DIVISION ONE
FILED: 04-06-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 08-0805
	)	
MICHAEL A. NORTON,	)	DEPARTMENT D
	)	
Petitioner-Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28(c), Arizona Rules of
SHARON NORTON,	)	Civil Appellate Procedure)
	)	
Respondent-Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2005-051511

The Honorable Ruth Harris Hilliard, Judge

AFFIRMED

Law Offices of Steven C. Polgar PC — Carefree
By Steven C. Polgar
Attorneys for Petitioner-Appellee

The Murray Law Offices PC — Phoenix
By Stanley D. Murray
Attorneys for Respondent-Appellant

T H O M P S O N, Judge

¶1 This is a divorce case. Sharon Norton (wife) challenges the family court's allocation of certain property and

debts following a one-day hearing to Michael A. Norton (husband). We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and wife married on April 21, 1984. The parties initially lived in Texas, and operated a Texas corporation called Creative Cement Coatings, Inc. They eventually sold this business to wife's two adult sons in 2001. Meanwhile, husband formed a similar community business, Creative Cement Coatings, L.L.C., an Arizona limited liability company, and the parties acquired a residence in Phoenix, Arizona.[1]

¶3 Husband filed a petition for dissolution in Maricopa County Superior Court on November 4, 2005. Wife responded and requested an award of attorneys' fees. Neither party requested spousal maintenance.

¶4 The family court continued the trial initially scheduled for December 12, 2006, and Husband's attorney filed a notice of settlement of "all issues" on March 26, 2007. Disagreements emerged over the final terms of the alleged settlement agreement, in which the parties had attempted to allocate their property, and the family court again continued the case on its inactive calendar.

[1] The family court's order refers to the property as the "marital residence." The parties' filings characterize the residence as community property, yet their purported settlement document states that it is held in joint tenancy. The appellate record contains no documents pertaining to title.

¶5 Wife filed an unsuccessful motion for partial summary judgment based upon the parties' alleged settlement of the property issues. Trial occurred on June 9, 2008.

¶6 The family court entered a minute entry ruling and directed Husband's counsel to prepare a decree. It then entered the decree (decree) over Wife's objection that it misstated the amount of rent calculated in the minute entry. The decree also denies both parties' requests for attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) section 25-324(A)(Supp. 2008). This appeal followed.

DISCUSSION

I. The Family Court's Order Awards Each Party A 50 Percent Interest In Creative Cement Coatings, L.L.C.

¶7 The parties advance different interpretations of the Decree's provisions concerning the award of Creative Cement Coatings, L.L.C. The Decree provides in relevant part:

> CREATIVE CEMENT COATINGS, L.L.C.: The parties own a community business known as Creative Cement Coatings, L.L.C. Husband operates the business but each party is entitled to his/her share of the fair market value of the business.
>
> > a. The Court finds that this business has a fair market value of $142,000.00 as of the end of 2005, when the Petition for Dissolution was served. Although the valuation is lower as of December 31, 2007, the earlier figure is the correct valuation to be used since the community ended

> upon service of the Petition for Dissolution.
>
> IT IS ORDERED that each party is entitled to one-half of the fair market value of the business, or $71,000.00. It is the Court's understanding that Husband wishes to operate the business as his sole and separate property; in order to do so he must buy out Wife's one-half interest in the business.
>
> *IT IS FURTHER ORDERED awarding Husband the Community Business, Creative Cement Coatings, LLC* upon payment to the Wife of $71,000.00 as her one-half share of the business. Wife shall retain her 50% interest until such time as payment is received in full from Husband.

(Emphasis added).

¶8 The plain language of the Decree awards Wife a present 50 percent interest in Creative Cement Coatings, L.L.C. Husband has transferred such stock to Wife. If Husband wishes to operate the company as a separate property business, he must pay Wife $71,000.

¶9 In a hearing held on the same day that the notice of appeal was filed, Wife sought to use this language to compel a sale of her interest. The family court clarified that: "I don't believe at this point that she has a right to force him to pay the 50 percent. They are co-owners at this time under the Decree." The family court further explained: "I did divide the assets. They each have a 50-percent interest until such time as Husband pays her $71,000 in order to buy her out; otherwise,

they each have a 50-percent interest in the business."[2] Such an award is legally sustainable as a property division under A.R.S. § 25-318(A)(Supp. 2008). *See Spector v. Spector*, 94 Ariz. 175, 186, 382 P2d 659, 666 (1963).

¶10 Based upon the Decree's plain terms, each party received a 50 percent interest in the business and Husband must pay Wife $71,000 if he decides to operate it separately. Because Husband sought to enforce the Decree under his interpretation after filing the notice of appeal, this court lacks jurisdiction to decide enforcement issues and can only interpret the Decree.

II. The Family Court Did Not Abuse Its Discretion In Reimbursing Husband For Residential Repairs And Improvements.

[2] Husband cites this language in support of his interpretation of the Decree. Husband's reliance upon this language is misplaced. An analogous issue concerning the interpretation of a divorce decree arose in *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 12, 972 P.2d 230, 233 (1999). After considering extrinsic evidence, the family court interpreted the decree to provide a fixed sum of spousal maintenance and denied the former wife's request to extend the award. *Id.* at 248, ¶ 6, 972 P.2d at 232. A final judgment "exists as an independent resolution by the court of the issues before it and rightfully is regarded in that context." *Id.* at 249, ¶ 11, 972 P.2d at 233 (citing *United States v. 60.22 Acres of Land*, 638 F.2d 1176, 1178 (9th Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). Even the oral testimony of a judge as to what she had in mind at the time of ruling cannot overthrow or limit a judgment. *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). Accordingly, *Zale* precludes any consideration of the family court's statements made in a hearing concerning the meaning of the Decree.

¶11 All property acquired by a husband and wife during marriage is community property unless it is acquired by (1) gift, devise, or descent, or (2) acquired after service of the petition for dissolution, legal separation, or annulment if the petition results in a decree of dissolution, legal separation or annulment. A.R.S. § 25-211(A)(Supp. 2008); *Cooper v. Cooper*, 130 Ariz. 257, 259, 635 P.2d 850, 852 (1981). The court "shall . . . divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct." A.R.S. § 25-318(A)(Supp. 2008). In making allocations, the court "is not required to make an absolutely equal distribution of the community property as long as it does not appear that the trial court's disposition of the community estate is inequitable or unfair." *Nesmith v. Nesmith*, 112 Ariz. 248, 252, 540 P.2d 1229, 1233 (1975).

¶12 In reviewing the family court's apportionment of community property and debts, we consider "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). We give due regard to the family court's acceptance or rejection of testimony in light of its ability to judge the credibility of witnesses. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998).

Finally, we note that Husband filed a request for findings of fact and conclusions of law pursuant to Rule 52(a) of the Arizona Rules of Civil Procedure. Consequently, we cannot set aside any factual finding unless clearly erroneous. *See* Ariz. R. Family L.P. 82(A).

¶13 The family court heard Husband's testimony concerning repairs and improvements made to the marital residence since the dissolution petition was filed in 2005. He testified to having "completely done all the entryways, walkways, patios, walls" since that time. Husband testified he paid for the repairs in an amount of $12,000-$13,000 to outside contractors plus his own work. The family court credited Husband's testimony by ordering an offset based upon the repairs' value. The family court has the opportunity to judge the credibility of witnesses and the weight to give evidence. *See Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81; *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983).

¶14 Wife disputes that repairs were made to the residence and argues that she was not liable for any repairs made prior to January 2007, the date when the parties allegedly agreed to evenly divide the costs of any repairs. *See Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978). We disagree. Wife can be liable for improvements made to a community asset with Husband's separate property; she will benefit from the

improvement at the time of sale. *See Berger v. Berger*, 140 Ariz. 156, 160-63, 680 P.2d 1217, 1221-24 (App. 1983). Because Husband's testimony provides evidence supporting the family court's finding of post-dissolution petition repairs that benefited a community asset, we affirm this finding.

¶15 Based on this, and in a related ruling, the trial court determined that Husband was liable for rent. The evidence shows that Wife's community share of the monthly rent was $500 for the thirteen months from July 2007 through August 2008. There was no abuse of discretion in the trial court's offset of that $6500 in rent due to Wife against $6500 share of repairs made by husband to the residence.

III. The Family Court Did Not Abuse Its Discretion In Dividing The Line Of Credit Liability.

¶16 Wife further complains that the family court evenly divided the liability for a $30,000 line of credit on the marital residence. It ordered the line of credit to be paid after the sale of the residence and directed an even split of the proceeds. According to Wife, the family court should have allocated this liability to Husband because the line of credit was used to finance the purchase of his motorcycle and should not be a community liability.

¶17 The family court has "jurisdiction to allocate indebtedness" upon dissolution. *Cadwell v. Cadwell*, 126 Ariz.

460, 462, 616 P.2d 920, 922 (App. 1980). "Generally all debts incurred during marriage are presumed to be community obligations unless there is clear and convincing evidence to the contrary." *Schlaefer v. Fin. Mgmt. Serv., Inc.*, 196 Ariz. 336, 339, ¶ 10, 996 P.2d 745, 748 (App. 2000).

¶18 The record reflects that the line of credit and the motorcycle were both acquired during the marriage. Husband testified that he bought the motorcycle in 2002 for approximately $33,000. Wife similarly testified that Husband bought the motorcycle in Houston in 2002 for $32,850 and financed it through Greentree Financial. According to Wife, Husband was making monthly payments of $550.51 out of his "personal" account, not the parties' joint account.

¶19 The parties opened the line of credit in 2004 and paid "another 32" when refinancing occurred. Wife testified that she rode the motorcycle once or twice. The parties traded the motorcycle for another vehicle in 2006. Husband estimated the traded motorcycle's value as $14,500 at that time of trade.

¶20 We presume that the line of credit was a community debt because it was acquired during the marriage. The only evidence in the record offered to support a different characterization was Wife's testimony. The trier of fact was entitled to reject this testimony, *see Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314,

318 (2000), and we defer to its assessment of a witness's testimony. *See Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81. Further, there is no clear and convincing evidence to rebut the presumption that the debt was for the community. Accordingly, we affirm the even division of the line of credit as a community debt.

IV. The Family Court Did Not Abuse Its Discretion In Denying Wife An Equalization Payment For The Vehicles.

¶21 Wife also challenges the family court's denial of an equalization payment based upon the values of the vehicles allocated to the parties. "[D]istribution of marital property is left to the sound discretion of the trial court and will not be disturbed unless clearly erroneous." *Baum*, 120 Ariz. at 142, 584 P.2d at 606.

¶22 The record reflects that Husband and Wife agreed that she would retain the 1999 Toyota Land Cruiser and the 1990 BMW, while Husband would retain the 2006 Nissan truck, the pop-up camper, the 1992 Jeep (which has been sold), and the motorcycle (which had been traded in 2006). Wife claims that she is entitled to $25,000 based upon the difference in values of the vehicles allotted to each party.

A. Vehicles Received By Husband

¶23 With respect to the vehicles Husband received, Wife introduced a Kelly Blue Book valuation of $5120 for a 1992 Jeep

Wrangler in good condition. According to Husband, however, he bought the Jeep for $2400 in 2002 when it had 125,000 miles on it, using money from his Mother. Husband sold the 1992 Jeep for $1200.

¶24 Husband testified that he bought the pop-up camper in 2006 after the petition for dissolution had been served. Wife did not dispute that it was separate property, so it was not subject to division as community property.

¶25 Husband further testified that he bought the Nissan Titan truck in 2005 for $42,000, using $10,000 from his mother for a down payment, and it had been paid off. At the time of the petition for dissolution, he owed $2000 or $3000 more on the truck than it was worth. Wife testified that the truck was paid off using Creative Cement Coatings, L.L.C. checks issued to Husband. In Wife's opinion, the vehicle was worth $36,000 to $40,000, although her own Kelly Blue Book estimate pegged the value at $17,980. Wife explained that improvements to the vehicle, including pipe modifications, satellite radio, new tires, and rims, had increased the value. As Husband pointed out, however, Wife's valuation did not address mileage on the vehicle.

¶26 Finally, Husband testified that the original motorcycle cost approximately $33,000 in 2002. He then traded it in 2006 for a "zero less expensive car" and received no cash.

B. Vehicles Received By Wife

¶27 With respect to the vehicles Wife received, the record contains Kelly Blue Book evidence that a BMW model in good condition was worth $4375, and a Toyota Land Cruiser in good condition was worth $17,165. Husband did not testify concerning these vehicles.

¶28 Based on the Kelly Blue Book evidence, the family court could have attributed a total vehicle value to Wife of $21,540. It could have valued Husband's Jeep Wrangler and truck at either $19,180 or $23,100, using the Kelly Blue Book value for the truck and adopting either Husband's or Wife's testimony as to the Jeep Wrangler. If it adopted the $19,180 figure and accepted Husband's contention about the minimal value of the vehicle obtained by trade, it could have found that Wife's vehicles were worth more than Husband's vehicles and no equalization payment was due. We credit the family court's assessment of valuation issues and its evaluation of the testimony, and consequently affirm. *See Baum*, 120 Ariz. at 144, 584 P.2d at 608; *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81.[3]

[3] We decline to consider the memorandum decision attached as Appendix 1 to Husband's Answering Brief. *See Walden Books Co. v. Dep't of Revenue*, 198 Ariz. 584, 589, ¶¶ 20-23, 12 P.3d 809, 814 (App. 2000)(holding that unpublished decisions may not be cited as precedent); A.R.C.A.P. 28(c). Nor can we consider Appendix 3 to the Brief, as the record does not contain it. *See*

V. The Trial Court Did Not Abuse Its Discretion In Denying Wife Her Attorneys' Fees.

¶29 Wife also challenges the family court's refusal to award her attorneys' fees pursuant to A.R.S. § 25-324(A). A family court has discretion under this statute to order one party to compensate the other for costs and expenses "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). The expenses may include attorneys' fees. A.R.S. § 25-324(B). Whether to award attorneys' fees under the statute, and in what amount, are issues committed to the family court's sound discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, 84, ¶¶ 35, 39, 163 P.3d 1024, 1033, 1034 (App. 2007).

¶30 Both parties had requested fees in the family court, and there is no indication that either party requested findings of fact pursuant to A.R.S. § 25-324(A). Each accused the other of unnecessarily prolonging the proceedings and causing the accrual of attorneys' fees. Neither persuaded the family court that fees should be awarded on that basis.

GM Dev. Corp. v. Cmty. Am. Mortage Corp., 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990). Finally, to the extent that Husband seeks relief from the Decree's terms, this effort is foreclosed by his failure to file a cross-appeal. *See Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988); A.R.C.A.P. 13(b).

¶31 With respect to financial resources, our record does not contain an affidavit of financial information from either party or any tax returns. Wife concedes that "[n]o testimony was presented as to the parties' incomes." Yet the record does include Wife's testimony that Husband's only source of income was Creative Cement Coatings, L.L.C. Husband points out that he lost medical insurance coverage and underwent dialysis prior to trial, although Wife contends he received Medicare benefits. In light of this record, we cannot say that the family court abused its discretion in declining to award fees to Wife.

¶32 For similar reasons, we decline to award attorneys' fees on appeal to either party. Neither party took unreasonable positions, and we lack information enabling us to assess their current respective financial positions. *See Hurd v. Hurd*, 223 Ariz. 248, 254, ¶ 27, 219 P.3d 258, 264 (App. 2009).

CONCLUSION

¶33 We affirm the family court's rulings as to the equalization payment and the $30,000 line of credit. In addition, we interpret the Decree to grant each party a present 50 percent interest in Creative Cement Coatings L.L.C. Husband must pay Wife $71,000 if he wishes to operate the business as separate property. We also find that the family court did not abuse its discretion in denying Wife an award of attorneys' fees. Finally, in the exercise of our discretion, we deny both

requests for attorneys' fees on appeal pursuant to A.R.S. § 25-324(A).

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge