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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0115
)
SHERYL A. WASSON,) DEPARTMENT A
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
RICHARD D. WASSON,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN2010-001358

The Honorable Pamela S. Gates

AFFIRMED

Katz & Bloom PLC
By Jay R. Bloom
Norman M. Katz
Attorney for Petitioner/Appellee

Phoenix

Steadman Law Firm PLC
By Timothy W. Steadman
Attorney for Respondent/Appellant

Mesa

P O R T L E Y, Judge

¶1 Richard D. Wasson ("Husband") was divorced from Sheryl A. Wasson ("Wife"). He challenges the property division, spousal maintenance award, and attorneys' fees award in the decree. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Wife filed for divorce on March 31, 2010, after thirty-two years of marriage. She was working as a secretary, while Husband, a master carpenter, was collecting unemployment because he had been laid off from his job in 2008. He was also helping their adult son run a construction business.

¶3 Husband was served with the summons and complaint on April 1, 2010. Hours earlier, he had withdrawn \$65,000 from a home equity line of credit on the marital home in New Jersey. He returned \$50,000 to the line of credit, however, he had used the remaining sum to buy a motorcycle and a quad. Based on a subsequent agreement by the parties, the family court ordered Husband to return the remaining \$15,000 within one week.

¶4 The case went to trial and the court subsequently awarded Wife an \$18,000 equalization payment for the community vehicles and noted Husband's continuing obligation to return \$15,000 to the line of credit. The court also ordered that when their New Jersey home is sold, "Wife is first entitled to a

credit of \$7,500 (or one-half of the amount Husband remains obligated to return to the Line of Credit).” The court also awarded Wife indefinite spousal maintenance of \$1,000 per month.

¶15 Husband filed an unsuccessful motion for reconsideration before filing this appeal.

DISCUSSION

I. Property Division

¶16 The family court is obligated to divide community property equitably without regard to marital misconduct. Arizona Revised Statutes (“A.R.S.”) section 25-318(A) (West 2012).¹ “The [family] court has wide discretion in the apportionment of community property under § 25-318 and all reasonable inferences are taken in favor of sustaining the trial court’s judgment.” *In re Marriage of Berger*, 140 Ariz. 156, 168, 680 P.2d 1217, 1229 (App. 1983) (citations omitted). As a result, we review the equitable division of property for an abuse of discretion. *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007) (citations omitted). An abuse of discretion occurs when there is no evidence to support the family court's decision, *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted), or

¹ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

when the court misapplies the law. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004) (citation omitted).

¶7 In challenging the division of property, Husband first argues that the equalization payment is unfair because the court did not assign values to the vehicles or indicate how it arrived at the equalization figure. He, however, did not request findings of fact, and the court was not otherwise required to make written findings. See Ariz. R. Fam. L.P. 82(A). As a result, we presume that the court found every fact necessary to sustain its judgment. *Fleming v. Becker*, 14 Ariz. App. 347, 350, 483 P.2d 579, 582 (1971) (citation omitted). And, we will accept the findings if the record contains any credible evidence to support them. *Berger*, 140 Ariz. at 162, 680 P.2d at 1223 (citation omitted).

¶8 The parties testified about the vehicles and offered evidence of their values. When awarding the vehicles in their possession to each party, which left the truck, quad, and two motorcycles in Husband's possession, the court had to determine whether Wife was entitled to an equalization payment. Although Wife's testimony suggested that the payment should be more than \$18,000, the court limited the payment to \$18,000. Thus, there is a factual basis for the court's determinations and we find no

abuse of discretion in the division of vehicles or the equalization amount Husband was ordered to pay.

¶9 Husband also contends that the decree allows Wife to collect twice for her share of the \$15,000 still remaining to be reimbursed to the line of credit. The decree, however, belies the argument because it provides that Wife is entitled to a credit of \$7,500 "or one-half of the amount Husband remains obligated to return to the Line of Credit" from the proceeds of the sale of the house. If Husband repays the \$15,000 to the line of credit, he will not have to pay Wife half of the value and she will not be entitled to any additional credit from the sales proceeds of their home. Furthermore, any amount Husband repays to the line of credit will proportionately reduce the credit to which Wife is entitled, whether by direct payment or by credit once the house is sold. Thus, the order provides for the contingencies that could occur to ensure that Wife does not get a windfall. Consequently, there is no abuse of discretion in the equitable resolution of the unpaid \$15,000.

¶10 Husband nevertheless claims that the property division is unfair because he can only repay the line of credit by selling vehicles, and Wife is still entitled to the equalization payment. Husband created the conundrum by purchasing the vehicles after he had been served with the divorce petition.

The court resolved the matter. The court was not required to order him to sell the vehicles, repay the line of credit, and then divide any profit. Moreover, we find no impediment to him selling the vehicles, repaying the line of credit and then seeking a modification of the equalization payment. As a result, the court did not err in the resolution of the three vehicles.

II. Spousal Maintenance

¶11 Husband next argues that the court abused its discretion in awarding Wife spousal maintenance because she does not lack sufficient property to provide for her reasonable needs. See A.R.S. § 25-319(A)(1) (West 2012). We review the award of spousal maintenance for an abuse of discretion. *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 9, 160 P.3d 231, 233 (App. 2007) (citation omitted). "We view the evidence in the light most favorable to the [family] court order and will affirm the judgment if there is any reasonable evidence to support it." *Id.* (citation omitted).

¶12 The court determined that Wife earned \$2800 per month. She received her retirement accounts and pension benefits. She was also awarded her share of equity in the marital home, though the parties had agreed not to sell it immediately because of the

existing market conditions and had tenants who were covering the costs associated with the home.

¶13 Wife does not have any income producing assets other than her wages. Although she has sizeable assets in her retirement accounts, she will not have access to those assets until she retires in the future. "Although courts may consider non-income producing property in determining whether a spouse has sufficient property to meet his or her needs, a court need not require a spouse to exhaust a retirement account to support himself or herself." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 18, 972 P.2d 676, 681 (App. 1998) (citations omitted). Similarly, Wife's equity in the house is not currently available to her. *See Deatherage v. Deatherage*, 140 Ariz. 317, 320, 681 P.2d 469, 472 (App. 1984) (in the context of § 25-319(A), property "means all property capable of providing for the reasonable needs of the spouse seeking maintenance").

¶14 Moreover, Wife's Affidavit of Financial Information ("AFI") listed monthly expenses that were approximately \$1100 more than her income. The court was able to consider the evidence to determine whether she lacked sufficient property to provide for her needs. Because Wife did not have access to income producing property, the court did not abuse its

discretion when determining that a spousal maintenance award was appropriate.

¶15 Husband also challenges the amount and duration of the spousal maintenance award. He argues that Wife has unnecessary expenses, including payments on behalf of their adult daughter, church contributions, voluntary retirement contributions, and family gifts. He, however, did not dispute any of her expenses or claim that they were unreasonable at the time of the hearing. Because he did not challenge her expenses at trial, he has waived any objection to her expenses and cannot challenge them here.² See *Dillig v. Fisher*, 142 Ariz. 47, 51, 688 P.2d 693, 697 (App. 1984) (issues not raised in the trial court are deemed waived on appeal).

¶16 Husband contends that the court abused its discretion by rejecting his testimony that he had no current income other than unemployment benefits. There was disputed testimony about whether Husband was receiving \$1000 per week to work in his son's construction business in addition to unemployment

² We note that a spouse's reasonable needs are determined in reference to the standard of living established during the marriage. See *Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993). Because Husband saved money regularly for their retirement, it is not unreasonable for Wife to contribute to her retirement accounts. Similarly, because Husband's AFI reflects contributions to their adult daughter and family gifts, he cannot complain that Wife has similar expenses or that they are unreasonable.

benefits, or whether he was paid only when business was good and was not being paid at the time of the trial. Additionally, Wife offered evidence of several cash deposits into his bank account in 2010.

¶17 "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81 (citation omitted). We find the record contains sufficient evidence to support the court's conclusion that Husband earned \$1000 per week *in addition to* the unemployment benefits he claimed on his AFI (\$2400 per month).

¶18 Husband also argues that when he begins to receive his retirement income, he will be in a worse financial position than Wife if his spousal maintenance obligation continues. We do not need to address the argument because it was not one that the family court addressed. Moreover, and without assuming the truth of the argument, it is one that he may ask the court to consider in the future. *See id.* at 349, ¶ 23, 972 P.2d at 682.

¶19 He also challenges the findings the court made in support of the spousal maintenance award; namely, that Wife assisted him with his business during the marriage; that she reduced her career opportunities; and that he violated the

preliminary injunction by withdrawing money.³ There was, however, evidence to support the findings. First, Wife testified that she helped him start some businesses during the marriage. She also testified that the jobs she held during the marriage were comparable to her current secretarial job. Although there was no specific evidence that she reduced her career opportunities during the marriage, the conclusion that she is presently working at her highest earning capacity is supported by the fact that she has worked in similar positions throughout the marriage.

¶20 Husband did not violate the preliminary injunction by withdrawing funds from the line of credit before he was served with process; he violated the injunction by spending \$15,000 to buy the two vehicles. Despite the fact that the withdrawal did not violate the injunction, there was evidence in the record to support the determination that the injunction had been violated.

¶21 "[T]he transition toward independence [is the] principal objective of maintenance under 25-319(B)." *Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993). Moreover, the court has "discretion to award indefinite

³ Husband also claims his health insurance costs three times more than Wife's. There is, however, nothing in the record to support his claim. His AFI states he has no insurance, though his interrogatory answers state the family is covered by union-provided insurance until April 1, 2011.

maintenance when it appears from the evidence that independence is unlikely to be achieved." *Id.* (citation omitted). Husband argues that the cases in which indefinite spousal maintenance has been awarded involve a receiving spouse or dependent with a disability or serious illness that precludes the spouse from becoming financially independent. See, e.g., *Leathers v. Leathers*, 216 Ariz. 374, 377, ¶ 12, 166 P.3d 929, 932 (App. 2007); *Gutierrez*, 193 Ariz. at 349, ¶ 22, 972 P.2d at 682; *Kelsey v. Kelsey*, 186 Ariz. 49, 50, 918 P.2d 1067, 1068 (App. 1996); *Rainwater*, 177 Ariz. at 503, 869 P.2d at 179; *In re Marriage of Hinkston*, 133 Ariz. 592, 594, 653 P.2d 41, 51 (App. 1982); but see *Fuentes*, 209 Ariz. at 53-54, ¶¶ 2, 6, 97 P.3d 876, 878-79 (App. 2004) (awarding spousal maintenance for 120 months to spouse with disabled adult child).

¶22 Despite the argument, A.R.S. § 25-319 does not limit the court's consideration of illness or disability. There was no evidence that Wife would be able to return to school or otherwise increase her earning capacity. As a result, she is not likely to transition to independence due to her age, education, career history, and earning capacity, as opposed to an illness or disability. Given the facts, we find no abuse of discretion in the award of indefinite spousal maintenance.

III. Attorneys' Fees

¶23 The family court awarded Wife \$2200 in attorneys' fees after finding that Husband acted unreasonably by: (1) stating in his interrogatory answers that he had no separate property; (2) failing to produce all relevant documents regarding the accounts he inherited from his parents; and (3) not adequately preparing his resolution management statement. We will not disturb the decision to award attorneys' fees unless we find an abuse of discretion. *Gutierrez*, 193 Ariz. at 351, ¶ 32, 972 P.2d at 684 (citation omitted).

¶24 Husband argues that the failure to assert a separate property claim regarding his inherited accounts was not unreasonable. He contends he did not understand the meaning of the term "separate property" and that Wife knew he had inherited the accounts. Until the day of the trial, Husband denied having any separate property claims and agreed that the accounts listed in the joint pretrial statement would be divided equally between the parties. The accounts included the three accounts Husband had inherited from his parents. Although the pretrial statement was filed only a few days before trial, Husband never clearly explained why he failed to raise the issue sooner. The court, as a result, did not abuse its discretion in finding that his failure to raise this issue prior to trial was unreasonable.

¶125 Husband's resolution management statement states that he is unable to take any position on any property issues until he receives Wife's discovery. Husband, however, handled the parties' finances, the rental of the marital home, and was in possession of several vehicles. Given that much of the information was in Husband's control, it was unreasonable for him to refuse to set forth his proposed position regarding these issues as required by Arizona Rule of Family Law Procedure 49(A). Accordingly, we affirm the limited award of attorneys' fees to Wife.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶126 Wife requests an award of fees on appeal pursuant to A.R.S. § 25-324 (West 2012). Because we are affirming the spousal maintenance award, both parties have comparable financial resources. Moreover, we cannot say as a matter of law that either party took unreasonable positions on appeal. Therefore, we deny Wife's request for an award of fees on appeal. Because she is the successful party, however, Wife is entitled to an award of her reasonable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. See A.R.S. § 12-341 (West 2012).

CONCLUSION

¶127 Based on the foregoing, we affirm the challenged rulings of the decree of dissolution.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

ANDREW W. GOULD, Judge