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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

In re the Marriage of:

DON R. TYRRELL, *Petitioner/Appellee*,

v.

JEAN A. TYRRELL, *Respondent/Appellant*.

No. 1 CA-CV 18-0096 FC
FILED 12-18-2018

Appeal from the Superior Court in Maricopa County
No. DR1993-002335
The Honorable Lori Horn Bustamante, Judge

AFFIRMED

COUNSEL

Burggraff Tash Levy PLC, Scottsdale
By Bryan K. Levy
Counsel for Petitioner/Appellee

Law Firm of M. Paul Fischer PC, Mesa
By M. Paul Fischer, Thomas J. Griggs
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Jean Tyrrell (“Wife”) appeals the family court’s order terminating spousal maintenance payments from Don Tyrrell (“Husband”). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Wife and Husband married in February 1957 and divorced in March 1994. The parties’ decree of dissolution stated that Husband had agreed to pay Wife \$1,750 per month until either of the parties died or Wife remarried. Husband moved to modify or terminate spousal maintenance in March 2017 because he was 82 years old, his company Alpha Delta Communications, Inc. was \$600,000 in debt, and he wanted to retire. The court held an evidentiary hearing in October 2017.

¶3 At the hearing, Husband testified that he was currently earning \$3,000 per month from Alpha Delta and receiving \$1,738 per month from Social Security and about \$1,100 per month from his pension. Husband testified that Alpha Delta owed about \$600,000 to Jim Burns and provided supporting documentation. He then explained that he intended to transfer ownership of Alpha Delta to Burns on January 1, 2018, in exchange for Burns’s assumption of its debts. Husband also presented a signed document evidencing his intention to transfer Alpha Delta to Burns. The document, however, did not have Burns’s signature. Husband further testified that if the transfer did not occur, he still intended to retire. Husband claimed that his retirement would reduce his income by \$3,000 per month and that his only remaining income sources would be his Social Security and his pension. With this reduction, Husband testified that he would “barely” be able to meet his monthly expenses. Thus, he requested that the court terminate spousal maintenance effective January 1, 2018. During cross-examination, Husband testified that his primary residence was valued at \$449,000 and was encumbered by a debt of \$397,000. Husband acknowledged that he had bought and sold several homes “over the years,” but was unsure if he currently had any homes listed for sale.

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¶4 Wife testified that she received \$723 per month from Social Security, about \$353 per month from her IRA as a mandatory minimum distribution, and \$1,000 per month from a life insurance annuity. As of the hearing date, Wife’s IRA contained about \$106,000 and her life insurance annuity was worth about \$61,000. She also testified that she had no remaining mortgage payments on her home, valued at \$164,000. Wife further testified that she was in the process of collecting additional pension funds of \$7,000 held in Hawaii and \$56,000 held in Tennessee.

¶5 After the hearing, the court noted that it had considered the testimony, exhibits, and arguments presented and also had considered all of the relevant factors concerning modification of the spousal maintenance award. The court found that Husband’s income would decrease by \$3,000 on January 1, 2018. The court then concluded that based on Husband’s decreased monthly income and Wife’s ability to meet her reasonable needs, Husband had shown a substantial and continuing change in circumstances. The court then analyzed the factors set forth in A.R.S. § 25-319(B) for determining the appropriate amount and duration of spousal maintenance. Among those factors, the court noted that both parties were in their 80s and unable to earn an income in the work force. The court then ordered spousal maintenance to terminate on January 1, 2018.

¶6 Wife moved for a new trial under Arizona Rule of Family Law Procedure 83. She argued that Husband was voluntarily giving up his \$3,000 monthly salary and that Burns’s acquisition of Alpha Delta was speculative. The court denied Wife’s motion, and she timely appealed.

DISCUSSION

¶7 Wife claims that the family court erred in finding that Husband showed a substantial and continuing change of circumstances that warranted termination of her spousal maintenance. Spousal maintenance determinations are reviewed for an abuse of discretion. *McClendon v. McClendon*, 243 Ariz. 399, 401 ¶ 8 (App. 2017). This Court defers to the family court’s factual findings unless they are clearly erroneous or unsupported by substantial evidence. *Id.* “The burden of proving changed circumstances is on the party seeking modification.” *Id.* at ¶ 9 (quoting *Scott v. Scott*, 121 Ariz. 492, 494 (1979)).

¶8 A spousal maintenance award may be modified “only on a showing of changed circumstances that are substantial and continuing.” A.R.S. § 25-327(A). A substantial change in the financial circumstances of either party may warrant modification of the award. *Chaney v. Chaney*, 145

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Ariz. 23, 25 (App. 1985). The change in circumstances must exist before a party may petition for modification; relying on future events is too “speculative.” *Id.* at 26–27. After finding that a substantial and continuing change in circumstances exists, the court must determine what modification is appropriate in light of the changed circumstances. *Scott*, 121 Ariz. at 495 n.5 (stating that courts must consider “the same . . . factors taken into consideration when granting an award for support and maintenance” under A.R.S. § 25–319).

¶9 Here, the family court received evidence that Husband’s income would decrease by \$3,000 per month beginning January 1, 2018.¹ The court also noted that it had received evidence of Wife’s ability to meet her reasonable needs through her mortgage-free home, IRA, life insurance annuity, and access to \$63,000 in pensions held in other states.² Thus, the court concluded that Husband had showed a substantial change in circumstances and ordered the spousal maintenance payments to terminate on January 1, 2018. Because sufficient evidence supports the family court’s finding that a change in circumstances warranted a modification of spousal maintenance, the court did not abuse its discretion by terminating Husband’s spousal maintenance obligation.

¶10 Wife asserts that circumstances have not changed because Husband can continue working and is choosing to stop. A petition for

¹ At the time the family court made its findings, Husband had not yet transferred ownership of Alpha Delta, nor had he retired. Thus, the court should not have considered that evidence in its change-of-circumstances analysis. *See Chaney*, 145 Ariz. at 26–27. This Court stayed the appeal and revested jurisdiction to the family court to determine whether Husband had in fact retired and transferred ownership of Alpha Delta to Burns on January 1, 2018, thereby reducing his income by \$3,000 per month. The family court issued an order based on a stipulation by the parties, which stated that “[t]he sale to Burns has occurred.” We infer that the statement is an affirmative answer to all of this Court’s inquiries. As such, Wife’s argument that the family court erred by relying on speculative evidence relating to the sale of Alpha Delta is moot.

² During its analysis, the court mistakenly found that Wife had additional funds from the sale of vacation properties. Although Wife had additional funds in Hawaii and Tennessee, they are not related to the sale of any real property. This mistake, however, did not affect the family court’s determination.

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modification cannot be denied, however, when a party retires voluntarily in good faith and not merely to reduce the spousal maintenance obligation. *Chaney*, 145 Ariz. at 27. Here, Husband was 82 years old and had been paying spousal maintenance for about 23 years. The family court also concluded that both parties were in their 80s and could no longer earn an income in the work force. Thus, substantial evidence supports the conclusion that Husband's sale of Alpha Delta was in good faith and that he was actually retiring.

¶11 Next, Wife argues for the first time that the court did not consider Alpha Delta's goodwill value as part of the company's overall value in determining spousal maintenance. The record shows that Husband received debt forgiveness in exchange for transferring Alpha Delta and all of its assets to Burns, including its goodwill. The evidence does not support Wife's contention that Husband received anything of pecuniary value for Alpha Delta's goodwill.

¶12 Wife also argues that if Husband sold his real properties, he would be able to continue his spousal maintenance payments. The court noted in its decision that it had considered all of the evidence presented, which included any evidence related to Husband's real properties. After finding that the \$3,000 per month decrease in income was a substantial and continuing change in circumstances, the court conducted its A.R.S. § 25-319 analysis and noted that it had considered all relevant factors. Therefore, the record shows that the court took Husband's real properties into account when it terminated spousal maintenance.

¶13 Next, Wife argues she was entitled to spousal maintenance based on the factors in A.R.S. § 25-319(A). The question before the family court, however, was not whether Wife was qualified to receive spousal maintenance; the question was whether a change in circumstances justified the modification of spousal maintenance. The court noted that it had considered all of the evidence that it had received and first determined under A.R.S. § 25-327(A) whether a change in circumstances occurred. After finding that a change had occurred, the court noted that it had considered all of the relevant factors under A.R.S. § 25-319(B); it found that the factors justified terminating Husband's spousal maintenance obligation. Additionally, even if the court found Wife was still qualified to receive spousal maintenance, the court still had discretion to deny spousal maintenance if appropriate under the circumstances. *See* A.R.S. § 25-319(A) (family court "*may* grant a maintenance order" for a qualified spouse) (emphasis added). Therefore, Wife's argument under A.R.S. § 25-319(A) is not persuasive.

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¶14 Wife further argues that the court should not have terminated spousal maintenance because doing so would lower her standard of living, and she would not be able to support herself. Again, the record shows that Wife owned a mortgage-free home, had a life insurance annuity worth \$61,000, had an IRA worth \$106,000, and had access to \$63,000 in out-of-state pension funds. Thus, the family court concluded that Wife could meet her reasonable needs independently. In light of this evidence, Wife's argument that she cannot support herself without spousal maintenance is not persuasive.

¶15 Husband and Wife have both requested attorneys' fees and costs on appeal under A.R.S. § 25-324 and Arizona Rule of Civil Appellate Procedure ("ARCAP") 21. In an exercise of our discretion, we decline to award attorneys' fees. We award Husband his costs upon his compliance with ARCAP 21.

CONCLUSION

¶16 For the foregoing reasons, we affirm.



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