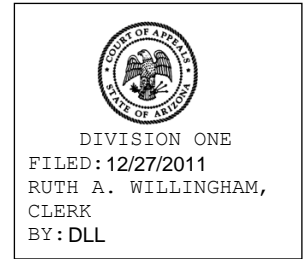


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:) No. 1 CA-CV 10-0526
)
KAY L. WARFIELD,) DEPARTMENT D
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.) Not for Publication
) (Rule 28, Arizona Rules
MARK BATEMAN SMITH,) of Civil Appellate Procedure)
)
Respondent/Appellee.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2002-094853

The Honorable Jo Lynn Gentry-Lewis, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 Kay Warfield ("Wife") appeals from the family court's post-decree order revaluing her former marital residence (the "house") after she purchased Mark Smith's ("Husband") equity interest and the subsequent denials of her post-order motions. Wife argues (1) the court's rulings violate her substantive due process rights, (2) Husband waived his claim for a higher appraised value of the house, and (3) Husband should be estopped from asserting his claim for a higher value. For the reasons that follow, we affirm.

DISCUSSION

¶2 In December 2002, Wife filed a petition for dissolution. The contested issues included whether the equity in the house should be equally divided.¹ At trial, the parties stipulated the house had a value of \$288,000. The court determined each party was entitled to one-half of the equity in the house and ordered Wife to pay Husband \$135,360² by October

¹ Wife argued she should receive a larger portion of the equity than Husband because her parents contributed \$100,000 toward the mortgage so she could be at home with the children.

² A six percent cost of sale factor was deducted from the \$288,000 value, leaving \$270,720 to be equally divided between the parties. This practice was subsequently disapproved in *Kohler v. Kohler*, 211 Ariz. 106, 107-08, ¶¶ 6-8, 118 P.3d 621, 622-23 (App. 2005).

15, 2003 or sell the house.³ Wife appealed and posted a \$135,360 supersedeas bond in July 2004, thereby staying the action.

¶3 In an opinion issued on September 7, 2006, this court held that Husband's attorney's service as a judge pro tempore for the trial judge created an appearance of impropriety and, therefore, remanded many of the rulings challenged on appeal for an independent determination. *In re Kay S. v. Mark S.*, 213 Ariz. 373, 142 P.3d 249 (App. 2006). One issue remanded was whether the equity in the house should be allocated equally between the parties. *Id.* at 383, ¶¶ 50-52, 142 P.3d at 259.

¶4 Prior to the hearing on remand, Husband requested the court value the house at \$455,000,⁴ which he asserted was the current fair market value based on a recent appraisal. Wife filed a motion in limine to preclude evidence regarding the new value for the house and argued equities balanced in favor of using the 2003 stipulated value. The court withheld ruling on the motion. After a three-day trial in early 2007, the court issued a ruling on June 28, 2007, ordering the parties to evenly

³ The court issued its findings in July 2003, three days after trial, in an unsigned minute entry. The court subsequently entered a signed dissolution decree in January 2004.

⁴ Husband initially requested the court to value the house at \$460,000, based on an appraisal he had obtained. At trial, however, Husband requested the court to value the house at \$455,000 based on an updated appraisal dated October 5, 2006.

divide the equity in the house at "the fair market value in 2003 or \$270,000.00." The court further ordered:

[Wife] shall pay to [Husband] \$135,000.00 by September 1, 2007. This shall represent payment for [Husband's] one half interest in the home. . . .

If [Husband] receives the funds by September 1, 2007, he shall within one week of receiving the funds sign any forms necessary to remove his ownership interest in the home.

¶15 Husband moved for post-trial relief, requesting the court alter or amend the judgment or grant a new trial with respect to the valuation issue. On August 29, 2007, while Husband's motion was pending, the parties filed a stipulation to release the \$135,360 supersedeas bond to Husband's attorneys' trust account "in conformity with the court's order of June 28, 2007 that [Wife] tender \$135,000 to [Husband] for his share of equity in the home by September 1, 2007." The court subsequently released the bond, and Husband executed and delivered a quitclaim deed to Wife, releasing his interest in the house.

