DIVISION ONE
FILED: 3/19/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 12-0386
	)	
NOELLE KEES,	)	DEPARTMENT E
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
TIMOTHY KEES,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-001793

The Honorable Thomas L. LeClaire, Judge

AFFIRMED IN PART; MODIFIED IN PART; VACATED AND REMANDED IN PART WITH DIRECTIONS

The Murray Law Offices, P.C. — Scottsdale
By Stanley D. Murray
Attorney for Petitioner/Appellant

Rachel L. Yosha, Esq. — Scottsdale
Attorney for Respondent/Appellee

H A L L, Judge

¶1 Noelle Kees (Wife) appeals from a dissolution decree denying her any interest in Timothy Kees' (Husband) military-retirement benefits or spousal maintenance and denying her

request for attorneys' fees. For the reasons stated below, we (1) modify the decree as it relates to the military-retirement benefits; (2) vacate the order denying spousal maintenance and remand with directions; and (3) affirm the denial of attorneys' fees.

FACTUAL AND PROCEDURAL HISTORY

¶2 The parties were married in 1999. Husband has been an active member of the United States Army throughout the marriage. At the time the parties separated in 2010, they lived in North Carolina with their two minor children. Wife moved to Arizona with the children in August 2010 and filed a petition for dissolution in Maricopa County Superior Court in March 2011. Husband filed a special appearance and accepted service, but contested the superior court's personal jurisdiction over him regarding property issues. Husband did not object to the superior court deciding custody and parenting-time issues.

¶3 In July 2011, Husband flew to Arizona to pick up the children and fly them back to his home in North Carolina. Husband was personally served at the Phoenix airport when he arrived to pick up the children. Husband moved to strike the affidavit of service in light of his prior, albeit limited, acceptance of service.

¶4 The superior court held an evidentiary hearing to decide the issue of personal jurisdiction. After the hearing,

Husband submitted a supplemental pleading arguing that the superior court could not enter orders pertaining to Husband's military-retirement benefits pursuant to the Uniformed Services Former Spouses' Protections Act (FSPA), 10 United States Code (U.S.C.) section 1408(c)(4) (2009). The superior court concluded that it could exercise personal jurisdiction over Husband because he was properly served while physically present in Arizona. The court did not address Husband's argument regarding the FSPA § 1408(c)(4).[1]

¶5 After a three-hour trial, the superior court denied Wife any interest in Husband's military-retirement benefits; concluded Wife did not meet the threshold requirements for a spousal-maintenance award, *see* Arizona Revised Statutes (A.R.S.) section 25-319(A) (2007); awarded sole custody of the children to Husband;[2] and denied Wife's request for an award of attorneys' fees. Wife filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

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[1] The court rejected Husband's earlier argument that the Servicemembers Civil Relief Act (SCRA), 50 U.S.C.A. § 522 (2008), provided any protection. However, Husband did not invoke the SCRA as an objection to personal jurisdiction; rather, he argued that he would seek a stay of proceedings available under the SCRA unless he was allowed to appear telephonically.

[2] Although Wife raised issues regarding the superior court's custody order in her appellate briefing, she announced at the outset of oral argument that these issues had been resolved and are now "moot."

DISCUSSION

I. Military-Retirement Benefits and Personal Jurisdiction

¶6 The superior court denied Wife any interest in Husband's military-retirement benefits because "the parties resided outside of Arizona for the entirety of their marriage while the marriage remained intact" and "never resided in Arizona during the accumulation of the retirement." Relying on A.R.S. § 25-318(A) (Supp. 2012),[3] Wife contends that she is entitled to her community share of Husband's military-retirement benefits. *See Steczo v. Steczo,* 135 Ariz. 199, 202, 659 P.2d 1344, 1347 (App. 1983) (holding that "[i]n Arizona, military retirement[-]benefits earned during the marriage are community property, . . . and are thereby subject to division in a dissolution proceeding according to Arizona law and without regard to the laws of other states").[4] Husband argues that the superior court had no authority to divide his military-retirement benefits because it lacked jurisdiction to do so pursuant to § 1408(c)(4) of the FSPA. Alternatively, Husband argues that the court did not err in determining that Wife was

[3] "[P]roperty acquired by either spouse outside this state shall be deemed to be community property if the property would have been community property if acquired in this state."

[4] Husband argues that Wife waived this issue by failing to argue a "§ 25-318(A) issue" below. However, Wife's pretrial statement specifically asked the court to divide the military-retirement benefits, thereby properly raising this issue.

not entitled to a division of Husband's military retirement based on Arizona law. We agree with Husband's first argument that the FSPA precluded the court from entertaining Wife's request; we therefore do not reach his alternative argument.

¶7 Wife initially asserts that Husband cannot raise the FSPA argument on appeal because he failed to file a cross-appeal from the court's ruling on personal jurisdiction.[5] *See* ARCAP 13(b)(3) ("The appellate court may direct that the judgment be modified to enlarge the rights of the appellee or to lessen the rights of the appellant only if the appellee has cross-appealed seeking such relief."). We disagree. Husband can properly raise the lack of personal jurisdiction under the FSPA as a cross-issue without the need for a cross-appeal. *See* State Bar Committee Note to ARCAP 13(b)(3) (explaining that "forum defenses" can be raised without filing a cross-appeal: "Essentially no issues which could lead to the same practical result as that embodied in the judgment will be foreclosed by lack of a cross-appeal."); *see also CNL Hotels and Resorts, Inc. v. Maricopa County*, 230 Ariz. 21, 25, ¶ 20, 279 P.3d 1183,

[5] We note that Husband has not challenged the court's decision that it had personal jurisdiction because of personal service while Husband was physically present in Arizona. We reject Husband's claim that the superior court could decline jurisdiction under the Uniform Interstate Family Support Act, A.R.S. § 25-1221 (2007). This act applies only to support orders, not property allocation, and it allows the exercise of personal jurisdiction where the nonresident is personally served within the state.

1187 (2012) ("[m]erely seeking to support a lower court's judgment for reasons not relied upon by it is not attempting to enlarge [an appellee's] own rights or lessen those of [an] adversary, and a cross[-]appeal is unnecessary.") (Quotation omitted).

¶8 We review the question of personal jurisdiction de novo. *Davis v. Davis,* 230 Ariz. 333, 336, ¶ 13, 284 P.3d 23, 26 (App. 2012). A court "may not address an issue or provide relief if it lacks jurisdiction to do so." *State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008). Pursuant to the FSPA, a state court may allocate military-retirement benefits in accordance with state law only if the military spouse (1) is a resident of Arizona (other than by reason of military assignment); (2) is domiciled in Arizona; or (3) consents to personal jurisdiction. 10 U.S.C. 1408(c)(4). The FSPA preempts any state law that confers personal jurisdiction on other grounds. *See Davis,* 230 Ariz. at 336, ¶ 15, 284 P.3d at 26 (citing *Free v. Bland,* 369 U.S. 663, 669-70 (1962) (valid federal enactments preempt inconsistent state laws)); *see also Pender v. Pender,* 945 S.W.2d 395, 396-97 (Ark. App. 1997) (holding state law regarding due-process requirements for exercising personal jurisdiction must yield to the valid federal-law requirements in FSPA); *Wagner v. Wagner,* 768 A.2d 1112, 1118 (Pa. 2001) (holding Congress "usurped state long arm

statutes and provided in § 1408(c)(4)(A)-(C) its own tests of personal jurisdiction that all state courts must apply.").

¶9 Thus, the superior court's finding that personal service in Arizona was sufficient to confer personal jurisdiction for all other matters in this case did not constitute a sufficient basis to establish jurisdiction under the FSPA. It was undisputed that Husband never lived in Arizona and was only present once to pick up the children at the airport. Throughout the litigation Husband maintained his objection to Arizona's personal jurisdiction, specifically raising this statute. Accordingly, because Husband was neither a resident nor domiciliary of Arizona and never consented to personal jurisdiction, the superior court lacked jurisdiction under the FSPA § 1408(c)(4) to allocate Husband's military-retirement benefits. Wife must seek to adjudicate her rights to Husband's military-retirement benefits in accordance with the FSPA in another jurisdiction.

¶10 Because the superior court lacked jurisdiction to allocate Wife's share of these benefits pursuant to FSPA § 1408(c)(4), we strike the language in the decree containing the court's determination that Wife is not entitled to a division of the Husband's military-retirement benefits under Arizona law and modify the decree to instead reflect that the superior court

lacked jurisdiction under the FSPA § 1408(c)(4) to allocate Wife's community interest in the military-retirement benefits.

II. Spousal Maintenance

¶11 The superior court found that Wife did not satisfy any of the threshold requirements to qualify for an award of spousal maintenance pursuant to A.R.S. § 25-319(A). Specifically, the court found that Wife's decision to obtain a nursing degree rather than find a job was a voluntary choice that resulted in Wife being unable to be self-sufficient. Additionally, the court found that Wife was not the custodian of the parties' children and that Wife's needs were being met because she lived with her mother.

¶12 Wife argues that the findings are insufficient to support the court's determinations that Wife could earn enough to meet her reasonable needs and also had sufficient property to meet her needs. *See* A.R.S. § 25-319(A)(1), (2).[6] Husband contends that Wife did not establish what her reasonable needs were or what she would be capable of earning after obtaining her degree, so the superior court did not abuse its discretion in concluding Wife's needs were met by living with her mother and by the minimum-wage income properly imputed to Wife in lieu of her going to school.

[6] The superior court also specifically found that the last two factors did not apply. Wife does not contest these findings.

¶13 "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). To be eligible for spousal maintenance, Wife was required to prove one of four statutory prerequisites: (1) that she lacks sufficient property, including property awarded to her, to meet her reasonable needs; (2) that she is unable to support herself through appropriate employment or lacks the ability to obtain adequate employment; (3) that she contributed to the educational opportunities of Husband; or (4) that she had a marriage of long duration and is of an age which may preclude her from gaining suitable employment. A.R.S. § 25–319(A)(1–4).

¶14 At trial, Wife submitted her affidavit of financial information, which listed her monthly expenses of approximately $3500. She, however, testified that her expenses were approximately $2000 a month, but varied. Therefore, we presume the court found Wife's reasonable needs were approximately $2000 a month. *See Gutierrez v. Gutierrez,* 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 682 (App. 1998) (holding appellate court views evidence in light most favorable to appellee).[7]

[7] The court was not required to make a specific finding as to Wife's reasonable needs, although such findings aid in our

¶15 Although Wife testified she was seeking to get an associate nursing degree by the summer 2013, she did not offer any evidence of her potential salary upon graduation. Wife's only work experience during the marriage was approximately one year of clerical work experience. Husband proposed attributing minimum wage, or $1324 a month. The attribution would be reasonable in light of Wife's lack of any significant work history.

¶16 The superior court presumably concluded that Wife could meet her reasonable needs with an attributed income of $1324 a month while living with her mother. Section 25-319(A)(2) focuses on whether the income or earning ability of the spouse seeking support is sufficient for that spouse to be *self-sufficient*. Wife is not able to be self-sufficient if she can only meet her needs while living with her mother. Section 25-319(A)(2) does not "foreclos[e] the possibility of any maintenance whatsoever unless a spouse is totally incapable of self-support." *Thomas v. Thomas,* 142 Ariz. 386, 391, 690 P.2d 105, 110 (App. 1984) (citing *Sommerfield v. Sommerfield,* 121 Ariz. 575, 592 P.2d 771 (1979)). As a result, in determining whether Wife qualified for an award of spousal maintenance pursuant to § 25-319(A), the court should have considered

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appellate review. *Hughes v. Hughes,* 177 Ariz. 522, 525, 869 P.2d 198, 201 (App. 1993).

whether Wife can meet her reasonable needs based on *her earning ability,* without considering that she has no housing expenses while living with her mother. The court erred in concluding Wife was financially self-sufficient, but nevertheless relied on her own Wife to meet her needs.

¶17 Wife also contends that the court failed to consider that she lacked sufficient property to provide for her reasonable needs. *See* A.R.S. § 25-319(A)(1). The court heard Husband argue that Wife has sufficient property because she took the parties' $15,000 2009 tax refund and $26,000 from the children's trust account. Wife testified, without contradiction, that she used the 2009 tax refund to pay primarily community expenses and spent these funds during the marriage after advising Husband of how she planned to spend the funds. Wife also admitted that she transferred the $26,000 in the children's trust account back to her mother, who had originally given the money to the children. She also admitted to spending at least some of the trust fund money herself; but the court ordered her to return those trust funds to Husband.

¶18 Although the superior court did not make any finding, the tax return and the trust account were no longer available to Wife to provide for her needs. Although Wife's use or misuse of these funds is relevant in determining the amount and duration of any support award, *see* A.R.S. § 25-319(B)(11) (court shall

consider "[e]xcessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community" property), she received no liquid assets in the decree, and there was no evidence of any other property available to Wife to provide for her needs. As a result, we conclude the superior court abused its discretion in failing to find Wife qualified for spousal maintenance under A.R.S. § 25-319(A)(1) and/or (2).

¶19 Our conclusion that Wife "qualifies" for an award of spousal maintenance does not generally mean that she was entitled to an award. *See* A.R.S. § 25-319(A) (providing that "the court *may* grant a maintenance order" if one of the four statutory prerequisites is met) (emphasis added). Based on the record, however, as well as the fact that Wife only sought support for two years, we are hard-pressed to conceive of a reason why Wife should not have received a short-term spousal maintenance award to allow her to complete her degree and earn more than minimum wage in the future. Such an award would be consistent with the public policy behind § 25-319(A). *See Schroeder v. Schroeder,* 161 Ariz. 316, 321, 778 P.2d 1212, 1217 (1989) (holding temporary maintenance serves current aim of spousal maintenance "to achieve independence for both parties and to require an effort toward independence by the party requesting maintenance"); *see also Thomas,* 142 Ariz. at 392, 690

P.2d at 111. Consequently, on remand, the superior court is directed to enter an appropriate award of spousal maintenance.

IV. Attorneys' Fees

¶20 The superior court declined to award attorneys' fees to either party. The decision whether to award attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2012) is discretionary, and we will not reverse absent an abuse of that discretion. *Gutierrez,* 193 Ariz. at 351, ¶ 32, 972 P.2d at 684.

¶21 Wife contends the court abused its discretion by failing to consider the financial disparity between the parties, Husband's unreasonable positions, and Wife's reasonableness. The superior court's decision may be affirmed if there is any reasonable evidence to support it. *Thomas,* 142 Ariz. at 390, 690 P.2d at 109.

¶22 Wife argued that Husband was unreasonable in failing to consistently pay child support and in objecting to the court's jurisdiction. As noted above, Husband appropriately objected to the court's jurisdiction. Husband disputed that he missed any child-support payments. "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81. Although Husband earns more than Wife, the evidence supports a finding that Husband did not take unreasonable positions. Thus, the court did not abuse its

discretion in denying Wife's request for attorneys' fees. Financial disparity is not the sole determining factor in awarding attorneys' fees pursuant to A.R.S. § 25-324; the reasonableness of the parties' positions is also relevant. *See Magee v. Magee,* 206 Ariz. 589, 593, ¶ 18, 81 P.3d 1048, 1052 (App. 2004) (holding where court finds a financial disparity exists, it may then exercise discretion in deciding whether an award of attorneys' fees is appropriate). We affirm the denial of attorneys' fees to Wife.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶23 Husband seeks an award of fees pursuant to A.R.S. § 12-349 (2003). He offered no support for this claim, and we find Wife's appeal is not unjustified as required for the imposition of fees against her pursuant to § 12-349.

¶24 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324. Neither party took unreasonable positions on appeal, but Husband earns substantially more than Wife. In the exercise of our discretion, we award Wife a portion of her reasonable attorneys' fees contingent upon her compliance with ARCAP 21. As the successful party, Wife is also entitled to an award of her costs on appeal.

CONCLUSION

¶25 Although we effectively "affirm" the superior court's denial of Wife's request that the court allocate to her a share of Husband's military-retirement benefits, we do so on the basis that the superior court lacked jurisdiction to allocate the military-retirement benefits pursuant to the FSPA § 1408(c)(4). Accordingly, we modify the decree to reflect this determination. We vacate the court's order denying Wife's request for spousal maintenance and remand with a direction that it grant an appropriate award of spousal maintenance. We affirm the superior court's denial of attorneys' fees but award Wife a portion of her reasonable attorneys' fees and her costs on appeal.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
MAURICE PORTLEY, Judge