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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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In re the Matter of:

JUAN C. HERNANDEZ, *Petitioner/Appellant*,

*v.*

CLAUDIA BARRERA, *Respondent/Appellee*.

No. 1 CA-CV 16-0529 FC  
FILED 4-27-2017

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Appeal from the Superior Court in Maricopa County  
No. FC2014-070394  
The Honorable Jeanne M. Garcia, Judge  
The Honorable Jacki L. Ireland, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

The Murray Law Offices PC, Scottsdale  
By Stanley D. Murray  
*Counsel for Petitioner/Appellant*

Yvonne Yragui PC, Phoenix  
By Yvonne Yragui  
*Counsel for Respondent/Appellee*

**MEMORANDUM DECISION**

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

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**K E S S L E R**, Judge:

¶1 Juan C. Hernandez (“Husband”) appeals from trial court orders (1) awarding child support to Claudia Barrera (“Wife”) starting December 2014, (2) awarding Wife the net proceeds from the sale of a marital residence after payment of community debts, (3) imposing a constructive trust on the marital residence and ordering Husband to either repay the \$40,000 loan he took out on the residence or pay Wife \$40,000, and (4) awarding Wife’s attorneys’ fees as a sanction. For the reasons stated below, we affirm all orders.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 Under a May 2014 consent decree, the parties agreed to equal parenting time with their two children and that no child support would be ordered. The consent decree listed two residences as community property.<sup>1</sup> The marital residence was awarded to Wife as her separate property upon refinancing the mortgage in her name within sixty days. The parties agreed to use the equity in the marital residence to pay off the community debts listed in the decree, and any remaining equity would be awarded to Wife. Wife agreed to give up her interest in the second community residence to Husband’s mother.

¶3 When Wife was unable to refinance the mortgage, she filed a petition to enforce the consent decree and modify child support seeking an order to sell the residence, pay the community debts with the proceeds, and pay Wife the remaining proceeds. Wife noted the decree failed to allocate the community business, a truck, and several bank accounts and asked the court to award the business and truck to Husband and equally divide the funds in the bank accounts. Wife also sought an increase in child support

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<sup>1</sup> Wife acknowledged that the parties placed title to the marital residence in Husband’s name but claims they both “understood they held 100% ownership as community property.”

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due to Husband's failure to exercise equal parenting time and his increased income.

¶4 Husband alleged that Wife signed a written agreement in July 2014 granting him the marital residence in exchange for \$20,000 and his payment of the community debts. Husband proposed awarding him the marital residence so he could refinance, pay Wife \$20,000, and pay off the community debts, or, alternatively, sell the home, pay the community debts, pay Husband \$8000 from the proceeds, and equally divide any remaining proceeds. Husband then filed a motion to enforce Wife's handwritten agreement pursuant to Arizona Rule of Family Procedure ("Rule") 69(A) claiming he was entitled to the marital residence after paying Wife \$20,000 and paying the community debts. Wife denied any such agreement, arguing the written statement did not constitute a Rule 69 agreement and, alternatively, that it was not fair and equitable.

¶5 The trial court held an evidentiary hearing to address the motions to enforce the consent decree and Wife's petition to modify parenting time and child support. After this hearing, but before the court's ruling, Wife filed an emergency motion and request for temporary restraining order ("TRO") when she learned Husband had taken out a \$40,000 loan using the marital residence as collateral and had failed to inform Wife or the court of this loan at the evidentiary hearing. The trial court issued the TRO without notice, froze Husband's bank accounts, and ordered Husband to turn over the loan proceeds to Wife's attorney until further order of the court. Wife also filed a motion for sanctions and imposition of a constructive trust on the marital residence as a result of Husband obtaining the loan without informing Wife or the court. At the hearing on Wife's emergency motion and request for TRO, Husband claimed he took out the loan to pay Wife \$20,000 pursuant to the handwritten agreement.

¶6 The trial court issued a final order addressing the petitions to enforce the consent decree, petition to enforce the Rule 69 agreement, and petition to modify parenting time and child support. The court concluded that, to the extent the handwritten statement constituted a Rule 69 agreement, it was not fair and equitable. The court ordered the marital residence sold and the community debts paid from the proceeds, with any remaining proceeds awarded to Wife. Wife was ordered to reimburse Husband for the mortgage payments he paid between April and December 2014. The business and truck were awarded to Husband and the bank accounts were equally split. The court declined to modify the equal parenting time plan but found Husband's income was greater than what

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was stated in the original child support order. It awarded Wife past child support of \$835.79 per month for the four months Husband did not exercise equal parenting time and \$319.20 per month beginning April 1, 2015, when Husband began exercising equal parenting time. Husband filed a motion for new trial/motion to amend the judgment.

¶7 In a separate order addressing Wife's motion for sanctions and for a constructive trust, the trial court found Husband was deceptive in obtaining the loan without notifying Wife and by failing to disclose the loan to the court. The court found Wife was prejudiced because the loan reduced the remaining equity to which Wife was entitled. Therefore, the court placed a constructive trust on the residence for Wife's benefit and ordered Husband to pay Wife \$40,000 or pay off the loan within sixty days. The court awarded Wife's attorneys' fees related to the motion for sanctions and denied both parties' motions for new trial. After entry of signed orders regarding attorneys' fees and the constructive trust issues, Husband filed a timely notice of appeal from these orders as well as the earlier final order regarding child support, the consent decree, and the Rule 69 agreement. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2017).<sup>2</sup>

## DISCUSSION

### I. Child Support Modification

¶8 We review the trial court's decision to modify child support under an abuse of discretion standard. *Little v. Little*, 193 Ariz. 518, 520, ¶ 5 (1999) (citation omitted). Wife filed her petition to modify child support in November 2014. Thus, pursuant to A.R.S. § 25-327(A) (2017), any modification would be effective the first day of the month following the petition, December 2014.

¶9 The 2014 child support order issued with the consent decree was based on Husband having an income of \$2000 a month and exercising equal parenting time. The trial court modified the child support order, finding Husband earned \$4400 a month. Husband argues the court erred because he does not actually earn \$4400 a month. Husband submitted an affidavit of financial information ("AFI") which stated his estimated income was \$4400 a month. Husband testified his AFI "could be true" and was based on his 2013 tax returns. Husband's AFI listed his 2013 income as

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<sup>2</sup> Absent material revision after the relevant date, we cite the current version of the statutes.

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\$49,884 and his 2015 year-to-date income as \$23,734.15 as of May 19, 2015. There was no evidence regarding Husband's 2014 income. Based on this evidence, the trial court did not abuse its discretion in finding Husband's income was \$4400 a month.

¶10 The trial court also found that Husband did not exercise equal parenting time from December 2014 through March 2015.<sup>3</sup> Wife presented evidence that Husband was not exercising equal parenting time until April 1, 2015. Husband failed to establish when he began exercising equal parenting time. Although Husband contends he began exercising overnight parenting time once he acquired appropriate housing in November or December 2014, he did not testify that he exercised *equal* parenting time at that time. We defer to the trial court's determination of witness credibility and conflicting testimony. See *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 511, ¶ 41 (App. 2005). "[W]e affirm the trial court's ruling because substantial evidence supports it." *Id.* (citing *In re Estate of Pouser*, 193 Ariz. 574, 580, ¶ 18 (1999)).

¶11 Husband also argues the trial court lacked authority to enter two child support orders covering different time periods. We disagree. Nothing in the Child Support Guidelines ("Guidelines") precludes the trial court from applying different parenting time adjustments to different time periods to reflect the actual parenting time exercised during each period. See A.R.S. § 25-320 Appx. §§ 11, 12 (2017). Trial courts routinely, and properly, prepare multiple worksheets when a parent's income varies over different time periods. We see no reason to preclude multiple worksheets that reflect variations in actual parenting time when supported by the evidence. The court did not modify child support prior to the date Wife filed her petition to modify; therefore, the court did not violate A.R.S. § 25-327(A).

