

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

JEANNE Y. DELINTT, NKA: JEANNE BELTRAN GERONIMO,
Petitioner/Appellant,

v.

DANIEL D. DELINTT, *Respondent/Appellee.*

No. 1 CA-CV 18-0640 FC
FILED 3-5-2020

Appeal from the Superior Court in Yuma County
No. S1400DO200901481
The Honorable Levi Gunderson, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Janet H. Metcalf, PC, Yuma
By Janet H. Metcalf
Counsel for Petitioner/Appellant

S. Alan Cook, PC, Phoenix
By S. Alan Cook, Sharon L. Ottenberg
Counsel for Respondent/Appellee

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OPINION

Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

M O R S E, Judge:

¶1 Jeanne Beltran Geronimo ("Wife") appeals from the denial of her petition to require Daniel D. DeLintt ("Husband") to pay her community interest in his federal retirement benefits as of the date he became eligible to retire. We hold that Wife did not waive the right to request an order for direct payment because the decree of dissolution deferred resolution of that issue. Therefore, we vacate the order and remand to the superior court for further proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 During their marriage, Husband worked for the United States Border Patrol. As a federal employee, Husband participates in the Federal Employee Retirement System ("FERS"). 5 U.S.C. §§ 8401-8479. When they divorced in 2010, Husband still worked for the Border Patrol and was not yet eligible to retire.

¶3 The parties agreed to equally divide the community interest in Husband's FERS benefits. Consistent with this agreement, the divorce decree provided that:

The petitioner and respondent shall equally divide the community interest in the FERS defined retirement benefit plan of the respondent . . . [T]he parties shall equally divide the fee of Brian Daum to prepare any necessary domestic relations orders or Federal Retirement Orders to divide the [Thrift Savings Plan] and FERS plans consistent with this decree. The Court reserves jurisdiction to resolve any disputes regarding the division of these retirement plans.

¶4 In December 2017, Wife petitioned to enforce this provision in the decree, alleging that Husband was eligible to retire. Wife asked the court to order Husband to pay Wife her share of the retirement benefits directly if he chose to continue working, as authorized in *Koelsch v. Koelsch*,

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148 Ariz. 176, 185 (1986). The reimbursement payments owed by an employee spouse who chooses to continue working after becoming eligible to retire are known as *Koelsch* payments.

¶5 Husband moved to dismiss the petition, arguing that Wife waived any claim for *Koelsch* payments because she did not request them at the time of the divorce and did not appeal the decree. Husband also argued that federal law precludes *Koelsch* payments for FERS benefits. Wife responded that she did not waive this claim because the decree reserved jurisdiction to determine future payments. The superior court denied the motion to dismiss and ordered the parties to address how *Boncosky v. Boncosky*, 216 Ariz. 448 (App. 2007), affected Wife's right to *Koelsch* payments.

¶6 The parties stipulated that Husband was eligible to retire when Wife filed her petition, but he continued to work and intends to work until 2021, when he turns 57. The superior court concluded that Wife was not entitled to *Koelsch* payments because the decree did not order such payments and Husband's FERS benefits had not matured. The court further concluded that ordering *Koelsch* payments now, without an agreement or prior order, would constitute an improper post-decree modification. The court signed an order, as later amended, directing that Wife receive her share of the FERS benefits only when Husband actually retires. Wife filed a timely notice of appeal, and we have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

¶7 This case presents a question of law which we review *de novo*. See *Danielson v. Evans*, 201 Ariz. 401, 406, ¶ 13 (App. 2001).

I. Wife Did Not Waive the Right to Seek Payments from Husband Because the Decree Reserved Jurisdiction to Consider Future Issues Relating to the Division of the Retirement Benefits.

¶8 The superior court concluded that *Koelsch* would not have applied when the parties divorced because Husband's FERS benefits had not matured, citing *Boncosky*, 216 Ariz. 448. The court also found that ordering such payments now, where the decree did not expressly provide for them, would constitute an improper retroactive modification of the decree. See A.R.S. § 25-327(A) ("The provisions as to property disposition 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."). Husband argues the superior court was correct because *Koelsch*

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predated the decree and Wife should have known to ask that the decree provide for *Koelsch* payments.

