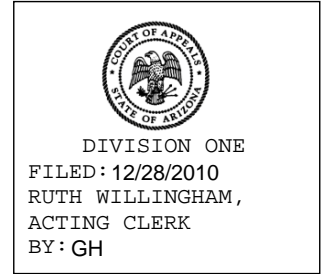


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



IN RE THE MARRIAGE OF:) 1 CA-CV 09-0428
)
JEANNETE IRENE LITTLEFIELD,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
GORDON M. LITTLEFIELD,)
)
Respondent/Appellee.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2002-003630

The Honorable Daniel G. Martin, Judge

REVERSED AND REMANDED

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O R O Z C O, Judge

¶1 Jennette Littlefield (Wife) appeals the family court's orders relating to Gordon Littlefield's (Husband) petition to modify the decree of dissolution and granting his petition to enforce the order of sanctions. For the reasons that follow we reverse and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2003, the parties entered into a consent decree of legal separation (Separation decree).¹ The Separation decree required Husband to maintain for the benefit of Wife a basic life insurance policy of \$10,000 and a supplemental life insurance policy of \$325,000. The Separation decree also required Wife to maintain for the benefit of Husband a life insurance policy of \$30,000. All of the life insurance policies specified were provided through a group life insurance contract with Husband's former employer.

¶3 Approximately three years later, Husband petitioned to convert the Separation decree into a dissolution. Subsequently, Husband obtained a judgment against Wife in the amount of \$1,500 plus interest for attorney's fees resulting from Wife's

¹ The Separation decree incorporated without merging the parties' settlement agreement of March 14, 2003.

concealment of assets.² In February 2008, the family court entered a decree of dissolution of marriage (Divorce decree). The Divorce decree specifically addressed the "life insurance polic(ies) held by Husband that name Wife as beneficiary" ordering "that Husband shall take such steps as are necessary to ensure that Wife is able to access those policies."³

¶4 On January 1, 2008, Husband's former employer reduced his supplemental life insurance policy from \$325,000 to \$100,000. Wife petitioned to enforce the insurance provisions of the Separation decree at the full amounts. Husband responded that "the amount of insurance available at the time of the [Separation] Decree was not \$325,000 but rather \$100,000" and that "the higher level of coverage was erroneously believed to be available, when actually it was not available." The family court ordered Husband to maintain the supplemental policy at the amount prescribed by the Separation decree in May 2008.

¶5 Four months later, Wife petitioned to hold Husband in contempt for failure to comply with the order. Husband petitioned to enforce the order of sanctions against Wife for his

² The total amount due to Husband before calculating interest was \$12,955.85. This amount included a judgment for attorney fees (\$1,500), a tax liability (\$1,986) and overpayment of spousal maintenance (\$10,683.63), less the offset awarded to Wife for spousal maintenance arrearages (\$1,213.78).

³ The Divorce decree neither specifically addressed Wife's life insurance obligation nor the amounts of life insurance Husband was required to maintain.

attorney fees and to modify the Divorce decree to relieve him of the life insurance obligation. Husband again argued that at the time of the Separation decree, the life insurance coverage amounts were set based on both parties' erroneous belief that the coverage was an employee benefit not subject to reduction, and that he could not independently afford that amount of coverage.⁴ Husband further argued that Wife has failed to maintain the \$30,000 life insurance policy for his benefit, as required by the Separation decree.

¶16 The family court denied Wife's petition to hold Husband in contempt. However, the family court found that Husband had failed to live up to his obligation under the Separation decree and subsequent court order by maintaining a base life insurance policy of \$18,000 and a supplemental policy of only \$100,000.

¶17 The family court also denied Husband's petition to modify the Divorce decree finding no evidence that a "substantial and continuing change of circumstances has occurred." Though the family court opined that "Husband's obligation to maintain insurance is linked to his spousal maintenance obligation," it

⁴ Wife posits for the first time on appeal that this argument is barred by collateral estoppel because the issue was previously litigated and decided by the family court in its ruling filed May 2, 2008. Because Wife failed to raise this issue below, it is waived. *Richter v. Dairy Queen of Southern Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("It is settled that an appellate court cannot consider issues and theories not presented to the court below.").

found "no proper legal grounds exist for modification." Thus, the family court concluded that "there exists a shortfall of \$207,000" in the amount of coverage required of Husband.

¶18 However, the family court also found that Wife was "non-compliant with her obligation" under the Separation decree to provide \$30,000 in coverage for Husband's benefit, and that "Husband is entitled to an offset in this amount." Thus, the court ordered Husband to maintain "an additional life insurance policy" of \$177,000 for Wife's benefit. That is, of the \$207,000 shortfall, Husband was required to make up only \$177,000 given Wife's failure to provide the \$30,000 coverage for Husband's benefit.

¶19 The family court granted Husband's petition to enforce the order of sanctions against Wife, conditioning "reinstatement by Husband of the supplemental life insurance for Wife's benefit" on her payment of the judgment against her.

¶10 Wife timely appealed and we have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-2101.B. (2003).

DISCUSSION

¶11 "In Arizona, dissolution of marriage proceedings are creatures of statute, and jurisdiction to decide such cases is conferred on the courts by the legislature." *In re Marriage of*

Waldren, 217 Ariz. 173, 175, ¶ 8, 171 P.3d 1214, 1216 (2007). The scope of the family court's authority to modify a decree depends on the nature of the provision being modified. See A.R.S. § 25-327.A. (distinguishing between spousal maintenance and property settlement provisions).

¶12 "The law presents a bifurcated approach toward separation agreement provisions: it distinguishes maintenance-type provisions from property settlement provisions." *LaPrade v. LaPrade*, 189 Ariz. 243, 246, 941 P.2d 1268, 1271 (1997). Under A.R.S. § 25-317.F. (2007), spousal maintenance provisions "are squarely within the continuing jurisdiction of the [family] court."⁵ *LaPrade*, 189 Ariz. at 246, 941 P.2d at 1271. Under A.R.S. § 25-327.A., "[t]he [family] court has the power to modify the maintenance provisions in keeping with the changing circumstances in the spouse's life."⁶ *LaPrade*, 189 Ariz. at 246, 941 P.2d at 1271. "In contrast, the [family] court does not have jurisdiction to modify property settlement provisions unless

⁵ A.R.S. § 25-317.F. reads, in part, "[e]xcept for terms concerning the maintenance of either party . . . entry of the decree shall thereafter preclude the modification of the terms of the decree and the property settlement agreement, if any, set forth or incorporated by reference."

⁶ A.R.S. § 25-327.A. reads, in part, "the provisions of any decree respecting *maintenance or support* may be modified or terminated only on a showing of changed circumstances that are substantial and continuing." (Emphasis added.)

circumstances exist which justify reopening the judgment." *Id.*;
A.R.S. § 25-327.A.⁷

¶13 Thus, "absent a change of circumstances, the original spousal maintenance order may not be modified." *In re Marriage of Rowe*, 117 Ariz. 474, 475, 573 P.2d 874, 875 (1978). Moreover, "[t]he well-established rule is that property settlements are not subject to modification or termination." *De Gryse v. De Gryse*, 135 Ariz. 335, 338, 661 P.2d 185, 188 (1983); *accord Reed v. Reed*, 124 Ariz. 384, 385, 604 P.2d 648, 649 (App. 1979) ("There is a compelling policy interest favoring the finality of property settlements.").

Characterization of the Life Insurance Provisions

¶14 Whether the life insurance provisions should be characterized as related to spousal maintenance or as part of the property settlement is primarily governed by the intent of the parties. *See Brooks v. Consol. Freightways Corp. of Delaware*, 173 Ariz. 66, 72, 839 P.2d 1111, 1117 (App. 1992) ("the parties themselves have treated the lump sum settlement as an award for spousal maintenance"); *see also States v. States*, 124 Ariz. 189, 190, 603 P.2d 81, 82 (1979) (enumerating "criteria for deciding whether the payments were intended to be solely maintenance or

⁷ A.R.S. § 25-327.A. reads, in part, "[t]he provisions as to *property disposition* may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." (Emphasis added.)

consideration for the property settlement"). This is a factual determination within the family court's sound discretion and will not be disturbed on appeal unless clearly erroneous. See *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991).

