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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/16/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 08-0465
)
ANN C. GROENEWOLD,) DEPARTMENT C
)
Petitioner/Appellee/) **MEMORANDUM DECISION**
Cross-Appellant,) (Not for Publication -
) Rule 28, Arizona Rules of
v.) Civil Appellate Procedure)
)
KEITH ALAN GROENEWOLD,)
)
Respondent/Appellant/)
Cross-Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-006905

The Honorable Peter C. Reinstein, Judge

AFFIRMED IN PART; REMANDED IN PART

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P O R T L E Y, Judge

¶1 Keith ("Husband") and Ann ("Wife") Groenewold both
appeal from the judgment dissolving their marriage. Husband

contends that the family court erred by: (1) failing to make a final custody award, (2) failing to make findings regarding Wife's alleged danger to the children and substance abuse, (3) finding Wife unable to work, (4) awarding Wife spousal maintenance, and (5) admitting into evidence a letter from Wife's treating physician. On cross-appeal, Wife contends that the trial court erred by failing to award her retroactive spousal maintenance.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Wife were married in 1984 and had two minor children. Both parties contributed to the family income. Husband is a sales and marketing director, and Wife has an M.B.A. degree and was a successful sales representative in the textiles industry. She stopped working when their family moved from New York to Arizona in 2004, but held several volunteer positions at the children's schools between 2005 and 2007.

¶3 Wife exhibited unusual behavior throughout 2007. She was hospitalized for psychiatric treatment for two weeks just after the parties separated. She had a second month long stay at a different psychiatric treatment facility just before trial. Between her stays and after she entered his residence intoxicated and belligerent, Husband secured an order of protection fearing Wife was a danger to their children when she drank. Dr. Jack Potts, a forensic psychiatrist retained by

Husband, testified that in his opinion Wife was likely not suffering from bipolar disorder, but that her conduct could be caused by alcohol abuse and taking prescription medications.¹

¶4 At trial, the parties agreed that Husband would have sole legal custody of the children and that Wife's parenting time "shall be suspended pending the issuance of the [therapeutic interventionist's] recommendation to the court." The family court, after the presentation of evidence, dissolved the marriage and awarded Wife spousal maintenance of \$4,000 per month for twelve months beginning February 1, 2008, to be reduced to \$3,000 per month for the next twelve months, and then \$2,500 per month for the following sixty months.

¶5 Husband filed a timely notice of appeal, and Wife filed a timely notice of cross-appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

I. Custody Order

¶6 Husband argues that the custody order language in the decree erroneously created an interlocutory order. Specifically, he argues that the language that "[t]he parties have heretofore agreed that pending further order of the Court,

¹ The custody evaluation and parenting conference report also noted the negative effect that Wife's drinking had on her behavior.

that Husband shall have the sole custody of the minor children" makes the order interlocutory. We disagree.

¶7 Whether the decree constitutes a final judgment or is an interlocutory order is a question of law we review de novo. See *Burnette v. Bender*, 184 Ariz. 301, 304, 908 P.2d 1086, 1089 (App. 1995) (appellate court reviews questions of law de novo). "The first step in construing a decree is to determine if it is ambiguous." *Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 11, 157 P.3d 482, 486 (App. 2007). A decree is ambiguous if its language is reasonably susceptible to more than one interpretation. *Id.* "The language in a decree 'should be construed according to [its] natural and legal import,' . . . and with reference to related provisions in the decree." *Id.* (citation omitted) (brackets in original).

¶8 Although the decree uses the words "pending further order of the Court" with respect to the custody order, the decree states it is a judgment pursuant to Arizona Rules of Family Law Procedure 81. The trial transcript, moreover, clearly notes that the court was entering a final custody order, but pursuant to the stipulation, only the terms of Wife's future parenting time would be based on a forthcoming recommendation by a therapeutic interventionist. Consequently, the decree constituted a final custody order. See *id.* at ¶ 14, 157 P.3d at

487 (courts may construe "the decree's language in the context of the court's statutory duty").

¶9 Although the family court did not need to use the language complained of, we are mindful that custody orders remain subject to future modification. See A.R.S. § 25-411 (Supp. 2008). Thus, the family court did not abuse its discretion or create an interlocutory custody order with the phrase "pending further order of the Court."²

II. Findings of Fact

A. Findings Related to Parenting Time

¶10 Husband contends that the family court erred when it failed to find that parenting time with Wife would seriously endanger the children's physical, mental, moral or emotional health, as required by A.R.S. § 25-408(A) (2007). Wife contends that the court was not required to make the finding because: (1) Husband never requested findings of fact,³ and (2) custody was not contested.

¶11 Section 25-408(A) provides that a noncustodial parent is entitled to reasonable parenting time "unless the court

² Having found the decree contains a final custody order, we need not address Husband's argument that the court was without jurisdiction to enter an interlocutory custody order.

³ Husband had previously lodged a proposed order that specifically included the § 25-408(A) language. This is sufficient to constitute a request for such a finding. Therefore, we reject Wife's claim that Husband waived the issue by failing to request findings of fact.

finds, after a hearing, that parenting time would endanger seriously the child's physical, mental, moral or emotional health." A.R.S. § 25-408(A). The findings, moreover, must be made on the record before the court can deny parenting time to a parent who would seriously endanger the child. See A.R.S. § 25-403(B) (2007); *Smart v. Cantor*, 117 Ariz. 539, 542, 574 P.2d 27, 30 (1977) (in contested custody action parent is entitled to due process before custody rights are limited).

¶12 Here, custody was not contested. The parties agreed that Husband would have sole legal custody and Wife's parenting time would be suspended until the court considered the therapeutic interventionist's recommendations. Consequently, because Wife agreed to suspend her parenting time, the family court was not required to make the § 25-408 findings.

B. Wife's Alcohol Use

¶13 Father also argues that the court abused its discretion when it found "that the evidence is ambiguous as to whether Wife is continuing to consume alcohol."⁴ He claims the finding conflicts with the court's prior order that Wife undergo alcohol and drug testing. The prior order did not find that

⁴ Wife argues that Husband never requested written findings of fact, so he cannot complain about the findings on appeal. Husband does not argue that the court failed to make findings; Husband argues that the finding is contrary to a prior order and to the evidence.

Wife was using alcohol. It only granted Husband's request to have Wife tested. We find no conflict between the two orders.

¶14 Husband also argues that the finding is not supported by the trial evidence. A family court's findings will be supported unless it is clear that evidence was ignored or the court was mistaken. *Armer v. Armer*, 105 Ariz. 284, 286, 463 P.2d 818, 823 (1970). "This court will not set aside the trial court's findings of fact unless clearly erroneous." *In re Marriage of Berger*, 140 Ariz. 156, 161, 680 P.2d 1217, 1222 (App. 1983); see also *Kocher v. Dep't of Revenue.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003) ("A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists.").

¶15 Here, the evidence supports the family court's determination that the evidence was ambiguous about Wife's current alcohol use. Although Wife appeared to be intoxicated when she entered Husband's home in May 2007 without permission; the Banner hospital intake form noted in October 2007 that she wanted to "detox from alcohol"; and Husband's expert, Dr. Potts, testified that there were "gross inconsistencies" in Wife's reporting of her alcohol use; there was also contradictory evidence. For example, Dr. Potts also testified that Wife could have used the term "detox" incorrectly on the Banner intake form; and the last time it could be documented that the children

had seen an empty wine bottle was early April 2007. Additionally, although Wife provided several diluted urine samples, she explained that her regular consumption of large amounts of water may have caused dilution.

¶16 Mindful that the judge, as the trier of fact, has to assess credibility, see *Standage v. Standage*, 147 Ariz. 473, 479, 711 P.2d 612, 618 (App. 1985), in light of all the evidence there is substantial evidence that even though Wife had abused alcohol in the past, the evidence was ambiguous about whether she continued to abuse alcohol after her second psychiatric hospitalization. Accordingly, we do not find that the family court abused its discretion in making the finding.

III. Spousal Maintenance

¶17 Husband contends that because the family court found that the evidence as to whether Wife continues to abuse alcohol was ambiguous, there is no reasonable evidence to support the award of spousal maintenance. We review the award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). "We view the evidence in the light most favorable to [the appellee] and will affirm the judgment if there is any reasonable evidence to support it." *Id.*

¶18 A party may receive spousal maintenance if he or she satisfies any of the factors listed in A.R.S. § 25-319(A)

(2007). Here, the court found two statutory factors: that the marriage was one of long duration; and that Wife was presently unable to work and earn an income that would allow her to be self-sufficient.

¶19 Moreover, the evidence supports the findings. Husband's vocational expert testified that Wife would not be employable for at least one year due to her emotional issues. Although Wife's bipolar diagnosis was disputed, it was undisputed that she had been undergoing extensive therapy and was twice hospitalized for emotional issues. There was no evidence that she was feigning her emotional difficulties. Furthermore, regardless of her emotional state, Wife has not been in the work force for several years and there is no comparable local employment to the positions Wife held in the past.

¶20 Additionally, Wife is unable to use her retirement accounts without penalty, and the income on the proceeds from the sale of the marital home would not be sufficient to support her. Husband's vocational expert testified that Wife would not be able to earn \$3,000 per month to cover her expenses at this time. Thus, Wife was entitled to spousal maintenance pursuant to § 25-319(A).

¶21 Husband next contends that Wife's lack of current earning ability should be viewed as a voluntary reduction in

income because she voluntarily abused alcohol and contributed to her emotional problems. There was, however, no conclusive evidence that Wife was abusing alcohol at the time of the decree. The evidence demonstrated, however, that Wife could not maintain steady employment because of her current emotional condition. The family court's finding that Wife's present emotional condition precludes her from finding adequate employment is supported by the record.

IV. Admission of Evidence

¶22 Husband argues that the court abused its discretion by admitting a letter written by Wife's treating physician, Dr. Susan Wilder, which stated Wife was unable to work. Wife contends that the letter was properly admitted. We will not overturn a trial court's admission of evidence unless there is an "abuse of discretion or legal error and prejudice." *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 10, 62 P.3d 976, 980 (App. 2003) (quoting *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 88, ¶ 7, 977 P.2d 807, 810 (App. 1998)).

¶23 Wife argues that the letter was properly admitted because Husband failed to request strict application of the Rules of Evidence. Arizona Rule of Family Law Procedure 2(B)(1) allows parties to require strict compliance with the Rules of Evidence upon the filing of a notice, but no notice was filed in this case. This rule also provides the court "shall" exclude

evidence for "failure to adequately and timely disclose same."
Ariz. R. Fam. L.P. 2(B)(2).

¶24 Husband's failure to invoke strict compliance with the Rules of Evidence precluded his hearsay objections. Husband, however, also objected because Wife failed to timely disclose Dr. Wilder's opinion or the bases for her opinion sixty days before trial.

¶25 Wife was required to disclose "the substance of the facts and opinions to which the expert is expected to testify, [and] a summary of the grounds for each opinion" at least sixty days before trial. Ariz. R. Fam. L.P. 49(H). Wife erroneously contends that she was not required to provide the information because she did not call Dr. Wilder as a witness. Regardless of whether the letter was considered the opinion of an expert or just an exhibit, it had to be disclosed. See Ariz. R. Fam. L.P. 49(G), 51.

¶26 The family court, in ruling on Husband's motions in limine,⁵ knew that the Husband was aware by April 2007 that Dr. Wilder was Wife's treating physician and that Wife intended to introduce the doctor's opinion that Wife was unable to work; that Husband did not timely depose Dr. Wilder, but waited until a month before trial to notify Wife's attorney that he was

⁵ Husband's motions in limine never directly mentioned the letter, but mentioned medical records from Dr. Wilder that expressed an opinion about Wife's ability to work.

having trouble scheduling Dr. Wilder's deposition; that Husband received the letter and his expert was able to review it with the other medical records; and that the expert, Dr. Potts, disagreed with its conclusion. Consequently, we find no prejudice resulting from admission of the letter and no abuse of discretion warranting a new trial.

V. Retroactive Spousal Maintenance

¶27 On cross-appeal, Wife argues that the family court should have made the award of spousal maintenance retroactive to when the parties separated in May 2007. The family court never addressed retroactive spousal maintenance in either the original dissolution decree or the amended decree. Husband argues that Wife waived any ability to receive temporary support because her request was not accompanied by a verified motion, and she was not entitled to pre-decree spousal maintenance.

¶28 Wife's verified petition for dissolution requested temporary spousal maintenance. Wife also requested temporary maintenance in May 2007. Although the motion was not verified, Husband never objected to the lack of verification. As a result, he is precluded from raising this objection on appeal. *See Health for Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 11, 57 P.3d 726, 728 (App. 2002) ("[P]rocedural defects are usually waived if not raised and preserved in the trial court."). Additionally, Wife's request for pre-decree

maintenance in the original, verified petition preserved her request despite her unverified motion.

¶29 Wife argues that it was legal error for the court to deny her pre-decree maintenance when it found she was entitled to post-decree spousal maintenance. Husband claims that Wife had separate assets available to her before the decree and that he contributed to all the family expenses except for Wife's residence.

¶30 The trial evidence demonstrated that Wife could not work to support herself financially during the divorce litigation. She used her credit cards, family help, her inheritance, and withdrew \$30,000 from a community retirement account. Husband paid all of the children's expenses, the expenses on the marital residence, insurance, and both parties' vehicles.

¶31 There was no evidence that Wife had substantial financial resources available to support herself before the decree. Although Husband argues that Wife had an inheritance, the record shows that in July 2007, Wife had only \$22,000. Moreover, she should not have been required to withdraw funds from the community retirement account, with a penalty, to support herself. See *Gutierrez*, 193 Ariz. at 348, ¶ 18, 972 P.2d at 681.

¶32 The trial court erred when it failed to address the temporary spousal maintenance issue in the dissolution decree retroactive to the May 2007 request. Accordingly, we remand the issue to allow the court to resolve it.

VI. Attorneys' Fees and Costs on Appeal

¶33 Both parties argue that they are entitled to attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324 (Supp. 2008) and Arizona Rule of Civil Appellate Procedure 21. Neither party took unreasonable positions on appeal. Although we agree with the family court that there is a substantial disparity between the parties' abilities to earn income, both parties received substantial assets upon dissolution. Thus, each party shall bear his or her own attorneys' fees on appeal. Pursuant to A.R.S. § 12-341 (2003), Wife is entitled to her reasonable costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶34 We remand for consideration of Wife's temporary spousal maintenance request. In all other respects, we affirm the decree. We order that each party shall pay his or her own attorneys' fees on appeal. Wife is awarded reasonable costs on

appeal upon compliance with Arizona Rule of Civil Appellate
Procedure 21.

MAURICE PORTLEY, Judge

CONCURRING:

MARGARET H. DOWNIE, Presiding Judge

PATRICK IRVINE, Judge