

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

SONJA HOLLEY, *Petitioner/Appellee*,

v.

DARYL HOLLEY, *Respondent/Appellant*.

No. 1 CA-CV 21-0692 FC
FILED 9-20-2022

Appeal from the Superior Court in Maricopa County
No. FC2019-002325
The Honorable Max Covil, Judge

AFFIRMED

COUNSEL

Raymond S. Dietrich, Phoenix
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in
which Judge Cynthia J. Bailey and Vice Chief Judge David B. Gass joined.

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T H U M M A, Judge:

¶1 Daryl Holley (Husband) appeals from an order granting Sonja Holley’s (Wife) petition to enforce a decree of dissolution. Husband claims the court erred in awarding Wife 4.7% of his pension (currently about \$110 per month) plus arrearages, arguing Wife should have been awarded about half that amount. Because Husband has shown no error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 When the couple married in 2008, Husband was in active military service. Husband retired in 2010. Wife later petitioned for divorce, and in May 2020 the court entered the decree, dividing the community’s interest in Husband’s pension. Neither party appealed from the decree.

¶3 Because Husband was in active duty for two years of the parties’ marriage, he had to pay Wife her share of his pension. *See* 10 U.S.C. § 1408(d)(2) (2022).¹ In February 2021, Wife petitioned to enforce the decree by requiring Husband to make monthly payments to Wife for her 4.7% interest in his pension plus arrears. Husband responded that Wife’s share was based on his “disposable retired pay,” 10 U.S.C. § 1408(a)(4)(A), and had to be reduced by (1) Survivor Benefit Plan (SBP) premiums paid for his prior spouse, (2) “recoupments required by law” and (3) estimated taxes.

¶4 Wife moved for summary judgment, arguing her share of the pension should not be reduced. Husband’s response attached a “Retiree Account Statement,” stating it was a “pay stub,” but he provided no foundation for the document. Nor did Husband dispute Wife’s separate statement of facts or provide his own a separate statement of facts. *See* Ariz. R. Fam. L.P. 79(c)(3)(B). Wife replied that Husband’s response cited no authority for reducing his “disposable retired pay,” citing federal authority supporting her position.

¶5 After oral argument, the court granted Wife’s motion and ordered Husband to pay Wife 4.7% of his pension benefits plus \$1,630.05 in arrearages. This court has jurisdiction over Husband’s timely appeal from that post-decree ruling under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(2). *See also Yee v. Yee*, 251 Ariz. 71, 73 ¶ 1 (App. 2021).

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

I. The Briefing on Appeal.

¶6 Although Wife's failure to file an answering brief could be treated as a concession of error, *see* ARCAP 15(a)(2), given this appeal turns on issues of law, the court will address the merits, *see In re Marriage of Diezsi*, 201 Ariz. 524, 525 ¶ 2 (App. 2002). Husband's brief does not comply with applicable rules, including the requirement to cite "appropriate references to the record" and identifying where issues raised on appeal were raised with the superior court. ARCAP 13(a)(4), (5) & (a)(7)(B); *see also Demastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 137 ¶ 7 n.2 (App. 2011) (failure to adequately cite the record is "an appropriate ground for this court to find an appellant's argument is waived"). Husband did not provide a transcript from the oral argument, which this court presumes would support the order. *See Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995). Similarly, Husband does not support his argument that the superior court acted in a manner contrary to that "mandated by federal law." For these reasons, Husband has waived the arguments he seeks to press on appeal.

II. Waiver Notwithstanding, Husband Has Shown No Error.

¶7 Waiver notwithstanding, Husband appears to argue that the superior court erred by failing to deduct from the award to Wife: (1) SBP premiums; (2) payments he makes to his other former spouse, which he claims are "required by law" and (3) tax liabilities. For the following reasons, Husband's arguments fail.

A. The SBP Premiums.

¶8 Federal law authorizes a state court to treat Husband's pension -- "disposable retired pay" -- as community property "in accordance with the law of the jurisdiction" of the family court. 10 U.S.C. § 1408(c)(1). Arizona treats a pension earned during the marriage as community property, *Edsall v. Superior Court*, 143 Ariz. 240, 242 (1984), and may treat a military pension as authorized by federal law, *Barron v. Barron*, 246 Ariz. 449, 450 ¶ 10 (2016).

¶9 As applicable here, Husband's "disposable retired pay" is subject to division in a divorce decree. 10 U.S.C. §§ 1408(a)(4)(A), (c)(1). Calculation of "disposable retired pay" begins with the serviceperson's "total monthly retired pay," which is the service member's retired pay as of the date of the decree plus cost-of-living adjustments. 10 U.S.C. § 1408(a)(4)(B)(i). Deductions are then allowed for any annuity paid to a

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former spouse under an SBP, 10 U.S.C. § 1447-55, to provide an annuity that is being made pursuant to a court order under federal law, 10 U.S.C. § 1408(a)(4)(A)(iv). The SBP is an annuity under which a designated beneficiary can receive a benefit after the dissolution of a marriage. 10 U.S.C. § 1448(b)(2)(C). Once the serviceperson begins receiving the pension, premiums for participation in the SBP are withheld from the serviceperson's monthly retired pay. 10 U.S.C. § 1452(a). Thus, where a retired serviceperson's pension has been divided by a dissolution decree, any premiums for SBP coverage to a former spouse are deducted before the division of disposable retired pay between the serviceperson and the former spouse. 10 U.S.C. § 1408(a)(4)(A)(iv).

¶10 The SBP program, however, permits only one former spouse to be designated as a beneficiary. 10 U.S.C. § 1448(b)(2). Federal law authorizes the deduction of SBP premiums paid by the serviceperson but *only if* the former spouse is *the* beneficiary of the SBP. 10 U.S.C. § 1408(a)(4)(A)(iv); *see also* Dep't of Defense Fin. Mgmt. Reg., Vol. 7B, Ch. 29, Former Spouse Payments from Retired Pay (authorizing deductions for "SBP premiums paid but only if the former spouse . . . is the beneficiary of the SBP"). Husband did not designate Wife as *the* SBP beneficiary, and he does not suggest any record evidence to the contrary. Husband has thus shown no error in the court refusing to deduct the monthly premium for SBP coverage in determining Wife's share of his disposable retired pay. A contrary ruling would lead to Wife, not Husband, paying for a percentage of the former spouse's benefit.

¶11 Although Husband relies on *Barron v. Barron*, 246 Ariz. 580, 589 (App. 2018), *vacated in part*, 246 Ariz. 449 (2019), that case is distinguishable. *Barron* held that, under 10 U.S.C. § 1408(a)(4)(A)(iv), the pension subject to division by a state court "is reduced by amounts a servicemember pays for an annuity to (1) a spouse or (2) a former spouse *when the payment to the former spouse is mandated by a court order.*" 246 Ariz. at 589 (emphasis added). Husband provided no evidence that any annuity payment to his former wife was mandated by a court order.

¶12 A court cannot direct the use of deductions other than those authorized to compute the former spouse's award. *See also* Dep't of Defense Fin. Mgmt. Reg., Vol. 7B, Ch. 29, Former Spouse Payments from Retired Pay. Any provision of a court order doing so is unenforceable. *Id.* at 29-23 ("If a court order directs the use of deductions other than those authorized . . . to compute the former spouse's award, that provision of the court order is unenforceable."). Because Husband provided no evidence of annuity payments to his former wife under a court order and because Husband

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provided no evidence that Wife was the designated SBP beneficiary, the superior court properly concluded that Wife's interest in his pension was not reduced by any SBP premiums. *See* Ariz. R. Fam. L.P. 79(c)(3)(B).

B. Husband Has Shown No "Recoupments Required by Law."

¶13 Disposable retired pay is reduced by "recoupments required by law resulting from entitlement to retired pay." 10 U.S.C. § 1408(a)(4)(A)(i). Husband argues the court erred in failing to reduce his disposable retired pay by payments he makes to his former wife. Noting the federal statute "uses the term recoupments," Husband summarily states that "Webster's defines recoupment as to pay back." Husband, however, provides no legal authority showing payments he is making to his prior wife are "recoupments required by law" that should reduce Wife's interest in the pension. *Cf. Newbery Corp. v. Fireman's Fund Inc. Co.*, 95 F.3d 1392, 1398 n.9 (9th Cir. 1996) ("a recoupment is a reduction by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction.") (citation omitted).

C. Wife's Tax Liability.

¶14 Husband argues the court erred by failing to deduct Wife's tax liability from his monthly payments to her. Husband, however, cites no authority supporting that proposition. Moreover, because a court's authority under 10 U.S.C. § 1408(c)(1) to divide a serviceperson's pension is limited to the amount remaining after adjusting for the effects of taxes, all income tax withheld is attributable to Wife. *Eatinger v. Comm'r*, 59 T.C.M. (CCH) 954, 958 (T.C. 1990). There is no need for the family court, under Arizona law, to address the federal tax consequences of that distribution.

¶15 Husband cites *Johnson v. Johnson*, 131 Ariz. 38, 43 (1981) in making his claim. *Johnson*, however, did not address a series of monthly payments like those involved here. Instead, *Johnson* discussed using a "present cash value" method to determine the community interest in a pension and then awarding half of that lump sum amount, "usually in the form of equivalent property," to the non-employee spouse. 131 Ariz. at 41. Moreover, Husband did not raise satisfying Wife's claim to the pension using "sufficient equivalent property" -- as *Johnson* did -- and has waived such an argument on appeal. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, 535 ¶ 18 (App. 2007).

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CONCLUSION

¶16 The order is affirmed. Husband's requests for attorneys' fees under A.R.S. § 25-324 and for taxable costs are denied.



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