

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: 01/03/2012
RUTH A. WILLINGHAM,
CLERK
BY: GH

In re the Marriage of:) 1 CA-CV 10-0882
)
HASKELL S. WRIGHT,) DEPARTMENT D
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate Procedure)
JOAN M. WRIGHT,)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FN 2006-051059

The Honorable Michael D. Gordon, Judge

AFFIRMED

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Peoria

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T H O M P S O N, Judge

¶1 Joan Wright ("Wife") appeals from the trial court's denial of her post-decree petition for orders regarding a

purported marital asset. Her principal argument centers on the court's determination that the asset was intentionally omitted from the stipulated decree of dissolution thereby precluding the asset's post-decree division between Wife and Haskell Wright ("Husband"). For the reasons that follow, we find no error and therefore affirm.

BACKGROUND

¶12 Husband and Wife were married on January 2, 1971, and Husband initiated dissolution proceedings on May 23, 2006. The trial court entered a consent decree of dissolution ("Decree") on January 25, 2007. Wife petitioned the court on October 31, 2007 for an order requiring Husband to provide an accounting of an oil well asset (the "Oil Well") that was allegedly owned by the parties' trust ("Trust"). Wife also requested the court order Husband to pay her one-half of all income he had earned from the Oil Well and that he pay her one-half of all future disbursements. Wife conceded that the Decree did not delineate the Oil Well as a marital asset.

¶13 The parties cross-moved for summary judgment on this issue with Husband arguing that the Oil Well was never properly conveyed to the Trust,¹ and alternatively, that the parties

¹ The Oil Well belonged to Husband's parents' trust and was conveyed to the beneficiaries, including Husband, upon the parents' deaths before ownership was allegedly transferred to the Trust.

mutually understood the Oil Well was Husband's sole and separate property, which they intentionally did not include in the Decree to be divided as a marital asset. Wife argued that although Husband acquired the Oil Well as his separate property, he transmuted it to community property when he transferred the Oil Well to the Trust, and she argued a fact issue existed regarding the parties' intent to omit the Oil Well from the Decree. Specifically, Wife asserted "[Husband's] beneficiary interest in the [Oil Well] was not considered or appropriately considered during the dissolution process." The court found that the Oil Well asset was transmuted to community property as a matter of law when it was transferred to the Trust, but the court determined a factual issue remained as to whether the parties (1) intentionally omitted the asset from the Decree because they intended it to be Husband's separate property, or (2) inadvertently omitted the asset whereby it would remain community property. Accordingly, the court held an evidentiary hearing on August 23, 2010 to resolve this issue.

¶4 Husband and Wife each testified at the hearing and introduced various documents into evidence. At the conclusion of the hearing, the court found "by clear and convincing evidence, that both parties intended to omit [the Oil Well] as an asset in the decree." Accordingly, the court declined to divide the asset pursuant to Arizona Revised Statutes ("A.R.S.")

section 25-318(D) and denied Wife's petition. Wife unsuccessfully sought a new trial under Arizona Rule of Family Law Procedure ("Rule") 83 or alternatively relief from judgment pursuant to Rule 85. Wife appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (5)(a) (Supp. 2011).

DISCUSSION

¶15 In a marriage dissolution proceeding, if the decree of dissolution makes no provision for commonly held property, A.R.S. § 25-318(D) provides: "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."

¶16 Wife raises various arguments challenging the propriety of the trial court's denial of her post-decree petition to divide the Oil Well asset. She contends the court erroneously "determined an intentionality requirement was embedded in section [25-]318(D),"² in violation of the Arizona Constitution. See Ariz. Const. art 2, § 4 ("No person shall be deprived of life, liberty, or property without due process of

² We note, however, that in her cross-motion for summary judgment, Wife requested the court to determine whether the parties intended to omit the Oil Well from the Decree: "Alternatively, if the Court believes there is a question of intent of the parties [regarding omitting the Oil Well from the Decree], then the Court must set an evidentiary hearing"

law."). She also challenges the court's reliance on parol evidence to interpret the Decree,³ and she argues the court "was divested of subject matter jurisdiction to further address the [Oil Well asset]" once the court determined the Oil Well was community property when the court disposed of the summary judgment motions. These arguments are without merit.

¶7 Our opinion in *Thomas v. Thomas* is dispositive. 220 Ariz. 290, 205 P.3d 1137 (2009). In that case, the parties in a dissolution proceeding intentionally omitted any reference to a marital asset, a condo, in their stipulated decree. *Id.* at 291, ¶ 2, 205 P.3d at 1138. Approximately eight months after the decree, husband conveyed the condo to wife by quitclaim deed. *Id.* at ¶ 3. Years later, husband requested the trial court award him half the condo's equity. *Id.* at ¶ 2. The court held a hearing and granted husband's request. *Id.* at ¶ 6.

¶8 Wife appealed arguing that, upon entry of the dissolution decree, the condo lost its character as a marital asset because the decree was silent regarding the condo's allocation among the parties. *Id.* at 292, ¶ 7, 205 P.3d at 1139. Thus, according to wife, the trial court lacked jurisdiction to order her to convey any interest in the condo to

³ Because in her opening brief Wife acknowledges that the parties omitted the Oil Well from the decree because the parties believed it belonged to Husband, we need not address this challenge.

husband. *Id.*; see *Weaver v. Weaver*, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982) (“[A] dissolution proceeding . . . [is] a statutory action, and the trial court has only such jurisdiction as is granted by [Title 25].”). Relying on the plain language of § 25-218(D), we agreed with wife and determined that the lack of reference to the condo in the decree transmuted the condo from community to separate property. *Thomas*, 220 Ariz. at 292, ¶ 10, 205 P.3d at 1139. Because the condo was no longer marital property, we noted it was not subject to Title 25, and we thus held that the trial court lacked statutory authority in the dissolution action to rule on the parties’ dispute pertaining to ownership of the condo. *Id.* at 294, ¶ 16, 205 P.3d at 1141.

¶19 *Thomas* controls the outcome in this case. Here, the court found, and Wife does not challenge,⁴ that the parties intentionally did not refer to the Oil Well in the Decree. As a result, the Oil Well became either the separate property of both Wife and Husband pursuant to A.R.S. § 25-318(D) or was left to

⁴ Even if Wife did contest the court’s factual finding, we would affirm it because the evidence at the hearing supports the court’s conclusion regarding the parties’ intent. See *Donahoe v. Marston*, 26 Ariz. App. 187, 191, 547 P.2d 39, 43 (1976) (appellate court bound by trial court’s factual findings that are supported by the record unless they are “clearly erroneous, giving due regard to the opportunity of the trial court to view the evidence and weigh the credibility of witnesses.”).

Husband if this was the parties' intent.⁵ In either case, the property was not a marital asset when Wife sought relief post-decree and thus was not subject to the authority of the court in the dissolution action. Accordingly, the family court, following *Thomas*,⁶ properly determined that it did not have statutory authority to resolve the dispute between the parties over the income from the Oil Well. Consequently, we affirm the court's order denying Wife's post-decree petition.⁷

⁵ Husband does not argue on appeal that Wife waived her claim that the Oil Well was community property by allowing it to be excluded from the decree, although at trial he argued "that everybody intended the rights [to the Oil Well] to be Husband's." On appeal, Husband acknowledges that "under A.R.S. § 25-318(D) the property as held by the parties is separate property as tenants in common."

⁶ See also *McCready v. McCready*, 168 Ariz. 1, 3-4, 810 P.2d 624, 626-27 (App. 1991) (property which parties to dissolution acquired post-decree was not a marital asset and was not subject to division under Title 25).

⁷ Because we reject Wife's contention that the trial court incorrectly applied *Thomas*, we also affirm the court's denial of Wife's requested relief pursuant to Rules 83 and 85.

CONCLUSION

¶10 The family court's order denying wife's post-decree petition is affirmed. We deny Wife's request for attorneys' fees on appeal.

/s/
JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
JOHN C. GEMMILL, Judge