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Ariz. R. Crim. P. 31.24



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

In re the Marriage of:) 1 CA-CV 08-0810
)
DAVID AMATO,) DEPARTMENT A
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
KIMBERLY AMATO,)
)
Respondent/Appellant.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-091451

The Honorable Sherry K. Stephens, Judge

VACATED AND REMANDED

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P O R T L E Y, Judge

¶1 Kimberly Amato ("Wife") appeals from two post-decree orders addressing David Amato's ("Husband") continuing financial

obligations to her. She argues that the family court erred "when it improperly modified the parties' Marital Settlement Agreement." For the following reasons, we vacate the family court's orders and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶1 After more than twenty-one years of marriage, Husband filed for divorce. Husband and Wife entered into a Marital Settlement Agreement ("MSA"),¹ and on June 27, 2007, the court issued a consent decree, which incorporated the terms of the MSA.

¶2 In lieu of spousal maintenance or claims for marital waste, the parties included four separate provisions in the MSA that outlined Husband's financial obligations to Wife.² Husband agreed to: (1) "maintain all of Wife's monthly costs, including all home related costs until [she] obtain[ed] full time

¹ Arizona Revised Statutes ("A.R.S.") section 25-317(A) (2007) states that, "[t]o promote amicable settlement of disputes . . . parties [involved in dissolution proceedings] may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody and parenting time of their children." Such an agreement is "binding upon the parties" if executed "in the absence of fraud or undue influence." *Keller v. Keller*, 137 Ariz. 447, 448, 671 P.2d 425, 426 (App. 1983).

² The parties agreed that "Wife's current employment situation [was] not sufficient for self support and therefore, she [was] entitled to an award for spousal maintenance." However, in lieu of spousal maintenance and Wife's claims for community waste against Husband, Husband agreed to give Wife the 401K, his portion of the equity in the marital residence, and financial assistance until she obtained full-time employment.

employment, including but not limited to the mortgage, utilities, and personal costs"; (2) "pay [her] American Express card bill until she [became] employed full time"; (3) "provide the sum of \$300 per month to [her] for health insurance until [she became] employed full time"; and (4) "pay all monthly condominium mortgage costs until the marital residence [was] sold."³ Wife agreed to "use her best efforts to obtain full time employment immediately upon graduation of her education program." The MSA also stated that "Wife intend[ed] [to] sell[] the marital residence."

¶3 Wife filed several motions to enforce the MSA in September, October, and November 2007, and alleged that Husband was refusing to comply with his financial obligations. Husband responded, argued that Wife had breached her implied covenant of good faith and fair dealing, and sought "relief from the terms of the [MSA] by releasing [him] from the obligation to pay

³ During the evidentiary hearing on September 24, 2008, the parties agreed that the condominium was scheduled for a foreclosure sale, and that "continuing to make payments on the obligation [was] unnecessary." The family court consequently relieved Husband of his obligation to pay condominium costs.

Wife's] expenses."⁴ Wife renewed her motions to enforce in April, May, and June 2008.⁵

¶4 Following an evidentiary hearing, the family court found that "the education program referenced in the [MSA] was the Kar-Che Skin Institute program" which Wife had begun in April 2007, and that she, by choice, "did not graduate from." The court also found that the MSA "[did] not make any provision for what would happen if Wife failed to graduate," and noted that the MSA "does not contain specific information, limitations, requirements, or deadlines on the issues before the

⁴ Specifically, Husband argued that Wife "ha[d] not made her best efforts to sell the [family residence]," "ha[d] not used her best efforts to gain full time employment," and "ha[d] refused to disclose credit card statements to [him]."

⁵ Husband subsequently filed a motion for declaratory judgment requesting that the court find the following: (1) "Wife has not used a good faith effort to complete her education program and obtain full-time employment and that, as a result of Wife's failure to use a good faith effort to complete her educational program and obtain full-time employment, Husband's financial obligations, which only terminate upon Wife's completing her education program and finding employment . . . shall be deemed satisfied as of November 2007, and Husband [had] no further obligation to make any payments on behalf of Wife"; (2) "Wife's actions as concerning the sale of the former marital residence constitutes bad faith and further constitutes a breach of the MSA and the covenant of good faith and fair dealing and therefore Husband should be relieved of any further obligation to pay any of the expenses, including mortgage payments, associated with the former marital residence and Wife's condominium, retroactive to November 1, 2007"; and (3) "Wife [had] acted in bad faith in using the American Express Card in accordance with the MSA and therefore, to the extent that the Court finds Husband responsible for payments on behalf of Wife past November 1, 2007, Husband should nonetheless be relieved from paying the American Express bill."

court." Finally, the court found that neither party had acted in bad faith.⁶

¶15 Based on its findings, the court stated that it had to "determine what Husband [was] required to do under the [MSA] in light of the existing circumstances." The court reasoned that "[s]ince the [MSA] [was] silent as to what w[ould] occur under the current circumstances, the court believes it is appropriate to impose terms that will fairly and equitably accomplish the reasonable intentions and expectations of the parties." Consequently, the court ordered that "Husband [was] to pay all of Wife's monthly costs, including all home related costs (mortgages, utilities and personal costs) until the marital residence [was] sold . . . [and,] [a]t that time, Husband's financial obligations to Wife [would be] terminated with the exception of child support payments ordered by the Court."