¶15 In this case, the family court determined that the insurance provisions were linked to spousal maintenance. Wife acknowledged that this was her intent, testifying that the life insurance obligation was a "basic part of spousal support" meant to ensure that she would be provided for in the event of Husband's death. Because the record supports the family court's determination, we choose not to disturb its finding that the life insurance provisions of the Separation decree are related to spousal maintenance and that they remain within the family court's continuing jurisdiction.

Sufficiency of Changed Circumstances

¶16 "The decision as to the sufficiency of changed circumstances to support a modification lies within the sound discretion of the [family] court and will not be disturbed on appeal unless it is abused." *Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App. 1983). If there is "ample post-decree evidence in the record of a substantial change in circumstances" it is an abuse of discretion for the family court to find otherwise. *Chaney v. Chaney*, 145 Ariz. 23, 27, 699 P.2d

398, 402 (App. 1985). "This change of circumstances must occur after the entry of the original decree in order to be material." *Id.* at 25, 699 P.2d at 400; accord *Richards v. Richards*, 137 Ariz. 225, 226, 669 P.2d 1002, 1003 (App. 1983) ("The changed circumstances alleged must be proved by a comparison with the circumstances existing at dissolution.").

¶17 In this case, the parties entered into the Separation decree allocating specific life insurance benefits provided to Husband through his former employer. Husband agreed to make Wife the beneficiary of a specific policy for a specific amount. The Separation decree makes this clear by specifying the amounts of coverage and by describing the policies as "underwritten by AETNA Life Insurance Company through a group life insurance contract with Husband's former employer." The parties do not contest that the amount of coverage specified by the Separation decree is what was available at the time of the decree. Thus, the Separation decree does not make Husband generally liable for life insurance coverage in the specified amount; but rather, it makes him liable only for a specific life insurance policy provided through his former employer as an employee benefit.

¶18 Subsequent to the Separation decree, the life insurance policy ceased to be available in the amount prescribed by the decree. That is, the amount of coverage was reduced by Husband's former employer. This was the result of Husband's former

employer changing life insurance carriers. In the course of the change over, it was determined that Husband's coverage level should have been adjusted in 2002 when he attained the age of 65 -- before entry of the Separation decree. Not until January 2008 -- nearly 5 years after the Separation decree -- was the policy actually adjusted. Consequently, the insurance policy mandated by the Separation decree became unavailable in the amount specified by the decree.⁸

¶19 The subsequent unavailability of the insurance policy in the amount specified by the Separation decree is, as a matter of law, a changed circumstance. To hold otherwise would require Husband to make up the shortfall independently of the group benefits available through his former employer when that is not what is required by the Separation decree. As such, the family court's determination was an abuse of discretion and is reversed.⁹ We remand for the court to consider what changes, if

⁸ In his petition, Husband asserted that to independently provide life insurance coverage in the amount specified by the Separation decree would result in monthly premiums starting at \$904.95 and increasing to \$1,858.95 over the course of 8 years. Husband further asserted that at the time of the Separation decree, it was not contemplated that he would undertake such a great personal expense by providing insurance coverage independent of the group benefits available through his former employer.

⁹ We express no opinion whether Husband should be required to maintain life insurance coverage in the amounts prescribed by the Separation Decree. We hold only that circumstances have sufficiently changed to warrant a modification, if appropriate.

any, are appropriate given the changes in circumstances regarding the life insurance policies.

Attorney Fees

¶20 Husband's request for attorney fees on appeal is denied.

CONCLUSION

¶21 Based on the foregoing, we reverse and remand for further proceedings consistent with this decision.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge