IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

PAUL ROBERT WRIGHT, *Petitioner/Appellee*,

v.

JENNIFER WRIGHT, *Respondent/Appellant*.

No. 1 CA-CV 16-0492 FC
FILED 2-6-2018

Appeal from the Superior Court in Maricopa County
No. FC2011-050271
The Honorable Cynthia J. Bailey, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

COUNSEL

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By Greg R. Davis
Counsel for Petitioner/Appellee

Berkshire Law Office, PLLC, Phoenix
By Keith Berkshire
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Jennifer Wright ("Wife") challenges the superior court's granting summary judgment for Paul Robert Wright ("Husband") in a dispute over the proceeds of a life insurance policy he procured on his mother's life. Wife also challenges the court's denial of her cross-motion for summary judgment seeking division of the policy proceeds under Arizona Revised Statutes ("A.R.S.") § 25-318(D). We conclude neither party was entitled to summary judgment and thus affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Husband took out a life insurance policy on his mother in 2002. He paid the premiums using community funds, and he received $500,000 in proceeds when his mother passed away in 2009, before he petitioned for dissolution. Upon receiving the proceeds, Husband deposited $200,000 into accounts for the couple's two children, and he used the remainder to make loans to two friends.

¶3 The parties were divorced by consent decree in 2011. The consent decree granted each party, as sole and separate property, "[a]ny and all life insurance policies held in [their name] alone." Wife moved to set aside the decree shortly thereafter, contending Husband had misrepresented that the policy proceeds were an inheritance and therefore his separate property. Following an evidentiary hearing, the superior court denied Wife's motion.

¶4 Wife then asked the court to divide the proceeds under § 25-318(D), which provides that "[t]he community, joint tenancy and other property held in common for which no provision is made in the decree shall be from the date of the decree held by the parties as tenants in common, each possessed of an undivided one-half interest." Husband moved to dismiss Wife's petition on claim preclusion and issue preclusion grounds. The superior court dismissed Wife's petition, and Wife appealed. This

court reversed and remanded, finding that neither claim nor issue preclusion applied. *Wright v. Wright*, 1 CA-CV 13-0761 FC, 2015 WL 1408117 (Ariz. App. Mar. 26, 2015) (mem. decision).

¶5 Following remand, the parties filed cross-motions for summary judgment regarding their rights to the proceeds. The superior court granted summary judgment for Husband without fully explaining its decision. Wife moved for a new trial, which the court denied, stating that it "adopted the findings of fact contained" in Husband's summary judgment motion. The court also awarded Husband attorney's fees based on its finding that Wife acted unreasonably by "pursu[ing] this litigation despite the fact that her own sworn testimony in a previous hearing demonstrated that the asset [in] question was not undivided, but known to both parties at the time of the dissolution and previously allocated to [Husband] prior to the dissolution."

¶6 The superior court entered final judgment under Arizona Rule of Family Law Procedure 78(B), Wife timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶7 In reviewing the court's rulings on the parties' cross-motions, we review questions of law de novo, but we review the facts in the light most favorable to the party against whom summary judgment was granted. *See Nelson v. Phoenix Resort Corp*., 181 Ariz. 188, 191 (App. 1994). Summary judgment is appropriate only if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118 (1978).

I. Husband's Motion.

¶8 The parties agree Husband purchased the policy during the marriage and paid the premiums using community funds, giving rise to a presumption that the policy and its proceeds were community property. *See* A.R.S. § 25-211(A); *Sommerfield v. Sommerfield*, 121 Ariz. 575, 577 (1979). Thus, to prevail on his claim that the proceeds were his separate property, Husband had to present clear and convincing evidence refuting this presumption. *Cockrill v. Cockrill*, 124 Ariz. 50, 52 (1979).

¶9 Husband first contends the decree granted him the proceeds as sole and separate property because the proceeds were initially deposited into a bank account that was subsequently designated as his property in the

decree. But he admitted the proceeds were no longer there when he petitioned for dissolution. Ownership of the account thus is irrelevant.

¶10 Husband alternatively contends that the "personal property provision" of the decree functioned as a catch-all provision, that included the policy proceeds. He cites *In re Estate of Lamparella*, 210 Ariz. 246 (App. 2005), in which we interpreted a decree that granted each spouse "all personal property in their respective possessions and/or control" as sole and separate property. *Id.* at 248, ¶ 5. But the decree in this case contains no such language; it instead granted each spouse specific categories of property as sole and separate property. And Husband conceded that the life insurance proceeds did not fit within any of the defined categories.

¶11 Husband also cites one line of argument from Wife's motion to set aside the decree as evidence that the parties agreed the proceeds would be his sole and separate property:

> Had Wife known that this was a community asset she would never have agreed to allow Husband to retain all of the alleged inheritance.

But when asked about this agreement, Husband only testified that "there was nothing from [Wife's] end as far as trying to get ahold of any of [the proceeds]." Wife, meanwhile, testified that Husband told her from the outset that the proceeds would be "his separate property" and that they "had all been spent." Wife also testified that she would not have agreed to the decree as written had Husband told her the proceeds were "not an inheritance, but rather . . . funds from a life insurance policy." *See* A.R.S. § 25-211(A)(1) (property "[a]cquired by gift, devise or descent" during the marriage is not community property).

¶12 Viewing this evidence in the light most favorable to Wife's position, the record reveals genuine issues of material fact as to the proper classification of the proceeds, which precludes summary judgment. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶ 17 (App. 2012). We therefore reverse the court's ruling granting summary judgment to Husband and vacate the related fee award.

II. Wife's Cross-Motion.

¶13 Wife also challenges the denial of her cross-motion. An order denying summary judgment generally is not appealable, nor is it reviewable on appeal from a final judgment. *Bothell v. Two Points Acres, Inc.*, 192 Ariz. 313, 316, ¶ 7 (App. 1998). We may, however, exercise our

discretion to reach the merits of such an order to avoid piecemeal litigation, *id.*, and we do so here.

¶14 Wife contends the court should have treated the proceeds as community property not provided for in the decree and divided it under § 25-318(D), giving each party an undivided one-half interest in the funds. But even assuming the decree did not allocate the policy proceeds, there remains a question of fact regarding whether the parties intentionally chose to omit them from the decree. *See Thomas v. Thomas*, 220 Ariz. 290, 294, ¶¶ 15–16 (App. 2009) ("Parties who decide together to omit property from their divorce decree cannot then expect the dissolution court to resolve post-decree disputes relating to the property."). Husband testified the parties had "several conversations" about the policy and that Wife "had absolutely given me all rights to that money" before entry of the decree. Wife testified to the contrary. Genuine issues of material fact thus remain as to whether division is appropriate under § 25-318(D).

III. Attorney's Fees on Appeal.

¶15 Both parties request attorney's fees on appeal. In reviewing their requests, we consider "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A).

¶16 The parties' most recent financial affidavits do not suggest a substantial financial disparity. Moreover, neither party took unreasonable positions in this appeal. We therefore decline to award attorney's fees.

CONCLUSION

¶17 We reverse the superior court's ruling granting Husband's motion for summary judgment, affirm its ruling denying Wife's motion for summary judgment, and remand for further proceedings. We also vacate the attorney's fee award to Husband. The superior court may consider awarding attorney's fees, if appropriate, upon resolution of the issues on remand. As the successful party, Wife may recover her taxable costs on appeal upon compliance with ARCAP 21.