¶16 After several motions for reconsideration, and an evidentiary hearing, the court found, in a second order, that Wife had "entered into a rent-to-own agreement on July 19, 2008, committing the [marital] residence for a period of one year," and that "Wife's decision to enter into [the] agreement [was] the equivalent of selling the marital residence and the terms of

⁶ Because Wife failed to provide any transcripts, we presume that the evidence presented was sufficient to support the court's factual findings. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

the [MSA] that occur upon sale of the marital residence are now in effect." It therefore concluded that, as of July 19, 2008, "Husband's obligation to provide financial assistance in the form of payments for Wife's living expenses under the [MSA] [was] satisfied."

¶7 Wife appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

¶8 Wife argues that the family court "erred when it improperly modified the parties' [MSA] to . . . change the event that terminate[d] Husband's obligation to pay Wife's living expenses from Wife obtaining full time employment to Wife's sale of the marital residence."⁷ Husband argues that the court's actions constituted permissible "interpretation" of the MSA. The parties' arguments present questions of law, which we review

⁷ In her opening brief, Wife challenges several other rulings. Because she did not provide transcripts, those arguments were withdrawn in the reply brief.

Wife also argues that the family court erred by appointing a real estate commissioner to supervise the sale of the marital residence. Although the court contemplated appointing a real estate commissioner in its July 16, 2008 minute entry, the court did not appoint a commissioner.

Finally, Wife argues that the family court erred in allowing relitigation of a final judgment. Although the family court set aside the decree of dissolution on December 18, 2007, and revised its ruling on January 1, 2008, to set aside only the MSA, it reinstated the MSA on May 16, 2008. Because the court reinstated the MSA, it did not ultimately permit the underlying dissolution proceedings to be relitigated, and Wife's argument has no merit.

de novo. See *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

¶9 Initially, although Husband plainly agreed to shoulder certain financial obligations until Wife obtained full-time employment, the MSA only specified the duration of those obligations under the explicit proviso that Wife would graduate from the Kar-Che program and "immediately" use her best efforts to obtain employment. In light of Wife's decision to abandon that educational program and not seek employment, the court found that the MSA did not specify the duration of Husband's continuing financial obligations. The court specifically found that the MSA "[did] not make any provision for what would happen if Wife failed to graduate," and noted that the MSA "does not contain specific information, limitations, requirements, or deadlines on the issues before the court." Therefore, we disagree with Wife's contention that the court "change[d] the event that terminate[d] Husband's obligation[s]." Rather, the family court was tasked to try to enforce provisions of the MSA that, in light of the changed circumstances, lacked certainty as to how long Husband had to meet the stated financial obligations.

¶10 Wife argued to the family court that, pursuant to the MSA, she was entitled to pursue educational opportunities at her discretion, and that Husband's financial obligations should

continue until she choose to do so. Conversely, Husband sought immediate relief from his obligations because Wife had abandoned her educational program and failed to seek full-time employment. The court rejected both arguments and concluded that the MSA was "silent as to what w[ould] occur under the . . . circumstances." Despite the conclusion that the MSA lacked certainty regarding essential terms, the court nevertheless "believe[d] it [was] appropriate" for it to "impose terms that [would] fairly and equitably accomplish the reasonable intentions and expectations of the parties."

¶11 Although the family court retained jurisdiction to interpret and enforce the MSA, see ARFLP 91(A); *Harris v. Harris*, 195 Ariz. 559, 562-63, 991 P.2d 262, 265-66 (App. 1999) (interpreting a separation agreement nearly six years after it took effect), the court was precluded from amending, adding to, or rewriting its terms.⁸ See *Andrews*, 205 Ariz. at 246, ¶ 34, 69 P.3d at 17 (stating that courts "cannot, and will not, make a new contract for . . . parties and specifically compel its performance" (quoting *Ernst v. Deister*, 42 Ariz. 379, 384, 26 P.2d 648, 650 (1933))); *Goodman v. Newzona Inv. Co.*, 101 Ariz.

