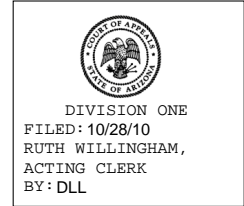


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



IN RE THE MARRIAGE OF:) 1 CA-CV 09-0742
)
STEVEN S. COLES,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
CONCEPCION B. COLES,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2008-002326

The Honorable Hugh E. Hegyi, Judge

AFFIRMED

Gary L. Thomas, Attorney at Law Phoenix
by Gary L. Thomas
Attorney for Petitioner/Appellant

Cates, Hanson, Sargeant & Schoenau, P.L.C. Phoenix
by William P. Sargeant III
Attorneys for Respondent/Appellee

S W A N N, Judge

¶1 Steven S. Coles ("Husband") appeals from a second amended divorce decree, which incorporates a partial denial of

his motion for a new trial. Husband challenges a number of the court's procedural and substantive rulings. For the reasons that follow, we affirm the family court's rulings.

FACTS AND PROCEDURAL HISTORY

¶12 On June 3, 2008, Husband filed a petition to dissolve his marriage to Concepcion B. Coles ("Wife"). On July 28, 2008, Husband filed for a default judgment, which was denied for failure to serve Wife. On August 18, 2008, Wife filed a Response claiming a community interest in their residence and Husband's business, seeking spousal maintenance, and alleging Husband had committed waste.

¶13 After an October 14, 2008 hearing before Judge Hegyi, the court set trial and awarded Wife temporary spousal maintenance and temporary attorney's fees, which Husband continued to oppose. The funds awarded were held at the Clearinghouse until ordered released by the court on April 1, 2009.

¶14 After an April 2, 2009 hearing, the court found the residence and business were Husband's separate property. The court awarded Wife spousal maintenance of \$400 per month for eight years and \$5,000 for Husband's waste. The court declined to award attorney's fees to either party.

¶15 On May 11, 2009, Husband moved for a new trial. On May 18, 2009, Wife, unable to afford her counsel's fees, filed a

pro per Response opposing Husband's motion and mailed a copy of it to Husband's counsel. On May 19, 2009, Wife's counsel filed a notice of withdrawal. On May 20, 2009, Husband's counsel moved to strike Wife's Response, claiming it was improper. On May 27, 2009, the court denied the motion to strike without prejudice on the grounds it had yet to receive Wife's Response.

A. *THE FIRST AMENDED DECREE*

¶16 On June 3, 2009, Husband filed a Request for Ruling on Petitioner's Motion for New Trial, claiming that his motion was unopposed "since the court has not received any Response from Respondent." Husband simultaneously lodged a proposed First Amended Decree. On June 23, 2009, Judge Pro Tem French took over the case, and on June 24, 2009, she granted Husband's motion for a new trial and signed Husband's First Amended Decree. The First Amended Decree (1) reduced the award for waste to \$2,500, (2) vacated the spousal maintenance award to Wife and held neither party was entitled to spousal maintenance, (3) vacated the order denying Husband's request for reconsideration of the temporary spousal maintenance and attorney's fees awarded to Wife, (4) ordered Wife to reimburse Husband \$6300 received from those awards and (5) found that Husband was entitled to attorney's fees.

¶17 On July 7, 2009, Wife filed a motion to set aside that judgment. She attached copies of mail receipts showing that

Husband's counsel's office and the Superior Court had signed for Wife's Response on May 19, 2009, and May 22, 2009, respectively. Husband responded that the courthouse mailroom had received the Response but it had not been sent to Judge Hegyi.

¶18 In a minute entry filed on August 19, 2009, Judge Hegyi granted Wife's motion to set aside and vacate the First Amended Decree. The court also denied the other requests in Husband's May 11, 2009 motion for a new trial¹ except for the reduction of the waste award to \$2,500. In the minute entry,

[t]he Court finds the First Amended Decree was erroneously entered. Husband's May 11, 2009 Motion to Set Aside was calendared to determine whether he would reply to Wife's May 18 Response. On June 3, 2009, Husband filed his Request for Ruling on his Motion for New Trial. At the same time he lodged his form of First Amended Decree, which was separately calendared for response. By June 23, 2009 Minute Entry, Commissioner French forwarded to this Division, which had rotated to a Civil assignment, Husband's Request for Ruling on Motion for New Trial. . . . The following day, June 24, 2009, the form of order of First Amended Decree was signed because it appeared no objection had been timely filed. However, the June 23, 2009 Minute Entry, as amended by the June 29, 2009 Minute Entry, establishes clearly that the signing was the result of an inadvertence.²

¹ The minute entry refers to this as a "Motion to Set Aside."

