DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 08-0806
	)	
PATRICIA M. AKSAMIT,	)	DEPARTMENT B
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
GREG KRAHN,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-052632

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Law Office of Danny L. Klein — Scottsdale
By Danny L. Klein
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By Todd Franks
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B A R K E R, Judge

¶1 Greg Krahn ("Father") appeals from the superior court's decree of dissolution dissolving his marriage to Patricia M. Aksamit ("Mother") and the denial of his motion for new trial. Pursuant to Arizona Rule of Civil Appellate Procedure 28(g), this is the memorandum decision referenced in the opinion, which we file simultaneously in this matter.

Facts and Procedural Background

¶2 We incorporate the factual statement in the opinion as if set forth herein and set forth the following additional facts. On June 3, 2008, Father's attorney filed a motion to withdraw as attorney of record. The motion was granted on July 16. On July 23, Father filed a motion to continue the trial set for August 4. It was denied on the day of trial.

¶3 Father was late to the trial due to mechanical problems with his car. The trial began in Father's absence, starting with the denial of his motion to continue, and proceeding with input offered by the Best Interests Attorney ("BIA") oral report. Father appeared in the midst of Mother's direct examination.

Discussion

¶4 In addition to the BIA issue set forth in the opinion, Father argues the court erred by 1) permitting Father's counsel to withdraw and denying his motion to continue, 2) allocating a debt without sufficient evidence, 3) divesting Father of certain

personal property, 4) miscalculating Father's child support arrearage, and 5) failing to apportion certain assets. We address these arguments in turn.

1. Procedural Issues

¶5 Father argues the court erred by granting his attorney's motion to withdraw and denying his motion to continue the trial. We review the superior court's ruling on a motion to withdraw and a motion for continuance for abuse of discretion. *Agraan v. Superior Court,* 4 Ariz. App. 141, 143, 418 P.2d 161, 163 (1966); *Dykeman v. Ashton,* 8 Ariz. App. 327, 330, 446 P.2d 26, 29 (1968). A court abuses its discretion if it misapplies the law or otherwise exercises its discretion on untenable grounds. *Fuentes v. Fuentes,* 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004); *Woodworth v. Woodworth,* 202 Ariz. 179, 183, ¶ 23, 42 P.3d 610, 614 (App. 2002).

¶6 A court may permit an attorney to withdraw from representation pursuant to a formal written motion "supported by written application setting forth the reasons" for withdrawal. Ariz. R. Fam. L.P. 9(A)(2). If a motion to withdraw does not contain the written approval of the client, the motion must be accompanied by a certificate of counsel that the client has been notified in writing of the case status or that the client cannot be notified. Ariz. R. Fam. L.P. 9(A)(2)(b). Additionally, an attorney may not be permitted to withdraw after an action has

been set for trial unless the substituting attorney or the client signs the motion indicating he or she is advised of the trial date and has made arrangements to be prepared for trial or the court finds good cause for withdrawal. Ariz. R. Fam. L.P. 9(A)(2)(c).

¶7 Here, Father's attorney filed a motion to withdraw as attorney of record after a trial date had been set. The brief motion contains a request for permission to withdraw as attorney of record "with the consent of [Father]" and provides Father's contact information. The motion, however, did not contain Father's signature indicating his consent, did not advise Father of the case status, and stated no grounds or reasons for withdrawal. Further, the court did not find good cause for withdrawal. For each of these reasons, the motion was defective as a matter of law for not complying with Rule 9(A)(2). Accordingly, the court abused its discretion by granting it.

¶8 However, as to the issues in this memorandum decision, we do not find that the error in granting the motion to withdraw caused prejudice.[1] An error must be prejudicial to the substantive rights of a party in order to justify reversal. *Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27

[1] We need not determine whether the error in granting the motion to withdraw caused error on the custody issue as we remand this issue on other grounds set forth in the opinion.

(1997). As set forth with regard to each substantive argument discussed below, with or without counsel there was no error.

¶9 As to the motion to continue, Father filed a request on July 23 to have his wife "pay for my attorney." In the alternative he asked "or I need [the] date extended [until] I can aford [sic] to pay for [an] attorney." Father's counsel's motion to withdraw was submitted on June 3, 2008, and a copy was endorsed to Father. Father has contested, accurately, that he never signed the document, as required. He has not indicated, however, that he was unaware of the motion nor has he provided an affidavit that he did not consent to the motion even though he did not do so in writing. When the only request before the court is to continue the trial until an uncertain date in the future when Father can afford an attorney, there is no abuse of discretion in denying such a request.

¶10 Additionally, Father orally requested to continue the trial when he encountered car problems and was late. In fact, the court delayed the start of trial per Father's request. At 1:50 p.m., twenty minutes after the trial was scheduled to begin, the court contacted Father and he indicated that he had car problems and would be there within thirty minutes. The court waited over thirty minutes (the time requested) and then started the trial at 2:30 p.m. Father was still not there. It

was not an abuse of discretion to proceed under these circumstances.

2. Credit Card Debt

¶11 The court entered a $19,000 judgment on behalf of Mother against Father based upon the existence of a credit card debt. In rendering its decision, the court explained:

> There was only testimonial evidence presented regarding the . . . debt, which both parties agreed involved a credit card in Father's name alone and used prior to the marriage. However, Father testified that the debt was accrued by him to pay the parties [sic] joint bills while cohabiting prior to marriage. Mother testified that she never knew of this credit card debt and only became aware of it because of a garnishment against her wages due to Father's having allowed a Default to be entered on the debt . . . . Mother has paid more than $15,000.00 towards this judgment and the garnishment is still being withdrawn from her pay at a rate of $1,000.00 per month. . . . . Father's testimony is credible as to the fact that some of this debt could have been accrued for joint bills during the time prior to the marriage, but he could not be specific as to the amounts. He also testified that he spent all of his 401k proceeds of over $100,000.00 during this period after he lost his job . . . and prior to the parties' marriage.
>
> Based upon the foregoing, the Court finds that Mother is responsible for approximately one-third of this debt . . . or $6,000.00 as the Court finds her credible regarding her lack of knowledge as to the existence of the claim until garnishment.

According to Mother, the original debt was $18,273, and with attorney's fees and interest accruing in the garnishment action, the total debt at the time of trial was over $25,000.

¶12 Father raises several arguments concerning this judgment. First, Father argues Mother failed to meet her burden demonstrating the extent to which the debt was incurred prior to the marriage. Second, Father argues there was no evidence supporting the court's allocation of the debt. Specifically, Father challenges the lack of findings regarding the nature of the debt as separate or community, the outstanding balance of the debt, and the character of the funds used to make payments on the debt. Finally, Father argues the court cannot enter a judgment against him for any amounts Mother has not yet paid.

¶13 The court has discretion to allocate debts. *Spector v. Spector,* 17 Ariz. App. 221, 225, 496 P.2d 864, 868 (1972); *Cadwell v. Cadwell,* 126 Ariz. 460, 461-62, 616 P.2d 920, 921-22 (App. 1980). We accept the court's factual findings unless clearly erroneous or unsupported by any credible evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995). Additionally, we defer to the superior court's determinations of witness credibility. *Gutierrez v. Gutierrez,* 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). Finally, we view the facts and all reasonable inferences derived therefrom in the light most favorable to upholding the superior

court's decision. *Spector v. Spector,* 94 Ariz. 175, 179, 382 P.2d 659, 661 (1963).

¶14 The court found the debt was incurred before the parties' marriage. This is supported by Mother's testimony, which is sufficient to uphold the court's finding.[2] Thus, Mother met her burden demonstrating the entire debt was incurred before the marriage and was a separate debt.

¶15 Father challenges the lack of findings regarding the nature of the debt as separate or community. Although the court did not expressly indicate whether the debt was community or separate, we may infer any findings necessary to sustain the judgment if supported by the evidence and not in conflict with the express findings. *See Coronado Co., Inc. v. Jacome's Dep't Store, Inc.,* 129 Ariz. 137, 139, 629 P.2d 553, 555 (App. 1981). A debt incurred by one spouse during the marriage is a community debt if that spouse acted with the object of benefitting the community. Ariz. Rev. Stat. ("A.R.S.") §§ 25-214 (2007), -215 (2007); *Johnson v. Johnson,* 131 Ariz. 38, 44, 638 P.2d 705, 711 (1981). However, a debt incurred entirely before marriage is not a community debt. *See generally,* A.R.S. §§ 25-215, -318

[2] When questioned about the debt, Father testified the credit card was used for living expenses "[f]rom 2000 to 2004, -5 -- -6 --4." As the trier of fact, the superior court could infer from this testimony the debt was incurred prior to the parties' marriage on July 14, 2004. *See Goats v. A.J. Bayless Markets, Inc.*, 14 Ariz. App. 166, 171-72, 481 P.2d 536, 541-42 (1971).

(Supp. 2009)[3]; *Arab Monetary Fund v. Hashim,* 219 Ariz. 108, 111, ¶ 17, 193 P.3d 802, 805 (App. 2008). Because the court found the debt was incurred prior to the marriage, the court implicitly determined the debt was Father's sole and separate debt.[4]

¶16 As Father's sole and separate debt, the court had no obligation to allocate any portion of the debt to Mother.[5] *See e.g., Cadwell,* 126 Ariz. at 462, 616 P.2d at 922 (citing *Neal v. Neal,* 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977) and noting the court has great discretion in apportioning community obligations); *accord Neely v. Neely,* 115 Ariz. 47, 49 n.1, 563 P.2d 302, 304 n.1 (App. 1997). Nevertheless, the court allocated one-third of the debt to Mother based on Father's testimony that he used the credit card and his retirement

[3] We cite to the current version of the applicable statutes because no revisions relevant to this decision have occurred since the family court proceedings.

[4] Although the court's factual findings are made under the heading "community debts," this was not an actual determination by the court that the debt was community. As in cases of statutory interpretation, headings are not law and the actual language of the court's findings is most important. *Bilke v. State,* 221 Ariz. 60, 62 n.5, ¶ 7, 209 P.3d 1056, 1058 n.5 (App. 2009) (noting that the actual language of the statute, rather than its heading, is most important).

[5] Because this debt is Father's sole and separate obligation, and not a community obligation, we reject his argument that the court was required to allocate the debt substantially equal. *See Tester v. Tester,* 123 Ariz. 41, 45, 597 P.2d 194, 198 (App. 1979) (holding that apportionment of community estate must be substantially equal).

account to pay joint living expenses prior to the marriage. Mother is not contesting this allocation. Because Father was unsure of the exact amount used for joint bills, the court exercised its discretion by determining Mother was responsible for one-third of the debt. Therefore, there was no error in allocating one-third of the debt to Mother and the remainder to Father.

¶17 At the time of trial, only $15,000 of the then total $25,000 debt had been paid. The court allocated the responsibility of $6000 to Mother and $19,000 to Father. According to Mother, her wages will continue to be garnished for approximately one year. If for any reason Mother's wages do not continue to be garnished, Mother would be unjustly enriched by being able to collect money from Father for a judgment she has not paid.[6] As such, Mother is only entitled to indemnity to the extent she satisfies the debt.

3. Tools

¶18 There are a number of tools stored in the garage of the marital residence. The decree provides:

[6] Father argues, for the first time in his reply brief, that the existence of the garnishment judgment is res judicata or collateral estoppel as to the nature of the debt. We will not address issues raised for the first time in a reply brief. *See Wasserman v. Low,* 143 Ariz. 4, 9 n.4, 691 P.2d 716, 721 n.4 (App. 1984).

> [I]f multiple tools exists [sic] in any particular category (for example, the list includes 4 large Tool Boxes w/ tools), Father shall pick one such tool and/or tool box as his sole and separate property. If only one tool exists in any particular category . . . then Mother shall be permitted to sell all such singular tools, along with the remaining multiples of other tools not chosen by Father to offset the debt owed by Father to Mother . . . .

Father argues this ruling was erroneous in several respects.

¶19 First, Father argues the court erred by awarding Mother portions of Father's sole and separate property. We disagree with this argument because the court did not find the tools were Father's sole and separate property. The decree is silent regarding the nature of the tools. Mother testified some of the tools were purchased during the marriage. Accordingly, we presume the court found some of the tools were community property. *See Neal,* 116 Ariz. at 592, 570 P.2d at 760 (we presume the court "found every fact necessary to support the judgment, and such presumptive findings must be sustained if the evidence on any reasonable construction justified it." (quoting *Porter v. Porter*, 67 Ariz. 273, 282, 1995 P.2d 132, 137-38 (1948))); *see also* A.R.S. § 25-211 (Supp. 2009) (property acquired during the marriage is community property subject to certain exceptions).

¶20 Next, Father argues the court lacked authority to grant Mother a lien against his tools to secure payment of the

debt. For support, Father cites *Weaver v. Weaver*, in which the Arizona Supreme Court held a court in a dissolution action lacks jurisdiction to grant a money judgment against one spouse for damage to the separate property of the other spouse. 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982). *Weaver* is inapposite because the issue here concerns community property, not destruction of separate property. The court has jurisdiction to equitably divide community property, which is what the court did here. A.R.S. § 25-318(A); *see also Kelly v. Kelly,* 198 Ariz. 307, 309, ¶ 7, 9 P.3d 1046, 1048 (2000) (noting the court generally divides community property equally absent a compelling reason to the contrary).

¶21 Father also argues the court circumvented provisions of A.R.S. "§ 47-3101, *et seq.*" by permitting Mother to sell the tools for the purpose of applying the proceeds against an indemnity obligation unrelated to the tools or a community debt. First, this argument is not well developed. Father does not specify which provisions within Title 47 apply, or are violated, or how the chapter on negotiable instruments applies. *See Polanco v. Indus. Comm'n of Ariz.,* 214 Ariz. 489, 491-92 n.2, ¶ 6, 154 P.3d 391, 393-94 n.2 (App. 2007) (failing to develop and support an argument waives the argument on appeal). Moreover, Title 25 gives the court authority to enter an order transferring property of one spouse to the other as compensation

for failure to pay a debt. A.R.S. § 25-318(N). Mother's wages are being garnished to pay a debt that Father is responsible for only because Father's wages cannot be garnished. Father testified he had no money and had not paid anything on the credit card judgment. The court had authority to allocate the majority of tools to Mother and to give her permission to sell them. *See Hrudka,* 186 Ariz. at 94, 919 P.2d at 189 (finding no error in ordering community property sold to satisfy indebtedness between spouses).

¶22 Finally, Father argues he is entitled to a $2500 exemption under A.R.S. § 33-1130(1) because his tools are used in his trade or business. Section 33-1130(1) provides tools "of a debtor" used in a trade or business up to a value of $2500 shall be exempt from process. "Process" includes any judicial remedy provided for collection of debts. A.R.S. § 33-1121 (2007). Father testified he could use all of the tools in his business working as a handyman. If the tools were Father's sole and separate property (tools "of a debtor"), the exemption would apply. However, because the court implicitly determined the tools were community property, there was no error. The court equitably divided the community property pursuant to A.R.S. § 25-318(A). In absence of evidence to the contrary, we presume the court knew the law and properly applied it. *See Fuentes,* 209 Ariz. at 58, ¶ 32, 97 P.3d at 883. The court does not need

to apply the exemption to the parties' community property. Accordingly, there was no error.

4. Child Support Arrearage

¶23 Next, Father argues the superior court erroneously calculated his child support arrearage by failing to apply the law of the case. Father's argument raises a legal issue we review de novo. *Maher v. Urman,* 211 Ariz. 543, 546, ¶ 6, 124 P.3d 770, 773 (App. 2005).

¶24 Initially, Father was given parenting time every other weekend and one overnight during the week. Father was ordered to pay $350 per month for child support beginning April 1, 2008. Father made no payments. In a minute entry issued on June 16, the court ordered Mother and Father to share parenting time on a 4-3-3-4 schedule and stated "child support shall be calculated and ordered for the remaining pretrial period during the August 4, 2008 hearing." However, the court noted Father's obligation to pay accrued child support would not be affected. After trial, the court entered a $1400 judgment against Father for child support arrearages accrued from April 1 through July 31, calculated at the rate of $350 per month.

¶25 Father argues the June minute entry constituted the "law of the case" which the court subsequently ignored in the decree. We disagree. The law of the case doctrine is "merely a practice that protects the ability of the court to build to its

final judgment by cumulative rulings, with reconsideration or review postponed until after the judgment is entered." *Zimmerman v. Shakman,* 204 Ariz. 231, 236, ¶ 15, 62 P.3d 976, 981 (App. 2003) (quoting *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994)). This doctrine does not apply if the previous decision did not actually decide the issue in question. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II,* 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993). Additionally, the law of the case "does not prevent a judge from reconsidering nonfinal rulings, '[n]or does it prevent a different judge, sitting on the same case, from reconsidering the first judge's prior, nonfinal rulings'". *Zimmerman,* 204 Ariz. at 236, ¶ 15, 62 P.3d at 981 (quoting *King*, 180 Ariz. at 279, 883 P.2d at 1035).

¶26 In the June minute entry, the court did not actually decide what Father's child support obligation would be in light of his increased parenting time. The minute entry merely states child support should be calculated during the trial. Further, the June minute entry was not a signed, final judgment. Finally, there was a new judge on the case after the June minute entry was issued. For these reasons, the law of the case does not apply and there was no error in calculating Father's child support arrearage.

5. Retirement Plan

¶27 The court ordered each party to keep their own retirement accounts as their sole and separate property. Father argues this ruling was erroneous because the court failed to divide the community interest in Mother's retirement plan. Although we review the superior court's characterization of property de novo, we review the division of property for an abuse of discretion. *In re Marriage of Pownall,* 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶28 The evidence reflects Mother owned her 401k retirement account before the parties' marriage and she made no contributions during the marriage. Further, there was no evidence of any increase in the value of Mother's retirement account during the marriage. Therefore, the superior court correctly characterized the account as Mother's sole and separate property and awarded Mother her account. *See* A.R.S. § 25-213(A) (Supp. 2009).

6. Settlement

¶29 Next, Father argues the court erroneously failed to divide an alleged money settlement Mother received during the marriage. The decree does not mention any settlement.

¶30 The only evidence of a settlement is Father's testimony. Father testified Mother received a settlement from her employer in 2005 for being fired while pregnant with their

child. Father stated he had no idea how much money Mother received or what Mother did with the money. Nothing in the record indicates Father raised the settlement as an issue prior to trial. Further, Mother was not questioned about the alleged settlement.

¶31 The superior court is not bound to accept the uncontradicted testimony of an interested party. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.,* 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000). This is particularly so here given the lack of detail as to any alleged settlement amount. Thus, we cannot say the superior court abused its discretion by not entering an order dividing Mother's alleged settlement.[7]

7. Attorney's Fees

¶32 Father requests attorney's fees on appeal pursuant to A.R.S. § 25-324. While the record reveals a financial disparity between the parties, such financial disparity does not account for the garnishment of Mother's wages to pay off the credit card debt. Additionally, both parties adopted reasonable positions

[7] Father also challenges the superior court's denial of his motion for new trial. On appeal, Father's argument emphasizes the superior court's error by failing to grant a new trial on the issue of custody. Because we have already determined Father is entitled to a new trial on the custody issue, we need not address this argument concerning his motion for new trial. Regarding the remaining issues, because Father's briefs present the same arguments as those raised in his motion for new trial and we have addressed those arguments, we do not separately address his motion for new trial on those issues.

on appeal. Therefore, in the exercise of our discretion, we decline to award Father fees on appeal. Each party shall bear his or her own costs on appeal.

Conclusion

¶33 For the foregoing reasons, and those set forth in the separately filed opinion, we remand for a new trial on custody[8] and affirm the remaining portions of the decree.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge

[8] In the interim, the current custody order shall remain in effect until a new order, temporary or otherwise, is issued.