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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-18-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

S. ALAN COOK,) 1 CA-CV 09-0596
)
Third Party/Appellant,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
THOMAS HETHERINGTON,)
) Not for Publication -
Respondent/Appellee.) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-011740, FC2005-053072, FC2005-094183
(Consolidated)

The Honorable Michael D. Gordon, Judge

AFFIRMED

S. Alan Cook, P.C. Phoenix
By S. Alan Cook
Third Party/Appellant

Udall, Shumway & Lyons, PLC Mesa
By Darrell J. Hadder
Matthew L. White
Attorneys for Respondent/Appellee

H A L L, Judge

¶1 Appellant S. Alan Cook appeals the superior court's order denying his motion to set aside its order directing him to return certain monies and subsequent order for the release of those monies to Respondent/Appellee Thomas Hetherington (Husband). For the following reasons, we affirm. We also affirm the court's awards of attorneys' fees to Husband.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Theresa Leigh Hetherington (Wife) filed for dissolution of her marriage to Husband in December 2005. Cook served as Wife's counsel in the action.

¶3 During the dissolution proceedings, the parties agreed to sell the marital residence for \$850,000. Subsequently, the buyer sought a \$20,000 reduction in the purchase price. Husband wanted to accept the price reduction, while Wife wanted to reject it. Husband and Wife agreed in a June 6, 2006 letter agreement that the entire \$20,000 reduction would be taken from Husband's share of the sale proceeds.

¶4 On June 7, 2006, Cook and Husband's counsel jointly authored a letter to the title agency in which they authorized the agency to distribute a portion of the proceeds due Husband and Wife from the house sale. They directed the agency to hold back \$102,487 of the proceeds (the Reserved Monies) and to disburse that amount in two equal checks payable to the trust accounts of Husband's attorney and Cook, "with those funds to be

held at interest pending the outcome of these proceedings.”¹ The parties had previously agreed in the June 6, 2006 agreement that the Reserved Monies would “be available for division and use as equalizing payments with respect to any and all other assets to be divided, including Husband’s . . . pension and any deferred compensation.” Cook and Husband’s counsel further agreed to hold the Reserved Monies as fiduciaries for Husband and Wife:

Each lawyer will be responsible for following the instructions of the Court with respect to the distribution of those funds. **Each lawyer will have a fiduciary duty to both clients to maintain those funds and to not distribute them absent a joint agreement of the parties or orders of the Court to distribute them** You may [] make out a check to each counsel in the amount of \$51,243.50 to be held in trust for both parties, with each lawyer to put the money at interest using his/her client’s respective social security number, **with those funds to be distributed only as the parties may agree or as the Court may direct by order.**

(Emphasis added). We refer to the monies held by Cook as the Held Funds.

¶15 Wife filed a pretrial statement in which she identified the Reserved Monies as marital property that remained undivided and asked the court to award those monies to her. In his pretrial statement, Husband noted that the Reserved Monies were being held by the parties’ counsel “for the purpose of

¹ Although the June 7, 2006 letter does not identify the referenced proceedings, the context indicates that the parties meant the divorce proceedings, and neither party has proposed a contrary interpretation.

providing available assets for equalization payments," and asked the court to order Wife to pay him certain amounts from the Held Funds.

¶16 At trial, Husband argued that his agreement that the entire \$20,000 purchase price reduction be taken from his share of the sale proceeds was unfair and should not be enforced by the court. In proposed findings of fact and conclusions of law, Husband asked the court to order Wife to reimburse him \$28,160.86 for the sale price reduction, expenses he incurred on behalf of the community, and his share of the proceeds from Wife's sale of community property from the Held Funds. Wife proposed that the court find that she was entitled to an award of \$99,447.26 of the Reserved Monies and order the balance of the Reserved Monies to be shared equally by the parties, "subject to any other set offs." In an unsigned minute entry dated March 19, 2007, the court ordered Wife to pay a total of \$28,160.86 (the Offset Amount) to Husband. It awarded Husband and Wife the personal property in their possession.

¶17 On March 28, 2007, nine days after the court entered its order, but before it signed a decree, Cook distributed \$10,000 of the Held Funds to Wife and the balance of \$43,247.18 to himself as a partial payment for Wife's outstanding

attorneys' fees.² Cook informed Husband's counsel of the distribution, justifying it on the grounds that Husband had repudiated the parties' June 6, 2006 agreement by asking the court to order Wife to share in the \$20,000 price reduction and thereby terminating any fiduciary obligation Cook owed to Husband. Cook also cited the superior court's ruling awarding Husband and Wife their personal property.

¶8 Husband moved the court to order Wife and Cook to return the Held Funds and requested the court award him attorneys' fees against both Wife and Cook. Husband also filed a proposed form of decree that directed Wife to pay the Offset Amount to Husband from the Held Funds. Wife opposed Husband's motion, and moved for a new trial on the issues of the division of Husband's pension, child support, the \$20,000 purchase price reduction, certain offsets awarded to Husband, and attorneys' fees. Wife also objected to that portion of Husband's proposed form of decree that directed her to pay the Offset Amount from the Held Funds. Wife stated that the proposed decree

included language that was not included in the Court's minute entry. Specifically, the proposed decree states: "Wife shall pay Husband \$28,160.86 from her portion of the house proceeds held in Wife's attorney's account that was set up on June 2006." The

² The amount distributed by Cook on March 28, 2007, is greater than the amount originally provided by the title company at the sale of the marital residence, likely because the funds were held in an interest-bearing account.

Court did not make that order and there is no money in the account at this date. To the contrary, the Court's minute entry states: "The Court finds that the personal property has been equitably divided and no equalization is equitably required. IT IS ORDERED: each party shall keep the personal property in his and her possession.

¶19 Husband agreed that language in his proposed decree regarding the distribution of the Offset Amount from the Held Funds should be deleted due to "impossibility" because Cook "improperly and unilaterally withdrew all funds held in the fiduciary account in his name." Husband also argued that the issues surrounding the Offset Amount from the Held Funds should be separately litigated from the Decree of Dissolution.

¶10 On May 3, 2007, the court entered the Decree of Dissolution, in which it ordered Wife to pay the Offset Amount within thirty days. The Decree did not address the parties' dispute concerning Cook's distribution of the Held Funds or otherwise provide the source of funds for Wife's payment of the Offset Amount to Husband. The court denied Wife's motion for new trial, and, on June 21, 2007, she timely appealed from that order and the Decree.

¶11 On June 22, 2007, the court held a hearing regarding Husband's motion for an order directing Wife and Cook to return the Held Funds. Wife argued the superior court lacked jurisdiction to consider Husband's motion because her notice of appeal divested it of jurisdiction. The court determined, in a

signed minute entry dated August 20, 2007, that Wife's appeal did not divest it of jurisdiction over Husband's motion because the motion did not relate to the subject matter of the appeal. The court also rejected Wife's argument that Husband's position during the dissolution proceedings that it was unfair for him to absorb the entire \$20,000 reduction in the sale price of the marital residence constituted a repudiation of the June 6, 2006 agreement that relieved Cook of his obligation, contained in the June 7, 2006 letter agreement, to hold the Held Funds as a fiduciary. Finally, the court rejected Wife's argument that the Decree awarded Wife the Held Funds because it awarded her the personal property in her possession. It found that Wife and Cook were jointly and severally responsible for returning the Offset Amount within thirty days.³ The court awarded Husband his reasonable attorneys' fees arising out of the motion and ordered him to submit a fee application.

¶12 On September 19, 2007, Cook filed a notice of compliance, in which he stated that Wife denied she had any

³ The court determined that the only amount in issue was the amount of the offsets and reimbursements it had ordered Wife to pay Husband and ruled there was no reason to require Wife or Cook to return funds in excess of that amount. We note, however, the amount the court ordered Wife and Cook to return, \$29,419.61, is not the same amount it awarded Husband in the Decree, \$28,160.86, because this new total included Wife's share for the preparation of the Decree and Wife's court-ordered reimbursement of a parenting coordinator fee.

monies to return, but that he had deposited the amount ordered by the court in a money market account at U.S. Bank.

¶13 On October 1, 2007, Wife and Cook filed a motion for reconsideration, new trial, or relief from the August 27, 2007 order. They challenged the court's jurisdiction to enter the order after Wife had appealed the Decree, argued that the ruling conflicted with the terms of the Decree, and asserted that it was incorrect as a matter of law and based on materially incorrect facts. On December 19, 2007, the court denied the motion. In that same order, the court awarded Husband the attorneys' fees and costs he incurred in connection with his motion to return funds, but denied his request for distribution of the monies pending the outcome of Wife's appeal from the Decree and a renewed request by Husband for distribution.

¶14 On June 19, 2008, this court issued an opinion in Wife's appeal in which we affirmed the superior court's orders regarding the division of Husband's retirement plan and the house sale proceeds, but remanded for the court to reconsider its child support order. *Hetherington v. Hetherington*, 220 Ariz. 16, 24, ¶ 34, 202 P.3d 481, 489 (App. 2008). We also directed the superior court to include language from its March 19, 2007 order in the Decree to the effect that Wife was not required to reimburse Husband for any custody evaluator fees that he did not incur. *Id.*

¶15 On July 7, 2008, Husband filed a motion to release the \$29,419.61 funds in Cook's account as well as the \$2738.50 in attorneys' fees and costs that had been awarded pursuant to the December 19, 2007 order.

¶16 Thereafter, on October 27, 2008, the court granted Cook's motion to withdraw as counsel for Wife.

¶17 On February 24, 2009, after the Arizona Supreme Court rejected Wife's petition for review, Husband renewed his request for release of the Offset Amount to him. In March 2009, Cook filed a motion to set aside the court's August 27, 2007 order directing Cook to return the Offset Amount to Husband and awarding Husband attorneys' fees on the grounds that the court lacked jurisdiction to enter that order. Husband filed a response to Cook's motion and argued that Cook violated Arizona Rules of Family Law Procedure (Family Rule) 31 because "[t]he fact that [Cook] continues to bring up the same subjects over and over under different pleadings and over an almost two year span of time, is evidence that his only purposes in doing so are to harass [Husband] and to increase the cost of litigation for" Husband.

¶18 The court denied Cook's motion, granted Husband's renewed motion for release of the funds, and awarded \$4000 in reasonable attorneys' fees to Husband, pursuant to Family Rule 31(A), as a sanction against Cook. Cook timely appealed.

¶19 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(C) (2003).⁴

ISSUES

¶20 Cook argues the superior court erred in failing to set aside its August 27, 2007 order directing him and Wife to return the Offset Amount and in granting Husband's motion for release of the Offset Amount. Cook also challenges the court's awards of attorneys' fees to Husband.

DISCUSSION

A. Motion to Set Aside the August 27, 2007 Order / Motion for Release of Funds / Personal Jurisdiction

¶21 Cook argues the superior court erred in denying his motion to set aside the August 27, 2007 order and in granting Husband's request for release of the Offset Amount. We review a

⁴ While reviewing the record in this appeal, we determined that the superior court resolved all outstanding issues on May 8, 2009, when it denied Cook's motion to set aside the August 27, 2007 order and granted Husband's renewed motion for release of funds, but failed to enter a signed order corresponding to its grant of the motion for release of funds. We issued an order pursuant to *Eaton Fruit Co. v. California Spray-Chemical Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967), giving Cook an opportunity to obtain the appropriate signed order. A form of signed order has now been filed. During the remand, Judge Gordon also signed an order making Cook "jointly and severally" liable for Husband's attorney's fees that Judge Rea had previously awarded against Wife. In his amended notice of appeal, Cook also appeals from this order. Although this order appears inconsistent with the underlying minute entries and was arguably not authorized by our *Eaton Fruit* order, we decline to determine its validity in this appeal because the issue has not been briefed. Accordingly, we attach no significance to the order for purposes of this appeal.

trial court's ruling on a motion to set aside a judgment pursuant to Rule 60(c) for abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985). We review legal issues, including the superior court's jurisdiction, de novo. *Danielson v. Evans*, 201 Ariz. 401, 406, ¶ 13, 36 P.3d 749, 754 (App. 2001); *Duwyenie v. Moran*, 220 Ariz. 501, 503, ¶ 7, 207 P.3d 754, 756 (App. 2009).

¶22 Cook contends the superior court erred in denying his motion to set aside because the court lacked jurisdiction to enter the August 27, 2007 order once Wife appealed from the Decree. Generally, an appeal divests the trial court of jurisdiction to proceed except for issues not relating to the appeal. *Cont'l Cas. Co. v. Indus. Comm'n*, 111 Ariz. 291, 294, 528 P.2d 817, 820 (1974). The trial court may take such action as may be necessary to enforce its judgment or may proceed with issues not directly involved in, or the subject matter of, the appeal. *Id.* It may not take any action that would negate the decision in a pending appeal or frustrate the appellate process. *State v. O'Connor*, 171 Ariz. 19, 22, 827 P.2d 480, 483 (App. 1992).

¶23 As relevant, the Decree ordered Wife to (1) share equally in the sale price reduction for the marital residence by reimbursing Husband \$10,000, (2) reimburse Husband for certain expenses he incurred on behalf of the community after Wife filed

the petition for dissolution, and (3) share with Husband the proceeds of her sale of certain community property. On appeal, Wife challenged the court's determination regarding child support, the division of Husband's retirement plan and the house sale proceeds, and its order directing her to reimburse Husband for certain expenses. Husband's motion for return of funds, which the superior court disposed of in the August 27, 2007 order, asked the court to direct the return of all Held Funds. The Held Funds were not directly involved in, or the subject matter of, the appeal and the court's order directing Wife and Cook to return that portion of the Held Funds equal to the Offset Amount did not negate the decision in the appeal or frustrate the appellate process. *O'Connor*, 171 Ariz. at 22, 827 P.2d at 483; *Cont'l Cas. Co.*, 111 Ariz. at 294, 528 P.2d at 820.⁵

⁵ Cook maintains the Decree awarded Wife the Held Funds because it stated that the parties' personal property had been equitably divided and no equalization was required and therefore the August 27, 2007 order altered the terms of the Decree by, in effect, revoking the court's award of personal property to Wife. It does not appear the court intended to divide the Reserved Monies via its catch-all disposition of personal property, as it stated in the August 27, 2007 order that it understood "personal property" to refer to tangible objects and not money or bank accounts. However, even assuming the superior court's award of personal property to each party included a division of the Reserved Monies, Wife's appeal did not divest the court of jurisdiction to enter the August 27, 2007 order because it did not negate the appellate decision or frustrate Wife's appeal. *O'Connor*, 171 Ariz. at 22, 827 P.2d at 483.

¶24 Cook next asserts the superior court erred in denying his Rule 60(c) motion and granting Husband's motion for release of funds because it lacked the authority to dispose of Husband and Wife's community property in a post-decree proceeding. Husband responds that the court's order that Wife and Cook return the Offset Amount and release it to Husband was in the nature of an enforcement of the Decree, not a post-decree division of the Reserved Monies. See *Carp v. Superior Court*, 84 Ariz. 161, 164, 325 P.2d 413, 416 (1958) (stating that where the proceedings are not stayed pending appeal, the trial court retains jurisdiction to enforce the judgment).

¶25 Cook relies on *Thomas v. Thomas*, 220 Ariz. 290, 205 P.3d 1137 (App. 2009), as support for his argument. *Thomas* held that when the parties intentionally omitted property from their stipulated decree, the omitted property "is not subject to consideration in a post-decree proceeding." *Id.* at 292, 294, ¶¶ 10, 17, 205 P.3d at 1139, 1141. This case, however, is distinguishable from *Thomas* because we do not view the funds as omitted. Here, the parties entered into an agreement pertaining to the Held Funds in which Cook had "a fiduciary duty to both clients to maintain those funds and not to distribute them absent a joint agreement of the parties or orders of the Court to distribute them." Cook, however, distributed the monies without obtaining a joint agreement of the parties or an order

of the court.⁶ Husband requested that the court resolve the issue of the Offset Amount separately from the Decree. When the court issued the Decree, it did not address the parties' dispute concerning Cook's distribution of the monies. Thus, the court's decision illustrates to this court that it implicitly agreed with Husband's suggestion that the issue should be resolved separately from the Decree. Viewed in this manner, the court simply postponed its consideration of the issue of the Offset Amount until a later time. We perceive no legal impediment to the court retaining jurisdiction to rule on this issue after the Decree was filed.

¶26 Next, Cook argues that the court lacked jurisdiction over him because he was never personally served in the action. We disagree. Cook put the Held Funds into an account and maintained control over those funds, pursuant to an agreement of the parties. As a result, he submitted himself to the authority of the court. The agreement also permitted the court to distribute the funds. Cook did not therefore have to be

⁶ We view this failure to abide by the agreement as a potential violation of the Arizona Rules of the Supreme Court 42, Ethical Rule 1.15(e), which states that "[w]hen in the course of representation a lawyer possesses property in which two or more persons . . . claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

personally served in the action in order for the court to exercise such authority.

B. Attorneys' Fees Award

¶27 Cook argues that the court's award of \$4000 in Family Rule 31(A) sanctions against him was improper. Family Rule 31(A) states, in relevant part, that an attorney's signature on any pleading, motion or other paper signifies

that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

¶28 We conclude that the trial court did not abuse its discretion in awarding sanctions against Cook. Cook's improper conduct regarding the disbursement of the Held Funds was compounded by his efforts to—as the trial court put it—“rehash[]” the litigation, causing both unnecessary delay and needlessly increasing the cost of litigation.⁷

⁷ Cook also asks this court to clarify that the attorneys' fees in the amount of \$2720.50 and costs of \$18.00 awarded in the minute entry dated December 19, 2007, was not entered

¶29 Husband requests an award of attorneys' fees on appeal. In this case, Husband is the prevailing party. Husband and Wife entered into an agreement with their attorneys acting as agents carrying out the agreement. Cook breached that agreement and Husband is therefore entitled to attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003) contingent upon his compliance with Arizona Rule of Civil Appellate Procedure 21(a).

CONCLUSION

¶30 For the foregoing reasons, we affirm.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
SHELDON H. WEISBERG, Judge

_____/s/_____
PETER B. SWANN, Judge

against him personally. Because this appeal does not involve an attempt to enforce the award against Cook, we decline to address his request.