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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

WILLIAM JOHN CHALMERS, *Petitioner/Appellant*,

v.

RENATA KAYE CHALMERS, *Respondent/Appellee*,

EAST VALLEY FIDUCIARY SERVICES INC., *Appellee.*

No. 1 CA-CV 18-0287 FC
FILED 6-27-2019

Appeal from the Superior Court in Maricopa County
No. FC2016-053887
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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Counsel for Petitioner/Appellant

Wilson-Goodman Law Group, PLLC, Gilbert
By Angela M. Wilson-Goodman
Counsel for Respondent/Appellee

McKindles Law Firm, PLLC, Mesa
By John M. McKindles
Counsel for Appellee East Valley Fiduciary Services, Inc.

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge David D. Weinzweig joined.

P E R K I N S, Judge:

¶1 William Chalmers ("Husband") appeals from the trial court's adoption of a consent decree that incorporated a property settlement agreement and dissolved his marriage to Renata Chalmers ("Wife"). For the following reasons we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in 1988. Husband petitioned the trial court for separation in September 2016. Wife then moved to convert the proceeding to a dissolution, which the court granted. Because the parties accused each other of hampering attempts to sell the marital home, the court appointed a real estate agent as a special commissioner to sell it. The special commissioner soon filed a request for an emergency hearing alleging that a potential buyer had made a reasonable offer on the home, Wife had signed all the paperwork accepting the offer, and Husband had not signed the paperwork nor responded to any of the commissioner's attempts to contact him.

¶3 The court held a hearing, after which it found the offer reasonable and within fair market value. It further held that the special commissioner had the authority to accept the offer on behalf of Husband. The court also ordered each party to take an inventory of the personal property in the home: Wife was to take a "video inventory" and Husband was to provide an inventory to the best of his recollection because an order of protection prevented him from entering the marital home.

¶4 In June 2017, Husband's counsel successfully moved the court to appoint a guardian *ad litem* ("GAL") for Husband, citing concerns that Husband had a diminished capacity to understand the proceedings or act in his own best interests, which put him at risk of suffering "substantial financial harm."

¶5 The special commissioner requested another hearing, which the court granted. The court allowed the commissioner to lower the home's asking price and to remove machinery and other property from the home's workshop. The court also determined that Husband had created unnecessary work, and thus required him to pay an increased commission to the agent from his share of the escrow. The court separately empowered the special commissioner to sign for Husband on any document "necessary to consummate the sale" of the marital home.

¶6 In July, Wife filed an emergency motion asking the court to restrict withdrawals from certain community retirement accounts and filed letters from the account management firms indicating that Husband sought to lift existing restrictions. The court ordered the accounts restricted until further notice. Husband had a parallel probate proceeding during this time and, at the next status conference, the court consolidated the dissolution and probate proceedings "for trial purposes only."

¶7 After hearing from Husband, Wife, the special commissioner, and others, the court appointed appellee East Valley Fiduciary Services ("EVFS") to be Husband's temporary conservator until February 18, 2018. It also consolidated the family and probate cases "for all further proceedings." In January 2018, the court extended the temporary conservatorship to March 23, set a hearing for appointment of a permanent conservator, released $30,000 to EVFS, and directed it to "continue to fund a spending account for [Husband] which allows [him] to show that he is able to budget and pay for his monthly expenses appropriately."

¶8 On February 23, 2018, the parties told the court that they had reached an agreement on the dissolution and would file a joint petition for the court's approval under Arizona Rule of Family Law Procedure ("ARFLP") 69 (2018). The court again extended the temporary conservatorship and continued the hearing on the permanent conservatorship upon the GAL's request.

¶9 On March 2, 2018, Wife lodged a consent decree and attached a Rule 69 agreement ("Agreement") regarding the division of community property. The Agreement split the proceeds of the marital home, various motor vehicles, bank accounts, retirement accounts, companies, personal property, and debts. It also provided that Husband would make an equalization payment to Wife, which would be reduced by $50,000 if Wife did not make reasonable efforts to find Husband's computer. The Agreement did not specify any particular computer. Parties, their attorneys,

Husband's GAL, and counsel for Husband's conservator all signed the Agreement.

¶10 Within two weeks, and before the court approved the Agreement or the consent decree, Husband and his GAL each objected to the proposed consent decree and to the Agreement's validity. Though Husband's objection to the Agreement and Wife's responses to Husband's and the GAL's objections are not in the record on appeal, we take judicial notice of them. Ariz. R. Evid. 201(b)(2); *State v. Bearup*, 221 Ariz. 163, 174, ¶ 58 (2009) (judicial notice of superior court records).

¶11 Husband disputed some financial divisions and alleged that Wife failed to disclose some personal property in her possession, including furniture and cutlery. Husband blamed EVFS for these issues, claiming it had failed to perform its due diligence on his behalf. Husband supported these arguments with several pictures of furniture and "garden towers" he alleged Wife had hidden before entering the Agreement. He also stated that Wife had returned his computer only after deleting "work product for a patent he was developing" and $10,000 worth of software.

¶12 The GAL claimed Wife had acted in bad faith, first misleading Husband about the computer before the Agreement and later deleting valuable software from the computer before returning it. The GAL identified the computer for the first time (serial number, processor, memory, hard drive, and graphics card), and described its "valuable" software, information, and portable backup hard drive. The GAL also alleged that Wife had not been forthcoming in her inventory of personal property. He requested the court either set aside the Agreement or rule that the computer's condition triggered the clause reducing Husband's equalization payment.

¶13 Wife replied, noting that Husband never claimed he entered the Agreement without all the facts he now alleged. She also noted that Husband did not argue that the Agreement's division of property was unfair or inequitable, pointing out that Husband received other furniture under the Agreement. As for the computer, she claimed Husband's former employer was the true owner and that, in any event, she did not know about any valuable software or information stored on it and Husband had failed to produce any evidence that the software or information ever existed.

¶14 EVFS separately responded that any issues with Wife's inventory did not affect the Agreement's validity because Husband and the

GAL knew or should have reasonably known about them when Husband entered the Agreement. EVFS further argued that the parties contemplated issues with the disposition of the computer and provided for a monetary offset should those problems arise.

¶15 The court signed the decree on April 2, 2018. In an associated minute entry, it summarily denied the objections to the Agreement, finding that "none of the objections raised" provided a basis to set it aside "in whole or in part." Husband timely appealed only from the portion of the decree regarding the Agreement.

DISCUSSION

¶16 Under the relevant version of the rule, "[a]n [a]greement between the parties shall be valid and binding if . . . the agreement is in writing." ARFLP 69(A)(1). Terms of separation agreements will bind the court "unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties . . . that the separation agreement is unfair." Ariz. Rev. Stat. ("A.R.S.") § 25-317(B). The court may make this finding on the record of the case and need not hold a hearing. *Hutki v. Hutki*, 244 Ariz. 39, 44–45, ¶ 29 (App. 2018). The court will "necessarily" consider evidence of the agreement itself, "together with all other evidence concerning the relation of the parties at the time of trial, their ages, financial conditions, opportunities, and the contributions of each to the joint estate." *Wick v. Wick*, 107 Ariz. 382, 385 (1971).

¶17 Family courts presume a separation agreement is valid and "it shall be the burden of the party challenging the validity of the agreement to prove any defect in the agreement." ARFLP 69(B). We review the distribution of community property for an abuse of discretion. *Hutki*, 244 Ariz. at 42, ¶ 14. The trial court abuses its discretion if no competent evidence supports its decision or if it commits an error of law in reaching a discretionary conclusion. *Engstrom v. McCarthy*, 243 Ariz. 469, 471, ¶ 4 (App. 2018).

¶18 Competent evidence supports a finding that the Agreement is fair and equitable. The proceeds from the sale of the marital home were split equally. Two bank accounts, "stock interests," the proceeds from the community's firearm collection, and at least one retirement account were divided equally. An additional retirement account was to be split with each party bearing half the cost to prepare a Qualified Domestic Relations Order. Husband and Wife each retained the personal property they already had, except that Wife was to make "reasonable efforts to locate and provide" the

computer and a letter of provenance for a set of china. Each party received a credit union account. Each party received one vehicle encumbered by a loan and one vehicle unencumbered by a loan. Each party received three retirement accounts. Each party agreed to hold the other harmless for any debts held.

¶19 Above this, Husband received an all-terrain vehicle, a trailer, two companies that Wife additionally agreed to not compete with, a severance package, and a retirement medical account. Husband was also required to make an equalization payment to Wife for "$102,183 which represents vehicle payments and equalization, house sale penalty, ordered attorney fees, missing [items from Wife's car], EVFS payments, credit card equalization, house sale prep and sale costs," and a separately-identified $61,000 equalization for Husband's severance package.

¶20 Husband's sole argument on appeal is that the trial court lacked adequate evidence to determine whether the Agreement was unfair, and thus erred in not holding a hearing to take evidence of the Agreement's unfairness. He argues that his GAL threatened to move for a permanent conservator if he did not sign the Agreement. The record belies this assertion because the issue of appointing a permanent conservator for Husband was already before the court when it consolidated the cases in August 2017, six months before Husband signed the Agreement.

¶21 Husband next claims he "provided the court with contested facts as to whether Wife was awarded a portion of his sole and separate property." He also claims that "contested facts" show that EVFS failed to properly investigate his claims that Wife committed waste. In his objection to the Agreement, Husband stated that he received a settlement for pain and suffering and did not later comingle those funds with the community. Husband did not provide any evidence that he received such a settlement, and further did not provide any evidence showing a lack of comingling; nor did he provide any evidence of Wife's alleged waste. *See Chanay v. Chittenden*, 115 Ariz. 32, 35 (1977) (one cannot create a *genuine* issue of fact by mere assertion). Husband had the burden to do so. ARFLP 69(B). The trial court did not abuse its discretion in declining to hold a hearing to determine the truth of facts not in genuine contention.

¶22 Finally, Husband argues—without citation to legal authority—that the trial court was required to hold a hearing because "the record contained no values, no evaluations, nothing that the trial court could have used" to determine the fairness of the Agreement. The terms of a separation agreement are binding on the court unless it finds them unfair,

"after considering the economic circumstances of the parties and any other relevant evidence *produced by the parties*." A.R.S. § 25-317(B) (emphasis added). Husband produced no "values" or "evaluations" that would aid the trial court in finding the Agreement unfair. Instead, he merely appended his objection with several context-free pictures of furniture. Given Husband's failure to produce any relevant evidence of unfairness, the trial court did not err in presuming the Agreement valid. ARFLP 69(B). Moreover, the Agreement itself contained ample evidence from which the family court could find it fair and equitable; the court was not required to hold a hearing unless and until one of the parties offered competent evidence to create a genuine issue of unfairness.

¶23 Each party seeks its attorney fees under A.R.S. § 25-324. After considering the reasonableness of all parties' positions, we award attorney fees to Wife and to EVFS, in amounts to be determined upon their compliance with ARCAP 21.

CONCLUSION

¶24 For the foregoing reasons we affirm the consent decree and incorporated Agreement, and award reasonable attorney fees to Wife and EVFS.

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