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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/29/10
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BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MARRIAGE OF) 1 CA-CV 09-0388
)
MARLEEN MARY LANSING,) DEPARTMENT E
)
Petitioner-Appellee,) **MEMORANDUM DECISION**
)
v.)
) (Not for Publication -
MARK LANSING,) Rule 28, Arizona Rules
) of Civil Appellate Procedure)
Respondent-Appellant.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2007-005014

The Honorable Dean M. Fink, Judge

AFFIRMED

Joseph C. Richter, P.C.
by Joseph C. Ritcher
Attorneys for Appellant

Scottsdale

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by Teresa S. Thayer
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Phoenix

W E I S B E R G, Judge

¶1 Mark Lansing ("Husband") appeals from the superior court's order allocating his retirement benefits in a dissolution action and ordering that he make a lump sum payment

to Marleen Mary Lansing ("Wife"). Husband argues that the retirement benefits could have been accurately divided by a domestic relations order ("DRO") directing his pension plan to pay Wife her community share of the pension on a monthly basis. For reasons that follow, we affirm the superior court's judgment.

BACKGROUND

¶2 The parties were married in December 1991. Husband retired from his employment with Maricopa County in 2002 but elected to participate in a Deferred Retirement Option Plan ("DROP"). Thus, he continued to work for an additional five years in which he did not accrue retirement benefits. He did, however, receive a lump sum of approximately \$157,000 when he ceased working in April 2002, and he deposited the lump sum into a 457 Plan between April and June 2007, bringing that account balance to \$170,021.84.¹ Husband began receiving monthly retirement benefits from the Public Safety Personnel Retirement System ("PSPRS") in May 2007.

¹Husband withdrew \$8,800 from the account between July and December 2007. He withdrew \$19,000 between January and June 2008 so that by June 30, 2008, the account balance was \$137,124.35. Between July and August 2008, he withdrew \$2,000, leaving a balance of \$135,100.15. In slightly over one year, Husband had withdrawn \$29,800. He also testified that he used \$15,000 from a home equity credit line to pay off the loan on Wife's vehicle. Wife testified that she had incurred approximately \$30,000 in debt during the pendency of the dissolution and had withdrawn \$6,000 from the home equity line of credit to pay credit card debt.

¶13 Wife filed a petition for dissolution in June 2007. The parties reached agreement about many aspects of the decree but were unable to agree on how to allocate Husband's pension. The matter went to trial in August 2008.

¶14 Richard Underwood, an attorney specializing in pension matters, testified that Husband's PSPRS plan does not permit the award of a survivor benefit to a former spouse but only permits division of a member's lifetime benefit. He had calculated the pension's value assuming three possible scenarios: no future cost of living increases ("COLA"), an average increase of 2%, and the maximum allowed increases of 4%. He acknowledged that future COLAs would be paid only if the pension fund had excess earnings and that the percentage of any COLA was somewhat speculative, but he added that the fund had paid a 4% COLA in each of the last ten years. He further acknowledged that the assumed 4.6% Treasury bill interest rate was an estimate that had been approved by the IRS for purposes of calculating lump sum valuations.

¶15 The parties had agreed during mediation that the funds in Husband's 457 plan before deposit of the DROP funds would be divided equally and that after the DROP funds had been deposited, Husband would receive 75% of the account and Wife 25% (50% as Husband's sole and separate and 25% as his half of the

community's share). The parties also agreed that Husband would retain the marital home and pay Wife \$80,000 for her interest.²

¶16 After hearing testimony from both parties, the court concluded that because Wife could not receive a survivor benefit if Husband passed away prematurely, she should receive her portion of the pension (\$119,963.75) up front and that Husband had sufficient liquid assets to pay out her interest in a lump sum. Husband moved for a new trial and argued that the court had abused its discretion both by ordering him to pay Wife a present value of her pension rights when he had insufficient liquid assets to do so and by using a 2% COLA in valuing the pension. The court denied the motion. Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101 (B) (2003).

DISCUSSION

¶17 When apportioning community property at dissolution, the superior court has broad discretion to equitably divide the assets, "and we will not disturb its allocation absent an abuse of discretion." *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶13, 167 P.3d 705, 708 (App. 2007). On appeal, we view the evidence in the light most favorable to upholding the superior court's apportionment and will sustain it if the evidence

²Husband refinanced the house to obtain funds to pay Wife for her share.

reasonably supports the ruling. *Id.* We have held, too, "that there may well be more than one method or formula which the trial court can use" in dividing pension rights. *Woodward v. Woodward*, 117 Ariz. 148, 150, 571 P.2d 294, 296 (App. 1977).

¶18 This case involves a matured and vested pension right. See *Boncoskey*, 216 Ariz. at 451-52, ¶¶ 15-16, 167 P.3d at 708-09 (a pension right is mature when employee has unconditional right to immediate payment); *Johnson v. Johnson*, 131 Ariz. 38, 41 n.2, 638 P.2d 705, 708 (1981) (a vested right is one not subject to forfeiture if the employment relationship ends before the employee retires). As our supreme court held in *Johnson*, 131 Ariz. at 41, 638 P.2d at 708, a court may award the non-employee spouse her community interest in her husband's pension benefits in a lump sum. The trial court must first determine the community's interest in the pension and calculate the present cash value of that interest; it then may award half of that value to "the non-employee spouse in a lump sum, usually in the form of equivalent property; the employee thus receives the entire pension right free of community ties." *Id.* In that case, however, the husband did not expect to retire for at least fifteen years, *id.* at 40, 638 P.2d at 707, which would postpone substantially the former wife's access to her share of the pension benefits.

¶9 Here, Husband had begun receiving his monthly pension benefits, and thus Wife also could have received her portion of those benefits on a monthly basis. But the significant risk posed by this distribution method is that if Husband were to die before Wife had received her community share of the pension, she would receive no further payments because Husband's plan would not allow former spouses to qualify for survivor benefits. Husband could have suggested other options to protect against this risk. For example, Husband might have purchased a life insurance policy payable to Wife with a decreasing benefit to account for Wife's progressive receipt of her community share. Or, Husband might have asked that even if a lump sum were ordered, it be made payable in several installments and protected by a lien for any unpaid portion. Instead, Husband simply contended that by awarding Wife a cash lump sum, his cash reserves would be depleted and that he wished to use the DROP money for his children's college educations and weddings. Under the circumstances, there was no abuse of the court's discretion in finding that a lump sum distribution to Wife was equitable.

¶10 Husband also challenges the court's acceptance of Underwood's valuation of Husband's pension using 2% as the estimated average COLA increases. This was less than the COLAs that the plan had awarded its members for the last ten years but took into account the possibility that the plan might award

either no or smaller increases in the future. Husband offered no contrary evidence. There was no abuse of discretion.

¶11 We also note that although Husband suggests that Underwood utilized a number of assumptions about the interest rate and his life expectancy, which resulted in a "speculative" valuation, Husband did not raise any objection to the valuation at trial nor did he produce his own valuation. Moreover, Husband has not suggested any way in which the trial court could more precisely foretell the future. Neither Underwood, the parties, nor the trial judge could know how long Husband will live, and thus a number of the variables used to value this pension necessarily represent an approximation. But, we cannot say that the approximation adopted here constitutes reversible error.

¶12 For the reasons stated, we find no abuse of the superior court's discretion in awarding Wife a lump sum distribution of her community share of Husband's pension. Accordingly, we affirm the court's ruling.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge