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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 02/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

In re the Marriage of:)	No. 1 CA-CV 10-0805
)	
HEATHER Y. HOLM,)	DEPARTMENT E
)	
Petitioner/Appellant,)	MEMORANDUM DECISION
)	(Not for Publication -
v.)	Rule 28, Arizona Rules
)	of Civil Appellate
JOHN G. HOLM,)	Procedure)
)	
Respondent/Appellee.)	
)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-006832

The Honorable Teresa A. Sanders, Judge

AFFIRMED IN PART AND REMANDED IN PART

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O R O Z C O, Judge

¶1 Heather Y. Holm (Wife) appeals from a decree of
dissolution dissolving her marriage to John G. Holm (Husband).

Wife contends the family court abused its discretion in refusing to enforce the parties' original property settlement agreement. Alternatively, Wife argues the court erred in reforming the agreement without holding an evidentiary hearing. Finally, Wife claims the court abused its discretion in awarding Husband a portion of his attorney fees. For the following reasons, we affirm the reformation of the agreement but remand for the family court to recalculate Husband's equalization payment and, in the court's discretion, to reconsider the amount of attorney fees awarded to Husband.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife were married in October 1997. Wife filed a Petition for Dissolution of Marriage on October 9, 2008. After the petition was filed, the parties entered private mediation to discuss the division of assets. During mediation, the parties agreed that Wife would receive the Scottsdale condo, which they jointly owned outright as community property, and Husband would receive the two farms in Kansas. The Scottsdale condo appraised at \$320,000 on April 9, 2009. On or about May 8, 2009, the Kansas farms had a collective value of \$412,000, with an encumbrance of approximately \$94,000, resulting in estimated equity of \$318,000.

¶3 On November 6, 2009, Husband and Wife memorialized the terms of their property settlement agreement (the Agreement) on

the record before a court reporter.¹ Consistent with their earlier discussions, the Agreement provided that the Scottsdale condo would be Wife's property and the Kansas farms would be Husband's property. At the time the parties executed the Agreement, Wife had already entered into a contract for the sale of the Scottsdale condo for the price of \$408,000,² but that information was not disclosed to Husband when he signed the Agreement.

¶4 On November 25, 2009, Wife signed the Consent Decree for Dissolution of Non-Covenant Marriage. Husband signed the Consent Decree on December 9, 2009. A few days later, Wife's counsel disclosed that Wife had accepted an offer for the sale of the Scottsdale condo because Husband's signature was required for the sale to be completed. However, at that time, Wife's counsel did not disclose the offer amount or the timing of the offer.

¶5 After discovering that the Scottsdale condo sold for significantly more than what Wife represented it to be worth when the parties signed the Agreement, Husband filed a Motion to Reform Settlement Agreement (the Motion), asking the family court to reform the Agreement to account for the equity Wife had

¹ Later that day, the parties jointly filed a Notice of Settlement. Husband and Wife signed a formal Property Settlement Agreement on November 24, 2009, the material terms of which are the same as in the Agreement.

² The Scottsdale condo actually sold for \$405,000, and Wife's net proceeds after the sale were approximately \$375,000.

concealed. The family court found that Husband was "entitled to relief due to Wife's material lack of disclosure."³ The court ordered the parties to submit their Consent Decree with an amendment providing for an equalization payment of \$42,500 to Husband.⁴ The court also found that Husband was entitled to a portion of his reasonable attorney fees and costs associated with the litigation of the Motion.

¶16 The family court signed the decree of dissolution on September 16, 2010. The decree states, in relevant part, that the "Property Settlement Agreement fully, fairly, equitably and completely disposes of all community, joint and common property and obligations of the parties with the exception of the equalization payment ordered by this Court on June 29, 2010," and the "Property Settlement Agreement . . . is hereby approved by this Court as being fair and reasonable, except as set forth in this Court's ruling on [Husband's] Motion to Reform Settlement Agreement." The decree also awarded Husband \$9,156 in attorney fees and costs incurred in connection with the Motion.

³ Wife complains that the family court did not make findings of fact and conclusions of law. However, Wife never requested findings and conclusions pursuant to Rule 82 of the Arizona Rules of Family Law Procedure.

⁴ The equalization payment was calculated by subtracting the Scottsdale condo's appraisal value (\$320,000) from its final sale price (\$405,000) and then dividing that amount (\$85,000) by two.

¶7 Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (2011).⁵

DISCUSSION

I. Fair and Equitable Distribution

¶8 Wife argues the family court had only two options in arriving at a fair and equitable distribution of Husband and Wife's community property: enforce the original agreement in its entirety or hold an evidentiary hearing. Because the court did neither, Wife contends its decision must be reversed.

A. Standard of Review

¶9 "In effecting a fair and equitable distribution the trial court is given a broad discretionary power and it is only where there is a manifest abuse of that discretion will an appellate court interfere." *Wick v. Wick*, 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971). We are obligated to affirm the family court's ruling if the result is legally correct for any reason. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992).

B. Reformation

¶10 With the goal of promoting amicable settlement of disputes between parties upon dissolution of their marriage, A.R.S. § 25-317.A (2007) provides that the parties may enter into

⁵ We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

a written separation agreement containing provisions for the distribution of their property. A property settlement agreement entered into by the parties in contemplation of divorce is a binding contract, unless tainted by fraud or undue influence. *In re Estate of Henry*, 6 Ariz. App. 183, 185-86, 430 P.2d 937, 939-40 (1967). Additionally, if the court believes the agreement to be unfair or inequitable, it can reject or modify the agreement. *Keller v. Keller*, 137 Ariz. 447, 448, 671 P.2d 425, 426 (App. 1983); see A.R.S. § 25-317.B ("[T]he terms of the separation agreement . . . are binding on the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties . . . that the separation agreement is unfair."). When the court makes a determination that the agreement is unfair or inequitable, the court may then either make orders for the disposition of property or request the parties submit a revised agreement. A.R.S. § 25-317.C.

¶11 Wife argues the court abused its discretion in not enforcing the Agreement as originally written because Husband never alleged the Agreement itself was "unfair" or "inequitable" and the court never made an express finding that the Agreement was "unfair" or "inequitable." First, we note that nothing in § 25-317.B requires the family court to make a specific finding on the record that the separation agreement is "unfair" or

"inequitable." Nor does the statute require Husband, as the basis for his reformation request, to allege in exact terms that he believes the agreement to be "unfair" or "inequitable." Nevertheless, the court did, in fact, make a finding in the decree of dissolution that "the Property Settlement Agreement fully, fairly, equitably and completely disposes of all community, joint and common property and obligations of the parties *with the exception of the equalization payment ordered by this Court on June 29, 2010* [in connection with the Motion]." (Emphasis added.) The decree also states that the Property Settlement Agreement "is hereby approved by this Court as being fair and reasonable, *except as set forth in this Court's ruling on [Husband's] Motion to Reform Settlement Agreement.*" (Emphasis added.) Though the court did not use the exact words "unfair" or "inequitable," these findings in the decree imply the court necessarily found that the Agreement was unfair and inequitable without the modifications it ordered.

¶12 Wife also argues that the court erred in considering Wife's "inequitable conduct" in determining what would be a fair and equitable division. Although the court may not consider "marital misconduct" in arriving at a fair and equitable division, the court may consider a spouse's concealment of community property. A.R.S. § 25-318.A, C (Supp. 2011); see *Martin v. Martin*, 156 Ariz. 452, 458, 752 P.2d 1038, 1044 (1988)

(holding that the family court may award one spouse a sum of money representing the value of his or her interest in the community assets that are not available for division because of "the excessive or abnormal expenditures, destruction, concealment or fraudulent dissipation of such assets by the other spouse"). The court in this case found that Husband was "entitled to relief due to Wife's material lack of disclosure." Because A.R.S. § 25-318.C specifically provides that the family court may consider concealment of community assets, the court did not abuse its discretion in ordering an equalization payment because it found the Agreement unfair and inequitable due to Wife's concealment of the true value of the Scottsdale condo.

¶13 Wife also contends there is no evidence to show that the Agreement was unfair or inequitable, nor that Wife engaged in "inequitable conduct." However, the undisputed facts support the court's conclusion that Wife concealed the value of the Scottsdale condo and that the Agreement was therefore unfair. The facts show that: (1) the Scottsdale condo appraised at \$320,000 on April 9, 2009; (2) when the parties executed the Agreement on November 6, 2009, Wife had already entered into a contract for the sale of the condo for \$408,000; and (3) Husband was not informed of the pending sale until after he signed the Consent Decree on December 9, 2009. Based on these facts, the court found,

This is not a situation where property awarded to a party in a dissolution action simply appreciates in value and the party awarded the property benefits from that appreciation. This is a situation where on the date the property settlement agreement was executed Wife knew that she had a binding contract for the sale of the property for a price of \$408,000. She knew that the price that she had negotiated to sell the property for exceeded the appraised value and the value that Husband believed the property was worth by \$88,000. She never disclosed this to Husband during the settlement negotiations. Husband was not made aware of the true value of the property and that there was a contract to sell it until his signature became necessary to finalize the sale of the property and after the settlement agreement between the parties had been signed.

Based on these findings, the court concluded that Husband was entitled to reformation of the Agreement as it related to equity in the Scottsdale condo. These undisputed facts provide sufficient support for the family court's findings that Wife engaged in inequitable conduct, which resulted in an unfair agreement.

¶14 We conclude the family court did not abuse its discretion in reforming the Agreement to include an equalization payment to Husband to account for equity in the Scottsdale condo that Wife had concealed.

C. Evidentiary Hearing

¶15 Alternatively, Wife argues the family court erred in failing to hold an evidentiary hearing to consider all the

evidence relating to the Agreement. The family court must determine for itself whether a property settlement agreement is fair and equitable. *Sharp v. Sharp*, 179 Ariz. 205, 210, 877 P.2d 304, 309 (App. 1994); A.R.S. § 25-317.B. In doing so, the court must consider all the evidence before it relating to the agreement, along with all evidence regarding the relation of the parties at the time of trial, the parties' ages, financial circumstances, opportunities, and the contributions of each toward the community; the court "is not foreclosed from the performance of this duty by a property settlement agreement entered into before a divorce is granted." *Wick*, 107 Ariz. at 385, 489 P.2d at 22.

¶16 Wife compares this case to *Sharp*, stating that the record in this case is "woefully incomplete" and that the evidence revealed disputed facts concerning the fairness of the agreement. *Sharp* is distinguishable from this case, and, therefore, no evidentiary hearing was required.

¶17 In *Sharp*, the husband filed a combined motion for summary judgment/motion to enforce agreement along with an affidavit declaring that the settlement agreement was fair and equitable. 179 Ariz. at 208, 877 P.2d at 307. The wife opposed the combined motion because she claimed the agreement was unfair as a result of her husband's undue influence and overbearing tactics. *Id.* Importantly, neither party introduced evidence

showing what property constituted community property. *Id.* at 210, 877 P.2d at 309. Pointing to the "plainly disputed facts on the question of fairness" and the lack of "evidence as to the extent of the community assets," we found the family court erred in granting the husband's motion because the court failed to independently determine whether the agreement was fair and equitable, and we remanded for an evidentiary hearing. *Id.* at 210-11, 877 P.2d at 309-10.

¶18 As contrasted with *Sharp*, in this case the family court had a complete listing of all joint, common and community property and debts, and both parties warranted that the list was full and complete. Based on the pleadings and the outline of the parties' community property, the family court was able to determine for itself what would be a fair and equitable division; therefore, the court did not err in finding an evidentiary hearing was unnecessary under these circumstances.

D. Equalization Payment

¶19 Wife argues that even if Husband is entitled to an equalization payment, the payment should have been calculated based upon the actual proceeds received by Wife after the cost of the sale. Husband did not respond to this issue.

¶20 We have held that, "[i]n the absence of evidence that a sale is likely to occur in the near future, it is speculative to allow a deduction of the costs of a hypothetical sale." *Kohler*

v. Kohler, 211 Ariz. 106, 108, ¶ 6, 118 P.3d 621, 623 (App. 2005). Because this case involves an actual sale that has already occurred, however, we agree with Wife's position and remand for the family court to determine the difference between Wife's net proceeds and the appraised value. Husband is entitled to an equalization payment that is one-half of that difference.

II. Attorney Fees

A. Family Court

¶21 Wife argues the family court abused its discretion in awarding husband a portion of his attorney fees. Wife contends the court was obligated to first determine the relative financial disparity between the parties, and only if it found a disparity could the court then decide whether an award was appropriate.⁶ We review awards of attorney fees for an abuse of discretion. *In re Marriage of Robinson and Thiel*, 201 Ariz. 328, 335, ¶ 20, 35 P.3d 89, 96 (App. 2001).

¶22 Under A.R.S. § 25-324 (Supp. 2011), the family court may, after considering the financial resources of both parties and the reasonableness of the positions taken by each party throughout the proceedings, order one party to pay the other party's attorney fees. Contrary to Wife's contention, the

⁶ Wife also claims that because the family court did not hold an evidentiary hearing, any award of attorney fees is premature. As stated above, we find an evidentiary hearing was not required; thus, we do not address this argument.

"reasonableness of the positions" provision is distinct from the "financial resources" provision, so a party "need not show both a financial disparity and an unreasonable opponent in order to qualify for consideration for an award." *Magee v. Magee*, 206 Ariz. 589, 591 n.1, ¶ 8, 81 P.3d 1048, 1050 n.1 (App. 2004).

¶23 The family court found Husband was entitled to a portion of his reasonable attorney fees and costs associated with the litigation of the Motion; with the exception of that award, the parties were ordered to bear their own fees and costs. The court was not required to find financial disparity before awarding some attorney fees to Husband based on Wife's deception and unreasonable position in the litigation of the Motion. We find no abuse of discretion in the award of fees to Husband. However, because we have remanded this matter to the family court for recalculation of the equalization payment, if the court believes the award of fees should be adjusted, we leave that to the court's discretion. We offer no opinion on whether the family court should adjust the fees.

B. On Appeal

¶24 Husband and Wife have both requested attorney fees and costs associated with this appeal, pursuant to A.R.S. § 25-324. In our discretion, we deny both requests.

CONCLUSION

¶25 For the foregoing reasons, we affirm the reformation of the Agreement but remand for a recalculation of Husband's equalization payment and adjustment of attorney fees, in the family court's discretion.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PHILIP HALL, Judge

/S/

JOHN C. GEMMILL, Judge