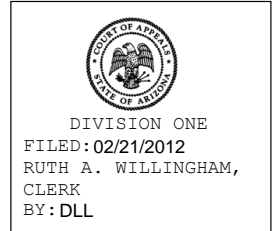


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:)
)
VICI LEE JACOBS,) 1 CA-CV 11-0066
)
Petitioner/Appellee,)
)
v.) DEPARTMENT D
)
DAVID H. HAY,) MEMORANDUM DECISION
) (Not for Publication -
Respondent/Appellant.) Rule 111, Rules of
) Arizona Supreme Court)
)
_____)

Appeal from the Superior Court of Maricopa County

Cause No. DR1997-005189

The Honorable Edward Bassett, Judge

AFFIRMED

Popp Law Firm, P.L.C.
By James S. Osborn Popp
Attorneys for Respondent-Appellant

Tempe

Law Offices of John R. Zarzynski
By Georgia Wilder
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Phoenix

T H O M P S O N, Presiding Judge

¶1 David H. Hay (husband) appeals from the trial court's amended domestic relations order and subsequent orders following

a determination of the appropriate division of his retirement benefits as a police officer. Finding no error, we affirm.

BACKGROUND

¶2 Husband and wife (Vici Lee Jacobs) were married in 1979. The two divorced upon entry of a consent decree in 1997; there was also a property settlement agreement. Husband served as a police officer from September 1975 to March 2010; the two were married for 215 of those 414 months of service. The consent decree contained a provision for spousal maintenance at \$500 per month until husband retired. The property settlement awarded wife half of his retirement benefits from the Arizona Safety Personnel Retirement System (System).¹ Soon thereafter, a Qualified Domestic Relations Order (QDRO) was done which stated the wife is entitled to an amount of the pension which was to be calculated with "the numerator of which is the number of months the parties were married to each other while Participant was employed as a Public Safety Employee . . . and the denominator of which shall be the total months of service . . . times fifty percent."

¶3 Husband opted to forgo retirement in April 2005 and elected to enter the Deferred Retirement Option Plan (DROP). Five years later, in April 2010, husband left service; between

1 Other community property, including deferred compensation and pensions, are not at issue in this appeal.

2005-2010 husband continued to pay wife spousal maintenance.

¶4 In 2005 the System calculated wife's benefits as 30.37% (215/354 months x 50%); in 2010 the System calculated her benefits as 26% (215/414 x 50%). Wife filed a Motion for Entry of Amended Domestic Relations Order to correct the System's award back to 30.37%. Husband objected and alternatively argued that he should get credit for the \$30,000 spousal maintenance paid during that five years.

¶5 After briefing and a hearing, the trial court entered an order amending the domestic relations order to 30.37% of the pension benefits and denying an offset for spousal maintenance. The court denied fees to all parties. Husband's motions for reconsideration and a new trial were denied. Husband timely appealed.

ISSUES ON APPEAL

¶6 Husband asserts on appeal that:

1. The amended domestic relations order unlawfully modified the consent decree and QDRO to include DROP funds, where there were no findings justifying a reopening of the judgment and where DROP funds did not exist during the marriage.
2. The trial court erred in determining that husband's total months of service excluded the five years during the DROP program.
3. The trial court erred in failing to order

reimbursement of spousal maintenance accrued during the DROP period if husband was not entitled to credit for those five years of service.

DISCUSSION

A. DROP Funds

¶7 Husband asserts the trial court erred in awarding wife DROP funds as those funds were not created during the marriage, but rather between 2005 and 2010. He asserts that to award DROP funds modifies the parties' settlement agreement and the judgment. Wife argues that the amended DRO actually enforces the original consent decree and property settlement agreement. The facts are not in dispute. We review legal questions arising from the family court's division of retirement benefits de novo. See *Danielson v. Evans*, 201 Ariz. 401, 406, 36 P.3d 749, 754 (App. 2001).

¶8 Pensions are a form of deferred compensation and any portion of the plan earned during marriage is community property subject to equitable division at dissolution. *Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986) (citations omitted). When the pension is divided pursuant to Arizona Revised Statutes (A.R.S.) § 25-318, each spouse receives an immediate, present, and vested separate property interest in the pension, even though the non-employee spouse has no control over it. See *id.* Earnings after the dissolution of

the marriage, of course, are the separate property of employee-spouse. *Id.* The issue, then, is whether the DROP monies are husband's separate earnings, earned from 2005-2010 after the marriage, or not.

¶9 Under DROP, a member of the System with twenty years of credited service who is eligible for normal retirement may elect to participate and then shall "voluntarily and irrevocably" designate a retirement date of up to sixty consecutive months into the future and agrees to terminate employment on the designated date. See A.R.S. §§ 38-844.02, -844.03(A), (B) (2011). Then, for the designated time period, the employee's retirement benefits are deposited into an individual account to draw a prescribed interest rate. A.R.S. §§ 38-844.03(B) (2)-(4), -844.05 (2011).

¶10 Under DROP, the employee continues to work and draw a salary for up to five years but does not collect pension benefits and does not accrue additional pension benefits. A.R.S. §§ 38-844.03(B) (2)-(4). The employee no longer contributes to the retirement fund. A.R.S. § 38-844.06(A) (2011). The DROP monies are then paid out, in a lump sum, upon actual retirement. A.R.S. § 38-844.02. And, as specifically outlined by statute, husband's retirement benefits vested on the day he filed his pension application in 2005. See A.R.S. § 38-844.01 (2011).

¶11 DROP, therefore, allowed husband to unilaterally defer both his and wife's separate shares of the pension into an interest-bearing account while he continued to work and draw salary for five years while no longer making contributions to the retirement account. The funds that went into DROP were, in part, wife's. The interest generated by deferring payment of pension payments in 2005 into DROP, is also, in part, wife's.

¶12 We find, as the family court did, that DROP merely delayed the previously-established retirement benefits. The amended DRO fulfills the original division of property outlined in the consent decree and property settlement.

B. Calculation of Service

¶13 Husband next asserts that the family court abused its discretion in calculating his total months of service when amending the DRO. The System evaluated husband's pension twice. In 2005, upon husband's election to join DROP, the System calculated wife's share as 30.37% of the monthly payout. In 2010, upon completion of the DROP, the System found that number to be 26% because it included the five years between 2005-2010.

¶14 The trial court determined that the extra-five years during the DROP period did not count, leaving the total months of service at 354. We agree. Husband is not entitled to an additional five years of credit for service from 2005-2010. As

previously described, husband's continued service did not count; no additional contributions were made and no additional benefits were accrued, and therefore those five years cannot be used to calculate months of service. The court is affirmed.

C. *Offset of Spousal Maintenance*

¶15 Finally, husband asserts that he should have received an offset for spousal maintenance paid during the DROP period.² We disagree.

¶16 The award of spousal maintenance was to run until wife "becomes eligible to receive her portion of the Arizona Public Safety Retirement." Wife was not eligible to draw "her portion" from 2005-2010 because husband unilaterally and voluntarily entered DROP. As husband states in his opening brief, her interest "is derivative of Mr. Hay's interest."

¶17 Husband voluntarily elected to join DROP and to continue to work and draw a full salary rather than draw a pension. Wife should not have to go five years with neither the maintenance nor pension benefits contemplated in the original decree and settlement agreement, based on husband's election to join DROP. Husband, had he wanted to assert this, should have sought modification in 2005.

¶18 For the above stated reasons, the court's denial of an

² The amount and duration of spousal maintenance is determined pursuant to A.R.S. § 25-319 (2007).

offset for spousal is affirmed.

/s/

JON W. THOMPSON, Presiding

Judge

CONCURRING:

/s/

MAURICE PORTLEY, Judge

/s/

JOHN C. GEMMILL, Judge