IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

MARIA TERESA MERCADO,
Petitioner/Appellant,

and

EVERARDO MERCADO,
Respondent/Appellee.

No. 2 CA-CV 2014-0045
Filed January 29, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20121315
The Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

COUNSEL

The Lara Law Firm, PLLC, Tucson
By Adolfo Lara
Counsel for Petitioner/Appellant

Solyn & Lieberman, PLLC, Tucson
By Scott Lieberman
Counsel for Respondent/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Maria Mercado appeals from a Decree of Dissolution and other pre-judgment orders, arguing the trial court erred by precluding her from introducing certain evidence and witnesses at trial and by awarding attorney fees to her former husband, Everardo Mercado. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's rulings.[1] *Sholes v. Fernando*, 228 Ariz. 455, ¶ 2, 268 P.3d 1112, 1114 (App. 2011). Maria filed a Petition for Dissolution of Marriage with Children in April 2012. A trial notice was issued on November 21, 2012, setting discovery and disclosure deadlines for January 22, 2013, and the pretrial statement deadline for January 28, 2013. Everardo and Maria filed their pretrial statements in late 2012. In January 2013, Maria filed a Motion for Temporary Orders, which was heard by the court on February 22, 2013, at the Final Pretrial Conference. The parties reached an agreement on several issues at that time and the agreement was memorialized and approved by the court on the record.[2] In relevant

[1]Maria's statement of facts fails to provide appropriate citations to the record as required by Rule 13(a)(4), Ariz. R. Civ. App. P. We therefore disregard it, *see Sholes v. Fernando*, 228 Ariz. 455, n.2, 268 P.3d 1112, 1114 n.2 (App. 2011), and instead rely on Everardo's statement of facts and our independent review of the record. *Id.*

[2]Maria did not provide a copy of the hearing transcript, but the minute entry reflects the agreement.

part, the parties agreed to keep their own separate bank accounts with "no equalization payment[s]." The only remaining unresolved issues were allocation of credit card and line of credit debts, spousal maintenance and child support, a parenting time plan for the school year, and attorney fees. The court set the trial for April 12, 2013.

¶3 Maria filed two amended pretrial statements separately on April 1 and April 8, both listing several new witnesses and adding the issue of community waste. The trial court granted a motion in limine filed by Everardo to preclude Maria's new witnesses and the waste claim. After the court denied Maria's motion for reconsideration, she filed an appeal, which was ultimately dismissed for lack of jurisdiction.

¶4 Before Maria's first appeal was dismissed, she filed a Petition for Enforcement of Temporary Orders, claiming Everardo was not responsibly exercising his parenting time. The trial court denied that petition and awarded Everardo attorney fees pursuant to A.R.S. § 25-324. Following the dismissal of Maria's appeal, the court issued a new trial notice, setting the trial for October 10, 2013.

¶5 On September 9, 2013, Maria filed a third amended pretrial statement, again asserting the community waste claim. At a pretrial conference on September 12, 2013, the trial court affirmed the trial dates, entered certain orders regarding credit card debts, and affirmed the April 10 order precluding certain witnesses and exhibits at trial.

¶6 The trial took place as scheduled and after considering the parties written closing arguments and proposed findings of facts, the trial court issued a detailed under advisement ruling on November 22, 2013, which included extensive findings and resolved all pending issues, including attorney fees. Maria filed a motion for new trial, which was denied, and the Decree of Dissolution was entered in December. We have jurisdiction over Maria's appeal pursuant to A.R.S. § 12-2101(A)(1).

Discussion

¶7 Maria contends the trial court abused its discretion in precluding certain witnesses and evidence as untimely disclosed, and in denying her motion for new trial. She also argues the court erred by applying res judicata principles to her community waste claim, and by awarding attorney fees to Everardo.

Untimely Disclosure and Discovery

¶8 Maria first argues the trial court erred in "not allowing [her] witnesses to testify at trial and in not allowing [her] to introduce her exhibits . . . simply because [she] missed the Pre-Trial Statement deadline." The trial court has broad discretion in ruling on disclosure and discovery matters, *Marquez v. Ortega*, 231 Ariz. 437, ¶ 14, 296 P.3d 100, 104 (App. 2013), including preclusion of witnesses, *Zuern v. Ford Motor Co.*, 188 Ariz. 486, 489, 937 P.2d 676, 679 (App. 1996). We will not disturb the court's rulings on the exclusion or admission of evidence "'unless a clear abuse of discretion appears and prejudice result[ed].'" *Zuern*, 188 Ariz. at 488, 937 P.2d at 678, *quoting Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

¶9 Rule 76(C)(1), Ariz. R. Fam. Law P., provides that "parties shall file a pretrial statement not later than twenty (20) days prior to trial, unless another date is set by the court." Exhibits or witnesses that are not "listed and exchanged" in the pretrial statements shall not "be offered or presented during the trial . . . except when otherwise permitted by the court in the interest of justice and for good cause shown." Ariz. R. Fam. Law P. 76(C)(1), (3). Evidence or witnesses not timely disclosed are also subject to preclusion under Rule 51(D)(2), Ariz. R. Fam. Law P., "except for good cause shown or upon written agreement of the parties."

¶10 Maria's account of the pertinent facts is somewhat misleading. She states "[Everardo's] bank records . . . were disclosed months prior to the trial" and suggests her witnesses and evidence were excluded "simply because [she] missed the Pre-Trial Statement deadline." She also asserts she disclosed all her witnesses

"in accordance [with] the Rules [of Family Law Procedure] and the deadlines set by the trial Court." In so arguing, Maria appears to rely on the trial court's final disclosure deadline of September 9, 2013, which had been set forth in the second trial notice after her first appeal was dismissed. September 9, however, was not the applicable deadline.

¶11 The original final discovery and disclosure deadline was January 22, 2013, and pretrial statements were due January 28, 2013. Maria filed her original pretrial and disclosure statements on December 4, 2012.[3] On April 1, 2013, less than two weeks before trial and nearly two months after the February 22 pretrial conference, Maria filed an amended pretrial statement alleging community waste for the first time and listing five new witnesses. Specifically, she alleged Everardo had "diverted community funds to a secret [checking] account . . . spen[ding] hundreds of dollars per month from 2006 to present," claiming this information was not known at the February 22 pretrial conference, and that the new witnesses were necessary to prove her waste claim.

¶12 On April 8, 2013, Maria filed a second amended pretrial statement, adding three additional witnesses. Everardo filed a motion in limine to preclude Maria's new witnesses and all new evidence relating to the waste claim, arguing they had not been timely disclosed and were precluded by the agreements made at the pretrial conference. The trial court granted Everardo's motion, finding "the issue of equalization of payments ha[d] already been ruled on" and the waste claim was barred "by the doctrine of res judicata." The court noted that "very specific issues for trial were identified" at the February 22 conference, and precluded "any additional witnesses that were not previously disclosed." Maria moved for reconsideration, and subsequently appealed, causing the court to vacate the trial pending the appeal.

[3]Maria's original pretrial statement listed only broad categories of witnesses, and included no names, addresses, or contact information.

¶13 Our review of the record discloses no reason to disturb the trial court's decision to preclude the witnesses and exhibits. In arguing the court erred, Maria correctly notes that late disclosure should be permitted where "good cause" is shown. *See Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 287-88, 896 P.2d 254, 257-58 (1995). She fails, however, to point to any factors that support a good cause finding in her case, other than noting that all her witnesses were disclosed before the final disclosure deadline of September 9, 2013. *See Marquez*, 231 Ariz. 437, ¶ 23, 296 P.3d at 106 (party who fails to provide timely disclosure has burden of showing good cause to avoid sanctions). And, as Everardo notes, the trial dates and disclosure deadlines would not have been extended but for Maria's premature appeal.

¶14 At the time the trial court originally precluded Maria's new witnesses and exhibits, the disclosure was clearly untimely and outside the scope of the issues identified for trial at the February 22 pretrial conference. Further, because the parties already had entered into a binding agreement regarding their separate bank accounts without any claim for equalization payments, we cannot say the court erred in finding that issue already resolved. *See* Ariz. R. Fam. Law P. 69(A)(2) ("An [a]greement between the parties shall be valid and binding if . . . the terms of the agreement are set forth on the record before a judge [or] commissioner."); *see also Pettit v. Pettit*, 218 Ariz. 529, n.4, 189 P.3d 1102, 1106 n.4 (App. 2008). And "parties are bound by their stipulation[s] unless relieved therefrom by the court." *Pulliam v. Pulliam*, 139 Ariz. 343, 345, 678 P.2d 528, 530 (App. 1984). Even assuming Maria did not discover Everardo's alleged secret account until after the parties' February 22 agreement,[4] the appropriate avenue would have been a motion to set aside the settlement agreement pursuant to Rule 85, Ariz. R. Fam. Law P. *Cf. Breitbart-Napp v. Napp*, 216 Ariz. 74, ¶ 13, 163 P.3d 1024, 1028-29

[4]Everardo apparently disclosed the separate account in his Rule 49 Disclosure Statement in September 2012, nearly five months before the February 22 Pretrial Conference. And he alleges Maria disclosed bank statements for this account spanning several years "on or about November 19, 2012."

(App. 2007) (property disposition approved in non-merged settlement agreement subject to Ariz. R. Civ. P. 60(c) relief). Accordingly, the court did not abuse its discretion in precluding the untimely disclosed evidence at the April 10 hearing.[5]

¶15 Nor can we say the trial court erred by not allowing Maria to present that evidence after her first appeal was dismissed. Once that occurred, the court issued a new trial notice on August 15, 2013, setting the final discovery and disclosure deadline as September 9, 2013, and the trial for October 10, 2013. A conference was held on September 12, 2013, where the court affirmed the trial dates, entered certain orders regarding credit card debts, and apparently affirmed the April 10 order precluding the late witnesses and evidence relating to community waste. The October 2, 2013, minute entry notes that the court entered an order regarding witness testimony on September 12, 2013, which was not reflected in the corresponding minute entry. Maria did not provide the transcript for that hearing. *See* Ariz. R. Civ. App. P. 11(b) (appellant's duty to include in record certified transcript of relevant proceedings); *see also Kline v. Kline*, 221 Ariz. 564, ¶ 33, 212 P.3d 902, 910 (App. 2009). We therefore assume the record supports the trial court's decision to affirm its earlier preclusion ruling. *See Kline*, 221 Ariz. 564, ¶ 33, 212 P.3d at 910 ("'When no transcript is provided on appeal, the reviewing court assumes that the record supports the trial court's decision.'"), *quoting Johnson v. Elson*, 192 Ariz. 486, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).

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[5]Maria also argues the trial court erred in barring her waste claim on res judicata grounds. Though it appears that doctrine may have been misapplied, we need not resolve this issue because we will uphold the court's ruling if correct for any reason supported by law and the evidence. *See State v. Canez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). In light of the court's rulings barring the equalization claim, the untimely proffered evidence, and the binding agreement entered into between the parties, Maria's waste claim was justifiably precluded.

Motion for New Trial

¶16 Maria next argues the trial court erred in denying her motion for new trial made pursuant to Rule 83, Ariz. R. Fam. Law P. She asserts the "[c]ourt should have considered that [Everardo]'s testimony was not credible" and that it erred in "[a]llowing all of the evidence submitted by [Everardo] (even false evidence) and not allowing evidence proposed by [Maria] . . . creat[ing] irregularity in the proceedings." A trial court's decision whether to grant a new trial is reviewed for abuse of discretion. *Gersten v. Gersten*, 223 Ariz. 99, ¶ 6, 219 P.3d 309, 312 (App. 2009). We "defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998).

¶17 Though Maria argues the trial court "did not consider the credibility of the parties' testimony" and the judgment "is against the weight of the evidence," she did not provide the trial transcripts by which we might review the evidence presented. As previously noted, it was her responsibility to do so. *See* Ariz. R. Civ. App. P. 11(b); *Kline*, 221 Ariz. 564, ¶ 33, 212 P.3d at 910. Accordingly, Maria has demonstrated no error in the trial court's denial of her motion for new trial.

Trial Court's Award of Attorney Fees

¶18 Finally, Maria argues the trial court erred in awarding Everardo attorney fees arising out of her Petition to Enforce Temporary Parenting Time Orders. We review an award of attorney fees and costs pursuant to A.R.S. § 25-324 for abuse of discretion. *Breitbart-Napp*, 216 Ariz. 74, ¶ 35, 163 P.3d at 1033.

¶19 Maria filed a Petition for Enforcement of Temporary Orders on May 23, 2013, alleging Everardo had "failed to exercise [his] parenting time" in accordance with the court's temporary orders issued on February 22, 2013. At that time, Maria had not vacated the marital home in accordance with the temporary orders. The trial court dismissed the petition, noting it would not enforce

the parenting plan while the parties were still living together.[6] The court also granted Everardo leave to submit an affidavit of fees arising out of Maria's petition. On July 11, the court issued an order awarding Everardo $800 in attorney fees pursuant to § 25-324(B)(2), specifically finding Maria's petition not grounded in fact or law.

¶20 Section 25-324(B)(2), mandates an award of reasonable costs and attorney fees to the party opposing a petition when the court determines the petition was "not grounded in fact or based on law." The trial court made that finding here and it is supported by the record. Accordingly, we find no abuse of the court's discretion. *See Medlin v. Medlin*, 194 Ariz. 306, ¶¶ 16-18, 981 P.2d 1087, 1090 (App. 1999).

Attorney Fees and Costs on Appeal

¶21 Everardo requests attorney fees and costs on appeal pursuant to § 25-324 and Rule 21, Ariz. R. Civ. App. P. Although he has prevailed on appeal, in view of the relative financial resources of the parties and the reasonableness of their positions on appeal, in our discretion we determine the parties should bear their own attorney fees and costs on appeal. *See* A.R.S. § 25-324(A); *see also Leathers v. Leathers*, 216 Ariz. 374, ¶ 22, 166 P.3d 929, 934 (App. 2007).

Disposition

¶22 For the foregoing reasons, the trial court's rulings granting Everardo's motion in limine, denying Maria's new trial motion, and awarding Everardo attorney fees pursuant to § 25-324(B)(2) are affirmed.

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[6]As an alternative to dismissal of the petition, the trial court stated it would "entertain a request by [Everardo] for modification of temporary orders to include a time limit for [Maria] to move out," at which time it would enforce the parenting time according to the temporary orders.