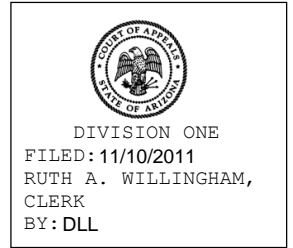


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



In re the Marriage of: ) 1 CA-CV 10-0795  
)  
CAROL FEHRING IRVIN, ) DEPARTMENT D  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules  
) of Civil Appellate  
JAMES MICHAEL IRVIN, ) Procedure)  
)  
Respondent/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-003396

The Honorable David J. Palmer, Judge

**AFFIRMED IN PART; VACATED IN PART**

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**P O R T L E Y**, Judge

¶1 Appellant James Michael Irvin ("Husband") challenges the spousal maintenance award and the appointment of a special master in the divorce decree, as well as the entry of orders

after he filed his appeal. For the following reasons, we find that the court lacked jurisdiction to enter one of the post-appeal orders, but otherwise affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶12 After twenty-six years of marriage, Carol Fehring Irvin ("Wife") filed for divorce on May 5, 2008. Husband, who was the family income earner, had served on the Arizona Corporation Commission and/or worked for family businesses, and Wife had been a stay-at-home mother for all except eight months during the marriage. The family enjoyed an affluent lifestyle.

¶13 Before trial, the family court granted partial summary judgment to Wife and entered judgment against Husband for \$405,000 for repayment of a loan from Wife's sole and separate property; \$69,000 for her half of a \$138,000 loan from community proceeds; and \$40,000 for her half of two loans from the community in the amounts of \$64,000 and \$16,000. The court had also ordered Husband to pay Wife temporary spousal maintenance.

¶14 The parties testified at their trial on July 8, 2010. They wanted the family court to resolve the amount and duration of spousal maintenance, and the division of Husband's judgment against Lexington Insurance for failing to defend him after he was sued for interfering with a merger involving Southern Union Company. Husband was willing to pay Wife spousal maintenance of \$500 per month for five years even though she wanted an

indefinite award of \$3,750 per month. Husband also asserted that Wife was not entitled to any proceeds from his lawsuit against Lexington Insurance because he had assigned any proceeds to the Kumiva Group because it had loaned him money for attorneys' fees and costs, while Wife claimed that a portion of the proceeds were community property and the assignment violated the court's preliminary injunction.

¶15 After making findings required by Arizona Revised Statutes ("A.R.S.") section 25-319(B) (West 2011),<sup>1</sup> the family court awarded Wife indefinite spousal maintenance of \$2,100 per month. The court then appointed a special master to "take possession of any funds awarded to Husband from the Lexington litigation" and to:

consider evidence and issue an appropriate arbitration award as to (1) what, if any, of the proceeds from that lawsuit are community property; and (2) to determine what portion of the award to Husband should be awarded to Wife under A.R.S. § 25-318 for amounts owed to Wife pursuant to any judgments in this matter.

¶16 After the entry of the final decree, Husband filed his appeal. The next day, Wife filed a "Motion for Clarification and Motion for Additional Judgments Re: Minute Entry Dated September 7, 2010"; a "Notice of Lodging Consolidated Judgments"; and a "Motion for Reconsideration Re: Allocation of

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<sup>1</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

Marital Residence Deficiency Judgment and Costs Associated with Sales.” The family court granted the order consolidating the earlier judgments on January 14, 2011. And, noting Husband’s failure to respond to Wife’s motion for clarification and additional judgments, the court granted the requested order. The court, however, denied Wife’s motion for reconsideration. The court also signed the domestic relations order assigning Husband’s Elected Officials Retirement Plan to Wife on December 15, 2010. Husband filed an amended notice of appeal, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2011).<sup>2</sup>

#### DISCUSSION

¶7 Husband first argues that the court erred in awarding Wife spousal maintenance of \$2,100 per month for an indefinite period of time. We review a spousal maintenance award for an abuse of discretion. *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 31, 5 P.3d 911, 917 (App. 2000) (citation omitted). We consider the evidence in a light most favorable to upholding the family court’s judgment and we will affirm the ruling if the evidence reasonably supports it. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). Additionally, we will consider whether the court properly

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<sup>2</sup> The Arizona Legislature recently renumbered A.R.S. § 12-2101. See 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.) (effective July 20, 2011).

applied the factors listed in A.R.S. § 25-319(B) when it set the amount and duration of the award. *Id.* at 348, ¶ 15, 972 P.2d at 681. For example, one of the factors is whether the spouse seeking maintenance has the resources to meet his or her own needs independently. A.R.S. § 25-319(B)(9). The ability of the receiving spouse to earn income and be self-sustaining is considered in relation to the standard of living established during the marriage. *Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993) (citation omitted). A court may consider all of a spouse's property in determining whether the spouse has sufficient property to meet his or her needs, but the spouse seeking maintenance is not required to use up all of that property. *Cullum v. Cullum*, 215 Ariz. 352, 354, ¶ 11, 160 P.3d 231, 233 (App. 2007); *Gutierrez*, 193 Ariz. at 348, ¶ 18, 972 P.2d at 681. The court must, however, consider the income potential of the requesting spouse's property. *Cullum*, 215 Ariz. at 355, ¶ 13, 160 P.3d at 234 (citation omitted). We presume that the family court's decision is supported by evidence in the record, even if the minute entry does not detail that evidence. *Id.* at 354, ¶ 11, 160 P.3d at 233 (citation omitted).

¶18 Wife submitted an affidavit that estimated her monthly expenses were just under \$8,500 and testified that the estimate reflected a "slimmed down" lifestyle and did not reflect the

standard of living during the marriage. She also testified that she estimated her income from her sole and separate property would be between \$2,700 and \$2,800 per month for the next year; a decrease from her estimate of \$4,000 six months earlier because of the condition of the economy. She testified that in 2007 and 2008, despite the fact that their tax records showed Husband made \$76,569 and \$72,247, respectively, Husband paid all expenses and she never had to use any of her sole and separate money to pay any family bills. Moreover, she testified that at the time she filed for divorce, Husband was being paid approximately \$13,000 per month from Kumiva, and that at the time of trial, Husband had resources to rent an office, own two cell phones, pay rent on an apartment, make a car payment, pay a gym membership, pay the mortgages on two different condominiums, and operate a vending machine business for which he had not provided financial information. She also referred to prior testimony that Husband and his father told her in the fall of 2009 that Husband's Kumiva salary had been cut so that he would be earning about the same amount as she did from her investments so that he would not have to pay spousal maintenance. His income as a building inspector in 2009 was \$146,700.

¶19 Husband argues that the family court did not properly take into account the tax returns for 2007 and 2008, which reflected that his earnings were approximately \$76,000 and

\$71,000, respectively. He argues that the remaining income came from Wife's sole and separate assets and that her income was more than sufficient to meet her claimed monthly expenses without maintenance from Husband. He points to one question and Wife's answer that wrongly insinuated that his income constituted the majority of the income reported in 2007 and 2008.

¶10 Even assuming such an insinuation, the concern was addressed at trial. Wife agreed on cross-examination that the tax returns showed Husband earned only \$76,569 in 2007 and \$71,247 in 2008, and that the remainder came from Wife's capital gains, even though she also testified that she did not believe it was all from sole and separate property. Because Husband's position was presented to the family court,<sup>3</sup> we defer to the court's determination of credibility and the weight given to conflicting evidence; we will not reweigh the evidence. Ariz. R. Fam. L.P. 82(A); *Gutierrez*, 193 Ariz. at 347-48, ¶ 13, 972 P.2d at 680-81.

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<sup>3</sup> The tax returns, however, do not show that the income was generated from Wife's investments, but that a significant portion of the income was generated from the sale of certain sole and separate property. Husband acknowledges such on appeal. Consequently, the tax forms do not show that Wife had an *annual* income of \$200,000 from her sole and separate property; rather they show that she earned income on these occasions from one-time sales of sole and separate property.

¶11 Husband also objects to the indefinite award of spousal maintenance because it is only meant to be transitional. Generally, maintenance for a fixed term is favored because it encourages the receiving spouse to work diligently towards self-sufficiency. *Rainwater*, 177 Ariz. at 503, 869 P.2d at 179. Self-sufficiency, however, is relative to the standard of living enjoyed during the marriage. *Id.* If the court determines it unlikely that the receiving spouse will be able to become self-sufficient, the court may, in its discretion, award maintenance indefinitely. *Id.* Such an award is modifiable, but the spouse paying maintenance bears the burden of proving a change in circumstances to warrant shortening the award. *Id.* at 504, 869 P.2d at 180.

¶12 Here, given the long duration of the marriage, Wife's age, the family lifestyle, and the absence of any significant employment by Wife outside of the home during the marriage, the family court did not abuse its discretion in awarding Wife \$2,100 per month indefinitely as spousal maintenance.<sup>4</sup>

¶13 Husband next argues that the family court erred when it appointed a special master to address the disposition of the

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<sup>4</sup> Husband argues that the indefinite award is particularly unfair considering that Wife also received all of the community property. Although the family court awarded much of the community property entirely to Wife, Husband was not denied the benefit of those funds. His portion of the community property was awarded to Wife, but it was used to offset the debt he owed to Wife.



Lexington Insurance litigation proceeds. He argues that Wife failed to join Kumiva, an indispensable party because he had assigned his judgment proceeds to Kumiva.<sup>5</sup>

¶14 The court appointed the special master to take possession of any proceeds from the litigation to determine "what portion . . . should be awarded to Wife under A.R.S. § 25-318 for amounts owed to Wife pursuant to any judgments in this matter." The court has the discretionary authority to appoint a special master on its own motion or upon application of the parties. Ariz. R. Fam. L.P. 72(A). "The master may deal with any issues pursuant to Title 25, A.R.S., that could be presented to the assigned judge . . . ." Ariz. R. Fam. L.P. 72(B).

¶15 Although Husband argues that Kumiva was an indispensable party because of the assignment, he did not raise the issue below. The issue is a question of law that we review de novo because the failure to join an indispensable party cannot be waived and may be raised on appeal for the first time.

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<sup>5</sup> Husband also argues that the court lacked the authority to appoint a special master because Wife failed to produce any evidence that community funds had been used for the litigation. Although Wife had argued on appeal that any prejudgment interest awarded on attorneys' fees may be community property, we vacated the prejudgment interest awarded on attorneys' fees in the Lexington Insurance appeal. *Irvin v. Lexington Ins. Co.*, 1 CA-CV 09-0279, 2010 WL 3450986, at \*24, ¶¶ 119-23 (Ariz. App. Sept. 2, 2010) (mem. decision). The argument is therefore moot.

*Gerow v. Covill*, 192 Ariz. 9, 14, ¶ 19, 960 P.2d 55, 60 (App. 1998) (citations omitted).

¶16 Husband argues that who or what constitutes an “indispensable party” has never been addressed under the Arizona Rules of Family Law Procedure (“ARFLP”), and then analyzes the issue under Arizona Rules of Civil Procedure (“ARCP”) Rule 19. We disagree.

¶17 ARCP only applies “when incorporated by reference” in the ARFLP. Ariz. R. Fam. L.P. 2(A). Moreover, ARFLP Rule 33(C) governs third-party practice and provides that the court “may join additional parties necessary for the exercise of its authority.” The Rule does not, however, make any reference to ARCP Rule 19, and the table showing the correlation between the ARFLP and ARCP demonstrates that ARFLP Rule 33 correlates to ARCP Rules 13 and 14; ARCP Rule 19 is not referenced in the ARFLP. Arizona Rules of Court Volume I - State 2011, at 949–51 (West 2010). ARFLP Rule 33, in fact, states that “[m]isjoinder or non-joinder of parties is not grounds for dismissal of an action,” even though dismissal is warranted under ARCP Rule 19 if a party is deemed indispensable. Ariz. R. Fam. L.P. 33(E); Ariz. R. Civ. P. 19(b). Thus, the Arizona Rules of Family Law Procedure do not contain provisions governing indispensable parties and do not incorporate by reference ARCP Rule 19. Consequently, the notion that Kumiva is an indispensable party

fails because the concept does not currently apply to family court proceedings.

¶18 Finally, Husband argues that the family court did not have jurisdiction to enter orders on Wife's pleadings after he filed his appeal because the appeal divested the court of jurisdiction to rule on those motions.

¶19 Generally, the superior court loses jurisdiction while an appeal is pending, except in furtherance of the appeal. *Burkhardt v. Burkhardt*, 109 Ariz. 419, 421, 510 P.2d 735, 737 (1973) (citations omitted). If the proceedings have not been stayed, however, the family court retains jurisdiction to enter orders to enforce any judgment. *Carp v. Superior Court (McFate)*, 84 Ariz. 161, 164, 325 P.2d 413, 416 (1958). The record does not show that the court's judgment has been stayed. Moreover, the family court can correct clerical mistakes or errors arising from oversight or omission during the pendency of an appeal up to the time the appeal is docketed, and after that time with leave of the appellate court. Ariz. R. Fam. L.P. 85(A).

¶20 The December 2010 entry of the domestic relations order constituted enforcement of the earlier judgment. The order declared Wife's right to receive a portion of the benefits of Husband's Elected Officials Retirement Plan. The court had ordered that Wife was entitled to the plan; the order merely

enacted the mechanism to enforce the existing judgment and was within the family court's jurisdiction.

¶21 Similarly, the order consolidating the earlier judgments was within the court's power. Wife's motion and the court's order restated various earlier orders and recalculated amounts owed by Husband after taking into account additional credit owing to Husband from subsequent judgments. Although not strictly an enforcement document, the consolidation and recalculation of the existing judgments facilitates enforcement, and does not purport to enter any new rulings.

¶22 We reach a different result, however, with respect to Wife's "Motion for Clarification and Motion for Additional Judgments Re: Minute Entry Dated September 7, 2010." The motion requested that the court alter its prior order regarding one of the IRA accounts; address an account that the court had failed to allocate and award it to Wife; order Husband to pay the special master's fees; order Husband to reimburse Wife for payments she made on a mortgage securing Husband's loan; and order Husband to reimburse Wife for costs related to the marital residence. The court agreed and entered the requested order.

¶23 Wife argues that the order was necessary to enforce previous judgments and represents the correction of clerical mistakes. The motion, however, did not address any clerical mistakes. The motion sought, and secured, new orders that were

not for the enforcement of prior orders nor in furtherance of the appeal; the new orders addressed matters that had not been raised or that the court had otherwise failed to address. Because the orders were not for enforcement of prior orders or in furtherance of the appeal, we find that the court lacked jurisdiction to enter the January 2011 order.<sup>6</sup>

¶24 Both parties have requested attorneys' fees on appeal pursuant to A.R.S. § 25-324 (West 2011). In our discretion, we decline to award fees.

#### CONCLUSION

¶25 Based on the foregoing, we affirm the spousal maintenance award, the order appointing a special master, and the post-decree orders other than the January 20, 2011 order, which we vacate.

/s/

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MAURICE PORTLEY, Judge

CONCURRING:

/s/

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JON W. THOMPSON, Presiding Judge

/s/

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JOHN C. GEMMILL, Judge

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<sup>6</sup> We need not address Wife's "Motion for Reconsideration Re: Allocation of Marital Residence Deficiency Judgment and Costs Associated with Sale," which was denied.