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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 NOT FOR PUBLICATION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).
Court of Appeals of Arizona, Division 2.

IN RE the MARRIAGE OF Amanda N. MAHER, Petitioner/Appellee,
and
Timothy R. Maher Jr., Respondent/Appellant.

No. 2 CA–CV 2016–0060
|
Filed August 30, 2017

Appeal from the Superior Court in Pima County; Nos. D20140966 and D20140996 (Consolidated); The Honorable Laurie B. San Angelo, Judge Pro Tempore. **AFFIRMED**

Attorneys and Law Firms

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David Lipartito, Tucson, Counsel for Respondent/Appellant

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly [1] concurred.

MEMORANDUM DECISION

STARING, Presiding Judge:

***1** ¶ 1 Timothy Maher appeals from the trial court's award of spousal maintenance and child support to his former spouse, Amanda Maher. He argues the court erred by improperly characterizing as income the proceeds of an annuity he received as a result of a childhood injury, and abused its discretion by awarding inappropriate and excessive spousal maintenance and deviating upward from the child support amount determined under the Arizona Child Support Guidelines. [2] For the reasons that follow, we affirm.

Factual and Procedural Background

¶ 2 We view the facts in the light most favorable to affirming the trial court's decision. *Milinovich v. Womack*, 236 Ariz. 612, ¶ 7, 343 P.3d 924, 927 (App. 2015). The parties married in 1999 and have three minor children. During the marriage, their primary financial resource was an annuity Timothy received because of a childhood burn injury. As of December 2015, the annuity provided $28,000 per month in tax-free proceeds, with the monthly amount increasing by four percent every year. Although no portion of the annuity compensated Timothy for lost income, the parties lived on the proceeds.

¶ 3 The parties filed separate petitions for dissolution in 2014, and the actions were consolidated. The parties disputed the nature of Timothy's annuity and the manner in which it should be characterized for purposes of determining child support and spousal maintenance. The trial court ultimately attributed $17,068 in monthly income to Timothy for purposes of child support and spousal maintenance. In February 2016, it awarded Amanda $3,000 per month in spousal maintenance for five years, and child support of $2,000 per month. In April 2016, the court issued a final decree determining the amount of costs and attorney fees. Timothy timely appealed, and we have jurisdiction pursuant to A.R.S. § 12–2101(A)(1).

Spousal Maintenance

¶ 4 On appeal, Timothy argues the trial court erred in awarding Amanda spousal maintenance, asserting no award would be appropriate and, in the alternative, that the award was excessive. We review an award of spousal maintenance for abuse of discretion, and will affirm the award "if there is any reasonable evidence to support it." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998); *see also Rainwater v. Rainwater*, 177 Ariz. 500, 502, 869 P.2d 176, 178 (App. 1993) (court has "substantial discretion to set the amount and duration of spousal maintenance"). Our review involves consideration of, first, whether the spouse meets one of the statutory grounds for an award pursuant to A.R.S. § 25–319(A), and second, whether the trial court properly applied the factors in § 25–319(B) in determining the amount and duration of the award. *Gutierrez*, 193 Ariz. 343, ¶ 15, 972 P.2d at 681.

¶ 5 An award of spousal maintenance is appropriate pursuant to § 25–319(A)(1) when a spouse "[l]acks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs," as the trial court found here. The parties' circumstances during the marriage are relevant to determining reasonable needs under § 25–319(A)(1), and a party need not be completely incapable of support to qualify for maintenance. *Sommerfield v. Sommerfield*, 121 Ariz. 575, 578, 592 P.2d 771, 774 (1979).

***2** ¶ 6 The trial court must consider the income potential, including any time needed to initiate income-producing activity, of the property available to a party seeking maintenance under § 25–319(A)(1). *See Deatherage v. Deatherage*, 140 Ariz. 317, 321, 681 P.2d 469, 473 (App. 1984). However, a party is not expected to exhaust principal assets to provide the funds to meet the party's reasonable needs. *Id.*; *see also* *Thomas v. Thomas*, 142 Ariz. 386, 391–92, 690 P.2d 105, 110–11 (App. 1984) (spouse who "enjoyed ... high standard of living" not expected to consume principal assets while earning minimum wage to provide for self).

¶ 7 The trial court must determine the amount and duration of a maintenance award based on "all relevant factors," including thirteen specifically enumerated factors. § 25–319(B). Some, but not all of the factors are "based upon the parties' needs." *See* *Elliott v. Elliott*, 165 Ariz. 128, 136, 796 P.2d 930, 938 (App. 1990). A maintenance award should generally "promote a transition toward financial independence" as measured in reference to the marital standard of living. *Rainwater*, 177 Ariz. at 503, 869 P.2d at 179. These considerations should, however, be balanced against other applicable circumstances, including the ability of the paying spouse to meet the needs of both parties. *See id.* at 504, 869 P.2d at 180. Although a court considers the relevant factors on a case-by-case basis, it is an abuse of discretion to disregard a relevant statutory factor. *See id.* at 502, 869 P.2d at 178.

¶ 8 Notably, the statute requires consideration of the assets of the receiving spouse in determining whether maintenance is appropriate, and while it specifies that this "includ[es] property apportioned to the spouse," it does not prohibit consideration of separate property acquired prior to the marriage. § 25–319(A)(1). Likewise, in determining the amount and duration of an award, the statute requires consideration of the parties' "comparative financial resources" and the contributing spouse's ability to meet the needs of both parties. § 25–319(B)(4)–(5). As a whole, § 25–319 draws no distinction based on the characterization of either spouse's resources as separate property, and we presume the legislature intended no distinction. *See* *In re Marriage of Downing*, 228 Ariz. 298, ¶ 5, 265 P.3d 1097, 1099 (App. 2011) ("[W]e look to the plain language of the statute as the best indicator of [legislative] intent."). Further, we presume the legislature was aware of the distinction between separate and community property, *see* A.R.S. § 25–318, and that its failure to refer to separate or community property in § 25–319(B) indicates it did not intend to distinguish among different types of "financial resources" for purposes of determining spousal maintenance. *See* *Egan v. Fridlund–Horne*, 221 Ariz. 229, ¶ 37, 211 P.3d 1213, 1223 (App. 2009) ("[W]e presume that when the legislature uses different wording within a statutory scheme, it intends to give a different meaning and consequence to that language.").

¶ 9 Here, the trial court observed that the parties had established "a high standard of living" during the marriage, acquiring two RVs and a "large home" furnished with electronics and "expensive personal items." Amanda underwent cosmetic surgery on multiple occasions, and took frequent vacations with the children. Timothy acquired "numerous vehicles" and spent more than $3,000 per month to maintain a shop where he stored and worked on them. The parties together spent over $9,000 per month on entertainment and items not related to household bills.

***3** ¶ 10 After the separation, Amanda worked as a preschool teacher for $12.51 per hour and experienced a drastic change in lifestyle, despite receiving substantial support and maintenance pursuant to the trial court's temporary orders. The court ultimately found that Amanda lacked sufficient property to provide for her reasonable needs and was thus entitled to maintenance pursuant to § 25–319(A)(1).

¶ 11 Although Timothy asserts in conclusory fashion that Amanda has sufficient property to provide for her reasonable needs, he has cited no evidence nor offered any analysis concerning the income potential of her property. He appears to suggest Amanda should liquidate the property awarded to her and spend the proceeds, a view not consistent with case law. *See Deatherage*, 140 Ariz. at 321, 681 P.2d at 473. In this instance, the trial court's decision reflects a determination that Amanda required more than the wages from her current employment to meet her reasonable needs, and is supported

by the parties' testimony concerning the standard of living established during the marriage. We conclude the court did not err in finding Amanda was entitled to maintenance pursuant to § 25–319(A)(1).

¶ 12 With respect to the duration and amount of the award, the trial court considered the applicability of each of the thirteen factors under § 25–319(B). It considered Timothy's annuity pursuant to § 25–319(B)(4)–(5), observing he received $26,000 per month, and allocated nothing for medical expenses related to his childhood burn injury.[3] The court attributed $17,068 in monthly income to him, an amount equal to his claimed monthly expenses. The court also acknowledged he could earn income by investing his annuity proceeds. It further found Timothy could earn money using his knowledge about cars, but that he used his expertise only in pursuit of a "car business, which appears to cost him money rather than generat[ing] any income."

¶ 13 The trial court found Amanda had reduced her career opportunities to stay home with the children, and would need between four and seven years to obtain a teaching degree in order to increase her income. The court specifically found that an award of $3,000 per month for five years would allow Amanda to complete the training she needed. These findings are amply supported by the parties' testimony. The award thus reflected an amount sufficient to allow Amanda to achieve some measure of self-sufficiency, and did not seek to replicate, at Timothy's expense, the lifestyle Amanda had enjoyed during the marriage. We therefore reject Timothy's suggestion the court abused its discretion by awarding maintenance in an excessive amount and duration. *See* *Thomas*, 142 Ariz. at 391–92, 690 P.2d at 110–11.

¶ 14 We likewise reject Timothy's argument that the trial court erroneously treated "all or most" of his annuity proceeds as income, and that this amounted to an improper distribution of his separate property. First, the court attributed only $17,068 in monthly income, less than two thirds of the amount he actually received. And, although we disagree with the court's characterization of part of the monthly annuity proceeds as "income" for spousal maintenance purposes,[4] we are required to affirm the award if it is "legally correct for any reason." *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992). The text of § 25–319(B)(5) requires consideration of the parties' "comparative financial resources" without drawing any distinction based on the characterization of the paying spouse's resources as separate property. The court properly considered the annuity as a financial resource despite mistakenly characterizing it as income.

***4** ¶ 15 Finally, the maintenance award did not deprive Timothy of the ability to meet his own needs. He claimed to have expenses of $17,068 per month, including a mortgage and other debt payments, plus an additional $2,500 per month in prescription costs for an unspecified back problem. He testified that, several years before the parties' separation, he learned of surgery that could "make [his] face look like it was never burned," but he had not had any burn-related surgery as an adult because he and Amanda had spent the entirety of his annuity proceeds received during the marriage. Although he testified he planned to undergo surgeries on his hands and face, he had not investigated the cost, and offered only speculation that they could cost as much as "a couple hundred thousand dollars." The trial court's determination that Timothy was able to meet his needs while also assisting Amanda was reasonable in light of the evidence that Timothy was able to afford but had willingly chosen to forego additional surgery for his childhood burn injuries.[5]

¶ 16 Moreover, the trial court's orders do not preclude Timothy from pursuing surgery sooner rather than later. Even if he took no steps to reduce his secured debt payments or other monthly expenses, the court's maintenance and child support orders still left him several thousand extra dollars each month.[6] There appears to be nothing preventing Timothy from saving this money for surgery expenses or allocating it to finance the surgeries.

¶ 17 We conclude the trial court properly balanced the relevant statutory factors of § 25–319(B), and ordered maintenance in an amount and duration designed to allow Amanda to finish her education and attain higher paying employment, while allowing Timothy ample funds to meet his reasonable needs. The maintenance award was not an abuse of discretion.

Child Support

¶ 18 We review the trial court's child support award for an abuse of discretion. *Nash v. Nash*, 232 Ariz. 473, ¶ 5, 307 P.3d 40, 43 (App. 2013). In doing so, we "accept the court's findings of fact unless they are clearly erroneous, but we draw our own legal conclusions from facts found or implied in the judgment." *Id.* Interpretation of the Child Support Guidelines

is reviewed de novo. *Clay v. Clay*, 208 Ariz. 200, ¶ 5, 92 P.3d 426, 428 (App. 2004).

¶ 19 Guideline 8 and Guideline 20 contain two distinct methods for a court to order support greater than the minimum amount. *See* A.R.S. § 25–320 app. §§ 8, 20. In some instances, Guideline 8 allows an upward adjustment to the Basic Child Support Obligation if a party establishes "that a higher amount is in the best interests of the children." § 25–320 app. § 8. The Basic Child Support Obligation, however, is an interim step in the process of determining child support, which is ultimately allocated in proportion to the parties' gross incomes and further adjusted based on the parenting time schedule and other factors. *See* § 25–320 app. §§ 8–14.

¶ 20 Guideline 20, on the other hand, allows the court to order support different than the amount ultimately calculated under the Guidelines. § 25–320 app. § 20(A). Pursuant to Guideline 20, a court "shall deviate from" the Guideline support amount only if, "after considering all relevant factors," the court makes written findings that the Guideline amount "is inappropriate or unjust" and deviation is consistent with the child's best interests, and also indicates what the order would have been both before and after deviation. *Id.* The relevant statutory factors include "[t]he standard of living the child would have enjoyed ... in an intact home ... to the extent it is economically feasible considering the resources of each parent and each parent's need to maintain a home ... when the child is with that parent." § 25–320(D)(3); *see also Nash*, 232 Ariz. 473, ¶ 23, 307 P.3d at 46 ("court must give considerable regard to the reasonable benefits, beyond their 'basic needs,' accorded to the children during the marriage").

***5** ¶ 21 Timothy argues the trial court should not have awarded child support in an amount higher than the minimum amount required under the Arizona Child Support Guidelines. He contends the court erred by finding that the children's best interests justified deviating from the Guideline support amount. We disagree. [7]

¶ 22 In its under advisement ruling, the trial court concluded there was a "substantial difference in lifestyle between the two households" and that deviating from the Guideline support amount was in the children's best interests because it would "allow them to have a more similar lifestyle in the home of each parent." Although the trial court did not explicitly discuss other factors in the context of child support, it discussed the marital standard of living and the parties' financial resources elsewhere in the ruling, and it made the written findings required for deviation in its separate child support order. *See* §§ 25–320(D), 25–320 app. § 20(A)(3). Thus, despite the court's citation in its under-advisement ruling to Guideline 8, which does not govern deviation from the Guidelines, its ultimate decision and child support order, viewed together, meet the requirements for an upward deviation consistent with Guideline 20. *See* § 25–320 app. §§ 8, 20.

¶ 23 Timothy asserts that the children's interests do not justify tripling the amount of mandated support, but he has not identified any relevant factor the trial court failed to consider, nor offered any authority for his contention that "an attempt to equalize conditions between the two parents' homes is not a proper basis for ... deviation." *See FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1, 200 P.3d 1020, 1021 n.1 (App. 2008) (failure to develop argument on appeal constitutes abandonment). We conclude Timothy has not established the court's decision to deviate upward from the Guideline support amount was an abuse of discretion.

Attorney Fees

¶ 24 Both parties request an award of attorney fees on appeal pursuant to A.R.S. § 25–324 and Rule 21(a), Ariz. R. Civ. App. P. In light of the marked disparity in financial resources and the reasonableness of the positions Amanda has taken throughout the proceedings, we grant Amanda's request for an award of reasonable attorney fees on appeal, subject to compliance with Rule 21(b). Because she is the prevailing party, Amanda is also entitled to her appellate costs pursuant to A.R.S. § 12–341.

Disposition

¶ 25 We affirm the trial court's spousal maintenance and child support awards.

All Citations

Not Reported in Pac. Rptr., 2017 WL 3747142

Footnotes

1 The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

2 *See* A.R.S. § 25–320 app.

3 The annuity amount was $28,000 per month as of December 2015.

4 *See* A.R.S. § 25–213(A) (property acquired before marriage is separate property); *Jurek v. Jurek*, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980) (payment for injury to "personal well-being" considered separate property).

5 Timothy's reliance on *Gallegos v. Gallegos*, 174 Ariz. 18, 846 P.2d 831 (App. 1992), is unpersuasive. In *Gallegos*, we held that the trial court erred in calculating a father's child support obligation without making any adjustment for "extraordinary expenses" of up to $6,000 per month needed just to preserve "an appropriate level of functioning" following a devastating injury that left him quadriplegic. *Id.* at 21–22, 846 P.2d at 834–35. In contrast, Timothy's planned surgeries are not necessary to restore appropriate functioning, as demonstrated by his willingness to defer them for over twenty years.

6 This estimate ignores the four percent annual increases to Timothy's annuity payments, an anticipated increase of over $1,200 per month in 2016 and thereafter. It also does not account for the effect full repayment of any debts would have on Timothy's monthly cash flow.

7 Because we conclude the child support order was an appropriate deviation under Guideline 20, we need not address Timothy's argument that the trial court erred by finding Amanda rebutted the presumption of equal cost sharing and considering the effect of an adjustment pursuant to Parenting Time Table B, § 25–320 app. § 11. *See* Ariz. R. Fam. Law P. 86 (court "must disregard" harmless errors).