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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: NADINE D. KING, Petitioner/Appellee, and DONOVAN KING, Respondent/Appellant.	2 CA-CV 2012-0140 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20111002

Honorable Wayne E. Yehling, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 In this marital dissolution action, appellant Donovan King challenges the trial court's grant of a monetary judgment to the appellee, Nadine King. He also challenges the award of spousal maintenance and attorney fees and costs. For the reasons that follow, we vacate the monetary judgment but otherwise affirm the decree of dissolution.

Factual and Procedural Background

¶2 We view the evidence presented below in the light most favorable to upholding the trial court's decision. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). Donovan and Nadine married in 2007 shortly after her prior marriage had been dissolved. Donovan was retired and lived off a stream of separate income, including two separate trusts. Nadine did not have a significant work history, but she occasionally found part-time work as a singer. Nearly all of her assets came from her former marriage.

¶3 Donovan and Nadine used loans and their own separate funds to purchase and improve two real properties, both of which they sold for a loss prior to the dissolution of their marriage. Nadine contributed approximately $90,400 of her own funds to these investments; Donovan contributed approximately $18,700 of his separate funds.

¶4 In her petition for dissolution, Nadine requested that the trial court "impress a lien on the separate property of [Donovan] to compensate [her] for contributions made from her separate property and from the community property of the parties and thereafter added to or commingled with [Donovan]'s separate property or used to improve the sole and separate property of [Donovan]." In the court's written findings, it found no

evidence that Donovan had used any of Nadine's separate property or community property to enrich his separate trusts or other investments. The court likewise found no evidence that Donovan's management of his separate property would subject it to a community lien or would give rise to a claim for reimbursement to the community. The court further found that no community funds were spent on the two real properties.

¶5 The trial court made no findings suggesting Donovan had wasted, concealed, or fraudulently disposed of Nadine's separate funds for their properties. However, the court found that Nadine had "entrusted" her separate funds to Donovan for the purchase and improvement of their real estate and that she had "relied on and trusted [him] properly to manage" these separate funds. The court determined Donovan had "invested [Nadine]'s money in such a way that she bore a disproportionate risk of the vagaries of the real estate market, . . . protect[ing] his own investment portfolio . . . at the peril of [Nadine]'s only significant assets." The court reasoned that one spouse owes another a "fiduciary duty" to invest separate funds with the same care one would exercise over one's own separate property. The court's findings thus led it to conclude Donovan had breached his fiduciary duty to Nadine by causing her to bear a disproportionate risk in their real estate investments. The court therefore determined it would be "equitable" to "require the parties to share the risk equally."

¶6 Based on this determination, the trial court's dissolution decree included a monetary judgment against Donovan for $35,802.08, an amount the court deemed an "equalization of [the] disproportionate risk [he had] required [Nadine] to assume" with

respect to their two properties. The decree also included an award of spousal maintenance and costs and attorney fees for Nadine. This timely appeal followed.

Monetary Judgment

¶7 Donovan first maintains the trial court erred by considering equitable factors in awarding the nearly $36,000 monetary judgment to Nadine. Specifically, he claims that because marital dissolution is a statutory action, and because A.R.S. § 25-318 does not authorize the balancing of equities, "the court erroneously found marital misconduct and entered a money judgment against [him] in violation of the statutory directive." He further claims that because a trial court's jurisdiction is provided by statute, the monetary judgment here was made "without jurisdiction." We agree the court committed reversible error, regardless of whether that error is characterized as jurisdictional.

¶8 Article VI, § 14(9) of the Arizona Constitution grants the superior court subject matter jurisdiction in divorce proceedings. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996); *accord State v. Maldonado*, 223 Ariz. 309, ¶ 20, 223 P.3d 653, 656 (2010); *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 7, 9 P.3d 329, 332 (App. 2000). Thus, when the domicile requirements for a dissolution action have been met, and when personal jurisdiction has been secured, as happened here, a trial court has jurisdiction over the proceeding, and a legally erroneous judgment by the court is not void for want of jurisdiction, but rather is "subject to reversal on timely appeal." *Auman v. Auman*, 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982).

¶9 Our supreme court has acknowledged that our jurisprudence often uses the term "jurisdiction" imprecisely. *Taliaferro*, 186 Ariz. at 223, 921 P.2d at 23. At times, the term simply refers to a court's "authority to do a particular thing." *Id.* Donovan correctly cites *Weaver v. Weaver*, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982), and *Andrews v. Andrews*, 126 Ariz. 55, 58, 612 P.2d 511, 514 (App. 1980), as examples where a trial court's lack of authority to render a particular judgment was characterized as a lack of jurisdiction. Yet whether our precedents speak of a court's lack of authority or its lack of jurisdiction, the key principle remains that "[e]very power that the superior court exercises in a dissolution proceeding must find its source in the supporting statutory framework." *Fenn v. Fenn*, 174 Ariz. 84, 87, 847 P.2d 129, 132 (App. 1993).

¶10 A dissolution proceeding is a creature of statute. *Waldren v. Waldren*, 217 Ariz. 173, ¶ 8, 171 P.3d 1214, 1216 (2007). Section 25-318(A) requires a trial court in such a proceeding to "assign each spouse's sole and separate property to such spouse" and to "divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct." "[T]he standards to be applied in a dissolution proceeding are those of an equity court." *Weaver*, 131 Ariz. at 587, 643 P.2d at 500. Despite the application of equitable standards, however, the proceeding remains a statutory action, with a court's powers limited to those granted by statute. *Id.* In other words, "equity is invoked in aid of the execution of the statute," and any "authority not expressly given by statute cannot . . . be assumed." *Van Ness v. Superior Court*, 69 Ariz. 362, 365, 213 P.2d 899, 900 (1950).

¶11 Notably, under § 25-318(A), a trial court may consider "equitabl[e]" factors when making a division of community, joint, or commonly held property. But equitable considerations play no role with respect to separate property. By law, the court's only task in this regard is to "assign each spouse's sole and separate property to such spouse." *Id.*

¶12 Past family law cases illustrate that a trial court often exceeds its authority when it attempts to resolve issues concerning clearly separate property. In *Weaver*, for example, our supreme court held the trial court "ha[d] no jurisdiction to grant a money judgment against one spouse for damage to the separate property of the other spouse in a dissolution proceeding." 131 Ariz. at 587, 643 P.2d at 500. In *Andrews*, we similarly determined that the court lacked jurisdiction to enter a monetary judgment reimbursing a father for payments he had made after his dissolution, and in lieu of child support, on his former wife's separate mobile home. 126 Ariz. at 57-58, 612 P.2d at 513-14. And in *Thomas v. Thomas*, we held the court lacked jurisdiction to resolve post-decree claims relating to a condominium that had been purchased during the marriage but transmuted into separate property thereafter, finding the subject property was not a marital asset subject to reallocation. 220 Ariz. 290, ¶¶ 10, 12, 205 P.3d 1137, 1139-40 (App. 2009).

¶13 Here, the trial court lacked statutory authority to use its "equitable" powers to equalize the parties' separate contributions to their past real estate investments. With the parties' separate payments on these properties having been established, and with no community, joint, or commonly held property remaining for the court to distribute at dissolution, the court had no basis under § 25-318(A) to consider whether the parties'

past use of their separate funds had been equitable. The monetary judgment relating to those funds, therefore, constitutes reversible error.

¶14 We further note that a trial court's equitable powers relating to separate property appear to have diminished over time. The former § 25-318(D) allowed a court to impress a lien upon a spouse's separate property to secure "'any equity which may have arisen in favor of either party out of their property transfers and dealings during [the] existence of the marriage relationship.'" *Proffit v. Proffit*, 105 Ariz. 222, 224, 462 P.2d 391, 393 (1969), *quoting* 1962 Ariz. Sess. Laws, ch. 45, § 1. Yet this provision was repealed in 1973. 1973 Ariz. Sess. Laws, ch. 139, § 1. Subsequent changes to the law indicate the legislature intended to limit a court's power in dissolution proceedings "to assigning to each spouse his or her separate property under [§] 25-318(A) and impressing a lien" pursuant to what is now § 25-318(E). *Weaver*, 131 Ariz. at 587, 643 P.2d at 500. Here, the court found no basis for a lien. Thus, the monetary judgment concerning the parties' investment of their separate property was outside the proper scope of § 25-318(A) and the dissolution proceeding.

