DIVISION ONE
FILED: 05/22/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0241
	)	
THOMAS J. QUINN,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
MEGHAN FITZPATRICK-QUINN,	)	Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-051407

The Honorable Alfred M. Fenzel, Judge

AFFIRMED IN PART, VACATED AND REMANDED IN PART

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O R O Z C O, Judge

¶1 Meghan Fitzpatrick-Quinn (Wife) appeals from the decree of dissolution of her marriage to Thomas J. Quinn (Husband) and the order denying her motion for new trial. For the following reasons, we affirm the decree in part and vacate and remand in part for the family court to make additional findings and amendments to the decree, consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife were married in 2001 and had one child born in February 2003. Husband filed a petition for dissolution of marriage on April 29, 2009. Wife accepted service of the petition on May 16, 2009.

¶3 A one-day trial was held on May 12, 2010. At the time of trial, Husband was employed by Advanced Charger Technologies (ACT) and was a 10% owner of the company. Husband began his employment with ACT in February 2010, but the ACT Stockholder Agreement identifies the effective date of Husband's 10% interest in the company as November 17, 2008. Husband testified that he actually signed the agreement in July 2009 but the agreement was backdated to November 2008.

¶4 Prior to working for ACT, Husband was employed by Electrical Transportation Engineering Corporation (ETEC). Husband was scheduled to receive a $132,000 signing bonus from ETEC, but he testified that he never received it. Husband left

ETEC in December 2009 after ETEC discovered Husband had been associating with ACT. Husband testified that he did not receive a severance package, stock options, or any other financial benefits from ETEC upon his termination. Because it was Husband's position that he never received a bonus from ETEC, Husband's counsel agreed during trial that Wife would receive the entirety of any bonus from ETEC, in whatever form it was paid. This stipulation was memorialized in the trial minute entry.

¶5 In addition to his interest in ACT, Husband purchased a business known as Efficiency Optimizing Systems (EOS) on April 15, 2009. He testified that he "was doing two friends a favor" by participating in the transaction and acted only as "a middleman to handle money." Husband sold the company back to one of the original sellers on June 1, 2009.[1]

¶6 Wife alleged during trial that Husband wasted community assets by liquidating numerous accounts and spending the money in a manner unknown to her. Husband responded by testifying that he spent the funds on community credit card debt, bills, living expenses, and attorney fees for both parties. The court concluded that Wife failed to prove Husband's expenditures were excessive or abnormal.

[1] Husband testified that he never received any money for participating in the transaction, but the contract for sale states that EOS was purchased from Husband for $5,000.

¶7 Regarding their child's education, both parties agreed their child should be enrolled in a private school, but they could not agree on how to divide the cost of tuition. Husband testified that he believed the cost should be shared equally, and Wife testified that she wanted the cost included in the child support calculation or divided in a manner proportionate to the parties' incomes.

¶8 Wife testified that she incurred approximately $47,000 in attorney fees at the time of trial, and she sought recovery of those fees based on both disparity in income and Husband's alleged unreasonable conduct during the proceedings. Husband was earning an annual base salary of $164,800[2] and Wife's only income was spousal maintenance. Wife also accused Husband of hiding assets, causing Wife to incur additional attorney fees. Husband testified that he previously paid a portion of Wife's attorney fees because she had charged approximately $35,000 of her fees to the parties' American Express card. Wife conceded that she used an American Express card to pay for her fees and the American Express bills were paid using money from joint accounts.

¶9 At the conclusion of trial, the court requested that Husband's attorney prepare a draft decree consistent with the

[2] Husband was also receiving an automobile allowance of $850 per month in addition to his base salary, but he testified that the allowance would end in September 2010 and he would receive a company automobile in lieu of an automobile allowance.

court's findings to be issued in a subsequent minute entry and including any previous stipulations and agreements.

¶10 The minute entry adopted the findings in the Child Support Worksheet with respect to child support. The worksheet did not include a provision for extra education expenses and it did not include Husband's automobile allowance in Husband's gross income. The parties were ordered to pay their own attorney fees, except for any fees previously awarded. The minute entry did not include any findings with respect to ACT or EOS or Wife's allegations regarding waste.

¶11 Wife objected to both Husband's draft decree and his revised draft decree, citing numerous errors, including an incorrect community termination date and incorrect allocation of uninsured or unreimbursed medical, dental or orthodontia expenses for the parties' minor child.

¶12 The court signed the judgment decree of dissolution on November 16, 2010. Wife filed motions for new trial and to alter or amend judgment, raising substantially the same objections she made when Husband lodged his draft decrees with the court. The court denied Wife's motions without comment.

¶13 Wife filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 and 5(a) (Supp. 2011).[3]

DISCUSSION

¶14 Both parties concede the family court erred by stating the incorrect termination date of the marital community and by incorrectly allocating responsibility for uninsured or unreimbursed health care expenses for the minor child with 50% to Wife and 50% to Husband. On remand, the family court shall amend the decree to reflect May 16, 2009 as the termination date of the marital community.[4] Additionally, we vacate the provision ordering Husband and Wife each to pay one-half of any uninsured or unreimbursed health care expenses and remand for the family court to allocate responsibility for uninsured or unreimbursed health care expenses in proportion to the parties' incomes. *See* A.R.S. § 25-320 app. §§ 9.A and 10 (Supp. 2011).

Husband's Bonus from ETEC

¶15 Wife argues the family court failed to include the stipulated provision awarding Wife 100% of any bonus Husband

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

[4] Pursuant to A.R.S. §§ 25-211.A.2 (Supp. 2011) and -213.B (Supp. 2011), the marital community ends upon service of the petition for dissolution of marriage if the petition results in a decree of dissolution of marriage.

received from ETEC, in the decree. Husband argues the bonus was properly omitted from the decree because it does not exist.

¶16 We review the family court's division of property for an abuse of discretion. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). An abuse of discretion occurs when the family court misapplies the law in the process of exercising its discretion. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004).

¶17 Both in open court and in the minute entry dated May 12, 2010, the family court awarded Wife 100% of any bonus from ETEC. During trial, the parties stipulated that Wife would receive the entire $132,000 bonus, if she could "find it." Then the following exchange took place:

> Judge Fenzel: To the extent that there is any bonus from E-Tech [sic] that was paid or will be paid, [W]ife gets 100 percent of it.
>
> Wife's Counsel: And that would be whether it's in cash or in stock.
>
> Judge Fenzel: Cash, stock, or anything.
>
> Husband: It's in stock. That's what the offer is for.
>
> Judge Fenzel: She's going to get the whole $132,000.
>
> Husband's counsel: Fine.
>
> Judge Fenzel: Okay.

Correspondingly, the trial minute entry stated:

> LET THE RECORD FURTHER REFLECT, to the extent that there is any bonus from ETEC, that was paid or will be paid; Wife will get 100% of it (in cash, stock, etc).

¶18 Despite this agreement on the record, this provision was omitted from the decree Husband lodged with the court. Furthermore, the court declined to add this provision, even after Husband indicated in his response to Wife's motion for new trial that he had "no objection" to amending the decree to reflect this agreement, as he believed no such bonus existed.

¶19 Rule 69 of the Arizona Rules of Family Law Procedure states that "[a]greements between the parties shall be binding if they are . . . made or confirmed on the record before a judge."[5] The agreement in question was entered in open court and was confirmed on the record by the court. Regardless of whether the bonus exists or not, the parties reached a binding agreement that Wife is entitled to 100% of it, if she discovers that it does in fact exist. Consequently, the family court abused its discretion in omitting the agreement from the decree. We therefore remand for the court to amend the decree to include a provision awarding Wife 100% of any bonus, whether stocks or cash or any other form, paid or to be paid to Husband by ETEC.

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[5] Rule 69 has since been amended, but we cite the version that was in effect during trial. *See* Order Amending Rules 5.1, 47, 67(B), 69, 74 and 78 of the Arizona Rules of Family Law Procedure, No. R-09-0042, Sept. 2, 2010 (effective Jan. 1, 2011).

Community Interest in ACT and EOS

¶20 Wife argues the family court also failed to divide the community interests in ACT and EOS. Husband responds that ACT and EOS were properly omitted from the decree because his interest in ACT is his separate property and EOS was a "straw man purchase" and he held the entity in constructive trust.

¶21 All property acquired by either spouse during the marriage is community property. A.R.S. § 25-211.A. But, property acquired by a spouse after service of a petition for dissolution of marriage is that spouse's separate property, as long as the petition results in a decree of dissolution. A.R.S. §§ 25-211.A.2, -213.B. All community property must be divided "equitably, though not necessarily in kind" between the parties. A.R.S. § 25-318.A (Supp. 2011).

¶22 Wife alleges that Husband acquired his interest in ACT in November 2008, six months before the initiation of the dissolution action. Husband, on the other hand, alleges that he signed the agreement regarding his interest in ACT in July 2009, two months after the petition for dissolution was filed and served, and that the agreement was backdated to November 2008. He also contends that his acquisition of interest in ACT was contingent upon his employment with ACT, which did not begin until February 2010. The family court did not make any factual findings regarding the date Husband acquired his interest in ACT.

¶23 Similarly, the family court did not make any findings with regard to Husband's interest in EOS. Husband and Wife dispute whether Husband ever had an actual ownership interest in the entity.

¶24 "Where possible, when a trial court in a non-jury case fails to make or makes insufficient findings of fact and conclusions of law, a reviewing court should remand the case to the trial court for further findings." *Miller v. Bd. of Supervisors of Pinal Cnty.*, 175 Ariz. 296, 300, 855 P.2d 1357, 1361 (1993). Therefore, we remand for the family court to issue its findings regarding Husband's interests in ACT and EOS and equitably divide the community interests, if any. Specifically, the court must determine what date Husband acquired his interest in ACT for purposes of determining whether this interest is separate or community property. Also, the court shall determine whether Husband acquired an ownership interest in EOS that would be subject to division.

Waste

¶25 Wife argues the family court erroneously denied her waste claim because the court applied the incorrect standard of proof. Wife contends the court improperly placed the burden on her to show that specific expenditures were not for a community purpose instead of requiring Husband to show how he spent the community funds in question. The family court's application of

the standard of proof is subject to de novo review. *Am. Pepper Supply Co. v. Federal Ins. Co.*, 208 Ariz. 307, 309, ¶ 8, 93 P.3d 507, 509 (2004).

¶26 The family court may consider "excessive or abnormal expenditures" when arriving at an equitable distribution of community assets, and those types of expenditures are a factor to be considered, if relevant, when determining a spousal maintenance award. A.R.S. §§ 25-318.C, -319.B.11 (2007). "[T]he spouse alleging abnormal or excessive expenditures by the other spouse has the burden of making a prima facie showing of waste." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 7, 972 P.2d 676, 679 (App. 1998). The burden then shifts to the spending spouse to go forward with evidence to rebut the showing of waste by showing that the money was spent to benefit the community. *Id.* at 346-47, ¶ 7, 679-80.

¶27 Wife testified that she knew nothing about various accounts Husband had liquidated, totaling approximately $172,800, or where that money had gone and that she saw no discernible community benefit from the expenditures. Husband did not deny the expenditures but testified that he used those funds to pay community credit card debt, three months' worth of living expenses for the family, and both parties' attorney fees. Husband also testified that he and Wife had each withdrawn

$10,000 from the accounts. However, Husband did not provide an accounting for any of the expenditures.

¶28 Wife presented a prima facie case of waste when she testified that Husband had spent significant community funds in a manner unknown to her, from which she did not discern a community benefit. *See Gutierrez*, 193 Ariz. at 346, ¶ 6, 972 P.2d at 679. At that point, the burden should have shifted to Husband to prove that the funds were spent for a community purpose. *See Id.* at 346-47, ¶ 7, 972 P.2d at 679-80. Instead, the family court accepted Husband's unsupported testimony and implied it was Wife's burden to prove Husband's expenditures were *not* for a community purpose when it stated, "[The money] could have gone for will [sic] bills, but you don't know. . . . This is not a question of what actually happened. It's what you can prove."

¶29 The court erred in requiring Wife to prove that Husband's specific expenditures were not for the benefit of the community. Therefore, we remand for an evidentiary hearing on the issue of waste, at which Husband must provide an accounting of the specific expenditures alleged by Wife. Then, if the court finds waste, it must reconsider spousal maintenance and the division of assets. *See* A.R.S. §§ 25-318.C, -319.B.11.

Private School Expenses

¶30 Wife argues the family court erred in omitting a provision allocating private school expenses for the parties'

minor child because both parties agreed the child should attend private school and Husband agreed to pay 50% of the cost.[6] We review the family court's awards of child support for an abuse of discretion, but we review the court's interpretation of the Child Support Guidelines (Guidelines) de novo. *Hetherington v. Hetherington*, 220 Ariz. 16, 21, ¶ 21, 202 P.3d 481, 486 (App. 2008) (citations omitted).

¶31 Under § 9.B. of the Guidelines, the court:

> May add to the Basic Child Support Obligation amounts for any of the following:
>
> * * *
>
> 2. Education Expenses
>
> Any reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of a child, when such expenses are incurred by agreement of both parents or ordered by the court.

A.R.S. § 25-320 app. § 9.B.2. The family court adopted the Child Support Worksheet as its findings with respect to child support. The worksheet did not provide for extra education expenses.

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[6] Husband asserts that the parties have an independently enforceable agreement that Husband will pay 50% of the minor child's education expenses. However, Wife has never agreed that Husband should be responsible for only 50% of the expenses, as she believes the cost should be divided according to the parties' incomes. Moreover, as Wife argues in her Reply Brief, there is no agreement incorporated in the decree and there is no separate order for Wife to enforce. *See* A.R.S. § 25-317.D (2007).

¶32 Although the court is not required to add extra education expenses to the basic child support obligation, it should consider how the parties are to divide the cost when both have agreed to incur the additional education expenses associated with private schooling. Here, both Husband and Wife agreed that their child should attend a specific private school and only disagreed on the proportionate amount of expenses each parent should pay. Because both parties agreed on private school, the court erred in failing to allocate the associated expenses pursuant to Guidelines § 9.B.2. We remand for the family court to determine the percentage each party must contribute to education expenses.

Husband's Automobile Allowance

¶33 Wife contends the family court abused its discretion by failing to include Husband's automobile allowance as part of his income for purposes of calculating child support. Again, we review the family court's awards of child support for an abuse of discretion, but we review the court's interpretation of the Guidelines de novo. *Hetherington*, 220 Ariz. at 21, ¶ 21, 202 P.3d at 486.

¶34 Section 5.D of the Guidelines states: "Expense reimbursements or benefits received by a parent in the course of employment or self-employment or operation of a business shall be counted as income if they are significant and reduce personal

living expenses." Wife alleges that the family court deviated from the Guidelines because Husband's $850 per month automobile allowance is significant and "reduces Husband's personal living expense by providing money to acquire and maintain an automobile."

¶35 However, Husband testified that his work involved sales, which required travel. Additionally, he testified that the automobile allowance would be discontinued in September 2010, four months after the trial, and he had gone over the allotted mileage under his lease. Therefore he would owe $3,000 when he turned-in the vehicle.

¶36 The testimony shows that any personal benefit Husband derived from the automobile allowance was de minimus, and the court did not err in so finding. Consequently, the court did not deviate from the Guidelines and did not abuse its discretion in failing to include the automobile allowance in Husband's gross income for purposes of calculating child support.

Attorney Fees

¶37 Lastly, Wife argues the family court abused its discretion by failing to award Wife her reasonable attorney fees. The family court has discretion, after considering the financial resources of both parties and the reasonableness of each party's position, to order one party to pay the other's costs and attorney fees. A.R.S. § 25-324.A (Supp. 2011). One purpose of §

25-324 is to provide a remedy for the party who is least able to pay. *Gore v. Gore*, 169 Ariz. 593, 596, 821 P.2d 254, 257 (App. 1991). This court will not disturb the family court's decision regarding attorney fees under § 25-324 absent an abuse of discretion. *Burnette v. Bender*, 184 Ariz. 301, 306, 908 P.2d 1086, 1091 (App. 1995). "It is an abuse of discretion to deny attorney[] fees to the spouse who has substantially fewer resources, unless those resources are clearly ample to pay the fees." *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997). Here, Wife's resources are not clearly ample to pay her attorney fees.

¶38 Wife's only income as of trial was spousal maintenance,[7] though she was in the process of renewing her registered nursing license so she could return to work. Conversely, Husband was earning in excess of $10,000 per month, even with deductions for his child support and spousal maintenance payments. In comparing the parties' resources, the family court stated, "[O]bviously [Husband] makes considerably more than [Wife] even assuming that the going rate for nurses is somewhere between 40- and 50- or 60,000. He's making two or three times that at this particular point."

[7] At the time of trial Wife was receiving $2500 per month in spousal maintenance, but after trial the court increased her spousal maintenance to $3000 per month.

¶39 In terms of community assets, the court determined that Wife would get at least $30,000 from the sale of the parties' residence and an equalization payment of $8,867.50. Beyond those items, the court noted, "There aren't really a whole lot of other assets here."

¶40 Husband argues that most of Wife's attorney fees have already been paid, but the testimony does not support that argument. Husband testified during trial that he "paid the first $15,000" of Wife's approximate attorney fees of $47,000 using community assets because Wife had charged $35,000 of her total fees to the parties' American Express card. Wife admitted during her testimony that some of the fees she had charged to the American Express had been paid out of joint accounts. However, that still leaves Wife with an outstanding balance of $32,000 in fees owed, in addition to any fees incurred post-trial.

¶41 We find the family court abused its discretion in ordering each party to bear its own costs and attorney fees. Even assuming Wife returns to work as a nurse, the disparity in resources between Husband and Wife is considerable. As the party with substantially fewer resources, which are clearly not sufficient to pay her fees, Wife is entitled to an award of costs and attorney fees on remand.[8] *See Roden*, 190 Ariz. at 412, 949

[8] Because we award Wife her costs and attorney fees based on disparity in the parties' financial resources, we need not

P.2d at 72. We leave to the family court's discretion the amount to be awarded.

¶42 Both parties seek attorney fees in connection with this appeal. In our discretion, we award Wife her reasonable fees and costs on appeal upon her compliance with ARCAP 21(a). Husband could have amended the decree to address the issues he now concedes. He chose not to, however, thus causing at least some of these issues to be appealed when they could have been resolved without the intervention of this court.

CONCLUSION

¶43 In summary, we affirm the family court's award of child support, except as it relates to extra education expenses. We remand for the court to divide the extra educational costs associated with the parties' agreement that their child attend private school. We also remand for an evidentiary hearing on Wife's claim of waste. If the court makes a finding of waste, it then must reconsider the spousal maintenance award and the division of assets. Additionally, we remand for the family court to issue findings regarding Husband's interests in ACT and EOS and adjust the division of community assets, if appropriate. We further remand for the court to amend the following provisions in

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address Wife's argument that she is also entitled to fees on the separate basis that Husband took unreasonable positions during the proceedings.

the decree as directed above: termination date of the marital community, allocation of the minor child's uninsured or unreimbursed medical, dental and orthodontia expenses, and the award of Husband's bonus from ETEC. Finally, we vacate the court's order that each party pay its own attorney fees and costs and remand for the family court to determine the appropriate award of fees and costs to Wife.

/S/

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge