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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 10-0409
)
DONALD ALLEN DYKE,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) Not for Publication
) (Rule 28, Arizona Rules
ROBYN KAY DYKE,) of Civil Appellate Procedure)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2009-003253

The Honorable David J. Palmer, Judge

AFFIRMED

Donald Allen Dyke
In *Propria Persona* Petitioner/Appellant

Glendale

Robyn Kay Brown-Dyke
In *Propria Persona* Respondent/Appellee

Moberly, MO

G E M M I L L, Judge

¶1 Donald Dyke ("Husband") appeals from portions of the decree dissolving his marriage to Robyn Dyke ("Wife"). Husband challenges the spousal maintenance award and the order for him

to pay certain medical costs for Wife. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in 1983. In 2003, Wife moved to Missouri after Husband committed domestic violence against her. As a result of this incident, Husband pled guilty to a class 6 undesignated offense. See Maricopa County Super. Ct. Case No. CR2003-009716.

¶3 Husband filed a petition for dissolution in August 2009. After a trial, the court issued a decree awarding Wife spousal maintenance of \$300 per month for thirty months retroactive to September 1, 2009. Additionally, the court ordered Husband to pay the debt owed for Wife's facial reconstruction surgery and to pay any future medical costs necessary based upon the domestic violence that occurred in 2003. Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A), (B) (2003).

DISCUSSION

¶4 Husband first challenges Wife's entitlement to spousal maintenance and the amount and duration of the award. We review an award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). We view the evidence in the light most

favorable to sustaining the award and "will affirm the judgment if there is any reasonable evidence to support it." *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 9, 160 P.3d 231, 233 (App. 2007).

¶5 To qualify for spousal maintenance, Wife was required to establish at least one of the following four statutory factors: (1) that she lacks sufficient property, including that awarded to her, to meet her reasonable needs; (2) that she is unable to be self-sufficient through appropriate employment or lacks earning ability in the labor market adequate to be self-sufficient; (3) that she contributed to Husband's educational opportunities; or (4) that she had a marriage of long duration and is of an age that may preclude her from gaining suitable employment. A.R.S. § 25-319(A)(1)-(4) (2007). Once a spouse establishes a statutory basis for spousal maintenance, the court must then consider the relevant factors listed in A.R.S. § 25-319(B) in setting the amount and duration of the award. *Leathers v. Leathers*, 216 Ariz. 374, 377, ¶ 10, 166 P.3d 929, 932 (App. 2007). Those factors include the standard of living established during the marriage; duration of the marriage; age, employment history, earning ability and physical condition of the spouse seeking maintenance; the supporting spouse's ability to pay and meet his or her own financial needs; the comparative earning power of the spouses; the financial resources of the spouse seeking maintenance and time needed to acquire sufficient

education or training to find appropriate employment; and damages from conduct that results in criminal conviction of either spouse in which the other spouse was the victim. A.R.S. § 25-319(B)(1)-(5), (9)-(10), (13).

¶16 The court determined Wife qualified for maintenance because she lacks sufficient property to provide for her reasonable needs, is unable to be self-sufficient through appropriate employment, and had a marriage of long duration and is of an age that may preclude gaining employment adequate to be self-sufficient. A.R.S. § 25-319(A)(1)-(2), (4). Additionally, the court set forth findings on all of the relevant A.R.S. § 25-319(B) factors in setting the amount and duration of the award. For instance, the court found the parties enjoyed a comfortable standard of living during the marriage, Wife occasionally worked at low paying jobs during the marriage and currently needs certification to work as a caregiver, which she has done since separating from Husband in 2003. A.R.S. § 25-319(B)(1), (3), (10). Husband is in a better financial position than Wife and is able to meet his own financial needs while also paying maintenance to Wife. A.R.S. § 25-319(B)(4), (5). Wife, however, cannot currently meet her own needs. A.R.S. § 25-319(B)(9).

¶17 The record contains substantial evidence supporting the court's findings. The parties were married 20 years before

separating. A.R.S. § 25-319(A)(4), (B)(2). At the time of the hearing, Wife was 47 years old, had completed tenth grade and obtained a GED. A.R.S. § 25-319(A)(4), (B)(3). Wife worked at a convenience store for a couple of years during the marriage, but was primarily a stay at home mother.¹ A.R.S. § 25-319(B)(1). Between 2003 and July 2009 she worked as a caregiver, making \$9.00 per hour approximately 30 hours per week, but the company she worked for closed. A.R.S. § 25-319(A)(2), (B)(4). According to the record, Wife is currently receiving unemployment, is unable to pay her bills, and needs certification to work as a caregiver again. A.R.S. § 25-319(A)(2), (B)(9), (10). Husband has worked as a truck driver throughout the marriage and earns approximately \$1,000 per week. A.R.S. § 25-319(B)(4), (5). Additionally, Wife suffered damages and may need future surgeries resulting from the domestic violence incident for which Husband was convicted. A.R.S. § 25-319(B)(13); see *State v. Thompson*, 200 Ariz. 439, 441, ¶ 7, 27

¹ Without citing to the record, Husband states Wife is able to be gainfully employed because of her customer service and cashier experience and because she attended college classes. Additionally, Husband asserts Wife was self-sufficient for the seven years prior to the petition for dissolution. Because Husband does not cite to the record as required and because these statements are not supported by the record, we disregard them. See *Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985) (court may disregard facts lacking appropriate references to record and those unsupported by record); see also ARCAP 13(a)(6) (an argument in an opening brief must contain citation to authority and parts of the record relied on).

P.3d 796, 798 (2001) ("One is convicted when there has been a determination of guilt by verdict, finding, or the acceptance of a plea.").

¶8 Wife requested \$300 per month for 240 months and the court awarded \$300 per month for 30 months. Because the court considered the relevant statutory factors and its findings are supported by the record, the court did not abuse its discretion in awarding Wife spousal maintenance in the amount and duration set forth therein.

¶9 Next, Husband argues the court erred by considering evidence of the criminal case stemming from the 2003 domestic violence incident because the court rejected Wife's pre-trial motion "to include case #CR2003009716 as Respondent's Exhibits in Divorce". We review evidentiary issues for an abuse of discretion. *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 398, 949 P.2d 56, 58 (App. 1997).

¶10 Although the court rejected Wife's motion because of her failure to file the motion with the clerk of the court² and to send Husband a copy, there was no error considering the testimony about the criminal case. Wife listed the case in her pre-trial statement and Husband did not object. At the hearing, the court questioned Wife about the domestic violence incident

² The motion is not part of the record.

and Wife testified about the criminal case and gave the case number. Husband did not object to Wife's testimony, and in fact, testified about the matter himself. See *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317 (2000) ("An objection to proffered testimony must be made either prior to or at the time it is given, and failure to do so constitutes a waiver."). Accordingly, Husband's argument is waived. Additionally, Husband's conviction was relevant to the issue of spousal maintenance. A.R.S. § 25-319(B)(13); see generally Ariz. R. Evid. 402 ("All relevant evidence is admissible, except as otherwise provided"). Further, a court may take judicial notice "that a record exists," "the nature of its content," and "that a judgment has been rendered." *Scottsdale Mem'l Health Sys., Inc. v. Clark*, 157 Ariz. 461, 468, 759 P.2d 607, 614 (1988); see also *Reidy v. O'Malley Lumber Co.*, 92 Ariz. 130, 132, 374 P.2d 882, 884 (1962) (court can take judicial notice of another action in the same court). Based on the information set forth in the decree, it appears the court took judicial notice of the criminal case, and there was no error in so doing.

¶11 Husband also argues the court erred by ordering him to pay for Wife's medical costs because the restitution issue was adjudicated in the criminal case. Contrary to Husband's argument, Wife testified there was no restitution ordered in the

criminal case.³ We defer to the family court's assessment of witness credibility as it is in the best position to make such determination. *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. Further, in her pre-trial statement, Wife requested payment of her past and future medical bills resulting from the domestic violence and Husband did not object to these issues. Based on the evidence in this record, the court did not err by ordering Husband to pay Wife's medical costs resulting from the domestic violence.

¶12 Last, Husband argues the court erred by considering Wife's untimely response to the petition for dissolution. Wife accepted service of the petition on September 14, 2009, but did not file a response until November 2, 2009. Husband filed an application and affidavit for default on October 19, 2009.

¶13 There was no error considering Wife's response. First, this issue is waived because Husband never requested the court to strike Wife's response, nor does he cite any legal authority requiring the family court to *sua sponte* strike Wife's response. See *In re 1996 Nissan Sentra*, 201 Ariz. 114, 117, ¶ 7, 32 P.3d 39, 42 (App. 2001) (failing to file a motion to strike waives any objection to deficiencies of a document); and

³ We disregard Husband's unsupported statements in his reply brief concerning his plea agreement. See *Flood Control Dist. of Maricopa County*, 148 Ariz. at 68, 712 P.2d at 981.

Ritchie v. Krasner, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failing to support arguments with legal authority may constitute abandonment or waiver of that claim).

¶14 Moreover, the court never entered a default judgment against Wife. Nearly two months after Wife filed her response, and shortly after Wife failed to appear at a resolution conference, the court set a default hearing for March 31, 2010. At some point, the hearing was apparently converted to a hearing on Wife's motion for temporary orders, although notification of such change does not appear in the record. At the hearing, the court converted the matter to the dissolution trial and Husband did not object.

¶15 Additionally, Wife actively participated telephonically at the trial and Husband made no objection to Wife's participation.

CONCLUSION

¶16 Finding no error, we affirm the dissolution decree.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge