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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: 05/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0449
)
DANNETTE MAGEDSON,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication-
v.) Rule 28, Arizona Rules
) of Civil Appellate
GARY MAGEDSON,) Procedure)
)
Respondent/Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-006902

The Honorable David J. Palmer, Judge

AFFIRMED

Andrew G. Galasky, P.C. Tempe
By Andrew G. Galasky
And
J. Douglas McVay, Attorney at Law Phoenix
By J. Douglas McVay
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Attorneys for Petitioner/Appellee

O R O Z C O, Judge

¶1 Gary Magedson (Husband) appeals the family court's order denying his Motion to Alter, Amend, or Vacate and the underlying ruling that Husband was not entitled to relief from the consent decree. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Dannette Magedson (Wife) entered a consent decree for dissolution of their marriage in March 2009. The decree approved and incorporated a property settlement agreement (PSA). The PSA provided that Husband would receive, among other assets, two parcels of real property: a residential property and a commercial property located on West Geneva Drive (the Geneva Property). The parties agreed that an equitable division of the community property required Husband to make an equalization payment to Wife in the amount of \$725,000, which was secured by a lien on the Geneva Property. The PSA provided that the equalization payment was:

in full and complete satisfaction of a disagreement between the parties as to the equity value of [the Geneva Property]. Although the parties disagreed as to the equity value of [the Geneva Property], the figure of \$725,000 has been agreed upon and is in full and complete satisfaction of any claims made by Wife with regard to [the Geneva Property].

The property disposition provided, "The divisions and transfers of real property, personal property, assets and/or accounts

between the parties as herein provided are effective immediately and are irrevocable."

¶13 In addition to the provisions dividing property, the parties agreed to the following spousal maintenance provision:

Husband shall pay non-modifiable spousal maintenance to Wife in the amount of \$2500 per month for a period of seventy-two (72) consecutive months, or until Wife has been paid the sum of \$725,000 by Husband or until the sale of [the Geneva Property] and payment to Wife of \$725,000 from the proceeds of the sale of [the Geneva Property] or until the death of Wife, whichever first occurs. Husband and Wife have expressly agreed and inform the Court that Wife's remarriage will not terminate Husband's obligation to pay spousal maintenance. It is the intention of the parties that Wife shall be paid \$725,000, less any prepayments, if any, made by Husband, directly out of the proceeds resulting from a sale of [the Geneva Property]. For this reason, Husband's obligation to pay spousal maintenance shall also terminate upon sale of [the Geneva Property] and the payment to Wife of \$725,000 from the proceeds of the sale of [the Geneva Property].

¶14 One year later, Husband filed a petition for relief from judgment pursuant to Arizona Rule of Family Law Procedure 85.C, arguing that due to the precipitous decline in real estate values since the time the parties entered the PSA, the division of assets was no longer equitable. Husband asked the court to decrease his equalization payment based on the reduction in value of the two properties awarded to him in the PSA, also taking into

consideration any reduction in value of the accounts awarded to Wife.

¶15 Wife filed a motion for summary judgment in response to Husband's petition for relief. Wife argued the non-modifiable spousal maintenance obligation and the \$725,000 equalization payment were intertwined because Husband's obligation to pay spousal maintenance terminates upon payment of the equalization payment; therefore, Wife argued, Husband could not amend the equalization payment. She conceded, for purposes of summary judgment, that the Geneva Property "likely had a substantial decrease in value due to economic conditions since the April 6, 2008 appraisal," but noted that although Husband was advised that he could seek his own appraisal of the Geneva Property, he instead chose to rely on the appraisal obtained by Wife nearly one year before the execution of the PSA. Wife urged the court to deny Husband's requested relief because he failed to establish the "extraordinary circumstances" required for relief under Rule 85.C.

¶16 In a minute entry filed November 30, 2010, the family court granted summary judgment in favor of Wife, thereby denying Husband's petition for relief from judgment. The family court found the non-modifiable spousal maintenance provision of the PSA "inextricably joined with the required payment to Wife of

\$725,000." Consequently, the court found it had no jurisdiction to make a modification to the equalization payment.

¶17 Husband filed a Motion to Alter, Amend, and/or Vacate and For New Trial, which the court denied. The court clarified its reasons for finding the equalization payment and spousal maintenance provision intertwined:

The bottom line is that [Husband] is required to pay an equalization payment of \$725,000.00 based upon the perceptions of the parties at the time of dissolution in March of 2009. . . .

[I]t was also contemplated that the distributions of property were irrevocable, with the spousal maintenance requirement non-modifiable, even if [Wife] were to re-marry, UNLESS the equalization payment was made; the sale of the Geneva Property was one of the ways that payment could be funded, and in fact was the only possibility mentioned, and the only property awarded to [Husband] upon which [Wife] received a lien securing her interest. For that reason, the Court found the equalization payment provisions intertwined with the non-modifiable spousal maintenance agreement.¹

¶18 This appeal followed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.2 (Supp. 2011).

¹ The court additionally noted that Husband provided no explanation as to why he waited over one year to file his petition for relief and found it "further interesting to note" that although Husband had the residential property appraised he did not get an appraisal of the Geneva Property prior to entering the PSA.

DISCUSSION

¶9 We review the family court's denial of a motion for relief under Rule 85.C for an abuse of discretion, but we review its interpretation of the PSA de novo. *Birt v. Birt*, 208 Ariz. 546, 549, ¶ 9, 96 P.3d 544, 547 (App. 2004);² *Jordan v. Burgbacher*, 180 Ariz. 221, 225, 883 P.2d 458, 462 (App. 1994). "An abuse of discretion exists when the [family] court commits an error of law in the process of exercising its discretion." *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23, 97 P.3d 876, 881 (App. 2004). In interpreting the PSA, we will attempt to enforce the agreement according to the parties' intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993).

¶10 The parties clearly and unambiguously expressed their intent regarding spousal maintenance in the following provision:

Both Husband and Wife intend that these provisions for the payment of spousal maintenance shall not be modifiable under any circumstances whatsoever regardless of whether any substantial, material and continuing change of circumstances hereafter occurs whether such change of circumstances was foreseeable, not foreseeable, unknown or unanticipated. One of the purposes of this

² Rule 85 is based on Rule 60 of the Arizona Rules of Civil Procedure. Ariz. R. Fam. L. P. 85 cmt. Thus, we use cases interpreting Rule 60.C to guide our analysis. See Ariz. R. Fam. L. P. 1 cmt. ("Wherever the language in these rules is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules.").

subparagraph is to fully express Husband and Wife's mutual intent that spousal maintenance is not intended to be and shall not be modified." (Emphasis added.)

¶11 Our supreme court held in *In re Marriage of Waldren*, 217 Ariz. 173, 171 P.3d 1214 (2007), that A.R.S. § 25-317.G (2007)³ removes jurisdiction from the courts to modify or terminate a non-modifiable spousal maintenance provision, such as the one Husband and Wife agreed to here. 217 Ariz. at 177, ¶ 22, 171 P.3d at 1218.

¶12 Husband does not contest the non-modifiable nature of the spousal maintenance provision but contends the court erred in determining it lacked jurisdiction to modify the equalization payment because it incorrectly found the equalization payment was intertwined with the spousal maintenance obligation. Husband contends that his spousal maintenance obligation is not intertwined with the equalization payment because he could satisfy his obligation by making seventy-two payments of \$2500 each, for a total of \$180,000; thus, he could satisfy his obligation without regard to the \$725,000 equalization payment.

³ Section 25-317.G reads, in relevant part: "[E]ntry of a decree that sets forth or incorporates by reference a separation agreement that provides that its maintenance terms shall not be modified prevents the court from exercising jurisdiction to modify the decree and the separation agreement regarding maintenance"

¶13 Husband misinterprets the PSA because his obligation to make all seventy-two maintenance payments does not exist independent of the equalization payment. By the terms of the PSA, Husband's obligation to continue spousal support is contingent upon when he makes the equalization payment. Husband can pay Wife \$2500 per month for seventy-two consecutive months or until he makes the equalization payment, whether he uses proceeds from the sale of the Geneva Property or some other means to finance the payment. Although Husband could theoretically make all seventy-two maintenance payments, his obligation to continue spousal maintenance terminates upon satisfaction of the equalization payment. If the court were to modify Husband's equalization payment, it would be modifying a condition relating to Husband's spousal maintenance obligation, which the parties have expressly agreed cannot be modified.

¶14 Therefore, we agree with the family court that the equalization payment is intertwined with the non-modifiable spousal maintenance obligation, and thus courts lack jurisdiction to modify the equalization payment.⁴ See A.R.S. § 25-317.G.

⁴ Husband also argues that unlike spousal maintenance provisions there is no statute allowing the parties to deprive the courts of jurisdiction to modify the property provisions of a settlement agreement. As stated above, the equalization payment in this case was intertwined with the spousal maintenance obligation, and therefore § 25-317.G deprives the courts of jurisdiction to modify that portion of the property disposition relating to the equalization payment.

Accordingly, the court did not abuse its discretion in denying Husband's petition for relief.

¶15 However, even assuming the trial court incorrectly found the equalization payment intertwined with the spousal maintenance obligation, Husband is still not entitled to relief under Rule 85.C. "[A]ny property settlement agreement approved by the court may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." A.R.S. § 25-325.B (Supp. 2011).

¶16 Here, the parties agreed at the time they executed the PSA that the division of property was fair. The fact that Husband's real property decreased in value is not an extraordinary circumstance that justifies relief under Rule 85.C. *See Panzino v. City of Phoenix*, 196 Ariz. 442, 445, ¶ 5, 999 P.2d 198, 201 (2000) ("This rule is primarily intended to allow relief from judgments that, although perhaps legally faultless, are unjust because of extraordinary circumstances that cannot be remedied by legal review." (citations and internal quotation marks omitted)). Husband took the risk that the properties would decline in value, just as Wife bore the risk that the properties' values would increase. Any hardship suffered by Husband is outweighed by the compelling societal interest in the finality of judgments. *See Panzino*, 196 Ariz. at 445, ¶ 6, 999 P.2d at 201

(noting that Rule 60.C(6) applies only when the policy favoring finality of judgments is outweighed by "extraordinary circumstances of hardship or injustice" (citations omitted)); cf. *Tippit v. Lahr*, 132 Ariz. 406, 409, 646 P.2d 291, 294 (App. 1982) ("The public policy against the assignment of personal injury claims does not outweigh the compelling societal interest in the finality of judgments.").

¶17 Wife requested attorney fees and costs pursuant to A.R.S. § 25-324 (Supp. 2011) and Arizona Rule of Civil Appellate Procedure 21. We award Wife a reasonable sum of attorney fees and costs, upon compliance with ARCAP 21.

CONCLUSION

¶18 For the foregoing reasons, we affirm the family court's denial of Husband's Rule 85.C petition for relief.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

LAWRENCE F. WINTHROP, Judge