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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: 06/07/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:) 1 CA-CV 10-0421
)
TERRY K. MCCLELLAN,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication
v.) - Rule 28, Arizona
) Rules of Civil
SUSAN E. MCCLELLAN,) Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2008-002907

The Honorable David J. Palmer, Judge

AFFIRMED

Terry K. McClellan
In Propria persona

Tempe

Mariscal, Weeks, McIntyre & Friedlander, P.A.
By Leonce A. Richard
Attorneys for Respondent/Appellant

Phoenix

H A L L, Judge

¶1 Susan McClellan appeals from the family court's
rulings on her petition to enforce the dissolution decree and

its denial of her motion for a new trial. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Susan McClellan (Wife) and Terry McClellan (Husband) were married on April 3, 1971. On September 12, 2008, Husband filed a petition for dissolution of marriage. On April 30, 2009, the family court entered a signed decree of dissolution dividing the parties' property and debts and denying Wife's request for spousal maintenance. On May 15, 2009, Wife filed a motion to reconsider, which the family court denied. Neither party appealed from the dissolution decree.

¶3 On May 26, 2009, Husband filed an amended property settlement agreement, advising the court that the parties, subsequent to the family court's entry of the decree of dissolution, "agreed to divide their property and debts differently." The settlement agreement bears the signatures and initials of both parties.

¶4 On June 15, 2009, Wife filed a motion entitled "Emergency Motion Ex-Husband's Failure to Comply with Court Orders for a 2nd Time [and] Trying to Coerce Me into Signing Everything Away [and] Continually Harassing Me [and] Trying to Manipulate Me." Two days later, Husband filed a second amended property settlement agreement, advising the family court that

the parties had entered a new binding agreement controlling the division of their property and debts. The second settlement agreement bears the names and initials of the parties.

¶15 On November 18, 2009, the Honorable Scott McCoy held an evidentiary hearing on Wife's motion to enforce the dissolution decree. At the evidentiary hearing, Wife testified that she never "saw," "read," or "agreed to" either of the settlement agreements. When she was initially questioned by Judge McCoy regarding her signature on the agreements, Wife responded that she had signed a blank piece of white paper, not the actual agreements. Later, however, Wife testified that Husband "force[d]" her to sign the documents. Finally, Wife testified that her initials on the settlement agreements were not written in her handwriting. Husband, on the other hand, testified that Wife had the opportunity to read and review the settlement agreements before signing and that the initials and signatures on both agreements are in Wife's handwriting. Judge McCoy took the matter under advisement.

¶16 Shortly thereafter, however, Judge McCoy "disqualified" himself and the case was transferred to the Honorable David Palmer for all further proceedings. On February 12, 2010, Judge Palmer entered a signed minute entry ruling on Wife's petition to enforce the dissolution decree. At the

outset of his ruling, Judge Palmer explained that he "carefully and deliberately" reviewed the pleadings and the audio-recording of the evidentiary hearing. Based upon his review of the evidence, Judge Palmer found that both parties "voluntarily" entered the amended property agreements. In making this finding, Judge Palmer explained that Wife's inconsistent testimony that (1) she never saw the agreements, and (2) she was coerced into signing the agreements, and (3) she only signed a blank piece of paper, was not "credible." Instead, Judge Palmer found Husband's testimony that the agreements were valid and voluntary credible. Accordingly, Judge Palmer found that the amended property agreements were binding and denied Wife's claims for relief other than ordering that Wife be permitted to retrieve her personal property from the former community residence, as ordered in the dissolution decree and not contravened by the subsequent agreements. Judge Palmer also ordered that Husband pay Wife the \$5,000 she is owed as consideration pursuant to the terms of the second property agreement.

¶17 Wife timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-2101(B) and - 2102(B) (2003).

DISCUSSION

I. Denial of Motion for New Trial

¶8 Wife contends that the family court erred by denying her motion for new trial. Specifically, Wife argues that she should have been afforded a new trial because Judge Palmer did not have the opportunity to view the witnesses' testimony first-hand and assess their credibility.

¶9 We review a trial court's ruling on a motion for new trial for an abuse of discretion. See *State v. Rhodes*, 219 Ariz. 476, 478, ¶ 9, 200 P.3d 973, 975 (App. 2008). As set forth in Rule 88 of the Rules of Family Law Procedure, when a judicial officer is unable to proceed after a trial or hearing has commenced, another "judicial officer may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." "[I]f an adequate electronic record is not available," however, and a party enters a request, "the successor judicial officer shall recall any witness whose testimony is material and disputed and who is available to testify again without undue burden." *Id.*

¶10 Here, Judge Palmer expressly stated that he had "carefully reviewed" all of the relevant documents and "carefully and deliberately" listened to the recording of the

November 18, 2009 evidentiary hearing. Wife does not argue that the audio-recording of the evidentiary hearing was inadequate or unreliable. *Cf. Gersten v. Gersten*, 223 Ariz. 99, 105, ¶¶ 15-16, 219 P.3d 309, 315 (App. 2009) (rejecting party's claim that electronic record was inadequate for purposes of Rule 88). Rather, she contends that Judge Palmer could not adequately assess the witnesses' credibility without receiving their testimony in-person. Initially, we note that Judge Palmer was not merely reviewing a transcript but listened to the parties' testimony. *Cf. In re MH 2004-001987*, 211 Ariz. 255, 258-59, ¶¶ 15-19, 120 P.3d 210, 213-14 (App. 2005) (concluding telephonic testimony is permissible under the Arizona Rules of Civil Procedure). Moreover, Judge Palmer explained that he found Wife's testimony not credible because it was internally inconsistent, that is, because Wife offered contradictory and mutually exclusive explanations for how her signature and initials appeared on the property agreements. Thus, Judge Palmer did not conclude that Wife's testimony was not credible simply by comparing the relative strength of the parties' testimony, but rather found Wife's differing explanations for her signature and initials on the property agreements to be implausible. The record supports Judge Palmer's conclusion that Wife's testimony regarding whether the parties voluntarily

entered the property agreements was not credible. Therefore, absent a claim that the electronic recording was inadequate, we conclude that the family court did not abuse its discretion by denying Wife's motion for a new trial.

II. Miscellaneous Issues

¶11 To the extent Wife also contends that Judge Palmer's ruling is erroneous because it is not "it[e]mized," we note that Judge Palmer thoroughly explained his reasoning and conclusions and Wife has failed to identify any omissions in the ruling or explain how she was prejudiced thereby. Therefore we do not address this claim. Likewise, to the extent Wife requests that this court order Husband to pay her \$5,000 and allow her to retrieve her personal property, we note that the family court included such provisions in its minute entry ruling.

¶12 Finally, Husband requests that we order Wife to sign quitclaim deeds and impose sanctions for "her obvious perjured statements" at the evidentiary hearing. In his minute entry ruling, Judge Palmer upheld the parties' property agreements and specifically noted that those agreements require Wife to execute quitclaim deeds on two properties. If Wife has refused to sign the quitclaim deeds, Husband may seek an order in the superior court compelling her to do so. As to the request for sanctions, Husband failed to submit this request in the family court and we

