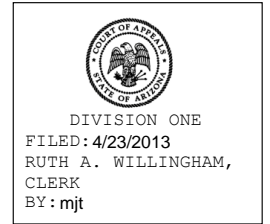


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 12-0006
)
CHRISTINE M. THOMAS,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
TIMOTHY J. THOMAS,) Civil Appellate Procedure)
)
Respondent/Appellee.)

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-000145

The Honorable Thomas L. LeClaire Judge

AFFIRMED

Law Office of Jeffrey Miller
By Jeffrey Miller

Phoenix

And

J. Douglas McVay, Attorney at Law
Attorneys for Petitioner/Appellant

Phoenix

Dickinson Wright/Mariscal Weeks PLLC
By Leonce A. Richard, III
Attorneys for Respondent/Appellee

Phoenix

K E S S L E R, Judge

¶1 Christine M. Thomas ("Wife") appeals from the superior court's judgment dissolving her marriage to Timothy J. Thomas ("Husband"). Wife contends the court's calculation of spousal maintenance ordered to be paid by Husband was too low because the court erred in determining the amount of Husband's income. We affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The parties married in 1994 and had two children. In 2010, Wife filed a petition for dissolution of marriage. The parties agreed to a joint custody and parenting plan, and they agreed that Wife was entitled to spousal maintenance; however, they disagreed, among other issues, as to the amount and duration of spousal maintenance. Wife argued she was entitled to a \$15,000 monthly award for an indefinite time. Husband asserted Wife should be awarded no more than \$4000 monthly for a period no longer than five years. The matter proceeded to a two-day bench trial.¹

¹ The superior court issued temporary orders requiring Husband to make available a credit card with a limit of \$10,000 a month for Wife's everyday living expenses. The expenses incurred on the credit card were ordered to be subject to reallocation at trial. Husband asserted that he "had to borrow money in order to meet the requirements of the [c]ourt's temporary orders."

¶3 The trial evidence revealed the following.² During the marriage, Husband worked in various sales capacities at two companies: Arizona Wholesale Supply Company ("AWS"), a wholesale supplier of appliances and flooring materials to home builders; and Quality Distributors, LLC ("QD"), a wireless communication equipment wholesaler and retailer. Husband's father had a majority ownership interest in AWS, which in turn was a majority owner of QD. Husband had a 16.1% ownership interest in AWS, but no direct ownership of QD.

¶4 Wife did not earn income during the marriage, but she does have a degree in business management from Arizona State University. Husband earned a significant income during the marriage, which was based mostly on commissions, bonuses, and ownership distributions. Husband's income allowed the family to enjoy a high standard of living. The downturn in the residential real estate market, however, adversely affected Husband's income beginning in 2007. Specifically, the parties' tax returns revealed a reported income of \$3,024,238 in 2006, \$1,876,824 in 2007, \$623,734 in 2008, and negative \$168,206 in 2009. As trial was underway, the parties sold the marital

² We regard the evidence and all reasonable inferences from it in the light most favorable to upholding the superior court's judgment. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998).

residence and split the sale proceeds so that each received approximately \$290,000.³

¶5 Husband's affidavit of financial information stated that Husband's total monthly income was \$37,738.41, which included approximately \$35,000 per month based on a 2009 average for commissions and bonuses. Husband clarified at trial that that figure was inaccurate because he was no longer earning commissions and bonuses and his monthly income was \$2,531. At trial, Wife's attorney suggested that the \$37,738.41 listed as total monthly income included some undisclosed amount of dividends, pensions, interest, trust income, annuities or royalties. Husband testified, however, that the total monthly income stated on the affidavit was erroneous, and that he was no longer making significant income in the form of commissions and bonuses. He also testified that his fixed salary had been historically low, that the majority of his income was through sales commissions, and that he had no control over whether or not distributions were made.

¶6 In a minute entry ruling, the superior court made detailed findings based on its application of the factors in Arizona Revised Statutes ("A.R.S.") section 25-319(B) (2007). The court rejected Wife's attribution of \$20,000 to \$35,000 in

³ Husband and Wife also equally split a tax refund of \$260,000 and a brokerage account balance of approximately \$62,000.

monthly income to Husband finding "[t]his amount is unrealistic and unsupported by the evidence at this time." Instead, the court found Husband's annual "income is probably closer to \$50,000 per year based on his current base salary of \$36,000 a year and a projection of some commissions on sales." The court ordered Husband to pay Wife monthly amounts of \$2000 in spousal maintenance and \$800 in child support for three years. The court also ordered Husband to pay for Wife's incurred attorneys' fees. Wife unsuccessfully moved for a new trial, and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and (A)(5)(a) (Supp. 2012).

DISCUSSION

¶7 This Court reviews the superior court's award of spousal maintenance for an abuse of discretion and views the evidence in the light most favorable to upholding the award, affirming the judgment if any reasonable evidence supports it. *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 9, 160 P.3d 231, 233 (App. 2007). "[A]ppellate courts adopt [a] deferential standard in reviewing trial court's factual findings and will sustain such findings unless clearly erroneous or unsupported by any credible evidence." *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (citing *Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990)).

¶8 Wife argues the court erred in its spousal maintenance award because it incorrectly determined Husband's annual income was only \$50,000.⁴ Her argument, verbatim, is as follows:

In this matter, it is a matter of simple arithmetic to demonstrate that no reasonable person could reach the trial [c]ourt's result. A review of the record in this case demonstrates that on an income which the trial [c]ourt determined to be \$4,166.67 gross per month, Husband was ordered to pay monthly expenses of \$5,556.00 per month, leaving him with a monthly shortfall of \$1,389.33 per month.

It is elementary that no court, without abusing its discretion, would knowingly enter an order which would require a party to pay \$1,389.33 more than his monthly gross income and thus place him at risk for a contempt petition every month. Yet that is what has occurred in this matter. The conclusion is inescapable that something went awry - a mistake was made.

¶9 This argument is not supported by the record. Wife includes in her calculation of Husband's court-ordered spousal maintenance obligation the amount of \$2375 in monthly private school tuition for the children. The superior court, however, did not order Husband to pay the children's tuition. Rather, the record reveals that Husband agreed to pay the tuition from

⁴ Wife appears to also challenge the amount of child support. However, she does not make any argument that is separate and distinct from her argument regarding the spousal maintenance award; rather, her child support challenge is based on the same purported error made by the court in determining Husband's income. Accordingly, for the reasons stated herein, we also affirm the court's order regarding child support.

his share of the proceeds from the sale of the marital residence, not his monthly income. Removing the \$2375 monthly expense of the children's tuition from the equation, the evidence demonstrates that Husband's net monthly income covers his obligations. Moreover, Husband testified that he planned on subsidizing his living expenses by using a portion of the proceeds from the sale of the marital residence. We find reasonable evidence supports the superior court's finding regarding Husband's monthly income.

¶10 In her reply brief, Wife amplifies her assertion that the court's determination of Husband's income was erroneous based on the following: 1) according to Wife's expert, as Chairman of the Board and Chief Operating Officer of QD, Husband was undercompensated; 2) evidence showed that despite Husband's contention that his income substantially decreased due to the lowered profitability of the companies, Husband was earning significant income in the form of distributions during times when the companies were not making money; 3) at the time of trial, Husband was owed a significant amount of money in undistributed retained earnings; 4) Husband's father had control over the amount distributed to Husband; and 5) Husband already agreed to pay \$4000 per month in spousal maintenance, which, when applying the court's determination of monthly income, would have resulted in a deficit each month. Finally, Wife argued

that the court ignored Husband's testimony that he was planning on obtaining a conventional home loan in the amount of almost \$340,000 within one year.

¶11 First, the evidence supports the superior court's determination of Husband's salary to be approximately \$50,000. Husband's affidavit of financial information states Husband's yearly income to be a little over \$30,000. Husband testified that he no longer received significant income in the form of bonuses and commissions and that he was not receiving distributions. Although Wife argues that Husband had earned income in the form of distributions in the past despite depressed economic times and the companies' lowered profitability, both Husband and Husband's father testified that those distributions represented retained past earnings. Thus, the court's determination that Husband's income was "probably closer to [\$]50,000 per year," was supported by the evidence. Furthermore, although Wife asserts Husband was undercompensated as an officer, the trial court's finding that Husband's title did not represent his actual role in the companies and that Husband did not possess the authority of an officer's position is supported by the evidence.

¶12 Second, although evidence established that a significant amount of the companies' retained earnings had not been distributed, Husband was not receiving distributions at the

time of trial. Husband's father testified that that because of the companies' diminished profitability, he had no plans to distribute any retained earnings at the time of trial or in the foreseeable future. In fact, even Wife's expert testified that although Husband's portion of the undistributed earnings was approximately \$2,254,000, the company did not have enough cash to make that distribution. While Husband's father may have had the power to direct or influence the board to make distributions, Husband did not have this power and he cannot be treated as if he did.⁵

¶13 Third, contrary to Wife's assertion, Husband had not agreed to pay \$4000 per month in spousal maintenance. Husband asserted in the Joint Pretrial Statement that based on his analysis of Wife's living expenses and her earning abilities, Wife was entitled to "no more than \$4,000" per month. (Emphasis omitted.) Husband stated that his proposed ceiling of \$4000 per month in spousal maintenance was "all that [he] [could] financially afford to pay." Husband's contention that Wife was not entitled to any more than \$4000 per month cannot be construed as an agreement to pay \$4000 per month.

⁵ If Husband receives distributions in the future and Wife can show a substantial and continuing change in Husband's circumstances, the award of spousal maintenance may be modified in amount and duration pursuant to A.R.S. § 25-327(A) (2007).

¶14 Wife's assertion that the superior court ignored Husband's testimony regarding Husband's plan to obtain a conventional home loan within one year is erroneous. The court explicitly addressed this evidence in its minute entry ruling, and rejected Wife's argument that the court should infer an expectation of significant income by Husband because that inference was not supported by the evidence. We agree.

¶15 Husband testified that he financed \$339,500 to purchase a home, which was made possible by his father's agreement to co-sign the loan. According to the terms of the financing arrangement, Husband agreed to pay monthly interest-only payments of approximately \$1500 for one year, applying an annual percentage rate of 5.25%. At the end of one year, Husband would be required to pay the full balance of the note in one principal payment of \$339,500. Wife's counsel tried to suggest that Husband's financing arrangement and his father's agreement to co-sign on the loan supported the inference that Husband planned on buying a more luxurious home after the divorce. Husband testified, however, that the financing arrangement was a "bridge loan" and that he planned on "rolling that principal amount into a conventional mortgage" after one year. Husband denied making any plans to purchase a more luxurious home after one year and testified that he planned on staying in the home he purchased. On appeal, Wife argues that

because Husband expects to be able to obtain a conventional loan in the amount of \$339,500 in one year, the court should have inferred that Husband was expecting an increase in income.

¶16 We disagree with Wife that an expectation of an increase in income on the part of Husband evidences the superior court's error in determining Husband's income at the time of trial. If Wife is correct and can later show that Husband's circumstances continuously and substantially changed, she may seek a modification of the spousal maintenance award pursuant to A.R.S. § 25-327(A).

¶17 In sum, Wife's argument that the superior court must have erred in determining Husband's monthly income because Husband's monthly expenses exceeded his monthly income is not supported by the evidence. Even when applying Wife's analysis of Husband's monthly expenses, Husband's monthly interest-only mortgage payment of approximately \$1500, and the children's school tuition, in comparison to the amount the court determined Husband earned per month, Husband's monthly deficit is covered by his portion of the proceeds from the marital residence and other assets. The same result occurs if the court had ordered a \$4000 per month spousal maintenance award. Husband's monthly expenses would then equal approximately \$9056. Using the superior court's determination of Husband's gross monthly income of \$4166, Husband would be left with a monthly deficit of

approximately \$4890. Husband testified, however, that he planned on supplementing his income with his portion of the assets, which totaled approximately \$451,000. Thus, even with a monthly deficit of \$4890, Husband would only be expending \$58,680 per year from those assets. Because we find the superior court's factual finding regarding Husband's monthly income was not clearly erroneous, we find no abuse of discretion in the court's award of spousal maintenance. See *Hrudka*, 186 Ariz. at 91, 919 P.2d at 186.

¶18 Wife also challenges the three-year duration of the spousal maintenance award. However, she concedes that "there was conflicting evidence as to how soon Wife could become self-supporting." Because the trial court, not this Court, weighs the evidence, we must reject Wife's assertion that three years of support reflects an "overly optimistic" evaluation of Wife's prospects of entering the workforce. See *Oppenheimer v. Oppenheimer*, 22 Ariz. App. 238, 241, 526 P.2d 762, 765 (1974) ("Where there is a conflict in the evidence and there is reasonable evidence to support the judgment of the trial court we will not disturb the judgment of the trial court." (citation omitted)).

CONCLUSION

¶19 The judgment is affirmed. Both parties request their attorneys' fees on appeal. We deny those requests; each party

shall bear its own fees incurred in this appeal. Husband is entitled to his costs on appeal upon timely compliance with Arizona Rule of Civil Appellate Procedure 21.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
JOHN C. GEMMILL, Presiding Judge

/S/
JON W. THOMPSON, Judge