¶15 The trial court's finding that Donovan had breached his "fiduciary duty" as a spouse likewise cannot support the judgment here. First, as was the case in *Andrews*, 126 Ariz. at 58, 612 P.2d at 514, no such claim was clearly pled in Nadine's petition for dissolution. Second, our supreme court has held that "[p]roperty may not be distributed in order to reward one party or punish the other." *Hatch v. Hatch*, 113 Ariz. 130, 133, 547 P.2d 1044, 1047 (1976). Third, our state has never recognized a fiduciary duty with respect to separate property; we have only recognized a fiduciary duty with respect to

community property. *See, e.g.*, *Mezey v. Fioramonti*, 204 Ariz. 599, ¶ 38, 65 P.3d 980, 989 (App. 2003), *disapproved on other grounds by Bilke v. State*, 206 Ariz. 462, 80 P.3d 269 (2003); *Gerow v. Covill*, 192 Ariz. 9, ¶ 40, 960 P.2d 55, 64 (App. 1998). This duty is based on a spouse's obligation to act for the community's benefit when exercising his or her statutory authority to manage community property and incur community debts. *See* A.R.S. § 25-214(B), (C); *Mezey*, 204 Ariz. 599, ¶ 38, 65 P.3d at 989; *Zork Hardware Co. v. Gottlieb*, 170 Ariz. 5, 6, 821 P.2d 272, 273 (App. 1991). We therefore conclude the proffered rationale for the judgment here was unsupported by our case law and inconsistent with our statutory framework concerning marital dissolution.

¶16 Nadine contends that the monetary judgment was based on "excessive or abnormal expenditures, concealment or fraudulent disposition of community, joint tenancy and other property held in common" and that it is therefore permitted under § 25-318(C). The record does not support this position. We interpret the trial court's written findings of fact and conclusions of law as rejecting Nadine's arguments that Donovan had behaved improperly with respect to her funds or their properties, except to the extent he had caused her to bear a disproportionate risk in the real estate market. Furthermore, Nadine acknowledges that the parties presented conflicting evidence on these issues, and it is not our role to weigh the evidence on appeal. *See Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986).

¶17 Nadine also relies on *Bender v. Bender*, 123 Ariz. 90, 597 P.2d 993 (App. 1979), to support the monetary judgment here. Her reliance is misplaced. In *Bender*, the parties disputed the value of certain community property that was to be divided, and we

upheld the dissolution decree's requirement that the husband pay $30,000 "to equalize the property settlement" which had been reached, apparently, based on stipulations and findings not included in the appellate record. *Id.* at 92, 94, 597 P.2d at 995, 997. Here, in contrast, the monetary judgment does not relate to the division of community, joint, or commonly held property, but rather calls for the reimbursement of separate expenditures, with no agreement or stipulation having been made on this point.

¶18 We acknowledge that *Bender* also disposed of an argument by the appellant wife that the trial court's "property division was inequitable because certain property was improperly determined to be the sole and separate property" of her husband. *Id.* at 91, 597 P.2d at 994. In another portion of our opinion, we characterized the issue, more accurately, as whether the trial court erred in finding a sales contract for certain real estate to be the husband's separate property. *Id.* at 92, 597 P.2d at 995. Accordingly, *Bender* does not support the broad proposition offered by Nadine that a court may "order . . . one spouse to pay the other an amount to equalize the division of assets between the parties." Nor does *Bender* authorize the trial court's attempt here to use equitable powers to help a party recoup some of her separate losses.

Spousal Maintenance

¶19 Donovan next claims that because "there was no evidence that [Nadine]'s standard of living after her divorce . . . would be any different from the standard of living that she enjoyed prior to her marriage," the trial court's spousal maintenance award of $1,250 per month for thirty months erroneously increased her income above what she was "accustomed to living on prior to her marriage." We reject this argument.

¶20 A trial court has substantial discretion when setting the amount and duration of spousal maintenance, *Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993), "and an appellate court will not substitute its judgment for that of the trial court unless there has been a clear abuse of discretion." *Deatherage v. Deatherage*, 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984). When a court determines the amount of spousal maintenance to award, it must consider the spouse's "standard of living established *during* the marriage." A.R.S. § 25-319(B)(1) (emphasis added). A spouse's prior standard of living also may be considered among the "relevant factors" to a just award. § 25-319(B); *cf. Davis v. Davis*, 18 Ariz. App. 13, 15, 499 P.2d 744, 746 (1972) (allowing consideration of prior income and brevity of marriage in determining alimony). Yet it is not dispositive of the issue, and Donovan's emphasis on this consideration is therefore unwarranted.

¶21 On appeal, he does not challenge the trial court's findings that Nadine lacked the property, employment, or skills to be self-sufficient, *see* § 25-319(A)(1), (2), or the finding that she "will not be able to meet her own needs independently." *See* § 25-319(B)(9). He simply points out that since their separation, she had been able to find housing and support from her family and former spouse. Such evidence of subsistence does not demonstrate the maintenance award was unjust or improper. Accordingly, because Donovan has failed to show the court abused its broad discretion in granting the maintenance here, *see Pullen v. Pullen*, 223 Ariz. 293, ¶ 22, 222 P.3d 909, 914 (App. 2009), we find no basis to disturb it.

Fees and Costs

¶22 Last, Donovan challenges the trial court's award of $7,500 in attorney fees and costs to Nadine, arguing "there was no demonstrated need that [she] receive such an award." Specifically, he contends there was no indication whether or how Nadine had paid the legal fees she had incurred, and consequently no "indication that [she] was in need of funds for payment of her legal expenses." He therefore concludes that "it was an abuse of discretion by the trial court to order [him] to pay a portion of the . . . fees and costs for the sole apparent reason that [he] was in a better position to pay such expenses." We find this argument meritless.

¶23 Section 25-324(A), A.R.S., allows a trial court to "order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining" a dissolution proceeding, provided the court first "consider[s] the financial resources of both parties and the reasonableness of the positions each party has taken." "The purpose of the statute is to provide a remedy for the party least able to pay." *In re Marriage of Zale*, 193 Ariz. 246, ¶ 20, 972 P.2d 230, 235 (1999). "[A]n applicant's inability to pay his or her own attorneys' fees is not a prerequisite to consideration for an award." *Magee v. Magee*, 206 Ariz. 589, ¶ 18, 81 P.3d 1048, 1052 (App. 2004). "[A]ll a spouse need show is that a relative financial disparity in income and/or assets exists between the spouses." *Id.* ¶ 1. We will not disturb an award under § 25-324 absent an abuse of the court's sound discretion. *See Roden v. Roden*, 190 Ariz. 407, 412, 949 P.2d 67, 72 (App. 1997).

¶24 Here, the trial court based its award only on the parties' financial resources, not the positions they had taken in the proceeding. The evidence credited by the court showed a significant disparity between the parties' assets and income. We therefore find no ground to disturb the award.

Disposition

¶25 For the foregoing reasons, we vacate the portion of the dissolution decree requiring Donovan to pay Nadine $35,802.08 based on the disproportionate risk she assumed with their real estate purchases. Otherwise, we affirm the decree. We also grant Nadine's request for attorney fees on appeal pursuant to § 25-324 and Rule 21, Ariz. R. Civ. App. P. *See Edsall v. Superior Court*, 143 Ariz. 240, 248-49, 693 P.2d 895, 903-04 (1984) (party need not prevail on appeal to be entitled to statutory award of attorney fees).

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge