IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

HEATHER ZIRPEL,
Petitioner/Appellant,

and

TROY L. ZIRPEL,
Respondent/Appellee.

No. 2 CA-CV 2016-0089
Filed March 22, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100DO201401810
The Honorable Steven J. Fuller, Judge

AFFIRMED

COUNSEL

Ryan Rapp & Underwood, P.L.C., Phoenix
By Terrie S. Rendler
Counsel for Petitioner/Appellant

Stewart Law Group, Chandler
By Dianne Sullivan
Counsel for Respondent/Appellee

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Heather Zirpel petitioned for dissolution of her marriage to Troy Zirpel. At trial, she sought reimbursement and equal apportionment for contributions she made to Troy's separate property, equal division of a trust account established by Troy during the marriage, and sole legal decision-making authority concerning the couple's children. In the decree of dissolution, the trial court denied Heather's request for reimbursement, equal apportionment, and equal division, and awarded Troy and Heather joint legal decision-making authority and equal parenting time. Heather appealed and for the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the record in the light most favorable to upholding the trial court's decision." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 2, 207 P.3d 754, 755 (App. 2009). Troy and Heather married in June 2007 and have two children together, ages nine and seven. In 2011, Troy moved to South Dakota for employment. He anticipated Heather and the children would join him there when he obtained full-time work with benefits. In October 2014, he moved back to Arizona. That same month, Heather petitioned for dissolution of the marriage. She also moved for temporary orders granting her sole legal decision-making authority for the children.

¶3 In December 2014, the couple stipulated to vacating a scheduled temporary orders hearing, noting they were "attending counseling and attempting to reconcile their relationship." In April 2015, they advised the trial court that reconciliation efforts had ceased and they wished to proceed with dissolution. The court referred the matter to Conciliation Court for a Family Assessment. Troy also filed a response to Heather's petition for dissolution,

requesting the court award each spouse joint legal decision-making authority and equal parenting time. Heather subsequently amended her motion for temporary orders, requesting the court order joint legal decision-making authority with Heather having final decision-making authority.

¶4 The trial court subsequently found Heather and Troy had "stipulate[d] that they shall share joint legal decision-making authority of the minor children," and further found it was in the children's best interest that their parents do so. The court also found "a shared parenting schedule" was in the children's best interest and ordered Troy and Heather to "continue a week on, week off parenting time schedule."

¶5 At a January 2016 bench trial, Heather and Troy presented evidence about their marital and separate property and their positions with respect to the issues of legal decision-making authority and parenting time. In her pre-trial statement, Heather asserted she was entitled to a marital lien on Troy's residence for "her half of the community's monies put into [Troy's] separate property." She listed a number of items, including: a $3,300 down payment; her half of the "mortgage pay-down"; and various home improvements—a water softener system, landscaping, a pool, appliances, and other miscellaneous items. She also asserted she was entitled to an equitable division of a trust account ("Trust") Troy established in 2014 at Securities America containing $208,868.07 as of February 2015. Heather also reasserted that she should be awarded sole legal decision-making authority and requested Troy's parenting time be limited "from Friday after school through Tuesday in alternating weeks . . . and evenings from after school to 6:30 p.m. on Tuesdays in the off weeks."

¶6 In an under advisement ruling, the trial court awarded Troy and Heather joint legal decision-making authority and equal parenting time with "a week on/week off parenting schedule." The court further found the Trust to be Troy's "sole and separate property." With regard to the mortgage reduction, the court denied Heather's request for reimbursement of a $3,300 down payment. The court also denied her request for equalization for the water softener system, appliances, and miscellaneous items she listed in

her pre-trial statement as she did not provide "conclusive evidence to show how much was paid for each item."

¶7 Heather filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Separate Property

¶8 On appeal, Heather argues Troy did not overcome the presumption that the Trust was community property. A strong legal presumption exists that all property acquired during marriage is community property. *In re Marriage of Foster*, 240 Ariz. 99, ¶ 9, 376 P.3d 702, 704 (App. 2016); *see also* A.R.S. § 25-211(A). But "real and personal property that is owned by [a] spouse before marriage and that is acquired by [a] spouse during the marriage by gift, devise or descent" is separate, non-community property. A.R.S. § 25-213(A). A spouse seeking to overcome the presumption of community property must present clear and convincing evidence the property in question is separate property. *Marriage of Foster*, 240 Ariz. 99, ¶ 9, 376 P.3d at 704. Evidence is clear and convincing if it demonstrates "the thing to be proved is highly probable or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 25, 110 P.3d 1013, 1018-19 (2005), *quoting Clear and Convincing Evidence*, Black's Law Dictionary (7th ed. 1999).

¶9 "The characterization of property is a question of law we review de novo." *Marriage of Foster*, 240 Ariz. 99, ¶ 5, 376 P.3d at 704. "However, we 'defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence.'" *Id.*, *quoting Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998); *see also Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009) (appellate court will affirm if "substantial evidence" supports trial court's ruling); *Am. Express Travel Related Servs. Co. v. Parmeter*, 186 Ariz. 652, 653, 925 P.2d 1369, 1370 (App. 1996) (evidence viewed in light most favorable to supporting trial court's decision regarding characterization of property).

¶10 In this case, the trial court made the following findings:

> [Troy] has a trust fund "the Troy L. Zirpel Trust" that had a value of $208,868 . . . on February 28, 2015. . . . [Troy] testified that the trust is comprised solely of money he obtained from an inheritance. On cross examination, [Heather] did not dispute [Troy's] evidence, conceding that she didn't know anything about the trust. . . . Exhibit 110 shows that paternal grandmother did in fact die, that her estate dispersed $17,597 to [Troy], and that more money would be forthcoming.
>
> In short, [Troy] presented evidence that the trust is solely in his name and contains funds resulting from [Troy's] inheritance. This evidence is uncontradicted by any other evidence. The Court finds, by clear and convincing evidence, that the Troy L. Zirpel Trust is [Troy's] separate property.

¶11 Heather first argues the trial court erred by relying on Exhibit 110, a letter from an attorney discussing disbursements from Troy's mother's estate. Heather notes the letter only documented a distribution of $17,597.39 from the estate and argues it "failed to reference any amount near the $208,868.07 in the [Trust]." She asserts the letter "was not clear and convincing evidence that the [Trust] was established . . . with funds [Troy] inherited."

¶12 Next, Heather argues the trial court erred by relying on Troy's testimony, which she asserts was "[a]t best . . . confused and referenced supposed documents he had not produced to the [court] and were not in evidence." She asserts "there was no evidence to support [Troy's] testimony," that the Trust was established using funds he inherited from his mother's estate. Additionally, she suggests that if the Trust was separate property, Troy should have produced documentation "to substantiate that claim." She also argues the trial court ignored her testimony, asserting she disputed Troy's testimony "in her direct examination and in her Pretrial

Statement which she affirmed in her testimony." She concludes, "[n]either separately, nor jointly," did the letter, Troy's testimony, and her lack of disputation, "establish clear and convincing evidence" to conclude the Trust was separate property. We disagree.

¶13 Troy testified that after his mother passed away, her land was sold and the proceeds of the sale were divided between himself and his siblings. The money he received from the sale was then used to establish the Trust. Troy also testified he provided copies of the trust and the checks used to fund it to Heather's attorney.[1] His testimony was supported by Exhibit 110, a letter stating his mother had died and that final distribution of the estate was still pending. Additionally, Troy pointed to a settlement proposal from Heather's attorney, which stated:

> **13. Separate Property**
> Given that Troy can conclusive[ly] demonstrate that 100% of the monies in the [Trust] were from an inheritance, and then we agree it is his sole and separate property. However, as discussed, any taxes that the community paid on the asset must be reimbursed to Heather.

Significantly, in the settlement proposal, Heather listed several other items for which she believed she was entitled to equalization. She did not list the Trust.

¶14 In addition, regarding the nature of the Trust, Heather testified she had not seen Exhibit 110, the letter from the attorney concerning disbursements from Troy's mother's estate, and that she has "not seen anything" establishing the Trust as Troy's separate property. She also testified she "[does] not know anything" about the Trust, including its funding source. Thus, Heather did not refute Troy's testimony.

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[1]At trial, Troy's attorney requested leave to submit the "already disclosed" documents to the court in a separate memorandum, but the court denied the request, saying, "I've heard enough."

¶15 "A finding of fact cannot be clearly erroneous if there is substantial evidence to support it, even though there also might be substantial conflicting evidence." *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 429, 561 P.2d 750, 753 (App. 1977) ("Resolution of any conflict in the evidence is for the trier of fact."); *see also Parmeter*, 186 Ariz. at 655, 925 P.2d at 1372 ("We will sustain the trial court's judgment" concerning property characterization "if any reasonable evidence supports it" and whether evidence is clear and convincing is left to the trial court.). Troy presented testimony the Trust was established with funds he received from the sale of his deceased mother's estate. Heather presented no meaningful evidence disputing that testimony, claiming only that she knew nothing about the Trust. And the death of Troy's mother and the future distribution of her estate were corroborated by additional evidence. *See Dumes v. Harold Laz Advert. Co.*, 2 Ariz. App. 387, 388, 409 P.2d 307, 308 (1965) ("The uncontradicted testimony of an interested party may be rejected, but where the testimony of an interested party is supported by 'disinterested corroboration,' a rejection of that evidence amounts to arbitrary action by the court."). Viewing "the record in the light most favorable to upholding the trial court's decision," *Duwyenie*, 220 Ariz. 501, ¶ 2, 207 P.3d at 755, as we must, the court's finding that the Trust was established with funds "obtained from an inheritance," was not clearly erroneous. Accordingly, the court did not err when it found the Trust is Troy's separate property.

Equalization

¶16 Heather argues the trial court erred in denying her reimbursement for a $3,300 pre-marital down payment on Troy's house; calculating the mortgage reduction; and denying her equalization for certain items listed in her pre-trial statement. We address each argument in turn.

¶17 Section 25-318, A.R.S., governs the division of marital property, and requires the trial court to assign to each spouse their own "sole and separate property" and divide commonly held property "equitably." There is no requirement that a court "make an absolutely equal distribution of the property as long as it does not appear that the trial court's disposition of the estate is inequitable or

unfair." *Cooper v. Cooper*, 167 Ariz. 482, 487, 808 P.2d 1234, 1239 (App. 1990). In dividing the community property, "the trial court is given broad discretionary power, and it is only where there is a manifest abuse of that discretion that an appellate court will interfere." *Id.* at 487-88, 808 P.2d at 1239-40. And, "courts might reach different conclusions without abusing their discretion." *In re Marriage of Inboden*, 223 Ariz. 542, ¶ 7, 225 P.3d 599, 601 (App. 2010).

Earnest Money Deposit

¶18 Heather testified she had paid a total of $3,300 to be used as a down payment on a house Troy purchased separately. Asked whether the money was repaid, she testified, "Not to my knowledge. I never saw it, no." Troy, however, testified the money was refunded because it was "earnest money." The trial court denied Heather's request for reimbursement, noting she only offered an exhibit "contain[ing] a stub from [her] check registry."

¶19 As noted, we defer to the trial court's determinations concerning witness credibility and the weight to give conflicting evidence. *Marriage of Foster*, 240 Ariz. 99, ¶ 5, 376 P.3d at 704. Heather argues, however, the court erred in denying her request for reimbursement of $3,300 because, although the court "had conflicting testimony from the parties about the refund of the $3,300[, she] produced documentary evidence to substantiate her testimony while [Troy] did not." For support, she points to one document, which disclosed the balance of the mortgage as of November 2014. She claims the amount listed as the "Original Principal Balance," $185,836, "demonstrates that [Troy] obtained credit for Heather's down payment as the purchase price [$195,218] was higher than the mortgage."

¶20 As Troy points out, however, there is no evidence to substantiate Heather's claim that the amount listed shows the original purchase price of the home.[2] To the contrary, she testified

[2]Troy explained in his pretrial statement that the discrepancy between the original mortgage amount and the later original balance resulted from the home being refinanced through the Home Affordable Refinance Program in 2012.

the original "total loan amount for the home was $195,218," as listed on the Addendum to Purchase Contract ("Addendum") admitted into evidence. And, as the Addendum states, the total loan amount requested was not $185,836, but $195,218.[3] The Addendum further corroborates Troy's testimony that the money Heather put towards the home was in the form of an "Earnest Money Deposit," and that this money was not credited towards the purchase of the home because the purchase price of the home was equal to the requested loan amount. The Addendum also discloses the buyer required no down payment. The court credited Troy's testimony over that of Heather, a judgment to which we defer. *See id.* Accordingly, we find no error.

Mortgage Reduction

¶21 Heather argues the trial court erred by using the mortgage value as of the time she filed for dissolution rather than the date of the parties' separation. She points to her testimony that between her filing for dissolution in October 2014 and the separation in February 2015, the parties continued to live together and that she contributed to paying the community's bills, which included the mortgage. Troy offered contradictory testimony. "We give great deference to the trial court's acceptance or rejection of testimony in light of its ability to judge the credibility of witnesses." *Valento v. Valento*, 225 Ariz. 477, ¶ 19, 240 P.3d 1239, 1245 (App. 2010) (wife's testimony concerning property values accepted over that of husband). The court found Troy had "clearly show[n] that the mortgage and utilities were paid from" his checking account between November 2014 and February 2015. Heather has not argued this finding was clearly erroneous and we find no error in the court's determination. *See id.* ¶ 11.

Upgrades

¶22 Heather also argues we should award her an additional $8,245 because "[t]here was no reasonable basis for the Family Court

[3]The court found the original mortgage amount to be $195,218, which Heather does not dispute and which she advocated for below.

to have awarded [her] an equalization payment for *some* of the items . . ., but not for all of the items." She asserts Troy did not dispute the items were purchased during the marriage, nor did he dispute the values she assigned to the items in her pretrial statement; thus, according to Heather, it was error for the court not to award her equalization for those items.

¶23 In support of her position, Heather directs us to her pretrial statement and her testimony that she believed the values listed were "an accurate total of what [she is] owed for the improvements to the marital home." Once again, however, she is asking us to reweigh the evidence and disregard our "great deference to the family court's acceptance or rejection of testimony in light of its ability to judge the credibility of witnesses." *Id.* ¶ 19. The court indicated it rejected Heather's testimony for failure to provide sufficient corroboration as to the amount paid for each item and she has not pointed to anything in the record besides her testimony to contradict the court's conclusion. Thus, we find no abuse of discretion in the court's decision. Moreover, Heather has also not demonstrated, nor even argued, the court's division of property was "inequitable or unfair." *See Cooper*, 167 Ariz. at 487, 808 P.2d at 1239.

Child Custody

¶24 Heather argues the trial court abused its discretion in awarding joint legal decision-making authority to Troy and that the court-ordered parenting schedule is not in the best interests of the children. We review an award of legal decision-making authority for abuse of discretion. *Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 15, 311 P.3d 1110, 1113 (App. 2013). And we do not reverse it unless there is "a clear absence of evidence to support" the court's actions. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179, 655 P.2d 1, 3 (1982).

> A [legal decision-making] proceeding more than any other court hearing challenges the trial judge to view and weigh the various personalities, motives and abilities of all the parties. . . . These observations, together

> with the transcribed testimony, make up the fabric from which a judge will cut his decision. Our observations are limited to the transcript and we must therefore be very careful in attempting to second guess the front line trial court from our rather limited appellate vantage point.

Smith v. Smith, 117 Ariz. 249, 253, 571 P.2d 1045, 1049 (App. 1977).

¶25 A trial court may award sole or joint legal decision-making authority. A.R.S. § 25-403.01(A). In determining what to award, it must consider the factors listed in A.R.S. § 25-403(A).[4] § 25-403.01(B). A court must additionally consider: whether the parents have agreed to joint legal decision-making; whether a lack of agreement is due to unreasonableness or an unrelated issue; the "past, present and future abilities of the parents to cooperate in decision-making"; and the logistical possibility of the arrangement. *Id.*

¶26 Here, the trial court made extensive findings regarding the factors listed in A.R.S. § 25-403(A). The court found both parents had provided primary care to the children; Troy contradicted Heather's testimony regarding the children "having difficulty adjusting to [Troy]"; the children are "functioning at an age-appropriate level in all areas"; "evidence suggests both parents have no limitations to their respective abilities to parent the children"; the parents were following the temporary orders regarding parenting time and it was "likely" both would continue to "fully comply with

[4]The § 25-403(A) factors include: the parents' current, present, and future relationship with the child; the child's interaction and interrelationship with parents and siblings; whether the child is adjusting to home and school; the wishes of the child; the "mental and physical health of all individuals involved"; the likelihood the parent will "allow the child frequent, meaningful and continuing contact with the other parent"; and whether there have been acts of domestic violence or child abuse.

all related court orders"; and the incidents of violence alleged by Heather were not "proven by a preponderance of the evidence."

¶27 The trial court also noted that in both February and July 2015, the parents agreed "to share legal-decision making authority," and only disagreed "[m]ore recently." The court found it "doubtful that [Troy's] parenting ability, which [Heather] believed was at least adequate for many years, [had] in a few short months become inadequate." The court further found both parents "made substantial decisions" affecting the children while they lived together. Although their "cooperation [had] been strained due to [their] wrangling over the divorce," the court was "convinced that, prospectively, communication between the parents [would] improve." Ultimately, the court awarded joint legal decision-making authority to Troy and Heather, finding it in the best interest of the children.

¶28 To support her claim the trial court erred by awarding joint legal decision-making, Heather lists the testimony she provided to the court, asserting it "failed to consider, or to give appropriate weight to [her] concerns about [Troy's] ability to co-parent effectively enough to have joint decision-making." She claims the court "glossed over [her] concerns about [Troy's] ability to effectively co-parent," "ignored" certain exhibits, and erroneously considered the findings of the Family Assessment Report.[5]

¶29 As noted, we do not reweigh evidence or determine the credibility of testimony. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 10, 18 P.3d 85, 89 (App. 2000). Instead, we "examine the record only to determine whether substantial evidence exists to support the trial court's action"; that is, "evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999). We also presume the trial court considered all admitted evidence. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004).

[5] Heather does not appeal the admission of the Family Assessment Report into evidence, but merely repeats the same concerns she made below as to its validity.

¶30 Although Heather may have been the primary caregiver during the three years Troy worked in South Dakota, he was primarily a stay-at-home parent between 2008 and 2011. He also testified he "Skyped and FaceTimed" with his children nearly every day during his absence. Additionally, Troy testified he made frequent trips to visit his wife and children, again being a stay-at-home parent between January and May 2012. At the time of trial, the children were receiving good grades and both made the honor roll at school. And the children's counselor, whom Troy and Heather jointly chose, noted both children were accepting of the divorce and their only concerns were school-related or about going to counseling. The Family Assessment Report noted Heather "reported no concerns regarding [Troy's] ability to parent the children," and recommended joint legal decision-making authority. Additionally, Troy contested all of Heather's concerns about violence towards the children. *See Marriage of Foster*, 240 Ariz. 99, ¶ 5, 376 P.3d at 704 (deference concerning witness credibility and weight of evidence). Also, Heather had previously agreed to joint legal decision-making authority on multiple separate occasions. Thus, there is substantial evidence to support the court's findings under §§ 25-403(A) and 25-403.01(B), and we find no error in its decision to award joint legal decision-making authority.

¶31 Heather also challenges the trial court's order granting equal parenting time. She again asserts the court "ignored" her testimony or did not give enough weight to her arguments "in determining a parenting time schedule." She goes on to provide the testimony she believes the court should have accorded greater weight.[6] According to Heather, the court "selectively ignored

[6]She asserts the children were having trouble adjusting to the new schedule; Troy left the children unsupervised; he did not provide primary care for substantial periods; he was "emotionally absent from the children"; the court should have given the wishes of the children greater weight; Troy interfered with her contact with the children; and notes she does not argue she wants to "eliminate [Troy's] parenting time, only that equal parenting time . . . was not in [the children's] best interests."

testimony and evidence that did not comport with its preconceived notion that these parties should have joint decision-making and equal parenting time."

¶32 Again, not only do we presume the trial court considered all admitted evidence, *Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d at 880-81, but also "[w]e must give due regard to the trial court's opportunity to judge the credibility of the witnesses," and we do not reweigh conflicting evidence, *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). The court made specific findings on the record pursuant to § 25-403(B) as to the factors listed in § 25-403(A). It also found the equal parenting arrangement, which had been in place since July 2015, "appear[ed] to be functioning well—though not perfectly—for both parents and children," and concluded it was in the best interests of the children for the parents to share equal parenting time. As noted, these findings are supported by substantial evidence. Additionally, Troy controverted each item of testimony or evidence Heather asserts the court "ignored." We will not second-guess the court's determinations concerning conflicting evidence.

Attorney Fees

¶33 Both parents seek attorney fees and costs pursuant to A.R.S. § 25-324. That section provides that a court, "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending" an action such as this one. *See In re Marriage of Zale*, 193 Ariz. 246, ¶ 20, 972 P.2d 230, 235 (1999) ("The purpose of the statute is to provide a remedy for the party least able to pay."). Here, after considering the record concerning the financial resources of the parties, as well as the reasonableness of the positions they have taken on appeal, in our discretion we decline to award attorney fees pursuant to § 25-324. *In re Gubser*, 126 Ariz. 303, 304-05, 614 P.2d 845, 846-47 (1980) (§ 25-324 award discretionary). However, we grant Troy his costs on appeal upon his compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶34 For the foregoing reasons, we affirm the dissolution decree.