¶9 The decree is silent as to the timing and terms of how Wife was to receive her share of Husband's retirement benefits. The parties expressly deferred resolution of those issues, and, by reserving jurisdiction, the court accepted the parties' decision to do so. Unlike the situation in *Boncosky*, Wife waited until Husband was eligible to retire to ask the court to order *Koelsch* payments. See *Boncosky*, 216 Ariz. at 449-50, 453, ¶¶ 3, 6-7, 23 (holding divorce decree improperly attempted to determine *Koelsch* payments fourteen years before the employee spouse was eligible to retire).

¶10 We also find no waiver because, unlike the non-employee spouse in *Quijada v. Quijada*, 246 Ariz. 217, 219, ¶ 1 (App. 2019), Wife did not "agree[] that the community-property portion of retirement benefits will be *paid upon distribution to the employee-spouse*[]" (Emphasis added). In *Quijada*, the non-employee spouse filed a post-decree petition seeking *Koelsch* payments after the employee spouse chose to work past his retirement date. *Quijada*, 246 Ariz. 249, ¶ 4. The court found the non-employee spouse waived the right to seek *Koelsch* payments because, in the divorce decree, which was entered by consent, she agreed to receive her share of the benefits when they were distributed to the employee spouse. *Quijada*, 246 Ariz. at 221, ¶ 10. In contrast, the decree here contained no specific payment terms and expressly reserved jurisdiction over future disputes as to the division of retirement benefits. Accordingly, the superior court erred in concluding that Wife waived the right to request *Koelsch* payments.

II. Husband's FERS Benefits May Be Considered for Purposes of *Koelsch* Payments.

¶11 Alternatively, Husband argues that we should affirm the superior court's order because federal law regulating FERS benefits precludes the direct payments authorized in *Koelsch*. Drawing an analogy to the military retirement benefits addressed in *Barron v. Barron*, 246 Ariz. 449 (2019), Husband reasons that FERS benefits are not mature because he is not entitled to payments until he separates from service. Wife contends that *Barron* is limited to military retirement benefits which are subject to different restrictions. The superior court did not reach this issue because it found the decree did not provide for *Koelsch* payments. We address it here because it is a question of law that will arise on remand. *Buckholtz v. Buckholtz*, 246 Ariz. 126, 131, ¶ 17 (App. 2019) (addressing issues or arguments that "may occur" on remand).

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¶12 In *Koelsch*, 148 Ariz. at 180, the Arizona Supreme Court addressed "how and when a non-employee spouse's community interest in an employee's matured retirement plan is to be paid when the employee wants to continue working, thus delaying the receipt of retirement benefits." The court defined a "matured pension as an 'unconditional right[] to immediate payment.'" *Id.* at 178, n.2. If the employee spouse chooses to continue working after his or her retirement rights have matured, "he or she would be liable to reimburse the non-employee spouse for the property interest in the monthly pension benefit[.]" *Id.* at 185. The court held that trial courts retain discretion "under very limited circumstances" to defer "all or part of the monthly payment owed to the non-employee spouse[]" as long as the deferred payments were repaid with interest and secured by a lien or by an insurance policy naming the non-employee spouse as a beneficiary. *Id.*

¶13 In *Barron*, the Arizona Supreme Court created an exception to *Koelsch*, holding that federal law applicable to military retirement pay ("MRP") did not allow *Koelsch* reimbursement payments. *Barron*, 246 Ariz. at 451-52, ¶¶ 14-18. Specifically, *Barron* recognized that, although MRP is community property, state courts may divide it only "to the extent permitted by federal law." *Id.* at 450, ¶ 10.

¶14 To that end, *Barron* explained that the Uniformed Services Former Spouses Protection Act ("USFSPA"), 10 U.S.C. § 1408, granted state courts "'precise and limited' authority . . . 'to treat disposable retired pay as community property.'" *Barron*, 246 Ariz. at 450, ¶ 7 (quoting *Mansell v. Mansell*, 490 U.S. 581, 589 (1989)). According to 10 U.S.C. § 1408(a)(4)(A), "disposable retired pay" is the monthly pay to which the member is "entitled." *Barron*, 246 Ariz. at 451, ¶ 14. The court pointed out that the legislative history of this statute provides that a member is "entitled" to disposable retired pay only when he or she has "applied and been approved for military retirement benefits." *Id.* at ¶ 15. And the regulation states "it is not enough that the member could, if the member so desired, retire [r]ather, the member must have actually retired from the uniformed service" *Id.* (quoting S. Rep. No. 97-502, at 17 (1982)). The distinction was important because, as the court observed, "military retirement based on years of service is discretionary." *Id.* at ¶ 16; *see also* 10 U.S.C. § 8323 ("An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service . . . may, in the discretion of the President, be retired on the first day of any month designated by the President."). Therefore, a military spouse's interest in military retirement pay "is neither vested nor mature until the member retires *and benefits are approved.*" *Id.* (emphasis added).

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¶15 The rationale underlying *Barron* and its limited exception to *Koelsch* is not applicable here. A FERS participant is "entitled" to benefits upon separation from service, "except by removal for cause on charges of misconduct or delinquency . . . after becoming 50 years of age and completing 20 years of service" 5 U.S.C. § 8412(d)(2). Thus, FERS benefits, unlike military retirement pay at issue in *Barron*, are not contingent on the government accepting the military spouse's application for retirement. As the statute provides, Husband "is entitled to an annuity" immediately upon separation once he has the required number of years of service. *Id.*¹

¶16 Moreover, as discussed in *Barron*, federal law provides "precise and limited" authority to state courts to treat only "disposable retired pay" as community property. *Barron*, 246 Ariz. at 450, ¶ 7 (quoting *Mansell*, 490 U.S. at 589 and 10 U.S.C. § 1408(c)). Neither party has pointed us to similar authority precluding Arizona courts from treating FERS benefits as community property. To the contrary, rather than a narrow grant of authority, the FERS statutes allow division of any "[p]ayments . . . which would otherwise be made to an employee . . . to the extent provided for in the terms of . . . any court decree of divorce" 5 U.S.C. § 8467(a)-(a)(1). Because federal law does not expressly limit the extent to which FERS benefits may be treated as community property, this case does not present the concern addressed in *Barron* about linking *Koelsch*-type payments to future retirement benefits which are not yet community property. *Barron*, 246 Ariz. at 451-52, ¶¶ 16-18. Accordingly, because Husband's FERS benefits are community property to the extent provided in the divorce decree, the superior court may consider Husband's FERS benefits in determining an award of *Koelsch* payments on remand.

¹ *Koelsch* expressly noted that A.R.S. § 38-844.01, which provides that an Arizona Public Safety Personnel Retirement System member does not have a vested right to benefits until he or she applies for and is found eligible for those benefits, did not "affect [its] analysis in [that] case." *Koelsch*, 148 Ariz. at 178 n.2. *Koelsch* does not explain why the statute, which was enacted two years after the parties divorced in *Koelsch*, was not pertinent. *Id.* Because our supreme court continues to cite and rely on *Koelsch*, A.R.S. § 38-844.01 does not appear to alter the *Koelsch* analysis. See *Barron*, 246 Ariz. at 451-52, ¶¶ 13-16 (distinguishing *Koelsch*); *Parada v. Parada*, 196 Ariz. 428, 432, ¶ 16 (2000) (citing *Koelsch*); see also *Blevins v. Gov't Emps. Ins. Co.*, 227 Ariz. 456, 462, ¶ 25 (App. 2011) (finding a statutory change did not implicitly overrule prior precedent when the statute and precedent are reconcilable).

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III. Federal Law Does Not Preclude State Courts from Ordering the Member Spouse to Make Direct Payments to the Non-Employee Spouse when Dividing FERS Benefits.

¶17 Husband argues that an order for *Koelsch* payments to be made directly to the former spouse is an unlawful assignment of FERS benefits in violation of 5 U.S.C. § 8470. Husband also contends that benefit payments to a former spouse allocated in a divorce decree can only be made by the U.S. Office of the Executive Director ("OED"). See 5 U.S.C. § 8467(a).

¶18 The anti-assignment provision in 5 U.S.C. § 8470 states that FERS benefits are "not assignable, either in law or equity, *except under the provisions of section 8465 or 8467 . . .*" (Emphasis added); see also 5 U.S.C. § 8346 (analogous statute applicable to Civil Service Retirement System ("CSRS") benefits).² Section 8467(a) states that the OED shall make FERS benefit payments to another person to the extent expressly stated in the terms of a divorce decree or court order incident to a divorce decree. See also 5 U.S.C. § 8345(j) (analogous statute applicable to CSRS benefits). Therefore, a divorce decree allocating FERS benefits to a former spouse constitutes an exception to the anti-assignment provision in § 8470.

¶19 This conclusion is supported by *McDannell v. U.S. Office of Pers. Mgmt.*, 716 F.2d 1063, 1065 (5th Cir. 1983), which interpreted the nearly identical anti-assignment statute governing CSRS benefits. Compare 5 U.S.C. § 8346(a) (CSRS anti-assignment statute) with 5 U.S.C. § 8470 (FERS anti-assignment statute). After analyzing relevant legislative history, *McDannell*, 716 F.2d at 1065, held that Congress made clear, by amending § 8346(a) and adding subsection (j) to § 8345, that state court orders dividing CSRS benefits were exempt from the anti-assignment provision in § 8346(a).

¶20 As to Husband's claim that only the OED can make payments under § 8467, we again consider the interpretation of the comparable CSRS statute. *McDannell* implicitly recognized that state courts could order direct payments from the employee spouse when it held that the divorce decree

² "On June 6, 1986, Congress enacted the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 1986 U.S.C.C.A.N. (100 Stat.) 514 (FERSA) (codified as amended at 5 U.S.C. §§ 8401-8479 (1988)). In so doing, it created the [FERS] as an alternative to the retirement benefits program existing under CSRS." *King v. Merit Sys. Prot. Bd.*, 105 F.3d 635, 636 (Fed. Cir. 1997).

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did not obligate the Office of Personnel Management to make CSRS payments directly to a former spouse because the decree solely ordered the employee spouse to pay his former spouse directly. 716 F.2d at 1063-64, 1066. The purpose of the statute authorizing the OED to make direct payments to non-employee spouses is to relieve the OED from the burden of deciding spousal entitlements and placing that obligation, more appropriately, on state courts. *Id.* at 1066; *see also Boniface v. Boniface*, 656 S.W.2d 131, 133-34 (Tex. Ct. App. 1983) (stating that the legislative history of § 8345(j) recognizes that state courts should determine spouses' property rights upon dissolution). Thus, these statutes do not preclude an order for payment directly from the member spouse.

¶21 Husband also argues that it is inequitable to order *Koelsch* payments without considering the tax consequences. In *Johnson v. Johnson*, our supreme court declined to consider "the speculative future effect of taxes[,] " but suggested that when the tax consequences "could be immediately and specifically determined[,] " courts must consider them. 131 Ariz. 38, 43 at n.11 (1981); *see also Koelsch*, 148 Ariz. at 186. Accordingly, on remand, if Husband establishes the immediate and specific tax consequences, the court shall consider them. Similarly, because the superior court found waiver, it did not address the amount or propriety of *Koelsch* payments. On remand, our decision does not preclude Husband from urging the court to exercise its limited discretion to defer "all or part of the monthly payment owed to the non-employee spouse[]" subject to repayment with interest and proper security. *Koelsch*, 148 Ariz. at 185.³

³ Husband also contends it is inequitable to order an employee spouse to indemnify the non-employee spouse before the employee spouse actually retires because married couples cannot receive retirement benefits before the employee spouse retires. This argument was not raised in the superior court. Accordingly, because it is waived, we will not address it. *See Nold v. Nold*, 232 Ariz. 270, 273, ¶ 10 (App. 2013).

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CONCLUSION

¶22 Wife did not waive the right to seek payment of her interest in Husband's FERS benefits under *Koelsch* because the decree deferred resolution of that issue. We vacate and remand to the superior court for further proceedings consistent with this decision. We award Wife her costs under A.R.S. § 12-342 upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA