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JUN 30 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2010-0202
	DEPARTMENT A
GAIL E. GREGORY,	
	MEMORANDUM DECISION
Petitioner/Appellant,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
FRANK S. BANGS, JR.,	
Respondent/Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20013887

Honorable David R. Ostapuk, Judge Pro Tempore

AFFIRMED

Law Office of Dan W. Montgomery
By Dan W. Montgomery — Tucson
Attorney for Petitioner/Appellant

The McCarthy Law Firm
By Kathleen A. McCarthy — Tucson
Attorneys for Respondent/Appellee

H O W A R D, Chief Judge.

¶1 Appellant Gail Gregory appeals from the trial court's denial of her request for modification of spousal maintenance from her former husband, Frank Bangs, Jr. She

argues that, because circumstances have changed since the entry of the original spousal maintenance order, the court abused its discretion by failing to modify it.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). Gregory and Bangs were divorced in November 2004. At that time, the court entered a modifiable order of spousal maintenance to continue for five years. In October 2009, Gregory filed a "Petition to Appear," requesting the court modify its original order for several reasons, including the decrease in value of real estate belonging to her. After a hearing, the court denied Gregory's request to modify the original order. This appeal followed.

Discussion

¶3 Gregory argues the trial court erred by denying her request for modification of spousal maintenance because it "discarded" the length of her marriage in its decision and because factors decreasing the value of her real estate constituted changed circumstances under A.R.S. § 25-327(A).[1] We review a court's determination of whether changed circumstances warrant a modification of a spousal maintenance award for an

[1]Gregory also argues the court should have modified its original order under A.R.S. § 25-319(A)(2) which allows spousal maintenance if the party "[i]s unable to be self-sufficient through appropriate employment." However, she did not make this argument to the trial court and, thus, has waived the issue. *See Medlin v. Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d 1087, 1089 (App. 1999) ("An issue raised for the first time after trial is deemed to have been waived.").

abuse of discretion, deferring to the court's findings of fact. *Van Dyke v. Steinle*, 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995).

¶4 Section 25-327(A) allows modification of a spousal maintenance order only if there has been a change in circumstances that is substantial and continuing. The party petitioning for the modification of the order has the burden of proving that circumstances have changed. *Van Dyke*, 183 Ariz. at 274, 902 P.2d at 1378. And the circumstances referred to in § 25-327 are "'the economic circumstances that justified the original award, as set forth in [A.R.S.] § 25-319.'" *Id.*, *quoting Smith v. Mangum*, 155 Ariz. 448, 451, 747 P.2d 609, 612 (App. 1987). Section 25-319(A) allows an order for spousal maintenance for several reasons, including if the party "[l]acks sufficient property . . . to provide for that spouse's reasonable needs" or "[h]ad a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient." However, a change that would have been reasonably foreseeable at the time of the dissolution is insufficient to support a modification of maintenance. *Marquez v. Marquez*, 132 Ariz. 593, 595, 647 P.2d 1191, 1193 (App. 1982) (appreciation of property value reasonably foreseeable); *see also Schroeder v. Schroeder*, 161 Ariz. 316, 322, 778 P.2d 1212, 1218 (1989).

Duration of Marriage

¶5 Gregory contends the trial court abused its discretion by failing to grant her request for modification because she qualified for maintenance under § 25-319(A)(4).[2]

[2]Because Gregory did not make this argument to the trial court, we could consider the issue waived. *See Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d at 1089 ("An issue raised for

This section allows the court to award a party spousal maintenance if the parties' marriage was of a "long duration" and the party to whom it is paid might not be able to obtain adequate employment due to her age. A.R.S. § 25-319(A)(4). But, the length of the marriage and Gregory's age at the time the original spousal maintenance obligation was to terminate were both known when the court entered the original order. Thus, neither of these constitutes a changed circumstance under the statute. *See* A.R.S. § 25-327(A); *see also Marquez*, 132 Ariz. at 595, 647 P.2d at 1193.

Real Estate

¶6 Gregory argues that the recent decline in the real estate market, the construction of a gas compression plant next to her property, and the addition of a pipeline easement on the property constitute sufficient change in circumstances to allow for a modification of the maintenance order.[3] She contends the trial court erred by failing to extend the order, because she does not have sufficient property to provide for herself under § 25-319(A)(1).

¶7 Gregory negotiated for and received payment for the gas pipeline easement across her land. Additionally, Gregory has gifted some interest in the property to her

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the first time after trial is deemed to have been waived."). However, in our discretion, we choose to address it.

[3]Gregory errs to the extent she relies on the existence of a wildlife covenant as a basis for modifying the maintenance order. That restrictive covenant has been in place on the property since before the original decree and, thus, does not constitute a changed circumstance. Additionally, although Gregory argues in her reply brief that her gifts to her children of interests in the property present a new impediment to removing the wildlife covenant, she testified before the trial court that "at the time of the divorce, the children each owned 4 percent interest or a total of 8 percent interest in 113 acres."

children, both before and after the divorce, reducing her interest in the land. Because Gregory voluntarily has reduced her interest in the land and its value, the trial court did not abuse its discretion in finding Gregory failed to establish a substantial and continuing change for these reasons. *Cf. Reeves v. Reeves*, 146 Ariz. 471, 473, 706 P.2d 1238, 1240 (App. 1985) (court may find voluntary early retirement "insubstantial basis for modification").

¶8 Gregory also argues the construction of the gas plant and decline in the real estate market constitute changed circumstances. At the time of the dissolution, Gregory's property was valued at $856,000 after taxes and costs or $7,576 per acre. And the trial court determined it would be possible to sell the property within six to twelve months.

¶9 Bangs's 2009 appraisal valued the property with the restrictive covenant at $1,478,300 or $12,019 per acre. And, Gregory testified the current estimated value of the property without the restrictive covenant was between $30,000 and $35,000 per acre. Both appraisers had reduced the value of the property by fifty percent due to the covenant. But reducing Gregory's own valuation by fifty percent still gives the property a higher value than at the time of the dissolution.

¶10 Although the parties' appraisals differed and contained some discrepancies, the trial court properly could conclude that the value of the property had increased since the dissolution such that the economic factors that justified the original award had not changed substantially. *See Van Dyke*, 183 Ariz. at 273, 902 P.2d at 1377. And her voluntary decision to maintain the investment in the land did not mandate a change in the spousal maintenance. *See Marquez*, 132 Ariz. at 595, 647 P.2d at 1193. The trial court

did not abuse its discretion denying Gregory's request for modification of the maintenance order.

Conclusion

¶11 For the foregoing reasons, we affirm the trial court's denial of Gregory's request for an increase in the duration of spousal maintenance. Bangs has requested an award of costs and attorney fees arguing Gregory's appeal "was groundless and not based in fact or law." We award Bangs his costs on appeal under A.R.S. § 12-342. And although we have denied Gregory's appeal, we do not find that it was not grounded in fact or based on law under A.R.S. § 25-324(B)(2), or groundless under A.R.S. § 12-341.01(C). Therefore, we deny Bangs's request for attorney fees.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

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