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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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

In re the Marriage of:) 1 CA-CV 10-0533
)
ROBYN LOOMSTEIN-EWING,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
LEO EWING,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2009-000278

The Honorable Randall H. Warner, Judge

AFFIRMED

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P O R T L E Y, Judge

¶1 Leo Ewing ("Husband") appeals from the denial of his petition to enforce his divorce decree and the family court's award of attorneys' fees. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 After a nearly ten year marriage, Robyn Loomstein-Ewing ("Wife") filed for divorce in January 2009. By June, the parties had settled all issues concerning their divorce, and their stipulated divorce decree was signed by the family court and filed the following month.

¶3 Two months later, Wife filed a motion to enforce the terms of the decree. She claimed that Husband failed to pay his portion of debts, kept personal property that she was awarded, and damaged her residence. Husband also claimed that Wife violated the decree because she failed to pay her portion of debts, failed to provide statements for the couple's home equity line of credit ("HELOC"), misspent HELOC funds during the marriage, and retained his personal property.

¶4 After an evidentiary hearing, the family court found that both Wife and Husband had violated terms of the decree. The court, however, found that Wife provided the required HELOC statements and that Husband failed to prove that she misspent the HELOC funds. The court also awarded Wife attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 25-324

(Supp. 2010). Husband appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

I. Discovery

¶15 Husband contends that the family court erred by restricting discovery on his counter-petition to enforce the divorce decree. Specifically, Husband contends that the court erred by: (1) holding that the divorce decree limited post-decree discovery; (2) denying his motion to compel; and (3) quashing his subpoena of Wife's bank account records.

¶16 We review the family court's interpretation of a dissolution decree de novo, but we review the court's resolution of discovery disputes for an abuse of discretion. *Cohen v. Frey*, 215 Ariz. 62, 66, ¶¶ 10-11, 157 P.3d 482, 486 (App. 2007); see *Seidman v. Seidman*, 222 Ariz. 408, 411, ¶ 18, 215 P.3d 382, 385 (App. 2009). We review the decree as a whole in accordance with general principles of contract interpretation. *Stine v. Stine*, 179 Ariz. 385, 388, 880 P.2d 142, 145 (App. 1994); *Lopez v. Lopez*, 125 Ariz. 309, 310, 609 P.2d 579, 580 (App. 1980). Because a decree is "an independent resolution by the court of the issues before it" we do not defer to the "negotiated intent of the parties." *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 11, 972 P.2d 230, 233 (1999). But when the decree is subject to more than one interpretation, it is within the court's authority

to interpret and clarify the decree. See *Cohen*, 215 Ariz. at 66, ¶¶ 11-12, 157 P.3d at 486.

¶7 Because Wife's expenditure of HELOC funds was a point of contention before the decree, paragraph 3(G) of the decree provides that:

G. Wife shall provide the Husband with two years of HELOC statements so the Husband can verify where those monies were spent. If the Husband has a question on a particular distribution from that account, he shall notify the Wife's counsel and Wife shall provide Husband proof of where the monies were spent. If the Husband believes the HELOC monies were not appropriately spent, he is free to petition the Court for relief as he sees fit.

¶8 In his petition, Husband alleged that he did not receive a "complete accounting of all HELOC statements," was unable to "verify where the monies went," and believed that Wife could not account for "several thousands of dollars." He further argued that paragraph 3(G) did not restrict his right to discovery during post-decree litigation, and he requested that Wife provide financial information¹ so that he could have a

¹ Husband requested the following documents:

1. Electronic copies of all accounting files along with any corresponding access information including logins and passwords;
2. Copies of all loan documents, agreements, notices, credit line amounts, initial balances and statements as well as

"clear and fair accounting of the assets, expenses and obligations related to [the] dissolution."

¶19 Wife asserted that many of the documents that Husband requested were irrelevant because the decree required Husband to first identify particular distributions before she was required to provide detailed expenditure information. As a result, she refused to provide the requested financial information until Husband disputed a particular transaction.

copies of cancelled checks, electronic transfers or other transactions;

3. Verifiable, legitimate documentation of all withdrawals, payments and interest accruals of all loans;

4. Bank copies of 2 years worth of bank statements of any account that included the deposit of any loan draws or payments to loans including account numbers and account headers;

5. Two years of Issuer's Statement copies of all jointly held credit card or bank accounts;

6. Documented origin of funds in any investment or bank accounts;

7. Receipts for cash transactions;

8. Documentation clearly identifying the balances of all checking, investment and loan accounts as of May 1, 2009;

9. Copies of all tax returns with corresponding documentation for the past seven years.

¶10 Before the evidentiary hearing, the family court denied Husband's motion to compel and quashed his attempt to subpoena Wife's bank account information. After the evidentiary hearing, the court found that Husband failed to make a "narrowly focused document request," as required by paragraph 3(G). The court determined that Husband was first required to question particular transactions from the HELOC statements; Wife was then required to provide detailed information concerning the questioned transactions; and only after receiving information from Wife could Husband seek judicial relief. Otherwise, the court determined, the provision requiring that Husband question a "particular transaction" would be meaningless. Concluding, the court found that Husband was attempting to "litigate post-decree what he had the full opportunity to litigate pre-decree"; that he did not comply with the requirements of paragraph 3(G); and that he did not meet his burden of proving that Wife misspent HELOC funds.

¶11 The decree "equitably and completely disposes of all community, joint and common property and obligations of the parties," and provides that Wife will fully indemnify Husband for all debt relating to the HELOCs. Despite the finality of the decree, paragraph 3(G) authorizes Husband to "petition the Court for relief as he sees fit" after the entry of the decree if he believed that Wife misspent money from the HELOCs.

Paragraph 3(G) does not, however, specify whether Husband must first question particular transactions and give Wife an opportunity to provide detailed expenditure information, or whether Husband can petition the court for relief without ever disputing a transaction. As a result, paragraph 3(G) is ambiguous, and we will interpret the decree in light of the surrounding circumstances including typical principles of family law. See *Zale*, 193 Ariz. at 250-51, ¶¶ 17-18, 972 P.2d at 234-35; *Cohen*, 215 Ariz. at 67, ¶ 14, 157 P.3d at 487.

¶12 Typically, disposition of property in a decree is final; “[t]he well-established rule is that property settlements are not subject to modification or termination.” *DeGryse v. DeGryse*, 135 Ariz. 335, 338, 661 P.2d 185, 188 (1983); A.R.S. § 25-327(A) (2007) (holding that provisions in a decree “as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state”). The general rule helps explain paragraph 3(G). Once the decree was filed, Husband’s right to continued discovery, let alone continued litigation concerning the division of community property, was extinguished absent potentially extraordinary circumstances. See Ariz. R. Fam. Law P. 84 and 85. Paragraph 3(G), however, enabled Husband to obtain information about Wife’s HELOC expenditures after entry of the final decree.

¶13 Husband's argument that the family court restricted his right to discovery is belied by paragraph 3(G) which significantly expands Husband's otherwise non-existent post-decree discovery rights into property issues. The numerous cases he cited which discussed expansive discovery rights before judgment or decree are inapposite. The proper point of comparison is only Husband's discovery rights post-decree. And, the family court's interpretation of paragraph 3(G) did not restrict Husband's right to post-decree discovery.

¶14 Husband, however, contends that the decree allows him to "petition the Court for relief as he sees fit," which necessarily authorizes a broad scope of discovery. His expansive interpretation of paragraph 3(G) would render the remainder of the property divisions in the decree illusory. See *Cohen*, 215 Ariz. at 67, ¶ 13, 157 P.3d at 487. His interpretation would authorize the alteration of debt, cash, and other property allocations in the decree, which, because the decree divides the entire community property estate, would result in a de facto modification. Arizona courts have repeatedly recognized the need for finality of property settlements. See, e.g., *In re Marriage of Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997); *DeGryse*, 135 Ariz. at 338, 661 P.2d at 188; *Reed v. Reed*, 124 Ariz. 384, 385, 604 P.2d 648, 649 (App. 1979) ("There is a compelling policy interest

favoring the finality of property settlements.”). To that end, de facto decree modifications are generally not permitted. *LaPrade v. LaPrade*, 189 Ariz. 243, 246, 941 P.2d 1268, 1271 (1997); *Cohen*, 215 Ariz. at 65, ¶ 8, 157 P.3d at 485; *Gaddis*, 181 Ariz. at 469, 957 P.2d at 1012. After the entry of the decree, Husband did not appeal any issue related to the decree or file other motions attacking its validity. If Husband wanted to litigate Wife’s alleged waste of community property, he should have done so before the entry of the decree. As a result, the financial information Husband requested was mostly irrelevant and would not have led to the discovery of admissible evidence. See Rule 51(B)(1).

¶15 We agree with the family court that paragraph 3(G) provides Husband with limited post-decree discovery rights, not the ability to re-litigate the decree. As a result, the family court did not abuse its discretion by limiting Husband’s discovery.

II. Attorneys’ Fees

¶16 Husband next asserts that the family court’s award of attorneys’ fees should be vacated because the trial court erred by restricting his discovery.² Because the court properly

² In his reply brief, Husband argues that the family court failed to make appropriate findings before awarding Wife attorneys’ fees. Issues first raised in a reply brief are waived. See *State v. Watson*, 198 Ariz. 48, 51, 6 P.3d 752, 755 (App. 2000).

resolved the post-decree discovery issue, the fee award was not an abuse of discretion.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶17 Wife requests an attorneys' fees and costs on appeal pursuant to A.R.S. §§ 12-341 to -342 (2003), and 25-324. In our discretion, we decline to award attorneys' fees. Wife is entitled to costs on appeal upon compliance with ARCAP 21.

CONCLUSION

¶18 For the foregoing reasons, we affirm the family court's judgment.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP Judge

/s/

SHELDON H. WEISBERG, Judge