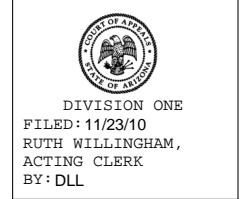


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS  
AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



In re the Marriage of: ) 1 CA-CV 09-0487  
ALLAN G. DAVIS, ) 1 CA-CV 09-0725  
) (Consolidated)  
)  
Petitioner-Appellant, ) DEPARTMENT E  
)  
v. )  
) **MEMORANDUM DECISION**  
ALICE E. DAVIS, )  
)  
Respondent-Appellee. ) (Not for Publication -  
) Rule 111, Rules of the  
) Arizona Supreme Court)  

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In re the Marriage of: )  
ALLAN G. DAVIS, )  
)  
Petitioner-Appellee, )  
)  
v. )  
)  
ALICE E. DAVIS, )  
)  
Respondent-Appellant. )  

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Appeal from the Superior Court in Maricopa County

Cause No. DR 0000-150089

The Honorable Andrew G. Klein, Judge  
The Honorable Lisa Daniel Flores, Judge

**DISMISSED IN PART; REVERSED IN PART; REMANDED**

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W E I S B E R G, Judge

¶1 Allan G. Davis ("Husband") appeals from orders denying his motion to dismiss a post-dissolution petition for lack of personal jurisdiction and awarding a portion of his military retirement benefits to Alice E. Davis ("Wife"). Wife also appeals from an order granting Husband's motion to dismiss her petition for lack of subject matter jurisdiction. For the reasons stated, we dismiss Husband's appeal, reverse the order dismissing Wife's petition for lack of subject matter jurisdiction, and remand for further proceedings.

**PROCEDURAL BACKGROUND**

¶2 After fifteen years of marriage, Husband and Wife were divorced in Arizona on July 29, 1981. At the time of the divorce, Husband had served approximately ten years in the military. Husband retired from the military ten years later and began receiving military retirement benefits on October 1, 1991.

Although the parties disagree as to the reason for this, the default divorce decree did not allocate or divide the benefits.

¶13 In 2008, Wife filed a petition for order to show cause re: undivided community assets under the same domestic relations case number. She sought an order awarding her one-half of the community property interest in Husband's military retirement benefits from October 1, 1991 to the present. The court appointed a special master to address the parties' respective positions and make findings and recommendations on division of the military retirement benefits.

¶14 Husband objected to the court's exercise of personal jurisdiction over him in a communication to the special master. The special master rejected this claim and issued his recommendation that Wife receive a portion of Husband's military retirement benefits. Husband then filed a motion to dismiss Wife's petition on the ground of lack of personal jurisdiction. Husband alleged that when Wife filed her petition, he was living in Florida and that he had not lived in Arizona since 1981.

¶15 In June 2009, Husband filed a separate motion to dismiss for lack of subject matter jurisdiction. On June 8, 2009, the court entered a minute entry denying the motion to dismiss for lack of personal jurisdiction and adopting the special master's recommendations regarding division of Husband's

military retirement benefits, including a "Clarifying Order Apportioning Military Retirement Pay." (June 8, 2009 orders).

¶16 On July 8, 2009, Husband filed a notice of appeal (1 CA-CV 09-0487) from the June 8, 2009 orders ("Husband's appeal"). In August 2009, the court granted Husband's motion to dismiss for lack of subject matter jurisdiction. In September 2009, Husband filed a motion to vacate the June 8, 2009 orders. Before the court could rule on this motion, on October 19, 2009, Wife filed a notice of appeal (1 CA-CV 09-0725) from the final order dismissing her petition for lack of subject matter jurisdiction ("Wife's appeal").

¶17 This court suspended Husband's appeal and revested jurisdiction in the trial court to allow the court to consider Husband's motion to vacate the June 8, 2009 orders. The court vacated the June 8, 2009 orders, and Husband's appeal was automatically reinstated. We consolidated the appeals.

#### **DISCUSSION**

¶18 These appeals raise issues regarding our appellate jurisdiction and the statutory authority of the domestic relations division of the superior court to consider Wife's post-dissolution petition to divide the military retirement benefits. Because they involve questions of law, our review is

de novo. *In re Marriage of Crawford*, 180 Ariz. 324, 326, 884 P.2d 210, 212 (App. 1994).

### **Appellate Jurisdiction**

¶9 We first consider the question of our appellate jurisdiction. See *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997) ("this court has an independent duty to determine whether it has jurisdiction to consider an appeal."). Wife filed a timely notice of appeal from the court's final order dismissing her petition. Therefore, we have jurisdiction over Wife's appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(D) (2003).

¶10 We reach a different result as to Husband's appeal. Here, the trial court vacated the June 8, 2009 orders. Because there are no orders in effect from which to appeal, Husband's appeal is moot. Additionally, Husband filed his notice of appeal while his motion to dismiss for lack of subject matter jurisdiction was pending; therefore, his notice of appeal was premature and a nullity under *Baumann v. Tuton*, 180 Ariz. 370, 884 P.2d 256 (App. 1994).

¶11 In *Baumann*, the trial court issued an order granting the defendants' motion to dismiss and the plaintiff filed a motion for new trial. The plaintiff filed a notice of appeal while his motion for new trial was still pending. The

defendants argued that the plaintiff had abandoned his motion for new trial when he filed a notice of appeal. *Id.* at 371, 884 P.2d at 257. We held that the notice of appeal was filed prematurely because the court had not yet ruled on the pending motion for new trial. We noted that a premature notice of appeal would “disrupt the trial process and require [the appellate court] to consider issues that are more appropriately considered by the trial court.” *Id.* at 372, 884 P.2d at 258. We concluded that the notice of appeal was a nullity and that this court lacked jurisdiction over the appeal. *Id.* at 373, 884 P.2d at 259. Here, as in *Baumann*, there had not yet been a ruling on Husband’s pending motion to dismiss for lack of subject matter jurisdiction when he filed his notice of appeal. Husband’s notice of appeal was a nullity, and we lack jurisdiction to consider his appeal. *Id.*; see also *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 415, ¶ 39, 132 P.3d 1187, 1195 (2006)(noting that litigants should give trial court opportunity to rule on a pending motion that may cure error and obviate necessity for appeal).<sup>1</sup>

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<sup>1</sup>Nothing in our decision precludes the parties on remand from reasserting their positions with regard to the now vacated June 8, 2009 orders.

### **Authority to Divide Omitted Military Retirement Benefits**

¶12 In dismissing Wife's post-dissolution petition, the court ruled that in order to divide the military retirement benefits, Wife was required to file a separate civil action to partition the property, with each party holding an undivided, one-half interest as tenants in common. The court determined that Wife could not obtain relief in a post-dissolution proceeding and concluded that it lacked subject matter jurisdiction to divide the retirement benefits.

¶13 Wife argues that A.R.S. section 25-318(D)(Supp. 2009) gives the court continuing and exclusive jurisdiction to divide the omitted military retirement benefits in a post-dissolution proceeding. See A.R.S. § 25-318(D) ("The community, joint tenancy and other property held in common for which no provision is made in the decree shall be from the date of the decree held by the parties as tenants in common, each possessed of an undivided one-half interest."). Wife also alleges that Rule 91(H), Arizona Rules of Family Law Procedure, authorizes the filing of a post-dissolution petition such as hers. See Rule 91(H) ("Any party seeking any other postdecree or post-judgment relief not specifically addressed in this rule shall file a petition in compliance with paragraph A setting forth detailed facts supporting the requested relief, together with the

specific legal authority that confers subject matter jurisdiction upon or authorizes the family court to grant the relief requested.”).

¶14 Relying on this court’s decision in *Thomas v. Thomas*, 220 Ariz. 290, 205 P.3d 1137 (App. 2009), Husband argues that Wife was required to file a separate civil action to divide the retirement benefits and that the court has no jurisdiction to grant such relief in a post-dissolution proceeding. In *Thomas*, the parties had acquired a condominium during their marriage. At the time they were divorced, they agreed to continue to jointly own the real property and each use it at separate times. With this understanding, they intentionally omitted the property from the decree of dissolution. Several years later, after Wife failed to abide by the terms of the agreement, the husband filed a motion for order to show cause in the dissolution action, requesting that the court award him one-half of the equity in the property. *Id.* at 291, ¶¶ 2-3, 205 P.3d at 1138.

