IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

FREDRIC J. BANASIK, JR., *Petitioner/Appellant*,

v.

HOLLY ANN MCLAUGHLIN, *Respondent/Appellee*.

No. 1 CA-CV 17-0778 FC
FILED 10-23-2018

Appeal from the Superior Court in Yavapai County
No. V1300DO201380316
The Honorable Jeffrey G. Paupore, Judge

AFFIRMED

COUNSEL

Linda Wallace PLLC, Sedona
By Linda Bagley Wallace
Counsel for Petitioner/Appellant

Hufford Horstman Mongini Parnell & Tucker PC, Flagstaff
By J. Leslie McLean
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

W E I N Z W E I G, Judge:

¶1 Fredric J. Banasik, Jr. ("Husband") appeals from a decree of marital dissolution, arguing the court erred in its characterization and division of community assets and debts, valuation of the marital home and denial of his request for attorneys' fees. We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Holly A. McLaughlin ("Wife") married in 2007. They had no children together. Wife, however, had a daughter from a previous marriage who lived in the marital home and received support from the couple. Husband commenced this action to dissolve the marriage in July 2013.

¶3 Husband and Wife vacated the marital home in November 2013, listed it for sale and accepted an offer for $265,000 in August 2014, but the transaction never closed. Wife and daughter moved back into the marital home in October 2014, remaining there throughout the divorce proceedings. Wife made all the mortgage payments on the marital home from November 2013 until the divorce was finalized in March 2017, including the eleven-month period in which the home was vacant.

¶4 Husband and Wife signed and filed a notice of settlement in December 2014, advising the court the "matter ha[d] been compromised and settled, and an appropriate Consent Decree w[ould] be submitted to the Court in due course." No terms were provided, and no consent decree was ever filed. Husband instead reported, six weeks later, that the parties had not reached a settlement. Both parties then retained attorneys.

¶5 Husband filed a Chapter 7 bankruptcy petition in October 2015 and so informed the superior court, which stayed the dissolution action until Husband obtained a discharge in January 2016 under 11 U.S.C. § 727. Husband's discharge included $32,000 in credit card debt he accumulated during the marriage.

¶6 The superior court held a two-day trial on community property and debt allocation issues. The court heard testimony from Husband and Wife, admitted exhibits and considered the parties' respective legal positions regarding the effect of Husband's bankruptcy discharge. In March 2017, the court dissolved the marriage. It issued a dissolution decree several months later.

¶7 Husband timely appealed the dissolution decree and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 Husband argues the court erred by undervaluing the marital home, improperly allocating community assets and debts between the parties and failing to award him attorneys' fees in the dissolution action. We consider each argument in turn.

A. Valuation of the Marital Home

¶9 The superior court found that the "fair market value of the marital home in 2014 was $265,000, based upon a sale agreement entered into by the parties that failed to close," and determined that "[n]o other reliable evidence was received to determine a different fair market value." The court then found the "equity in the marital home, at the time the divorce proceeding was served on [Wife], [was] $40,000."

¶10 Husband argues the court improperly undervalued the marital home by using the valuation "at the date of dissolution rather than the date of service." He then asserts that the undisputed fair market value of the house at the time of the evidentiary hearing was about $300,000 based on testimony from him and Wife.

¶11 We find no error. The superior court has broad discretion to determine the value of community assets for distribution under A.R.S. § 25-318. *Sample v. Sample*, 152 Ariz. 239, 242 (App. 1986). The court abuses its discretion when competent evidence does not support its decision or the court legally errs in making a discretionary decision. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018). Arizona law does not require the court

to value the marital home as of any particular date. *Sample*, 152 Ariz. at 242 ("[A] trial court must be allowed to utilize alternative valuation dates.").[1]

¶12 Nor did the court abuse its broad discretion when it used an August 2014 free-market offer for the marital home to determine its value after concluding that the offer represented the most reliable evidence of valuation. Neither Husband nor Wife submitted a professional appraisal and the court was not required to accept the testimony of Husband and Wife, whose higher valuations hinged on "the internet, mainly"; a "guess[]" as to what the home would "probably" sell for; comparable listings or a "comparable report" never admitted into evidence; and a realtor's alleged thoughts or "guess" as to the home's value. *Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 85 (App. 1995) (superior court's role of weighing evidence and determining witness credibility is exclusive).[2]

B. College Fund

¶13 Wife received regular child support payments from the biological father of her daughter. She first deposited the funds in a community bank account, but ultimately transferred the funds to a discrete bank account set aside for her daughter's college education (the "education bank account"). Husband contends the superior court erred because Wife funded the education bank account with money from a community bank account.

¶14 We review *de novo* whether property is separate or community property. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15 (App. 2000). Separate property is presumed to be community property if commingled with and indistinguishable from community property. *Martin v. Martin*, 156 Ariz. 440, 443 (App. 1986). The party seeking to establish the

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[1] Husband's legal authorities do not support a different conclusion. A.R.S. § 25-211 provides no direction on valuation of community assets, but instead concerns the character of assets acquired during marriage. And the cases he cites do not involve the valuation of community assets for distribution in a dissolution action. *Honnas v. Honnas*, 133 Ariz. 39, 40-41 (1982) (valuation of community lien on separate property); *Drahos v. Rens*, 149 Ariz. 248, 249-51 (App. 1985) (same).

[2] Husband provides no legal authority for his argument that Wife is estopped from disputing the valuation evidence she provided. *In re Aubuchon*, 233 Ariz. 62, 64-65, ¶ 6 (2013) (arguments waived if unsupported by authority).

separate character of commingled property must do so by clear and convincing evidence. *Franklin v. Franklin*, 75 Ariz. 151, 155 (1953). We view the evidence in the light most favorable to supporting the superior court's decision and uphold the court's factual findings unless they are clearly erroneous. *Walsh v. Walsh*, 230 Ariz. 486, 490, ¶ 9 (App. 2012).

¶15 The superior court specifically concluded that the child support payments in the education bank account were Wife's separate property. We concur. Wife did not earn the court-ordered child support payments during the marriage. *See* A.R.S. § 25-211(A). Wife instead accepted these regular payments from her daughter's biological father for her daughter's benefit. *Cf. Hines v. Hines*, 146 Ariz. 565, 567 (App. 1985) (child support is premarital separate debt).

¶16 And though temporarily commingled with community property assets, the child support payments were easily traced to the education bank account. Husband did not contribute to the education bank account, had no access to it and believed it was "set aside for [daughter's] future educational expenses." Wife received $400 per month in child support for her daughter. Wife testified that she "always transfer[red] the full child support amount into [the education bank account]" and "you can see [that] the exact amount" of the child support payment "match[es] the deposit" into the education bank account. And the few times child support funds were used for other purposes, Wife immediately reimbursed the education bank account "as soon as [her] paycheck came in." *See In re Marriage of Cupp*, 152 Ariz. 161, 164 (App. 1986) ("The mere fact that the property was commingled does not cause it to lose its separate identity, as long as the separate property can still be identified."). The court did not err in concluding the education bank account funds were Wife's separate property.

C. Community Debt

¶17 Husband contests the superior court's allocation of community debt. The superior court enjoys "broad discretion in determining what allocation of property and debt is equitable under the circumstances," *In re Marriage of Inboden*, 223 Ariz. 542, 544, ¶ 7 (App. 2010), and in doing so, considers "the overall marital estate," *In re Marriage of Flower*, 223 Ariz. 531, 537, ¶ 24 (App. 2010).

¶18 Husband first claims the superior court erred by ordering him to reimburse Wife for one-half of all mortgage payments after separation. Husband contends he should only be charged for "those mortgage

payments made by Wife while the [marital home] was vacant." Husband offers no legal authorities for his argument, and we conclude the superior court did not abuse its broad discretion to achieve an equitable debt allocation as to Husband, especially when Wife is responsible for more debt than him.

¶19 Husband next argues he should have received credit for $32,000 in community debt discharged under his bankruptcy. Husband is incorrect. Wife enjoyed some level of protection during the marriage, U.S.C. § 524(a)(3), but was accountable for the credit card debt after dissolution because she did not join Husband's bankruptcy petition, *see* 11 U.S.C. §§ 101(13), 727(a) (granting discharge to the "debtor," which is a "person . . . concerning which a case under this title has been commenced"); *In re Heilman*, 430 B.R. 213, 218-19 (B.A.P. 9th Cir. 2010).

D. Attorneys' Fees

¶20 Husband claims the superior court erred by not awarding his attorneys' fees in the dissolution action because Wife had a larger income and engaged in unreasonable conduct during the lawsuit, including her alleged breach of a settlement agreement between the parties and removal of his name from a health insurance policy despite a contrary injunction. A court may award attorneys' fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). We review the court's denial of attorneys' fees for an abuse of discretion. *Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 6 (App. 2014). We find none. An award of fees under A.R.S. § 25-324 is permissive, not mandatory. *Id.* at 494, ¶ 9. And Husband offers no authority for the proposition that an award of fees was required here.

¶21 On appeal, Husband and Wife both request an award of attorneys' fees under A.R.S. § 25-324. In our discretion, we deny their requests. As the prevailing party, Wife is entitled to her taxable costs upon compliance with ARCAP 21.[3]

CONCLUSION

[3] Wife asks us to issue an order that Husband execute a quit claim deed, but Wife must first pursue such relief in the superior court. *See Muscat by Berman v. Creative Innervisions LLC*, 244 Ariz. 194, 200, ¶ 22 (App. 2017) (superior court must first consider plaintiff's statutory claim); Ariz. R. Fam. Law P. 91 (procedures to enforce a family court order).

¶22 We affirm the dissolution decree.

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