IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

ANNA KISS, *Petitioner/Appellant*,

v.

LASZLO KISS, *Respondent/Appellee*.

No. 1 CA-CV 19-0792 FC
FILED 9-3-2020

Appeal from the Superior Court in Maricopa County
No. FN2018-091778
The Honorable Joan M. Sinclair, Judge

REVERSED AND REMANDED FOR RECONSIDERATION

COUNSEL

Davis Miles McGuire Gardner PLLC, Tempe
By Spencer T. Schiefer
Counsel for Petitioner/Appellant

Law Office of Roman A. Kostenko, Phoenix
By Roman A. Kostenko
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Cynthia J. Bailey delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Kent E. Cattani joined.

B A I L E Y, Judge:

¶1 Anna Kiss ("Wife") appeals the superior court's ruling that she did not qualify for spousal maintenance following the dissolution of her marriage to Laszlo Kiss ("Husband"). Because the record does not support the court's ruling, we reverse and remand for reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties married in 1985 and have no minor children. Both parties are the legal guardians of their grandson, who was eleven at the time of trial. Throughout the marriage, Wife did not work outside the home except for a brief part-time clerical position in 2006 or 2007. She has a high school diploma and received a medical office management certification in 1985. Husband is a self-employed software engineer earning approximately $17,360 per month.

¶3 The parties separated in 2017. In dividing marital property, the parties agreed to Wife receiving $24,500 from the sale of a vehicle, $14,000 from the sale of the marital residence, and $1,400 from an escrow refund. Husband also paid Wife $1,800 per month before the temporary spousal maintenance order of $2,000 per month became effective December 2018.[1] Wife and her grandson now live with Wife's boyfriend who pays many of her living expenses.

¶4 The superior court initially denied Wife's request for temporary spousal maintenance, finding she did not qualify under Arizona Revised Statutes ("A.R.S.") section 25-319(A) because her boyfriend paid her living expenses and she was able to work at least part-time but chose

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[1] The parties dispute how much Husband paid Wife before the temporary order took effect. According to Wife, he paid her $1,800 per month from June 2017 to November 2017 but did not pay her anything more until the temporary orders. Husband asserts, and the court found, that he paid her $1,800 per month for ten months before the temporary orders.

not to. The court also found that Wife did not contribute to Husband's educational opportunities.

¶5 Wife moved for reconsideration because, among other things, the superior court did not rely on the current version of § 25-319(A). Wife also argued that the court failed to consider that she used a portion of her "rather large personal injury settlement" to help fund Husband's business which she claims qualified her for spousal maintenance under § 25-319(A)(3) (spouse seeking support has made a significant contribution to the career or earning ability of the other spouse). Wife also added that, after the temporary orders hearing, she found out that she needed carpal tunnel surgery on both hands, impacting her ability to work. Husband disputed Wife's inability to work and that her settlement proceeds contributed to his career or earning ability.

¶6 Upon reconsideration, the superior court concluded that Wife was entitled to $2,000 per month in temporary spousal maintenance but did not specify the basis for its decision. The matter went to trial, and the court ultimately concluded that Wife did not qualify for spousal maintenance under § 25-319(A)(1), (2), (3), or (4). Wife timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶7 We review the superior court's spousal maintenance order for abuse of discretion and will affirm if there is any reasonable evidence to support the court's ruling. *Helland v. Helland*, 236 Ariz. 197, 202, ¶ 22 (App. 2014).

¶8 When considering a request for spousal maintenance, the court first determines whether the requesting spouse is eligible under § 25-319(A). *In re Marriage of Cotter & Podhorez,* 245 Ariz. 82, 85, ¶ 7 (App. 2018); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 15 (App. 1998). Under § 25-319(A), a court may award spousal maintenance if it finds that the spouse seeking maintenance qualifies under any one of five statutory factors. The superior court found Wife did not qualify for spousal maintenance under any of the following § 25-319(A) factors:

> 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
>
> 2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to

> seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.
>
> 3. Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse.
>
> 4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.[2]

¶9 The superior court need only find one circumstance for a spouse to be eligible for spousal maintenance. *Cotter*, 245 Ariz. at 86, ¶ 10. "Thus, although a spouse might be able to be self-sufficient through appropriate employment, he or she may nevertheless remain eligible for an award solely on the basis of insufficient property." *Id.* Under § 25-319(A), these are independent inquiries and a showing of any one factor qualifies a spouse for spousal maintenance. The court then considers the amount and duration, if any, of a support award based on § 25-319(B). Husband contends that Wife did not qualify for spousal maintenance because she could support herself through appropriate employment, citing *Rowe v. Rowe*, 154 Ariz. 616, 621 (App. 1987), *superseded by statute on other grounds in Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 8 (App. 2014). However, *Rowe id.*, applied a prior version of § 25-319(A) which required *both* an inability to be self-supporting through employment *and* a lack of sufficient property for a spouse to qualify for spousal maintenance. Regardless of Wife's ability to support herself through employment, she may qualify for spousal maintenance if she lacks sufficient property to support herself. *Cotter*, 245 Ariz. at 86, ¶ 10.

¶10 In considering whether Wife lacked sufficient property to provide for her reasonable needs under § 25-319(A)(1), the superior court found that Wife received $14,000 from the sale of the marital residence, $24,500 from the sale of a vehicle, $1,800 per month from Husband for 10 months before the temporary support order went into effect, and that Husband paid Wife's medical insurance. The court found that Wife's only income was $2,000 per month temporary spousal maintenance. The court did not make an express finding as to Wife's living expenses, only that Wife

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[2] The court found no evidence regarding § 25-319(A)(5) ("Has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse.").

"testified that her expenses are about $5,000 per month" and that "her current boyfriend contributes to her household expenses."

¶11 The monthly support and health insurance payments Husband made *pendente lite* are not properly considered under § 25-319(A)(1) because Wife used the payments for living expenses and they will not continue in the future. "'[P]roperty', as used in A.R.S. § 25-319(A), means all property capable of providing for the reasonable needs of the spouse seeking maintenance." *Deatherage v. Deatherage*, 140 Ariz. 317, 320 (App. 1984). It includes property awarded to the spouse as well as property presently producing income or that can be transformed to provide for the spouse's reasonable needs. *Id.* Husband's payments, therefore, do not constitute property for purposes of § 25-319(A)(1).

¶12 Husband also argues that Wife's casino winnings constituted property which she could use to support herself. But Husband did not present evidence of any recent winnings that exceeded losses, instead only presenting evidence that dated back several years to 2012. Thus, Wife had only $38,500 in cash from the sale of the marital residence and a vehicle, $1,400 in escrow refunds, and $8,000 from the division of a joint savings account when the parties separated. We consider whether that property is sufficient to provide for Wife's living expenses.

¶13 The superior court did not make specific *findings* regarding Wife's expenses; stating only that Wife testified that her expenses were approximately $5,000. Wife's financial affidavit listed $5,504.33 in monthly living expenses.[3] The record showed Wife's boyfriend paid $3,575 per month towards her living expenses. Husband argues that the boyfriend's payments should be considered property available for Wife's support for purposes of § 25-319(A)(1). Like Husband's *pendente lite* payments, the expenses paid by Wife's boyfriend are not property available to Wife. Rather, the payments reduced Wife's living expenses by $3,575.

¶14 Husband next contends that Wife inflated her expenses by including expenses related to their grandson for whom she was not financially responsible and medical expenses which he claims are not properly considered "living expenses." The superior court has discretion to include the estimated monthly cost of Wife's health insurance ($400) and

[3] The monthly expenses on Wife's financial affidavit totaled $6,662.66, which consisted of $5,504.33 in "living expenses" and $1,158.33 in medical and health insurance expenses.

unreimbursed medical expenses *for Wife* ($458.33) as reasonable living expenses. Husband does not offer any legal authority in support of his claim that these are not reasonable living expenses. Nor is there evidence that the medical expenses were excessive or inflated. We agree, however, that the court had discretion to exclude expenses for Wife's grandson because she was not legally responsible for his financial support. But without additional findings, we cannot ascertain whether the court excluded the grandson's expenses or included Wife's medical and health insurance expenses. Nevertheless, according to Wife's financial affidavit, she incurred approximately $2,000 per month in expenses that were not for her grandson and were not paid by her boyfriend.[4]

¶15 The parties did not request findings of fact under Arizona Rule of Family Law Procedure 82(A), and § 25-319 does not require that the superior court make specific findings. *See Higgins v. Higgins*, 154 Ariz. 87, 88 (App. 1987). "[W]e may infer additional findings of fact and conclusions of law sufficient to sustain the [superior] court's order as long as those findings are reasonably supported by the evidence, and not in conflict with any express findings." *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11 (App. 1998). The evidence does not reasonably support the conclusion that Wife is ineligible for spousal maintenance under § 25-319(A)(1). According to the record, the property available to Wife consists of a newer car and $47,900 in cash, which Wife claims to have spent on living expenses and her grandson's education savings. Even if Wife had not spent these funds, they are not sufficient to meet Wife's living expenses for her lifetime. *See Cotter*, 245 Ariz. at 86, ¶ 10 (defining sufficient property as "property that, standing alone, can provide for a spouse's reasonable needs during his or her lifetime."); *Deatherage*, 140 Ariz. at 320 (considering whether spouse has property that is capable of providing for the spouse's reasonable needs).

¶16 Because Wife is eligible for spousal maintenance under § 25-310(A)(1), we need not consider whether she is also eligible under the remaining subsections. *Cotter*, 245 Ariz. at 86, ¶ 10 ("the current statute only requires a court to find one circumstance before determining a spouse eligible."). In holding that Wife is eligible for spousal maintenance, we take

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[4] Husband argues that certain expenses were not reasonable, such as a garage expense, retirement savings, and entertainment, but these expenses are paid by Wife's boyfriend and thus excluded in the analysis above. Wife contends she also has a substantial tax liability. However, because no evidence established the amount of any tax debt Wife may owe, we do not consider this.

no position as to the appropriate amount and duration of such an award, or if any award is warranted after consideration of § 25-319(B). Rather, we instruct the superior court to consider the relevant factors under § 25-319(B), balance the equities between the parties, and exercise its discretion as it deems just.

¶17 We deny Husband's request for an award of attorneys' fees under A.R.S. § 25-324 because Wife did not take an unreasonable position on appeal.

CONCLUSION

¶18 We reverse the ruling that Wife did not qualify for spousal maintenance under § 25-319(A)(1) and remand for reconsideration. On remand, the superior court shall consider the factors in § 25-319(B) in determining the amount and duration of the support award, if any. As the successful party on appeal, Wife is entitled to recover her costs upon compliance with Arizona Rule of Civil Appellate Procedure 21. *See* A.R.S. § 12-342.

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