⁸ Neither party sought to amend the MSA, nor did they file any post-decree motion to amend or modify the judgment. We note, however, that under § 25-317, the family court may modify support and custody provisions of separation agreements even when the agreement is not merged into the decree. See *Young v. Burkholder*, 142 Ariz. 415, 421, 690 P.2d 134, 140 (App. 1984).

470, 472, 421 P.2d 318, 320 (1966) ("It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement."). The family court, while trying to enforce the MSA under the changed circumstances, erred when it "imposed" essential terms of duration into the MSA.

¶12 General contract principles govern the construction and enforcement of settlement agreements, *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998), and mutual assent is an essential element of any enforceable contract. *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997); see also *Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 473, 799 P.2d 810, 814 (1990) ("It is well-established that before a binding contract is formed, the parties must mutually consent to all material terms. A distinct intent common to both parties must exist without doubt or difference, and until all understand alike there can be no assent."). "Although the terms and requirements of an enforceable contract need not be stated in minute detail, it is fundamental that, in order to be binding, an agreement must be definite and certain so that the liability of the parties may be exactly fixed." *Pyeatte v. Pyeatte*, 135 Ariz. 346, 350, 661 P.2d 196, 200 (App. 1983); see also *Savoca Masonry Co. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975) ("It is elementary that for an enforceable contract to exist

there must be . . . sufficient specification of terms so that the obligations involved can be ascertained."). A contract cannot be found if essential terms are so uncertain that there is no basis on which to determine a breach or fashion a remedy. *AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 297-98, 848 P.2d 870, 876-77 (App. 1993); see also Restatement (Second) of Contracts § 33 (1981) (stating that "terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy").

¶13 Here, based on the findings of the family court, and our review of the MSA, there was not a mutual understanding between the parties of what would occur if Wife did not seek and obtain employment. Wife essentially contends that Husband's obligations were indefinite and Husband contends that his obligations must immediately cease. Although we recognize that the family court endeavored to fairly and equitably craft a position to meet the expectations of the parties, the court did not have authority to impose terms when "the essential terms and requirements of [the MSA] were not sufficiently definite so that the obligations of the parties to the agreement could be determined." *Pyeatte*, 135 Ariz. at 351, 661 P.2d at 201. Given the changed circumstances, the parties could not have reached the mutual understanding inherent in an enforceable contract.

Consequently, the family court must conduct further proceedings to either secure a consensual amendment to the MSA, or conduct proceedings to retroactively divide the marital property, and determine the amount and duration of spousal maintenance, with credit for sums paid.⁹

¶14 Finally, the family court awarded Husband \$13,500 in attorneys' fees after considering A.R.S. § 25-324 (Supp. 2009). Wife argues that the award is improper because our ruling on appeal "may affect who is deemed to be the prevailing party."¹⁰ Although fees under § 25-324 are not based on a prevailing party standard, see *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995) (stating that whether a party prevails is

⁹ Wife also argues that the family court "erred when it improperly modified the parties' [MSA] to . . . change the event that terminate[d] Husband's obligation to pay Wife's condo expenses [and] . . . living expenses, from the sale of the marital residence to the execution by Wife of a lease-purchase agreement" We need not address the argument. The only obligation originally conditioned upon Wife selling the marital residence was Husband's obligation to pay Wife's monthly condominium mortgage costs. However, the parties stipulated that Husband be relieved of that obligation. See *supra* n.3. Additionally, although the family court modified the termination point of Husband's other financial obligations from Wife obtaining full-time employment to sale of the marital residence, as discussed previously, the modification was improper and we need not independently address the effects of the September 24, 2008 order. However, to the extent that the court's September 24, 2008 minute entry relied on findings and conclusions in the July 16, 2008 ruling, it is likewise vacated.

¹⁰ The court's July 2008 finding, however, was based on the fact that "Wife's actions ha[d] resulted in unnecessarily prolonging and complicating the resolution of the[] issues and that an award of some attorney fees to Husband [was] appropriate."

irrelevant to A.R.S. § 25-324), we vacate the fee award. Because the family court will need to either secure an agreement between the parties or otherwise resolve the issues retroactively, the court can consider the issue of fees, including the July 2008 finding and award, at the conclusion of the case.

¶15 Husband requests reasonable attorneys' fees pursuant to A.R.S. § 12-341.01 (2003) and costs pursuant to A.R.S. § 12-341 (2003). In our exercise of discretion, we decline to award him attorneys' fees.

CONCLUSION

¶16 For the foregoing reasons, we vacate the family court's orders and remand for further proceedings consistent with this decision.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

MARGARET H. DOWNIE, Judge