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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

DAYNA ROBIN LAMBERT, *Petitioner/Appellee/Cross-Appellant*,

v.

DAVID SHEETS, *Respondent/Appellant/Cross-Appellee*.

No. 1 CA-CV 17-0103 FC
FILED 5-22-2018

Appeal from the Superior Court in Maricopa County
No. FN2012-090423
The Honorable Theodore Campagnolo, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jon W. Thompson and Judge James P. Beene joined.

S W A N N, Judge:

¶1 David Sheets (“Husband”) appeals the superior court’s post-decree domestic relations order awarding Dayna Lambert (“Wife”) a pro rata share of any cumulative interest in his Deferred Retirement Option Plan (“DROP”) account. Wife cross-appeals the court’s denial of her request for attorney’s fees. For the following reasons, we affirm the denial of fees, vacate the order in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Wife served Husband with a petition for dissolution of marriage in March 2012. At the time, Husband was eligible to retire under the Arizona Public Safety Personnel Retirement System (“PSPRS”) pension plan. He was eligible to receive \$3,930.84 per month in benefits upon retirement but chose to continue working. He was qualified to participate in DROP, *see* A.R.S. §§ 38-844.02 *et seq.*, but had not elected to do so.¹

¶3 In November 2015, the parties finalized their dissolution of marriage and consent decree that incorporated a property settlement agreement (“PSA”). The parties agreed to divide Husband’s PSPRS benefit pursuant to *Koelsch v. Koelsch*, 148 Ariz. 176 (1986). Under the agreement, each party received 50% of the community interest accrued through the date of service of the divorce petition.² The parties also agreed that

¹ The Arizona Legislature enacted DROP to allow certain PSPRS members (such as Husband) “to access a lump sum benefit in addition to their normal monthly retirement benefit on actual retirement.” A.R.S. § 38-844.02(A).

² In *Koelsch*, our supreme court addressed “how and when a non-employee spouse’s community property interest in an employee spouse’s matured retirement benefit plan is to be paid when the employee wants to continue working.” 148 Ariz. at 180. The court determined the lump sum

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Husband would make the remaining payments on their joint Chapter 13 bankruptcy plan and would thereafter pay Wife monthly, as non-modifiable spousal maintenance, "one-half of the community monthly benefit Husband would have been entitled to receive from PSPRS as of date of service of the divorce petition." The parties agreed to the amount of \$1,965.42 in spousal maintenance. Upon Husband's retirement, spousal maintenance would terminate, Wife would receive a portion of the PSPRS benefit in "the amount Husband had been paying as spousal maintenance," and Husband would receive the remainder. Wife would not receive an increased benefit resulting from Husband's additional service "because she commenced receiving benefits at the earlier date." The parties also agreed that the prevailing party in an action to enforce the PSA would be entitled to recover reasonable attorney's fees.

¶4 The next year, Wife sought a domestic relations order in connection with her interest in the PSPRS benefit. Husband objected to the provision in the proposed order allocating Wife "a pro rata share of any DROP benefits and contributions" made by him, should he elect to participate in DROP. Wife then amended her proposed order to provide her a share of the "cumulative interest" in Husband's DROP account. Husband again objected, arguing that because Wife had "commenced receiving benefits at the earlier date," she would not be funding the DROP account and therefore, was not entitled to any portion of it.

¶5 After an evidentiary hearing, the court determined that Husband's decision to participate in DROP would "place his PSPRS accrued funds into DROP, from which he will receive a lump sum upon

method was preferable, but "[i]f the lump sum method would be impossible or inequitable, the court can order that the non-employee spouse be paid a monthly amount equal to his or her share of the benefit which would be received if the employee spouse were to retire." *Id.* at 185. Under this approach, the monthly amount "available if the employee spouse were to retire is multiplied by a fraction in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan up to the date of dissolution is the denominator." *Id.* One-half of that amount is awarded to the non-employee spouse. *Id.* "If the employee spouse decides to retire, both shares can be paid directly to the beneficiaries by the retirement agency." However, "[i]f the employee spouse chooses not to retire, he or she would be liable to reimburse the non-employee spouse for the property interest in the monthly pension benefit that is precluded by the employee spouse's decision not to retire." *Id.*

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retirement.” The court concluded that such a decision “has the result of depositing his entire PSPRS account into an interest bearing deferred compensation account.” Therefore, “[Wife] would be entitled to calculate her 50% of the community interest to include interest earned in DROP.” Finally, the court held that the interest earned in DROP constituted an increase due to the “intrinsic quality” of the retirement plan in which Wife would be entitled to share. *See Koelsch*, 48 Ariz. at 185.

¶6 The court awarded Wife (1) an amount equal to 50% of Husband’s pension benefit accrued under the PSPRS as of March 16, 2012 and (2) “a pro rata share of any *cumulative interest* accumulated under DROP.” (Emphasis in original.) The court denied Wife’s request for attorney’s fees. Following several post-trial motions, Husband appealed, and Wife cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2). *See Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 12 (App. 2007) (recognizing the right to appeal from a qualified domestic relations order as a special order after final judgment).

DISCUSSION

¶7 Husband argues the court erred by awarding Wife a share in the cumulative interest in the DROP account. *See* A.R.S. § 25-318(A). We agree. Although property acquired during marriage is presumed to be community property, property acquired after service of the dissolution petition is separate property if the petition results in a decree of dissolution. A.R.S. §§ 25-211(A)(2), -213(B); *Brebaugh v. Deane*, 211 Ariz. 95, 97-98, ¶ 6 (App. 2005). “The characterization of property as separate or community is a question of law we review *de novo*.” *Schickner v. Schickner*, 237 Ariz. 194, 199, ¶ 22 (App. 2015).

¶8 The dispositive question is whether Wife’s property interest in the PSPRS benefit will be used to generate the accumulated interest in Husband’s DROP account.³ We conclude that it will not. Upon Husband’s participation in DROP, he must designate a retirement date no later than five years from the date of his decision and he must retire on the designated date. *See* A.R.S. §§ 38-844.02, -844.03(A)-(B). By participating, Husband

³ In its amicus curiae brief, Phoenix Law Enforcement Association argues the superior court erred to the extent it concluded the entirety of a participant’s PSPRS account is deposited into an interest-bearing account during the DROP period. We agree. *See* A.R.S. §§ 38-844.03(B)(2)-(4), -844.05.

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will not accrue benefits under PSPRS, but rather, his “normal retirement benefit” will be deposited into an interest-bearing account. See A.R.S. §§ 38-844.03(B)(2)–(4), -844.05. In accordance with the consent decree, Husband pays \$1,965.42 per month to Wife, which compensates her for the interest in the PSPRS benefit that is delayed by his decision not to retire. See *Koelsch*, 148 Ariz. at 185. Because Wife’s property interest in the PSPRS benefit will not be used to accumulate interest in Husband’s DROP account, she will not be contributing a share of the “normal retirement benefit” to the account. Accordingly, Wife is not entitled to draw on either the principal or the interest.

¶9 Wife contends that the cumulative interest in DROP may be considered an after-discovered asset and divided under A.R.S. § 25-318(D). We hold otherwise. Wife’s argument presumes that the accumulated interest is community property. However, as noted in *Koelsch*, an increase in the value of a pension benefit is separate property if it is based on the employee spouse’s efforts after dissolution and is community property if it is based on “the inherent quality of the pension plan.” 148 Ariz. at 184 n.9 (citation omitted). We agree with Husband that DROP is the former, not the latter. An “inherent quality” increase is granted “regardless of whether the employee was still working or had retired.” *Id.* Here, Husband must continue working and participate in DROP. Therefore, any increase in the value of his retirement benefit would be attributable to his own post-marital effort and funds, not unexpected or passive appreciation.

¶10 Wife further argues that the court correctly classified the monthly payments as non-modifiable spousal maintenance. From this proposition, she reasons that her receipt of \$1,965.42 per month should not be treated as her share of the PSPRS benefits. The parties’ own agreement for spousal maintenance belies this argument. By providing that Wife was entitled to non-modifiable payments in an amount equal to her monthly interest in Husband’s retirement benefits, the agreement makes clear that – however denominated – Wife received the full measure of her property interest and contributed nothing to any future DROP account.

¶11 Finally, Wife argues the superior court erred by denying her request for attorney’s fees as the prevailing party in an action to enforce the PSA when it found that A.R.S. § 25-324 “overrides” the prevailing-party provision in the PSA. Given that Wife is no longer the prevailing party, we decline to address this issue.

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CONCLUSION

¶12 For the foregoing reasons, we affirm the denial of Wife's request for attorney's fees, vacate the order to the extent it awards Wife a share of any cumulative interest accumulated under DROP, and remand for modification of the order indicating that Wife is entitled to neither the principal nor the interest in the DROP account.

¶13 Wife requests an award of attorney's fees on appeal under the prevailing-party provision in the PSA. This provision does not govern our award of fees on appeal. *Bobrow v. Bobrow*, 241 Ariz. 592, 598-99, ¶¶ 30-32 (App. 2017). In our discretion, we decline to award Wife attorney's fees under A.R.S. § 25-324.



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