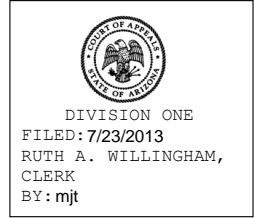


THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) No. 1 CA-CV 12-0039
) 1 CA-CV 12-0076
STEPHEN JOHN NASH,) 1 CA-CV 12-0077
) (Consolidated)
Petitioner/Appellee)
) DEPARTMENT C
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
ALEJANDRA AMARILLA NASH,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Respondent/Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2010-007378

The Honorable Thomas L. LeClaire, Judge

JUDGMENTS REVERSED IN PART AND REMANDED

Dickinson Wright/Mariscal Weeks PLLC Phoenix
By Robert L. Schwartz
Steven D. Wolfson
Anne L. Tiffen
Attorneys for Petitioner/Appellee

Hallier & Lawrence, PLC Phoenix
By Angela K. Hallier

And

Jones, Skelton & Hochuli, P.L.C.
By Eileen Dennis GilBride

J O H N S E N, Chief Judge

¶1 These are consolidated appeals from the superior court's rulings in a dissolution decree. In this decision, we reverse the decree and a subsequent order insofar as they hold and treat the proceeds of the sale of a home as community property.¹

FACTS AND PROCEDURAL HISTORY

¶2 Stephen John Nash ("Father") and Alejandra Amarilla Nash ("Mother") married in 2005. Father filed for dissolution in 2010. In April 2011, Father and Mother filed a Memorandum of Understanding ("Memorandum") pursuant to Arizona Rule of Family Law Procedure ("Rule") 69 that purported to divide their property. The superior court then heard evidence about the treatment of a home that was the only property remaining in dispute. In the decree and in a subsequent post-decree order, the court ruled that the home was community property.

¶3 We consolidated Mother's timely appeals of the decree and the post-trial order. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona

¹ In a separate opinion, we address other issues raised by the decree and post-decree orders. See ARCAP 28(g).

Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013) and -2101(A)(1), (2) (West 2013).²

DISCUSSION

¶4 The home at issue was purchased with Father's separate funds after the parties were married, but was titled in Mother's name alone and was used by Mother's mother. The Memorandum by which the parties agreed to divide their property omitted any reference to the home. On appeal, Mother argues Father waived any right to any interest in the home or its proceeds.

¶5 The Memorandum provided that Father expressly "waive[d] all right he may have to seek or receive a monetary adjustment for any and all funds or property utilized by [Mother] or provided to [Mother] prior to April 12, 2011, or any monetary adjustment or reimbursement for any funds provided to or gifted to any of [Mother's] friends or family prior to April 12, 2011." The superior court accepted Father's argument that the waiver in the Memorandum did not apply to the home because Father did not know when he executed the Memorandum that the home had been titled in Mother's name. Father testified he knew that the children's grandmother lived in the home, and said he thought that when he and Mother purchased the home, title had been placed in the name of the grandmother, not Mother.

² Absent material revisions after the relevant date, we cite a statute's current version.

¶16 The interpretation of a contract is a question of law that we review *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶12, 69 P.3d 7, 11 (2003). "A valid contract must be given full force and effect even if its enforcement is harsh," and, absent fraud, misrepresentation or mistake, "[a] clear and unambiguous contract must be interpreted according to its terms." *Isaak v. Mass. Indem. Life Ins. Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981).

¶17 Citing *State v. Davis*, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972), and *Sosa v. Marine Midland Automotive Financial Corp.*, 158 Ariz. 512, 514, 763 P.2d 1387, 1399 (App. 1988), Father argues the waiver provision in the Memorandum does not apply because "waiver is a voluntary relinquishment of a known right." The cases Father cites consider the circumstances under which the law will imply a waiver from the conduct of a party. The question here is different. The question is not whether Father intended to waive his rights to "any and all funds or property" used or provided to Mother - the Memorandum clearly states that he did. The question is whether, as Father argues, that broad waiver excludes funds and property that Father did not know Mother had used or been provided.³

³ Father does not argue the Memorandum should be rescinded or reformed. See, e.g., *Nelson v. Rice*, 198 Ariz. 563, 566, ¶¶ 7-9, 12 P.3d 238, 241 (App. 2000) (quoting Restatement (Second) of Contracts §§ 152, 154 (1981)) (court may rescind contract on

¶18 In the words of the Memorandum, Father's waiver applied to "any and all funds or property utilized by [Mother] or provided to" her. That language is plain - the waiver is broad, and admits of no exceptions. Father points to no parol evidence to support his contention that he intended the waiver only to apply to money or property he knew Mother had used or taken. The Memorandum was a settlement agreement the parties negotiated through their respective counsel and, as the Memorandum stated, was their "attempt to resolve, with finality to the extent possible, all . . . division of property issues."

¶19 Under these circumstances, by signing the Memorandum, Father accepted the possibility that he was waiving his rights in property or funds unknown to him that might fall within the terms of the waiver. Such a waiver as to "any and all funds or property" is unambiguous and must be enforced. See *The Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1040 (9th Cir. 2011) (negotiated waiver by sophisticated parties of "all claims" included "claims they didn't know they had"). For these reasons, the superior court erred in concluding the Memorandum's waiver did not encompass the home or funds provided for purchase of the home.

basis of mistake where party claiming mistake does not bear risk of mistake).

¶10 The issue of the waiver arose again in an arbitration proceeding conducted after the superior court issued the decree. In that proceeding, the arbitrator at Father's request ruled that the waiver in the Memorandum would apply only to funds or property Father knew about when he signed the Memorandum. By written order entered after Mother's appeal from the decree was pending, the superior court affirmed that ruling. Mother filed an amended notice of appeal from that order.

¶11 As Mother argues, by submitting the issue of the home to the superior court at the dissolution trial, Father waived his right to have the arbitrator address the matter. An arbitration provision is waived by conduct inconsistent with an arbitration remedy. *Meineke v. Twin City Fire Ins. Co.*, 181 Ariz. 576, 582, 892 P.2d 1365, 1371 (App. 1994). In his pretrial statement, Father asked the court to rule that the waiver provision in the Memorandum did not apply to the home because he "could not waive what he did not know." Father made the same request in his written closing argument.

¶12 Because Father waived any right to ask the arbitrator to interpret the waiver provision as applied to the home, the arbitrator's ruling and the superior court's order affirming that ruling are void insofar as they purport to invalidate the application of the waiver in the Memorandum to the home. We reverse the decree insofar as it reflects the superior court's

finding that the proceeds of the sale of the home are community property. On remand, the court shall direct allocation of the proceeds to Mother.

CONCLUSION

¶13 For the reasons stated above, we vacate the decree (and reverse the subsequent order adopting the arbitrator's ruling on waiver) insofar as they hold and treat the proceeds of the sale of the home as community property. On remand, the superior court shall enter such order as is necessary and appropriate to ensure that Mother receives the proceeds of the sale of the home.

_____/s/_____
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge