DIVISION ONE
FILED: 07-22-2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 09-0524
	)	
ELLEN C. JOHNS,	)	DEPARTMENT D
	)	
Petitioner-Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
TIMOTHY A. JOHNS,	)	Civil Appellate Procedure)
	)	
Respondent-Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-007651

The Honorable Susanna C. Pineda, Judge

DECREE VACATED; REMANDED

Law Office of Scott E. Boehm, P.C. Phoenix
by Scott E. Boehm
and
Law Office of Gerald D. Sherrill
by Gerald D. Sherrill Phoenix
Attorneys for Appellant

The Law Office of Joseph C. Richter, P.C. Scottsdale
by Joseph C. Richter
Attorney for Appellee

W E I S B E R G, Judge

¶1 Ellen C. Johns ("Wife") appeals from a decree of dissolution and the denial of her motion for reconsideration/new trial challenging the fairness of a settlement agreement between Wife and Timothy A. Johns ("Husband").[1] Although the agreement had been placed on the record by a court reporter in a mediation proceeding, insufficient evidence supported a finding that the settlement agreement was fair and equitable. Therefore, we vacate the decree and remand for further proceedings to determine whether the agreement was fair and equitable. We also conclude that credibility determinations require remand for a determination of whether Wife entered the agreement without the exertion of coercion or undue influence.

BACKGROUND

¶2 The parties were married in 1982. Husband is a physician and the medical director and partial owner of Gilbert

[1]Husband asks that we disregard most of Wife's statements of fact in her opening brief as not properly supported by record citations. Each paragraph, rather than each statement, cited to the record, and we find no violation of ARCAP 13(a)(4). Furthermore, Wife's trial brief on validity of the post-nuptial agreement was part of the record when the superior court considered her challenge to the settlement agreement. Thus, we may consider her trial brief on appeal. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.,* 165 Ariz. 1, 4, 795 P.2d 827, 830 (App. 1990)*(*appellate court will consider record as it existed before trial court).

Hospital, L.L.C., which runs an emergency hospital. Wife has been a homemaker since 1988.

¶3 The community owns ten shares of stock, representing a 25 percent ownership interest in Gilbert Hospital, L.L.C. Other community assets include Husband's medical practice, two lots, the marital residence, and several bank and retirement accounts.

¶4 Wife filed for dissolution in 2006. In late 2007, the parties entered a post-nuptial agreement but continued to live together and attempted a reconciliation.

¶5 In May 2006, Wife's counsel, Len Mark, had requested discovery regarding the community business interests and entities. When the parties decided to proceed with the dissolution, Mark filed a motion to compel production of information regarding these entities.[2]

¶6 Husband claimed without any supporting documentation that the LLC's had been registered after the community had

[2]Wife's attorney discovered by searching the Arizona Corporation Commission website that Husband owned but failed to disclose the following entities: Gilbert Emergency Medicine Specialists, L.L.C.; Peoria Hospital, L.L.C.; Florence Hospital at Anthem, L.L.C.; D2D Consulting, L.L.C.; GHD Property, L.L.C.; BHD Property, L.L.C.; PHD Property, L.L.C.; FHAD Property, L.L.C.; and Gilbert Gateway Surgery Center, L.L.C.

terminated. The superior court sanctioned[3] Husband for failing to disclose the requested information.

¶7 The parties also stipulated that future hearings would be bifurcated so that first a special master would address the validity of the post-nuptial agreement. If the special master found the post-nuptial agreement invalid, the court would hold a trial on the dissolution petition.

¶8 Before the hearing with the special master, Barry Brody, Wife submitted proposed findings of fact and conclusions of law as well as a trial brief arguing that the post-nuptial agreement was unenforceable. The special master conducted a two-day hearing in December 2008.

¶9 On the first day of the hearing, the parties agreed instead to discuss a settlement rather than the validity of the post-nuptial agreement. The special master later recited for the record an apparent agreement to divide the ownership interest in Gilbert Hospital and to cover spousal maintenance, attorneys' fees, unspecified bank accounts, mortgage payments on

[3]Husband was not allowed to introduce any evidence not disclosed by August 28, 2008 or to offer a defense to anything produced after August 28, 2008.

Wife's house, and child support. Husband's attorney was to prepare a draft of the settlement agreement.[4]

¶10 In February 2009, Mark moved to withdraw as Wife's attorney. On the same day, Wife and new counsel asked the superior court to set a resolution management conference to address non-disclosure and other issues. Husband objected on the grounds that the parties had reached a settlement and that he had lodged a decree with the court. Wife objected that there had been inadequate disclosure of marital assets and raised numerous other issues requiring a trial including Wife's competence to enter the settlement agreement and whether she had been coerced and under duress at the December hearing. The court found pursuant to Arizona Rule of Family Law Practice 69[5] that the special master had placed an agreement on the record. The court ruled that a post-decree motion was Wife's only option to challenge the agreement, and it signed the decree.

[4]Our record does not reflect whether the settlement agreement was reduced to writing before Husband's attorney lodged a proposed decree.

[5]The Rule provides that agreements between parties shall be binding if "confirmed on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Administrative Order to accept such agreements."

¶11 Wife moved for reconsideration/new trial and raised the same objections. After the court set an evidentiary hearing, Husband moved for summary judgment.

¶12 While these motions were pending and shortly before the scheduled hearing, the firm representing Wife closed its domestic relations practice and moved to withdraw. The court acquiesced. Wife requested a continuance to retain new counsel, but ultimately, the court denied Wife's motion for reconsideration without holding an evidentiary hearing, and in effect granting summary judgment to Husband.

¶13 Wife filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101 (C) and (F)(1) (2003).

DISCUSSION

Special Master's Authority to Accept Settlement Agreement

¶14 Wife cites this court's recent decision in *In re Marriage of Reeder v. Johnson,* 224 Ariz. 85, 227 P.3d 492 (App. 2010), in support of her claim that the special master did not have authority to act as judge pro tem and to accept a settlement agreement. Whether the special master had authority under Family Law Rule 69 is a question of law for our *de novo* review. *See id.* at 87, ¶ 6, 227 P.3d at 494.

¶15 In *Reeder,* Barry Brody acted as a paid private mediator in a dissolution action. *Id.* at ¶ 2. Although Brody also had been approved as a Maricopa County judge pro tem, "he had not been assigned by the court to act on this particular case." *Id.* Instead, the parties there simply agreed that Brody could act as judge pro tem to place a settlement agreement on the record pursuant to Rule 69, and they used "a tape recorder as the recording device." *Id.*

¶16 *Reeder* held that to properly "serve as a judge pro tem . . ., Brody would have to have been assigned to it by the presiding judge, departmental presiding judge, the judicial branch administrator, or some person expressly authorized by the court to make that assignment." *Id.* at 89, ¶ 12, 227 P.3d at 496. We also held that neither Family Law Rule 69 nor Rule 6.10(b)(7) of the Arizona Local Rules of Practice for Maricopa County Superior Court (hereinafter "Local Rule") authorized the mediator to place an agreement on the record. *Id.* at ¶¶ 13-14. The Local Rule required that an agreement reached in mediation "be placed in writing, signed by both parties and presented to the court." Thus, mediators lack authority "to create a binding agreement by placing it 'on the record.'" *Id*. at ¶ 14.

¶17 Here, unlike in Reeder, the parties and Brody orally recited the terms the settlement agreement to a court reporter.

But Wife contends that even so, the process did not satisfy Local Rule 6.10(b)(7) and that both Rules must be satisfied. As Wife notes, the requirements of the two Rules may conflict when a settlement agreement is placed on the record before a court reporter but is not placed in writing and presented to the court. Nevertheless, Family Law Rule 2(C) states that "[t]o the extent these rules are inconsistent with local rules, the provisions of these rules shall apply." Therefore, by placing the settlement agreement on the record before a court reporter, the parties satisfied Family Law Rule 69, and we need not address other contentions regarding application of *Reeder*.

Court's Finding that Agreement is Fair

¶18 On appeal, Wife contends that neither the court nor the special master could make the requisite finding that the settlement agreement was fair because Husband did not disclose all relevant financial information. Husband responds that because the special master complied with A.R.S. § 25-317(B),[6] the court was not required to make its own finding of fairness.

[6]Section 25-317(B) provides:

> In a proceeding for dissolution of marriage . . ., the terms of the separation agreement, except those providing for the support, custody and parenting time of children, are binding on the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by

¶19 Husband also argues that Wife waived objection to any lack of disclosure by failing to raise an objection before entry of the decree. Wife, however, did attempt to object, but the court instructed her to raise the issue in a post-decree motion. Wife accordingly did so, although the court's ruling was incorrect as a matter of law. *See Brietbart-Napp v. Napp,* 216 Ariz. 74, 80, ¶ 17, 163 P.3d 1024, 1030 (App. 2007) (party may assert fraud, undue influence, or other misconduct as basis for trial court to disapprove settlement agreement). There was no waiver.

¶20 As noted, the superior court concluded that the special master had entered the settlement agreement on the record pursuant to Rule 69. The court, however, did not confirm the agreement's terms on the record pursuant to Rule 69 or make a finding that the agreement was fair as required by section 25-317(B) but merely relied on the special master's findings.

¶21 Nonetheless, § 25-317(B) places upon the superior court an obligation to determine whether a settlement agreement is fair before accepting its terms. *See Sharp v. Sharp,* 179 Ariz. 205, 210, 877 P.2d 304, 309 (App. 1994). In doing so, the

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> the parties, on their own motion or on request of the court, that the separation agreement is unfair.

court must consider the assets comprising the community estate "and whether the party challenging the agreement had full knowledge of the property involved." *Id.* (citing *In re Estate of Harber,* 104 Ariz. 79, 88, 449 P.2d 7, 16 (1969)). Here, the record contains no express finding by the court that the agreement was fair. And as is often the case, the decree was silent on the valuation for any item of real or personal property and did not reveal any account balances or debt amounts.

¶22 Husband argues that the special master's finding that the settlement agreement was fair met the requirement of § 25-317(B). But, the record of the settlement hearing similarly does not reveal the value of the various bank and retirement accounts, the vehicles, land, houses, business entities, other property, or debts. Thus, the record does not demonstrate that the parties had presented the special master with evidence of the value of the community assets and liabilities. Moreover, the special master admitted that he did not know if the settlement agreement was fair and equitable because he did not have all the evidence regarding the assets at the settlement hearing. Therefore, there was not sufficient evidence to support either a finding by the special master or the court that the settlement agreement was fair.

¶23 Even if Wife had waived her right to any further discovery regarding Husband's assets, the parties' own statements about the agreement's fairness do not relieve the court of its independent obligation under § 25-317 to assess fairness. As we held in *Sharp,* 179 Ariz. at 210, 877 P.2d at 309, one who asserts the validity of a settlement agreement has the burden of proving its fairness by clear and convincing evidence. Furthermore, "the trial court is obliged to achieve a fair and equitable distribution of the property and is 'not foreclosed from doing so by the parties' separation and property settlement agreement.'" *Id.* (*quoting Wick v. Wick,* 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971)).

¶24 Husband nonetheless contends that Mark's deposition testimony, to the effect that the negotiations had considered the L.L.C.s and other property and that Mark believed the agreement was fair, permits a finding that the settlement indeed was fair. But, as noted, even the testimony of Wife's former counsel will not extinguish the court's obligation to make a fairness determination. *See Wick,* 107 Ariz. at 385, 489 P.2d at 22 (opinions of parties or their attorneys are not enough); *see also Sharp,* 179 Ariz. at 210, 877 P.2d at 309.

¶25 *Sharp* additionally stated that an evidentiary hearing is not necessary in all cases and that a court may "decide by

summary judgment whether an agreement is equitable" if sufficient evidence enables such a determination. *Id.* But here, as in *Sharp*, "there were plainly disputed facts on the question of the fairness of the agreement, and the court was presented no evidence as to the extent of the community assets." *Id.* Statements in the decree and by the special master that the agreement was fair lack evidentiary support in the record, and accordingly Husband did not meet his burden. Therefore, we vacate the decree and remand for further proceedings.

Wife's Claim of Duress, Coercion, and Undue Influence

¶26 Wife also challenges the court's failure to hold an evidentiary hearing on whether she was coerced and subjected to undue influence by her former attorney and the special master during the settlement hearing. She first raised this claim in her objection to the proposed decree Husband lodged after the settlement hearing. She again raised the issue in her motion for reconsideration/new trial and reply, which included affidavits and transcript citations. Husband disputed these factual allegations, and he deposed Wife's former attorney and the special master. Although the court initially set an evidentiary hearing, it later denied Wife's motion for reconsideration/new trial without a hearing. The court found

that the record did not support Wife's claim of coercion or undue influenced.

¶27 Generally, a trial court may not resolve conflicting versions of the material facts by summary judgment. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1008, 1010 (1990) (summary judgment improper if it requires trial court to assess witness credibility or differing factual accounts, to weigh evidence, or "to choose among competing or conflicting inferences"). The court here had not observed the settlement negotiations and had no basis for assessing credibility from a transcript of the hearing and the deposition transcripts of the special master and Mark. We therefore remand this issue for the superior court's consideration.

CONCLUSION

¶28 We vacate entry of the decree and remand for a determination of the fairness of the settlement agreement and consideration of the claims of undue influence and coercion. If the court finds the agreement to be fair and equitable, it may enter the agreement on the record. If it finds the agreement not fair, however, the parties then may address the effect of the post-nuptial agreement.

¶29 Both parties have requested an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 (Supp. 2009). Although each has substantial financial resources, "relative financial disparity between the parties is the benchmark for eligibility." *Magee v. Magee,* 206 Ariz. 589, 593, ¶ 18, 81 P.3d 1048, 1052 (App. 2004). A party who is able to pay may still receive an award of fees if there is a financial disparity. *Id.* In 2007, Husband earned very substantial income as a physician and received an even greater sum as co-owner of a hospital. Although Wife presumably received comparable income as a co-owner of the hospital, Husband still has far greater earnings. Therefore, we award Wife her reasonable attorneys' fees and costs subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
MICHAEL J. BROWN, Presiding Judge

/s/_____
JON W. THOMPSON, Judge