

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/26/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0826
)
SHARON J. JOHANNSEN,)
) DEPARTMENT E
Petitioner/Appellant,)
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JAMES E. JOHANNSEN,) Rule 111, Rules of
) Arizona Supreme Court)
)
Respondent/Appellee.)
)

Appeal from the Superior Court of Maricopa County

Cause No. FN2011-090836

The Honorable Teresa A. Sanders, Judge

AFFIRMED

Gregan Law Office, P.C.
By Maureen E. Gregan
Attorney for Petitioner-Appellant

Apache Junction

Ivy L. Kushner
Attorney for Respondent-Appellee

Scottsdale

T H O M P S O N, Judge

¶1 Sharon Johannsen (wife) appeals from the trial court's decree of dissolution of marriage denying her request for an award of spousal maintenance and attorneys' fees. Finding no abuse of

discretion by the trial court, we affirm.

BACKGROUND

¶2 James Johannsen (husband) and wife were married in 1990, when husband was 59 and wife was 44. Wife filed for legal separation in February 2011 and several months later, on husband's cross-petition, the court held a trial for dissolution. A judgment was entered. The court determined the separate property and divided the community property and debts. The parties stipulated to wife's portion of the community share of husband's Arizona State Retirement pension. The court declined to order husband to pay spousal maintenance or award wife her attorneys' fees. Wife's motion for reconsideration was denied and wife timely appealed.

ISSUES ON APPEAL

¶3 Wife asserts on appeal that:

1. The trial court erred failing to award her spousal maintenance; and
2. The trial court erred in failing to award her attorneys' fees.

DISCUSSION

A. Spousal Maintenance

¶4 An award of spousal maintenance is determined pursuant to Arizona Revised Statutes (A.R.S.) § 25-319 (2007). The trial court "may" award spousal maintenance where a spouse lacks sufficient property to provide for his or her reasonable needs,

lacks the earning ability to be self-sufficient, contributed to the educational opportunities of the other spouse or had a marriage of long duration and is of an age that may preclude the possibility of gaining sufficient employment. *See id.* On review, we examine an award of spousal maintenance under an abuse of discretion standard. *See In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983). Therefore, we view the evidence in the trial court in the light most favorable to sustaining the trial court's ruling and we will affirm if there is any reasonable evidence to support it. *See Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984).

¶5 At the time of trial, husband was 80 years old, wife was 65 years old, the two had been married for nearly 21 years, both were currently living off pensions and/or Social Security, both had health problems and neither was working. The couple declared chapter seven bankruptcy in 2010. Husband had a long work life, acquiring two separate pensions prior to marrying wife and one pension during the course of marriage which was, in part, community property. Husband had been the primary breadwinner in the marriage, working until age 79.¹ Wife worked part-time most of

¹ In 2008, husband had wages of just over \$35,000. In 2009, husband had wages of approximately \$27,000. In 2010, husband had wages of just over \$18,000. Husband stopped working after tax year 2010.

their marriage.²

¶6 At trial wife requested \$1500 per month in spousal maintenance for the duration of her life. Husband contended she did not meet the criteria and was able to work and support herself. The trial court recognized her health problems and financial difficulties, but found she did not qualify for an award of maintenance stating:

Husband is now over eighty years old, is no longer working, suffers from early Alzheimer's disease, is unable to drive, and lives with his adult son. His [\$3200 prior to the A.S.R.S. QDRO] income is derived exclusively from social security and retirement benefits. Most of his retirement income is his sole and separate property. In contrast, Wife is 65 years old, and able to be employed. She was working up until just prior to filing the pending petition, and decided to voluntarily terminate her employment at that time. Wife does have physical health issues; however, she has not been deemed disabled for social security purposes, and the Court has not been provided with any evidence that she cannot work at all. The Court believes that she can obtain employment, and that income, coupled with her [approximately \$531] social security benefits and her share of the community portion of Husband's Arizona State Retirement proceeds [\$160], will enable her to support herself.

¶7 Citing the statutory language and *Leathers v. Leathers*, 216 Ariz. 374, 166 P.3d 929 (App. 2007), wife asserts that due to the long marriage, her inability to support herself, her health issues and husband's receipt of \$3200 a month in pensions and

² In 2008, wife had wages of \$8811. In 2009, wife had wages of \$8112. In 2010, wife had wages of \$14,303. Wife stopped working in February 2011. The trial court found that although wife has "significant health issues," such issues did not completely prevent her from working and her leaving her last job was not due to her

Social Security benefits, she should be awarded spousal maintenance from his retirement income. *Leathers* does not support her claim. In *Leathers*, husband was, notably, still working and making in excess of \$100,000 a year. 216 Ariz. at 377, ¶¶ 11-12, 166 P.3d at 932. Unlike husband here, Mr. Leathers was not solely reliant on his retirement income. As we noted in *Leathers*, state and federal law prohibits the attachment or assignment of husband's Social Security benefits. *Id.* at 377-78, ¶ 14, 166 P.3d at 932-33 (citing 42 U.S.C. 407(a) (1998) (federal law prohibits the transfer or assignment of rights to Social Security benefits); *Kohler v. Kohler*, 211 Ariz. 106, 108, ¶ 10, 118 P.3d 621, 623 (App. 2005) (citations omitted) (state law prohibits the division of Social Security as community property)). Husband's Social Security is his. Nor is there any evidence, that at 79, this husband prematurely left the workforce. See, e.g., *Shaughnessy v. Shaughnessy*, 164 Ariz. 449, 451, 793 P.2d 1116, 1118 (App. 1990).

¶8 Spousal maintenance is not merely a matter of wife's need based on the statutory factors, husband must be able to afford it. See *In re Foster*, 125 Ariz. 208, 210, 608 P.2d 785, 787 (App. 1980) (upholding award of entitlement to spousal maintenance where husband "was well able to pay"). An award of maintenance under A.R.S. § 25-319 is permissible (the court "may" award maintenance when conditions are met) not mandatory. The court determined,

health.

after hearing husband's expenses and health situation and after considering wife's work history and her health situation, that wife was in a better position to return to work than husband was to pay maintenance. The trial court is the best judge the credibility of the witnesses and the weight of evidence. *Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971). We will not substitute our opinion of that determination. See *id.* at 169, 481 P.2d at 539. On this record we cannot conclude the court abused its discretion.

B. Attorneys' Fees Below

¶9 After considering the factors of A.R.S. § 25-324, the trial court declined to award wife attorneys' fees. The court heard testimony that neither husband nor wife could afford their own attorneys' fees and that both were receiving assistance from family members. The court did not find any party acted unreasonably. For the above stated reasons, we do not find the trial court abused its discretion. See *Magee v. Magee*, 206 Ariz. 589, 590, ¶ 1, 81 P.3d 1048, 1049 (App. 2004).

C. Attorneys' Fees on Appeal

¶10 Both husband and wife request attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. Section 25-324 requires us to examine both the financial resources and the reasonableness of the positions of each party. After doing so, we find that the parties should bear their own fees and costs on appeal.

CONCLUSION

¶11 For the foregoing reasons, we affirm.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge