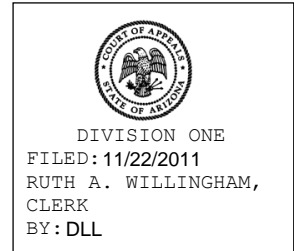


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Civ. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



In re the Marriage of: 1 CA-CV 10-0810

FRANCISCA LABATE, ) DEPARTMENT B

)

)

**MEMORANDUM DECISION**

Petitioner/Appellee, )

)

(Not for Publication -

v. )

Rule 28, Arizona Rules

)

Of Civil Appellate

PASQUALE LABATE, )

)

Procedure)

)

Respondent/Appellant. )

)

Appeal from the Superior Court in Maricopa County

Cause No. FC2006-002588

The Honorable Pamela S. Gates, Judge

**AFFIRMED**

Law Offices of Janice M. Palmer P.C.

Chandler

By Janice M. Palmer

Attorneys for Petitioner/Appellee

Pasquale Labate

Phoenix

Respondent/Appellant, *In propria persona*

**K E S S L E R**, Judge

¶1 After we remanded this case to the superior court, the court entered judgment for Francisca Labate ("Wife") and determined she was entitled to spousal maintenance and an

equitable lien on one property (the Roosevelt property). Respondent/Appellant, Pasquale Labate ("Husband") appeals the superior court's judgment. Finding no error on appeal after remand, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Husband appealed the superior court's judgment in his divorce case. On appeal, this Court affirmed in part, reversed in part, and remanded the case to the superior court to resolve two issues, whether Wife: (1) had an equitable lien on the Roosevelt property; and (2) was entitled to spousal maintenance after the distribution of assets was altered on appeal.

¶3 An evidentiary hearing was scheduled for June 14, 2010. Husband appeared and requested a continuance. The court granted a continuance until September 10, 2010. It also granted Husband two additional weeks to comply with discovery. Soon thereafter, Husband filed a notice informing the court about his upcoming heart surgery on June 24, 2010. In August 2010, Husband filed several motions and other documents, witness and exhibit lists, a motion to extend the hearing time from three hours to six hours, and a "list of facts and discoveries" in preparation for trial.

¶4 Three days before the hearing, on September 7, 2010, Husband filed a motion informing the court that an appeal was taken in another case in which his son sued him and Wife.

Without explanation, Husband contended "[t]he [September 10] trial must [be] continue[d] until all matters between Pasquale Labate and Francisca Labate are resolved." The superior court denied the request for a stay of proceedings because the other matter did not affect the present family court case.<sup>1</sup>

¶15 At the September 10, 2010 hearing, Husband testified and presented exhibits, and the superior court took the matter under advisement. Husband then filed a motion to strike the court's September 15, 2010 minute entry denying Husband's motion to stay the proceeding. The court treated that motion as a motion for reconsideration and denied it. Husband also filed a motion demanding that the superior court stop the proceedings. The court again denied the motion. Husband also filed a motion to remove Wife's attorney. The court denied the motion and stated "[t]o the extent the pleading requests the Court to reconsider [the] request to stay the September 10, 2010 proceeding or reset the matter for additional time" the request was denied.

¶16 Finally, Husband filed a "motion to strike the minute entry dated 09/09/2010," which the court treated as another motion for reconsideration from the court's denial of the request for a stay. The court denied the motion for the

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<sup>1</sup> The court noted that Husband "previously asserted that the parties' children were necessary parties to the family court proceeding. The Court of Appeals disagreed."

previously stated reasons and also stated, "[t]o the extent the pleading requests that [this] [c]ourt reverse a decision by the Court of Appeals . . . this Court has no authority to do so. Therefore, the Court takes no action to redesignate property previously identified by the trial [c]ourt as community property, which was affirmed by the Court of Appeals."

¶17 On October 13, 2010, the superior court entered a final signed judgment determining Wife had an equitable lien on the Roosevelt property and that she was entitled to spousal maintenance. Husband filed a timely appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) (2003) and 12-2101(A)(1) (Supp. 2011).

#### **ISSUES ON APPEAL**

¶18 Despite a lack of clarity or compliance with the Rules of Civil Appellate Procedure in Husband's opening brief, we understand the issues he raises on appeal. Notably, Husband does not appeal the superior court's determination that Wife was entitled to spousal maintenance or that she had an equitable lien on the Roosevelt property.<sup>2</sup> Instead, he contends:

1. The Court of Appeals correctly concluded that the residence located at 1534 East Willetta St. Phoenix, AZ, 85006 is Husband's sole and separate property.
2. The Court incorrectly ruled on the properties the husband purchased during the marriage by stating they were community properties.

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<sup>2</sup> Wife did not file an answering brief.

3. The Court did not hear Husband. The evidence on September 10, 2010 from Husband, Husband was not recovered from his heart surgery. The trial judge denied Husband's Motion to continue and set a new date for the court hearing. Husband proved with legal documents on December 10, 2007 it was fraud trial by defense attorney and James E. Vile.

4. Husband provided his attorney James E. Vile with all the proper documents and Bank Accounts in Chase Bank. The bank accounts belonged party to Husband and two accounts from the minors with money received from the auto accident settlement on September 01, 2002[.]

#### **DISCUSSION**

¶9 Husband's first issue regarding the Willetta property is not a claim of error nor does it pertain to this appeal. The Willetta property was not a subject of the remand order and it did not affect the superior court's judgment on remand.

¶10 Similarly, Husband's second and fourth claims do not pertain to the remand order or this appeal. The issues were fully resolved in the previous appeal. Moreover, on remand, the superior court specifically told Husband that it did not have the authority to reclassify property in contravention of the decision of this Court.

¶11 We construe Husband's third claim to contend that the superior court abused its discretion by failing to continue the September 10, 2010 hearing and the family court proceedings

pending the outcome of another case.<sup>3</sup> We review the denial of a continuance for an abuse of discretion. *Evans v. Lundgren*, 11 Ariz. App. 441, 445, 465 P.2d 380, 383 (1970) ("A motion for continuance is addressed to the sound, judicial discretion of the trial court predicated on good cause shown."). The local court rules for Maricopa County specify that in a family court case "[n]o continuances shall be granted after a case has been set for trial except on written motion setting forth grounds recognized by statute or rule, or for good cause shown." Maricopa Cnty. Super. Ct. L.R. 6.8(f).

¶12 On appeal, Husband contends the court erred in denying the continuance because of his recent heart surgery. However, in his original motion for a continuance of the September hearing and his subsequent motions for reconsideration, the basis for his request was not his surgery, but rather a pending appeal in the other civil case. Thus, he raises a different basis in support of his motion on appeal than was presented to the superior court. We will not consider an issue raised for the first time on appeal. *Romero v. Sw. Ambulance*, 211 Ariz.

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<sup>3</sup> Husband's third claim also contends fraud in connection with his trial attorney in the original proceedings before the first appeal. Though it is not clear that any purported fraud relates to the issues on remand or to this appeal, to the extent it does, we find no evidence of fraud. Husband also filed a motion in this Court that seems to request us to order the superior court to transfer fourteen pages of "fraudulent documents." We do not know what documents Husband is referring to or their relevance to this appeal and accordingly deny the motion.

200, 203-04, ¶ 6, 119 P.3d 467, 470-71 (App. 2005) (“The only objection which may be raised on appeal . . . is that made at trial.” (quoting *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982))).

¶13 Moreover, upon Husband’s oral motion on June 14 (the original date of the evidentiary hearing) the superior court continued the hearing until September 10, 2010, nearly a month and a half after his surgery. During that time before the hearing, Husband actively prepared for trial by filing witness and exhibit lists and a variety of other motions.<sup>4</sup> This would seem to belie any need for a continuance of the September hearing or any resultant prejudice to Husband by the denial of that continuance. See *In re Marriage of Molloy*, 181 Ariz. 146, 150, 888 P.2d 1333, 1337 (App. 1994) (“We will reverse only if . . . [there is] prejudice as a result of the [superior court’s] error” that “appear[s] affirmatively [in] the record.”) (internal citation omitted).

¶14 Finally, Husband’s broad contention that the proceedings should have been continued based on the other civil case was unsupported by facts or law in his motion. The superior court specifically determined that the other appeal did not affect the family court case or the issues on remand. And

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<sup>4</sup> About a month after his surgery, Husband filed a motion requesting the court order emergency spousal maintenance and specifically that Wife pay half of his \$30,000 medical bills.

the superior court relied upon this Court's determination during the first appeal that the children were not necessary parties to the action. Husband failed to show a legal basis or good cause for a continuance. Accordingly, the superior court did not abuse its discretion by denying his motion.

**CONCLUSION**

¶15 For the foregoing reasons, we affirm the superior court's judgment awarding Wife spousal maintenance and an equitable lien on the Roosevelt property.

  /S/    
DONN KESSLER, Judge

CONCURRING:

  /S/    
MARGARET H. DOWNIE, Presiding Judge

  /S/    
PETER B. SWANN, Judge