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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARIO ALVAREZ, *Petitioner/Appellant*,

v.

MARBELLA SALDANA, *Respondent/Appellee*.

No. 1 CA-CV 16-0721 FC
FILED 10-24-2017

Appeal from the Superior Court in Maricopa County
No. FC2016-002638
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

B E E N E, Judge:

¶1 Mario Alvarez (“Husband”) appeals from a decree of dissolution of his marriage to Marbella Saldana (“Wife”). Husband challenges the superior court’s ruling awarding Wife spousal maintenance, determining his annual income, and awarding the couple’s residence to Wife as her sole and separate property. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 The parties were married for nine years. During the marriage, Husband owned a small business that installed and repaired garage doors. Wife worked fulltime at a dry cleaner earning \$1,681 per month.

¶3 During the marriage, the parties purchased a house where they lived. Though it was purchased during the marriage, only Wife’s name was on the deed and mortgage. The house was valued at approximately \$140,000, with an outstanding mortgage of \$40,000. Neither party testified as to the purchase price or the exact amount that each contributed to the mortgage payments. Wife admitted the down payment for the house came from community funds.

¶4 Husband’s financial affidavit stated he earns approximately \$1,746 per month. At trial, Husband admitted he paid for many of his personal expenses through the business, gave Wife \$500 per month, gave his daughter \$100-150 per month, rented a house for \$1,000 per month, owned five vehicles, and paid for a gardening service for his residence. Additionally, he paid contract laborers \$50 per hour and one employee \$600 per week. Wife testified Husband earned far more than he claimed and frequently underreported income on his tax returns.

¶5 The superior court found that Husband’s testimony about his income was not credible, and assessed his income at \$50 per hour, or \$104,000 per year. The court granted Wife’s request of \$1,500 per month in

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spousal maintenance for 60 months and awarded Wife the residence as her sole and separate property. The court concluded that it had insufficient information to calculate shared interest in the property and therefore did not award Husband a community share.

¶6 Husband timely appealed from the superior court's dissolution of marriage. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

I. Spousal Maintenance and Husband's Income

¶7 We review the superior court's award of spousal maintenance for an abuse of discretion, viewing the evidence in the light most favorable to upholding the court's order, and will affirm if any reasonable evidence supports the award. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14 (App. 1998) (citations omitted); *Martin v. Martin*, 156 Ariz. 440, 450 (App. 1986). A court abuses its discretion when it commits an error of law or fails to consider evidence in reaching a discretionary conclusion or if upon review, "the record fails to provide substantial evidence to support the trial court's finding." *Flying Diamond Airpark, LLC v. Meinberg*, 215 Ariz. 44, 50, ¶ 27 (App. 2007) (citation omitted).

¶8 Husband argues the court erred in awarding spousal maintenance because Wife worked fulltime for several years during the marriage and because the length of the marriage "does not seem to meet the duration requirement."

¶9 In reviewing a spousal maintenance award, we first consider whether the spouse "meets the statutory requirements for maintenance set out in A.R.S. § 25-319(A). Second, we must review the amount and duration of the award to determine whether the trial court properly considered the factors listed in A.R.S. § 25-319(B)." *Thomas v. Thomas*, 142 Ariz. 386, 390 (App. 1984). "The trial judge is in the best position to properly tailor a maintenance award; therefore, we will not interfere with the amount unless it was the result of an abuse of discretion." *Ruskin v. Ruskin*, 153 Ariz. 504, 507 (App. 1987) (citation omitted).

¶10 The superior court found that Wife met the statutory criteria for maintenance because she was unable to be self-sufficient through appropriate employment and was the primary residential parent for the couple's nine-year-old son. See A.R.S. § 25-319(A)(2). Husband argues that Wife was capable of being financially self-sufficient because she had

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worked fulltime for several years during the marriage. The record, however, shows Wife earned minimum wage, and her gross monthly income was approximately \$1,681. Her monthly expenses totaled \$2,075. Husband presented no evidence that showed Wife was capable of earning more than \$1,681 per month. Thus, the superior court properly found Wife was incapable of earning an income sufficient to meet her financial needs, and did not abuse its discretion in concluding that Wife qualified for an award of spousal maintenance under A.R.S. § 25-319(A)(2).

¶11 Husband contends that the court erred in determining spousal maintenance because the length of his marriage “does not seem to meet the duration requirement” under A.R.S. § 25-319(B). This argument fails because the statute has no specific “duration requirement.” Instead, a marriage’s duration is only one relevant factor the court can consider in determining a proper award. *See* A.R.S. § 25-319(B). In its order, the court referred to the couple’s comfortable standard of living, Wife’s lack of education, Wife’s meager income, and Wife’s assistance with Husband’s business as factors for the award. Therefore, the court did not abuse its discretion in determining the spousal maintenance award.

¶12 Husband also argues the superior court erred when it calculated his income as \$50 per hour, or \$104,000 per year, for purposes of spousal maintenance.¹ The superior court set forth the following detailed explanation of its findings regarding Husband’s income:

[Wife] testified that the family had a good standard of living, and that they regularly took vacations. . . . Her pretrial statement also indicates that during the marriage the parties enjoyed never having to be concerned about finances. Contrasted with this information is [Husband’s] testimony that he only draws a small salary from his solely owned business, and that he pays contract labor over \$50.00 per hour. He also has one employee whom he pays \$600.00 per week, which is \$31,200 in annual income. [Husband] also testified that he pays a large amount of the monthly family bills out of the business, including utilities, vehicle expenses, dining

¹ In his reply brief, Husband argues his income was incorrectly calculated for purposes of child support. Because he failed to raise this argument in his opening brief, we deem it waived and will not consider it. *See Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶ 11 (App. 2000) (stating that a party waives an argument by failing to raise it in the opening brief on appeal).

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during work hours, and repair and upkeep for his residence. His Affidavit of Financial Information lists \$500.00 per month in house rental costs, which he testified was because he works out of his rental home. The total monthly rental for his home is \$1,000.00 based on his testimony. [Husband's] Affidavit of Financial Information lists his monthly income at \$1,746.00 or \$10.08 per hour.

The court further finds that [Husband's] testimony and representations in his Affidavit of Financial Information are not credible. It is inconceivable that [Husband] would earn only \$10.08 per hour while paying contract labor upwards of \$50.00 per hour. Based upon his testimony, it is much more likely that he pays with cash from business receipts for any purchases, including the numerous vehicles owned by the parties in recent years, and that he pays much of his monthly budgetary expenses directly from the business. Given the credibility issues with [Husband's] AFI and testimony, the Court finds it appropriate to impute [Husband's] income at the rate of \$50.00 per hour, or \$104,000 per year.

¶13 The record adequately supports the superior court's findings as to Husband's income, and we defer to the court's determination of a witness's credibility. *Gutierrez*, 193 Ariz. at 347-48, ¶13. Further, the court's findings are supported by Wife's testimony that Husband does not declare cash receipts on his earnings statements and that he earns above \$9,000 per month. Finally, Husband argues that his business earnings are variable, stating his net profit in February 2014 was \$4,887 while the profit in May 2014 was \$6,734. However, these amounts are much higher than the \$1,746 Husband purported to earn in his testimony, and the amounts do not support Husband's assertion that he earned \$28,971 in 2014.

¶14 Here, sufficient evidence supports attributing income of \$104,000 per year to Husband; therefore, the court did not abuse its discretion in determining Husband's income.

II. Community Property

¶15 Husband contends that the superior court erred in awarding the couple's residence to Wife as her sole and separate property without awarding him a community share in the property. "We review the court's distribution of property for an abuse of discretion." *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4 (App. 2007) (citation omitted). However,

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we review the superior court's classification of property as separate or community *de novo* as a question of law. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15 (App. 2000).

¶16 Wife argues that the superior court correctly characterized the residence as her sole and separate property because the deed and mortgage to the property were in her name only. Husband responds that the house was a community asset because it was acquired during the marriage using community funds. "Property takes its character as separate or community at the time [of acquisition] and retains [that] character" throughout the marriage. *Honnas v. Honnas*, 133 Ariz. 39, 40 (1982). To resolve this issue, we must determine the character of the residence at the time of acquisition.

¶17 "All property acquired by either husband or wife during the marriage is the community property of the husband and wife . . ." A.R.S. § 25-211(A). Typically, "[p]roperty acquired by either spouse during marriage is presumed to be community property, and the spouse seeking to overcome the presumption has the burden of establishing a separate character of the property by clear and convincing evidence." *Brebaugh v. Deane*, 211 Ariz. 95, 97-98, ¶ 6 (App. 2005) (citation omitted).

¶18 The superior court awarded Wife the residence as her sole and separate property because the deed and mortgage to the residence were in Wife's name only. The court's reliance on this fact in determining the character of the property is misplaced. Neither party disputed that the residence was purchased during the marriage. And Wife testified that \$15,000 in community assets was used to purchase the property. The mere fact that the deed and mortgage to the residence were placed in Wife's name does not defeat the presumption of a community asset. Wife failed to proffer any evidence, much less clear and convincing evidence, establishing that Husband intended to disclaim any interest in the residence at the time of its acquisition. *Cf. Bell-Kilbourn*, 216 Ariz. at 524, ¶ 10 (residence purchased with community assets determined to be Wife's sole and separate property when Husband executed a disclaimer deed at the time when the home was acquired in Wife's name). Consequently, the superior court erred in classifying the parties' residence as Wife's sole and separate property.

CONCLUSION

¶19 Based on the foregoing, we reverse only the ruling awarding Wife the residence as her sole and separate property, and remand for further proceedings consistent with this decision. We otherwise affirm the

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court's ruling on spousal maintenance and determination of Husband's annual income. Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324. After considering the financial resources of the parties and the reasonableness of their positions throughout the proceedings, in the exercise of our discretion we decline to award fees or costs on appeal.



AMY M. WOOD • Clerk of the Court
FILED: AA