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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



DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

In re the Marriage of:)
)
SANDRA SCHREINER,) 1 CA-CV 10-0732
)
Petitioner/Appellee,)
) DEPARTMENT D
v.)
) **MEMORANDUM DECISION**
DENNIS W. SCHREINER,) (Not for Publication -
) Rule 111, Rules of
Respondent/Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court of Mohave County

Cause No. DO 2009-07178

The Honorable Randolph A. Bartlett, Judge

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

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T H O M P S O N, Presiding Judge

¶1 Dennis W. Schreiner (husband) appeals from the trial

court's divorce decree. We reverse and remand to the trial court for a re-determination of the duration of the spousal maintenance awarded to wife. As to all other claims, we affirm.

BACKGROUND

¶2 Husband and wife were married in August 1980 in Ohio. The two separated in the summer of 2006. Wife moved to Lake Havasu, Arizona, where her mother was and husband continued to live in the marital residence in Ohio. Wife filed for divorce in Arizona in June 2009. The parties have two grown sons. Wife at the time of trial was 54 and husband was 58. Neither testified to significant health issues.

¶3 Husband is a senior consultant working at a nuclear power station. Husband's salary is approximately \$104,000 annually plus the potential for annual bonuses which generally range from \$12,000-16,000; for 2009 his bonus was \$22,380. It is undisputed that, throughout the early marriage, husband was the primary breadwinner and wife primarily a homemaker and stay-at-home mother. When the youngest son was in middle school, wife started working part-time and soon thereafter started teaching. She obtained a masters degree in teaching in 2004. Her annual teaching salary prior to the separation was between \$19,000-24,000. After moving to Arizona, wife obtained substitute teaching work eventually earning \$11,000 for the 2006-2007 school year. At the time of trial in June 2010 wife was the district's most recent hire as

regular teacher; her contract rate was \$38,000.

¶4 The evidence at trial was that nearly from the time of the separation, husband and wife's finances were separate. Other than \$3,100 that she received from husband, wife supported herself and did not use community accounts or credit; husband paid all community obligations such as the mortgage, consumer credit and auto insurance.¹ Wife testified that since the separation she had lived frugally, with about \$100 remaining after the payment of necessary bills.

¶5 In May 2009, husband unilaterally liquidated their community property Wachovia IRA totaling \$165,179.40. He applied \$49,646.15 to essentially eliminate the outstanding community consumer debt; taxes in the amount of \$94,137.43 were automatically taken out of the distribution. He additionally purchased a new vehicle which was divided as part of the community property.

¶6 At trial, husband and wife agreed to an allocation of certain property and debt including the Ohio home to husband (\$38,521.69 in equity), an IRA to wife of \$36,018.08, and agreed to split equally the pension from his employer (which will pay \$3,667.39 per month if husband retires at age sixty-five) and an employer based savings plan valued at \$141,637.77. The parties allocated some personal property, including several vehicles, and a small amount of outstanding debt (under \$300). Husband was awarded

1 Wife also cashed out a small community property pension plan

all personal property in his possession and control, including a tool collection, guns and some Amish heirloom furniture valued collectively at \$25,000; wife's personal property in her control was valued at approximately \$2,500.

¶7 The trial court awarded wife \$2,000 per month in spousal maintenance for a period of fifteen years starting in September 2010, found two Bank of America accounts in wife's name to be her sole and separate property, awarded wife an equalization payment of \$24,683.82. The trial court found "troubling" husband's unilateral decision to liquidate the community IRA account of \$165,179.40. Of that, the court stated:

The Respondent's decision to liquidate the Wachovia IRA, which resulted in early withdrawal penalty and state and federal tax liabilities is troubling. While the community did benefit by the payment of \$49,646.15 in community debt, the community lost \$94,137.43 (\$82,576.72 federal income tax and \$11,560.71 state income tax) and the court considers this to be a waste of the community asset to the Petitioner's detriment. However, Respondent's incurring of the significant tax liability is tempered by Respondent solely paying all community obligations from the parties' physical separation in the amount of \$48,127.86, and his representation that he will pay the ten percent (10%) early withdrawal penalty []. Nonetheless, the Court concludes that petitioner should be compensated by an award of \$33,702.70 ($165,179.40 - 49,646.15 - 48,127.86 = 67,405.30$ divided by 2).

Neither party was awarded attorneys' fees or costs. Husband timely appealed.

she had from teaching in Ohio valued at approximately \$3,000.

ISSUES ON APPEAL

¶8 Husband asserts on appeal that:

1. Wife failed carry her burden of proof to show two Bank of America accounts the trial court awarded her were her sole and separate property.
2. The trial court abused its discretion in determining the amount and duration of wife's spousal maintenance.
3. The trial court erred finding a portion of the liquidation of a community retirement account in the amount of \$165,179.40 to be waste.

DISCUSSION

A. *Wife's Bank of America Accounts*

¶9 Husband asserts the trial court erred in awarding wife two Bank of America accounts valued at approximately \$18,024.54 as her sole and separate property. We view the evidence in the light most favorable to sustaining the trial court's findings and determine whether there was evidence that reasonably supports those findings. *Mitchell v. Mitchell*, 152 Ariz. 317, 323, 732 P.2d 208, 214 (1987). An inheritance is generally the sole and separate property of the spouse who received it. Arizona Revised Statutes (A.R.S.) § 25-213(A) (2007).

¶10 Wife testified that the accounts were opened in her name in February 2009 after her mother died and she received an

inheritance. Wife testified the source of the funds were her inheritance. Husband testified he had never had access to those accounts and did not know the source of the funds. Although he requested the accounts be treated as community property, he testified that he had no reason to believe wife was lying about the source of the funds or where she could have otherwise gotten that amount of money. Therefore, we find the evidence does reasonably support the trial court's determination that the two Bank of America accounts were wife's sole and separate property.

B. Spousal Maintenance

¶11 Husband next asserts that the trial court abused its discretion in determining the amount and duration of spousal maintenance due to wife. We review an award of spousal maintenance under an abuse of discretion standard. See *In re Marriage of Berger*, 140 Ariz. 156, 167, 680 P.2d 1217, 1228 (App. 1983) (citation omitted). Therefore, we will view the evidence in the trial court in the light most favorable to sustaining wife's spousal maintenance award and will affirm if there is any reasonable evidence to support it. See *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984) (citation omitted).

¶12 The amount and duration of spousal maintenance is determined pursuant to A.R.S. § 25-319 (2007). The trial court must consider thirteen factors, as each may be relevant in the particular case, including the standard of living during the

marriage, the duration of the marriage, each spouse's age, employment history and earning ability, and the financial abilities and resources of each spouse. *Id.* The minute entry stated the trial court found one factor under A.R.S. § 25-319(A) to support an award of maintenance: that the parties had a marriage of long duration and wife is of an age that may preclude the possibility of gaining employment adequate to be self sufficient. Under A.R.S. § 25-319(B), the determination of amount and duration, the trial court stated that he considered all relevant factors including standard of living during the marriage and relative financial resources at the time of trial before arriving at \$2,000 per month for a period of fifteen years.

¶13 We find no abuse of discretion in either the trial court's award of maintenance or in the amount awarded. However, under the facts of this case, the trial court did abuse its discretion in ordering spousal maintenance to last fifteen years. *See Hughes v. Hughes*, 177 Ariz. 522, 525, 869 P.2d 198, 201 (App. 1993). We note that although the parties did not request findings of fact and conclusions of law, the duration of fifteen years was far in excess of what wife requested and our independent review of the record failed to support a maintenance award lasting until husband is nearly 74 years of age. It does not appear from this record the trial court took into account the natural diminution of income husband would experience at retirement or what the parties'

relative financial status' would be at that time.²

¶14 During the trial, most of the focus was on spousal maintenance until husband retired. Testimony was vague as to whether husband had definitive plans to retire at age 62 or age 65. The projections as to husband's pension and social security were focused on age 65, although husband alluded to the fact he might retire before that. When asked by her counsel what maintenance she was seeking, wife testified "I think \$2,000 until Dennis retires" because once he did their income would be "somewhat equal" although she asked to "keep it open, you know, if I may if that's a possibility." On cross-examination, the following exchange occurred with wife:

Q: And when do you hope to retire?

A: Probably 65, I suppose. I don't know.

Q: Well, I really need to know.

A: 62.

Q: Do you think that it's fair that Dennis should be able to retire when he's 62 as well?

A: Yes.

Wife's counsel in closing stated, regarding maintenance "She's asking for at least \$2,000 until the time that Mr. Schreiner retires."

² We note that husband, of course, could not attempt to reduce his spousal maintenance obligations by voluntarily and prematurely leaving the workforce. See *Shaughnessy v. Shaughnessy*, 164 Ariz.

¶15 Given the evidence presented regarding husband's retirement, this award might not be modifiable upon that event. See *Reeves v. Reeves*, 146 Ariz. 471, 472-73, 706 P.2d 1238, 1239-40 (App. 1985) (husband's retirement was contemplated in the maintenance award and therefore was an insubstantial basis for modification); *Linton v. Linton*, 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (App. 1972) (finding in spousal maintenance case involving husband's retirement, "[i]n our opinion no substantially changed circumstances can be made out of the appellee's decrease in income because all of these facts were available to the parties at the time"). These case authorities indicate that the court was obliged to take into account the different financial circumstances that will occur upon a party's retirement in awarding maintenance for a period well into the normal retirement period. For the above stated reasons, the trial court's spousal maintenance award as to the duration of maintenance is reversed for further proceedings consistent with this decision.

C. *Wachovia IRA Liquidation*

¶16 Husband asserts that the trial court abused its discretion determining a portion of the liquidation of the Wachovia IRA was waste. We disagree.

¶17 The trial court is specifically authorized to consider excessive or abnormal expenditures when apportioning community

449, 451, 793 P.2d 1116, 1118 (App. 1990).

property. A.R.S. § 25-318(A) (2007). Again, we view the evidence in the light most favorable to sustaining the trial court's findings. *Mitchell*, 152 Ariz. at 323, 732 P.2d at 214. The evidence was that the IRA was liquidated without wife's knowledge or permission and resulted in tax penalty that significantly trumped the immediate gain. The trial court found husband's liquidation a troubling devaluation of a community asset. The trial court noted that the tax consequences would have been different if applied to wife's lower tax bracket, after retirement, and spread out over a period of time. The trial court took care to not charge the entire \$165,179.40 against husband, but rather deducted the amount spent on community debts and amount husband paid toward other community obligations during the separation. The waste determination is affirmed.

D. Attorneys' Fees on Appeal

¶18 Wife requests attorneys' fees and costs on appeal pursuant to A.R.S. § 12-341.01(C) and 25-324 (2005), and Rule 21 of the Arizona Rules of Civil Appellate Procedure. Section 25-341.01(C) is inapplicable as we have reversed on one of the grounds raised by husband. Section 12-324 requires us to examine both the financial resources and the reasonableness of the positions of each party. After doing so, we find that the parties should bear their own fees and costs on appeal.

CONCLUSION

¶19 For the foregoing reasons, we reverse the judgment of the trial court on the issue of the duration of spousal maintenance. In all other matters, the trial court is affirmed.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

JOHN C. GEMMILL, Judge