DIVISION ONE
FILED: 02/11/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 08-0803
	)	
TIMOTHY L. BONCOSKEY,	)	DEPARTMENT D
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
LAURA S. BONCOSKEY,	)	Civil Appellate Procedure)
	)	
Respondent/Appellee.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2002-001171

The Honorable Michael D. Gordon, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Bill Stephens, PC — Phoenix
By Bill Stephens
Attorneys for Petitioner/Appellant

Law Offices of Robert E. Siesco — Phoenix
By Robert E. Siesco
Attorneys for Respondent/Appellee

G E M M I L L, Judge

¶1 Timothy L. Boncoskey ("Husband") appeals from an Amended Domestic Relations Order ("ADRO") concerning his pension plan. Specifically, Husband contests the valuation method used and the order for him to elect a joint and survivor annuity naming his ex-wife, Laura Boncoskey ("Wife"), as contingent annuitant. For the following reasons, we affirm in part, vacate in part, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 This is Husband's second appeal in this case, having previously appealed from a Domestic Relations Order ("DRO") entered in 2006. On September 25, 2007, this court issued an opinion vacating the DRO and remanding for additional proceedings. *Boncoskey v. Boncoskey,* 216 Ariz. 448, 454, ¶ 29, 167 P.3d 705, 711 (App. 2007). This appeal results from the ADRO entered on remand. All of the underlying facts are set forth in our previous opinion. However, to the extent the facts are relevant on appeal, we recite them again.

¶3 Husband and Wife were divorced in 2003, when Husband was forty years old. *Id.* at ¶¶ 1, 3. Husband works for the State of Arizona and participates in the Arizona State Retirement System ("ASRS"), entitling him to a monthly pension benefit upon retirement. *Id.* at ¶ 3. During the marriage, Husband was employed with the State for 12.5 years. *Id.* The

pension "is a defined benefit plan that pays retired employees a monthly pension based upon a formula, usually related to the employee's years of service and average salary." *Id.* (citations omitted); *see* Arizona Revised Statutes ("A.R.S.") section 38-712(B) (2001). Husband's pension rights do not mature until he is 54 years old.[1] *Boncoskey*, 216 Ariz. at 451, ¶ 16, 167 P.3d at 708; A.R.S. § 38-711(27) (Supp. 2009); A.R.S. § 38-740(A) (2001). Upon dissolution, the parties agreed each was entitled to one-half of the community interest in the pension which was to be divided by a Qualified Domestic Relations Order ("QDRO"). *Boncoskey*, 216 Ariz. at 449, ¶ 6, 167 P.3d at 708.

¶4 The superior court signed a DRO prepared by the special master. *Id.* at ¶ 9. In the DRO, Husband was ordered to pay $530 per month to Wife when he attained age 50 because he was eligible to retire at that age. *Id.* at ¶¶ 7, 9. *Koelsch v. Koelsch,* 148 Ariz. 176, 713 P.2d 1234 (1986), was cited as authority. *Boncoskey,* 216 Ariz. at 450, ¶ 7, 167 P.3d at 707. Additionally, the DRO required Husband to elect a joint and survivor 50% annuity benefit and to name Wife as sole beneficiary thereof. *Id.* at ¶ 27.

¶5 On appeal, we vacated the entire DRO. *Id.* at ¶¶ 28-29. First, we determined *Koelsch* did not apply and instead,

[1] A pension right has matured when an employee is eligible to an unconditional right to immediate payment. *Boncoskey*, 216 Ariz. at 451-52, ¶¶ 15-16, 167 P.3d at 708-09.

Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981), controlled. *Boncoskey,* 216 Ariz. at 451-53, ¶¶ 16-18, 21, 167 P.3d at 708-10. Second, we examined the reserved jurisdiction method and the time formula (also known as the *Van Loan* formula). *Id.* at ¶¶ 14-18. Finally, we found the required joint and survivor annuity improperly awarded Wife more than her share of the community interest in the pension. *Id.* at ¶ 28. Accordingly, we remanded the case to the superior court. *Id.* at ¶¶ 28, 29.

¶6 On remand, Husband lodged a proposed QDRO. In that QDRO, Husband valued the pension based on the formula set forth in A.R.S. § 38-757(B) (Supp. 2009).[2] Wife objected to the valuation method in the proposed QDRO. On March 25, 2008, after oral argument, the court ruled:

> Wife's position prevails and the Domestic Relations Order for the Arizona State Retirement benefits should be handled through the traditional numerator denominator calculation, using *Van Loan and Johnson*.
>
> . . .
>
> IT IS FURTHER ORDERED that Wife is free to pick the survivor benefit that she wishes as long as she pays for the costs of the benefits and the Court shall sign the QDRO that incorporates those provisions.

¶7 The matter was subsequently assigned to a new judge.

[2] In Husband's objections to the original DRO, he proposed using the same valuation method.

Wife lodged a proposed ADRO to which Husband objected. In the ADRO, Wife used the time formula for valuation and elected a joint and survivor 50% annuity. After oral argument, the court found the March 25 minute entry controlled and refused to disturb it. Accordingly, the court signed the ADRO as proposed. Husband timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

I. Standard of Review

¶8 We review the superior court's apportionment of community property for an abuse of discretion. *Gutierrez v. Gutierrez,* 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998). A court abuses its discretion if it misapplies the law or otherwise exercises its discretion on untenable grounds. *See Fuentes v. Fuentes,* 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004); *Woodworth v. Woodworth,* 202 Ariz. 179, 183, ¶ 23, 42 P.3d 610, 614 (App. 2002). We consider the evidence in the light most favorable to sustaining the superior court's decision and will uphold the decision if any evidence reasonably supports it. *Kohler v. Kohler,* 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005).

II. Valuation

¶9 Husband challenges the use of the time formula in the ADRO to value his pension. As explained in *Boncoskey*, under the

time formula, the community share of a pension is obtained "by dividing the length of time worked during the marriage by the total length of time worked toward earning the pension." *Boncoskey,* 216 Ariz. at 452, ¶ 18, 167 P.3d at 709 (quoting *Johnson,* 131 Ariz. at 41 n.4, 638 P.2d at 708 n.4). Each future pension payment is multiplied by that figure to determine the portion of the payment constituting community property. *Johnson,* 131 Ariz. at 41 n.5, 638 P.2d at 708 n.5.

¶10 Husband maintains a more accurate way to value his pension is by application of A.R.S. § 38-757(B). Section 38-757(B) provides:

> [A] member[3] who meets the requirements for retirement benefits at normal retirement shall receive a monthly life annuity that equals the result of paragraph 1 multiplied by paragraph 2 when those paragraphs are defined as follows:
>
> 1. The number of whole and fractional years of credited service times the following:
>
> (a) 2.10 per cent if the member does not have more than 19.99 years of credited service.
>
> (b) 2.15 per cent if the member has at least 20.00 years of credited service but not more than 24.99 years of credited service.

[3] A "member" is defined as an employee of the state or a participating political subdivision of the state or any person receiving a benefit under the ASRS. A.R.S. § 38-711(23),(13).

> (c) 2.20 per cent if the member has at least 25.00 years of credited service but not more than 29.99 years of credited service.
>
> (d) 2.30 per cent if the member has at least 30.00 years of credited service.
>
> 2. The member's average monthly compensation.

A.R.S. § 38-757(B). A member's average monthly compensation is defined as "the monthly average of compensation on which contributions were remitted during a period of thirty-six consecutive months during which a member receives the highest compensation within the last one hundred twenty months of credited service." A.R.S. § 38-711(5)(b).[4] Husband argues applying this formula based on facts existing at the time of dissolution results in a more accurate value than the time formula.[5]

¶11 Arizona has identified two methods of apportioning unmatured benefits in a retirement plan: the present cash value method and the reserved jurisdiction method. *Hetherington v. Hetherington,* 220 Ariz. 16, 19, ¶ 9, 202 P.3d 481, 484 (App. 2008) (citing *Johnson,* 131 Ariz. at 41, 638 P.2d at 708). The

[4] We cite to the current version of A.R.S. § 38-711 because no material changes relevant to this case have been made.

[5] Husband proposes paragraph 1 being 12.5 (years of marriage) times subparagraph (a) (2.10), and multiplying that result by his monthly compensation as of the date the community interest terminated, February 7, 2002.

present cash value method is a lump-sum distribution for which the court actuarially determines the present value of the pension plan. *Johnson,* 131 Ariz. at 41, 638 P.2d at 708. In determining the plan's present value, the court must consider various contingencies such as mortality, interest, probability of vesting, probability of continued employment, and the like. *Miller v. Miller,* 140 Ariz. 520, 523, 683 P.2d 319, 322 (App. 1984). After determining the value, the court awards one-half of the present value to the non-employee spouse, often in the form of equivalent property. *Johnson,* 131 Ariz. at 41, 638 P.2d at 708. The present cash value method is the preferred method of distribution if the plan can be accurately valued "and if the marital estate includes sufficient equivalent property to satisfy the claim of the non-employee spouse." *Id.* at 42, 638 P.2d at 709.

¶12 The reserved jurisdiction method allows a court to determine a formula for division at the time of the decree, but delays division until the participant spouse begins receiving payment. *Id.* at 41, 638 P.2d at 708; *see also Boncoskey,* 216 Ariz. at 452, ¶ 18, 167 P.3d at 709 (explaining division of pension payments occurs "'if, as, and when' the pension is paid out.") (citation omitted). It is within the court's discretion to apply the formula it deems appropriate. *See Woodward v. Woodward,* 117 Ariz. 148, 150, 571 P.2d 294, 296 (App. 1977)

(noting there may be more than one method or formula a court can use to divide a pension plan). Here, the superior court used the reserved jurisdiction method and the time formula.

¶13 Husband is seeking to value his pension as of the date of dissolution, but to award Wife her share of the pension in the future. Essentially, Husband is combining the present cash value method and the reserved jurisdiction method into a third method of division he has created. Husband cites no appellate decision supporting this division method. If Husband's pension was being distributed pursuant to the present cash value method, a determination of the pension's value as of the date of dissolution would be appropriate and the court could have opted to value the pension pursuant to A.R.S. § 38-757(B). However, the present cash value method cannot be used in this case because there were no community assets that remained unallocated when the original DRO (and the ADRO) was entered. *See Boncoskey,* 216 Ariz. at 452, ¶ 17, 167 P.3d at 709 (explaining the present cash value cannot be used if no community assets remain unallocated when a DRO is entered) (citing *Johnson,* 131 Ariz. at 41-42, 638 P.2d at 708-09). Further, as Wife mentions, she is being compelled to wait until the pension is paid out to receive her portion. Husband's proposed division does not comply with either approved division method in Arizona. The superior court's division employs the approved reserved

jurisdiction method. We expressly approved the reserved jurisdiction method and the time formula in *Boncoskey*, 216 Ariz. at 453, ¶ 21, 167 P.3d at 710.

¶14 Nevertheless, Husband argues the only variables in the statutory formula are years of service and potential salary increases, neither of which Wife is entitled to share in. However, when the number of years served by an employee is a substantial factor in determining the benefits such employee will receive, "the community is entitled to have its share based upon length of service performed on behalf of the community *in proportion to the total length of service necessary to earn those benefits*." *Cooper v. Cooper,* 167 Ariz. 482, 490, 808 P.2d 1234, 1242 (App. 1990) (emphasis added). Even if the present cash value method had been used, such value "must be determined according to the *amount anticipated to be payable at normal retirement*." *Id.* at 489, 808 P.2d at 1241 (emphasis added). Thus, if Husband's pension amount increases due to additional years of service after dissolution, the value must take such factor into account. Because the number of years served by Husband is relevant to determine the amount of his retirement benefits, the time formula is an appropriate method to value Husband's pension.

¶15 Further, in *Boncoskey* we favorably cited *In re Marriage of Lehman,* 955 P.2d 451 (Cal. 1998), which dealt with

the same "variables" as in the present case. *Boncoskey,* 216 Ariz. at 452 n.6, ¶ 18, 167 P.3d at 709 n.6. In *Lehman*, the California Supreme Court discussed enhancements, or increases to a retirement plan, due to additional years of service and salary increases after dissolution. *Lehman,* 955 P.2d at 459-62. Like *Cooper,* the court found use of the time formula reasonable when the amount of retirement benefits was substantially related to years of service. *Lehman,* 955 P.2d at 461. Additionally, like the present case, the benefits at issue in *Lehman* were a product of years of service, final compensation, and a per-service year multiplier. *Id.* The *Lehman* court specifically determined "the result of the time [formula] is not unreasonable when the 'relative contributions of the community and separate estates' are accounted for." *Id.* (citation omitted). Here, use of the time formula takes into account the contributions of the community in the numerator and separate property in the denominator.

¶16 Husband argues the time formula is not the appropriate method for valuation in this case, but is appropriate for other plans in which the value cannot be calculated until the employee retires. He distinguishes his pension plan because the exact amount resulting from community efforts can be calculated at any point in time under the statutory formula. Nonetheless, it is irrelevant whether Husband's pension can be computed at any

point in time because Husband has not employed an approved division method in his proposed distribution of his pension. *See supra* ¶ 13.

¶17 Moreover, the case law Husband cites is inapplicable and distinguishable. *See Boncoskey,* 216 Ariz. at 453, ¶ 21, 167 P.3d at 710 (stating *Koelsch* does not apply); *see also Cooper,* 167 Ariz. at 488-89, 808 P.2d 1240-41 (distinguishing *Koelsch*). In *Harris v. Harris,* 195 Ariz. 559, 560, ¶ 2, 991 P.2d 262, 263 (App. 1999), husband and wife agreed wife would be awarded one-half of husband's military pension excluding his disability payments. After dissolution, husband sought and obtained a higher disability rating, increasing his disability benefits and decreasing his non-disability retirement payments. *Id.* at ¶ 3. We determined that a former spouse should not be allowed to unilaterally transform retirement benefits after dissolution from community property to separate property. *Id.* at ¶ 13; *see also In re Marriage of Gaddis,* 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997) (finding the value of wife's community interest in husband's pension could not be altered after dissolution because it was distributed by the court and vested in the wife as of the date of dissolution). The present case is distinguishable from *Harris* because the husband in *Harris* unilaterally transformed post-dissolution benefits from community property to separate property, thereby depriving wife

of benefits.

¶18 The superior court used the reserved jurisdiction method and the time formula. We expressly approved the time formula in *Boncoskey,* and the superior court did not abuse its discretion by using that formula. Accordingly, we affirm the valuation method of Husband's pension in the ADRO.

III. Survivor Benefit

¶19 Husband challenges the superior court's order requiring him to elect a joint and survivor 50% annuity naming Wife as contingent annuitant. The superior court allowed Wife to choose the survivor benefit she wanted as long as she paid the costs of the benefit. Wife chose the joint and survivor 50% annuity.

¶20 Generally, when a member of the ASRS retires, the member receives his or her retirement benefits on a monthly basis until the member dies. *See* A.R.S. § 38-764(A), (B) (Supp. 2009). However, a member may elect certain survivor options including a joint and survivor annuity, a period certain life annuity, or a lump sum payment. A.R.S. § 38-760(B)(1)-(3) (Supp. 2009). By electing a survivor option, a member will receive reduced retirement benefits during his or her lifetime, but upon the member's death the benefits will continue to be paid to a designated person, if that person survives the member. *Id.* The joint and survivor annuity allows a member to name a

contingent annuitant to receive all, two-thirds, or one-half of the retirement income after the member's death and for the contingent annuitant's life. A.R.S. § 38-760(B)(1); *see also* A.R.S. § 38-711(8) (defining "contingent annuitant" as "the person named by a member to receive retirement income payable following a member's death"). A member may only name one contingent annuitant, but such designation is revocable. A.R.S. § 38-760(B)(1)(a)-(e).

¶21 In the first DRO, Husband was also required to choose the joint and survivor 50% annuity, with Wife paying the costs of the election. This requirement was an issue in the first appeal. In *Boncoskey,* we stated:

> Husband finally asserts that the superior court improperly required him to elect a joint and survivor annuity and to name Wife as the sole beneficiary. [footnote omitted]. He contends that the court exceeded its authority by ordering him to elect the joint and survivor annuity because . . . such an election improperly would allow Wife to share in Husband's post-dissolution separate property earnings.
>
> . . . Wife has cited no authority supporting the court's order that Husband must choose a joint and survivor annuity naming Wife . . . . [I]f Wife were to receive a 50% survivor annuity, she would receive the entire survivor benefit, including portions that had accrued after dissolution and Husband's remarriage and in which a second wife presumably would have a community interest. Because this aspect of the DRO has the effect of awarding Wife more than her share of the community interest in Husband's

pension, we vacate the DRO *in toto* . . . .

216 Ariz. at 454, ¶¶ 27-28, 167 P.3d at 711.

¶22 The "law of the case" doctrine is a policy rule which provides that once an appellate court rules on a legal issue in a case, that decision is the law of the case throughout the remaining proceedings. *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The law of the case controls subsequent proceedings in the same case if the facts, issues, and evidence do not change. *Aida Renta Trust v. Maricopa County,* 221 Ariz. 603, 614, ¶ 38, 212 P.3d 941, 952 (App. 2009).

¶23 Here, the law of the case states Husband is not required to elect a joint and survivor 50% annuity. *Boncoskey,* 216 Ariz. at 454, ¶ 28, 167 P.3d at 711. This exact issue was previously decided.[6] *Id.* Further, Wife concedes no new facts or evidence were introduced on remand. However, there are exceptions precluding application of the law of the case, including a change in applicable law or an error in the previous decision. *Dancing Sunshines Lounge,* 149 Ariz. at 482-83, 720

[6] We note, however, the law of the case does not apply to the valuation issue raised in this appeal because that exact issue was not previously decided in *Boncoskey*. The relevant issues in *Boncoskey* were whether the superior court had authority to order Husband to make payments to Wife beginning on his 50th birthday and the classification of those payments as spousal maintenance. *Boncoskey,* 216 Ariz. at 453, ¶¶ 21-24, 167 P.3d at 710. In the present appeal, the issue concerns the valuation of Husband's pension.

P.2d at 83-84. Although the relevant statute, A.R.S. § 38-760, was amended effective July 1, 2008, said amendment did not materially change the statute as relevant to this decision. Therefore, the only circumstance under which we could conclude the law of the case does not apply is if the previous decision was erroneous. We find no error.

¶24 Wife argues the superior court's order in the ADRO was appropriate and cites several cases for support. However, we find her case law distinguishable. First, in *In re Marriage of Lowell,* 171 Ariz. 462, 462-63, 831 P.2d 838, 838-39 (App. 1991), when husband and wife divorced, husband had already retired from his federal civil service position and elected a reduced pension with a survivorship benefit. The court held there was nothing improper about awarding wife the survivorship benefit because the benefit had been "paid for overwhelmingly by community funds." *Id.* at 463, 831 P.2d at 839. Here, Husband is still working, does not plan on retiring for many years,[7] and has not elected a survivorship benefit. Further, if we assume Husband will retire at age 67 and will accumulate a total of 39 years in the ASRS, only 12.5 years would have accrued during the marriage. This is less than one third of the total anticipated years and the retirement benefit will not be "paid for

[7] According to *Boncoskey,* Husband does not intend to retire until he is approximately 67 years old. *Boncoskey,* 216 Ariz. at 451, ¶ 16, 167 P.3d at 708.

overwhelmingly by community funds" as in *Lowell*.

¶25 Similarly, *Parada v. Parada,* 196 Ariz. 428, 999 P.2d 184, (2000), is distinguishable. The husband in *Parada* had already retired when his first marriage was dissolved. *Id*. at ¶ 2. Wife collected one-half of husband's retirement payments pursuant to the divorce decree. *Id.* at ¶ 10. When husband died, his second wife (surviving spouse) received all of the retirement payments. *Id.* at ¶ 5. Pursuant to the relevant statute, death benefits were to be paid to an employee's "surviving spouse." *Id.* at ¶ 18 (citing A.R.S. § 38-846). An employee could not designate a beneficiary, and thus could not control who receives death benefits. *Id.* at ¶¶ 18-19. Thus, first wife was unable to receive any death benefits. *Id.* at ¶ 25. We do not believe that *Parada* controls the issues in the present case.

¶26 Finally, in *Carpenter v. Carpenter,* 150 Ariz. 62, 63, 722 P.2d 230, 231 (1986), the court addressed whether husband's first wife had a community property interest in husband's ASRS death benefit. There, husband's retirement plan was omitted from the dissolution decree. *Id.* Husband remarried approximately three months before his death. *Id.* at 62, 722 P.2d at 230. The court concluded first wife had a community interest in husband's pension and awarded first wife one-half of the undisputed value of husband's pension as of the date of

dissolution to be paid from the death benefits. *Id.* at 65, 722 P.2d at 233.

¶27 There are some notable distinctions between *Carpenter* and the present case. First, in *Carpenter*, husband's retirement plan was an omitted asset and the relevant issue was whether former wife had a community property interest in the death benefits actually paid. *Id.* at 63, 722 P.2d at 231. Here, it is undisputed Wife has a community property interest in Husband's retirement plan and the plan was not an omitted asset. Second, the husband in *Carpenter* had passed away when this issue arose. *Id.* at 62, 722 P.2d at 230. Third, the first wife in *Carpenter* was receiving her exact community interest in husband's retirement plan from the death benefits as the community value was undisputed. Here, if Husband is required to elect Wife as contingent annuitant, she would receive one-half of Husband's entire retirement payments, which might constitute more than her share of the community property and include a portion of Husband's separate property. *Boncoskey,* 216 Ariz. at 454, ¶ 28, 167 P.3d at 711. Finally, husband in *Carpenter* was not required to elect a particular survivor benefit for first wife and first wife was able to receive her community interest through the paid death benefits. Therefore, we find Wife's case

law distinguishable.[8]

¶28 As stated in our previous decision, the parties' settlement agreement did not require Husband to elect a joint and survivor annuity, and requiring Husband to elect such an option may allow Wife to share in Husband's post-dissolution separate property. *Boncoskey,* 216 Ariz. at 454, ¶ 28, 167 P.3d at 711. There was no error in the *Boncoskey* opinion, nor has the law changed to render the opinion erroneous. This is the law of the case, and therefore this requirement in the ADRO was an abuse of discretion. Accordingly, we vacate this portion of the ADRO.

¶29 We recognize there remains an issue regarding the potential situation of Husband predeceasing Wife after he retires, but prior to Wife receiving her full share of Husband's

[8] Similarly, although *In re Marriage of Smith*, 56 Cal. Rptr. 3d 341 (Cal. Ct. App. 2007) is more on point, we decline to reverse the law of the case based on *Smith*. First, *Smith* was decided on March 23, 2007, six months prior to *Boncoskey*. Second, out of state cases, though potentially persuasive, are not controlling. *See, e.g., State ex rel. Vivian v. Heritage Shutters, Inc.*, 23 Ariz. App. 544, 545, 534 P.2d 758, 759 (1975). Finally, *Smith* is distinguishable because California courts are specifically authorized to make an order "requiring a party 'to elect a survivor benefit annuity . . . for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election.'" *Smith,* 56 Cal. Rptr. 3d at 348 (quoting Cal. Fam. Code § 2610(a)(2)). The Arizona Rules of Family Law Procedure contain no similar provision.

pension.[9] Therefore, we remand this issue to the superior court with instructions to fashion an appropriate order designed to provide Wife her full share of the pension should this situation arise. The superior court may consider ordering Husband to purchase a life insurance policy for Wife's benefit with the costs of such policy being appropriately apportioned between Husband and Wife. Alternatively, if Husband chooses to elect a survivor option, he should be required to name Wife as a beneficiary, or contingent annuitant, and under such circumstance, Wife must be ordered to pay all amounts received in excess of her community share to a beneficiary of Husband's choosing.[10] These options are merely suggestions for the superior court to consider on remand and not limitations. The superior court should be creative and flexible to balance both parties' interests. *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243. We encourage Husband and Wife to present ideas to the superior court as well.

IV. Attorneys' Fees

¶30 Wife requests attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2009) and Husband requests attorneys'

---

[9] The ADRO specifically provides for the contingency if Husband predeceases Wife prior to retirement.

[10] Such a requirement would not conflict with the law of the case because the election will be at Husband's option and it ensures Wife will receive no more than her community property interest in Husband's pension.

fees on appeal pursuant to A.R.S. § 12-349(A) (2003). After considering the statutory factors and in the exercise of our discretion, we decline to award fees on appeal to either party.

CONCLUSION

¶31 For the foregoing reasons, we affirm the valuation formula in the ADRO, but vacate the requirement that Husband choose a joint and survivor annuity, and remand for further proceedings consistent with this decision.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge