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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: 01/13/2011  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JOHN T. ORMBREK, an individual, ) 1 CA-CV 10-0006  
)  
Appellee, ) DEPARTMENT T  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JAMES DURLACHER, an individual; ) Rule 28, Arizona Rules of  
and ESTATE OF MARGARET A. MALEY, ) Civil Appellate Procedure)  
)  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-018457

The Honorable John Rea, Judge

**AFFIRMED**

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McKindles Law Firm PLLC Mesa  
by John M. McKindles  
Attorneys for Appellee

Thomas M. Shaw, Attorney at Law Mesa  
by Thomas M. Shaw  
Attorneys for Appellants

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**P O R T L E Y**, Judge

¶1 James Durlacher ("Husband") and the Estate of Margaret Maley ("Estate") appeal from the judgment in favor of John T. Ormbreck ("Cousin").

## FACTS AND PROCEDURAL BACKGROUND

¶2 Margaret Maley ("Ms. Maley"), a state employee, was enrolled in the Arizona State Retirement System ("ASRS"). She also participated in a separate deferred compensation plan and named her father as the primary beneficiary and Cousin as the contingent beneficiary. Nearly nine years later, Ms. Maley enrolled in an annuity plan with Nationwide Retirement Solutions, Inc. ("Nationwide") and named her father as beneficiary.

¶3 Ms. Maley married Husband in December 2004. They created a trust and executed mutual wills in February 2005. She named Husband as the primary beneficiary on her ASRS account and annuity account. She did not, however, change the beneficiary designation on the deferred compensation plan before or after her father's death in November 2005.

¶4 Ms. Maley died in May 2006. When Husband contacted Nationwide, which also managed the deferred compensation plan, he was told that Cousin was the beneficiary. He filed a probate action, created a probate estate for his deceased spouse, and was appointed as personal representative. Nationwide

subsequently filed a separate interpleader action and requested that the superior court determine ownership of the proceeds.<sup>1</sup>

¶15 The superior court found that Cousin was the intended beneficiary but that ten percent of the deferred compensation plan was community property. The court then divided the community property share equally between Cousin and Husband. Husband and the Estate filed an unsuccessful motion for a new trial. They appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S") section 12-2101(B) and (F)(1) (2003).

## DISCUSSION

### I.

¶16 Husband contends that Ms. Maley intended to remove Cousin as a beneficiary on her deferred compensation plan. We will review the superior court's ruling for an abuse of discretion. See *Flores v. Cooper Tire & Rubber Co.*, 218 Ariz. 52, 57, ¶ 20, 178 P.3d 1176, 1181 (App. 2008) (holding that questions hinging on conflicting facts or witness credibility issues are reviewed for an abuse of discretion). We view the evidence in the light most favorable to upholding the superior court's decision. *Double AA Builders, Ltd. v. Grand State Constr., L.L.C.*, 210 Ariz. 503, 506, ¶ 9, 114 P.3d 835, 838

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<sup>1</sup> Nationwide deposited the deferred compensation plan proceeds with the superior court and its liability was subsequently discharged.

(App. 2005). We are bound by the superior court's findings of fact unless they are demonstrated to be clearly erroneous. *Combs v. DuBois*, 135 Ariz. 465, 468, 662 P.2d 140, 143 (App. 1982).

¶17 Husband contends that it can be inferred that Ms. Maley intended to remove Cousin from the deferred compensation plan because she changed the beneficiary designations on her ASRS and annuity accounts. Like the superior court, we disagree.

¶18 After receiving testimony from Ms. Maley's friend, Husband, her financial planner, and Nationwide's Arizona program director, the superior court found that there was "no substantial evidence" that Ms. Maley was confused, or otherwise believed that, by changing the beneficiary on the ASRS and annuity accounts, she had changed the beneficiary on the deferred compensation plan. Because we defer to the superior court's determinations regarding witness credibility and the weight to give conflicting evidence, the superior court did not abuse its discretion when it determined Cousin was the deferred compensation plan beneficiary. See *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

## II.

¶19 Husband next argues that the superior court erred when it distributed half of the community property share of the

deferred compensation plan proceeds to Cousin. Husband maintains that the entire community property share should have been awarded to Ms. Maley's estate pursuant to A.R.S. § 14-3101(A) (2005).

¶10 To resolve the issue we must interpret the statute and related section, which we do de novo. *In re Paul M.*, 198 Ariz. 122, 123, ¶ 1, 7 P.3d 131, 132 (App. 2000). When interpreting a statute, our goal is to give effect to the legislature's intent. *State v. Peek*, 219 Ariz. 182, 184, ¶ 11, 195 P.3d 641, 643 (2008). We will look to the statutory language, which provides "the best and most reliable index of a statute's meaning." *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). "[W]here the language is plain and unambiguous, courts generally must follow the text as written." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994).

¶11 Section 14-3101(A) states that "[t]he *rights of creditors, devisees and heirs* to his property are subject to the *restrictions and limitations contained in this title* to facilitate the prompt settlement of estates." (Emphasis added.) Compensation plans are addressed in Title 14 and are defined as nontestamentary. A.R.S. § 14-6101(A) (2005). Specifically, § 14-6101(A) states that "[a] provision for the nonprobate transfer on death in any insurance policy, . . . account

agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, . . . or other written instrument of similar nature is nontestamentary." Section 14-6101(B)(1) broadly defines other types of written instruments that are nontestamentary, namely those where "[m]oney . . . due to, controlled by or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing." The document can also be nontestamentary if it provides that the money does not have to be paid "in the event of death of the promisee or the promisor before payment or demand," A.R.S. § 14-6101(B)(2), or "[a]ny property that is controlled by or owned by the decedent before death and that is the subject of the written instrument or in a separate writing." A.R.S. § 14-6101(B)(3).

¶12 Here, the deferred compensation plan is a nontestamentary, nonprobate transfer because it meets the statutory definition of a compensation plan in § 14-6101(A). See also *In re Estate of Lamparella*, 210 Ariz. 246, 248 n.1, ¶ 10, 109 P.3d 959, 961 n.1 (App. 2005) (defining nonprobate transfers as assets transferred outside of probate such as insurance proceeds, payable on death accounts, and other revocable dispositions). The account is also a nonprobate, nontestamentary transfer because the deferred compensation plan

is the writing which provides that the money, which the decedent owned, would be paid to the designated or alternate beneficiary after her death. A.R.S. § 14-6101(B)(2).

¶13 Cousin, however, did not receive all of the deferred compensation plan proceeds. The superior court determined, without objection, that ten percent of the proceeds were community property, the portion of the proceeds that were earned during the marriage. A.R.S. § 25-211(A) (Supp. 2009). As a result, the superior court awarded Cousin only the portion of the proceeds that Ms. Maley could have received if the community property was divided. A.R.S. § 25-318(A) (Supp. 2009). Consequently, the superior court did not err by not awarding the full community property share of the deferred compensation plan to the estate.

### III

¶14 Finally, Husband argues that A.R.S. § 14-6102(B)(3) (2005) provides that the Estate is entitled to receive a pro rata share of the three statutory allowances<sup>2</sup> from Cousin's share of the deferred compensation plan proceeds. We disagree.

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<sup>2</sup> A surviving spouse can receive three types of statutory allowances that are exempt from, and have priority over, all claims against the estate except expenses of administration or other allowances. There is an \$18,000 homestead exemption, A.R.S. § 14-2402 (2005), a \$7000 exempt property allowance, A.R.S. § 14-2403 (2005), and a family allowance that cannot exceed \$12,000. A.R.S. §§ 14-2404 to -2405 (2005).

¶15 Although a nonprobate transferee may be liable to an insolvent estate, Husband ignores the fact that he received nonprobate transfers in excess of the statutory allowances. The surviving-spouse statutory allowance provisions do not support Husband's position.

¶16 The homestead allowance provision, for example, provides that the "allowance is chargeable against any benefit or share that passes to the surviving spouse . . . by nonprobate transfer pursuant to section 14-6102." A.R.S. § 14-2402(C). The provision clearly provides that Husband's nonprobate transfers will be considered to determine if he is entitled to a homestead allowance. If, for example, he did not receive any nonprobate transfers and the Estate was insolvent, the Estate could seek to recover Cousin's nonprobate transfers to meet the statutory allowance obligation. However, because Husband received nonprobate transfers from ASRS and the annuity, the Estate does not need to look to Cousin's share of the deferred compensation plan nonprobate transfer to pay the homestead allowances to Husband. See *In re Estate of Lawson*, 721 P.2d 760, 762 (1986) (stating "the purpose of the allowances is to ensure that a surviving spouse is not left penniless and abandoned by the death of a spouse").

¶17 The same legal analysis applies to and precludes Husband's claims as to the exempt property allowance and family



allowance. Both provide that the allowance is "chargeable against any benefit or share passing to the surviving spouse . . . by a nonprobate transfer pursuant to § 14-6102." Compare A.R.S. §§ 14-2403(D) with -2404(C).

¶18 Moreover, the plain meaning of the statutes is supported by *May v. Ellis*, 208 Ariz. 229, 92 P.3d 859 (2004). In *May*, our supreme court found that life insurance proceeds that a surviving spouse received were exempt from the creditors of the estate. *Id.* at 232, ¶ 13, 92 P.3d at 862. In examining § 14-6102(A), the court determined that the first phrase of the statute - "[e]xcept as otherwise provided by law" [-] . . . only applies when there is no other 'law' to the contrary." *Id.* at 231, ¶ 11, 92 P.3d at 861 (quoting A.R.S. § 14-6102(B)). Here, the language of the statutory allowance provisions is "other law" that requires courts to consider all nonprobate transfers, even those to Husband. We do so to harmonize the language and to avoid statutory conflict. *Id.* at ¶ 12. Consequently, because Husband received nonprobate transfers in excess of the allowances, he does not need to look to the Estate for payment of those allowances, and the Estate does not need to attempt to collect the allowances from Cousin. Therefore, the trial court did not err when it declined to apply the deferred compensation plan proceeds to pay the statutory allowances.

¶19 Husband and Cousin request attorneys' fees and costs on appeal pursuant to A.R.S. § 12-349 (2003) and ARCAP 21(c). Cousin is not entitled to fees pursuant to § 12-349 because Husband's appeal was not frivolous. Additionally, Cousin is not entitled to fees pursuant to ARCAP 21 because "it does not provide a substantive basis for a fee award." *Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 375, ¶ 24, 45 P.3d 1219, 1224 (App. 2002). Husband is not entitled to fees because he was not the prevailing party. Cousin, however, as the successful party, is entitled to his costs upon compliance with ARCAP 21.

**CONCLUSION**

¶20 Based on the foregoing, we affirm the judgment.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Judge

/s/

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PATRICIA A. OROZCO, Judge