IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

DEBRA S. KLEIN, *Petitioner/Appellant*,

v.

KEITH T. KLEIN, *Respondent/Appellee*.

No. 1 CA-CV 19-0769 FC
FILED 12-22-2020

Appeal from the Superior Court in Maricopa County
No. FC 2014-094095
The Honorable Andrew J. Russell, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

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Counsel for Petitioner/Appellant

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By Dorian L. Eden
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MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Chief Judge Peter B. Swann joined.

C A M P B E L L, Judge:

¶1 Debra Klein ("Mother") appeals the superior court's order denying her request to compel Keith Klein ("Father") to release money from an education savings account for their son's college tuition. We vacate the superior court's ruling that it lacked jurisdiction to grant relief, and remand for further proceedings.

BACKGROUND

¶2 In January 2016, the parties entered a consent decree of dissolution. The parties have three children in common, all minors at the time of the divorce. During the marriage, the parties maintained a number of accounts for the benefit of the children ("children's accounts"). As relevant here, the decree provided:

> [A]ll accounts in the names of the children, or set up for the benefit of the children (including 529 accounts, Foothills Security Accounts, AZCCU accounts) shall continue to be held as currently titled. These accounts shall be maintained for the benefit of the children. . . . *Neither party may withdraw or use the . . . funds without written permission of both parents*. For all accounts, . . . both parties shall provide each other with access to the accounts if possible as a permissible user, and shall provide at least quarterly statements, or as reasonably requested by the other.

(Emphasis added).

¶3 At issue here is a 529 account.[1] As of the date of divorce, Father was listed as the account owner and the parties' eldest son as the

[1] A 529 account is a college savings vehicle that provides the owner tax incentives to save for future education costs. *See* 26 U.S.C. § 529. The exact terms of the account are determined by the state. 26 U.S.C. § 529(b)(1).

beneficiary. After the eldest son turned 18 and started college, Father replaced him as the beneficiary with one of the other children. Father made this change without Mother's consent. Additionally, Father refused to allow Mother to use the funds in this account to pay for his tuition.

¶4 In January 2019, Mother moved to enforce the decree, asking the court to order Father to reinstate the eldest son as the beneficiary. She also asked the court to either transfer the 529 account into her name so she could pay for his education herself, or order Father to pay his tuition using the 529 funds. At trial, Mother proposed in the alternative that the court could also divide the 529 account between the parties, or between the three children. The court found that Father, by unilaterally changing the beneficiary on the account, had violated the decree and ordered him to return the funds to an account naming the eldest son as the beneficiary. The court concluded, however, that it lacked "jurisdiction to require the parties to pay for an adult child's education," and declined further relief to Mother.

¶5 Mother filed both an appeal of this ruling and a motion for reconsideration or clarification. This court stayed Mother's appeal and allowed the superior court to rule on Mother's motion. The court then denied Mother's motion and certified its decision as a final judgment under Arizona Rule of Family Law Procedure ("Rule") 78(c). Mother filed a timely amended notice of appeal.

DISCUSSION

¶6 On appeal, Mother argues that the superior court erred by concluding it lacked jurisdiction to grant the relief requested. Mother also argues that the superior court erred by failing to either divide the account or otherwise reform the decree.

I. The Superior Court had Jurisdiction to Resolve Mother's Motion

¶7 As a general rule, the superior court lacks jurisdiction to order a parent to provide support to a child who has reached majority. *Solomon v. Findley*, 167 Ariz. 409, 411–12 (1991). On appeal, Mother argues she did not ask the court to order Father to provide for the eldest son's education. Instead, she contends that the parties had already agreed to set aside funds for his education, and she was merely asking the court to enforce the decree's provisions regarding those funds. She contends that, under the decree, Father may not unilaterally keep the money in the 529 account from being used for the eldest son's college tuition. Mother claims that because she is simply seeking to enforce the provisions of the consent decree, that court has jurisdiction to do so.

¶8 We agree that, absent more, the court generally lacks jurisdiction to initiate payment of support for a child who is no longer a minor. In *Solomon*, our supreme court addressed a decree that required the father "to provide educational funds to the best of his ability" for the parties' daughter. 167 Ariz. at 409. Later, after the daughter reached majority, the mother sued the father to enforce that provision under the decree. *Id.* The supreme court denied relief because, under A.R.S. §§ 25-320 and -327, the superior court lacks jurisdiction to order support for a child who has reached majority. *Id.* at 412.

¶9 In contrast to the relief sought in *Solomon*, Mother did not ask the court to order Father to deposit money into the 529 account or otherwise use his unrestricted sole and separate funds to pay for the eldest son's tuition. Here the parties had already created the 529 account for his benefit prior to divorcing, and the parties' agreement as to the disposition of those funds can be inferred from the language of the decree.

¶10 Mother argues she simply asked the court to order the distribution of money from that account or otherwise allow her access to the account for purposes consistent with the creation of the account. In response, Father argues that the decree allocated the 529 account to him as his sole and separate property. Accordingly, ordering disbursement from the account would compel him to use his sole and separate property funds to support a child over the age of majority.[2] However, on the facts unique to this case, we conclude that, as matter of law, the 529 account is not Father's sole and separate property.

¶11 Under A.R.S. § 25-318(D), community property "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." The parties do not dispute that the 529 account was a community asset at the time of divorce. Thus, the question before us is whether the consent decree sufficiently resolves ownership of the 529 account. The terms of a decree "are to be given a reasonable construction so as to accomplish the intention of the parties." *Harris v. Harris*, 195 Ariz. 559, 562, ¶ 15 (App. 1999). We construe the decree in a way to give meaning to all

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[2] Mother contends that Father waived the argument that the 529 account is his sole and separate property. However, Father's position in the superior court was that he is the owner of the account, and that affords him the right to do what he wants with the 529 account**.** Implicit in Father's arguments is a claim that the account is his sole and separate property.

parts. *See In re Marriage of Johnson and Gravino*, 231 Ariz. 228, 233 ¶ 17 (App. 2012).

¶12 To support his position that the 529 account is his sole and separate property, Father points out that he was the named owner of the account at the time of divorce, and that the decree states that the 529 account is to remain as titled. Although the decree requires the children's accounts to remain as titled, neither party may utilize these accounts without the other's consent. Mother and Father are required to provide each other access to the accounts as permissible users whenever possible and provide each other quarterly statements. Additionally, as Father concedes in his pre-trial filings, Mother is listed as the successor in interest of the 529 account. Contrary to Father's contention, the decree grants Mother too much continued control of the 529 account to determine that the account is Father's sole and separate property. Thus, we hold that the parties own the account as tenants in common under § 25-318(D).

¶13 We also agree with Mother that she is simply asking per the terms of the decree for the court to grant her access to funds already set aside for the eldest son's education. This is not a request for post-majority support. As such, the superior court had jurisdiction to consider Mother's request, and we vacate the court's order to the contrary and remand for further proceedings.

II. Considerations on Remand

¶14 On appeal, Mother contends that her *pro se* motion should be treated as a motion for relief from the decree under Rule 85(b)(5) or (6). Although Mother did not reference Rule 85(b) in her filings in the superior court, she need not file a specific motion to invoke this rule. *Quijada v. Quijada,* 246 Ariz. 217, 220, ¶ 6 n.3 (App. 2019). Under Rule 85(b)(5), the court may grant relief from a judgment in a family court matter if "applying it prospectively is no longer equitable." Rule 85(b)(6) allows the court to grant relief from judgment for "any other reason justifying relief." [3]

[3] Mother also asserts relief from judgment is appropriate under Rule 85(b)(4), which permits relief when the underlying judgment is void. Mother contends that if the court lacked jurisdiction to grant the relief requested, then the terms of the underlying decree are also void. However, since we hold that the superior court did have jurisdiction to consider Mother's request, this argument is no longer valid.

¶15 In ruling on Mother's motion on remand, the court should consider her contention that, although the decree explicitly requires the written consent of both parties to draw monies from the 529 account, the decree should be construed or reformed to bar Father from withholding his consent unreasonably or without good cause. Mother contends that the entire purpose of the 529 account was to fund the children's education and argues that interpreting the decree to allow Father to refuse consent for "any reason" would frustrate this purpose, thereby rendering the consent decree's section on the children's accounts meaningless. *See Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 12 (App. 2007) ("[W]hen interpreting a decree, we may not assign meaning to one provision which would render other provisions meaningless.").[4]

¶16 The court also should consider Father's argument that the funds in the 529 account are not necessarily committed to the eldest son's educational expenses. As Father points out, while only one person can be named the beneficiary of the 529 account, he may change the beneficiary designation to another child without incurring penalty under federal tax law. 26 U.S.C. § 529(c)(3)(C); *see also Frequently Asked Questions*, AZ 529, https://az529.gov/faq (last visited Dec. 7, 2020). Therefore, the eldest son can serve as a placeholder for any of the parties' children. Additionally, the 529 account can be cashed out and used for non-educational expenses, albeit with a 10% penalty. *See Frequently Asked Questions*, *supra*. Further, Father notes that the decree only states that the account must be held "for the benefit of the children" and does not explicitly require that the funds be used for education, or for the education of any one of the parties' three children in particular.

¶17 These issues, along with the specifics of Mother's request to Father to release the funds must be resolved on remand. The superior court

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[4] Mother also argues that implicit in all written agreements is an obligation of good faith and fair dealing. *See Campbell v. Westdahl*, 148 Ariz. 432, 437 (App. 1985). Therefore, according to Mother, Father's duty of good faith requires him to act reasonably in considering whether to release funds from the account. But we construe the decree as a judgment of the court, not as a contract between the parties. "A judgment is not an agreement between or among the parties. Rather, it is an act of a court which fixes clearly the rights and liabilities of the respective parties to litigation and determines the controversy at hand." *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 10 (1999) (internal quotation marks and citation omitted).

on remand also may decide to consider Mother's suggestion that the 529 account is divisible under A.R.S. § 25-318(D) as a joint asset.

CONCLUSION

¶18 For the foregoing reasons, we vacate the superior court's ruling that it lacked jurisdiction. We remand the matter to the superior court so that it may consider the motion under Rule 85 or A.R.S. § 25-318(D). On remand, the court has discretion to decide whether to take additional evidence or to resolve the matter based on the existing record. Both parties request attorneys' fees pursuant A.R.S. §§ 12-349 and 25-324 . We award Mother, as the prevailing party, costs upon compliance with ARCAP 21, but in our discretion decline to award either party attorneys' fees.

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