DIVISION ONE
FILED: 4/16/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0164
	)	
SHARON KATHLEEN HUFF,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
BRIAN REED HUFF,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa

Cause No. FN2011-000217

The Honorable Thomas L. LeClaire

REVERSED AND REMANDED

GILLESPIE SHIELDS & DURRANT — Mesa
By DeeAn Gillespie Strub
Mark A. Shields
Attorney for Petitioner/Appellant

BURCH & CRACCHIOLO, P.A. — Phoenix
By Daryl Manhart
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Attorney for Respondent/Appellee

G E M M I L L, Judge

¶1 Sharon Kathleen Huff ("Wife") appeals from a decree of dissolution denying her requests for spousal maintenance and

attorneys' fees from Brian Reed Huff ("Husband"). We reverse and remand for reconsideration of the spousal maintenance and attorneys' fees awards because the family court erred in its consideration of Husband's financial resources.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 After nineteen years of marriage, the parties filed for dissolution in 2011. The parties stipulated that Husband would pay Wife $875 a month in temporary spousal maintenance and $3,500 for her attorneys' fees.

¶3 The main issue at trial was Wife's request for spousal maintenance. The parties agreed that Wife qualified for spousal maintenance under Arizona Revised Statutes ("A.R.S.") section 25-319(A) (2007). The family court specifically found that Wife lacked sufficient property and earning ability to support herself, the marriage was of long duration, and Wife's age precluded her from gaining employment adequate to become self-sufficient. *See* A.R.S. § 25-319(A)(1), (2), (4).[1]

¶4 The family court concluded that the parties' earnings were comparable and that it was precluded from considering, "in

[1] Although the parties agreed and the trial court found Wife met the threshold requirements of § 25-319(A) for an award of spousal maintenance, the trial court later found, in analyzing § 25-319(B)(9), that "Wife receives the income necessary to meet her expenses." Neither party addresses this seemingly conflicting finding, and in light of the parties' agreement regarding § 25-319(A), neither do we.

any fashion," Husband's separate property resources for purposes of spousal maintenance. The court also concluded that it could not base a spousal maintenance award on the expected future payment of a promissory note to Husband. The court denied Wife's request for spousal maintenance and additional attorneys' fees.

¶5 Wife filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

I. Spousal Maintenance

¶6 Wife argues the denial of spousal maintenance was erroneous. "The question of spousal maintenance is left to the sound discretion of the trial court, and an appellate court will not substitute its judgment for that of the trial court unless there has been a clear abuse of discretion." *Deatherage v. Deatherage,* 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984). An abuse of discretion occurs where the record fails to substantially support the family court's decision or where the court commits an error of law in reaching its decision. *State v. Cowles,* 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004). We determine that the family court made an error of law.

¶7 It was undisputed that Wife qualified for an award of spousal maintenance under A.R.S. § 25-319(A). The fact that

Wife qualified under § 25-319(A), however, did not *require* that the family court award her spousal maintenance. The language of the statute is permissive: "the court *may* grant a maintenance order" to a spouse meeting one of the four factors listed. A.R.S. § 25-319(A) (emphasis added). The *amount* of any award is governed by the factors listed in § 25-319(B) and is discretionary. *Rainwater v. Rainwater,* 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993). After balancing the factors, a court may determine that no amount of support should be paid to a spouse who met the threshold requirements of § 25-319(A).

¶8 Wife's argument that the family court erred in this regard may be a result of the court's analysis which conflated the threshold elements of § 25-319(A) with some of the § 25-319(B) factors. Although the court's findings do not precisely follow the statutory framework, the record supports the court's ultimate conclusion that Wife meets the requirements for a spousal maintenance award under § 25-319(A).[2]

[2] We reject Wife's argument that the joint pretrial statement constituted a binding agreement that Wife should receive spousal maintenance. In the joint pretrial statement, there was considerable disagreement regarding the amount and duration of the spousal maintenance. Husband took the position that Wife should receive at most $100 over 84 months. Husband also argued, however, that because he overpaid Wife under the temporary orders, Wife would not receive any future support payments. There was no enforceable agreement regarding the amount of spousal maintenance.

¶9 In determining the amount and duration of the support award, the court must consider several statutory factors, including the ability of the paying spouse to meet his or her needs while paying support and the spouses' comparative financial resources. *See* A.R.S. § 25-319(B)(4) & (5). Wife argues the family court erred in its assessment of these factors. The court stated that it could not consider Husband's separate property assets in considering these two factors. Our review of the interpretation and application of statutes is de novo. *Warner v. Sw. Desert Images, LLC,* 218 Ariz. 121, 136, ¶ 49, 180 P.3d 986, 1001 (App. 2008). We conclude the court incorrectly interpreted § 25-319(B).

