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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

HANADI OSSMAN, *Petitioner/Appellee*,

v.

ABDULLAH TALIB, *Respondent/Appellant*.

Nos. 1 CA-CV 16-0098 FC and 1 CA-CV 16-0185 FC
(Consolidated)
FILED 3-1-2018

Appeal from the Superior Court in Maricopa County
No. FC2013-096699
The Honorable Justin Beresky, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Garnice Law, PLLC, Scottsdale
By Victor A. Garnice
Counsel for Respondent/Appellant

Sheridan Larson, PLLC, Mesa
By Steven K. Larson
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Acting Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Patricia A. Orozco (retired) and Judge Michael J. Brown joined.

S W A N N, Judge:

¶1 This is an appeal from a dissolution decree. The appellant challenges the superior court's denial of his motion to continue trial after his counsel's late-stage withdrawal, and he contends that he was denied due process because of his pro per appearance at the trial. The appellant also challenges the propriety of the decree's property-division, spousal-maintenance, and attorney's-fees awards.

¶2 We affirm. The court acted within its discretion when it declined to continue the trial, and we perceive no procedural irregularities that deprived the appellant of a fair opportunity to present his case. Further, the evidence presented at the trial reasonably supported the court's substantive orders.

FACTS AND PROCEDURAL HISTORY

¶3 In December 2013, Hanadi Ossman ("Wife") filed a petition for dissolution of her marriage to Abdullah Talib ("Husband"). The court set the matter for trial and entered temporary orders requiring Husband to pay Wife \$1,000 per month in child support and \$6,000 per month in spousal maintenance.

¶4 In August 2015, after several trial continuances, the court set trial for December 10, 2015. On November 11, 2015, Husband's counsel filed a motion to withdraw, representing that Husband had substantially failed to pay her and that the attorney-client relationship had been compromised. At a contempt hearing two days later, which Husband attended, counsel stated at the outset that she could not proceed in good faith because Husband had failed to provide her the information relevant to the subject of the hearing and "the attorney-client relationship is deteriorated." After the court noted the December 10 trial date and Wife withdrew her motion for a change of judge, the court indicated that it was "inclined to grant [counsel]'s motion to withdraw, but I'm planning on

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affirming a trial date.” Husband’s counsel responded that she had “discussed this with my client,” and knew that he had “consulted with other counsel and the other lawyer will not be taking the case if this matter went to trial on December 18 [sic].” The court then affirmed the December 10 trial date and granted counsel’s motion to withdraw. Husband made no comment on counsel’s representations or the court’s ruling. Husband thereafter proceeded, on his own behalf, to present argument and testify regarding the contempt issue.

¶5 Wife filed a pretrial statement on December 4. On December 7, Husband filed a pro per motion to continue the trial for at least ninety days based on “the exigent circumstance” of his counsel’s recent withdrawal. Husband asserted that his former counsel retained his file, including documents he intended to use as trial exhibits, and that he required the assistance of counsel in view of the case’s complex financial and business-valuation issues. The court denied Husband’s motion to continue, and Husband appeared pro per at the December 10 trial. Husband was given the opportunity to testify, present exhibits, conduct cross-examination, and make opening and closing arguments.

¶6 The evidence at trial established the following relevant facts. Husband and Wife married in 2002, had three children together, and separated in early 2011 (according to Wife) or in 2012 (according to Husband). In 2009, Husband started a medical-transportation business, Valley MedTrans (“VMT”), located on real property purchased during the marriage by Husband and Wife’s limited-liability company, 432 E. Southern, LLC (“the LLC”). The LLC later sold the real property and purchased a new parcel (“the Property”) to which VMT moved. Part of the sale proceeds were used to purchase, renovate, and make mortgage payments on the Property; the remainder of the proceeds were transferred to VMT’s main, payroll, and operating accounts. Husband obtained appraisals valuing VMT at approximately \$1,174,000 and the Property at approximately \$350,000, and the parties agreed that at the time of trial the LLC’s equity in the Property was approximately \$238,000. The parties further agreed that one of them should buy out the other’s interest in VMT for \$600,000.

¶7 As the sole officer of VMT, Husband received annual compensation and other distributions totaling several hundred thousand dollars. Husband also made substantial withdrawals from an automotive company registered in his significant other’s name. Husband precluded Wife from participating in any business matters, and he exercised sole direct control over all funds. According to Wife, Husband did not even

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inform her that they had owned and sold VMT's original location. Wife further claimed that Husband never told her about \$300,000 that he caused VMT to transfer in late 2011 and 2014 to overseas accounts in his name, and she professed knowledge of only one \$50,000 expenditure for a foreign apartment. Husband testified that the transfers were for failed investments in an apartment in Egypt and a peanut farm in Sudan, and that Wife knew of the investments.

¶8 Wife, who had trained as a civil engineer in Sudan, worked in daycare from mid-2006 to late 2009 but stopped when Husband asked her to stay home with the parties' children and pursue her education. At the time of trial, Wife was unemployed and without savings. She rented a home, used a VMT vehicle and gas card for transportation, and relied on credit cards that were near their limit. She testified that she could not transfer her foreign civil-engineering background to this country without considerable additional schooling, and she expressed her intent to obtain a radiology degree from a community college in two years.

¶9 The superior court entered a decree dissolving the parties' marriage. The court treated VMT, the LLC, and the Property as community property, found that Husband's overseas transfers had wasted \$300,000 of VMT funds, and ordered a substantially equal division of community property accounting for the waste. The court awarded Husband all interest in VMT, and awarded Wife all interest in the LLC and the Property, plus \$631,000. The court arrived at that award by: (1) crediting Wife with \$150,000 for her equal share of the wasted funds; (2) crediting Wife with \$600,000 for her equal share of VMT; and (3) crediting Husband with \$119,000 for his equal share in the Property's equity. The court ordered Husband to pay Wife spousal maintenance in the amount of \$4,000 per month for 48 months. The court further ordered Husband to pay a portion of Wife's reasonable attorney's fees, later quantified as approximately \$17,500, which represented one-third of the fees she owed to the second of the two attorneys she had hired to represent her in the matter.

¶10 Husband filed timely and procedurally proper notices of appeal from the dissolution decree and the attorney's-fees judgment. We consolidated the appeals. At the same time, in view of Husband's assertion that his former counsel deprived him access to exhibits for use at trial, we suspended the appeals and revested jurisdiction in the superior court to conduct further proceedings regarding the alleged deprivation. After holding an evidentiary hearing, the superior court found that Husband's former counsel had electronically transmitted every document in Husband's file to him.

DISCUSSION

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING HUSBAND’S MOTION TO CONTINUE TRIAL; NOR DID THE COURT IMPROPERLY CONDUCT THE TRIAL.

¶11 Husband challenges the superior court’s denial of his motion to continue trial. We discern no reversible error.

¶12 Husband first contends that a continuance was warranted because the court allowed his counsel to withdraw shortly before trial without “sufficient compliance with the provisions of A.R.F.L.P. Rules 9.A.2.b and 9.A.2.c” and “mention [of] trial or pretrial deadlines.” ARFLP (“Rule”) 9(A)(2)(b) requires an attorney who unilaterally seeks to withdraw to certify in writing that a locatable client has been given written notice of the case’s status, including upcoming court dates. Counsel’s motion to withdraw was deficient in that respect. But in view of counsel’s oral avowals and the court’s express affirmance of the trial date at the contempt hearing, in Husband’s presence, the written motion’s deficiency was harmless. And though subsection (1) of Rule 9(A)(2)(c) limits post-trial-setting withdrawals to circumstances where the client or a substituting attorney avers preparedness for trial, subsection (2) of that Rule alternatively provides for post-trial-setting withdrawals based simply on a finding of good cause for withdrawal. Here, counsel was permitted to withdraw under subsection (2). Accordingly, there was no requirement that Husband – who made no objection at the contempt hearing to the proposed withdrawal or the trial date – avow that he was prepared for trial.

¶13 That is not to say that a last-minute good-cause withdrawal cannot provide grounds for a continuance. Under Rule 77(C)(1), the court may continue a set trial date “upon written motion setting forth sufficient grounds and good cause, or as otherwise ordered by the court.” The court has discretion to determine whether a continuance is warranted under the good-cause standard. *Cf. Ornelas v. Fry*, 151 Ariz. 324, 329 (App. 1986) (recognizing court’s discretion with respect to motions to continue in civil case).

¶14 Husband contends that his counsel’s withdrawal constituted good cause for a continuance because it left him with no adequate opportunity to obtain a copy of his file or procure the assistance of new counsel. But the court found that Husband had copies of all relevant documents, and that finding is supported by the record – at the

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evidentiary hearing in the supplemental proceedings, the court received as evidence a copy of a December 2, 2015, letter sent to Husband by his former counsel in which counsel advised Husband that he had been provided copies of everything in his file and that he could obtain hard or original copies on request. We cannot say that the court abused its discretion by determining that counsel's withdrawal (to which Husband voiced no objection even after the court stated its intent to affirm the trial date) did not deprive Husband of the ability to make adequate preparations for the already much-delayed trial set for December 10. Husband was not, as he contends, deprived due process based on his stated inability to engage new counsel in the month leading up to the trial. *Cf. Encinas v. Mangum*, 203 Ariz. 357, 359, ¶ 10 (App. 2002) (holding that litigant's inability to afford counsel in civil action does not violate due process).

¶15 Husband further contends that because he appeared pro per, the proceedings were conducted in a manner that deprived him of due process. We observe no impropriety in the proceedings. The record demonstrates that Husband was given an adequate and fair opportunity to present his case. Contrary to his contention, the fact that Wife filed an individual pretrial statement did not prevent him from providing a pretrial statement. *See* Rule 77(C)(1) (contemplating joint or separate pretrial statements). Further, nothing in the record supports Husband's contention that he was not allowed to object to Wife's exhibits. And to the extent that Husband complains of leading questions, a lack of opportunity to conduct re-cross examination after the court asked questions, and the presence of Wife's expert in the courtroom, he raised no objections at trial and Rule 2(B)(1) contemplates flexibility with respect to the application of evidentiary rules in family-law cases.

¶16 Husband finally contends that Wife's expert must not have been sworn because the trial transcript describes him only as having been "previously sworn" and does not reflect any initial swearing-in. Setting aside the facts that the court's minute entry similarly describes the expert as having been previously sworn, and that Husband has offered no evidence to support his theory to the contrary, we hold that the expert's testimony is immaterial to the appeal. The only non-cumulative testimony provided by the expert was his opinion that Husband had overpaid himself for running VMT and that the court needed to take the overpayment into consideration when allocating marital assets. The superior court expressly declined to adopt that opinion, to Husband's benefit.

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II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY FINDING WASTE, OR BY ALLOCATING THE LLC AND THE PROPERTY TO WIFE.

¶17 Husband next challenges the superior court's disposition of the parties' marital property under A.R.S. § 25-318. As an initial matter, we note that Husband does not dispute that VMT, the LLC, and the Property were subject to allocation under § 25-318.

¶18 Section 25-318(A) provides that the court must "divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct." "In apportioning community property between the parties at dissolution, the superior court has broad discretion to achieve an equitable division, and we will not disturb its allocation absent an abuse of discretion." *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13 (App. 2007). "[W]e consider the evidence in the light most favorable to upholding the superior court's ruling and will sustain the ruling if it is reasonably supported by the evidence." *Id.* We discern no abuse of discretion here.

¶19 First, we reject Husband's contention that the court abused its discretion by finding waste. Section 25-318(C) permits the court to consider "excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common" when allocating community property. Once the spouse alleging waste has presented a prima facie case, the burden shifts to the other spouse to rebut the showing of waste by providing that the expenditures benefitted the community. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346-47, ¶ 7 (App. 1998). If the prima facie case is not rebutted, the court should add the value of the dissipated property to the value of the existing marital property for purposes of the allocation calculus. *See Martin v. Martin*, 156 Ariz. 452, 458 (1988). Here, Wife presented evidence that after the parties separated, Husband transferred \$300,000 of VMT's funds to his solely held overseas accounts without her knowledge. Wife's evidence was sufficient to make a prima facie case of waste. Husband contends that he rebutted that evidence by his testimony that the funds were used with Wife's knowledge to invest in an apartment and a farm. But Husband presented no evidence to substantiate his claims, and his credibility was for the court to decide. *See Gutierrez*, 193 Ariz. at 347, ¶ 13.

¶20 We next address Husband's contention that by awarding VMT to him and its premises to Wife, the court created the undesirable result of further entangling the parties' lives. But the fact that Husband

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disagrees with the prudence of the property allocation's structure does not describe abuse of discretion. The court was statutorily obligated to make an equitable property division, and it did so.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY
AWARDING SPOUSAL MAINTENANCE TO WIFE.

¶21 Husband next challenges the spousal-maintenance award.

¶22 Section 25-319(A) provides that the court may award spousal maintenance if the spouse seeking maintenance either: (1) lacks sufficient property, including property apportioned to him or her, to provide for his or her reasonable needs; (2) is unable to be self-sufficient through appropriate employment; (3) contributed to the other spouse's educational opportunities; or (4) is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient, and the marriage was of long duration. Section 25-319(B) provides that once the court determines that an award of spousal maintenance is appropriate, it must consider all relevant factors, including those set forth in the statute, to determine the appropriate amount and duration of the award. We review an award of spousal maintenance for abuse of discretion, viewing the evidence in the light most favorable to upholding the award. *Gutierrez*, 193 Ariz. at 348, ¶ 14. We will affirm the award if there is any reasonable evidence to support it. *Id.*

¶23 Husband contends that Wife's receipt of the Property means that she is ineligible for spousal maintenance because the Property gives her sufficient resources to provide for her reasonable needs. Husband explains that because Wife was made his landlord, she thereby has "a significant additional income source" that she may, in bad faith, exercise in a manner that causes him to incur "significant additional monthly expense." But Husband expressly waived any objection to Wife's spousal-maintenance eligibility at trial – he stated, "I don't mind paying her spousal maintenance" and contested only the amount and duration of the award she requested. We further note that the parties presented no evidence at trial to support Husband's speculation regarding the "income shift" effect of the property division. Finally, we observe that the court's findings under § 25-319(B) provide adequate support for a determination of eligibility under § 25-319(A)(2).

¶24 We further find no abuse of discretion in the court's determination of the award's amount and duration. The court made detailed, factually supported findings regarding the factors set forth in § 25-319(B). In view of those findings, particularly those regarding the parties'

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respective resources, education status, use of community assets, and employability, we cannot say that the court abused its discretion by awarding Wife spousal maintenance of \$4,000 per month for 48 months.

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEY'S FEES TO WIFE.

¶25 Husband finally challenges the award of attorney's fees to Wife. As an initial matter, we note that though Husband filed a second notice of appeal from the judgment quantifying the fee award, his argument on appeal is limited to the court's determination that a fee award was justified under A.R.S. § 25-324(A). He raises no separate challenge to the amount of the award.¹ We review the award for abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56 (App. 1999).

¶26 Section 25-324(A) provides that "[t]he court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter [regarding marriage dissolution]." Here, the court found that Husband had "considerably more resources available" and had acted unreasonably in the litigation "by his delays in complying with discovery requests as well as transferring large amounts of money overseas in violation of the preliminary injunction."

¶27 Husband first challenges the court's finding regarding the parties' relative financial resources. He contends that the court failed to account for the orders dividing the marital property and imposing spousal-maintenance and child-support obligations on Husband. But the court was well-aware of its own orders, and Wife presented evidence that Husband had received substantial compensation from VMT for years, whereas Wife had no job or savings, and at the time of trial relied largely on credit to meet her needs. On this record, we discern no abuse of discretion in the court's determination that there was a substantial disparity in the parties' financial resources even in view of the decree's other orders.

¶28 Husband next challenges the court's finding regarding the reasonableness of the parties' conduct. First, Husband contends that the finding was factually incorrect because his overseas transfers predated the

¹ Husband also makes no argument regarding the superior court's determination that fees were justified under A.R.S. § 25-324(B).

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matter's preliminary injunction. But though the evidence established that some transfer activity predated the December 2013 dissolution petition and accompanying injunction, other transfer activity occurred after the litigation commenced. Next, Husband contends that the court received no evidence at trial to support its finding regarding his conduct during discovery. But "[i]t is proper for a court to take judicial notice of its own records," *In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4 (App. 2000), and the record supports the finding that Husband unreasonably failed to comply timely with discovery requests. Husband finally contends that the court failed to consider Wife's unreasonableness because it made no findings regarding her conduct. But because Husband did not request that the court make findings, we assign no error to the court's failure to expressly state its findings regarding Wife's conduct. *See Myrick v. Maloney*, 235 Ariz. 491, 494-95, ¶ 10 (App. 2014). The court had ample evidence upon which to assess Wife's relative reasonableness, and its assignment of unreasonableness to Husband alone was sufficient to constitute a finding regarding Wife's conduct.

¶29 We conclude that the court's decision to award attorney's fees to Wife was sufficiently supported by the evidence, and that the court therefore acted within its discretion.

CONCLUSION

¶30 We affirm for the reasons set forth above. In the exercise of our discretion, we hold that Wife may recover reasonable attorney's fees and costs on appeal upon compliance with ARCAP 21. We deny Husband's request for fees and costs on appeal.



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