IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

WENDY MCCURDY,
Petitioner/Appellee/Cross-Appellant,

and

JENNIFER ENGLISH,
Respondent/Appellant/Cross-Appellee.

No. 2 CA-CV 2020-0082-FC
Filed May 18, 2022

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NOT FOR PUBLICATION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. D20181014
The Honorable Jane Butler, Judge Pro Tempore
The Honorable Dean C. Christoffel, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

McNorton Fox PLLC, Tucson
By Lisa C. McNorton
Counsel for Petitioner/Appellee/Cross-Appellant

Christopher M. Jeffrey, Tucson
Counsel for Respondent/Appellant/Cross-Appellee

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 In this marriage dissolution appeal, both parties challenge certain aspects of the trial court's decree. For the reasons that follow, we affirm the decree in part, vacate it in part, and remand to the court for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 The operative facts involved in this appeal are undisputed. Jennifer English and Wendy McCurdy married in 2014, and nearly four years later, McCurdy filed a petition for dissolution of marriage without children. The trial court granted McCurdy's motion for summary judgment, finding certain real property in Canada and Tucson—which had been purchased by McCurdy before the marriage—to be her separate property. English requested spousal maintenance in the amount of $6,000 per month for thirty-six months.

¶3 Following a three-day bench trial at which both McCurdy and English testified, the trial court entered a decree of dissolution. The court denied English's request for maintenance, finding she had not established a statutory basis for entitlement of such an award. The court affirmed its previous ruling regarding the separate nature of McCurdy's Canadian and Tucson properties, but awarded English one-half of the community's interest in their appreciations, less the amount she had previously received from the sale proceeds of the Canadian property. Both McCurdy and English were awarded their respective separate property, and English was also awarded over $30,000 as an equalization payment for the community bank accounts that were awarded to McCurdy. As noted above, both parties have appealed from the decree.

English's Appeal

Denial of Spousal Maintenance

¶4 English first argues the trial court erred in denying her request for spousal maintenance. We review the court's ruling for an abuse

of discretion and will affirm the order if reasonable evidence supports it. *See In re Marriage of Cotter & Podhorez*, 245 Ariz. 82, ¶ 6 (App. 2018); *Boyle v. Boyle*, 231 Ariz. 63, ¶ 8 (App. 2012). We defer to the trial court's opportunity to judge the credibility of witnesses firsthand and will not reweigh conflicting evidence on appeal. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009).

¶5 Pursuant to A.R.S. § 25-319(A), the trial court may grant maintenance if it finds that the requesting spouse: (1) lacks sufficient property to provide for their reasonable needs; (2) is unable to be self-sufficient through appropriate employment; (3) has made significant contributions to the education, training, vocational skills, career, or earning ability of the other spouse; (4) had a marriage of long duration and is of an age that may preclude the possibility of gaining adequate employment to be self-sufficient; or (5) has significantly reduced their income or career opportunities for the benefit of the other spouse. English has not identified which ground entitles her to a maintenance award. *See Boyle*, 231 Ariz. 63, ¶ 9 (spousal maintenance appropriate when spouse meets any of enumerated grounds). And although she acknowledges that a trial court is not required to make specific findings under § 25-319(A), *see Marriage of Cotter & Podhorez*, 245 Ariz. 82, ¶ 12, she nevertheless appears to contend the record here is insufficient to support the court's determination of her ineligibility. We disagree.

¶6 English was awarded an equalization payment of over $30,000. *See* § 25-319(A)(1). And her own testimony supports the trial court's implicit finding that she is capable of adequate employment: she has an MBA in marketing, has a history of Fortune 50 brand marketing, and successfully took a company out of bankruptcy and revived it as a retail operation. Moreover, as of trial, English had a consulting job earning $50 per hour, with a guaranteed contract of ten hours per month, worked two days each week at a restaurant, had negotiated ownership of franchising rights to open dessert restaurants in Canada, Massachusetts, and Washington, and had a potential opportunity to be a culinary arts substitute teacher. *See* § 25-319(A)(2). McCurdy was already established in her career before the relatively short marriage. During the marriage, English managed household duties, but McCurdy also hired outside help; thus there was little evidence that her efforts significantly contributed to McCurdy's earning ability. *See* § 25-319(A)(3), (4). And although English testified that she had reduced her career opportunities for McCurdy's benefit by relocating to Canada, where she was unable to have paid employment, McCurdy provided contrary evidence, testifying that during the marriage, English had worked as a culinary consultant, radio show host,

and food-and-wine article writer, and that to work in Canada, English needed only complete some paperwork, which she did less than two months after service of the dissolution petition. *See* § 25-319(A)(5). As noted above, we will not reweigh conflicting evidence on appeal. *See Hurd*, 223 Ariz. 48, ¶ 16. In sum, the record contains ample evidence supporting the trial court's determination that English was not eligible for spousal maintenance, and English has therefore failed to show that the court abused its discretion. *See Boyle*, 231 Ariz. 63, ¶ 8.

Division of Community Property

¶7 English next challenges the trial court's division of property. Under A.R.S. § 25-318(A), the court must divide community property "equitably, though not necessarily in kind." The trial court has wide discretion in determining how to effect such division, which we will not disturb absent a clear abuse of discretion. *Flower v. Flower*, 223 Ariz. 531, ¶ 14 (App. 2010). Without citing to the record to support her assertion, English generally contends the court made "an unequal distribution of property based solely and specifically on the separate, pecuniary contributions of the parties to that property," in contravention of *Inboden v. Inboden*, 223 Ariz. 542 (App. 2010). An appellant's opening brief, however, is required to include "appropriate references to the portions of the record on which the appellant relies." Ariz. R. Civ. App. P. 13(a)(7)(A). We deem English's argument waived due to her omissions, *see Varco, Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, n.5 (App. 2017), but in any event the record belies her argument. The decree of dissolution divided the couple's community assets almost equally, without regard to the separate financial contributions of the parties. Although English may believe it unfair that the decree awarded McCurdy more property than her because of McCurdy's separate assets, that order is consistent with Arizona law.[1] *See* § 25-318(A) ("the court shall assign each spouse's sole and separate property to such spouse"). Notably, English has not challenged the court's characterization of McCurdy's separate property as such, nor would the record support such

[1]English's theory below on why she was entitled to McCurdy's sole and separate property appears to have been based on a misunderstanding of community property law and belief that marriage converts all of a spouse's separate assets into community assets that are to be divided 50-50 at dissolution.

a challenge. English has not demonstrated the court abused its discretion here.[2] *See Flower*, 223 Ariz. 531, ¶ 14.

McCurdy's Cross-Appeal

Community Liens on McCurdy's Real Property

¶8 As previously mentioned, the trial court found the two residences purchased by McCurdy in Canada and Tucson before the marriage to be her separate property. Although the nature of property purchased before marriage does not change because it is used as a family home and mortgage payments are made from community funds, if the community contributed capital to the separate property, it is entitled to compensation and an equitable lien against the property. *Drahos v. Rens*, 149 Ariz. 248, 249 (App. 1985). While we review the court's apportionment of community property for an abuse of discretion, the characterization of property is a conclusion of law that we review de novo. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 4 (App. 2007).

Tucson Property

¶9 McCurdy argued below that the community only contributed to half of the mortgage payments during the marriage, the other half was traceable to her separate bank account. The court rejected her argument, reasoning there was no evidence "the parties had divided their housekeeping or living expenses between sole and separate accounts and community accounts."

¶10 McCurdy maintains the trial court's reasoning is contrary to law because the community lien must be calculated based on the community contribution toward the real estate. We agree. Regardless of whether the parties maintained separate accounts for their household and living expenses, the value of the community lien is calculated based on community contributions. *See Drahos*, 149 Ariz. at 250; *Barnett v. Jednyak*, 219 Ariz. 550, ¶ 21 (App. 2009) (calculating community lien using community's contributions to principal). Despite undisputed evidence

[2]To the extent English has attempted to raise several additional issues in her answering brief on cross-appeal—not raised in her opening brief—regarding the manner in which the trial was conducted, we deem them waived and do not address them. *See Dawson v. Withycombe*, 216 Ariz. 84, n.11 & ¶ 91 (App. 2007) (appellant waives issues not raised in opening brief).

establishing the community had contributed only half of the payments toward the property, the court attributed all of the mortgage payments during the marriage to the community. Thus, the community lien must be adjusted. We therefore vacate the portion of the decree regarding the Tucson property and remand for the court to recalculate the value of English's share of the community lien.

Canada Property

¶11 McCurdy contends the trial court erred in finding that English was entitled to any share of a community lien on the Canada property because there was no evidence the community made any contribution to the mortgage. The record supports that claim. McCurdy provided evidence that all of the mortgage payments on the Canadian residence during the marriage were paid from an account consisting only of her separate assets, and English failed to provide any evidence to the contrary. *See Hefner v. Hefner*, 248 Ariz. 54, ¶ 9 (App. 2019) (spouse seeking to overcome presumption of asset characterization has burden of establishing character of property by clear and convincing evidence). And English failed entirely to address this issue in her answering brief on cross-appeal, which we deem a confession of error. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7 (App. 2001); *In re Pinal Cnty. Juv. Action No. S-389*, 151 Ariz. 564, 565 (App. 1986) ("In a civil case in which an appellant raises a debatable issue and the appellee makes no reply, we may, in our discretion, treat the lack of a response as a confession of error and reverse on that basis.").

¶12 Accordingly, we vacate the portion of the decree finding the community acquired an equitable lien against the Canadian residence. *See Drahos*, 149 Ariz. at 249 (community entitled to compensation when it "contributed capital to the separate property"). English is correct, however, that the calculation of community liens against both the Tucson and Canadian properties were part of the trial court's equitable distribution of property in this case, and remand is appropriate for the court to reconsider the equitable division of community property in light of this decision. *See Toth v. Toth*, 190 Ariz. 218, 222 (1997) (remanding for equitable distribution of property after vacating lower court's ruling).

Allocation of Debt

¶13 During the marriage, McCurdy refinanced the obligation on her Canadian house and incorporated a $276,000 line of credit secured by

the Canadian property.[3] McCurdy testified that the line of credit was used to support the couple's living expenses. The trial court allocated the outstanding balance at the time the property was sold entirely to McCurdy, reasoning "[t]here is no evidence to trace back the parties' living expenses to the line of credit." As stated above, we review the allocation of community property for an abuse of discretion, but classification of the property as separate or community is a question of law that we review de novo. *Bell-Kilbourn*, 216 Ariz. 521, ¶ 4.

¶14 A debt incurred during marriage for the benefit of the community is presumed to be a community debt. *Johnson v. Johnson*, 131 Ariz. 38, 44 (1981). The spouse who contends a debt incurred during the marriage is not a community obligation has the burden of overcoming that presumption by clear and convincing evidence. *Lorenz-Auxier Fin. Grp., Inc. v. Bidewell*, 160 Ariz. 218, 220 (App. 1989). The uncontradicted evidence here showed the balance on the line of credit was incurred during the marriage and used to pay for community expenses. Thus, we agree with McCurdy it should have been presumed a community obligation, and we vacate the portion of the decree treating it otherwise and remand for reallocation of this debt.

Denial of Health Insurance Reimbursement

¶15 McCurdy last asserts the trial court erred by denying her request to reimburse her payments for English's health insurance premiums during the dissolution proceedings. She correctly points out that A.R.S. § 25-315(A)(1)(c) requires parties to maintain all insurance coverage in full force and effect during the pendency of a dissolution action. In denying McCurdy's request, the court incorrectly stated that the health insurance order had been issued by a court in another jurisdiction; in fact that order was entered in Arizona. *See* § 25-315(A)(1)(c). Accordingly, we vacate this portion of the decree and remand for the court to determine under the correct factual backdrop whether McCurdy is entitled to any reimbursement for her payments, and, if so, how any reimbursement impacts the equitable distribution of community property. *See Flower*, 223 Ariz. 531, ¶ 14 (trial court has broad discretion to equitably distribute property).

[3]The line of credit was initially opened before the marriage but did not have a balance as of the date of the marriage.

Attorney Fees and Costs

¶16 McCurdy requests an award of attorney fees incurred for filing her answering brief to English's appeal and her reply brief on cross-appeal pursuant to A.R.S. § 25-324. Section 25-324(A) provides that the 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 any proceeding." The record as a whole demonstrates McCurdy has substantially greater financial resources than English, and although English's arguments were poorly supported and unsuccessful, we cannot say they were objectively unreasonable. In our discretion, we therefore deny McCurdy's requests. *See Coburn v. Rhodig*, 243 Ariz. 24, ¶ 16 (App. 2017). However, because she has prevailed in defending against English's appeal and in her cross-appeal, McCurdy is entitled to her costs pursuant to A.R.S. § 12-341.

Disposition

¶17 The dissolution decree is affirmed in part and vacated in part, and we remand to the trial court for further proceedings consistent with this decision.