the premiums he paid.

¶20 The court's ruling was error. When Husband filed for dissolution, the preliminary injunction required by A.R.S. § 25-315 took effect. The injunction prohibited Husband from removing Wife from his insurance plan during the pendency of the action. Husband complied with the injunction and paid for both parties' continued coverage through deductions from his salary. The salary that Husband earned after Wife

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was served with the petition for dissolution was his separate property because upon entry of the decree of dissolution, the marital community terminated retroactively to the date of service. A.R.S. §§ 25-211(A)(2), -213(B). Husband is entitled to an equalization payment for the separate property that he expended to pay for the portion of the insurance premiums attributable to Wife's post-petition coverage.

C. The Superior Court Did Not Abuse Its Discretion by Denying an Equalization Payment for the Funds that Husband Expended for Rent.

¶21 Husband moved out of the marital home in January 2011 and rented a residence. Wife continued to live in the marital home, without making any mortgage payments, until the home was sold at foreclosure in November 2011. The superior court ruled that Husband was not entitled to an equalization payment for the rent he paid before the foreclosure sale.

¶22 Husband contends that he was entitled to reimbursement under *In re Marriage of Pownall*, 197 Ariz. 577, 5 P.3d 911 (App. 2000). In *Pownall*, we held that the superior court could offset the community interest in the husband's separate-property residence by the benefit that the wife received by living alone in the residence while the husband paid the mortgage. *Id.* at 583, ¶ 24, 5 P.3d at 917. *Pownall* is distinguishable. As an initial matter, there was no evidence that Husband continued to pay the mortgage while Wife lived in the marital home. Moreover, the undisputed evidence showed that Husband voluntarily moved out of the home against Wife's wishes while knowing that Wife intended to stop paying the mortgage. The record supports a finding that Husband intentionally placed Wife in the position of occupying the house until it was sold. We therefore cannot say that the superior court abused its discretion by denying Husband's request for an equalization payment for his rent.

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CONCLUSION

¶23 We reverse and remand with respect to the decree's orders distributing Husband's individual retirement account and denying his request for an equalization payment based on his payment of health insurance premiums. We otherwise affirm. In our discretion, we deny Husband's request for an award of attorney's fees and costs on appeal.



Ruth A. Willingham · Clerk of the Court
FILED: mjt