¶10 The language of § 25-319(B)(4) does not limit the type of property the court may consider in assessing the paying spouse's ability to meet his or her needs. Nor does § 25-319(B) limit the type of "financial resources" the court may consider. These terms are not defined in § 25-319(B). However, in determining a party's financial resources for purposes of § 25-319(A), this court held that "property" means "all property capable of providing for the reasonable needs of the spouse seeking maintenance[,]" including "community and separate property awarded to the maintenance-seeking spouse." *Deatherage,* 140 Ariz. at 320, 681 P.2d at 472. It also includes

"property presently producing income as well as property capable of producing income or otherwise transformed in order to provide for the reasonable needs of the spouse." *Id.*

¶11 Although *Deatherage* interpreted § 25-319(A) and the property of the spouse *seeking* support, we will apply the same definition of property to subsection 25-319(B). *See State ex rel. Larson v. Farley,* 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970) (courts construe statutes relating to the same subject together and seek to achieve consistency). Additionally, if it is appropriate to consider the separate property of the spouse seeking support in determining that spouse's ability to meet his or her needs, it is equally appropriate to consider the paying spouse's separate property in determining his or her ability to pay support. We conclude the family court erred as matter of law in failing to consider the separate property resources available to Husband in determining the amount and duration of the spousal maintenance.[3]

¶12 Husband testified that he had $50,000 of separate property funds in a bank account at the time of trial. The court failed to consider these funds for purposes of § 25-

[3] Husband contends the trial court considered Husband's other separate property, including his post-decree wages and rental income. Although the trial court discussed these two resources, the court was clear in the decree that it would not consider any potential proceeds of the promissory note because such proceeds would be Husband's separate property.

319(B). The fact that these funds are Husband's separate property does not preclude the court from considering them as a financial resource available for Husband to meet his own needs and, if warranted, pay support to Wife.

¶13 Husband's separate property also included a $500,000 promissory note secured by real property payable to him, in part, a few months after the trial with the balance due one year later. The family court did not consider this property. Husband argues that the court did not err because this separate property was not immediately payable and the court need not consider speculative future payments.

¶14 This court has held that speculative future events "should not be considered in establishing the present rights of the parties relating to spousal maintenance." *Chaney v. Chaney,* 145 Ariz. 23, 27, 699 P.2d 398, 402 (App. 1985) (*citing In re Marriage of Rowe,* 117 Ariz. 474, 476, 573 P.2d 874, 876 (1978)). The appropriate procedure is for the party seeking a change in spousal maintenance "to wait until that future time, and if the expected change occurs, then petition for modification." *Chaney,* 145 Ariz. at 23, 699 P.2d at 402.

¶15 Although the amount and due dates of the promissory note were not speculative, it was not certain that the note would be paid in full as anticipated. Despite that fact, the

note was secured by real property which would not disappear if the note was not paid. A promissory note, particularly a note secured by real property, has a current value to the holder and is not merely speculative. *See e.g.* A.R.S. § 36-2934.02 (2009) (determining "the fair market value of a promissory note . . . is a countable resource" for evaluating a person's eligibility under the Arizona Long-Term Care System). Husband's interest in the promissory note secured by real property is distinguishable from a purely speculative future event or hypothetical earnings. *See e.g. Chaney*, 145 Ariz. at 26-27, 699 P.2d at 401-02 (finding it too speculative to calculate spousal maintenance based on future retirement of a spouse); *Brevick v. Brevick,* 129 Ariz. 51, 54, 628 P.2d 599, 602 (App. 1981) (improper to award percentage of payor spouse's income); *Richards v. Richards,* 137 Ariz. 225, 226, 669 P.2d 1002, 1003 (App. 1983) (calculating spousal support cannot be based on anticipation of a spouse's future income). The family court should have considered the income-producing potential of the secured promissory note in evaluating Husband's financial resources. *See Deatherage,* 140 Ariz. at 320, 681 P.2d at 472. Accordingly, the court erred in deciding that the $500,000 promissory note as secured by the deed of trust was not a financial resource currently available

to Husband for purposes of deciding the appropriate amount of spousal maintenance.

¶16 We reverse the spousal maintenance award and remand for reconsideration of Husband's separate property assets. We note, without expressing any opinion on the matter, that the amount of spousal maintenance may change on remand.[4]

¶17 Additionally, we need not address Husband's argument that the evidence supports the award of zero dollars. Furthermore, Husband's argument that Wife waived any objection to the court's findings of fact is unpersuasive. Wife may not

[4] Because we remand for a new spousal maintenance determination, we need not directly address Wife's argument that the court should have awarded her a nominal amount of maintenance. We do pause to note, however, that the rulings of the family court imply that it may have believed that a court could grant spousal maintenance based on changed circumstances even though spousal maintenance was not awarded at time of dissolution. Our case law is clear that a provision for spousal maintenance in the original decree of dissolution is necessary to give the court jurisdiction to modify spousal maintenance in the future. *Long v. Long,* 39 Ariz. 271, 274, 5 P.2d 1047, 1048 (1931); *Birt v. Birt,* 208 Ariz. 546, 552 n.6, ¶ 26, 96 P.3d 544, 550 n.6 (App. 2004). In *Neal v. Neal,* 116 Ariz. 590, 592-93, 570 P.2d 758, 760-61 (1977), our supreme court expressed disapproval of the use of nominal awards to enable a party to seek modification in the event of some unforeseen circumstances. This court explained in *Standage v. Standage,* 147 Ariz. 473, 478-49, 711 P.2d 612, 617-18 (App. 1985), that "[w]here foreseeable circumstances exist that could fundamentally alter the ability of a spouse to provide for his or her reasonable needs, a nominal award of spousal maintenance is not improper, and does not conflict with either the statutory mandate or the *Neal* decision."

have objected to the adequacy of the findings, but she did argue that the court made a legal error. We find no waiver.

II. Attorneys' Fees at Trial

¶18 The family court denied Wife's request for an award of additional attorneys' fees. The court specifically refused to consider Husband's separate property resources in comparing the parties' financial resources and did not discuss the reasonableness of the parties' positions. The decision whether to award attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2012) is within the family court's discretion, and we will not reverse absent an abuse of that discretion. *Gutierrez v. Gutierrez,* 193 Ariz. 343, 351, ¶ 32, 972 P.2d 676, 684 (App. 1998); *Roden v. Roden,* 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997). An abuse of discretion exists where the court commits an error of law in reaching its discretionary decision. *See Cowles,* 207 Ariz. at 9, ¶ 3, 82 P.3d at 370.

¶19 We reverse the denial of attorneys' fees at trial and remand for a redetermination of that issue. The family court erred as a matter of law in failing to consider any of Husband's separate property in considering the parties' comparative financial resources. Although "financial resources" is not defined in § 25-324, this court has previously considered a spouse's separate property in this context. *See Roden,* 190

Ariz. at 412, 949 P.2d at 72 (finding an abuse of discretion to deny fees to wife where husband had significantly more income and "about $2 million in separate property"); *In re Marriage of Fong,* 121 Ariz. 298, 306, 589 P.2d 1330, 1338 (App. 1978) (holding it was appropriate to award fees to wife considering husband's separate property).

¶20 Additionally, we are guided by the definition of "financial resources" in the spousal maintenance statutes discussed above, which includes the parties' separate property. *See Farley,* 106 Ariz. at 122, 471 P.2d at 734. Statutes relating to the same subject should be construed in harmony. *See Bonito Partners, L.L.C. v. City of Flagstaff,* 229 Ariz. 75, 83, ¶ 30, 270 P.3d 902, 910 (App. 2012). On remand, therefore, the court should consider the separate property resources available to both Husband and Wife in determining whether to award attorneys' fees to Wife. Because we are reversing the denial of attorneys' fees on this basis, we need not address Wife's argument that the court abused its discretion in denying her request because Husband took unreasonable positions.

III. April 6, 2012 Order

¶21 Wife asks this court to disregard an April 6, 2012 family court order purporting to correct the decree. This order is not part of the record on appeal, but we may take judicial

notice of superior court records. *See State v. Valenzuela,* 109 Ariz. 109, 110, 506 P.2d 240, 241 (1973). This order was improperly entered. Rule 85(A) of the Arizona Rules of Family Law Procedure, which the family court cites as authority for this order, provides that once an appeal has been docketed, the family court must obtain leave of this court before issuing a corrective order. No such leave was requested or granted. Accordingly, we will not consider this order.

IV. Attorneys' Fees on Appeal

¶22 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324 and ARCAP 21. Neither party took unreasonable positions on appeal. We lack current financial information regarding either party. Accordingly, in the exercise of our discretion, we deny both parties' requests for attorneys' fees on appeal. We will, however, award Wife her taxable costs on appeal, contingent upon her compliance with ARCAP 21.

CONCLUSION

¶23 The family court erred as a matter of law in failing to consider Husband's separate property in determining the amount and duration of a potential award of spousal maintenance and the award of attorneys' fees. Therefore, we reverse the

spousal maintenance and attorneys' fees awards and remand for reconsideration consistent with this decision.

/s/

_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
DONN KESSLER, Judge