¶16 On March 27, 2008, the family court granted Husband's motion for post-trial relief, ruled that the house would be valued at \$455,000, and ordered Wife to pay Husband his one-half interest in the equity by June 1, 2008. Wife filed a motion to alter or amend the March 27 order, which the court subsequently

denied. Thereafter, Wife moved for relief from the March 27 order pursuant to Arizona Rule of Family Law Procedure ("ARFLP") 85(C)(1)(e), (f), which the court also denied. Wife appealed.⁵ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (Supp. 2011).⁶

DISCUSSION

I. Substantive Due Process

¶7 Wife first argues the family court's order revaluing the house after the completed sale violates her substantive due process rights.⁷ Specifically, she argues the family court could not retroactively change the house value after her property rights were fully vested. We review constitutional claims de

⁵ Wife's original notice of appeal was premature due to the unresolved counter motions Husband raised in response to Wife's 85(C) motion. The family court subsequently ruled on Husband's counter motions, and Wife timely filed a notice of appeal.

⁶ Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

⁷ Although not thoroughly argued in the family court, Wife asserted her due process rights were violated in two of her pleadings. Therefore, this issue is not waived on appeal. *Cf. Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (we do not consider issues raised for the first time on appeal, including constitutional issues); *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, 116, ¶ 16, 41 P.3d 651, 654 (App. 2002) ("Issues not properly raised below are waived.").

novo because they involve questions of law.⁸ *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 327-28, ¶ 6, 972 P.2d 658, 660-61 (App. 1998); *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, ¶ 16, 132 P.3d 290, 294 (App. 2006).

¶18 Article 2, Section 4, of the Arizona Constitution, provides, "No person shall be deprived of life, liberty, or property without due process of law." Ariz. Const. art. 2, § 4. A substantive due process claim requires a showing of a constitutionally protected property or liberty interest. *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 568, ¶ 44, 81 P.3d 1016, 1027 (App. 2003). Substantive rights may be abrogated if they are not vested; thus, a protectable property interest must be vested. *S & R Properties v. Maricopa County*, 178 Ariz. 491, 498, 875 P.2d 150, 157 (App. 1993); *Baker v. Ariz. Dep't of Rev.*, 209 Ariz. 561, 567, ¶ 25, 105 P.3d 1180, 1186 (App. 2005). Consequently, "a substantive legal right may

⁸ All of the issues raised on appeal were made in Wife's post-trial motions, which we review for an abuse of discretion. See *Maher v. Urman*, 211 Ariz. 543, 550, ¶ 21, 124 P.3d 770, 777 (App. 2005) (addressing Arizona Rule of Civil Procedure 60(c), which is identical in all material respects to ARFLP 85(C)); and *Innovative Home Health Care Inc. v. P.T. -O.T. Assoc. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (applying abuse of discretion standard to the federal counterpart of Rule 59(e), a motion to alter or amend judgment). The court abuses its discretion if it misapplies the law, acts arbitrarily or inequitably, or exercises its discretion on incorrect legal principles. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985); *Nowell v. Rees*, 219 Ariz. 399, 403, ¶ 11, 199 P.3d 654, 658 (App. 2008).

be subject to retroactive impairment before it becomes a vested right. . . . [b]ut, once the right is vested, legislation may not interfere by retroactively altering the law that applies to completed events.”⁹ *Aranda v. Indus. Comm’n of Ariz.*, 198 Ariz. 467, 471, ¶ 16, 11 P.3d 1006, 1010 (2000); see also *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205, ¶ 15, 972 P.2d 179, 189 (1999) (“legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events”).

¶19 “A property right ‘vests’ when every event has occurred which needs to occur to make the implementation of the right a certainty.” *Aranda*, 198 Ariz. at 471, ¶ 18, 11 P.3d at 1010; see also *San Carlos*, 193 Ariz. at 205, ¶ 15, 972 P.2d at 189 (“A vested right is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.”) (internal quotations omitted). Wife contends all of the events necessary for the sale of the house occurred by September 9, 2007, when Husband executed and delivered the deed to Wife, and, therefore, her property rights were fully vested at that time.

⁹ On the authority of *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 108, ¶ 11, 170 P.3d 712, 717 (App. 2007), we will consider, for purposes of our analysis and decision in this case, that a court order constitutes state action subject to constitutional limitations, and therefore a court order may, similar to legislation, be examined in light of substantive due process considerations.

¶10 Because Husband's motion for post-trial relief was pending when these actions occurred, we disagree with Wife's position.

¶11 In his motion, Husband expressly contested the value of the house the court used in the 2007 decree and requested the court to revalue the house at \$455,000. Like a *lis pendens*, which provides notice that a pending lawsuit may affect title to real property, *Santa Fe Ridge Homeowners' Ass'n v. Bartschi*, 219 Ariz. 391, 395, ¶ 11, 199 P.3d 646, 650 (App. 2008), Husband's motion gave Wife notice the value of the house was being challenged and might change. Wife therefore took title to the house subject to the possibility that the court would change the value. Because the decree was subject to the pending post-trial motion, the ruling concerning the house value was not final. *See, e.g., Baumann v. Tuton*, 180 Ariz. 370, 372, 884 P.2d 256, 258 (App. 1994) (issues raised in a post-trial motion are more appropriately considered by a trial court and "[a] litigant should be given the opportunity to persuade the trial court of its error . . . so that the trial court's ruling on a pending motion may cure any error and obviate the necessity for an appeal"). Thus, Wife's right to purchase Husband's entire equity interest for \$135,360 was not a certainty at that point.

¶12 Moreover, pursuant to A.R.S. § 25-318(A) (Supp. 2011), the family court must divide community property equitably. *In*

re Marriage of Flower, 223 Ariz. 531, 536, ¶ 18, 225 P.3d 588, 593 (App. 2010). The family court has discretion to determine the appropriate valuation date for assets. *Sample v. Sample*, 152 Ariz. 239, 242-43, 731 P.2d 604, 607-08 (App. 1986). In the present case, the appropriate valuation date was a contested issue at trial. After reconsidering its decision pursuant to Husband's post-trial motion, the court apparently determined valuing the house at the 2006 value was more equitable than its initial valuation. See, e.g., *In re Marriage of Bouquet*, 546 P.2d 1371, 1377 (Cal. 1976) ("The state's paramount interest in the equitable distribution of marital property upon dissolution of the marriage, we concluded, justified the impairment of the husband's vested property rights."). Contrary to Wife's argument, the court had discretion to reconsider the valuation date issued in the decree in light of Husband's post-trial motion. On this record, we discern no abuse of discretion by the trial court.

¶13 Accordingly, because the value of the house was not fixed by September 2007, Wife's right to purchase Husband's share of the equity for \$135,360 was not vested. Therefore, the family court's subsequent order increasing the value of the house, and consequently, Husband's share of the equity therein, did not violate Wife's substantive due process rights.

II. Waiver

¶14 Next, Wife argues Husband waived his claim to a higher appraised value for the house by entering into the stipulation and signing and delivering the quitclaim deed.

¶15 "Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). Although waiver is generally a question of fact, where the facts are not in dispute, the trial court may decide waiver as a matter of law. *Jones v. Cochise County*, 218 Ariz. 372, 381, ¶ 29, 187 P.3d 97, 106 (App. 2008). Nevertheless, when waiver "must be inferred from conduct, it is essentially a matter of intention . . . and, if the conduct from which such intention must be inferred is such that reasonable minds may differ as to what the inference should be[,] whether there is a waiver becomes a question of fact to be determined from the evidence submitted." *Sw. Cotton Co. v. Valley Bank*, 26 Ariz. 559, 563, 227 P. 986, 988 (1924). We will uphold the family court's express or inferred factual findings unless clearly erroneous or unsupported by credible evidence. *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995); see also *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998) ("[W]e may infer additional findings of fact

and conclusions of law sufficient to sustain the trial court's order as long as those findings are reasonably supported by the evidence, and not in conflict with any express findings.").

¶16 Husband did not expressly waive his claim to a higher appraised value of the house by signing the stipulation or by executing and delivering the deed. Neither the stipulation nor the deed reference Husband's pending post-trial motion.¹⁰ Thus, although Wife argues the stipulation does not contain a reservation of Husband's rights, Husband never withdrew his pending motion, nor did Wife require withdrawal of the motion when the court released the supersedeas bond.¹¹ In December 2007, Wife acknowledged Husband's pending motion and specifically requested a ruling on it. Wife's conduct of requesting a ruling on the pending motion belies her assertion that the stipulation or deed precluded reconsideration of the valuation issue or constituted a withdrawal of the motion. Additionally, by signing and delivering the quitclaim deed, Husband relinquished his ownership interest in that specific

¹⁰ The stipulation provides: "The parties, through Counsel undersigned, hereby stipulate that the Clerk of the Court immediately release the supersedeas bond in this matter in the amount of \$135,360 payable to the Udall Shumway Trust Account in conformity with the Court's order of June 28, 2007 that [Wife] tender \$135,000 to [Husband] for his share of equity in the home by September 1, 2007."

¹¹ In her brief Wife mentions Husband's pending motion "should have been withdrawn."

real property. He did not, however, waive his claim for a higher value of his equity interest as part of the overall division of the parties' property.¹²

¶17 Likewise, Husband's conduct does not necessitate an inferred finding of waiver. "A party who accepts an award or legal advantage under an order, judgment or decree, waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted." *Rosen v. Rae*, 132 Ariz. 509, 511, 647 P.2d 640, 642 (App. 1982). Here, the 2007 decree was adverse to Husband in that it used the 2003 value for the house despite Husband's request to use the 2006 value. Wife enforced the judgment by paying Husband \$135,360 for his interest in the property prior to the court deadline, thereby forcing Husband to comply with the remaining terms to remove his ownership interest in the house. See *Webb v. Crane Co.*, 52 Ariz. 299, 320, 80 P.2d 698, 708 (1938) ("[T]he payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment be by way of compromise and settlement or

¹² Wife cites Justice Udall's dissent in *Porter v. Porter*, 101 Ariz. 131, 147, 416 P.2d 564, 580 (1966), stating that a "quitclaim deed" "absolutely and unequivocally waived any right, title and interest in the property in dispute." Justice Udall, however, found waiver by virtue of the deed, as well as a release of judgment and an assignment, following appellee's submission to the jurisdiction of another state's court. *Porter*, 101 Ariz. at 146-48, 416 P.2d at 579-81. Here, there was no release of Husband's post-trial motion.

under an agreement not to appeal or under circumstances leaving only a moot question for determination.") (citation omitted); accord *Freeman v. Wintroath Pumps-Division of Worthington Corp.*, 13 Ariz. App. 182, 183, 475 P.2d 274, 275 (1970). The record reveals no agreement pertaining to Husband's pending post-trial motion.

¶18 Furthermore, this case is distinguishable from *Rosen*. In *Rosen*, the appellant seller appealed from a judgment ordering specific performance of a sales contract and directing that the real property and personal property described in the sales contract be conveyed to a previously appointed receiver. *Rosen*, 132 Ariz. at 510-11, 647 P.2d at 641-42. This court determined the appeal was barred because the appellant accepted benefits of the judgment including a check, the redemption of certain foreclosed properties, and representation by the appointed receiver in other actions. *Id.* at 511, 647 P.2d at 642. Further, the appellant demanded and obtained performance of one provision in the sales agreement which the judgment specifically required all parties to perform. *Id.* Accordingly, the appellant could not complain about the receiver's appointment or the order of specific performance. *Id.* at 511-12, 647 P.2d at 642-43.

¶19 Here, however, Husband received no benefits besides compensation for the house, the amount of which he contested.

Husband's actions signing the stipulation and deed do not constitute an acceptance of benefits that would waive review of the valuation issue. Moreover, the house was not sold to innocent third parties who took title without notice of the valuation issue. Instead, the action was between Husband and Wife who both had notice of the valuation dispute. Under these circumstances, Husband did not waive his right to seek a higher appraised value of the house in accordance with his pending motion.

III. Estoppel

¶20 Wife also argues Husband should have been estopped from pursuing his claim for a higher value of the house based on Wife's detrimental reliance on the stipulation and the family court's orders. "We review a trial court's decision not to apply estoppel for an abuse of discretion." *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007).

¶21 Estoppel may apply if one party engages in conduct or makes representations that induce another to believe in certain facts and the other party acts in justifiable reliance on that belief, which causes injury. *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 317, 742 P.2d 808, 818 (1987); *Carlson v. Ariz. Dep't of Econ. Sec.*, 184 Ariz. 4, 5, 906 P.2d 61, 62 (App. 1995). "Reliance is justified when it is

reasonable, but is not justified when knowledge to the contrary exists." *Carondelet Health Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 187 Ariz. 467, 470, 930 P.2d 544, 547 (App. 1996) (citations omitted).

¶122 According to Wife, Husband insisted on payment by September 1, 2007, without conditions, despite the fact the money had been lodged in the form of a supersedeas bond since July 2004, thereby persuading her to buy Husband's interest in the house. *See generally Bruce Church, Inc. v. Superior Court*, 160 Ariz. 514, 517, 774 P.2d 818, 821 (App. 1989) (noting the general purpose of a supersedeas bond is to preserve the status quo pending appeal). Wife asserts she would have let Husband purchase her equity interest had she known the court would later revalue the home. The court's order releasing the bond provides it is "in satisfaction of the Court's June 28, 2007 order that [Wife] tender \$135,000 to [Husband] for his share of equity in the home."

¶123 Nevertheless, Wife had knowledge of Husband's pending post-trial motion challenging the house value. Such knowledge makes any reliance on Husband's conduct unjustifiable because the motion was not withdrawn and there is no indication Husband released his claim to a higher value.¹³ Moreover, in an

¹³ At most, it is a disputed issue of fact whether Husband released his claim to revalue the house. Because the court

affidavit filed in May 2008, Wife stated she relied on the court's orders when she paid the money to Husband, not Husband's conduct.¹⁴

¶24 The court's order releasing the bond says nothing about Husband's post-trial motion and Wife knew the 2007 decree was subject to modification due to Husband's pending post-trial motion. In fact, in response to Wife's "emergency motion to order Husband's counsel to hold funds in trust," Husband noted that both parties still have appellate rights regarding the court's ruling. Thus, Wife failed to meet her burden of proving estoppel.¹⁵ See *Knight v. Rice*, 83 Ariz. 379, 381, 321 P.2d

denied Wife's post-trial motions, impliedly finding Husband did not release his valuation claim, and there is evidence that Husband did not release his valuation claim -- specifically no withdrawal of his post-trial motion and no express waiver of such claim -- we will uphold this implied factual finding. *Hrudka*, 186 Ariz. at 92, 919 P.2d at 187.

¹⁴ Wife stated, "[i]n an effort to bring finality to this matter," she paid Husband \$135,000 by the court deadline.

¹⁵ Wife also contends it is unfair for Husband to share in the appreciation of the house when he refused to allow his share of the equity to remain in the house, thereby subjecting only Wife to the risk of a market decline. Regardless of market conditions, Husband was entitled to his portion of the equity in the house. A.R.S. § 25-318(A). And we note that changing market conditions, whether up or down, may seem to inject an element of unfairness to one side or the other. We necessarily defer to a substantial extent to the discretion and judgment of trial court judges in making these important decisions. Additionally, Wife argues Husband's statement on August 31, 2007, that "[t]here is no legal or equitable reason [Husband] should not be paid by 9/1/07 as this Court has already ordered,"

1037, 1038 (1958) (the party asserting equitable estoppel "has the burden of showing by clear and satisfactory proof that all the elements are present").

IV. Attorneys' Fees

¶25 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2011). Section 25-324(A) grants the court discretion to order one party to pay a reasonable amount of the other party's costs and expenses including attorneys' fees "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). After considering the financial resources

is a binding judicial admission. See *Clark Equip. Co. v. Ariz. Prop. and Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) ("A judicial admission is '[a]n express waiver made in court . . . by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact, [and] has the effect of a confessional pleading, in that the fact is therefore to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.'") (citation omitted). We disagree that this was a binding judicial admission that prevents Husband from benefiting from the trial court's increased valuation. Husband's statement was made in response to Wife's "emergency motion to order Husband's counsel to hold funds in trust pending disposition of fee application." Husband previously asserted that without these funds available he was unable to pay his attorney or buy a house. Further, Husband's position throughout these proceedings has consistently been that he is entitled to more than \$135,000 for his equity interest in the house. There was no reason for Husband not to accept a portion of the proceeds he believed he was entitled to pursuant to the court's order which was subject to the pending post-trial motion.

of the parties and the reasonableness of the positions throughout these proceedings, we exercise our discretion and decline to award fees to either party.

CONCLUSION

¶126 For the foregoing reasons, we affirm the family court's post-decree order valuing the house at \$455,000.

_____/s/_____
JOHN C. GEMMILL, Judge

_____/s/_____
PATRICK IRVINE, Presiding Judge

_____/s/_____
PHILIP HALL, Judge