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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/28/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 11-0802
)
ANTONIA DAY,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
MICHAEL C. DAY,) Civil Appellate Procedure)
)
Respondent/Appellee.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN2008-051191

The Honorable Michael D. Gordon

AFFIRMED

Collins & Collins, LLP
By C. Robert Collins
Attorney for Petitioner/Appellant

Phoenix

The Murray Law Offices, P.C.
by Stanley David Murray
Attorney for Respondent/Appellee

Scottsdale

P O R T L E Y, Judge

¶1 Antonia Day ("Wife") challenges various provisions in the final decree of dissolution. For the reasons stated below, we affirm the decree.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Michael Day ("Husband") and Wife got married in 1979, separated in 2006, and Wife filed for divorce in June 2008. The court entered temporary orders three months later,¹ and the parties subsequently began trial on October 5, 2009, to resolve the division of community property and waste. After taking the matter under advisement, the court issued a decree in December 2010. After hearings to resolve issues raised by the parties in their motions to amend and/or clarify, the court signed and filed the superseding and restated dissolution decree in October 2011.

DISCUSSION

¶3 Wife raises three issues on appeal. She argues the family court abused its discretion by: (1) its allocation of the community assets and debts; (2) denying her full compensation for Husband's waste of community funds; and (3) denying her request for additional attorneys' fees.

¹The temporary orders included a spousal maintenance award for Wife, the division of two bank accounts, and an order that Husband pay \$6000 of Wife's attorney's fees.

¶14 Husband, as a preliminary matter, requests that we strike the portion of Wife's appendix containing her summary of the trial transcripts. Wife argues that the record on appeal includes a certified transcript and that her summaries cite to the certified transcript. Because the record in this appeal does not include a certified transcript, we disagree.²

¶15 Generally, the official record on appeal includes certified transcripts. The official record, however, does not include a party's *summary* of transcripts. See Arizona Rule of Civil Appellate Procedure ("ARCAP") 11(a)(1). Moreover, an appendix can be attached to a brief but can only include "copies of any of the papers making up the record on appeal." ARCAP 11(a)(4). Because summaries of any trial transcripts are not part of the official record on appeal and, as a result, should not be included in an appendix, we grant Husband's request and strike Wife's summaries of the trial transcripts.

I. Community Property Division

¶16 Wife challenges the division of community property and debt. We review the court's apportionment of community property for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz.

² We did not find any certified transcripts in the record. Because the parties cited to transcripts, we ordered that a copy be filed by January 22, 2013. Neither party filed any transcript.

343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998). "We view the evidence in the light most favorable to sustaining the [family] court's findings and determine whether there was evidence that reasonably supports the court's findings." *Id.* Additionally, "[w]e will defer to the [family] court's determination of witnesses' credibility and the weight to give conflicting evidence." *Id.* at 347, ¶ 13, 972 P.2d at 680.

¶7 Wife first contends that the court abused its discretion because it relied on Husband's false testimony. There are two problems with this argument. First, we will not reweigh the evidence because the family court is in the "best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 234, ¶ 13, 256 P.3d 628, 631 (App. 2011). Second, Wife failed to provide a certified transcript of the trial court proceedings. See ARCAP 11(b). As a result, we presume that the evidence presented was sufficient to support the court's ruling. See *Hardin v. Hardin*, 163 Ariz. 501, 502-03, 788 P.2d 1252, 1253-54 (App. 1990). Consequently, we find that the court did not abuse its discretion by determining the credibility of the witnesses and the weight to be given to the testimony and evidence.

¶18 Wife next contends that the court abused its discretion by failing to award her a share of the profits from the sale of the restaurant in Mexico. She argues that she was not aware of the sale or that the proceeds would be used to buy a parcel of land in Mexico. We disagree.

¶19 Husband used community funds to purchase the restaurant. He later sold the business at a profit and used some of the proceeds to buy a parcel of land. He deposited the sales proceeds in the Mexican bank account, and that account was ordered to be equally divided as part of the temporary orders. Moreover, the court ordered Husband to pay the home equity loan on the marital home that was used in part to buy the restaurant. Although the court awarded Husband the parcel subject to the outstanding liens, Wife was awarded other real property.

¶10 Although Wife contends that she did not authorize Husband to use the profits from the sale of the restaurant to buy the land, the court found that she "was on notice of the transactions precipitating the acquisition of the property and implicitly agreed." We assume the evidence supports the finding because we do not have the trial transcript. *Hardin*, 163 Ariz. at 502-03, 788 P.2d at 1253-54. Consequently, we find no factual basis for the contention that the court abused its

discretion in resolving the sale of the restaurant, the purchase of the land or division of the bank account.

¶11 Wife next complains that the court abused its discretion by failing to take judicial notice that the value of the real property had decreased because of the economic recession. Again, we disagree.

¶12 The parties owned the parcel in Mexico, a Rocky Point condo, three rental properties and the marital home. During trial, Wife submitted appraisals for the marital home and one rental property dated May 2009 and a January 2010 appraisal of the Rocky Point condo. Husband submitted appraisals of the marital home and the three rental properties dated 2009 without objection. Although the evidence of valuation was in conflict, the court had to determine the weight to give to the evidence and determine valuation of the properties. We defer to the court's factual determination. *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680.

¶13 Moreover, there is no evidence in the record that we have that suggests that Wife requested that the court take judicial notice of the value of the properties in 2008 or provided the court with a basis to evaluate the value in 2008. As a result, she has waived the issue. Consequently, because a court has discretion in determining the appropriate valuation

date, we find no abuse of discretion. *Sample v. Sample*, 152 Ariz. 239, 242-43, 731 P.2d 604, 607-08 (App. 1986).

¶14 Wife also challenges the division of their real property. She received the marital home as her sole and separate property subject only to the first mortgage but Husband was responsible for the home equity line of credit/second mortgage. She argues Husband should be responsible for paying \$125,000 of the \$255,000 first mortgage on the marital home because he added that amount to the mortgage and used it to buy the restaurant. Because the court found that Wife was aware of the transactions, see *supra* ¶ 11, and resolved the marital home along with the other property, we find no abuse of discretion.

¶15 Wife also asserts that she was entitled to an equalization award for her share of (1) the fifth wheel valued at \$25,000; (2) a quad trailer and sand rail valued at \$10,000; (3) 2006 tax refunds totaling \$17,634; (4) \$25,000 she spent to improve community rental properties; and (5) \$144,000 in an unspecified Mexican bank account. She also argues Husband should be responsible for one-half of the following debts the trial court allocated to her: (1) American Express credit card debt (\$1842); (2) Wells Fargo line of credit (\$23,517); (3) Wells Fargo Visa card (\$5226); (4) two debts to Wife's father (\$9651); and (5) an unsecured line of credit.

¶16 The court concluded, however, that the allocation of property and debts was fair and equitable; the touchstone for the division of property. See *In re Marriage of Flower*, 223 Ariz. 531, 536, ¶¶ 17-18, 225 P.3d 588, 593 (App. 2010). The final decree does not provide any specific valuations for the parties' real or personal property or debts. It is, as a result, difficult for us to discern whether the division was not equitable. *Id.* at 535, ¶ 14, 225 P.3d at 592 ("[W]e will not disturb a court's ruling absent a clear abuse of discretion."). Compounding the absence of valuation information is the absence of any trial transcripts. We therefore presume the evidence supports the court's conclusion that the division of property and debt was fair and equitable. See *Hardin*, 163 Ariz. at 502-03, 788 P.2d at 1253-54.

II. Waste Claim

¶17 "The [family] court is specifically authorized to consider excessive or abnormal expenditures and the concealment or fraudulent disposition of community property when apportioning community property." *Gutierrez*, 193 Ariz. at 346, ¶ 6, 972 P.2d at 679 (citing A.R.S. § 25-318(A) (1991) (now at A.R.S. § 25-318(C) (West 2013))). Where one party makes a prima facie showing of abnormal or excessive expenditures, the opposing party then has "the burden of showing that the money

was spent to benefit the community." *Id.* at 346, ¶ 7, 972 P.2d at 679. If the spending party provides a reasonable explanation for how he spent the community funds, then the trial court does not abuse its discretion in finding no waste. *Id.* at ¶ 8. The court has to resolve any conflict and we defer to the court's determination. *Id.* at 347, ¶ 13, 972 P.2d at 680.

¶18 The court addressed Wife's waste claim, and awarded her \$1500 to compensate her for community funds Husband used for gifts and travel that did not benefit the community. She, however, contends that the court erred in the ruling because Husband took more than \$330,000 in unexplained cash withdrawals. She also claims that Husband bought his girlfriend a \$5900 car; gave his mother \$74,000; concealed a cash withdrawal in 2008 of \$50,000; purchased an \$18,000 boat; and spent an estimated \$26,000 on his girlfriend.

¶19 The court addressed Husband's gift to his mother, and awarded Wife one-half of the \$74,000 gift. The court also addressed the \$50,000 Husband withdrew but later re-deposited. Despite Wife's argument, the court found that Husband adequately explained how he used the funds and denied Wife's request for a \$25,000 judgment relating to the claim. We assume the record supports the court's determination as to the \$50,000 and other claims because we do not have the transcript. *See Hardin*, 163

Ariz. at 502-03, 788 P.2d at 1253-54. Accordingly, we find no basis for concluding that the court abused its discretion in resolving the waste claim.

III. Attorneys' Fees at Trial

¶20 Wife argues that the court abused its discretion by denying her request for an award of attorneys' fees in addition to the \$6000 temporary orders award. She contends she was entitled to an additional award of fees because Husband had greater financial resources, provided false testimony, and acted unreasonably. The court found, however, that neither party took unreasonable positions, but Wife's conduct prolonged the litigation. We review the denial of attorneys' fees for an abuse of discretion. *Gutierrez*, 193 Ariz. at 351, ¶ 32, 972 P.2d at 684.

¶21 Although we do not have a transcript, the record we do have supports the court's finding that Wife prolonged the litigation. She requested several continuances and most were granted. Although the continuances were granted, the court could consider the reason for the continuances in determining that the litigation was prolonged.

¶22 Moreover, the court considered the financial disparity between the parties when ordering Husband to pay \$6000 for Wife's attorneys' fees in the temporary orders. The court also

considered the disparity after trial but knew that Wife had received two rental properties with significant equity and a judgment against Husband. See *Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997) (holding that “[i]t is an abuse of discretion to deny attorneys’ fees to the spouse who has substantially fewer financial resources, *unless those resources are clearly ample to pay the fees*”) (emphasis added). Accordingly, we cannot find that the court abused its discretion by denying Wife’s request for fees after trial.

ATTORNEYS’ FEES ON APPEAL

¶123 Both parties request an award of attorneys’ fees and costs on appeal pursuant to A.R.S. § 25-324(A) (West 2013). Although Wife has less earning capacity than Husband, she has resources to pay her attorney. *Id.* Moreover, she raised a number of frivolous issues on appeal, including a matter never raised during the trial proceedings, and sought a portion of the funds Husband gave to his mother although the court had resolved the issue. Consequently, in the exercise of our discretion, we deny Wife’s request for fees.

¶124 Husband earns more than Wife. In the exercise of our discretion we deny his request for an award of attorneys’ fees. We, however, will award him costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶25 Based on the foregoing, we affirm the decree of dissolution.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PHILIP HALL, Judge