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

DIVISION ONE
FILED: 11-12-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF:	No. 1 CA-CV 09-0556
BARBARA ALLAN,	DEPARTMENT B
Petitioner/Appellee,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
SCOTT ALLAN,	
Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-094211

The Honorable Jo Lynn Gentry-Lewis, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

Bonnie Yarbrough — Mesa
Attorney for Petitioner/Appellee

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By Leonce A. Richard, III
Attorneys for Respondent/Appellant

J O H N S E N, Judge

¶1 Scott Allan ("Husband") appeals from the division of property in the decree dissolving his marriage to Barbara Allan ("Wife"). Husband also challenges the superior court's

calculation of his equalization payment to Wife. For the reasons that follow, we affirm in part, vacate in part and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband and Wife married in May 1989. In November 2007, Wife filed a petition for dissolution. The parties eventually entered into an agreement pursuant to Arizona Rule of Family Law Procedure 69 that resolved several issues. After a trial, the court issued a decree reaffirming the Rule 69 agreement, valuing and dividing the remaining assets and ordering Husband to make an equalization payment to Wife. Husband filed a motion for new trial; Wife responded and filed a motion for clarification. The court denied both motions, and Husband timely appealed.[1] We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(B), (F)(1) (2003).

DISCUSSION

A. Standard of Review.

¶3 We review the family court's division of property for an abuse of discretion. *In re Marriage of Pownall,* 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). The court abuses its discretion if there is no evidence to support its decision

[1] Husband's notice of appeal was premature, but the superior court later entered a final appealable judgment. *See Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981).

or if it makes a legal error. *Little v. Little,* 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999); *Fuentes v. Fuentes,* 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). We will affirm the court's factual findings unless they are clearly erroneous or unsupported by credible evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995).

B. IRA Awards and Values.

1. The value of Nos. 8814/6214.

¶4 Husband first argues that in calculating the equalization payment, the court incorrectly valued a pair of IRAs, Nos. 8814 and 6214. Apparently due to a confusing trial exhibit, the court valued these IRAs collectively at $251,275. At trial, however, the parties informed the court that $41,448 of the total was held for their daughter, so that the two IRAs together should have been valued for these proceedings at $209,827. On appeal, Wife does not dispute that the court used the wrong value for these accounts. Accordingly, we vacate that portion of the decree specifying the value of IRA Nos. 8814 and 6214 and direct the court on remand to use the revised value of these accounts in determining an appropriate equalization payment.

2. Awards of spouses' respective IRAs to the other party.

¶5 It was undisputed at trial that IRA Nos. 8814 and 6214 were held in Husband's name and IRA Nos. 9919 and 5005 were held

in Wife's name. Husband argues the superior court erred by awarding IRA Nos. 8814 and 6214 to Wife and awarding IRA Nos. 9919 and 5005 to him. In its order, the superior court did not explain its decision to award each of the parties the other's IRA accounts.

¶6 A judgment "must be within the issues formed by the pleadings," and the superior court cannot award greater or different relief than that sought. *Wall v. Superior Court of Yavapai County,* 53 Ariz. 344, 354-55, 89 P.2d 624, 628 (1939); *see also Wineglass Ranches, Inc. v. Campbell,* 12 Ariz. App. 571, 575-76, 473 P.2d 496, 500-01 (1970) (court cannot adjudicate an issue not raised). Therefore, under the rule stated in *Wall* and *Wineglass Ranches*, because neither party asked the court to transfer the other's IRAs, the court erred by awarding the IRAs to the opposite parties.

¶7 Wife contends that if the court erred, the mistake can be corrected by a qualified domestic relations order ("QDRO"). She does not develop this argument, however, nor does she offer authority to support her contention. *See A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County,* 222 Ariz. 515, 540-41, ¶ 85, 217 P.3d 1220, 1245-46 (App. 2009) (failing to develop an argument on appeal results in waiver and abandonment). Accordingly, we vacate the portion of the decree that allocated these IRA accounts and direct the court to re-allocate them on

remand, unless the court discerns and articulates a reason in equity for doing otherwise.[2]

3. Value of IRA No. 0334.

¶8 Regarding an IRA account labeled No. 0334, the decree provides:

> Husband is awarded, as his sole and separate property, the IRA #0334 totaling $18,136.26 as this was his account prior to the date of marriage. This account is awarded without offset to Wife.

Husband argues the court erred in this portion of the decree because by the time of trial, IRA No. 0334 no longer existed (it had been rolled into IRA No. 8814).

¶9 The evidence includes a 1989 statement showing Husband came into the marriage with $18,136.26 in IRA No. 0334. Although it is not clear from the record that IRA No. 0334 was rolled into IRA No. 8814, Wife does not dispute that assertion. She argues, however, that the issue is irrelevant because both parties came into the marriage with IRAs of approximately equal value. According to the record, Wife came into the marriage with an IRA worth $14,333. The court, however, did not confirm

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[2] Although the parties' settlement agreement reserved for trial the issue of the community's interest in each of these IRA accounts, it is not clear from the record that the parties presented evidence on that issue or asked the court to determine it. In any event, except as discussed *infra* ¶¶ 8-9, Husband does not take issue on appeal with the court's failure to decide whether the community had an interest in the accounts and, if so, the extent of that interest.

or award Wife her sole and separate interest in that IRA (which was rolled into one of her IRAs, either No. 9919 or No. 5005).

¶10 Our order that IRA No. 8814 should be awarded to Husband on remand, *supra* ¶ 7, should resolve this issue appropriately. If the superior court determines on remand that equity demands that the account be awarded to Wife, however, the court shall award $18,136.26 from the account to Husband as his sole and separate property.[3]

C. Wife's Withdrawal from Savings Account.

¶11 Husband next argues the court erred by failing to reimburse him for his community interest in $20,000 that Wife withdrew from the parties' savings account. In her pretrial statement and written closing argument, Wife conceded she removed $20,000 from the savings account and owed Husband an offset of $10,000. The value of the account as of the date of service of the petition for dissolution was $301.91; however, the decree awards Wife the account at a value of $10,000.

¶12 Wife argues the court did not fail to compensate Husband for the withdrawal because Husband had possession of

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[3] Because Wife did not file a cross-appeal and does not request relief from the court's failure to determine her separate property interest in her IRAs, we cannot order the superior court to reconsider the matter. *See* ARCAP 13(b)(3) (a cross-appeal is required if an appellee seeks to enlarge her rights or lessen the appellant's rights); *Wineglass,* 12 Ariz. App. at 575-76, 473 P.2d at 500-01 (a court cannot grant relief not requested).

other community funds and owed her an offset of $3,409.52 for her share of those funds. Further, she contends the equalization payment takes into account other expenses Husband owes her. The decree does not mention these purported arrearages or expenses, however.

¶13 Although we may infer any findings necessary to sustain the decree, *Bender v. Bender,* 123 Ariz. 90, 92, 597 P.2d 993, 995 (App. 1979), under the circumstances, we cannot infer the court intended to compensate Wife for any arrearages and expenses by reducing the $10,000 offset Wife agreed she owed Husband.[4] Therefore, when it calculates an equalization payment on remand, the court must take into account the $20,000 Wife took from the savings account.

D. ALPA Claim.

¶14 Husband has worked for Delta Air Lines since March 1987. He testified that in connection with Delta's bankruptcy, company pilots made certain prospective salary concessions in exchange for an unsecured claim and notes ("ALPA claim"). According to Husband, the salary concessions began June 1, 2006 and run through December 31, 2012. In the decree, the superior court ordered the parties to "work together to determine the community interest in the ALPA Note and Claim. The parties

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[4] We decline to address the merits of the purported expenses and arrearages because Wife did not file a cross-appeal. *See supra* note 3.

shall each receive one-half the community interest." Husband argues the court erred by not resolving what portion of the ALPA claim is his separate property.

¶15 In his pretrial statement and at trial, Husband asserted that, based on the duration of the contract (79 months) and length of marriage during the contract (16.5 months), only 21 percent of the ALPA claim is community property. Husband argues the ALPA claim is compensation for a prospective voluntary reduction in pay incurred by the pilots over the 79 months of the contract; thus, he contends, the portion of the claim representing compensation for reduced pay incurred or to be incurred since service of the petition for dissolution is his separate property. *See* A.R.S. § 25-213(B) (2009) (property acquired after service of a petition for dissolution is separate property). Conversely, Wife argues all or most of the payments are community property because Husband's interest in the ALPA claim accrued during the marriage. Wife contends the ALPA claim payments are in lieu of retirement payments Husband would have received, most of which accrued during the marriage.

¶16 The superior court did not explain whether it adopted Husband's position that the ALPA claim payments are in lieu of future compensation or Wife's position that they are a form of retirement pay. The court should have resolved this issue and determined the percentage that constitutes Husband's separate

property. Therefore, we direct the court on remand to determine whether the ALPA claim was in lieu of compensation or was a retirement benefit and what portion of the claim constitutes Husband's sole and separate property. We leave to the discretion of the court whether to accept additional evidence on the issue.

E. Other Retirement Accounts.

¶17 Husband next argues the superior court erroneously failed to determine the community's interest in a Pension Benefit Guarantee Corporation ("PBGC") account.

¶18 In their Rule 69 agreement, which was received in evidence at trial, the parties specified that "PBGC . . . payments will be divided through a QDRO appropriately for the parties with the valuation date being the date of service, 11/18/07 . . . with the parties each equally paying 50% of the cost associated with the preparation [of the QDRO]." After trial, the court ordered the community interest in the PBGC funds to be determined and divided by a QDRO, but did not determine the community's interest in the account.

¶19 Although the parties apparently did not call the issue to the court's attention, the parties did not agree on the amount of the community interest in the PBGC. In his pretrial statement, Husband stated, "The matter of the PBGC payments being divided by QDRO . . . using the ratio of months method was

agreed on in a Settlement Conference . . . ." By contrast, Wife testified the parties agreed to equally divide the PBGC account.

¶20 Because the parties did not ask the superior court to resolve the issue, we will not address the matter on appeal. *See Stewart v. Mut. of Omaha Ins. Co.,* 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991) (issues not raised in the superior court will not be considered on appeal). On remand, the superior court shall determine the method by which the parties' respective interests in the PBGC are to be divided pursuant to the QDRO.

¶21 Husband also argues on appeal that the superior court erred by failing to determine his separate property interest in certain Fidelity retirement accounts. He does not specify the account numbers of these accounts, but we note that in their Rule 69 agreement, the parties agreed that Wife would receive a deferred contribution plan labeled No. 8066 and Husband would receive a pilot's savings plan labeled No. 4779. According to a trial exhibit, these account numbers correspond with accounts maintained at Fidelity. The parties' Rule 69 agreement reserved for trial the amount of offsets to be made from these accounts but did not reserve the issue of apportionment of any community/separate property interests in the accounts.

¶22 Parties are bound by their stipulations unless relieved by the court. *Harsh Building Co. v. Bialac,* 22 Ariz.

App. 591, 593, 529 P.2d 1185, 1187 (1975). Further, "[a] party to an action cannot stipulate to one thing and then later change her mind and withdraw her consent." *Pulliam v. Pulliam,* 139 Ariz. 343, 346, 678 P.2d 528, 531 (App. 1984). Because Husband agreed to the distribution of the Fidelity accounts in the Rule 69 agreement without reserving apportionment as an issue at trial, we affirm the superior court's division of these accounts without apportionment in the decree.

F. The HELOC.

¶23 Husband also argues the court erred by failing to include Wife's withdrawal of $91,000 drawn on the community's home equity line of credit in the value of community property awarded to Wife for purposes of calculating a proper equalization payment.

¶24 The parties' Rule 69 agreement provided that Wife would keep the $91,000 "as her own cash money," and did not specify that that sum would be subject to any offset. We note that Husband did not raise at trial any issue concerning an offset for the $91,000.[5] Given the parties' agreement, we cannot conclude the superior court erred in failing to include the $91,000 in its equalization calculation.

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[5] The only issue concerning the HELOC Husband raised at trial was his entitlement to an offset for the interest he paid on the HELOC.

G. Equalization Payment.

¶25 Husband finally contends the superior court erred in calculating the equalization payment. He argues the court erred by ordering him to pay the entire difference (rather than one-half the difference) between the respective values of the community property awarded to each party.

¶26 In its order, the court calculated Husband owed Wife $143,772.49 to offset its division of the community's interests in real property, vehicles and a handful of other interests. That calculation is not disputed on appeal. As described above, the court then divided the parties' retirement and other accounts, awarding to Husband property totaling $722,721.44 and to Wife property totaling $529,509.26. Thus, the court awarded to Husband $193,212.18 more in these accounts than it awarded to Wife. The court then ordered Husband to make an equalization payment of $336,981.67, which it apparently calculated by adding $193,212.18 to the other offset amount of $143,772.49.[6]

¶27 The effect of the court's ruling is that Wife will receive $866,490.93 of community property, while Husband will receive $385,789.77.[7] Although the court found that the result

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[6] We recognize this sum is off by $4.00.

[7] Wife receives a total of $866,490.93 calculated as follows: $529,509.26 (community property Wife received) plus $336,981.67 (equalization payment ordered) equals $866,490.93. Husband, however, receives a total of $385,739.77 calculated as follows:

was an equitable division of the community property, on the record presented, we cannot agree. *See In re Marriage of Inboden,* 223 Ariz. 542, 544, ¶ 6, 225 P.3d 599, 601 (App. 2010) (equitable division of property pursuant to A.R.S. § 25-318(A) generally requires a substantially equal division unless a sound reason exists supporting a contrary result).

¶28 We do not infer from the court's order that it intended by the equalization payment it imposed to direct anything other than a roughly equal division of the community property subject to allocation at trial. By the manner in which it calculated the amount of the payment, however, the court caused a decidedly unequal division in favor of Wife. Indeed, it appears the court mistakenly ordered Husband to pay to Wife the *total* amount of the difference between the two community property awards, rather than *half* of the difference. Accordingly, we vacate the amount of the equalization payment ordered and, on remand, direct the superior court to reconsider the amount of the equalization payment consistent with this decision.

CONCLUSION

¶29 For the foregoing reasons, we vacate the portions of the dissolution decree specified above and remand to the

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$722,721.44 (property Husband received) minus $336,981.67 (equalization payment ordered) equals $385,789.77.

superior court for further proceedings consistent with this decision. We deny Wife's request for attorney's fees. We award Husband his costs on appeal, contingent on compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN
Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge