IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Marriage of:

GREGORY ANDREW ERTL, *Petitioner/Appellee*,

v.

SUE AMANDA ERTL, *Respondent/Appellant*.

No. 1 CA-CV 20-0690 FC
FILED 11-9-2021

Appeal from the Superior Court in Yuma County
No. S1400DO202000095
The Honorable Mark W. Reeves, Judge

AFFIRMED

COUNSEL

Mary Katherine Boyte PC, Yuma
By Mary K. Boyte Henderson
Counsel for Petitioner/Appellee

Sue Amanda Ertl, Yuma
Respondent/Appellant

OPINION

Presiding Judge Randall M. Howe delivered the opinion of the court, in which Judge Brian Y. Furuya and Judge Michael J. Brown joined.

H O W E, Judge:

¶1 Sue Ertl ("Wife") appeals the family court's order finding that she entered a valid separation agreement with Greg Ertl ("Husband") when the parties' respective attorneys agreed to the terms through signed e-mails. She also appeals the resulting dissolution decree. She argues that the court erred in finding the parties' separation agreement, which distributed property according to their premarital agreement, fair under A.R.S. § 25–317(B).

¶2 We hold that counsel's e-mail exchanges may bind their respective clients. We also hold that when the parties incorporate a premarital agreement into a final separation agreement, distribution according to the premarital agreement is deemed fair under A.R.S. § 25–317(B) unless the premarital agreement is unenforceable under A.R.S. § 25–202(C). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 Wife worked as a nurse and Husband worked as a doctor in a dermatology practice that he owned. The two met and decided to marry. To protect their respective interests, they entered a premarital agreement that defined each of their property rights. Among other things, under the agreement, (1) neither party would receive spousal support if the marriage were dissolved; (2) both parties would retain all earnings from their work during marriage as sole and separate property—as if the "marriage had never occurred"; and (3) both parties would waive any right to acquire any community or equitable interest in the sole and separate property earned during marriage or held before marriage. The parties attached two exhibits to the agreement that itemized their pre-marriage property and their respective values at the time of marriage.

¶4 Wife and Husband married in November 2003, and in 2005, Wife gave birth to twin girls. She later quit her nursing job to raise the

children and did not begin working part-time again until 2011. Husband continued to work full-time throughout the marriage.

¶5 Husband petitioned for dissolution of marriage in January 2020. Wife and Husband participated in mediation in the conciliation court and signed a partial parenting agreement under Arizona Rule of Family Law Procedure 68. Both parties agreed that Wife would be the primary residential parent and that Husband would receive parenting time every other weekend. Neither party objected to the partial parenting plan by the agreement's May 2020 deadline, and Husband submitted the agreement to the court.

¶6 Meanwhile, the parties' attorneys exchanged e-mails about a settlement of the remaining issues, which focused on child support, legal decision-making regarding the children, and property distribution. After extended communication between the parties and their attorneys, Husband's attorney e-mailed Wife's attorney that Husband and Wife "[we]re in full and final agreement" that (1) the parties' premarital agreement was valid and enforceable and would be applied to the resolution of the matter; (2) child support would be set at an upward deviation of $2,500; and (3) Husband's attorney would draft the terms of the final separation agreement to save Wife money. The parties also agreed to cancel Wife's deposition set for the next day. Husband's attorney noted, however, that Husband had requested joint legal decision-making about issues with the children and asked whether Wife would agree to joint legal decision-making. Wife's attorney responded that Wife also agreed to have joint decision-making authority with Husband and, with that addition, Wife was "in agreement with the terms."

¶7 Husband's attorney sent the completed agreement to Wife's attorney in early June. Wife's attorney responded that she had signed a motion to withdraw and authorized Husband's attorney to communicate directly with Wife. Over the course of the next few months, Wife told Husband's attorney that she was too busy to review and discuss the separation agreement. She eventually informed Husband's attorney that she would finalize the agreement only if Husband paid her $250,000.

¶8 Husband moved to enforce the parties' separation agreement as reflected by the e-mails. Wife responded that the e-mails did not form an agreement and alleged via a declaration that "the girls relayed information suggesting that [Husband] should have limited parenting time." Wife also asked that the court interview the two children without Husband present, arguing that their best interests were not served in

having mandatory visits with Husband. She also moved to set a trial date. In response, Husband argued that he and Wife had no factual dispute requiring a trial because the alleged agreement resolved all factual issues. In her reply in support of her motion to set a trial date, Wife requested a hearing to determine "whether the Pre[marital] Agreement [was] enforceable." The court denied both of Wife's motions, found that the parties had reached a valid agreement on both parenting time and financial distribution, and ordered that the parties lodge a proposed dissolution decree and file any later objections.

¶9 Wife objected to Husband's receiving parenting time every other weekend, to his paying medical insurance, to the allocation of the children's tax-exempt status, and to joint legal decision-making. She also requested clarification of the termination date of the child support. Overruling Wife's objections, the court adopted the proposed decree, finding that it was fair and equitable and in the best interests of the children. Wife timely appealed.

DISCUSSION

¶10 Wife argues that the family court erred in finding that (1) the parties entered a final separation agreement disposing of all contested issues, (2) the agreement's distribution of the parties' assets was fair without first holding an evidentiary hearing, and (3) the parenting plan was reasonable without first conducting an interview with the children without Husband present to determine their best interests. We reject Wife's arguments and affirm the dissolution decree.

I. The e-mails created an enforceable separation agreement.

¶11 Wife argues that a separation agreement cannot be created by e-mails exchanged between parties' counsel and that the e-mails did not address all material issues. The validity and enforceability of a separation agreement is a mixed question of law and fact reviewed de novo. *Armiros v. Rohr*, 243 Ariz. 600, 605 ¶ 16 (App. 2018); *see also Buckholtz v. Buckholtz*, 246 Ariz. 126, 129 ¶ 10 (App. 2019) (a marital separation agreement is a contract).

¶12 Arizona has long recognized that parties can enter a separation agreement disposing of rights to property as they desire. *See* A.R.S. § 25–317. An enforceable agreement requires "an offer, acceptance, consideration, a sufficiently specific statement of the parties' obligations, and mutual assent." *See Buckholtz*, 246 Ariz. at 129 ¶ 10. Parties must

mutually assent to all material terms, *id*., but need not have worked out all the basic terms of the agreement, *see Schade v. Diethrich*, 158 Ariz. 1, 8–11 (1988) (finding sufficient manifested mutual assent to be bound despite the absence of basic terms).

¶13 These agreements are valid under Arizona Rule of Family Law Procedure 69 if they are "in writing and signed by the parties personally or their counsel on the party's behalf." Ariz. R. Fam. L. Pro. 69(a)(1). In addition, under A.R.S. § 44–7007, a record and signature in electronic form "cannot be denied legal effect," A.R.S. § 44–7007(a), (c), and (d), and applies to any transaction relating to government affairs, *see* A.R.S. §§ 44–7003(a), 44–7002(17). Signed e-mail communications involving court proceedings involve this state's judicial branch of government affairs and therefore are considered "in writing" under Rule 69. *See* A.R.S. §§ 44–7002, 44–7003, and 44–7007; *see also Murray v. Murray*, 239 Ariz. 174, 177–78 ¶ 12 (App. 2016) (finding Husband's e-mail sent to attorney to write out details, and later to Wife, constituted a valid agreement).

¶14 The parties entered an enforceable agreement created by their attorneys' e-mails. Husband, through counsel, sent Wife's attorney a signed e-mail stating that Husband agreed that the parties were "in full and final agreement" with a list of obligations, including that the premarital agreement would control the distribution of the parties' property, Husband would pay an upward deviation of $2,500 a month in child support, the parties would cancel Wife's deposition scheduled for the next day, and Husband's counsel would draft the agreement to save Wife the expense of her counsel doing so, which exhibited both parties' consideration in coming to the agreement. The offer, however, left undetermined whether Husband would share in joint legal decision-making authority for their daughters. Wife's attorney replied by e-mail that Wife had agreed to joint legal decision-making and that Wife agreed with the previous e-mail's terms, which constituted an acceptance of the material terms in Husband's offer and an offer to joint legal decision-making. Husband's attorney accepted Mother's offer with a signed e-mail and informed Wife's attorney that she would begin drafting the formal agreement.

¶15 When Wife agreed that the premarital agreement would control distribution of property, she effectively consented to distribution of property and waiver of spousal support expressed in the premarital agreement. *See* A.R.S. § 25–202. Furthermore, the parties' Rule 68 parenting plan filed with the court addressed all parenting-related issues not otherwise agreed to in the e-mails. *See* Ariz. R. Fam. L. Pro. 68(c)(6)(b). Wife's argument that the court "bootstrapped" her into "a temporary

parenting plan" is unavailing. Her failure to timely object to the Rule 68 parenting plan relayed the parties' objective intent to have the court enter it as part of its final agreement. *See* Ariz. R. Fam. L. Pro. 68(c)(6)(b); *see also Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 384 ¶ 11 (2006) ("Mutual assent is ascertained from objective evidence, not [from] the hidden intent of the parties."). The e-mails, together with the parenting plan filed with the court and the parties' premarital agreement, thus exhibited objective expressions of the parties' obligations in dissolution, supported by consideration, and their mutual assent to all material terms to the dissolution of their marriage. *See Buckholtz*, 246 Ariz. at 129 ¶ 10.

¶16 Wife nevertheless argues that the e-mails contained insufficient terms to create the binding agreement accepted in the dissolution decree. She has waived on appeal, however, any argument about the disposition of property under the premarital agreement or to the nature of property subject to the decree by not first timely raising the issue before the family court in her motion to set trial date or her answer to Husband's motion to enforce agreement. *See Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 418 ¶ 10 n.11 (App. 2010); *see also Dawson v. Withycombe*, 216 Ariz. 84, 111 ¶ 91 (App. 2007) (courts will not consider argument made for the first time in a reply brief). Furthermore, the parenting plan expressly addressed all parenting issues Wife claimed were material but for the allocation of child-tax exemption and the expiration of child support. But two statutes directly determined those issues. A.R.S. § 25–320, 2018 Child Support Guidelines § 27 (tax exemptions); A.R.S. § 25–320(F) (end of child support). Both statutes state that if the parties do not express otherwise, the statute's terms shall apply. *See id*. Without express terms to the contrary in their parenting plan, the statute therefore informed the court how to dispose of both the tax exemptions and the termination of child support. *See Daley v. Earven*, 131 Ariz. 182, 185 (App. 1981) (a material term not raised by the parties is not missing when disposed of by operation of law).

¶17 Wife also argues that even if a separation agreement could be made through e-mail, her counsel's signature demonstrated only that counsel signed the e-mail and that Husband did not prove that she had intended to be bound by the agreement. Rule 69, however, provides that signatures by counsel are binding, and Wife submitted no evidence of a contrary intent to the family court. *See* Ariz. R. Fam. L. Pro. 69(a). Once Husband proved the requirements that Rule 69 specifies, Wife had the burden to show that the Rule 69-compliant agreement was defective. *See* Ariz. R. Fam. L. Pro. 69(c) (a signed agreement is presumed valid and the party objecting to the agreement has the burden to prove a defect under the

agreement). Her subsequent decision not to sign the memorialization of the parties' agreement does not negate her prior act of agreeing, through her attorney, to all the terms in the e-mails. *See Johnson*, 212 Ariz. at 384 ¶ 11 (The intent of the parties is shown through objective evidence, not the hidden intent of the parties.); *see also Hutki v. Hutki*, 244 Ariz. 39, 43 ¶ 19 (App. 2018) (requiring the movant for an evidentiary hearing to provide affirmative evidence of a factual dispute to be entitled to an evidentiary hearing on the matter).

¶18 Wife next argues that a unilateral mistake voids the agreement because Husband's counsel's e-mail had removed a proposed lump-sum equalization payment. A unilateral mistake is an erroneous belief of fact. *See* Restatement (Second) of Contracts § 151, comment a (1981). To escape a contractual obligation because of a unilateral mistake of fact, a party must have made a mistake of fact about a material and basic assumption of an agreement, *see* Restatement (Second) of Contracts § 153, and the other party knew of the mistake of fact and unfairly exploited the other party's error, *Hartford v. Indus. Comm'n of Ariz.*, 178 Ariz. 106, 111 (App. 1994).

¶19 Wife provided no evidence to the family court that she believed that an equalization payment was needed to finalize the agreement. Without evidence that the equalization payment was a basic assumption of the contract, she has failed to prove a mistake that would void the parties' agreement as recognized in the dissolution decree. *See* Restatement (Second) of Contracts § 153; *see also Hutki*, 244 Ariz. at 43 ¶ 19. Although she provides on appeal an e-mail exchange that included her request that Husband pay a lump sum of $250,000 to show that she had mistakenly assented to the agreement, those e-mails were not submitted to the family court and the evidence cannot be considered. *See GM Dev. Corp. v. Cty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) (appellate court will not consider evidence not first presented to trial court).

II. The financial separation agreement was fair.

¶20 Wife argues that the court erred in approving the parties' distribution of their assets without an evidentiary hearing and that the distribution was unfair. This court reviews a family court's distribution of property for an abuse of discretion, *In re Marriage of Flower*, 223 Ariz. 531, 535 ¶ 14 (App. 2010), as we do a trial court's denial to set an evidentiary hearing, *see Hutki*, 244 Ariz. at 42 ¶ 15.

¶21 Arizona law permits parties to enter "an agreement between prospective spouses that is made in contemplation of marriage and that is effective on marriage." A.R.S § 25–201(1). Premarital agreements are "enforceable without consideration," A.R.S. § 25-202(A), and may be used by parties to define their rights and obligations "in any of the property of either or both, whenever or wherever located," A.R.S. § 25–203(A)(1), and to contract the "disposition of property on separation or marital dissolution," A.R.S. § 25–203(A)(3).

¶22 Parties may also enter a separation agreement that contains provisions for disposition of any property owned by either of them at the dissolution of their marriage. A.R.S. § 25–317(A). While premarital agreements are enforceable unless the person against whom enforcement is sought proves either that they did not execute the agreement voluntarily or that the agreement was unconscionable, A.R.S. § 25–202(A), (C), the court has a duty to review the financial distributions of a separation agreement for unfairness, A.R.S. § 25–317(B). In comparing the standard applied to the two agreements, the unconscionability standard of a premarital agreement imposes a more stringent standard on a party seeking to challenge a premarital agreement than A.R.S. § 25–317(B)'s "unfair" standard, *Buckholtz*, 246 Ariz. at 131 ¶ 18 n.4. In addition, unconscionability is determined when the parties entered the agreement, not at dissolution as with a separation agreement's unfairness review, *Nelson v. Rice*, 198 Ariz. 563, 568 ¶ 14 (App. 2000).

¶23 The family court did not err in approving the distribution of the parties' property under the premarital agreement without first holding an evidentiary hearing. The family court found the separation agreement fair and equitable. Wife did not factually dispute the nature of the property addressed in either agreement, nor did she argue that she did not voluntarily sign the premarital agreement or that it was unconscionable when she signed it. Thus, without a factual dispute before it, the family court had no need to hold an evidentiary hearing and was required to distribute all remaining property Wife or Husband owned under the premarital agreement.

¶24 Wife's argument that the premarital agreement was unfair because of the disparity of distribution incorrectly imposes the demands of A.R.S. § 25–317, which governs separation agreements onto a premarital agreement, which is governed by A.R.S. § 25–202. If her argument were accepted, a separation agreement's mere recognition that a premarital agreement controlled the distribution of property would allow a court to unilaterally revoke the premarital agreement as unfair at dissolution under

A.R.S. § 25–317. This would vitiate the heightened unconscionability standard of a premarital agreement and the moving party's burden to prove the agreement's unconscionability. *Compare* A.R.S. § 25–202 (C), *with* A.R.S. § 25–317(B). Thus, without evidence that the premarital agreement was unconscionable or involuntary under A.R.S. § 25–202(A), (C), the family court did not abuse its discretion in finding the parties' final separation agreement was fair without an evidentiary hearing. *See Hutki*, 244 Ariz. at 42 ¶ 15.

III. Legal decision-making, parenting time, and child support were reasonable and in the best interests of the children.

¶25 Wife argues that the family court did not consider the children's best interests in determining legal decision-making and parenting time and that the court erred in its award of child support. We will not disturb the family court's custody or parenting time orders absent an abuse of discretion, *Nold v. Nold*, 232 Ariz. 270, 273 ¶ 11 (App. 2013), and we review a parenting agreement de novo, *Baker*, 237 Ariz. at 114 ¶ 7.

¶26 Although the parties can agree on child support, legal decision-making, and parenting time, such an agreement is subject to family court scrutiny. A.R.S. §§ 25–317(A) & (B); *Sharp v. Sharp*, 179 Ariz. 205, 208 (App. 1994). If the court finds the parties' separation agreement "is reasonable as to support, custody and parenting time of children," however, the agreement must be set forth or incorporated by reference into the dissolution decree. A.R.S. § 25–317(D). In determining reasonableness, the family court must conduct an independent analysis of the provisions to ensure that they align with the children's best interests before accepting the terms. A.R.S. § 25–317(B). When the parties stipulate to a parenting plan without objections, however, courts seldom "will make a child custody determination which differs from the language of the agreement signed by the parents." *Lowther v. Hooker*, 129 Ariz. 461, 463 (App. 1981).

¶27 Evidence supports the family court's finding that the parties' agreement regarding custody, support, and parenting time was reasonable and that it independently considered the children's best interests. Both parties voluntarily entered the plan and the court expressly found that it was in the children's best interests. Husband has shared the home with Wife and the children for a long time before the petition for dissolution, has developed a relationship with his children, and has provided almost all their financial support. Even so, Husband received only two days of parenting time every two weeks, to which Wife and Husband agreed was

in the children's best interests. The court did not err in accepting the terms of the agreement as reasonable.

¶28 Wife argues that the court erred in not holding private interviews with the children to determine what was in their best interests. But she presented no evidence that such interviews were necessary to determine best interests and the reasonableness of the parenting plan. *See* A.R.S. § 25–403; *see also* A.R.S. § 25–403.02(B) (Consistent with children's best interests, "the court shall adopt a parenting plan that . . . maximizes [the parent's] respective parenting time."). Wife has therefore failed to point to anything in the record that would rebut the presumption that the court considered the children's best interests.

¶29 Wife's remaining arguments, including her due process argument, were not properly raised either with the family court or on appeal and have been waived. *See Nold*, 232 Ariz. at 273 ¶ 10 (waiver of arguments not raised at the family court); *Dawson*, 216 Ariz. at 111 ¶ 91.

CONCLUSION

¶30 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA