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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 3/12/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 12-0221
)
JOHN PETER HARRIES,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
PATRICIA LEE HARRIES,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-094731

The Honorable Timothy J. Ryan, Judge

AFFIRMED IN PART, VACATED AND REMANDED IN PART

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H A L L, Judge

¶1 This is a spousal maintenance and child support case.
After a one-day trial, the family court awarded Patricia Lee

Harries (Wife) \$8000 in monthly spousal maintenance and \$1969 in monthly child support. For the reasons that follow, we affirm the decree with the exception of the child-support award, which we vacate and remand for further proceedings.

BACKGROUND

¶12 Wife married John Peter Harries (Husband) in 1995. They have three minor children together. Husband petitioned for dissolution on December 1, 2010.

¶13 Wife, who is forty-two years old, has an undergraduate sociology degree. She held a clerical job in a law firm and served as a substitute teacher prior to becoming a parent. Wife stated that she planned to return to school to obtain a master's degree in business administration. Meanwhile, Wife desired to remain in the parties' marital residence in Scottsdale, and agreed that the parties should sell their other home in Show Low, which appraised at \$550,000.

¶14 Husband, a forty-three-year old, is a principal at PricewaterhouseCoopers (PwC). He receives a monthly distribution of \$31,588. Husband also earns other distributions throughout the year which have consistently provided him with more than \$1 million in annual earnings since 2007.

¶15 The family court entered a decree awarding Wife \$8000 in monthly spousal maintenance for ten years, and \$1969 in monthly child support for the children. Wife moved for a new

trial under Rules 83(A)(5) and (6) of the Arizona Rules of Family Law Procedure. The family court denied the motion.

¶16 Wife appealed from the denial of her Rule 83(A) motion. After the family court entered an order granting Wife \$65,952.81 in attorneys' fees and \$920 in costs, Wife filed a supplemental notice of appeal regarding the attorneys' fees award. We have appellate jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1), (5)(a) (Supp. 2012).

DISCUSSION

¶17 On appeal, Wife claims the family court abused its discretion by denying her motion for new trial on the issues of spousal maintenance, child support, and failing to allocate the children's educational expenses. We address each of these issues in turn.

¶18 The family court has broad discretion in determining whether to grant a new trial, and we will not disturb its ruling absent an abuse of that discretion. *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009). This court also applies the abuse of discretion standard when reviewing the amount of spousal maintenance. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). Accordingly, we will view the evidence in the light most favorable to sustaining this award and will affirm if there is

any reasonable evidence to support it. *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984). We also review the amount of the child-support award for an abuse of discretion, but review the family court's application of the Arizona Child Support Guidelines (Guidelines) de novo. *Engel v. Landman*, 221 Ariz. 504, 510, ¶ 21, 212 P.3d 842, 848 (App. 2009).

I.

¶9 Wife contends the family court abused its discretion by awarding her \$8000 in spousal maintenance for a period of ten years and denying her new trial motion. According to Wife, a more appropriate amount of maintenance would be \$25,000 per month for seven years.

¶10 We must determine whether the family court properly considered the spousal support factors in A.R.S. § 25-319(B) (2007).¹ The family court provided a brief analysis with respect

¹ The A.R.S. § 25-319(B) factors include:

1. The standard of living established during the marriage.
2. The duration of the marriage.
3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.

to each factor in the decree. Wife did not file a motion to amend the findings.

5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.
6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.
7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.
8. The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children.
9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.
10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available.
11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.
12. The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved.
13. All actual damages and judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim.

¶11 Distilled to its essence, Wife's argument is that the family court's spousal maintenance award does not allow her to approximate the standard of living established during the marriage, see A.R.S. § 25-319(B)(1), and is not commensurate with Husband's superior financial resources. But the court must consider all thirteen statutory factors and "no one factor is conclusive in measuring the amount of maintenance." *Oppenheimer v. Oppenheimer*, 22 Ariz. App. 238, 242, 526 P.2d 762, 766 (1974). Specifically, the family court was also required to weigh Husband's ability to meet both his own needs and Wife's needs, see A.R.S. § 25-319(B)(4), as well as the marital property apportioned to Wife, see A.R.S. § 25-319(B)(9), among other factors.

¶12 Wife additionally contends that the family court applied the wrong income standard for Husband and ignored his history of earning over \$1 million annually in gross income. The family court admitted the parties' tax returns containing these amounts and Husband acknowledged such income in his testimony.

¶13 During trial, Husband explained that he receives different streams of compensation throughout the year. In addition to his monthly salary, Husband receives quarterly disbursements for the purpose of paying his income taxes in the jurisdictions where PwC does business. According to Husband,

these distributions--which recently totaled \$38,588--were never sufficient, and Husband and Wife budgeted \$10,000 to meet their tax obligations.

¶14 Husband additionally receives compensation based upon his shares, his performance, and his employer's performance. After netting expenses for medical, disability, life insurance, taxes, and deferred savings plans, Husband claimed \$13,779 per month for cash flow or disposable income purposes. We presume that the family court reviewed and considered the evidence, including Husband's record of grossing in excess of \$1 million annually, even though it did not specifically refer to the amounts in its rulings. See *Fuentes v. Fuentes*, 209 Ariz. 51, 55-56, ¶ 18, 97 P.3d 876, 880-81 (App. 2004).

¶15 In denying Wife's motion for new trial, the family court stated that it "does not find it appropriate to blindly apportion spousal maintenance based on the paying parties' income." The family court also found that Wife's claimed needs were not her actual or even reasonable needs. Accordingly, the family court did consider what it determined were Wife's reasonable needs, and her ability to meet them, which did not depend upon Husband's earning potential.

¶16 Wife nonetheless contends that her demonstrated monthly needs exceeded \$8000, citing Husband's testimony and an exhibit listing household expenses in excess of \$13,000. This

evidence pertained to the expenses of the intact household, when Husband was also incurring expenses. Moreover, other trial evidence indicated that these monthly expenses could drop as low as \$5615.85 if the parties sold the Show Low house and eliminated discretionary expenses, such as charitable donations. In any event, current expenses do not dictate what a spouse's reasonable needs are post-dissolution. See generally *Rainwater v. Rainwater*, 177 Ariz. 500, 504, 869 P.2d 176, 180 (App. 1993) ("divorce often requires a lesser standard of living for both parties").

¶17 Wife also introduced evidence that the parties' credit card expenses averaged \$10,884.03 per month. Husband countered that these charges were not representative as they included extraordinary expenses, such as a home theater system, marriage counseling, and a new backyard fountain/landscaping; when normalized, Husband maintained the household charges averaged \$3471.47 per month.

¶18 Another factor significant to the family court's spousal-maintenance analysis was the availability of other income sources. Wife received in excess of \$500,000 in cash, more than \$500,000 in retirement accounts, and the Scottsdale residence, contingent on her obtaining refinancing and making an equalization payment to Husband. The receipt of these assets is a proper consideration in calculating spousal maintenance. See

Deatherage v. Deatherage, 140 Ariz. 317, 319-21, 681 P.2d 469, 471-73 (App. 1984); see generally A.R.S. § 25-319(B)(9). Although Wife depleted these assets by buying Husband's interest, rather than selling the Scottsdale home, that decision does not undermine the basis for attributing the assets to Wife.

¶19 Wife further complains that the family court's ruling was not fair or just in light of Husband's earning ability. But as Husband points out, Wife has no right to share in Husband's post-decree earnings. See A.R.S. § 25-213(B) (Supp. 2012) (party's income from separate labor is separate property); *Sheeley v. Sheeley*, 10 Ariz. App. 318, 321, 458 P.2d 522, 525 (1969) (holding that an ex-spouse has no right to share in the future income accumulation by her former spouse). Viewing the evidence in the light most favorable to sustaining the award, we cannot say that the family court abused its discretion in its award of spousal maintenance.

¶20 Finally, Wife challenges the adequacy of the family court's factual findings. The decree contains a brief discussion of every factor listed in A.R.S. § 25-319(B), which was supplemented by a discussion of Wife's needs in the order denying the new trial motion.

¶21 Husband counters that Wife did not request findings of fact before trial, and thus she waived the issue. See Ariz. R. Fam. L.P. 82(A) (requiring findings of fact "if requested before

trial"). Even if Wife had made a timely request for findings of fact, the family court's findings, though brief, are adequate to permit review. See *Hughes v. Hughes*, 177 Ariz. 522, 525, 869 P.2d 198, 201 (App. 1993) (detailed findings regarding § 25-319(B) factors not required absent a pretrial request). Moreover, the family court further elaborated on its reasoning in denying the motion for new trial. We find no basis to remand for clarification.

II.

¶22 Wife also contests the family court's award of child support, claiming that it erred: (1) in calculating Husband's gross income, (2) by not ordering an upward deviation under Section 8 of the Child Support Guidelines, and (3) by not addressing Wife's request that the responsibility for payment of private school costs for the two older children be allocated between the parties.

¶23 The Guidelines establish a standard of support for children consistent with their reasonable needs and the ability of parents to pay by providing a formula for calculating child support based, in significant part, on the parties' gross incomes. See Guidelines, §§ 1, 6-11. The amount resulting from application of the Guidelines shall be the amount of child support ordered unless "application of the guidelines would be

inappropriate or unjust in a particular case." A.R.S. § 25-320(D) (Supp. 2012).

¶24 "Gross Income" is defined in part as "income from any source" including "bonuses" that are "continuing or recurring in nature." Guidelines, § 5. Although the evidence is undisputed that Husband's gross income, including bonuses, exceeded \$1 million for the four years preceding the trial,² the family court used a figure of \$31,588 per month, or \$379,056 per year, for Husband's "Gross Monthly Income" on its child support worksheet. The figure represents approximately 1/3 of Husband's actual gross income. The court provides no explanation in the decree why it used the substantially lower figure in its calculation of child support, and, in any event, we perceive no justification for such a drastic reduction from the amount Husband actually received. The family court's use of \$31,588 as Husband's gross monthly income resulted in Husband being attributed a Proportionate Share of Combined Income of 71.78% rather than approximately 90% had the court input his actual gross income in the worksheet. Assuming that the Basic Child Support Obligation (*see infra* ¶ 26) and the Additions to Child Support Obligation remained unchanged, Husband's Final Child Support Obligation would have been increased by several hundred dollars. Because

² Husband's average gross income for 2007 through 2010 was \$1,136,386.50, or \$94,699 per month.

such an increase would not be *de minimus*, we vacate the child support award and remand for a recalculation pursuant to the Guidelines.

¶25 As to the two remaining issues raised by Wife, we discern no error. The family court acted within its discretion in denying Wife's requests for an increase in the Basic Child Support Obligation and an order allocating the children's educational expenses.

¶26 Guideline § 8 provides that for parties whose combined adjusted gross income is more than \$20,000 per month, "the amount set forth for combined gross income of \$20,000 shall be the presumptive Basic Child Support Obligation." The amount set forth in the Schedule of Basic Child Support Obligations for parents of three children whose income is \$20,000 is \$2795, which is the amount the court used for the parties' Basic Child Support Obligation. Wife had the burden of establishing that a higher amount would be in the best interests of the children. Guidelines, § 8. We cannot say that the court abused its discretion in determining that Wife failed to demonstrate that an increased amount was appropriate.³

³ Wife also claims that the family court erred by attributing \$1274 in income to her for purposes of the child support calculation without also awarding child care expenses. We perceive no error. First, when income is attributed to the parent receiving support, attribution of childcare expenses is discretionary, not mandatory. Guidelines, § 5(E). Second, the

¶127 Finally, Wife asserts that the family court neglected to address her request that Husband shoulder more responsibility for funding the two older children's private school education. We disagree.

¶128 Guideline § 9(B)(2) states that the total child support *may* include "[a]ny reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of a child, when such expenses are incurred by agreement of both parents or ordered by the court." In the portion of the decree discussing spousal maintenance factors, the court acknowledged the parties' differing positions on how much each parent should contribute to their children's future educational costs. Thus, the failure to include any expense for educational costs in the child support worksheet does not suggest that the court forgot to address Wife's request; rather it shows that the court exercised its discretion by denying it. See *Pearson v. Pearson*, 190 Ariz. 231, 237, 946 P.2d 1291, 1297 (App. 1997) (holding that the failure to rule on an attorneys' fee issue is deemed a denial). Nor are we able to conclude that the family court abused its discretion by not allocating the educational expenses and, in effect, requiring the parents to negotiate between themselves

parties' children, ages thirteen, eleven, and eight at the time of trial, attend school.

regarding the extent to which each party would contribute to the children's future educational expenses.

III.

¶29 Both parties have requested attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2012). Wife cites the disparity in the parties' resources and contends that her positions on appeal were reasonable. See A.R.S. § 25-324(A). Husband responds that her positions were "not grounded in fact or based on law" and thereby entitle him to a fee award under A.R.S. § 25-324(B)(2). Wife has been partially successful on appeal; therefore, Husband is not entitled to fees pursuant to § 25-324(B)(2). In the exercise of our discretion, and after considering the financial resources of both parties, we grant Wife a partial award of her reasonable attorneys' fees, contingent upon her compliance with ARCAP 21. Because each party has been partially successful on appeal, neither shall be awarded appellate costs.

