

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



DIVISION ONE
FILED: 06-10-2010
PHILIP G. URRY, CLERK
BY: GH

In re the Marriage of:) 1 CA-CV 09-0480
)
DONALD G. FOUCH,) DEPARTMENT B
)
Petitioner/Appellant/) Maricopa County
Cross Appellee,) Superior Court
) No. FN 2008-000793
v.)
) **DECISION ORDER**
DEBORAH A. FOUCH,)
)
Respondent/Appellee/)
Cross Appellant.)
)
)

**DISMISSING APPEAL; ACCEPTING SPECIAL ACTION JURISDICTION;
DENYING RELIEF**

In this appeal, petitioner/appellant Donald G. Fouch ("Husband") argues the family court should not have authorized collection of what he characterizes as a "non-support judgment" from his retirement plan, asserting it is barred by the anti-alienation provision of the Employee Retirement Income Security Act ("ERISA"). See 29 U.S.C. § 1056(d)(1) (1999). After this matter was fully briefed, and before oral argument, we requested the parties address whether this court had jurisdiction over this appeal. Specifically, we asked whether the ruling Husband challenges was final or merely preparatory without the

anticipated qualified domestic relations order ("QDRO") having been entered. This question arose because the judgment that is the subject of this appeal is a signed post-decree order that directed preparation of a QDRO.

On the record before us, we have determined we do not have jurisdiction over this appeal. Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003) allows an appeal "[f]rom any special order made after final judgment." To qualify as a special order, the judgment must not be merely preparatory to a later proceeding that might affect the judgment. *In re Marriage of Dorman*, 198 Ariz. 298, 300, ¶ 3, 9 P.3d 329, 331 (App. 2000). Here, the family court's judgment was preparatory and in anticipation of a QDRO being prepared.¹

Although we have determined we do not have appellate jurisdiction, we may, in the exercise of our discretion, treat this appeal as a petition for special action jurisdiction. *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996). Because the parties had fully briefed this appeal when we requested them to address the jurisdictional issue, the primary issue raised by Husband

¹In his briefing on appeal, Husband asserts we have jurisdiction because the court entered a signed order denying his motion for new trial. Generally, denial of a motion for new trial is appealable under A.R.S. § 12-2101(F)(1). Nevertheless, if the underlying judgment is not final, denial of a motion for new trial does not create appellate jurisdiction. *Maria v. Najera*, 222 Ariz. 306, 308, ¶ 10, 214 P.3d 394, 396 (App. 2009).

constitutes an issue of law, and resolution of this issue would promote judicial economy and would constitute an efficient use of the resources of the parties and this court, we will treat this appeal from the judgment as it pertains to preparation of a QDRO as a petition for special action and accept special action jurisdiction. As we explain, however, we deny Husband the relief he seeks.

In the dissolution decree, respondent/appellee Deborah A. Fouch ("Wife") was awarded one half of the community interest in Husband's retirement plan. The court also granted Wife a \$2,533.58 judgment against Husband as an equalization payment and ordered Husband to pay Wife or the mortgage company \$19,000 as his share of the debt against the marital residence. The court further instructed that absent her agreement, Husband could not satisfy his obligation to pay the \$19,000 toward the debt against the residence by giving Wife a greater share of his retirement account. Thereafter, Wife moved to enforce the decree and requested a greater share of Husband's retirement plan to cover the \$21,533.58 Husband owed under the decree. After an evidentiary hearing, the court entered a \$25,840.30 judgment against Husband.² The court ordered preparation of a QDRO giving Wife her community property interest in Husband's

²The court calculated this amount as follows: \$21,533.58 plus 20% (\$4,306.72) to compensate Wife for taxes she would owe on the retirement plan.

retirement plan (previously established at 34.58%) and then giving her \$25,840.30 from the remainder.

Characterizing the judgment for the \$25,840.30 as a "non-support judgment," Husband argues it is barred by the anti-alienation provision of ERISA. We disagree.

ERISA's anti-alienation provisions are inapplicable to a state court order constituting a QDRO. 29 U.S.C. § 1056(d)(3)(A). A QDRO is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," as long as certain additional requirements are met. *Id.* at § 1056(d)(3)(B)(i). A domestic relations order is defined as "any judgment, decree, or order (including approval of a property settlement agreement) *which--* (I) *relates to* the provision of child support, alimony payments, or *marital property rights to a spouse, former spouse, child, or other dependent of a participant, and* (II) is made pursuant to a State domestic relations law (including a community property law)." *Id.* at § 1056(d)(3)(B)(ii) (emphasis added). Contrary to Husband's assertion, the judgment entered here relates to marital property rights.

In a dissolution action, a court may divide community assets and debts between the parties to achieve an equitable

division of community property. A.R.S. § 25-318(A) (Supp. 2009). Arizona law does not make a conceptual distinction between the division of community assets and the division of community liabilities at dissolution. *Birt v. Birt*, 208 Ariz. 546, 550, ¶ 17, 96 P.3d 544, 548 (App. 2004). "The authority of the court to allocate community liabilities between the parties is simply an aspect of its duty to effect an equitable division of all community property." *Id.*

Here, as discussed, the \$25,840.30 judgment stems from the division of the parties' community debt and community assets. That sum was comprised of \$19,000 which pertained to an allocation of a community liability on the parties' marital residence and the \$2,533.58 judgment which was an equalization payment ordered by the family court after dividing community assets. The judgment, therefore, relates to the marital property rights of the parties. Accordingly, the cases cited by Husband in his briefing are distinguishable. The \$25,840.30 judgment may be satisfied from Husband's retirement plan assuming all other ERISA QDRO requirements are met.

Finally, Wife has cross-appealed from the family court's denial of her request for attorneys' fees pursuant to A.R.S. § 25-324 (Supp. 2009). Although the family court found Husband's position that he should not pay Wife as ordered in the decree unreasonable, the court denied Wife's request for

attorneys' fees in part because it believed Wife had not testified about her current financial circumstances at the evidentiary hearing, while Husband did. Our review of the record reflects Wife did testify about her financial resources at the hearing. Because we are remanding this matter for further proceedings, the court may, on remand, address Wife's request for an award of attorneys' fees pursuant to A.R.S. § 25-324(A).

Both parties have requested an award of attorneys' fees in this matter pursuant to A.R.S. § 25-324. In the exercise of our discretion, we deny their request and order each party to bear his or her own attorneys' fees.

Accordingly,

IT IS ORDERED dismissing Husband's appeal for lack of jurisdiction.

IT IS FURTHER ORDERED that the court, in its discretion, will treat Husband's appeal as a petition for special action and will exercise special action jurisdiction.

IT IS FURTHER ORDERED denying relief to Husband, with each party to bear his or her own attorneys' fees in this special action.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge