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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

EDIE WYLENN LEE, *Petitioner/Appellee/Cross-Appellant,*

v.

DIRK MERRILL LEE, *Respondent/Appellant/Cross-Appellee.*

No. 1 CA-CV 16-0585 FC
FILED 3-20-2018

Appeal from the Superior Court in Navajo County
No. S0900DO201300368
The Honorable Michala M. Ruechel, Judge

VACATED AND REMANDED IN PART, AFFIRMED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge James B. Morse Jr. joined.

S W A N N, Judge:

¶1 In this divorce case, Dirk Merrill Lee (“Husband”) challenges the superior court’s rulings regarding the treatment of a community business and the award of spousal maintenance. Edie Wylenn Lee (“Wife”) cross-appeals the court’s division of community property. We vacate the property-division orders because the court adopted a business valuation unsupported by the evidence, and potentially double-counted community real estate. We vacate the spousal maintenance order based on the decree’s internal inconsistencies. We remand for further proceedings with respect to the foregoing, but we affirm the court’s rulings on all other issues raised.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife married in 1991. They thereafter purchased a mail-delivery business, White Mountain Passenger Lines, Inc. (“White Mountain”), and a lot on which to store the company’s vehicles.

¶3 Wife petitioned for dissolution of the parties’ marriage in 2013. The matter proceeded to trial in January 2016. The parties’ jointly retained valuation expert, John Casalena, opined that as of December 2014, White Mountain had a fair market value of \$173,000. Casalena included the lot in his analysis. Both parties disagreed with Casalena’s calculation: Husband testified that he believed Casalena’s figure was too high, while Wife testified that she believed White Mountain was worth approximately \$1 million. Neither party retained another expert to support their contentions.

¶4 The superior court deviated from Casalena’s calculation:

The Court did identify one concern in the 2013 corporate tax return [for White Mountain]. It listed “outside service” of \$32,491 in Exhibit 34D and “outside services” of \$52,085 in Exhibit 34E. That appears to be a distinction from 2011, and 2012 tax returns. The court is not convinced those are appropriate deductions for valuation purposes. For that

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reason the Court added them back into the corporate discretionary earnings and recalculated the seller's discretionary earnings for years 2011, 2012 and 2013 and averaged them out to \$63,289. Using the same multiplier as [Casalena] . . . the Court determines the Fair Value of [White Mountain] to be 191,768.

The court concluded that "the way to resolve [the] property issues quickly and with the least chance of ongoing litigation is to award [White Mountain] to [Husband], the marital residence to [Wife] and to use the Commercial property [the lot] to achieve equity." The court set forth two methods to achieve an equal division:

Plan 1 - The Court will allow [Husband] to buy out [Wife]'s interest in the home and commercial property within 120 days by refinancing the home and/or commercial property and paying off all of the Debts listed above or have them put solely in his name (except the car loan) and providing her with \$127,119.00 for her remaining equity in the home and Commercial property (value of the marital home \$240,000.00 + value of the commercial land \$74,900.00 - debts \$60,661.67 ÷ 2 = \$157,450.00). The Court will award [Wife] a judgment for her share of [White Mountain] in the amount of \$95,884.00. That debt is to be paid at the rate of at least \$1500.00 per month beginning on January 1, of 2017. . . .

Plan 2 - If [Husband] is not able to buy [Wife] out within 120 days, the marital residence and Commercial Property are to be sold in a commercially reasonable manner. . . . Upon the sale of either parcel, the above listed debts (excluding the car payment) are to be paid out of escrow and the parties will divide the remaining equity. The Court awards to [Wife] a judgment for her share of the Corporation in the amount of \$95,884.00. That debt is to be paid at the rate of at least \$1500.00 per month beginning on August 1, of 2016.

¶5 The court also ordered Husband to pay spousal maintenance in the amount of \$1,600 per month for 60 months but reduced the amount to \$600 per month upon Wife's receipt of regular monthly payments for "her equity in the home and Commercial property." The court further held that "[o]nce Wife begins receiving regular monthly payments from her share of the Corporation, her eligibility may reduce further." The court's child-support calculation adjusted Husband's income by only \$600 "for

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spousal maintenance paid.” The court also found a substantial disparity in income and ordered Husband to pay \$1,000 of Wife’s attorney’s fees and costs.

¶6 Both parties moved to amend the decree under ARFLP 83. Husband contended that the lot was an asset of White Mountain and thereby should not have been included in the equalization payment, that the court’s valuation of White Mountain was contrary to the evidence, and that the spousal maintenance award exceeded his ability to pay. Wife contended that the court should have implemented an unequal division of community property because Husband wasted community assets. She also sought clarification regarding the two equalization methods, and she sought an increase in the award of attorney’s fees and costs. The court granted both motions in part, ruling that the lot was a White Mountain asset and increasing Wife’s share of White Mountain to \$133,384.

¶7 Husband moved for reconsideration, arguing that the court had improperly included the lot in multiple calculations. Husband then timely filed a notice of appeal from the decree as amended, and Wife timely filed a notice of cross-appeal. We stayed both appeals to allow the superior court to rule on Husband’s motion for reconsideration. The superior court granted Husband’s motion for reconsideration, but held that it had not counted the lot’s value multiple times:

The Court[] originally ruled that the reasonable value of the business is \$191,768.00 excluding [the lot]. The Court again recognizes that the figure is different from the value proffered by Mr. Casalena (which included the parcel) but again finds that (after considering the testimony of Mr. Casalena, and the parties, as well as bank records, contracts, and the business practices) that Mr. Casalena’s valuation report is valuable and informative but not dispositive.

Once the value of the parcel was placed back into the business, the Court determined that the value of the corporation is increased to \$266,768.00 upon further consideration the Court finds, [Husband] is correct that the overall value of the properties (however titled) remain the same. . . .

For all of the foregoing reasons the Court affirms [Wife]’s judgment for her share of the corporation in the amount of \$95,884.00.

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DISCUSSION

I. HUSBAND'S APPEAL

- A. The Superior Court Adopted a Business Valuation Unsupported by the Evidence, and Potentially Included the Lot in Both the Business Valuation and the Equalization Scheme.

¶8 Husband contends that the superior court erred by deviating from Casalena's opinion of White Mountain's value and by including the lot's value in both the White-Mountain valuation and the equalization-payment calculation. We review a business-value determination in a divorce proceeding for abuse of discretion. *Schickner v. Schickner*, 237 Ariz. 194, 197, ¶ 13 (App. 2015). We will defer to the superior court's factual findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous if no substantial evidence supports it. *Id.* at 197-98, ¶ 13.

¶9 The court was free to give Casalena's opinion "whatever weight it thought best." *City Consumer Servs., Inc. v. Metcalf*, 161 Ariz. 1, 5 (1989). Here, the court modified Casalena's opinion on the ground that it improperly omitted certain amounts that White Mountain deducted on its tax filings for "outside services." Casalena testified that those amounts were misclassified and unusually high. But he also explained that the amounts had no bearing on his assessment of the company's value, and no other evidence established their relevance. Though the court was free to reject Casalena's opinion in whole or in part, it could not adopt a modified version of his opinion in the absence of evidence to support the modified value. Accordingly, because no other evidence bore on the issue, the court's "outside services" adjustment was error.

¶10 Further, on this record, we cannot determine whether the court improperly included the lot in both the business valuation and the equalization-payment scheme. Casalena's opinion included the lot, but the court later indicated, by its amendment to the decree and in its ruling on reconsideration, that it had omitted the lot when modifying Casalena's opinion. That modification to Casalena's opinion, however, was nowhere stated in the original decree or explained in the later orders. The court may well have omitted the lot in the first instance, but on this record we are ill-equipped to confirm whether that was the case. And if the court did not omit the lot, its inclusion in the equalization-payment calculation was error.

¶11 We vacate the court's orders regarding division of the community property. We remand so that the court may determine White

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Mountain's value based on the evidence, and establish and explain an equalization scheme that accounts for the lot's value once.

B. The Superior Court Entered Inconsistent Orders Regarding Spousal Maintenance.

¶12 Husband also challenges the amount and duration of spousal maintenance. If the superior court decides that spousal maintenance is warranted under A.R.S. § 25-319(A), it must then consider all relevant factors, including those set forth in § 25-319(B), in determining the amount and duration of the award. We afford the superior court broad discretion in doing so. *Pullen v. Pullen*, 223 Ariz. 293, 298, ¶ 22 (App. 2009).

¶13 Husband contends that the \$1,600 monthly award, when combined with the \$1,500 monthly equity payment, exceeds his ability to pay and ignores the substantial assets Wife was given in the decree. See A.R.S. § 25-319(B)(4), (9). But the decree leaves unclear whether, or for how long, Husband must pay both amounts. While the decree required Husband to pay \$1,600 per month for 60 months, it also provided that Husband's maintenance obligation would be reduced to \$600 per month "once [Wife] receives her equity in the home and Commercial property" and that further reductions may be appropriate "[o]nce she begins receiving regular monthly payments from her share of the Corporation." At the same time, the child-support calculation only credited Husband for \$600 monthly spousal maintenance, directly contradicting the maintenance award. In view of the decree's internal inconsistencies, we vacate the spousal maintenance award and remand with directions to the superior court to clarify the amount and duration of the award.

II. WIFE'S CROSS-APPEAL

A. The Superior Court Did Not Abuse its Discretion by Declining to Find Waste.

¶14 Wife first contends that the superior court should have awarded her half of approximately \$75,000 in "abnormal expenses" she contends Husband incurred using White Mountain accounts. The superior court must divide community property "equitably, though not necessarily in kind" absent a compelling reason to do otherwise. A.R.S. § 25-318(A); *Kelly v. Kelly*, 198 Ariz. 307, 309, ¶ 7 (2000). The court may, however, consider waste, including "excessive or abnormal expenditures," when apportioning community property. A.R.S. § 25-318(C); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 6 (App. 1998). We review the evidence in the light most favorable to upholding the court's distribution and will affirm if

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it is reasonably supported by the evidence. *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13 (App. 2007).

¶15 Wife presented evidence showing that Husband incurred significant personal expenditures on White Mountain accounts. Husband, however, testified that after Wife filed for divorce, he reimbursed the company in full for his personal expenditures. The court reviewed the relevant evidence and determined it could not find “that those amounts were not either paid back to the Corporation or counted as part of [Husband’s] compensation as an employee.” The court had discretion to accept Husband’s testimony on those matters. See *Vincent v. Nelson*, 238 Ariz. 150, 155, ¶ 18 (App. 2015) (“[T]he family court is in the best position to judge the credibility of witnesses and resolve conflicting evidence, and appellate courts generally defer to the findings of the family court.”).

B. The Superior Court Did Not Abuse its Discretion by Limiting Wife’s Recovery of Attorney’s Fees.

¶16 Wife next contends that the superior court’s award of attorney’s fees under A.R.S. § 25-324 was too modest.

¶17 The court may award attorney’s fees under § 25-324(A) “after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings.” We will not disturb the court’s award absent an abuse of discretion. *Gutierrez*, 193 Ariz. at 351, ¶ 32. According to Wife, she was entitled to an award of “at least \$11,000” because “the evidence clearly supported a determination that [] Husband had taken an unreasonable position.” But Wife cites no specific evidence demonstrating any such positions. We therefore find no abuse of discretion.

C. We Need Not Decide Wife’s Challenge to the Absence of Post-Judgment Interest.

¶18 Wife finally contends that the superior court erred by not awarding her post-judgment interest on the equalization payment. We need not reach that issue because we vacate and remand the property-division orders.

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CONCLUSION

¶19 We vacate the court's orders dividing community property and awarding spousal maintenance, and we remand for further proceedings consistent with this decision. We otherwise affirm.

¶20 Both parties request attorney's fees on appeal under § 25-324(A). Though neither party took unreasonable positions on appeal, the record indicates that Husband earns at least twice as much as Wife. We therefore will award Wife a reasonable amount of attorney's fees upon compliance with ARCAP 21.



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