¶12 Finally, Husband contends the evidence did not support the application of the 16.1 percent parenting time adjustment for December 2014 through March 2015 because Wife testified that he had exercised ninety days of parenting time during that period. Husband misconstrues Wife's testimony. In response to a leading question from her attorney, Wife asked the court to base the child support order on Husband having ninety

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<sup>3</sup> Although the court did not make this explicit finding, it is supported by the child support worksheets. The parenting time adjustment on the child support worksheet effective December 1, 2014 to March 30 [sic], 2015 applied a 16.1 percent parenting time adjustment, whereas the worksheet effective April 1, 2015, includes an adjustment for equal parenting time.

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days of parenting time per year as of December 1. We do not interpret that to mean Husband exercised ninety days of parenting time between December 1, 2014 and March 31, 2015; rather Wife was attempting to annualize Husband's actual parenting time and came up with ninety days. This results in a 16.1 percent parenting time adjustment, which the trial court applied. Deferring to the court's resolution of conflicting testimony as to how much time Husband actually exercised, we find no abuse of discretion. *Double AA Builders*, 210 Ariz. at 511, ¶ 41.

II. Allocation of the Marital Residence

¶13 Husband contends the trial court erred in ordering the parties to sell the marital residence, pay community debts from the proceeds, and award any remaining proceeds to Wife. "We review the trial court's interpretation of an existing decree of dissolution *de novo*." *Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 10 (App. 2007) (citation omitted); see *In re Marriage of Johnson & Gravino*, 231 Ariz. 228, 233, ¶ 15 (App. 2012) (citation omitted). Courts do not look to extrinsic evidence or the parties' intent to determine the meaning of the decree, but "constru[e] the decree's language in the context of the court's statutory duty" to enter a fair and equitable property allocation. *Cohen*, 215 Ariz. at 67, ¶ 14 (citations omitted); see A.R.S. § 25-318(A) (2017); *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 11 (1999) (citation omitted) (holding a decree is "an independent resolution by the court of the issues before it and rightfully is regarded in that context and not according to the negotiated intent of the parties").

¶14 "The first step in construing a decree is to determine if it is ambiguous." *Cohen*, 215 Ariz. at 66, ¶ 11 (citation omitted). A decree is ambiguous "only when [the language] can be reasonably construed to have more than one meaning." *Id.* (quoting *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 21 (App. 2005)). This is a question of law. *Id.* (citation omitted).

¶15 The consent decree listed the marital residence as community property which was

awarded to [Wife] as her sole and separate property upon refinancing the mortgage to the property in her sole name. [Wife] will refinance the mortgage in her sole name within 60 days after entry of a decree of dissolution of marriage. The parties will use the equity in the property to pay off all debts acquired during the marriage, including the taxes owed for tax year 2013. If there is any remaining equity in the property after paying off such debts, it is awarded to [Wife].

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The decree does not state what would happen if Wife was unable to refinance the mortgage. Husband argues there is no ambiguity because “it is plain to see” the residence would remain his separate property because Wife signed a disclaimer deed in 2012. However, Husband also suggests that in the event Wife failed to refinance, he had the option of claiming the residence as his separate property or “choosing to continue to treat it as community property for the purpose of an alternative argument that the [residence] be sold, the community debts be paid off [and] the parties equally shar[e] in the remaining sale proceeds.” Wife’s interpretation was that the if she could not refinance, the residence would be sold, community debts paid with the proceeds, and she would receive any remaining proceeds.

¶16 The decree’s failure to address how to allocate the residence and community debts in the event Wife was unable to refinance the mortgage created an ambiguity that required the trial court to interpret the decree to achieve a fair and equitable result in keeping with the purpose of the agreement. *See Id.* at 67, ¶ 14. The court did so.

A. Husband is Estopped from Challenging the Property Allocation Based on a Claim that the Residence was His Separate Property

¶17 Husband argues the trial court erred in treating the residence as community property because Wife signed a disclaimer deed granting the residence to Husband as his separate property. However, after Wife signed the disclaimer deed, Husband agreed to treat the residence as community property for purposes of the decree. The decree listed the residence as a community asset and awarded it to Wife after using the equity therein to pay the community debts. Because Husband treated the residence as community property in the decree, he cannot take the contrary position that it is his separate property later in the same proceedings.

¶18 On appeal, Wife argues Husband waived the argument that the residence was his separate property by failing to raise it in his post-decree motions. Although Wife’s argument is based on the theory of waiver, she contends that in the trial court, Husband consented to treat the residence as community property, which is contrary to the position he took at the TRO hearing and on appeal. We conclude it more appropriate to consider the doctrine of estoppel rather than waiver.

¶19 The doctrine of estoppel precludes Husband from subsequently claiming the property is his separate property. *See In re*

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*Marriage of Thorn*, 235 Ariz. 216, 222, ¶ 27 (App. 2014) (citation omitted). “Judicial estoppel prevents a party who has assumed a particular position in a judicial proceeding . . . [from assuming] an inconsistent position in a subsequent proceeding involving the same parties and questions.” *Id.* (quoting *State v. Towery*, 186 Ariz. 168, 182 (1996) (internal quotations omitted)). For judicial estoppel to apply, “the party asserting the inconsistent position must have been successful in the prior judicial proceeding.” *Id.* (citation and quotation omitted).

¶20 Husband did not argue the residence was his separate property until the hearing on the TRO. Husband argues the issues at the TRO were different so he did not need to argue the marital residence was his separate property in the earlier proceedings. However, the TRO hearing involved the same asset as the consent decree. In the consent decree, Husband agreed the residence was community property. Having consented to the final decree which characterized the residence as community property, Husband was “successful” in the earlier proceedings and is, therefore, estopped from asserting the marital residence is his separate property.

B. Trial Court Properly Rejected the Rule 69 Agreement

¶21 Husband contends the trial court abused its discretion by rejecting the parties’ Rule 69 agreement as inequitable.<sup>4</sup> Under the agreement, Husband was to pay Wife \$20,000 and the community debts in exchange for Wife’s interest in the marital residence. The community assets consisted of the marital residence, which had approximately \$67,000<sup>5</sup> in equity after the community debts were paid (prior to Husband obtaining a \$40,000 loan); a community business and a second community residence, both with an undetermined value; bank accounts that were equally divided;

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<sup>4</sup> Wife did not appeal the trial court’s ruling that assumed the Rule 69 agreement was valid, therefore, we accept the court’s assumption and only address whether the agreement was inequitable.

<sup>5</sup> Husband disputes Wife’s valuation in his reply brief; however, he did not object to the valuation evidence Wife submitted at trial. We view the evidence in the light most favorable to sustaining the trial court’s judgment and affirm the judgment if it is reasonably supported by the evidence. *Federoff v. Pioneer Title & Tr. Co. of Ariz.*, 166 Ariz. 383, 388 (1990) (citation omitted). There was evidence to support Wife’s valuation.



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a 2014 truck with little to no equity; and a 2005 vehicle which was to be sold and the proceeds shared equally.

¶22 Based on this evidence, the court did not abuse its discretion in concluding the Rule 69 agreement was not fair and equitable. Accordingly, we affirm the order.

C. Trial Court's Property Allocation was Equitable

¶23 Husband challenges the property allocation based on the premise that the residence was his separate property and Wife, at best, has an equitable lien in the property. For the first time in his reply brief, Husband argues, even if the residence was community property, the property allocation was not fair and equitable. *See Malad, Inc. v. Miller*, 219 Ariz. 368, 373, ¶ 26 (App. 2008) (citation omitted) (holding that, generally, courts do not consider arguments raised for the first time in a reply brief). Assuming this argument is not waived, we conclude the trial court equitably allocated the community assets and debts.

¶24 The order to sell the marital residence, pay the community debts with the proceeds, and award any remaining proceeds to Wife achieved an equitable result similar to the consent decree. The order relieved Husband of financial responsibility for the marital residence and from any further financial obligation to Wife. Wife received funds (the remaining sales proceeds) that allowed her to obtain appropriate housing. Husband received the community business, which had an unspecified value but was essentially worth whatever Husband was able to earn. This was reasonable, as Wife does not possess the necessary skills or experience to run the community business. As stated above, Wife received spousal maintenance for only four months despite her inability to earn an income sufficient to support herself. Therefore, awarding Wife additional community property in the form of the remaining sales proceeds was fair and equitable under these circumstances. We find no abuse of discretion.

III. Awarding Constructive Trust and Attorneys' Fees was Not an Abuse of Discretion

¶25 The trial court placed a constructive trust on the marital residence after finding Husband obtained a \$40,000 loan using the residence as collateral. The court ordered Husband to either pay off the loan or pay Wife \$40,000 from his separate property and pay the attorneys' fees associated with Wife's motion for sanctions and TRO. Husband argues the court erred in imposing the constructive trust and sanctions. The availability of an equitable remedy, such as a constructive trust, is a

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question of law subject to de novo review, but we review the remedy imposed by the trial court under an abuse of discretion standard. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 409, ¶ 106 (App. 2012) (citation omitted). We review the imposition of sanctions under an abuse of discretion standard. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 15, ¶ 31 (App. 2011) (citation omitted).

¶26 A constructive trust is “a remedial device, used ‘to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.’” *Cal X-Tra*, 229 Ariz. at 409, ¶ 107 (quoting *Harmon v. Harmon*, 126 Ariz. 242, 244 (App. 1980)). It is an equitable doctrine that prevents one person from being unjustly enriched at the expense of another. See *Chirekos v. Chirekos*, 24 Ariz. App. 223, 224 (1975). A court may impose a constructive trust when it would be “unconscionable for the holder of legal title to continue to retain and enjoy its beneficial interest.” *Harmon*, 126 Ariz. at 244 (citation omitted).

¶27 For purposes of the parties’ dissolution, the residence was considered a community asset, although Husband held the deed as his separate property. The trial court concluded Wife was entitled to the equity remaining after the residence was sold and community debts were paid. However, Husband encumbered the marital residence with an additional \$40,000 loan, thereby reducing the equity to which Wife was entitled. The constructive trust was a reasonable remedy that prevented Husband from further encumbering the property or retaining any sales proceeds before Wife received the \$40,000 Husband owed her. Thus, the constructive trust was appropriate.

¶28 We also find the trial court did not abuse its discretion by ordering Husband to repay the loan or pay Wife \$40,000. The court clearly explained that the purpose of this order was to place the parties in the position they were in at the time they filed motions to enforce the decree. The evidence showed the property had approximately \$67,000 in equity after the debts were paid. As stated above, the court properly awarded the equity to Wife. See *supra*, ¶¶ 22, 24. Husband testified that he had already spent more than half of the loan proceeds without providing Wife the \$20,000 he claims he intended to pay her. The court properly placed the parties in the same position they were in at the time the decree was entered. We find no abuse of discretion.

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¶29 The trial court awarded attorneys' fees to Wife as a sanction.<sup>6</sup> Wife requested fees pursuant to Rule 65(D), which authorizes sanctions where a party knowingly fails to timely disclose damaging or unfavorable information, as required by Rules 49 and 50. Husband was obligated to disclose the loan and related documents pursuant to Rule 49(E)(1), (F), and (I) and failed to do so. The court also found Husband deceived both Wife and the court by taking out the loan without Wife's knowledge or consent and by failing to inform the court of the loan at the earlier hearing. Husband's action needlessly complicated and increased the cost of the litigation. In light of these circumstances, the court did not abuse its discretion by awarding Wife her attorneys' fees as a sanction.<sup>7</sup>

IV. Attorneys' Fees and Costs on Appeal

¶30 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. We have no current information regarding the parties' financial resources, but find that Husband took unreasonable positions on appeal. Accordingly, we award Wife her reasonable attorneys' fees and taxable costs on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure ("ARCAP") 21. See A.R.S. § 12-342 (2016).

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<sup>6</sup> Contrary to Husband's argument on appeal, the trial court awarded fees in response to Wife's motion for sanctions and not pursuant to A.R.S. § 25-324 (2017).

<sup>7</sup> Wife argues Husband waived his objection to the lack of legal authority for imposing attorneys' fees as a sanction. However, Husband objected to the sanctions at the TRO hearing and in his written response. Because Wife's motion for sanctions included attorneys' fees, we presume Husband's objection to sanctions, similarly, encompassed attorneys' fees and find no waiver.

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**CONCLUSION**

¶31 We affirm the trial court's order. Wife is awarded her reasonable attorneys' fees and costs on appeal upon compliance with ARCAP 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA