IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

CARLOS ALCANTARA, *Petitioner/Appellee*,

v.

MARGARITA ALCANTARA, *Respondent/Appellant*.

No. 1 CA-CV 19-0113 FC
FILED 12-12-2019

Appeal from the Superior Court in Maricopa County
No. FC 2018-003384
The Honorable Michael C. Blair, Judge

AFFIRMED

COUNSEL

Katz & Bloom PLC, Phoenix
By Jay R. Bloom
Counsel for Respondent/Appellant

Woodnick Law PLLC, Phoenix
By Markus W. Risinger
Counsel for Petitioner/Appellee

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Michael J. Brown joined.

C A M P B E L L, Judge:

¶1 Margarita Alcantara ("Wife") appeals from the superior court's decree of dissolution of marriage ("decree") as well as its judgment in favor of Carlos Alcantara ("Husband") for attorney fees. For the following reasons, we affirm.

BACKGROUND

¶2 Shortly before their marriage, Husband and Wife executed a premarital agreement. In connection with that agreement, each party was represented and advised by separate counsel. The agreement provided that all real property owned separately by Husband before the marriage would remain his separate property and the community would not acquire an interest in this separate property if: (1) it appreciated in value during the marriage, regardless of the cause; or (2) Husband used community funds to pay the associated mortgages, taxes, insurance, and maintenance expenses.

¶3 After six years of marriage, Husband petitioned for dissolution. Early in the litigation, Husband notified the superior court that the parties had reached a "comprehensive" settlement agreement through a private mediator. As outlined in the settlement agreement, the parties agreed to: (1) a parenting-time schedule for their child; (2) spousal maintenance to Wife for a limited period; (3) a lease agreement, permitting Wife to rent one of Husband's properties for a limited period; (4) equal division of jointly held bank and investment accounts, as well as two retirement accounts containing community property but held in Husband's name; (5) allocation of separately held bank, investment, and pension accounts to the named account holder; (6) equitable division of personal property; (7) allocation of student loans to the named account holder; (8) allocation of the marital residence to Husband as separate property; (9) child support to Wife; and (10) payment of attorney fees.

¶4 Disputing Husband's characterization of the settlement agreement as "comprehensive," Wife filed a controverting notice of

settlement, asserting the agreement failed to resolve the community's claim for reimbursement against Husband's separate property, the marital residence. To address this claim, Wife requested a resolution management conference.

¶5 In response, Husband reaffirmed that the settlement agreement had indeed resolved all claims. He also argued that the premarital agreement precluded any community lien against his separate property. According to Husband, each of the parties' agreements precluded a community lien on the marital residence, and Wife's request for additional proceedings was without merit, justifying an award of his attorney fees pursuant to A.R.S. § 25-324(B).

¶6 Granting Wife's request, the superior court held a resolution management conference. At the hearing, Wife's attorney argued that the parties' premarital agreement was rescinded by operation of law when they executed the settlement agreement. As support for this contention, counsel noted the settlement agreement did not reference or otherwise incorporate the premarital agreement. Working from the proposition that the premarital agreement had been nullified and noting the settlement agreement allocated the marital residence to Husband without expressly precluding a community interest, counsel argued the community was not foreclosed from asserting a lien on the property.

¶7 After the parties presented their respective arguments, the superior court granted Wife's request to file a memorandum fully briefing the issue but warned that attorney fees would likely be awarded to Husband if Wife's memorandum necessitated a response. In her subsequent memorandum, Wife reasserted her contention that the settlement agreement: (1) rescinded the premarital agreement, and (2) did not foreclose a community interest in the marital residence. In response, Husband maintained that the settlement agreement resolved all issues and foreclosed any claim of a community interest in the marital residence. In the alternative, Husband argued that if the settlement agreement failed to resolve all issues—including any community interest in the marital property—it did not operate to rescind the premarital agreement, and the premarital agreement still in effect foreclosed a community interest in the marital residence. Again, asserting Wife's position was unreasonable and meritless, Husband requested an award of his attorney fees and costs.

¶8 In a detailed order, the superior court denied Wife's claim of a community interest in the marital residence, finding: (1) the parties' premarital agreement unequivocally foreclosed any community interest in

the marital residence; (2) Wife acknowledged during the settlement negotiations that she had no legal interest in the marital residence; (3) the settlement agreement entirely resolved the dissolution action subject only to the preparation and signing of a consent decree; (4) the settlement agreement did not rescind the premarital agreement; (5) both the premarital and settlement agreements are binding and in full effect; and (6) the settlement agreement is fair and equitable. Notwithstanding Husband's substantially greater income, the court further found that under these facts Wife's claim of a community interest in the marital residence was unreasonable, justifying an award of attorney fees. After Husband filed an affidavit of attorney fees, the court awarded him $5,000 pursuant to A.R.S. § 25-324.

¶9 At that point, the parties submitted competing parenting plans and forms of decree of dissolution, and the superior court entered a signed decree incorporating its prior rulings regarding the marital residence and adopting Husband's parenting plan. Wife appealed.

DISCUSSION

I. Jurisdiction

¶10 As a preliminary matter, Husband contends Wife failed to timely appeal from both the superior court's November 5, 2018 signed order, determining that the community had no interest in the marital residence, and its December 5, 2018 signed judgment, awarding attorney fees to Husband. Whether this court has jurisdiction is a question of law subject to de novo review. *Francisco F. v. Ariz. Dep't of Econ. Sec.*, 228 Ariz. 379, 381, ¶ 6 (App. 2011).

¶11 While the December 5, 2018 judgment was certified as a final, appealable order pursuant to Arizona Rule of Family Procedure ("Rule") 78, the November 5, 2018 order did not contain Rule 78(B) certification and therefore was not final and appealable. *See Bollermann v. Nowlis*, 234 Ariz. 340, 342, ¶ 8 (2014). Although Husband argues the court's November 5, 2018 order became appealable once the court entered the December 5, 2018 attorney fees judgment, all dissolution matters had not been resolved at that time, as reflected by the subsequently lodged competing parenting plans and forms of decree. Therefore, we have jurisdiction to review Wife's challenge to the superior court's November 5, 2018 determinations regarding the marital residence, which were incorporated in the final decree of dissolution, but lack jurisdiction over Wife's untimely challenge to the court's award of attorney fees to Husband. *See* ARCAP 9(a) (requiring

an appellant to file a notice of appeal not later than 30 days from entry of judgment from which the appeal is taken).

II. Lack of Community Interest in Marital Property

¶12 Wife challenges the superior court's determination that the community has no legal interest in the marital property. First, she contends the premarital agreement was rescinded by operation of law when the parties entered the settlement agreement. Second, she argues the court's interpretation of the premarital agreement was incorrect, and even if the premarital agreement remains in full effect, the community has a lien on the marital residence to the extent Husband used community funds to voluntarily pay down the mortgage on the property in excess of the monthly obligation. Because the parties' settlement agreement forecloses any community lien on the marital residence, we need not reach either of Wife's arguments regarding the premarital agreement.

¶13 General principles of contract law govern determinations concerning the validity, interpretation, and scope of settlement agreements. *Emmons v. Sup.Ct.*, 192 Ariz. 509, 512, ¶ 14 (App. 1998). "The purpose of contract interpretation is to determine the parties' intent and enforce that intent." *Roe v. Austin*, 246 Ariz. 21, 26, ¶ 17 (App. 2018) (internal quotation omitted). "In determining the parties' intent, courts must decide what evidence is admissible in the interpretation process, bearing in mind that the parol evidence rule allows extrinsic evidence to interpret, but not to vary or contradict the terms of the contract." *Id*. "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court." *Taylor v. State Farm Mut. Auto. Ins. Co*., 175 Ariz. 148, 158–59 (1993). We review de novo a superior court's interpretation of a settlement agreement as well as its conclusion that the agreement is enforceable. *Burke v. Ariz. State Retirement Sys*., 206 Ariz. 269, 272, ¶ 6 (App. 2003); *Schuck & Sons Const. v. Indus. Comm'n*, 192 Ariz. 231, 233, ¶ 6 (App. 1998).

¶14 By its express terms, and without qualification, the settlement agreement allocates the marital residence to Husband as his sole and separate property. Although Wife asserts that a claim of community interest in the marital residence remains outstanding, the penultimate provision of the settlement agreement states, "Husband's attorney shall draft the *final* documents consistent with the foregoing," reflecting that all claims were resolved by the contract and a consent decree would be prepared accordingly. (Emphasis added).

¶15 Even were we to assume the terms of the settlement agreement are arguably ambiguous and the unqualified allocation of the marital residence to Husband does not, on its face, foreclose a community lien on the property, the parties' settlement negotiations demonstrate that the issue of a community interest was discussed and resolved before the settlement agreement was executed. In a letter sent to Husband's counsel three months before the parties signed the settlement agreement, Wife's attorney "attempt[ed] to resolve the outstanding issues" by offering a "global settlement." With respect to the marital residence, Wife "acknowledge[d] that she d[id] not have any specific legal" claim to an interest in the property, but asked that Husband "consider some monetary token of appreciation for all the work that [Wife] put in the home." Agreeing that Wife had no legal claim to the property, Husband declined to provide her "any funds related to [the marital] residence," but acceded to some of her other requests.

¶16 In her reply brief, Wife argues for the first time that her attorney's letter, unquestionably written as part of settlement negotiations, may not be considered. Although Arizona Rule of Evidence 408 precludes evidence of conduct or statements "made during compromise negotiations" to prove or disprove the validity of a disputed claim, the failure to make an objection in the superior court "precludes that objection being raised for the first time on appeal." *DeForest v. DeForest*, 143 Ariz. 627, 632 (App. 1985) (concluding husband waived objection to the admission of settlement negotiation evidence by failing to raise the claim in the superior court). Moreover, evidence of settlement negotiations "otherwise precluded by Rule 408 may be offered for a purpose other than to prove or disprove . . . the validity of a claim . . . such as to prove the elements of estoppel." *John C. Lincoln Hosp. and Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, 538, ¶ 13 n. 3 (App. 2004); *see also* Ariz. R. Evid. 408(b).

¶17 "Equitable estoppel precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting in reliance thereon." *McLaughlin v. Jones*, 243 Ariz. 29, 38, ¶¶ 39–40 (2017) (noting the supreme court has "often applied equitable estoppel in [] family law jurisprudence, including dissolution cases"). While Husband did not expressly invoke the doctrine of equitable estoppel in the superior court, he argued it in principle, submitting opposing counsel's letter and contending he "would not have been nearly as generous . . . if he did not believe [the settlement agreement] was a final settlement of all issues in th[e] case."

¶18 Although a contract may be rescinded on grounds of mutual mistake when the mistake is a "basic assumption on which both parties made the contract," *Emmons*, 192 Ariz. at 512, ¶ 14, Wife does not seek to set aside the settlement agreement because she and Husband entered the contract based on a shared misinterpretation of the premarital agreement. To the contrary, Wife adamantly and unequivocally affirms the settlement agreement as binding and contends that it supplants the premarital agreement.

¶19 Given a plain reading, however, the settlement agreement resolves all outstanding issues and allocates the marital residence to Husband without reservation. Even were we to assume ambiguity in its terms, we must construe the settlement agreement consistent with the parties' intent as reflected in the record. On that basis, we likewise conclude that the settlement agreement forecloses any community lien on the marital residence. Therefore, the superior court did not err by finding no community interest in the property.

III. Settlement Agreement Fair and Equitable

¶20 Wife challenges the superior court's finding that the settlement agreement is fair and equitable. First, she asserts the court had a statutory obligation to equitably divide the purported community interest in the marital residence. Second, even if she "transferred" her portion of the community interest in the marital residence to Husband through the settlement agreement, Wife argues the court improperly found the settlement agreement fair and equitable without holding a hearing to determine whether Wife received other assets to offset her portion of the "community lien."

¶21 We review a superior court's distribution of marital property for an abuse of discretion. *Hutki v. Hutki*, 244 Ariz. 39, 42, ¶ 14 (App. 2018). The court abuses its discretion only when "it exceeds the bounds of reason" or "commits an error of law." *Id.* (internal quotation omitted).

¶22 Under A.R.S. § 25-317(B), the terms of a settlement agreement relating to property distribution are "binding" on the superior court unless the court finds that the agreement is "unfair." A party challenging the validity of a settlement agreement bears the burden of proving any defect therein, and the superior court need not conduct a hearing "before independently resolv[ing] the issue of a fair and equitable division of property." *Hutki*, 244 Ariz. at 43–44, ¶¶ 19, 29.

¶23 In this case, Wife's challenges to the superior court's finding of fairness presuppose a community interest in the marital residence, at least at the time the parties engaged in settlement negotiations. As discussed, *supra* ¶¶ 12–19, however, the parties expressly denied the existence of any community interest in the marital residence during negotiations. As relevant here, the other terms of the settlement agreement confirmed separate accounts to the named account holder and provided for equal division of jointly held accounts, and Wife does not dispute the characterization of those accounts as separate or community property. Therefore, Wife has failed to meet her burden of demonstrating that the property allocation set forth in the settlement agreement is unfair or inequitable, and the superior court's finding that the settlement agreement is fair and equitable "was firmly within the bounds of reason."

IV. Compliance with A.R.S. § 25-317

¶24 Wife asserts the superior court included unsupported findings in the decree, in contravention of A.R.S. § 25-317. Specifically, Wife challenges the court's findings that: (1) the community has no lien on the marital residence; (2) the settlement agreement is fair and equitable; and (3) the settlement agreement resolves all outstanding issues.

¶25 Under A.R.S. § 25-317(D), the terms of a fair and reasonable settlement agreement "shall be set forth or incorporated by reference in the decree of dissolution." By its express terms, the statute requires the superior court to include or incorporate the terms of the settlement agreement in the decree, but it does not preclude the court from including additional terms. *Id*.

¶26 As discussed, *supra* ¶¶ 12-23, the superior court correctly found that: (1) the community has no lien or other interest in the marital residence; (2) the settlement agreement is fair and equitable; and (3) the settlement agreement resolves all issues. The court also properly incorporated the terms of the settlement agreement into the decree by reference. Therefore, contrary to Wife's claim, there is no basis to conclude that the decree violates A.R.S. § 25-317.[1]

[1] Wife also challenges the superior court's findings that she refused to sign a consent decree and requested inclusion of terms inconsistent with the settlement agreement. The record reflects that Wife objected to Husband's proposed decree based on its alleged inclusion of terms not set forth in the

V. Inclusion of Husband's Parenting Plan

¶27 Wife contends the superior court improperly incorporated Husband's parenting plan into the decree. Specifically, she asserts that Husband accepted her proposed holiday schedule apart from one exception, and therefore the court lacked jurisdiction "to determine any elements other than the one remaining element in dispute."

¶28 As set forth in the settlement agreement, the parties assented to a basic parenting-time schedule, but failed to assign holidays, agreeing only that holidays "shall be alternated." In a parenting plan subsequently conveyed to Wife, Husband outlined a proposed holiday schedule. Although Wife proposed several changes to the schedule, Husband lodged his parenting plan with the superior court, unmodified. Wife then lodged a competing parenting plan containing several substantive changes to Husband's proposed holiday schedule. In response, Husband urged the court to adopt his parenting plan, but only specifically challenged Wife's proposed schedule for the Christmas holiday.

¶29 Under A.R.S. § 25-403.02(A), when parties cannot agree on a plan for parenting time, "each parent must submit a proposed parenting plan." Consistent with the child's best interests, the superior court "shall adopt a parenting plan that . . . maximizes [both parents'] parenting time." A.R.S. § 25-403.02(B). In the event "parents are unable to agree on any element to be included in a parenting plan, the court shall determine that element." A.R.S. § 25-403.02(D).

¶30 We review a parenting-time order for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, 273, ¶ 11 (App. 2013). An abuse of discretion occurs when the court commits legal error, *Hutki*, 244 Ariz. at 42, ¶ 14, or "when the record, viewed in the light most favorable to upholding the [superior] court's decision, is devoid of competent evidence to support the decision." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5 (1999) (internal quotations omitted).

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settlement agreement and thereafter submitted a competing form of decree for the court's consideration. Although the superior court arguably failed to accurately describe Wife's objection, Wife has not suggested, and our review of the record has not revealed, that this purported mischaracterization prejudiced Wife with respect to any substantive ruling.

¶31 While Husband objected only to Wife's proposed Christmas schedule, he did not withdraw his proposed parenting plan and asked the superior court to adopt it. Given this procedural posture, the parties had not resolved the holiday schedule and the court properly considered their respective parenting plans. On this record, we cannot say the court abused its discretion, or exceeded its legal authority, by adopting Husband's proposed holiday schedule.

VI. Schedule of Child Support Award

¶32 Wife argues the superior court improperly ordered child support payments to commence in September 2018. Noting the court ordered child support four months before the decree was entered, Wife argues the court should have ordered retroactive child support to begin in July 2018 rather than September 2018. Under A.R.S. § 25-320(B), the superior court shall, if "appropriate," order retroactive child support. We review a child support order for an abuse of discretion. *Stein v. Stein*, 238 Ariz. 548, 549–50, ¶ 5 (App. 2015).

¶33 As outlined in the settlement agreement, the parties agreed that Husband would commence child support payments to Wife on September 1, 2018. Husband incorporated this start date in his proposed decree and Wife objected, stating the parties separated earlier than had been anticipated and requesting a retroactive child support award for July and August 2018. In response, Husband acknowledged that the parties had separated in July 2018, but argued the unanticipated change was entirely attributable to Wife's conduct—she had been arrested for assault against father, jailed, and ordered not to return to Husband's residence. Moreover, Husband noted that he had permitted Wife to live rent-free in another property for part of August and argued the value of the unpaid rent should be considered in determining whether a retroactive child support award was appropriate. On this record, the superior court did not abuse its discretion by ordering Husband to pay child support effective September 1, 2018, as set forth in the parties' settlement agreement rather than July 1, 2018, as requested by Wife.

CONCLUSION

¶34 We affirm the decree. Both parties request an award of their attorney fees and costs pursuant to A.R.S. § 25-324 and ARCAP 21(C). After considering the parties' respective financial resources (as reflected in the superior court) and the reasonableness of the positions each party has taken throughout the proceedings, we deny Wife's request and grant Husband a

portion of his reasonable attorney fees and costs on appeal, subject to compliance with ARCAP 21.

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