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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 8/22/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 12-0554
)
PETER J. STERLING,) DEPARTMENT B
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
HEATHER K. STERLING,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2011-095094 and FC2012-090277 (Consolidated)

The Honorable James P. Beene, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Peter Sterling ("Husband") appeals the order requiring him to designate his former spouse, Heather Sterling ("Wife"), as the beneficiary of his life insurance policy. For the reasons that follow, we affirm the court's order.

FACTS AND PROCEDURAL HISTORY

¶2 The parties entered into a Marital Settlement Agreement ("Agreement") which was incorporated into their 2007 California divorce decree. In the Agreement, Husband agreed to pay child support for their two children and to keep Wife as the beneficiary of a million dollar life insurance policy.

¶3 Both parties subsequently moved to Maricopa County, and in 2011, both domesticated their California decree in the Maricopa County Superior Court. After the cases were consolidated, Husband sought to modify his child support obligation and Wife, by counterclaim, sought \$110,000 in child support arrears.¹ Wife soon discovered that the life insurance policy that Husband had maintained pursuant to the Agreement had lapsed. She also learned that Husband had acquired a different life insurance policy with AXA Equitable Life Insurance Company ("AXA life insurance policy") and had named his new wife as the beneficiary.

¹ There is nothing in the record to suggest that Wife sought to recover the arrearages in an earlier proceeding or hold Husband in contempt for failing to pay child support.

¶4 Wife filed a motion asking the court to order Husband to name her as the beneficiary on his current life insurance policy pursuant to the Agreement. Following briefing,² the court granted her request and ordered Husband to designate Wife the sole beneficiary of his life insurance policy.

DISCUSSION

I

¶5 Husband contends in his reply brief that the trial court lacked subject matter jurisdiction to enforce the California decree.³ We disagree.

¶6 Subject matter jurisdiction "refers to a court's statutory or constitutional power to hear and determine a particular type of case." *State v. Maldonado*, 223 Ariz. 309, 311, ¶ 14, 223 P.3d 653, 655 (2010). Because jurisdiction cannot be vested by waiver or estoppel, *Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 184, ¶ 18, 33 P.3d

² Neither party requested an evidentiary hearing.

³ Although we typically do not address issues raised for the first time in a reply brief, see *State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998); see also *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.") (internal quotation marks omitted), we recognize that "challenges to subject matter jurisdiction may be raised at any time," including for the first time on appeal. *Health For Life Brands, Inc. v. Powley*, 203 Ariz. 536, 538, ¶ 12, 57 P.3d 726, 728 (App. 2002); *Ames v. State*, 143 Ariz. 548, 552, 694 P.2d 836, 840 (App. 1985).

514, 518 (App. 2001), we independently review whether the superior court had subject matter jurisdiction over the domesticated decree as an issue of law. *Medina v. Ariz. Dep't of Transp.*, 185 Ariz. 414, 417, 916 P.2d 1130, 1133 (App. 1995).

¶7 Husband contends that the court was precluded from exercising jurisdiction because the decree was not registered as required by *Glover v. Glover*, 231 Ariz. 1, 289 P.3d 12 (App. 2012). His reliance on *Glover*, however, is misplaced. In *Glover*, the father failed to properly register, not domesticate, the Massachusetts judgment of divorce pursuant to the Arizona Uniform Interstate Family Support Act. *Id.* at 3, ¶ 8, 289 P.3d at 14. As a result, this court held that, in the absence of proper registration, the court did not have subject matter jurisdiction to modify the foreign child support order. *Id.* at 6-7, ¶¶ 20-22, 289 P.3d at 17-18.

¶8 Here, although neither Husband nor Wife properly registered their domesticated decree, the issue is whether the court had subject matter jurisdiction to enforce the decree by entering the order. Regardless of any defects in registering the California decree, the decree was properly domesticated with the superior court. As a result, the court had subject matter jurisdiction to enforce the decree's terms, even though it could not then modify the child support obligation. Consequently, because the decree was properly domesticated, the court had

subject matter jurisdiction to resolve Wife's motion to enforce the life insurance provision. See Ariz. Const. art. 6, § 14 (3), (9) (conferring the superior court with original jurisdiction over proceedings involving divorce and cases "in which the demand or value of property in controversy amounts to one thousand dollars or more").

II

A

¶9 Husband contends the court erred by both finding that the Agreement required him to designate Wife as the beneficiary of his AXA life insurance policy and entering the order. Because the Agreement provides that any dispute about the Agreement will be governed by California law, we apply California law. See, e.g., *Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207-08, 841 P.2d 198, 202-03 (1992).

¶10 We review issues of contract interpretation de novo, *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal. App. 4th 516, 520 (2003), and give effect to the "mutual intention" of the parties. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal. App. 4th 282, 290 (2011) (citing Cal. Civ. Code § 1636 (West 2013)). Because "we strive to determine the actual intent of the parties," *Campbell v. Scripps Bank*, 78 Cal. App. 4th 1328, 1337 (2000), we look solely to the written provisions of the contract, interpreted as a whole and in the

circumstances of the case. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647-48 (2003).

¶11 The Agreement provides in relevant part that:

Husband shall designate Wife as the sole primary beneficiary on a life insurance policy in the face amount of \$1,000,000, insuring his life. Such designation shall be maintained until the obligation for support ends. Husband shall make all premium payments on the policy during that period as they become due. Within ten days after the effective date of this agreement, Husband shall direct the insurer in writing to send to Wife as well as to himself all premium notices, lapse notices, and receipts for premiums paid. If Husband fails to make any premium payments as required, Wife may, at her option, make such payments in which event she shall be entitled to recover from Husband or his estate all premiums paid by her to preserve the policy. If the policy lapses because of Husband's default in the payment of premiums, Wife shall be entitled to payment from Husband's estate of the full amount of all death benefits to which she would have been entitled but for the lapse of the policy. Husband waives the right, during the period in which he is required to maintain said designation, to exercise any rights, privileges, and options granted to the owner of the policy without the prior written consent of Wife.

. . .

Neither party may cash out or borrow against the life insurance policy to reduce effective coverage to less than \$1,000,000 unless a new policy is purchased to bring the total face value to \$1,000,000, and the beneficiary designation shall remain the same as the original policy.

(Emphasis added.)

¶12 The provision clearly provides that Husband was required to name Wife as the sole beneficiary of a \$1,000,000 life insurance policy so long as he is required to pay child support. The provision also required Husband to provide notice of premium payments and lapses to Wife to protect her interest in the policy and name Wife as the sole beneficiary of any subsequent policy if he cashed out or borrowed against the original policy. If, however, the policy lapsed due to Husband's failure to pay the premiums, Wife could collect any child support arrearages from Husband's estate after he passed away as if the policy had not lapsed.

¶13 Husband contends the court erred by directing him to substitute Wife as the beneficiary of the AXA life insurance policy. He argues that the plain language of the Agreement did not require him to name Wife as his beneficiary on any subsequent policy because he allowed the original policy to lapse.

¶14 The parties do not contest the operative facts: Husband had or acquired a \$1,000,000 policy and named Wife as the beneficiary; he did not give Wife notice of the policy; he did not request the carrier to provide her with any notice much less notice of potential lapse; and Husband allowed the policy to lapse. Because Husband failed to comply with all of the terms of the provision before it lapsed, Wife sought to be

returned to the status quo before Husband had allowed the original policy to lapse. Although Husband conceded at oral argument that he allowed the policy to lapse when he learned that Wife had not secured a corresponding policy naming him as the beneficiary, he never sought to enforce the provision. Consequently, the question becomes whether the court could order the parties to return to the position they were in before the lapse of the original policy given Husband's failure to otherwise comply with the provision.

B

¶15 Under California law "[a] claim for specific performance is an equitable one," *Nwosu v. Uba*, 122 Cal. App. 4th 1229, 1240 (2004), which may be compelled unless otherwise excluded by California statute. Cal. Civ. Code § 3384 (West 2013). California law prohibits certain types of obligations from being specifically performed, such as an obligation for personal service.⁴ There is, however, no statute that precludes enforcing the provision in the Agreement that required Husband to name Wife as the beneficiary of a \$1,000,000 policy. Moreover, we have found no California decision that examined a

⁴ For example, a California statute prohibits specific performance: (1) on a personal service obligation; (2) to employ another in personal service; (3) to make someone perform an act they cannot lawfully perform; (4) to get the consent of a third party; or (5) where the precise terms of the act are not clearly ascertainable. Cal. Civ. Code § 3390 (West 2013).

similar provision and determined that the enforcement of the provision was excluded by statute.

¶16 "Specific performance of a contract may be decreed whenever: (1) its terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is mutuality of remedies; and (5) plaintiff's legal remedy is inadequate." *Union Oil Co. of Cal. v. Greka Energy Corp.*, 165 Cal. App. 4th 129, 134 (2008) (quoting *Blackburn v. Charnley*, 117 Cal. App. 4th 758, 766 (2004)). Although the first three factors are easily defined, the last two need examination. The fourth factor, mutuality of remedies, exists where the agreement is such that a court exercising its equitable authority can grant performance against either party. *Wheat v. Thomas*, 209 Cal. 306, 315 (1930) (finding no lack of mutuality of remedies where the land purchase contract did not bind appellant to convey future unknown water rights). Finally, the legal remedy is inadequate where damages fail to provide the surety of avoiding a future risk, specific performance is "practically feasible," and "[s]pecific performance is the most direct means to remedy the breach." See, e.g., *Union Oil*, 165 Cal. App. 4th at 135-36.

¶17 Here, the order granting specific performance was appropriate. First, the terms of the Agreement are sufficiently definite and required Husband to name Wife as the beneficiary of a \$1,000,000 life insurance policy. Second, there is consideration for the Agreement because the provisions were the mutual promises between Husband and Wife leading to their divorce. *Gummerson v. Gummerson*, 14 Cal. App. 2d 450, 452 (1936). Third, the order is substantially similar to the requirement in the Agreement that had been fulfilled for a time before Husband allowed the policy to lapse. Moreover, mutuality of remedies exists - the insurance provisions can be specifically enforced by requiring Husband to name Wife as the beneficiary of an existing policy and Wife to name Husband as the beneficiary of a corresponding policy.⁵ The last requirement - inadequacy of a legal remedy - is also satisfied. Because of the lapse of the policy, Wife has no surety for unpaid child

⁵ At one time, a court could not order specific performance of a life insurance provision. In 1956, the California Court of Appeals in *Lubin v. Lubin*, in dicta stated a divorced wife could not specifically enforce the provision requiring husband to name her as a beneficiary on a life insurance policy during his life because "[t]he rule is settled that contracts which by their terms stipulate for a succession of acts [continual payment of the premiums] . . . are not enforceable in equity." 144 Cal. App. 2d 781, 791 (1956). California courts, however, have recognized that the rule is "archaic," has been "soundly criticized" and is generally "limited to building construction contracts and distribution or sales agency agreements." *Okun v. Morton*, 203 Cal. App. 3d 805, 820-21 (1988). Accordingly, we are not bound by *Lubin's* dicta.

support. Under the Agreement she will be required to wait until Husband dies if she cannot otherwise collect any support arrears and then will be limited to attempt to collect any unpaid child support from anything that might remain in his estate. Without the court's order of specific performance, the legal remedy is inadequate and requires Wife to shoulder the child support obligations of both parents.

¶18 California public policy also supports specific performance to protect child support. The California legislature and its courts have long recognized the importance of child support and that "payment of appropriate support is a parent's primary obligation." *Moss v. Superior Court (Ortiz)*, 17 Cal. 4th 396, 424 (1998) (citing Cal. Fam. Code § 4053(a) (West 2013) (mandating that "[a] parent's first and principle obligation is to support his or her minor children according to the parent's circumstances and station in life"). See also Cal. Fam. Code § 4053(e) (stating that the statewide uniform child support guidelines "seek[] to place the interests of children as the state's top priority"); *In re Marriage of Bodo*, 198 Cal. App. 4th 373, 385 (2011) ("California has a strong public policy in favor of adequate child support."); *In re Marriage of Leonard*, 119 Cal. App. 4th 546, 555, 561 (2004) (reasoning that "[t]he duty of a parent to support the parent's child or children is a fundamental parental obligation" and that "the

needs of the children are of paramount concern"); *Hoover-Reynolds v. Superior Court*, 50 Cal. App. 4th 1273, 1279 (1996) (holding that because "strong public policy [] favors protecting the child's welfare against [the] infringement of the right to receive support," any agreement "purporting to modify the child's right to support is not binding on the court or the child"). Although California courts have not directly addressed this specific performance issue,⁶ courts in other jurisdictions have granted specific performance where Husband was required to procure and maintain a life insurance policy naming Wife as the beneficiary for the benefit of her or their children. See, e.g., *Chattin v. Chattin*, 427 S.E.2d 347, 349, 351 (Va. 1993) (holding that the trial court "abused its discretion in failing to decree specific performance" where Husband was required to name Wife as the beneficiary of a life insurance policy pursuant to a settlement agreement and allowed the policy to lapse); *Gibson v. Gibson*, 687 S.W.2d 274, 276 (Mo. Ct. App. 1985) (affirming a grant of specific performance to Wife that Husband could not defeat the value of the life insurance policy naming her as beneficiary because it "enforced the parties' agreement

⁶ Specifically, California courts have only addressed a similar life insurance policy after one spouse has died and the other is seeking to collect damages from the estate. See, e.g., *In re Marriage of O'Connell*, 8 Cal. App. 4th 565, 569-70 (1992); *Burgart v. Burgart*, 5 Cal. App. 3d 409, 411 (1970); *Cramer v. Biddison*, 257 Cal. App. 2d 720, 723-24 (1968).

that [Wife] have security in the form of life insurance policies," and "the uncertain fate of a claim against an estate would not be an adequate remedy to defeat the remedy of specific performance"); *Reichhart v. Brent*, 230 A.2d 326, 329 (Md. Ct. App. 1967) (holding that an "equity court . . . has the power to enforce the insurance maintenance provision of the [settlement] agreement by an order of specific performance"); *Stillman v. Stillman*, 20 A.D.2d 723, 723 (N.Y. App. Div. 1964) (holding that Wife was entitled to specific performance on insurance provisions made by Husband for her benefit pursuant to a separation agreement); *Buswell v. Buswell*, 105 A.2d 608, 613 (Pa. 1954) (reasoning that Wife could seek specific performance of a insurance provision in a settlement agreement and affirming the court's order that Husband reinstate his children as the beneficiaries of the policy). See also *Morse v. Morse*, 254 P.2d 720, 722 (Wa. 1953); *Hiecke v. Hiecke*, 157 N.W. 747 (Wis. 1916) (cases where Husband was ordered to maintain a life insurance policy or survivor benefit plan for Wife's benefit pursuant to a settlement agreement).

¶19 Consequently, because the five prongs under *Union Oil* have been satisfied, and the Agreement recognizes that the

provisions can be enforced by equitable remedies,⁷ the superior court did not err by granting specific performance. *Hutton v. Gliksberg*, 128 Cal. App. 3d 240, 249 (1982) (affirming the court's grant of specific performance because "[e]quity . . . has the flexibility to adjust the remedy in order to do right and justice").⁸

III

¶20 Both parties request attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S") sections 12-341.01 and 25-324 (West 2013) and Arizona Rule of Civil Appellate Procedure ("ARCAP") 21. Husband also requests costs pursuant to A.R.S. § 12-341. Having considered the financial resources of the parties, the positions taken by the parties and knowing that there are other issues the court will have to decide, in the exercise of our discretion, we award Wife a reasonable portion of her attorneys' fees upon compliance with ARCAP 21.

⁷ The language of the Agreement provides that all executory provisions "shall be enforceable in contract, tort, or as otherwise provided by law."

⁸ Husband contends the order is void because the AXA life insurance policy premiums were paid by his community funds and his new wife was not joined into this case. The California Court of Appeals resolved that question in *Burgart*. There, the court rejected the new wife's argument that ex-wife was not entitled to death benefits under a life insurance policy without the community's consent because the premiums were paid with community funds. *Burgart*, 5 Cal. App. 3d at 412. The court would not "allow a divorced husband to halve his contractual or judgment imposed continuing obligations to his ex-wife by the simple expedient of remarriage." *Id.* at 413.

CONCLUSION

¶21 Based on the foregoing, we affirm the order directing Husband to substitute Wife as the beneficiary on his life insurance policy.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Judge

/s/

DONN KESSLER, Judge