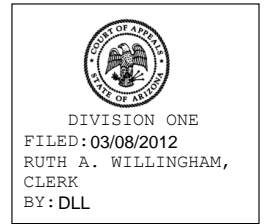


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



In re the Marriage of: ) No. 1 CA-CV 11-0221  
)  
THEODORE CRAIG TROSETH, ) DEPARTMENT E  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
)  
v. ) Not for Publication  
) (Rule 28, Arizona Rules  
MAUREEN YVONNE TROSETH, ) of Civil Appellate Procedure  
)  
Defendant/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-050932

The Honorable Shellie F. Smith, Judge Pro Tem  
The Honorable Paul A. Katz, Judge, Retired

**AFFIRMED**

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Law Office of Shaw & Gould Phoenix  
By: Jason A. Gould  
Attorneys for Plaintiff/Appellant

Sallquist, Drummond & O'Connor Phoenix  
By: Dean W. O'Connor  
Attorneys for Defendant/Appellant

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G E M M I L L, Judge

¶1 Wife appeals the family court's order regarding apportionment of her husband's retirement benefit plan. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife submitted a consent decree that was accepted and signed by the family court in January 2009. The consent decree ordered that Wife was "entitled to receive, from the proceeds of the sales of the parties' two real properties, one of which is already sold, and the other is for sale, reimbursement for her contribution to the former marital residence." Husband was ordered to pay Wife \$321,000. Wife was to immediately receive \$93,000 from the sale of the parties' Glendale property, which was in escrow at the time of the consent decree, and the remaining balance after the sale of the parties' New River property. Further, Husband was to receive \$80,000 from the sale of the homes and any remaining balance was to be divided equally between Husband and Wife. The consent decree further ordered:

that the retirement benefits Husband receives from the [f]ederal [g]overnment will be divided equally, fifty-fifty, and that any benefits that accrued during the marriage and that each is entitled to fifty percent. To the extent it is possible, a [Qualified Domestic Relations Order ("QDRO")] shall be entered dividing the account so that each party is paid their share directly from the [f]ederal government. Alternatively, if the account cannot be divided under the existing laws, Husband is ordered to pay half of any funds he receives monthly, directly to Wife, which currently is approximately \$5,723.00.

¶13 Wife filed a petition for order to show cause in September 2009. Wife's petition requested the court enter an order to show cause against Husband as to why the following orders should not be entered against him: 1) order dividing the sale proceeds of the New River property; 2) order directing Husband to "pay immediately upon receipt of his Federal Retirement Benefits half to Wife pursuant to the consent decree no later than the 10th of each month post mark and dated, or that a QDRO enter"; 3) attorneys' fees and costs; and 4) any further relief the court may deem just and proper.

¶14 On January 8, 2010, the court ordered that Husband and Wife determine whether a QDRO was needed and, if it was, then the parties were to prepare it. Wife then filed a notice advising the court that the parties had agreed on an attorney to prepare a QDRO on Husband's retirement benefits pursuant to the consent decree.

¶15 Husband filed a petition to modify a prior court order and response to petition for order to show cause in January 2010. Husband asserted that certain provisions of the consent decree "were induced by fraud and misrepresentation, are ambiguous, vague, unenforceable and not a fair and equitable division of the assets and liabilities of the parties and therefore, should be declared void." The provisions in the consent decree that Husband asserted should be modified included

the Wife's right to Husband's retirement benefits. Wife argued in response that the petition to modify a court order should be denied because more than six months had elapsed since the entry of the consent decree, Arizona Rule of Family Law Procedure ("Rule") 85(C)(e) was inapplicable, and Husband had not made a showing to justify relief pursuant to Rule 85(C)(f). The response stated "[i]f [H]usband did, in fact, work in the military prior to his marriage, the QDRO will adjust the payments," and, "[i]f there has been an overpayment by [H]usband, that can be addressed." Wife "recommend[ed] that the [c]ourt allow the QDRO . . . to be entered and that the [c]ourt review whether or not there is any issue regarding whether it is a fifty-fifty division or some other division based upon the length of time [Husband] worked in the armed forces."

¶16 In May 2010, Wife filed a motion to enforce the consent decree regarding Husband's federal government retirement benefits. Wife indicated that the attorney originally agreed upon by the parties did not handle federal retirement accounts, so the parties agreed and consented to use M.W. McCarthy instead. Mr. McCarthy reviewed the consent decree and "indicated a portion of the military retirement benefits accrued prior to the marriage," and he "was concerned that the [d]ecree seemed to call for an even division of the entire retirement pay rather than an even division of the community interest in the

retirement pay." Because Husband did not agree with Wife's interpretation that the parties "agreed to an equal division of [Husband's] benefits," the QDRO could not be finalized. Wife indicated that Mr. McCarthy was "unwilling to proceed" unless the court intervened. Husband filed a response and noted that his position was that "the intent of the parties and their agreement was to divide the retirement equally fifty-fifty only until a QDRO was entered upon which [Husband's] retirement benefits could be equitably divided based on the amount that was earned during the marriage." Husband asserted that the "accrued during marriage" language, in the consent decree, made "it clear that the parties intended to only take into account those benefits [Husband] acquired during the marriage."

¶17 The court held an evidentiary hearing on October 26, 2010, and concluded "page 5 lines . . . 14 through 22 [of the consent decree] are ambiguous, or at least arguably so. Because it starts out the retirement benefits Husband receives from the federal government will be divided equally, and it doesn't distinguish between when they were accrued." Instead, the court believed, the consent decree "should have read that the retirement benefits Husband is currently receiving from the federal government will be divided equally or 50/50 until a [QDRO] dividing the marital interest in that retirement can be executed." The court further explained:

But I think what the intent of the parties really was, and while the law says in the event of an ambiguity the [c]ourt can [] consider parol evidence. And Wife tells me it was the intent of the parties for her to get half of his retirement irrespective of when it vested, Husband tells me that it was the intent of the parties to divide -- to have him pay Wife half of his retirement benefits without getting into higher mathematics and tax consequences until a QDRO could be executed.

And I think without a[] doubt, it was the intent of the parties to have a [QDRO] executed dividing their marital interests in the retirement plan, and only, if and only a [QDRO] couldn't lawfully be drafted to divide that interest, it was the intent to have Husband continue to pay Wife one-half of, arguably either the gross or the net, it has been the net benefit. And Wife could argue it should be the gross benefit.

. . . .

The law is in the case of an ambiguity, the agreement should be drafted against -- excuse me, should be interpreted against the drafter, in this case Wife, or her attorney on her behalf, drafted the agreement with the ambiguity in it.

. . . .

I believe the only construction reasonable of this ambiguous paragraph, . . . is to have the marital interest in the retirement, or approximately 70 percent of the retirement benefits to be calculated by the [QDRO] attorney, divided equally between the parties.

The court ordered "that no later than November 26, 2010, Wife shall pay the retainer fee and execute the fee agreement and

authorization for Mr. McCarthy to go forward on the parties' behalf to divide the community interest in Husband's retirement plan by [the QDRO]." Wife subsequently submitted a motion to amend judgment order or, alternately, motion for relief from judgment or order.

¶18 In December 2010, Mr. McCarthy filed a notice of submission of order apportioning Husband's federal retirement pay to the court. The order was signed by the court and found that Wife was entitled to 37.4% of Husband's retired pay.<sup>1</sup>

¶19 Wife filed a motion for new trial, motion to amend judgment and/or motion for relief from judgment and order. The court denied the motion, and Wife filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A) (Supp. 2011).<sup>2</sup>

#### DISCUSSION

¶10 Wife presents the following five issues on appeal: 1) the court's February 15, 2010 order apportioning Husband's

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<sup>1</sup> The court's order apportioning public health service retired pay reflects two differing percentages, 37.4% and 34.7%. The actual mathematical calculation, outlined in the order, reflects the following: "[T]he community interest in [Husband's retired pay] is 268.8 divided by 359.2, or 74.8%, and Wife is therefore entitled to award of 37.4% of [Husband's retired pay]." Therefore, we presume the subsequent references to 34.7% to be typographical errors.

<sup>2</sup> Unless otherwise specified, we cite the current versions of statutes when no material revisions have been enacted since the events in question.

federal retirement and the court's ruling on the record are inconsistent and not supported by the facts or law; 2) the consent decree signed and entered into by the parties constituted a binding agreement between the parties that the court cannot alter; 3) the family court's rulings violate the doctrine of laches, estoppel, equitable estoppel, and, therefore, the court cannot alter or amend the consent decree; 4) the court improperly denied Wife's motion for new trial or motion to amend judgment and/or motion for relief from judgment; and, 5) the court's ruling and order regarding apportionment of Husband's federal retirement pay is erroneous and not supported by law or fact.

**February 15, 2010 Order**

¶11 Wife's opening brief lists, as issue one, whether the court's order dated February 15, 2010 apportioning federal retirement pay and the court's ruling on the record, are inconsistent and not supported by the facts or law. Later, on the same page of the brief, the brief refers to issue one as relating to a court order dated February 25, 2010 apportioning retirement benefits. We do not have in our record, however, a court order apportioning benefits on either February 15 or February 25. We have in our record a minute entry for a hearing held on February 18, 2010, which was filed February 23, 2010, but the minute entry only reflects the resetting of an



evidentiary hearing regarding contempt to April 7, 2010. No orders apportioning Husband's federal retirement benefits are reflected in that minute entry, or any minute entry in our record around that time period. The brief provides no citation to the record of an order dated either February 15 or 25, and the reply brief provides no further clarification. See ARCAP 13(a)(6) (an appellant's brief shall contain arguments "with citations to the authorities, statutes and parts of the record relied on"); see also *In re Marriage of Downing*, 228 Ariz. 298, \_\_\_, ¶ 11, 265 P.3d 1097, 1100 (App. 2011) (concluding an argument was waived because it was based on "unsupported assumptions"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (finding an argument waived because appellant failed to cite relevant supporting authority and did not adequately develop the argument).

¶12 Therefore, we will not review Wife's asserted issue regarding a February 15 or February 25 order.

#### **Consent Decree**

¶13 Wife argues that the consent decree constituted a binding agreement such that the court cannot alter the terms of the decree. We disagree with Wife's position.

¶14 Husband filed a petition to modify a prior court order pursuant to Rules 85 and 91 and Arizona Rule of Civil Procedure 60. Regarding retirement benefits, Husband requested the court

require the parties obtain a QDRO "to determine a fair and equitable division of [Husband's] retirement benefits." Rule 85(C), like Arizona Rule of Civil Procedure 60(c), permits a court to relieve a party from a final judgment, order, or proceeding for various reasons, including mistake, newly discovered evidence, fraud, discharge of judgment, or "any other reason justifying relief from the operation of the judgment." Ariz. R. Fam. Law P. 85; Ariz. R. Civ. P. 60. Rule 91 permits a party to file a petition to modify or enforce a prior family court order. Ariz. R. Fam. Law P. 91.

¶15 In Wife's response to Husband's petition to modify a court order, Wife asserted Husband had not made a showing to justify relief pursuant to Rule 85(C)(f). Husband, however, was not trying to argue the consent decree was invalid. He instead wanted the court to order the parties to obtain a QDRO, a concept that was already referenced in the consent decree. The consent decree indicated that "[t]o the extent it is possible, a QDRO shall be entered dividing the account so that each party is paid their share directly from the [f]ederal government."

¶16 We agree that, ordinarily, a consent decree would constitute a binding agreement. The problem here is that the language of the decree is unclear as to what was meant regarding the division of Husband's retirement income, and therefore it

was necessary for the family court to receive evidence and make findings determining the meaning of the decree.

¶17 Therefore, we find the court did not abuse its discretion by interpreting the terms of the consent decree.

#### **Doctrine of Laches, Estoppel, and Equitable Estoppel**

¶18 Wife argues that the court should have found that Husband was estopped from claiming a division other than 50/50, especially because he had paid Wife half of his retired pay for one year and ten months prior to the court's decision.

¶19 We review a court's application of estoppel and the doctrine of laches for an abuse of discretion. *McLaughlin v. Bennett*, 225 Ariz. 351, 353, ¶ 5, 238 P.3d 619, 621 (2010); *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007). "To establish equitable estoppel, a party must generally show: (1) affirmative acts inconsistent with a claim afterwards relied upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting from a repudiation of such conduct." *McBride v. Kieckhefer Assocs., Inc.*, 228 Ariz. 262, \_\_\_, ¶ 23, 265 P.3d 1061, 1066 (App. 2011). Wife has not proven the elements of equitable estoppel.

¶20 At the evidentiary hearing, Husband testified that he had been paying Wife half of his retired pay because that is what had been ordered by the consent decree, but that it was his

understanding that a QDRO would be prepared and would "divide up the monies properly to see who is entitled to what." Husband never intended for Wife to receive half of the retired pay that he had accrued prior to marriage.

¶21 Furthermore, Wife was aware that her payment amount may change due to a QDRO being ordered. The consent decree prescribed "[t]o the extent it is possible, a QDRO order shall be entered dividing the account so that each party is paid their share directly from the [f]ederal government." The consent decree also stated that "[a]lternatively, if the account cannot be divided under the existing laws, Husband is ordered to pay half of any funds he receives monthly, directly to Wife, which currently is approximately \$5,723.00." Further, in Wife's response to Husband's petition to modify a court order, Wife indicated "[i]f [H]usband did, in fact, work in the military prior to his marriage, the QDRO will adjust the payments," and, "[i]f there has been an overpayment by [H]usband, that can be addressed." Wife was therefore aware, prior to the evidentiary hearing that changes could occur to her payments.

¶22 A delay constituting laches "must be unreasonable under the circumstances . . . and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief." *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81,

84 (1993). Wife argues that Husband "did not raise the issue of a division other than 50/50, until the idea was given to him apparently by Mr. McCarthy, the attorney that was preparing the QDRO order." Even if true, this is not the kind of delay that would support a finding of laches. Wife experienced no delay in actual payments during the court proceedings because Husband paid her half of his whole retired pay for one year and ten months, as she concedes. And Wife experienced no financial prejudice from the delay in resolution of the QDRO issue.

¶23 As already noted, the desirability of a QDRO was mentioned in the consent decree, and Husband understood that a QDRO would be prepared to divide up the money properly. Husband testified that it was never his intention for Wife to receive half of his retired pay accrued prior to marriage. Part of the delay in the creation of the QDRO was based on the fault of both parties, as the original attorney chosen did not handle federal retirement accounts. Additional delay was due to Mr. McCarthy's assertion that because a portion of the retirement benefits accrued prior to the marriage, he was concerned that the decree may have called for an even division of the whole retirement pay, and he was unwilling to proceed without court intervention and clarification.

¶24 For these reasons, the doctrines of laches, estoppel, or equitable estoppel are not applicable.

## **New Trial**

¶25 Wife argues the court erred in denying her motion for new trial or motion to amend the judgment and/or motion for relief from judgment. We review a denial of a motion for new trial for an abuse of discretion. *McBride*, 228 Ariz. at \_\_\_, ¶ 16, 265 P.3d at 1065.

¶26 As an initial matter, Wife's opening brief fails to provide any authority for her argument. See ARCAP 13(a)(6). On appeal, Wife argues that the court erred because the consent decree "is a final judgment and enforceable by the [c]ourt, and that [Husband] has failed to show any justifiable hardship or injustice such that it should be altered or amended and that the language is clear and not ambiguous." In Wife's motion for new trial, Wife asserted that the ruling regarding a modification for the consent decree was inconsistent with the decree and the testimony of the parties. We disagree with Wife's characterization of the court's rulings.

¶27 The court found the consent decree to be "ambiguous" regarding the division of Husband's retirement income. The court received evidence, considered the intent of the parties, and concluded that the parties intended "to have a [QDRO] executed dividing their marital interests in the retirement plan, and only, if and only a [QDRO] couldn't lawfully be drafted to divide that interest, it was the intent to have

Husband continue to pay Wife one-half of . . . the net benefit." In interpreting the consent decree, the court found the reasonable interpretation was to divide the community interest in the retirement benefits equally between the parties. If the consent decree had been clear and unambiguous, there would have been no need for interpretation and clarification. In light of the ambiguous language of the decree, interpretation was necessary. See *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993) ("Interpretation is the process by which we determine the meaning of words in a contract."). The court was not modifying or changing the meaning of the decree; rather, the court was determining the intent of the parties and the meaning of the decree.

¶28 The testimony and evidence presented at the evidentiary hearing supports the court's ruling. Therefore, the court did not abuse its discretion in denying the motion for new trial, motion to amend judgment, and/or motion for relief from judgment.

#### **Apportionment of Husband's Retirement Benefits**

¶29 "In Arizona, [federal] retirement benefits earned during the marriage are community property and are thereby subject to division in a dissolution proceeding according to Arizona law and without regard to the laws of other states."

*Steczo v. Steczo*, 135 Ariz. 199, 202, 659 P.2d 1344, 1347 (App. 1983) (citation omitted); see A.R.S. 25-318 (Supp. 2011).

¶30 In its order apportioning public health service retired pay, the court found that the community interest in Husband's federal retirement pay was 74.8%, thereby entitling Wife to 37.4% of Husband's retired pay.

¶31 While Wife argues that the court's apportionment was erroneous and not supported by law or fact, Wife fails to provide us with any statute or case law supporting her argument. The court's apportionment was accomplished through a QDRO order created by an experienced attorney, Mr. McCarthy, who was jointly selected by the parties as the attorney to complete the QDRO. On this record, the court did not err in apportioning the retired pay in accordance with Mr. McCarthy's recommendations, which included the concept that Wife was not entitled to a share of retired pay accrued by Husband prior to their marriage.

#### **Attorneys' Fees**

¶32 Husband requests attorneys' fees pursuant to A.R.S. §§ 25-324 (Supp. 2011), 12-341 (2003), 12-342 (2003), and Arizona Rule of Civil Appellate Procedure 21. In our discretion, we decline to award attorneys' fees. Husband, as the prevailing party on appeal, is entitled to an award of his taxable costs on appeal upon his compliance with Arizona Rule of Civil Appellate Procedure 21.



**CONCLUSION**

¶33 For the foregoing reasons, we affirm the family court's rulings and order.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge