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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

MARVIN JAMES KOESTER, *Petitioner/Appellant,*

v.

WENDY FILLMORE, *Respondent/Appellee.*

No. 1 CA-CV 18-0084 FC
FILED 1-10-2019

Appeal from the Superior Court in Maricopa County
No. FN2016-052844
The Honorable Joseph C. Kreamer, Judge

AFFIRMED

COUNSEL

Marvin James Koester, Phoenix
Petitioner/Appellant

Weiss-Riner Law PLC, Scottsdale
By James E. Riner, Melissa Weiss-Riner
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Marvin Koester (“Husband”) appeals the dissolution decree dissolving his marriage to Wendy Fillmore (“Wife”). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in April 2006. Husband and Wife had disparate earning capabilities, with Husband working as a union plumber for more than \$35.00 per hour, while Wife worked as a caregiver for minimum wage. They maintained a moderate standard of living during the marriage, but to pay their bills, they often sold personal items and took funds from Husband’s retirement account. Husband continued this pattern after service of the divorce petition, and he sold and kept the proceeds of over \$13,000 of community property without informing Wife.

¶3 In November 2016, Husband served Wife with the petition for dissolution, and in December 2017, the superior court conducted an evidentiary hearing. The superior court awarded Wife spousal maintenance of \$500 per month for three years, but denied her request for attorney’s fees, noting that neither party had substantial financial resources. The superior court ordered that the parties’ community property be divided as follows: (1) one horse to Husband and two horses to Wife; (2) a truck with equity of \$15,000 to Wife and a truck with negative equity of \$9,000 to Husband; and (3) a two-horse trailer to Husband and a four-horse trailer to Wife. Husband and Wife were to keep all other community property in their possession, including the amount Husband had received from the sale of community assets. The court also awarded Wife two bank accounts with minimal amounts and ordered that Husband and Wife equally split another account containing less than \$2,000. The court ordered that both Husband’s and Wife’s retirement accounts be divided by a qualified domestic relations order (“QDRO”) and ordered Husband and Wife to equally divide a \$1,500 credit card debt.

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¶4 Husband appealed, and we have jurisdiction under Arizona Revised Statutes (“A.R.S.”) § 12-2101(A)(1).

DISCUSSION

I. Spousal Maintenance.

¶5 Husband argues that the superior court erred by awarding Wife spousal maintenance. We review an award of spousal maintenance for an abuse of discretion and will affirm the award if reasonable evidence supports it. *Leathers v. Leathers*, 216 Ariz. 374, 376, ¶ 9 (App. 2007).

¶6 Under A.R.S. § 25-319, the superior court conducts a two-part inquiry to determine if spousal maintenance is appropriate. First, the court determines whether the spouse seeking maintenance is eligible for an award, *see* § 25-319(A), and then the court determines the appropriate amount and duration of the award, *see* § 25-319(B).

¶7 Here, the superior court assessed and considered the relevant factors under A.R.S. § 25-319. The court found that Wife was eligible for spousal maintenance because she lacked sufficient property to provide for her reasonable needs. After considering the factors specified in § 25-319(B), the court awarded Wife \$500 per month for three years, finding that: (1) Husband and Wife had a moderate standard of living; (2) the marriage was of moderate length; (3) Wife had limited earning capabilities; (4) Husband’s income would likely be between \$60,000 and \$70,000 in the next few years; (5) Husband earned far more than Wife; and (6) Wife was limited in her ability to meet her own needs.

¶8 Husband argues that because Wife was able to support herself during their separation, the superior court should not have awarded spousal maintenance. But after the property division, Wife was left with only two horses, one trailer, one vehicle, and several items of personal property. Wife earned minimum wage as a caregiver, while Husband earned over \$70,000 annually. A spouse need not be destitute to receive spousal maintenance, *see Sommerfield v. Sommerfield*, 121 Ariz. 575, 578-79 (1979), and reasonable evidence supports the superior court’s award of spousal maintenance.

¶9 Husband further claims that spousal maintenance was not warranted because during the marriage, they often had to sell personal items and use money from his retirement account to pay their bills. Although a spouse is not entitled to “live beyond her means merely because she has done so in the past,” *McClennen v. McClennen*, 11 Ariz. App. 395,

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399 (App. 1970), here, the court was aware of Husband and Wife’s spending patterns, and nevertheless noted that they had a “moderate” standard of living. The court properly took into account the parties’ standard of living, *see Rainwater v. Rainwater*, 177 Ariz. 500, 503 (1993), and did not abuse its discretion by awarding a relatively modest amount of spousal maintenance for a limited period of time.

II. Property Valuation and Division.

¶10 Husband asserts that the superior court improperly valued the parties’ community property and did not effectuate an equal division of the property. We review a superior court’s valuation determinations for an abuse of discretion. *See Schickner v. Schickner*, 237 Ariz. 194, 197, ¶ 13 (App. 2015). We similarly review the overall community property division for an abuse of discretion, *In re Marriage of Inboden*, 223 Ariz. 542, 544, ¶ 7 (App. 2010), and we will uphold the division unless the record lacks competent evidence to support it. *Platt v. Platt*, 17 Ariz. App. 458, 459 (App. 1972).

¶11 The superior court has discretion to rely on various methods of valuation, *see Kelsey v. Kelsey*, 186 Ariz. 49, 51 (App. 1996), and that court is in the best position to weigh the evidence and determine witness credibility. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13 (App. 1998).

¶12 At the hearing, Wife claimed that Husband possessed \$37,000 more in community property than Wife, and that the difference should be an offset in her favor. Wife supported this assertion with quotes from online retail sites. The superior court credited Wife’s testimony, but nevertheless awarded less of an offset than Wife had requested. Under the circumstances presented, the superior court’s valuation determination was not an abuse of discretion.

¶13 Husband further argues that the division of community property was inequitable. But both Husband and Wife agreed that Wife’s truck had \$15,000 in equity and that Husband’s truck had \$9,000 in negative equity. Additionally, by Husband’s own admission, he sold over \$13,000 worth of community property after service of the petition for dissolution and kept the proceeds. Accordingly, the court did not abuse its discretion by determining that the difference in value of the cars awarded to Husband and Wife (and Wife’s retention of an additional horse) was offset by the value of the community property assets Husband kept or had sold after service of the petition.

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¶14 Husband also asserts that the superior court erred when it directed Husband and Wife to split a \$1,500 credit card debt. Husband claims that Wife had used the credit card to pay for attorney's fees, which contravenes the superior court's denial of Wife's request for attorney's fees. Husband did not raise this claim at the evidentiary hearing, however, and he provided no documentary evidence supporting his assertion. In contrast, Wife listed the \$1,500 credit card debt in her financial affidavit as community debt for food, and the court could properly find Wife's claim credible. *See Gutierrez*, 193 Ariz. at 347, ¶ 13. Thus, competent evidence supports the superior court's property division.

III. Accusation of Fraud.

¶15 Finally, Husband argues that Wife committed fraud on the court by filing a false financial affidavit. Fraud on the court, which must be proved by clear and convincing evidence, occurs "[w]hen a party obtains a judgment by concealing material facts and suppressing the truth with the intent to mislead the court." *Clark v. Kreamer*, 243 Ariz. 272, 275, ¶ 13 (App. 2017). Clear and convincing evidence is a "heightened standard of proof that indicates that the thing to be proved is highly probable or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-85, ¶ 25 (2005).

¶16 Husband did not raise a claim of fraud on the court in superior court, and he did not present evidence to support his allegation that Wife suppressed material facts with the intent to mislead. Therefore, Husband failed to meet his heightened burden of clear and convincing evidence.

¶17 Furthermore, the record does not support an assertion that Wife filed a fraudulent affidavit. Although Husband asserted below that the Arizona Attorney General's Office was considering whether Wife filed false tax returns, he did not present any documentary evidence to support this assertion. Moreover, Husband's own report of his 2015 income aligns with the income reported in Wife's 2015 tax return. Wife testified that she had no reason to believe her financial affidavit, which included her tax returns, was fraudulent, and the superior court was free to credit her testimony as well as the validity of her affidavit. Thus, the superior court did not err by relying on Wife's financial affidavit.

CONCLUSION

¶18 For the foregoing reasons, we affirm. After considering the relevant factors under A.R.S. § 25-324, we deny Wife's request for an award

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of attorney's fees on appeal. As the prevailing party, however, Wife is entitled to her costs on appeal upon compliance with ARCAP 21.



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