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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: JEFFREY A. DAVIS, Petitioner/Appellant, and CHRISTINA E. DAVIS, Respondent/Appellee.	2 CA-CV 2012-0132 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO201102340

Honorable Steven J. Fuller, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Jeffrey Davis appeals from the trial court's decree of dissolution of his marriage to Christina Davis. He argues the court abused its discretion by dividing the community property and debts inequitably and by ordering him to pay spousal maintenance to Christina. For the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). Jeffrey and Christina were married in April 2001, and they have one minor child. Jeffrey filed a petition for dissolution of marriage in December 2011. After a one-day trial in June 2012, the court entered an order that dissolved the marriage, divided the parties' community property and debt, established a custody and parenting plan, and awarded Christina spousal maintenance and child support. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Discussion

Property and Debt Division

¶3 Jeffrey first argues "the trial court improperly distributed community property/debt when it allocated [to him] an unconscionable portion of the negative equity suffered by the marital community." In reviewing the division of community property, we consider the evidence in the light most favorable to upholding the trial court's ruling and will sustain that ruling if the evidence reasonably supports it. *Kohler v. Kohler*, 211 Ariz. 106, ¶ 2, 118 P.3d 621, 622 (App. 2005). We will not disturb the ruling absent an abuse of discretion. *Id.*

¶4 The trial court awarded Jeffrey the marital residence, valued at $121,057 and encumbered by a mortgage of $193,034, and his 401(k) retirement plan, which had a net, community value of $23,395. The decree incorporated the parties' agreement that Jeffrey would keep the 2004 sport utility vehicle, valued at $3,041, and Christina would keep the 2003 car, valued at $2,033. Additionally, the court ordered Jeffrey to pay the following debts: $35,654 home equity line of credit; $14,059 credit card consolidation; and $1,620 of medical bills in his name. Christina was assigned her $3,733 student loan[1] and $3,596 of medical bills in her name. The court explained:

> After totaling all debts assigned to each party and considering Father's award of the 401(k), the court notes that Father is assigned approximately $20,000.00 more debt than Mother. The court is also mindful of the fact that Father is significantly "underwater" on the marital residence. The court, however, does not view the debt on the home—an appreciable asset—in the same light as the other debts. . . . Given the significant disparity of the parties' incomes, the court will not order an equalization payment.

¶5 In a marital-dissolution proceeding, the trial court must divide the community property "equitably, though not necessarily in kind." A.R.S. § 25-318(A). Because assets and debts are reciprocally related, "there can be no complete and equitable disposition of property without a corresponding consideration and disposition of obligations." *Cadwell v. Cadwell*, 126 Ariz. 460, 462, 616 P.2d 920, 922 (App. 1980);

[1]Jeffrey argues that Christina's student loan is "presumptively characterized as a sole and separate liability," despite the fact that it was incurred during the marriage. We disagree. "A debt incurred by a spouse during marriage is presumed to be a community obligation," and Jeffrey presented no evidence contesting the community nature of this debt, although he bore the burden of overcoming the presumption by clear and convincing evidence. *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (App. 1995).

see also § 25-318(B) (providing, "[i]n dividing property, the court may consider all debts and obligations that are related to the property"). Accordingly, the court must "allocate community liabilities between the parties in effecting an equitable division of all community property." *Lee v. Lee*, 133 Ariz. 118, 123, 649 P.2d 997, 1002 (App. 1982); *see also Birt v. Birt*, 208 Ariz. 546, ¶ 25, 96 P.3d 544, 552 (App. 2004) ("The duty of the trial court [i]s to make a fair and equitable division of assets and debts between the parties under the circumstances then existing.").

¶6 Jeffrey maintains the trial court's division of community property and debt was inequitable. He contends the court abused its discretion by allocating "95% of the negative equity suffered by the marital community" to him. He further maintains the "unconscionably inequitable distribution of community assets/debts is exacerbated by the radical disparity of monthly obligations to which the trial court consequently subject[ed] the parties." Despite the court's explanation that the debt allocation was due largely to the 401(k) and the house, which were both awarded to Jeffrey, he nevertheless argues the "approximately $20,000" difference still violates the principles of equity.

¶7 Generally, an equal division of community property and debts will be the most equitable; however, a trial court may find "sound reason" to deviate, and it has discretion to do so. *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997). "The touchstone of determining what is 'equitable' is a 'concept of fairness dependent upon the facts of particular cases.'" *In re Marriage of Flower*, 223 Ariz. 531, ¶ 18, 225 P.3d 588, 593 (App. 2010), *quoting Toth*, 190 Ariz. at 221, 946 P.2d at 903. For example, in *Toth*, the husband used $140,000 of his separate funds to purchase a house the day after

the couple was married. 190 Ariz. at 219, 946 P.2d at 901. They took title as joint tenants with right of survivorship. *Id*. Less than a month later, the husband filed for an annulment. *Id.* The trial court entered a dissolution decree and awarded the wife $15,000 "as her share" of the house. *Id.* In affirming the decree, our supreme court rejected the wife's argument that she was entitled to one-half the value of the residence. *Id.* at 221, 946 P.2d at 903. The court stated the trial court had "sound reason to divide the Toths' property unequally" because the husband had paid for the house from his separate funds and the marriage was of such a short duration. *Id*.

¶8 Similarly, although here the trial court did not divide the community property and debts equally, we nevertheless conclude the allocation was equitable. The parties' community obligations far exceeded their assets, and they owed more on their marital residence than it was worth by approximately $72,000. And despite Christina's request that the house be sold in a short sale, Jeffrey insisted on being allowed to remain in the house for the benefit of their daughter. Because Jeffrey's insistence on keeping the house required the community to retain the corresponding debt, it was fair and reasonable for the court to assign the negative equity to him. *See In re Marriage of Inboden*, 223 Ariz. 542, ¶ 18, 225 P.3d 599, 604 (App. 2010) ("[W]hen making an equitable division of community property upon dissolution of a marriage, the family court should consider all factors that bear on the equities of the division.").

¶9 Notably, in addition to assigning the negative equity in the house to Jeffrey, the trial court also ordered him to pay more of the parties' other debts. Although the court could have ordered Christina to make an equalization payment to Jeffrey as an

offset, it specifically declined to do so because of the "significant disparity of the parties' incomes." We believe the income disparity, coupled with Jeffrey's desire to keep the house, provided the court with "sound reason" to deviate from an equal division of the debt. *See Neal v. Neal*, 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977) (considering appellant's future earning ability in determining whether court abused its discretion in assigning him medical debt); *Inboden*, 223 Ariz. 542, ¶ 18, 225 P.3d at 604. "In this case, equal is not equitable." *Toth*, 190 Ariz. at 221, 946 P.2d at 903. Jeffrey's gross monthly income is $5,567, and he testified he receives quarterly bonuses averaging approximately $3,000. In contrast, according to Christina, she earns approximately $731 in gross income per month, plus $200 to $250 per week in tips. When discussing her ability to pay the community debt, Christina explained, "I can't give what I don't have." Moreover, Jeffrey expressed concerns about splitting certain debts with Christina due to her inability to pay. Reasonable evidence thus supports the court's ruling, and we find no abuse of discretion in the division of the community property and assignment of the community debts.

Spousal Maintenance

¶10 Jeffrey next contends "the trial court improperly awarded spousal maintenance when it failed to consider all relevant factors for imposing the award, made findings that lack evidentiary support, and mis-stated entirely the evidentiary record regarding . . . two factors." We review an award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). In doing so, we view the evidence in the light most favorable to sustaining the award and

will affirm if there is any reasonable evidence to support it. *Leathers v. Leathers*, 216 Ariz. 374, ¶ 9, 166 P.3d 929, 931 (App. 2007).

¶11 Pursuant to A.R.S. § 25-319(A), the trial court may award spousal maintenance if it finds that the spouse seeking maintenance meets any of the following requirements:

> 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
>
> 2. Is unable to be self-sufficient through appropriate employment . . . .
>
> 3. Contributed to the educational opportunities of the other spouse.
>
> 4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

After determining that a spouse is entitled to maintenance, the court must consider the factors enumerated in § 25-319(B) in setting the amount and duration of the award.[2] This

[2]The § 25-319(B) factors include: (1) the standard of living during the marriage; (2) the marriage duration; (3) the "age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance"; (4) the "ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance"; (5) the spouses' "comparative financial resources"; (6) the "contribution of the spouse seeking maintenance to the earning ability of the other spouse"; (7) the "extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse"; (8) the spouse' abilities to "contribute to the future educational costs of their mutual children"; (9) the "financial resources of the party seeking maintenance"; (10) the "time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment"; (11) "[e]xcessive or abnormal expenditures, destruction, concealment or fraudulent disposition" of common property; (12) the cost of health insurance for both spouses; and (13) "[a]ll actual damages and

determination requires a case-by-case analysis, and not all of the factors will apply in each case. *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993). Here, the trial court found Christina was entitled to an award of spousal maintenance pursuant to § 25-319(A)(1), and after addressing seven of the § 25-319(B) factors, the court ordered Jeffrey to pay Christina "$500 per month for a period of 48 months."

¶12 Jeffrey first contends the trial court "neglected to address two [§ 25-319(B)] factors" that weighed against an award of spousal maintenance. However, Jeffrey never requested that the court make findings of fact and conclusions of law. *See* Ariz. R. Fam. Law P. 82(A); *see also Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990) (when requested, court must make findings on all ultimate facts); *Higgins v. Higgins*, 154 Ariz. 87, 88, 740 P.2d 508, 509 (App. 1987) (specific § 25-319 findings not required). We thus assume the court found every fact necessary to sustain its ruling. *See Silva v. De Mund*, 81 Ariz. 47, 50, 299 P.2d 638, 640 (1956); *see also Myrland v. Myrland*, 19 Ariz. App. 498, 504, 508 P.2d 757, 763 (1973) (in addition to express findings made by court, findings of fact necessary to sustain judgment are implied where such additional findings are reasonably supported by evidence and not in conflict with express findings). Moreover, the court explicitly acknowledged that it had "reviewed the thirteen (13) factors under A.R.S. § 25-319(B)," but was specifically "address[ing] only the factors where significant evidence was presented."

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judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim."

¶13 Jeffrey maintains "the trial court rather bewilderingly mis-state[d] the evidence on . . . two factors critically important" in this case, § 25-319(B)(3) and (10). In its ruling, with regard to § 25-319(B)(3), the court noted, "Father asserts that [Mother] is close to landing a management position. Mother denies this." Jeffrey argues the record is "utterly devoid of [Christina] denying this." He is correct; there is no evidence in the record that Christina refuted Jeffrey's assertion that, upon the dissolution of their marriage, she could "[a]bsolutely" obtain a managerial position at the restaurant where she currently works. Although we agree the court misstated Christina's testimony, we also conclude that Jeffrey's testimony about Christina's ability to obtain a managerial position was pure speculation and thus did not support a finding under § 25-319(B)(3). There was no evidence beyond Jeffrey's bare assertion that management positions were readily available. "A maintenance award 'cannot be based upon mere hopes and speculative expectations.'" *Gutierrez*, 193 Ariz. 343, ¶ 23, 972 P.2d at 682, *quoting Thomas v. Thomas*, 142 Ariz. 386, 391, 690 P.2d 105, 110 (App. 1984).

¶14 Next, regarding § 25-319(B)(10), the trial court noted, Christina "seeks to retrain as a veterinary technician for which she would need approximately three (3) years of schooling." Jeffrey again asserts there is no "evidence or testimony that [Christina] intends to pursue said veterinary career." The record, however, belies this assertion. Christina testified she may return to the veterinary field if her "health permitt[ed]." Additionally, in her pretrial statement, Christina explicitly said she "would like to attend school [to become a] Veterinary Technician which will take . . . two (2) to three (3) years."

¶15 Jeffrey lastly argues that of the seven factors the trial court specifically addressed, "findings on five factors fail to have substantial support in the record so as to justify the amount/duration of the award." But Jeffrey essentially is asking us to reweigh the evidence on appeal, which we will not do. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). Rather, we will affirm the court's ruling if there is any reasonable evidence to support it, *see Leathers*, 216 Ariz. 374, ¶ 9, 166 P.3d at 931, and we find such evidence here.

¶16 The record shows that during their marriage of eleven years, *see Schroeder v. Schroeder*, 161 Ariz. 316, 320 n.5, 778 P.2d 1212, 1216 n.5 (1989), the parties established a comfortable lifestyle. *See* § 25-319(B)(1), (2). Christina spent nine years employed in various restaurant positions; she also worked as a veterinary assistant for approximately two years and expressed a desire to return to that field after further education. *See* § 25-319(B)(3). However, Christina suffers from seizures and rheumatoid arthritis, which occasionally interfere with her ability to work. *See id.* In contrast, Jeffrey has been the general manager of a restaurant for the past eleven years. *See* § 25-319(B)(4). In 2011, he earned more than $84,000, compared to Christina's income of approximately $17,000. *See* § 25-319(B)(4), (5). After the parties separated, Christina moved in with her parents and is relying on financial support from her grandparents to purchase a condominium. *See* § 25-319(B)(9). Christina testified that she needs $650 a month in spousal maintenance for at least four years to "make ends meet" and pay her bills. The trial court did not abuse its discretion in awarding spousal maintenance to Christina in the amount of $500 per month for forty-eight months.

Disposition

¶17 For the foregoing reasons, we affirm the decree of dissolution. Christina has requested her attorney fees and costs on appeal pursuant to A.R.S. § 25-324. In our discretion, we deny her request for attorney fees. However, as the prevailing party, Christina is entitled to her costs, *see* A.R.S. § 12-341, and we grant them contingent upon her compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge