IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

OMEGA PERALTA BARROSO, *Petitioner/Appellee*,

v.

JORGE L BARROSO, *Respondent/Appellant*.

No. 1 CA-CV 17-0347 FC
FILED 8-23-2018

Appeal from the Superior Court in Maricopa County
No. FC2015-054178
The Honorable Chuck Whitehead, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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By James P. Mueller
Counsel for Petitioner/Appellee

Udall Shumway, PLC, Mesa
By Steven H. Everts
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 This is an appeal from spousal-maintenance, child-support, and property-division orders in a dissolution action. We vacate and remand the spousal-maintenance order because it contemplates retroactive application, and we vacate and remand the child-support order because it relies on the erroneous spousal-maintenance order. Further, based largely on insufficient findings, we vacate and remand the property-division orders with respect to the division of precious metals, restricted stock units, and reimbursement for rental income. We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Omega Peralta Barroso ("Mother") and Jorge Barroso ("Father") married in Washington and had two children together. Father later commenced dissolution proceedings in Washington, but he dismissed the action after the parties reconciled and moved to Arizona in September 2015. Weeks after the move, Father obtained an order of protection against Mother, and Mother filed a petition for legal separation in Arizona.

¶3 In January 2016, the superior court entered temporary orders awarding sole legal decision-making to Father and supervised parenting time to Mother, with Father to pay for the supervision subject to possible reallocation. The court further ordered Mother to pay child support (but later corrected the child-support calculation and concluded that neither party owed support). The parties stipulated to the appointment of a custody evaluator, with Father to pay for the evaluation subject to possible reallocation. The court granted Mother's motion to convert the legal-separation proceeding to a dissolution proceeding.

¶4 The matter proceeded to trial in October and December 2016. At trial, the parties agreed to joint legal decision-making, a tiered parenting-time schedule, and appointment of an interventionist. They further agreed that they each would receive their separate business ventures, that they each would receive their separate condominiums in Florida, that they

would share equally in the proceeds from the sale of their Washington residence, and that each would assume all credit card debt in his or her name. They also agreed that a third party would determine the character of all retirement benefits and would prepare all necessary domestic-relations orders.

¶5 In February 2017, the court divided the remainder of the parties' property, ordered Father to pay spousal maintenance and child support, and awarded attorney's fees to Mother. Father timely moved for an amended judgment and new trial. The court denied the motion and dissolved the parties' marriage. Father appeals.

DISCUSSION

I. THE SUPERIOR COURT ERRONEOUSLY IMPOSED RETROACTIVE SPOUSAL MAINTENANCE.

¶6 Father first challenges the superior court's award of spousal maintenance.

¶7 The court held Mother eligible for maintenance under A.R.S. § 25-319(A)(1), finding that she lacked sufficient property to provide for her reasonable needs. The court then made findings on each of the factors set forth in § 25-319(B), and concluded that Mother was entitled to maintenance of $3,000 per month for 30 months, "effective as of October 1, 2015." The court explained that "[t]he 30 months will allow Mother the time that she needs to secure additional employment and arrange for any training she needs to secure appropriate employment."

¶8 We find nothing in § 25-319 or Arizona case law to support imposition of a retroactive maintenance obligation that places a party in arrears (here, 16 months in arrears) from the outset. Retroactive maintenance is available only in the context of an order modifying an initial obligation. *See* A.R.S. § 25-327(A). Further, a retroactive obligation in this case is inconsistent with the court's rationale that Mother "will" need 30 months to secure appropriate employment.

¶9 Based on the retroactivity aspect alone, we vacate and remand the maintenance obligation. And because the child-support calculation was partially based on the maintenance obligation, we vacate and remand it as well.

II. REMAND IS REQUIRED FOR SEVERAL OF THE SUPERIOR COURT'S PROPERTY-DIVISION ORDERS.

¶10 Father next challenges many components of the superior court's property-division orders.

¶11 We review de novo the characterization of property as community or separate. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15 (App. 2000). A.R.S. § 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.*

¶12 We hold that the superior court failed to make adequate findings with respect to several of its orders, despite Father's timely request under Ariz. R. Fam. Law P. ("ARFLP") 82(A). We conclude that other of the court's orders were proper.

a. Remand Is Required to Address the Superior Court's Division of Precious Metals, Restricted Stock Units, and Rental Income.

i. The Superior Court Made No Findings Regarding the Community Status of the Precious Metals.

¶13 Father contends that the superior court failed to equally divide precious-metal certificates and coins because it simply ordered that each party retain the certificates and coins in his or her possession. Father contends that under that scheme, he would be entitled to an equalization payment of approximately $8,000.

¶14 Father's argument correctly assumes that the precious metals were community property. At trial, Father testified that metals were acquired during the marriage. Though Mother claimed that the metals held by each spouse constituted separate property, she offered no evidence to support her claim and rebut Father's testimony that the metals were acquired during the marriage. Accordingly, under A.R.S. § 25-211(A), the property was presumptively community. *See In re Marriage of Foster*, 240 Ariz. 99, 101, ¶¶ 6–9 (App. 2016).

¶15 But the court's order does not make clear whether it treated the metals as community and decided that an unequal division was nonetheless equitable under § 25-318(A), or whether it treated them as separate property. The latter approach would have been legal error, and the former approach—while potentially within the court's discretion—would require explanation. We therefore vacate and remand the court's orders regarding the metals for resolution of the ambiguity.

ii. The Superior Court Failed to Consider Evidence of Sales of Restricted Stock Units.

¶16 Father contends that all restricted stock units ("RSUs") he acquired during the marriage were cashed in to pay for community expenses.

¶17 At the outset, we reject Father's argument that the superior court erred by characterizing those RSUs as community property. The RSUs were granted during the marriage, and Father did not present evidence at trial sufficient to rebut the presumption that they were community property. *Cf. Brebaugh v. Deane*, 211 Ariz. 95, 98, ¶¶ 7–15 (App. 2005) (holding that unvested stock options' characterization as community or separate property depends upon employer's purpose for awarding options, and concluding that agreements' language characterizing options as incentives for continued employment and new hires was sufficient to overcome community-property presumption). Father did not provide the court a copy of his company's "stock incentive plan" summary until after trial. Even assuming that the plan summary weighed in favor of a separate-property characterization, it was provided too late. *See Evans v. Valley Radiologists, Ltd.*, 127 Ariz. 177, 180 (1980) (holding overpayment claim waived when no evidence of overpayment was offered at trial and claim was not raised until after entry of judgment).

¶18 The parties' joint tax returns do reveal, however, that at least some of the RSUs were sold during the marriage. Yet it appears that the superior court did not take *any* sales into account. If the court divided community assets no longer in existence—a possibility that we cannot discount on this record—it erred. We therefore vacate and remand for the court to determine whether the division of RSUs, and the resulting equalization payment, properly accounted for property that the parties actually owned at the time of dissolution. We note that the court's decision on remand may affect its spousal-maintenance determination.

iii. The Superior Court Made No Findings Concerning Expenses Father Claimed to Have Paid for the Parties' Rental Property.

¶19 Father contends that the superior court erred by disregarding his undisputed testimony that mortgage and upkeep expenses reduced the income he received from renting out the parties' Washington residence. Mother contends that Father's testimony was unsupported by documentation, and that the court properly disregarded it in favor of a simpler division of the undisputed amount of rental income. But while documentation would have been desirable, it was not a prerequisite for the admission of Father's testimony. In its discretion, the court could have accepted or rejected Father's testimony on credibility grounds. But the court set forth no findings at all, instead summarily ordering reimbursement with no accounting for any of the expenses Father claimed to have paid. On this record, we cannot determine whether the court simply overlooked Father's testimony or whether it rejected it as incredible. Accordingly, we vacate the court's order requiring Father to reimburse Mother for half of the rental income, and we remand for further findings.

b. The Superior Court Acted Within Its Discretion With Regard to Its Allocation of Vehicles, Community Bank Accounts, and Fees.

i. The Superior Court Did Not Err by Declining to Discount the Value of a Community Vehicle.

¶20 Father contends that the superior court abused its discretion in valuing a community vehicle. The court valued the community vehicle at $39,364 and awarded it to Father, with Mother receiving an equalization payment of $18,259 (half the value of the community vehicle, less $2,846 for the value of an encumbered community vehicle that Mother traded in after the date of service). Father testified that the community vehicle needed repairs and was worth only about $30,000 by the time of trial. He now contends that his testimony was the only evidence of the vehicle's value. But Father had, in a January 2016 interrogatory response admitted at trial, provided the $39,364 valuation used by the court. And though Father provided estimates for repair costs at trial, the estimates established neither the repairs' necessity nor a $30,000 value. We discern no abuse of discretion in the court's decision to rely on the valuation that Father provided at the time of the interrogatories. *See Sample v. Sample*, 152 Ariz. 239 (App. 1986) (holding that court has discretion to choose equitable valuation date).

ii. The Superior Court Did Not Err by Ordering Equal Division of Community Bank Accounts.

¶21 Father contends that the superior court abused its discretion by requiring him to make an equalization payment to achieve an equal division of the funds in two community bank accounts. He contends that the equalization payment was unwarranted because he spent funds in the account he controlled on community expenses. At trial, however, the expenditures that Father identified almost entirely postdated service of Mother's petition, and therefore could not be community expenses. *See* A.R.S. § 25-211(A) (community ends after service of petition for legal separation or dissolution if petition results in decree). We therefore conclude that the court did not err in its division of the bank accounts.

iii. The Superior Court Correctly Addressed Reimbursement for the Custody Evaluation, Supervised Parenting Time, and Child Support.

¶22 Father contends that the superior court should have required Mother to reimburse him for the fees he paid for the custody evaluation and supervised parenting time. The court's earlier orders, however, contemplated that Father would pay for these services with the possibility—not a guarantee—of future reallocation. We perceive no abuse of discretion in the court's decision to leave the obligation with Father. Likewise, we perceive no abuse of discretion in the court's decision to reimburse Mother for child support erroneously paid under the temporary orders.

III. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION TO AWARD ATTORNEY'S FEES TO MOTHER.

¶23 Father finally challenges the superior court's award of attorney's fees to Mother under A.R.S. § 25-324(A), which provides:

> The 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].

We review an award under § 25-324(A) for abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 56 (App. 1999).

¶24 Here, the court found a "substantial disparity of financial resources between the parties" based on Father having considerably "more resources available to contribute toward [M]other's attorney's fees and costs." The court further found that "Father has taken unreasonable positions and that he has acted unreasonably in the litigation."

¶25 Father contends that the financial-resources finding ignored the fact that Father owed equalization payments, spousal maintenance, and child support. But even so, the undisputed evidence showed that Father had a long-term high-paying job, whereas Mother was in debt and struggling to reenter the job market. We therefore find no abuse of discretion in the court's conclusion that Father had substantially greater financial resources than Mother. We also find no abuse of discretion in the court's conclusion that Father took unreasonable positions in the litigation—especially in view of the parties' agreement on joint legal decision-making and parenting time after Father's insistence on supervision. We conclude that the court's decision to award attorney's fees to Mother was sufficiently supported by the evidence.

CONCLUSION

¶26 We affirm in part, and vacate and remand in part, as set forth above. We deny both parties' requests for attorney's fees on appeal.

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