IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

ELENA J. SCHLEMBACH,
Petitioner/Cross-Respondent/Appellant,

and

HORST A. SCHLEMBACH,
Respondent/Cross-Petitioner/Appellee.

No. 2 CA-CV 2022-0032-FC
Filed September 27, 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NOT FOR PUBLICATION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 Pinal County
No. S1100DO201901008
The Honorable Richard T. Platt, Judge Pro Tempore
The Honorable Patrick K. Gard, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 In this domestic relations action, Elena Schlembach appeals from the trial court's under-advisement ruling dismissing her petition for dissolution, granting Horst Schlembach's cross-petition for annulment, and denying her request for an equitable distribution of their property and debts. She also challenges the award of attorney fees to Horst. Elena argues the court violated her due process rights by ruling her marriage to Horst was void without first conducting an evidentiary hearing on the issues of ratification and estoppel. And she contends that in granting Horst's cross-petition for annulment the court erred by failing to divide the parties' community property and debts. For the following reasons, we vacate the annulment ruling in part, and vacate both the order awarding attorney fees and the amended-judgment ruling in their entirety and remand to the trial court for further proceedings.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's rulings. *Bell–Kilbourn v. Bell–Kilbourn*, 216 Ariz. 521, n.1 (App. 2007). In December 1994, Elena and Horst were married in the Philippines. Throughout the twenty-five years they held themselves out as married, the parties acquired property and incurred debts. In June 2019, Elena petitioned for dissolution of the marriage. Before filing his response, Horst moved for emergency temporary orders, alleging that Elena had withdrawn "community" funds from their bank accounts and requesting an order directing her to return "all monies wrongfully withdrawn" and directing the bank to "discontinue access and operating privileges" to their joint accounts. The court granted Horst's motion for temporary orders.

¶3 Nearly two months after filing a response to the dissolution petition, Horst amended it to include a cross-petition for annulment. He alleged the marriage was "null and void" because Elena "never properly annulled" the 1985 marriage to her first husband before the parties' marriage as required under Philippine law.

¶4 Elena sought leave to amend her petition for dissolution to request spousal maintenance and the equitable division of community property and debts. The trial court granted the motion. Horst then moved for summary judgment on the ground that the parties' marriage was invalid and requested the court to dismiss Elena's dissolution petition and grant his request for annulment. After a hearing, the court denied his motion, finding a genuine issue concerning the validity of the parties' marriage.

¶5 At a hearing in June 2020, the trial court heard oral argument concerning the validity of the parties' marriage and whether the court should treat the matter as a dissolution or annulment. In September, the court issued an under-advisement ruling finding the marriage was invalid, dismissing Elena's petition for dissolution with prejudice, and granting Horst's cross-petition for annulment. The court also denied Elena's petition for "dissolution, spousal maintenance, division of property, division of business interest, division of retirement benefits, division of debt or other assets and claim for attorney fees" and awarded Horst his attorney fees. Elena appealed.

¶6 In October 2020, two days after Elena filed her notice of appeal, Horst filed a motion to amend judgment and request for accounting concerning the funds at issue in the earlier temporary order. In her response, Elena objected to the trial court's jurisdiction. Before the court ruled on the motion to amend judgment but after it awarded Horst his attorney fees in February 2021, Elena filed an amended notice of appeal to include "all underlying interlocutory orders and rulings" and the award of attorney fees. This court dismissed the appeal as premature because neither the September nor February orders had included appropriate finality language under Rule 78, Ariz. R. Fam. Law P. In January 2022, the trial court issued its ruling denying Horst's motion to amend judgment and finding "that all claims pending before the Court have been resolved pursuant to Rule 78(c)." This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

Validity of Marriage

¶7 Elena argues the trial court violated her due process rights by granting Horst's cross-petition for an annulment without an evidentiary hearing on the issue of "validity and/or ratification." Whether a marriage is valid is a question of law we review de novo. *State v. Fischer*, 219 Ariz. 408, ¶ 21 (App. 2008). We likewise review constitutional challenges de novo. *Backstrand v. Backstrand*, 250 Ariz. 339, ¶ 28 (App. 2020).

¶8 During the June 2020 hearing, Horst argued that under Philippine law, the parties' marriage was void ab initio and, thus, the only remedy was an annulment. Although Elena conceded that the parties' marriage was invalid, she argued it had been ratified by the parties' conduct. And she maintained that because they had ratified the marriage, the trial court should proceed with her petition for dissolution. The court rejected this argument, concluding it lacked authority because the marriage was invalid.

¶9 On appeal, Elena contends that she was precluded from "fully and completely presenting her positions" so "[t]he trial court did not have the opportunity to hear testimony and assess the credibility of either party or their respective positions." However, under the circumstances here, determining the validity of a marriage is strictly a question of law. *See Cook v. Cook*, 209 Ariz. 487, ¶ 7 (App. 2005) (the validity of marriage is matter of law when material facts concerning its validity are uncontested); *see also* Ariz. R. Civ. P. 44.1 ("The court's determination [of foreign law] must be treated as a ruling on a question of law."). We therefore look to relevant Arizona and Philippine law to determine whether the parties' marriage was valid.

¶10 The validity of a marriage is determined by the law of the place where the marriage is contracted, not where the dissolution is sought. *Cook*, 209 Ariz. 487, ¶ 8. Arizona will therefore recognize a marriage if it is valid where it was contracted or solemnized, "except marriages that are void and prohibited by [A.R.S.] § 25-101."[1] A.R.S. § 25-112(A). A trial court "may adjudge a marriage to be null and void when the cause alleged constitutes an impediment rendering the marriage void." A.R.S. § 25-301.

[1] Section 25-101 prohibits certain marriages, none of which are involved here.

An impediment permitting a grant of an annulment includes "[a]ny grounds rendering the marriage void or voidable." *Hodges v. Hodges*, 118 Ariz. 572, 574 (App. 1978). A voidable marriage is capable of ratification, whereas a void marriage is not. *Id.*; *State ex rel. Dep't of Econ. Sec. v. Demetz*, 212 Ariz. 287, ¶ 12 (App. 2006).

¶11 In this case, the validity of the parties' marriage depends on whether it was valid under Philippine law because the parties were married there. *See* § 25-112; *Cook*, 209 Ariz. 487, ¶ 8. In the Philippines, "[a] marriage contracted by any person during subsistence of a previous marriage shall be null and void" unless certain conditions are met which do not apply here. Family Code, Exec. Ord. 209, art. 41, as amended (Phil.). Bigamous marriages are void from the beginning. Family Code, art. 35(4). If a person was previously married and is seeking remarriage, the court must enter a "final judgment declaring such previous marriage void" before a subsequent marriage can be valid. Family Code, art. 40. Additionally, if such a judgment is not properly recorded, the subsequent marriage is invalid. Family Code, arts. 52, 53.

¶12 Both parties agreed below that their marriage was "void for being bigamous" because Elena was in an existing, valid marriage at the time she married Horst. However, they disputed whether their marriage was nonetheless valid because a Philippine court had not declared it void. Article 40 of the Family Code of the Philippines states that "[t]he absolute nullity of a previous marriage may be invoked for purposes of remarriage on the basis solely of a final judgment declaring such previous marriage void." The parties offered expert opinions regarding the interpretation of this article. Elena's expert opined that the parties' marriage was valid because there was no "declaration of the invalidity of the marriage." In contrast, Horst's expert opined that the requirement for a judicial declaration of nullity only applies to prior marriages when a former spouse is seeking remarriage and is therefore inapplicable to subsequent marriages that are void ab initio. We agree with the trial court that Horst's expert offered a more "plausible interpretation" of the relevant law. Therefore, under Philippine law, the marriage between Horst and Elena was void ab initio.

¶13 Because we conclude the parties' marriage was void and therefore not subject to ratification, the trial court did not violate Elena's due process rights by failing to consider evidence of a purported ratification. Procedural due process entitles a party to proper notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Samiuddin v. Nothwehr, 243 Ariz. 204, ¶ 20 (2017); *Holcomb v. Ariz. Dep't of Real Est.*, 247 Ariz. 439, ¶ 11 (App. 2019). Contrary to Elena's contention, because the marriage was void and incapable of ratification, *see Higgins v. Higgins*, 154 Ariz. 87, 89 (App. 1987), the court's ruling rendered an evidentiary hearing on ratification moot.

Equitable Estoppel

¶14 For these same reasons, we reject Elena's argument that Horst should have been estopped from challenging the validity of their marriage based on his actions both during the marriage and in the early stages of the underlying proceedings. Questions of estoppel are fact-intensive inquiries that we generally review for an abuse of discretion.[2] *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10 (App. 2004). But as discussed above, because the parties' marriage was incapable of being ratified, Horst's conduct in furtherance of a void marriage is of no consequence. The trial court thus did not err by refusing to address Elena's "arguments on the estoppel" during the summary judgment hearing.

Distribution of Property

¶15 Elena argues that the trial court erred by failing to divide the parties' community property and debts after granting the annulment. A court abuses its discretion when it commits an error of law in exercising its discretion. *Dole v. Blair*, 248 Ariz. 629, ¶ 8 (App. 2020). We review issues of law de novo. *Id.*

¶16 "If grounds for annulment exist, the court to the extent that it has jurisdiction to do so, shall divide the property of the parties . . . ." A.R.S. § 25-302(B). In an annulment action, a court has authority to equitably divide the parties' community property and debts under A.R.S. § 25-318. *Hammett v. Hammett*, 247 Ariz. 556, ¶ 23 (App. 2019). Property acquired during the marriage is presumed to be community property, except for property "[a]cquired after service of a petition for . . . annulment if the petition results in a[n] . . . annulment." A.R.S. § 25-211(A). A petition for annulment does not "[a]lter the status of preexisting community property" or "[c]hange the status of community property used to acquire new

[2]"The three elements of estoppel are (1) affirmative acts inconsistent with a claim afterwards relied upon, (2) action by a party relying on such conduct and (3) injury to the party resulting from a repudiation of such conduct." *Decker v. Hendricks*, 97 Ariz. 36, 40 (1964).

property or the status of that new property as community property." § 25-211(B). Similarly, "debt acquired by one spouse during a marriage binds both spouses even after the marriage is annulled." *Hammett*, 247 Ariz. 556, ¶¶ 19, 22-23.

¶17 In support of her argument, Elena cites *Hammett*, which is dispositive on this issue. There, as here, the trial court found that the wife had not properly terminated her first marriage so her second marriage was bigamous and thus invalid. *Id.* ¶ 6. The court annulled the parties' marriage and ruled that the annulment voided the creation of the marital community. *Id.* ¶¶ 8, 25. In doing so, as in this case, the trial court did not equitably distribute the parties' community property and debts as required by the applicable marital-property statutes under Title 25 of the Arizona Revised Statutes. *Id.* ¶¶ 7-8, 25. In *Hammett*, this court held that "parties acquire community property and debt even during a marriage that results in an annulment; and, when terminating the marriage, the [trial] court must dispose of such assets and debt under [A.R.S. §] 25-318, to the extent applicable." *Id.* ¶ 1.

¶18 Despite recognizing the factual similarities between the two cases, Horst cites *Cross v. Cross*, 94 Ariz. 28, 31 (1963), in which our supreme court concluded that "where there was no valid marriage of appellant to appellee, there can be no acquisition of property rights based on their marital status." But that case predated *Hammett*, and in *Hammett*, we explicitly stated that "[t]o the extent *Cross* conflicts with the current marital property statutes, A.R.S. §§ 25-211 to -215, it has been superseded." 247 Ariz. 556, ¶ 20. To the extent Horst suggests the *Hammett* court incorrectly determined that *Cross* was superseded by the amendments, we disagree. We presume the legislature is aware of existing case law when amending statutes, *see State v. Pennington*, 149 Ariz. 167, 168 (App. 1985), and we therefore presume it was aware of *Cross* and nevertheless chose not to differentiate between the remedies for dividing community property and debts in an annulment. Horst also criticizes *Hammett*'s holding, contending that it "is clearly legal 'recognition' of a bigamous marriage," which the Arizona Constitution prohibits. *See* Ariz. Const. art. XX, Second. Horst maintains that the "only way" to harmonize §§ 25-301 and 25-302 and the legislature's addition of "annulment" to A.R.S. §§ 25-211 and 25-213 with article XX, Second of the Arizona Constitution is to draw a distinction between voidable marriages and those that are void ab initio.

¶19 Although we acknowledge there is a difference between void and voidable marriages, in that voidable marriages can be ratified, *see*

Demetz, 212 Ariz. 287, ¶ 12, that difference is irrelevant to the question of whether a trial court is obligated to divide the parties' property in an annulment proceeding. Horst nevertheless argues that "a void marriage is not marriage at all" and, thus, it cannot create property rights because "no marital status ever existed." He contrasts this with a voidable marriage, which he maintains can create community property and debt because a voidable marriage "is valid until it is annulled." He contends this distinction offers a "clear and rational explanation of the [l]egislature's intent." We disagree for two reasons.

¶20 First, when it is silent on an issue, we will not "read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself," nor will we "inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions." *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965). In 1998, the legislature amended §§ 25-211 and 25-213 to specifically include marriages that end in an annulment without drawing a distinction between the grounds for which the petitioner was seeking an annulment. *See* 1998 Ariz. Sess. Laws ch. 280, §§ 3, 4. Horst argues that the grounds for annulment matter, but he concedes the absence of such a distinction in the statute. And to the extent Horst is suggesting a statutory ambiguity, there is nothing in the legislative history to suggest the legislature intended to draw such a distinction. *See* S. Fact Sheet for S.B. 1132, 43rd Leg., 2d Reg. Sess. (Ariz. 1998). Accordingly, we will not read into the statutes an additional requirement that an annulment must have been sought on the ground that it was voidable, not void, to be within their scope.

¶21 Second, dividing the parties' property and debt in an annulment action is not a legal recognition of a bigamous marriage. Instead, it is a recognition that the legislature intended the equitable distribution of community property and debts when parties are in void or voidable marriages that end in annulment. This was made clear by the holding in *Hammett*. 247 Ariz. 556, ¶¶ 1, 15.

¶22 In sum, the trial court erred by applying the incorrect legal principles when, after annulling the parties' marriage, it ruled Elena was "precluded from any claim" seeking the equitable distribution of the

parties' community property and debts.[3] We therefore vacate that portion of the order and remand for the court to conduct such a distribution.

Attorney Fees

¶23 Elena argues the trial court erred by awarding Horst his attorney fees under A.R.S. § 25-324. We review an award of attorney fees for an abuse of discretion. *Hefner v. Hefner*, 248 Ariz. 54, ¶ 6 (App. 2019). The court abuses its discretion when it commits a legal error in making a discretionary decision. *In re Marriage of Williams*, 219 Ariz. 546, ¶ 8 (App. 2008).

¶24 Elena contends the trial court failed to make any findings related to the financial resources of the parties or the reasonableness of the parties' positions as required by § 25-324. However, absent a request, the court is not required to make specific findings of fact. *Myrick v. Maloney*, 235 Ariz. 491, ¶ 10 (App. 2014). Elena maintains she made such a request by including these findings in her proposed findings of fact and conclusions of law. We need not decide whether this constituted a proper request for specific findings because the court made a legal error in awarding fees.

¶25 In its September 2020 ruling, the trial court ordered that Elena was barred from seeking attorney fees under § 25-324 and awarded Horst his attorney fees in the amount of $29,014. It appears the court based this order on its grant of annulment. However, an annulment does not prohibit a party opposing annulment from requesting attorney fees. *Cf. Hammett*, 247 Ariz. 556, ¶¶ 7, 10, 14, 26 (vacating and remanding award of attorney fees where trial court applied incorrect legal principles in awarding attorney fees to spouse who successfully sought annulment); *In re Pima Cnty. Juv. Action No. S-113432*, 178 Ariz. 288, 294 (App. 1993) (recognizing that § 25-324 allows award of attorney fees for annulments); *but see Cross*, 94 Ariz. 28, 32 (vacating dissolution decree which awarded attorney fees and remanding for trial court to enter annulment decree).

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[3]In the same order, the trial court also precluded Elena from seeking spousal maintenance and an award of attorney fees, which are addressed separately in this decision. We note that spousal maintenance is not available in an annulment proceeding, and thus this portion of the order is correct. *See* A.R.S. § 25-319(A) (annulment not included in list of qualifying proceedings under spousal-maintenance statute); *see also Malott v. Malott*, 145 Ariz. 587, 588 (App. 1985).

¶26 Under § 25-324(A), a court can "order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter," which includes annulments under § 25-301. The trial court erred by applying incorrect legal principles, constituting an abuse of discretion. Accordingly, we vacate the court's award of attorney fees and direct the court to reconsider it on remand.

Attorney Fees on Appeal

¶27 Both parties have requested attorney fees and costs on appeal under § 25-324 and Rule 21, Ariz. R. Civ. App. P. In the exercise of our discretion, we deny both requests. And because each party partially prevailed on appeal, we make no award of costs.

Disposition

¶28 For the foregoing reasons, we vacate the portion of the trial court's annulment ruling precluding Elena from seeking the division of property, business interest, retirement benefits, debt, or other assets and claim for attorney fees. We affirm the remaining portions of the annulment ruling. We also vacate the award of attorney fees and amended-judgment ruling in their entirety. Accordingly, we remand for further proceedings consistent with this decision.