¶15 We noted that when the decree was entered, pursuant to A.R.S. § 25-318(D), the omitted community property was transmuted by operation of law into separate property, with each party holding a one-half interest as tenants in common. *Id.* at 292, ¶¶ 9-10, 205 P.3d at 1139. We held that “post-decree litigation in a dissolution proceeding . . . is not permitted in



a case in which the parties intentionally omitted the property at issue from the decree [and that] [p]arties who decide together to omit property from their divorce decree cannot then expect the dissolution court to resolve post-decree disputes relating to the property." *Id.* at 294, ¶ 15, 205 P.3d at 1141. We concluded that "a legal dispute regarding community property intentionally omitted from a dissolution decree by both parties and transmuted by law to separate property is not subject to consideration in a post-decree dissolution proceeding." *Id.* at ¶ 17.

¶16 Wife claims *Thomas* does not apply here because (1) the parties did not intentionally omit the military retirement benefits from the decree; (2) *Thomas* involved a dispute about ownership interests in real property, which can be resolved in a civil action; and (3) military retirement benefits can only be divided by a Qualified Domestic Relations Order which, by its very name, must be obtained in a post-dissolution proceeding. We agree that *Thomas* does not control.

¶17 In *Thomas*, the parties specifically agreed on the use and ownership of their condominium after their divorce, and intentionally omitted it from the decree in order to effectuate their oral agreement. It was only when the wife allegedly breached the agreement that the husband attempted to divide the

real property. *Id.*, 220 Ariz. at 291, ¶ 3, 205 P.3d at 1138. Here, however, the parties did not have a separate agreement that one party breached regarding disposition of the military retirement benefits intentionally omitted from the decree; the benefits were simply not mentioned in the decree.

¶18 This situation is governed by other Arizona cases. At the time the decree was entered on July 29, 1981, Husband had an unvested right to military retirement benefits. *Van Loan v. Van Loan*, 116 Ariz. 272, 273, 569 P.2d 214, 215 (1977). In *Van Loan*, the Arizona Supreme Court held that the wife also had a community property interest in the unvested right to such benefits, which were divisible in a post-decree modification proceeding. *Id.* at 273-74, 569 P.2d at 215-16.

¶19 On June 26, 1981, the United States Supreme Court decided *McCarty v. McCarty*, 453 U.S. 210 (1981), and held that federal law precluded state courts from dividing military retirement benefits in dissolution proceedings. "*McCarty* directly overruled *Van Loan*.". *Edsall v. Superior Court*, 143 Ariz. 240, 241, 693 P.2d 895, 896 (1984). However, on February 1, 1983, Congress passed the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1983) ("Act"). The Act abrogated *McCarty* and made military retirement benefits subject to state law, retroactive to the date *McCarty* was decided.

*Edsall*, 143 Ariz. at 242, 693 P.2d at 897; 10 U.S.C. § 1408)c)(1). Congress' intent in making the Act retroactive was to permit individuals divorced during the interim period between June 26, 1981 and the effective date of Act, such as occurred here, to "return to the courts to take advantage" of its provisions. *Steczo v. Steczo*, 135 Ariz. 199, 201, 659 P.2d 1344, 1346 (App. 1983) (citation omitted).

¶120 Our Supreme Court subsequently held that "[p]ursuant to the Act, we will again treat military retirement pay as community property" consistent with *Van Loan*, and that "[t]his treatment will be retroactive to the date of *McCarty*." *Edsall*, 143 Ariz. at 242, 693 P.2d at 897. In that case, the parties were divorced in the interim period and three months after passage of the Act, the wife filed a petition to reopen the decree to dispose of the husband's military retirement benefits. *Id.* at 241-42, 693 P.2d at 896-97. The property settlement agreement provided that the husband would receive all of his military retirement benefits, but that wife was entitled to a portion of those benefits as result of future or pending legislation by Congress. The court held that "the trial court had the power to reopen a final decree where the parties relied on *McCarty* in disposing of military retirement benefits." *Id.* at 246, 693 P.2d at 901. The court noted that because the

interim period was short, the number of divorces granted during that period involving military retirement benefits was small and that reopening such cases would not overburden the courts. *Id.*

¶21 In *Beltran v. Razo*, 163 Ariz. 505, 788 P.2d 1256 (App. 1990), the husband began receiving his military pension in 1980 and the parties divorced in September 1981. In 1989, the wife filed a petition for order to show cause to divide the military retirement benefits. Unlike the facts in *Edsall*, neither the decree nor property settlement agreement mentioned military retirement benefits. *Beltran*, 163 Ariz. at 507, 788 P.2d at 1258. The court held that "the retirement benefits here were community property for which no division was made in the decree and, therefore, were held by the parties as tenants in common pursuant to [former] A.R.S. § 25-318(B), thus giving the petitioner the right to bring an action to divide the property at any time." *Id.* The court noted, however, that "the equitable defense of laches is available to prevent unfairness to a spouse who may have spent the money in reliance on the judgment." The court concluded that the wife was entitled to her share of "vested property rights in the pension," payable prospectively from the date she filed her petition. *Id.* *Cf. Cooper v. Cooper*, 167 Ariz. 482, 487, 808 P.2d 1234, 1239 (App. 1990) (non-military retirement benefits not mentioned in decree

were omitted property under former A.R.S. § 25-318(B) and wife had the right to seek post-dissolution division of them "at any time"). Thus, subject to defenses, such as waiver, estoppel or laches, issues which are not before this court, Arizona cases have "clearly established that a trial court may reopen and modify final decrees entered during the *McCarty* interim period, in order to make a proper disposition of military retirement benefits." *Flynn v. Rogers*, 172 Ariz. 62, 65, 834 P.2d 148, 151 (1992).<sup>2</sup>

¶122 In support of his argument that a former spouse must bring a separate civil action to recover his or her share of an omitted asset or contribution for an omitted debt, Husband cites *Dressler v. Morrison*, 212 Ariz. 279, 130 P.3d 978 (2006), *Dawson v. McNaney*, 71 Ariz. 79, 223 P.2d 907 (1950), and *Fischer v. Sommer*, 160 Ariz. 530, 774 P.2d 834 (App. 1989). However, those cases are distinguishable because none of them involves division of omitted military retirement benefits. We conclude that Wife may seek division of Husband's military retirement benefits omitted from the decree under A.R.S. § 25-318(D) in a post-

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<sup>2</sup>Consistent with Arizona law, except for possible division of the military retirement benefits, all other provisions of the decree are final, non-modifiable and are not subject to equitable reallocation. *In re Marriage of Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997); A.R.S. §§ 25-325, -327(A).

dissolution proceeding. The trial court erred in dismissing Wife's petition for lack of subject matter jurisdiction.<sup>3</sup>

¶23 On this point, we note that the term "subject matter jurisdiction" is "inexact" as it is used to describe the scope of a proceeding, not the court's jurisdiction over the subject matter. *Marvin Johnson, P.C. v. Meyers*, 184 Ariz. 98, 101, 907 P.2d 67, 70 (1995). The superior court is a single, unified court and its organization into various divisions or departments are "in-house administrative mechanisms that do not affect the jurisdiction of the superior court." *Id.* at 102, 907 P.2d at 71. See also *Lee v. Lee*, 133 Ariz. 118, 125, 649 P.2d 997, 1004 (App. 1982)(subject matter jurisdiction describes the right of the court to exercise judicial power over a class of cases and to order the relief sought). More appropriately, the issue is one of statutory authority. *Thomas*, 220 Ariz. at 294, ¶ 16, 205 P.3d at 1141 (court did not have statutory authority to divide omitted real property in post-decree dissolution litigation). In this case, the domestic relations division of the superior court has the statutory authority to consider Wife's petition to

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<sup>3</sup>Having decided that the court erred in dismissing Wife's petition, we need not address her argument that a Qualified Domestic Relations Order can only be obtained in a post-dissolution proceeding and not in a separate civil action.

divide the military retirement benefits in a post-dissolution proceeding.

#### **Costs and Attorneys' Fees on Appeal**

¶24 Wife argues that she is entitled to costs and attorneys' fees pursuant to A.R.S. § 25-324(A) (Supp. 2009). She claims that she has a substantially lower income than Husband and that Husband caused delay by taking unreasonable positions in this matter. There is no evidence in the record regarding Husband's current financial resources. Thus, we are unable to base an award of attorneys' fees on the parties' financial disparity. However, we agree that Husband has caused a delay by pursuing his appeal after the June 8, 2009 orders were vacated. He has also caused delay by seeking to dismiss the post-dissolution proceeding, despite recognizing that his military retirement benefits might be subject to judicial division. Therefore, we award Wife her costs and reasonable attorneys' fees on appeal.

#### **CONCLUSION**

¶25 For the foregoing reasons, we dismiss Husband's appeal. As to Wife's appeal, we reverse the order of dismissal and remand to the trial court for further proceedings consistent with this court's decision. We award Wife her reasonable

attorneys' fees and costs on appeal subject to compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

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SHELDON H. WEISBERG, Judge

CONCURRING:

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PHILIP HALL, Presiding Judge

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PETER B. SWANN, Judge