



Priessman v. Priessman

2006 | Cited 0 times | Court of Appeals of Arizona | June 29, 2006

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil Appellate Procedure

AFFIRMED

¶1 Petitioner/appellant Kurt Priessman appeals from the trial court's order awarding spousal maintenance indefinitely to respondent/appellee Chong Priessman and from the court's denial of his motion for new trial. We affirm.

¶2 We view the evidence in the light most favorable to sustaining the award of spousal maintenance and will affirm if any reasonable evidence supports the award. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶14, 972 P.2d 676, 681 (App. 1998). Kurt filed a petition in July 2004 for dissolution of his marriage to Chong, whom he had met and married in 1979 while stationed in Korea with the military.

¶3 In awarding spousal maintenance pursuant to A.R.S. § 25-319, the court found that Chong lacked sufficient property to provide for her reasonable needs and that, because of her age, third-grade education, and difficulty speaking English, she would not be self-sufficient through employment. The court also found Chong had contributed to Kurt's education by maintaining the household and caring for their child while he was attending school. The court determined that Kurt was "well able to provide spousal maintenance to [Chong] and also meet his reasonable needs" and awarded Chong maintenance of \$1,750 per month indefinitely.

¶4 Kurt argues on appeal the duration and amount of spousal maintenance are excessive. When reviewing an award of spousal maintenance, we "will not substitute [our] judgment for that of the trial court unless there has been a clear abuse of discretion." *Cooper v. Cooper*, 130 Ariz. 257, 261, 635 P.2d 850, 854 (1981). Section 25-319(B) lists some of the factors a court must consider when determining the amount and length of spousal maintenance, including the duration of the marriage and the age and earning ability of the spouse seeking maintenance. § 25-319(B)(2) and (3).

¶5 As part of his general contention that the trial court's award of maintenance is excessive in length and amount, Kurt argues the court improperly considered evidence of Chong's knee problem. But Kurt stipulated to the admission of an emergency room report documenting Chong's knee injury and,



Priessman v. Priessman

2006 | Cited 0 times | Court of Appeals of Arizona | June 29, 2006

therefore, failed to properly preserve the issue for our review. See *Hamm v. Y & M Enters., Inc.*, 157 Ariz. 336, 338, 757 P.2d 612, 614 (App. 1988) ("The trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal.").

¶6 In any event, the record shows the court did not rely on the evidence of Chong's knee injury in awarding spousal maintenance, but rather, relied on the statutorily enumerated factors. See § 25-319(A) and (B). After hearing testimony about the knee problem, the court stated it would "not make an assumption that [Chong is] unable to work." And the court merely noted in its findings of fact in the context of discussing Chong's employment that she had injured her knee at work and had lost pay because of it. Because the court ultimately relied on the appropriate factors in § 25-319 in awarding spousal maintenance, and because Kurt stipulated to the admission of evidence that Chong had injured her knee, the court did not abuse its discretion when it merely acknowledged that injury in its findings of fact.

¶7 Kurt next argues the court should have considered what Chong could reasonably earn, claiming she is voluntarily underemployed. Kurt is essentially arguing the court erred by failing to adopt the testimony of his expert witness, a labor market consultant. She testified Chong has the potential to earn more money than she currently earns as a bagger at the air force base commissary. However, Chong testified she had unsuccessfully looked for work in one of the fields Kurt's expert had recommended-hotel housekeeping. We defer to the trial court's resolution of any conflicts in the evidence. See *Rowe v. Rowe*, 154 Ariz. 616, 620, 744 P.2d 717, 721 (App. 1987).

¶8 Furthermore, the court's award of \$1,750 a month in maintenance is reasonably supported by its conclusions that: (1) Chong's age, limited education, and lack of English skills preclude her from obtaining employment adequate for her to be self-sufficient; (2) the marriage was of long duration; and (3) Chong had contributed to Kurt's education by taking care of their child and maintaining the household. See *Rainwater v. Rainwater*, 177 Ariz. 500, 504, 869 P.2d 176, 180 (App. 1993) (upholding award of indefinite spousal maintenance because marriage of long duration, wife had supported husband's education and career and acted as caretaker for home and children, and support was necessary to maintain standard of living achieved through common efforts during marriage); see also *Mori v. Mori*, 124 Ariz. 193, 195, 603 P.2d 85, 87 (1979) (trial court abused discretion in ordering only one year of spousal maintenance considering marriage was of long duration, wife had little employment history, and wife was fifty-two years old at time of dissolution). We also note that Kurt may petition for modification of spousal maintenance based on substantial and continuing changed circumstances. See A.R.S. § 25-327(A) (stating requirements for modification of spousal maintenance); see also *Rainwater*, 177 Ariz. at 504, 869 P.2d at 180 (noting that decision was "strongly affected by the presumptive modifiability of spousal maintenance awards"). We find no error.

¶9 Kurt next argues Chong "should have mitigated her damages prior to dissolution," contending she should have attempted to "better herself" by learning to read and drive and by generally "obtaining skills." However, he concedes "the concept is not addressed in the spousal maintenance statute, and .



Priessman v. Priessman

2006 | Cited 0 times | Court of Appeals of Arizona | June 29, 2006

.. has not yet been addressed by Arizona courts." He relies on a Tennessee Court of Appeals case in which the court upheld the denial of spousal maintenance to a wife who had been a physician in her home country but had not obtained a license to practice in the United States. *Kesterson v. Kesterson*, No. W2004-02815-COA-R3-CV, 2006 WL 16309, *8 (Tenn. Ct. App. Jan. 4, 2006). But the marriage in *Kesterson* was of a much shorter duration than Chong and Kurt's, and the wife was much more educated than Chong, two materially different facts that render *Kesterson* inapplicable. *Id.* Furthermore, the *Kesterson* court simply deferred to the lower court's discretionary decision to deny spousal maintenance; it did not vacate an award of spousal maintenance as Kurt requests we do. *Id.* Finally, as Kurt concedes, whether a spouse has "mitigated" a loss is not one of the statutorily enumerated factors a court must consider before awarding spousal maintenance. Such an addition to the statutory scheme would have to come from the legislature, not this court. See *Hamblen v. Hamblen*, 203 Ariz. 342, ¶ 21, 54 P.3d 371, 375 (App. 2002) (it is province of legislature to make public policy). We therefore reject his argument.

¶10 Kurt argues that the amount of spousal maintenance poses an extreme hardship to him and that the trial court erred by denying his motion for new trial made on that ground. We review the denial of a motion for new trial for an abuse of discretion. *Standage v. Standage*, 147 Ariz. 473, 482, 711 P.2d 612, 621 (App. 1985). Kurt testified extensively about the couple's financial matters and introduced numerous tax returns and other financial documents. In its findings of fact, the court listed Kurt's monthly income and expenses and concluded he "is well able to provide spousal maintenance to [Chong] and also meet his reasonable needs." See § 25-319(B)(4) (instructing trial court to consider financial ability of paying spouse to meet own needs while meeting other spouse's needs); *Fuentes v. Fuentes*, 209 Ariz. 51, ¶¶ 17-18, 97 P.3d 876, 880-81 (App. 2004) (court presumed to have considered financial needs of husband in awarding wife spousal maintenance because husband testified about income and introduced financial documents).

¶11 Kurt filed a cursory motion for new trial with no accompanying memorandum, stating he could not "keep abreast of his own expenses of living while paying [Chong] the sum awarded." He separately submitted additional financial documents to the court. The trial court denied the motion, refusing to set it for a hearing. It was within the court's discretion how much weight to give Kurt's additional evidence in the face of the other evidence it had already considered about Kurt's financial status. See *Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d at 680-81 (trial court determines weight to give conflicting evidence). And, again, Kurt may petition to modify the maintenance if a substantial and continuing change of circumstances occurs. See § 25-327(A). Accordingly, we find no error.

¶12 Finally, Kurt argues the trial court abused its discretion in analyzing the factors justifying spousal maintenance. However, as Chong correctly observes, this argument is nothing more than "a rehash of the facts and arguments contained in earlier sections of [Kurt]'s brief." And we have already determined reasonable evidence supports the court's award of maintenance. See *Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d at 681. We find no abuse of discretion.



Priessman v. Priessman

2006 | Cited 0 times | Court of Appeals of Arizona | June 29, 2006

¶13 Chong argues she is entitled to reasonable attorney fees on appeal pursuant to A.R.S. § 12-341.01(C), contending Kurt's appeal "constitutes harassment, is groundless and is not made in good faith." She relies on Ziegelbauer v. Ziegelbauer, 189 Ariz. 313, 318, 942 P.2d 472, 477 (App. 1997), in which we awarded fees on appeal in a dissolution case pursuant to § 12-341.01(C). However, we awarded fees, in part, because we found the appeal had "unreasonably complicated [the wife]'s efforts to collect child-support arrearages." Ziegelbauer, 189 Ariz. at 318, 942 P.2d at 477. This appeal has not stayed Kurt's payment of the ordered monthly spousal maintenance. See A.R.S. § 25-325(A). Therefore, we are not persuaded by Ziegelbauer to award attorney fees to Chong. And, in our discretion, we deny her request. See Rowe, 154 Ariz. at 622, 744 P.2d at 723 (declining to award fees under § 12-341.01(C) when no evidence "either party abused the judicial system during the lengthy litigation").

¶14 Affirmed

PETER J. ECKERSTROM, Presiding Judge

CONCURRING: J. WILLIAM BRAMMER, JR., Judge PHILIP G. ESPINOSA, Judge

