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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Maria Castro, *Petitioner/Appellant*,

v.

Antonio Castro, *Respondent/Appellee*.

No. 1 CA-CV 12-0702
FILED 12-17-2013

Appeal from the Superior Court in Yuma County
No. S1400DO201101031
The Honorable Lisa W. Bleich, Judge Pro Tem

AFFIRMED

COUNSEL

Law Offices of Jose De La Luz Martinez, PLLC, Phoenix
By Jose De La Luz Martinez

Counsel for Petitioner/Appellant

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MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Acting Presiding Judge Patricia K. Norris and Chief Judge Diane M. Johnsen joined.

J O N E S, Judge:

¶1 Appellant, Maria D. Castro (Wife), appeals from the order of the trial court on the dissolution of her marriage to Appellee, Antonio Castro (Husband).¹ Wife challenges the trial court's exclusion of some of her exhibits as well as the trial court's rulings regarding the valuation of certain real property, Husband's parenting time, and Wife's spousal maintenance. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Wife and Husband were married in 1997. They have three children, two of whom are minors. At the time of the proceedings, the couple owned five pieces of real property: the marital home in Yuma, Arizona; a parcel of property in Algodones, Mexico; a lot in San Felipe, Mexico; a house in Michoacan, Mexico; and a lot in Michoacan, Mexico.

¶3 A trial was held on Monday, June 25, 2012. When Wife sought to introduce one of her exhibits, Husband objected on the grounds that it was hearsay and untimely disclosed. Husband asserted that he did not receive any of Wife's exhibits until Friday, June 22, and that the exhibits were time-stamped as having been filed at 8:42 p.m. Wife acknowledged that the exhibits were not provided until Friday, but asserted that they had been submitted before 5:00 p.m., noting that the time stamp was that of the court clerk, which closed at 5:00 p.m., and not that of the night depository. Wife suggested the proper time of submission was 4:42 p.m. and therefore the 8:42 p.m. stamp was a

¹ Husband did not file an answering brief. Although it is within our discretion to regard this as a confession of error, we decline to do so here. See *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 n.1 (App. 2008).

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mistake. Husband's counsel stated she was out of town on Friday and the documents were not received by her assistant, but that she discovered the documents had been put "through the door" when she visited her office on Saturday.² The trial court noted that, even if the exhibits were provided by 4:42 p.m. on Friday, they were still very late. Husband did not object to six of Wife's eleven exhibits, and those were admitted; the remaining exhibits were excluded.

¶4 Wife testified that she was not working and had been unsuccessful in her attempts to find employment, and that she was living on \$499 in Social Security from Husband. She testified that she received AHCCCS benefits, but that the children did not, and asked the trial court to require Husband to pay for the children's health insurance.

¶5 Husband testified that he was sixty-nine years old and that he was still working but would like to retire soon, although he did not have retirement savings. He further testified that he received \$1,136 in Social Security, after payments to Wife and his children, and that his pay varied depending on his hours worked; in 2011, he had a gross income of \$41,140. Husband also testified that he would like his summer visitation with the children to take place during the entire month of July as well as Father's Day; Wife did not address this issue.

¶6 Both parties wanted the Yuma home. They agreed Husband should be awarded the property in Algodones and San Felipe, and Wife should be awarded the house and lot in Michoacan, but they differed in their valuations of the properties. Neither provided any appraisals. With regard to the Algodones property, Wife testified the couple bought the property for \$29,000 when it was an undeveloped lot, but that it had increased in value to \$60,000 because it was now a commercial lot that contained a structure. Husband testified that the Algodones property was purchased for about \$26,000 and currently contained an incomplete structure surrounded by a fence. He explained the property had a toilet but no kitchen and that a person could sleep there but could not live there because it lacked utilities. He valued the property at \$25,000.

¶7 As to the Michoacan house, Wife testified that the couple bought it for 400,000 pesos, or \$40,000, and that it was now worth \$70,000.

² In Husband's response to Wife's motion for reconsideration and request for new trial, Husband's counsel noted that her assistant had left that Friday at 3:30 p.m., and at that time the exhibits had not yet arrived.

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She stated the house was falling apart and leaked when it rained, but that she wanted to keep the property. Husband acknowledged that they paid \$40,000 for the property but testified that the house was a very pretty three-bedroom house that contained marble throughout and was centrally located in town. He asserted its value was \$130,000.

¶8 The trial court did not award child support because the Social Security benefits received by the children from Husband exceeded the amount of child support required by the Arizona Guidelines. The trial court granted Husband's request that he be given four weeks of parenting time in July and Father's Day in addition to weekend visits.

¶9 The trial court found the home in Yuma had a value of \$120,000 with equity of \$60,000 and awarded it to Husband. As a form of spousal maintenance, the trial court ordered Husband to pay the mortgage on the Yuma home for one year while Wife and the children resided there, after which Wife could live with the children in the house until the youngest child was eighteen years old, provided Wife timely paid the mortgage. In considering the spousal maintenance award pursuant to Arizona Revised Statutes (A.R.S.) section 25-319(B) (2013),³ the trial court found that the children received AHCCCS benefits. In addition to the Yuma property, the trial court awarded Husband the property in Algodones, Mexico, which the trial court valued at \$25,000 "based on husband's estimation," and the lot in San Felipe, which the trial court valued at \$15,000 based on the average of the estimates provided. The trial court awarded Wife the house in Michoacan, with a value of \$60,000, which the trial court stated was "what the Wife paid for the property." The trial court also awarded Wife the lot in Michoacan, which the trial court valued at \$20,000 based on the purchase price. The trial court ordered a set off to Wife of \$10,000.

¶10 Wife filed a motion for reconsideration and request for new trial, arguing the trial court erred by excluding her exhibits, the trial court wrongly found that the children received AHCCCS benefits, and the trial court's award of parenting time to Husband in July was inconsistent with a prior agreement that his parenting time would be in June. Along with her motion, Wife submitted photographs and exhibits concerning the Michoacan home and the Algodones property. Wife reasoned that she did not provide this evidence at trial because some of the documents were

³ Absent material change since the events in question, we cite the current version of a statute.

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expensive to obtain and she “gave [Husband] the benefit of the doubt and [did not] imagine [he] would lie . . . under oath.”

¶11 In response, Husband argued Wife was not prepared at trial, the documents she now attached were not newly discovered and should have been presented at trial, and she should not be permitted to relitigate the case because she was unprepared and did not like the outcome. Husband asked for the documents to be stricken from the record.

¶12 The trial court denied Wife’s motion for reconsideration and request for new trial, finding the attachments to the motion were not newly discovered evidence but, rather, evidence that should have been presented at trial, and thereby ordered the exhibits stricken from the record.

¶13 Wife timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) (2013), -2102(B) (2013).

DISCUSSION

¶14 On appeal, we defer to the trial court’s factual findings unless they are clearly erroneous. *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 537, ¶ 10, 96 P.3d 530, 535 (App. 2004). We view the evidence in the light most favorable to upholding the trial court’s ruling and must affirm if any evidence supports the court’s judgment. *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005) (citing *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998)).

I. Valuation of the Algodones Property

¶15 Wife argues that the trial court wrongly denied her motion for new trial seeking an upward modification of the valuation of the Algodones property. A new trial may be granted based on “material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial.” ARFLP⁴ 83(A)(4). To grant a new trial on this basis, the evidence must appear to have been undiscoverable before trial by the exercise of due diligence and it must appear the new evidence would probably change the result upon rehearing. *Black v. Black*, 114 Ariz. 282, 285, 560 P.2d 800, 803 (1977). We

⁴ Arizona Rules of Family Law Procedure.

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review the denial of a motion for new trial for an abuse of discretion. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996).

¶16 The trial court valued the Algodones property at \$25,000 based on Husband's estimate. Wife's motion for new trial was based on a copy of the property's purchase contract that listed the purchase amount as \$29,439.25, as well as photographs of the property, which she claimed was newly discovered evidence. Trying to rebut Husband's testimony that the property was not habitable, Wife also asserted she and Husband had spent the night there every weekend, they had paid to put a second story on the home, and her sister operated a pharmacy on the premises.

¶17 None of this information was newly discovered. Wife does not contend that she could not have obtained the purchase contract or the photographs and offered them at trial. Nor does she assert that she could not have testified at trial about the home's expansion, the use of the property on weekends, or her sister's use of the property. Indeed, at trial, Wife testified the lot was purchased for \$29,000, had undergone construction, and that it was a commercial lot.⁵

¶18 Because the evidence submitted in Wife's motion for new trial was not newly discovered, the trial court did not abuse its discretion in denying the motion.

II. Exclusion of Exhibits

¶19 Wife also argues that the trial court wrongly excluded her trial exhibits on the ground of untimely disclosure.⁶ We will not disturb the trial court's decision on the admissibility of evidence absent a clear abuse of discretion and resulting prejudice. *Elia v. Pifer*, 194 Ariz. 74, 79, ¶ 22, 977 P.2d 796, 801 (App. 1998).

⁵ Husband had testified that he had used money from his IRA to build a pharmacy on the Algodones property, but that the construction was not completed.

⁶ Following the conferencing of this matter and preparation of this Decision, the Clerk of the Court of Appeals received the exhibits from the June 25, 2012 bench trial. In review of those items, the exhibits not admitted are addressed within this Decision. The exhibits that were admitted, and have now been reviewed by this Court, do not impact or serve to alter this Court's Decision in regard to the issues raised on appeal.

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¶20 Trial was to commence on a Monday at 9:00 a.m. Wife disclosed her trial exhibits the Friday immediately prior to the trial date. The documents were stamped as filed by the court clerk at "8:42 p.m." The documents did not bear the stamp of the trial court's night depository. Wife argued that the documents were disclosed before 5:00 p.m., as evidenced by the absence of the night depository stamp and that the 8:42 p.m. stamp was a mistake. Wife's counsel told the trial court he was present when his assistant returned from filing the documents, and that he filed them before 5:00 p.m. Counsel suggested that the stamp probably should have said 4:42 p.m. as that was approximately when the documents were filed. Further, Wife argues it did not matter when the exhibits were filed because Husband's counsel was out of town on that day and therefore "would not have received the exhibits on Friday anyways." Wife claims that one of the excluded exhibits proved the children were not receiving AHCCCS benefits, contrary to the trial court's finding.

¶21 Even accepting that the exhibits were disclosed at 4:42 p.m., the trial court found that they were, nevertheless, very late.⁷ Wife acknowledged the tardiness of the documents and offered no explanation for their late disclosure. The trial court apparently rejected Wife's argument that Husband's counsel could have reviewed the documents over the weekend. We can find no abuse of discretion in that decision.

III. Husband's Parenting Time

¶22 Wife argues that the trial court wrongly ordered Husband's four weeks of summer parenting time take place in July rather than June, as the parties had agreed in mediation. We review a court's decision on parenting time for an abuse of discretion. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970).

¶23 The agreement the parties entered during the mediation does not establish a specific time for Husband's summer parenting time, nor does it reflect any arrangement requiring Husband take his summer parenting time in June. Rather, it states in bold, underlined letters,

⁷ The record does not contain any order from the trial court setting a deadline by which the parties were required to have exchanged exhibits. However, the trial court did order the parties to file their exhibits with the court for marking no later than 4:00 p.m. the day before trial.

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“Parents agree to decide specific times on their own and do not wish to include them in this plan.”

¶24 In addition, Wife failed to object to Husband’s request at trial. Husband noted in his Resolution Statement that he wanted the mediation agreement to be applied with the exception that he wanted his summer parenting time to take place during the entire month of July, as well as Father’s Day weekend. Father also testified to that wish at trial. Wife offered no testimony in opposition to this request, did not cross-examine husband on this point, and did not oppose it in her closing argument. Given these circumstances, the trial court did not abuse its discretion in granting Husband’s request.

IV. Valuation of the Michoacan House

¶25 Wife also contends that the trial court attached the incorrect value to the Michoacan house, which was awarded to Wife. The trial court valued the house at \$60,000, stating that was what Wife paid for the property. Wife argues the correct value should be roughly \$40,000 because she testified the property was purchased for 400,000 pesos, or approximately \$40,000.

¶26 Although Wife testified that the house was purchased for approximately \$40,000, she also testified that she valued the house at \$70,000, with a lien of \$5,000 plus attorney costs. In her Resolution Statement, Wife placed a value of \$70,000 on the property, although with a lien of \$10,000, resulting in an ultimate value of \$60,000.⁸ Consequently, regardless of the trial court’s incorrect statement that \$60,000 was “what the Wife paid for the property,” the \$60,000 value attached to the property was supported by the evidence in the record and therefore was not an abuse of discretion.

⁸ The trial court noted that it was using the property list provided by Wife and specifically noted that Husband valued the property at \$90,000 and Wife valued the property at \$70,000, which is consistent with the list of property values contained in Wife’s Resolution Statement. The property list appears as Petitioner’s Exhibit 9, which was admitted into evidence.

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V. Spousal Maintenance Award

¶27 Wife also challenges the trial court's decision to award spousal maintenance of one year of mortgage payments on the home in Yuma. When determining spousal maintenance, the trial court is required to consider all relevant factors, including thirteen factors listed in A.R.S. § 25-319(B) (2013). *Leathers v. Leathers*, 216 Ariz. 374, 377, ¶ 10, 166 P.3d 929, 932 (App. 2007). The trial court, however, is only required to apply those factors relevant to the individual case and on which evidence has been presented. *Cullum v. Cullum*, 215 Ariz. 352, 355, ¶ 15, 160 P.3d 231, 234 (App. 2007). We review the trial court's decision on spousal maintenance for an abuse of discretion. *Id.* at 354, ¶ 9, 160 P.3d at 233.

¶28 The trial court found that Wife had not worked much during their fifteen-year marriage, but that she had an accounting degree from Mexico, was capable of earning minimum wage, and was receiving \$499 from Husband's Social Security. The trial court also found that Husband received \$1,136 in Social Security and earned a gross monthly income of approximately \$4,100, but was nearly seventy years old and nearing retirement, while Wife was approximately twenty years younger. When considering the cost of Wife's health insurance, the trial court found that the children received AHCCCS benefits, and that no evidence indicated that either parent had insurance. *See* A.R.S. § 25-319(B)(12). The trial court determined Wife was entitled to some spousal maintenance based upon the duration of the marriage and her lack of employment during the marriage.

¶29 Wife does not argue the trial court improperly applied the statutory factors, but contends the trial court reached the wrong conclusion and should have awarded additional spousal maintenance. Wife specifically challenges the trial court's findings that she was capable of finding employment and that the children were covered by AHCCCS.

¶30 Wife asserts that she testified about her unsuccessful attempts to obtain employment. She also argues that the trial court wrongly assumed that her accounting degree from Mexico would transfer to the United States to allow her to be employed in that capacity in this country.

¶31 Contrary to Wife's contention, the trial court did not base its decision on an assumption that she could be employed as an accountant because of her degree from Mexico. Rather, the trial court considered Wife's degree and age, and concluded, not that she could be employed as

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an accountant, but that she was capable of earning minimum wage. Regardless of Wife's unsuccessful attempts to obtain employment, the record contains no evidence suggesting that Wife is unemployable at minimum wage as the trial court found.

¶32 Wife also argues that the trial court erroneously found that the children received AHCCCS benefits. Wife testified that she received AHCCCS benefits but that her children did not because Husband claimed the children on his tax returns. She estimated it would cost approximately \$100 per child to obtain health insurance for the children. Wife, however, stated in her Resolution Statement that she received AHCCCS benefits "for the minor children." The trial court's finding, although inconsistent with Wife's trial testimony, nevertheless has support in the record.⁹ *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 19, 219 P.3d 258, 262 (App. 2009) ("An abuse of discretion exists when the record, viewed in the light more favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.") (citations omitted).

¶33 One purpose of spousal maintenance is to provide assistance to an ex-spouse for a limited period of time until he or she can achieve financial independence. *Gutierrez*, 193 Ariz. at 349, ¶ 24, 972 P.2d at 682. Here, Husband is nearly seventy years old and has no retirement savings, while Wife is twenty years younger. Nothing in the record suggests that

⁹ Wife may re-apply for AHCCCS benefits. If denied, she may request a modification of her spousal maintenance. See A.R.S. § 25-327(A) (2013) ("[T]he provisions of any decrees respecting maintenance or support may be modified . . . on a showing of changed circumstances that are substantial and continuing [A] change in the availability of health insurance coverage may constitute a continuing and substantial change in circumstance.").

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Wife is incapable of earning a minimum wage, and she does receive a portion of Husband's Social Security. Awarding spousal maintenance in the form of mortgage payments on the home for one year to allow Wife time to become independent keeps with the purpose of spousal maintenance and is not an abuse of discretion.

CONCLUSION

¶34 The trial court judgment is affirmed.



Ruth A. Willingham · Clerk of the Court
FILED: mjt