² In a minute entry dated August 31, 2009, and filed on September 10, 2009, Judge Hegyi further explained that he had conferred with Commissioner French's Division and had obtained the Commissioner's agreement that Judge Hegyi would decide all motions concerning modification or amendment of the Decree; this

B. *THE SECOND AMENDED DECREE*

¶19 Accordingly, on September 30, 2009, the court filed a Second Amended Decree that had been prepared by Husband's counsel. The Second Amended Decree was identical to the original Decree except for the reduction of the award for waste to \$2,500. On October 29, 2009, Husband timely appealed. We have jurisdiction under A.R.S. § 12-2101(B).

DISCUSSION

I. *THE FAMILY COURT PROPERLY VACATED THE FIRST AMENDED DECREE.*

¶10 Husband challenges the authority of the family court to vacate a decree, an issue of law we review de novo. *Maximov v. Maximov*, 220 Ariz. 299, 300, ¶ 2, 205 P.3d 1146, 1147 (App. 2009).

¶11 Husband first contends -- without citation to authority -- that the judge who vacated the First Amended Decree lacked the authority to do so because he was not the judge who issued it. However, "a different judge, sitting on the same case," has discretion to reconsider "for good cause, or as otherwise provided by these rules, an issue previously determined by the court." See *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994).

approach, the court explained, follows the normal procedure following judicial assignment rotation.

¶12 Husband also contends that the Ariz. R. Fam. L.P. ("Rules" or "Rule") only authorize correction of clerical mistakes, and that the entry of the First Amended Decree was not such a mistake. Interpretation of the Rules is a question of law we address de novo. *Wersch v. Radnor/Landgrant - a Phoenix P'ship*, 192 Ariz. 99, 100-01, 961 P.2d 1047, 1048-49 (App. 1997). The Rules "should be construed and enforced in a manner to secure the just, prompt and inexpensive determination of every action and proceeding." Rule 1.

¶13 Husband misstates the authority of the family court. Rule 85(C) provides in pertinent part:

1. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:
 - a. mistake, inadvertence, surprise, or excusable neglect;
 -
 - . . . or
 - f. any other reason justifying relief from the operation of the judgment.

Here the trial court found that the issuance of the First Amended Decree was the result of an inadvertence. Husband does not challenge that finding. We hold that Rule 85(C)(1) provided the family court with the authority to correct its own error by vacating the First Amended Decree.

II. THE FAMILY COURT COULD PERMIT WIFE TO PROCEED PRO PER.

¶14 After Husband's May 11, 2009 Motion For New Trial, Wife could no longer afford to pay her attorney.³ So on May 18, 2009, Wife filed her Response to Husband's Motion For New Trial pro per. Wife's attorney filed a Notice of Withdrawal the next day. The following day, Husband filed a Motion To Strike Wife's pro per response and asked that the court rule on his Motion For New Trial "without reference to the response." Husband argued, citing Rule 9(A), that until the court issued an order allowing Wife's attorney to withdraw, Wife was not legally able to file papers on her own behalf. Husband provided no authority for that claim.

¶15 On appeal, Husband still provides no authority requiring or even authorizing the court to strike Wife's pro per response. "Rule 13(a)(6), Arizona Rules of Civil Appellate Procedure, requires the appellant to provide 'citations to the authorities, statutes and parts of the record relied on.' Failure to do so can constitute abandonment and waiver of that claim." *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009). And we are aware of no authority that would effectively subject a party to default when she seeks to be heard merely because counsel's motion to withdraw is pending.

³ At that time, the Clearinghouse was still holding the temporary spousal support and attorney's fees awarded to Wife.

The overriding purpose of the Rules is to facilitate just decisions on the merits -- not to secure unfair advantage through gamesmanship. We reject Husband's argument.

III. THE FAMILY COURT DID NOT ABUSE ITS DISCRETION IN PARTIALLY DENYING HUSBAND'S MOTION FOR NEW TRIAL.

¶16 Husband also challenges the partial denial of his motion for new trial. The family court has broad discretion in determining whether to grant or deny a motion for new trial, and its ruling will not be disturbed absent an abuse of that discretion. *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009). An abuse of discretion occurs when a family court erroneously applies the law in reaching its discretionary determination. *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). The burden rests on the party seeking to overturn the family court's decision. *Pullen*, 223 Ariz. at 296, ¶ 10, 222 P.3d at 912.

¶17 Husband contends that because the minute entry partially denying his motion did not explicitly communicate that the court had reviewed the sufficiency of the evidence, the court had violated its duty to conduct that review. Rule 83(D)(4) governs new trial motions in family court, and provides: "No order granting a new trial shall be made and entered unless the order specifies with particularity the grounds on which the new trial is *granted*." (Emphasis added.)

Rule 83(D)(4) does not require the court to specify the grounds for its decision to deny a motion for a new trial or recite that it has reviewed the evidence. We therefore find Husband has not met his burden of showing the court abused its discretion.

IV. *THE FAMILY COURT DID NOT ABUSE ITS DISCRETION BY AWARDING WIFE \$400 PER MONTH IN SPOUSAL MAINTENANCE.*

¶18 Husband challenges both the family court's finding that Wife qualified for spousal maintenance, and the amount awarded. We review an award of spousal maintenance for abuse of discretion, viewing the evidence in the light most favorable to sustaining the award, and will affirm if there is any reasonable evidence to support the award. *Leathers v. Leathers*, 216 Ariz. 374, 376, ¶ 9, 166 P.3d 929, 931 (App. 2007). There is an abuse of discretion if there is no evidence to support the family court's decision, *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999), or if the court made an error of law. *Fuentes*, 209 Ariz. at 56, ¶ 23, 97 P.3d at 881. We will not overturn a court's factual findings unless they are clearly erroneous. *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995).

A. Eligibility For Spousal Maintenance

¶19 The family court found that Wife qualified for spousal maintenance based upon three statutory factors: lack of sufficient property to provide for her reasonable needs, A.R.S.

§ 25-319(A)(1); inability to be self-sufficient through appropriate employment, A.R.S. § 25-319(A)(2); and a marriage of long duration after which Wife's age might preclude self-sufficiency through employment, A.R.S. § 25-319(A)(4).

¶120 The record contains substantial evidence to support the family court's award. Because much of the property identified in the decree was not community in character, Husband received the overwhelming majority of the assets. The property Wife received could reasonably be considered insufficient to meet her reasonable needs. Similarly, wife's modest income while employed and difficulty remaining employed could, taken in the context of the substantial debts Wife has, reasonably be considered to show that she could not meet her reasonable needs through employment. And Wife's age and the duration of the marriage independently satisfied A.R.S. § 25-319(A).

B. Maintenance Amount

¶121 To determine the appropriate amount and duration of the spousal maintenance, the family court must consider the relevant factors listed in A.R.S. § 25-319(B). The family court has "substantial discretion to set the amount and duration of spousal maintenance." *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993).

¶122 The Second Amended Decree awards \$400 per month after noting it considered "relevant factors," and Husband contends

that it is defective because it does not specifically mention any A.R.S. § 25-319(B) factors. We disagree. "When the sufficiency of evidence to support a judgment is questioned . . . an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the court below." *Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986). Husband's own briefs concede the court had evidence of Wife's limited income and employment history. Wife provided testimony about her expenses. There was testimony about Wife's debts and possessions. Finally, there was testimony that Husband earned substantially more than Wife, which the family court could have found credible. There is no requirement that the court make detailed findings of fact on each factor under A.R.S. § 25-319(B), and ample evidence existed to permit the court to consider the relevant factors. We therefore affirm the amount of spousal maintenance awarded.

V. *THE FAMILY COURT DID NOT ERR IN ITS DENIAL OF HUSBAND'S REQUEST FOR RECONSIDERATION OF ITS TEMPORARY ORDERS.*

¶23 Husband contends that the family court's refusal to reconsider its temporary order of attorney's fees and spousal maintenance was an abuse of discretion. Under Arizona law, "[o]n the basis of the showing made, and in conformity with §§ 25-318 and 25-319, the court may issue . . . an order for

temporary maintenance or support in amounts and on terms just and proper in the circumstances." A.R.S. § 25-315(E). And Section 25-324(A) provides for an award of fees "from time to time." We review such awards for abuse of discretion. *Berger v. Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983).

¶24 Wife was unemployed when she sought temporary maintenance, although Husband and Wife disagreed over whether Wife had left her previous job voluntarily. Wife's subsequent employment was temporary. Although Husband contends Wife should use \$40,000 in allegedly liquidated retirement benefits to support herself, we cannot say the family court misapplied the law or otherwise abused its broad discretion in refusing to revisit the awards.

VI. THE FAMILY COURT DID NOT ABUSE ITS DISCRETION IN GRANTING WIFE \$2,500 TO COMPENSATE FOR HUSBAND'S WASTE.

¶25 Husband also challenges the family court's decision to award Wife \$2,500 to compensate for marital waste. The family court had originally awarded \$5,000 to Wife based upon Husband's expenses incurred during trips to Southeast Asia. It later reduced the waste award to \$2,500, allocating Husband a \$2,500 share of the community's interest in the \$5,000.

¶26 When dissolving a marriage, a family court must divide the parties' community property "equitably." A.R.S. § 25-318(A). The family court may consider "excessive or abnormal

expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common." A.R.S. § 25-318(C). See also *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 6, 972 P.2d 676, 679 (App. 1998). If the family court finds waste, it may add the value of the dissipated property to the total value of other existing community, joint tenancy, or commonly held property, equitably divide the total between the spouses, and make an equalizing payment to compensate the complaining spouse. *Martin v. Martin*, 156 Ariz. 452, 458, 752 P.2d 1038, 1044 (1988). We review the apportionment for abuse of discretion. *Hrudka*, 186 Ariz. at 93, 919 P.2d at 188.

¶127 As the party alleging waste, Wife bore the initial burden of production. *Gutierrez*, 193 Ariz. at 346, ¶ 7, 972 P.2d at 679. Once such a showing was made, the burden of proof shifted to the spending spouse to demonstrate that the expenditures were made for a community purpose. *Id.* at 346-47, ¶ 7, 972 P.2d at 679-80.

¶128 Wife produced documentation of overseas travel and related expenses that amounted to a *prima facie* showing of waste. Husband on appeal asks that we weigh that evidence against the evidence he presented. "The evidence in this case was conflicting. We will defer to the trial court's determination of witnesses' credibility and the weight to give

conflicting evidence." *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. As in *Gutierrez*, "[r]easonable evidence supported the trial court's finding of waste in this case." *Id.* at 348, ¶ 13, 972 P.2d at 681.

VII. THE FAMILY COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO AWARD ATTORNEY'S FEES TO HUSBAND.

¶29 Finally, Husband contests the family court's refusal to compensate him for attorney's fees and costs pursuant to A.R.S. § 25-324(A). We review the family court's fee ruling for abuse of discretion. *Magee v. Magee*, 206 Ariz. 589, 590, ¶ 6, 81 P.3d 1048, 1049 (App. 2004).

¶30 The family court has discretion to order one party to pay a reasonable amount of the other party's costs and expenses "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). The balancing of the required factors is "a matter for the trial court's sound discretion." *Magee*, 206 Ariz. at 592-93, ¶ 17, 81 P.3d at 1051-52.

¶31 Husband contends Wife's claim for a community lien on the residence was an unreasonable position that compels the awarding of attorney's fees. Though Husband prevailed on that issue, the record does not compel a finding that Wife's position was unreasonable. The trial court was also required to balance

the financial resources of the parties, and the record supports a finding that Husband has superior resources. The denial of attorney's fees to Husband was not an abuse of discretion.

CONCLUSION

¶32 We affirm the family court's rulings in all respects. In our discretion, we deny both parties' requests for attorney's fees. Wife is entitled to her costs on appeal. A.R.S. § 12-341.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

SHELDON H. WEISBERG, Judge