

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/27/09
PHILIP G. URRY, CLERK
BY: DN

In re the Marriage of:) 1 CA-CV 08-0377
)
WAYNE ENGRAM,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
SUSANA GLADICE KAJIH,) Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2006-005024

The Honorable Randall H. Warner, Judge

AFFIRMED

Wayne Engram
In Propria Persona

Phoenix

H A L L, Judge

¶1 Wayne Engram appeals from the trial court's dissolution decree. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Engram (Husband) and Gladice Kajih (Wife) were married in 2003. On December 21, 2006, Husband filed a petition for

dissolution. The following evidence was presented at the March 28, 2008 trial on the matter.

¶13 The parties never lived together during their marriage. In 2004, Wife purchased a house in Phoenix, using \$25,000.00 of her separate funds as a down-payment. The property is titled in Wife's name only.

¶14 Wife also has a Fidelity 401k account titled solely in her name, but did not make any contributions to the account during the marriage. Wife did, however, make contributions to a TD Waterhouse options account, titled in her name, during that time. Although the TD Waterhouse account at one point held approximately \$70,000.00, the funds rapidly declined as a result of an economic downturn. The amount remaining in the account, approximately \$2,000.00, is subject to a \$57,000.00 federal tax lien. The tax lien relates to income taxes not paid on Wife's earnings for the years 2003, 2004, and 2005.

¶15 On April 1, 2008, the trial court issued a signed minute entry dissolving the parties' marriage. As set forth in the minute entry, the trial court found the Phoenix home to be Wife's sole and separate property, but also found "that the community has a right of reimbursement to the extent the principal in the house was reduced by virtue of payments Wife made on the house using her wages." Because the federal tax debt relates to community income, however, the trial court awarded Wife the home and all of its equity in "an equitable exchange" for assigning Wife the entire tax

debt. The trial court explained that this division was equitable for two reasons:

First, whether there is equity in the house is disputed. Husband testified that there is approximately \$70,000.00 in equity and Wife testified that there is none. Assuming the truth is somewhere in the middle, an equitable exchange is that Wife take on the entire debt in exchange for getting the entire asset.

Second, these parties never really had a functioning "marital community." They testified that they never even lived together, and that shortly after their marriage it was clear that they did not want to be married. For all intents and purposes, the parties lived, worked and spent separately during the entire time that Wife owned the house and incurred the tax debt.

¶16 The trial court also awarded Wife the Fidelity 401k as her sole and separate property "because it consists solely of pre-marriage funds and profits from those funds" and the TD Waterhouse account because "there no longer are any funds in that account due to the imposition of a tax lien."

¶17 Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶18 On appeal,¹ Husband contends that the trial court erred by awarding Wife the Phoenix home and the two investment accounts.²

¹ Wife did not file an answering brief in response to this appeal, which we may regard as a confession of error. We decline to do so on this record. See *Gonzalez v. Gonzalez*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982) ("Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so.").

² To the extent Husband also argues that the trial court improperly assigned him the tax debt, we note that the trial court

He contends that he should have been awarded a one-half interest in each.

¶9 "[W]e view all evidence and reasonable inferences therefrom in the light most favorable to supporting the decision of the trial court regarding the nature of property as community or separate." *Thomas v. Thomas*, 142 Ariz. 386, 392, 690 P.2d 105, 111 (App. 1984). The trial court has "broad discretion in apportioning community property between the parties at dissolution to achieve an equitable division," and we will not disturb its apportionment absent an abuse of discretion. *Barnett v. Jedynak*, 219 Ariz. 550, 553, ¶ 10, 200 P.3d 1047, 1050 (App. 2009).

¶10 A property's status as community or separate is established at the time of its acquisition. See *Bender v. Bender*, 123 Ariz. 90, 92, 597 P.2d 993, 995 (App. 1979). "A spouse's real and personal property that is owned by that spouse before marriage . . . and the increase, rents, issues and profits of that property, is the separate property of that spouse." A.R.S. § 25-213(A) (2007). In contrast, property acquired during a marriage is generally presumed to be community property. A.R.S. § 25-211 (Supp. 2009). The spouse seeking to overcome these presumptions has the burden of establishing the character of the property by clear and convincing evidence. *Thomas*, 142 Ariz. at 392, 690 P.2d at 111.

ordered that the tax debt is Wife's "sole obligation" and that "Wife shall indemnify Husband and hold him harmless from that debt."

I. Real Property

¶11 The Phoenix home was purchased during the parties' marriage and is therefore presumed to be community property. The undisputed evidence at trial, however, reflects that Wife purchased the property using only her separate funds and that title to the property is held only in Wife's name. Therefore, because Wife presented substantial evidence of the separate character of the real property, the trial court did not err in characterizing the home as Wife's sole and separate property.

¶12 The trial court also correctly found that "the community has a right of reimbursement to the extent the principal in the house was reduced by virtue of payments Wife made on the house using her wages." See *Honnas v. Honnas*, 133 Ariz. 39, 40, 648 P.2d 1045, 1046 (1982). Because the amount of equity, if any, in the property was disputed at trial, and the community was liable for a significant income tax debt, the trial court awarded the real property and its equity solely to Wife, and also assigned her the community debt. We conclude that the trial court acted well within its discretion in apportioning the community's assets and debts "to achieve an equitable division." See *Barnett*, 219 Ariz. at 553, ¶ 10, 200 P.3d at 1050.³

³ Husband also contends that the trial court erred in its apportionment because there was insufficient evidence of the tax debt. Wife specifically testified regarding the nature and amount of the debt and we defer to the trial court, as the fact-finder, to determine the weight and credibility of evidence. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998); see also *Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987).

