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



DIVISION ONE
FILED: 10/04/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 10-0577
)
BILLIE ROSE DIVINE,) DEPARTMENT E
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
)
v.)
) Not for Publication -
TIMOTHY MICHAEL DIVINE,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2003-091460

The Honorable David G. Gass, Judge

AFFIRMED

The Law Offices of Wendy Raquel Hernandez, P.C. Phoenix
By Wendy Raquel Hernandez
Ashley Blair Mercomes
Attorneys for Petitioner/Appellant

Ryan Rapp & Underwood, P.L.C. Phoenix
By Susan M. Swick
Attorneys for Respondent/Appellee

J O H N S E N, Judge

¶1 Billie Rose Divine ("Wife") appeals the superior court's order dismissing her petition to modify spousal maintenance. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Wife was married to Timothy Michael Divine ("Husband") for 23 years when she filed a petition for legal separation. On October 19, 2004, the parties appeared before the court and agreed that in lieu of an award of spousal maintenance, Wife would receive substantially all of the community property.¹ In particular, they agreed Wife would receive, among other things, the marital residence, her vehicle and the proceeds of Husband's 401(k) plan as of the date of the petition (valued at approximately \$208,000), plus an additional \$10,000. Husband agreed to continue to pay the mortgage and utilities for the marital residence for six months after the date of the hearing. In addition, he agreed to pay the premiums for Wife's health insurance for two years after entry of the decree. Husband and Wife agreed Husband's mortgage, utility and health insurance premium payments were spousal support obligations that could be modified if there was a change in circumstances, specifically if Husband lost his job.

¹ Wife was represented by counsel, Husband was not.

¶13 The parties set forth their agreement on the record, pursuant to Arizona Rule of Civil Procedure 80(d), which provides that an agreement is binding if made orally in open court and entered in the minutes.² The court questioned Husband and Wife to ensure they understood the agreement and assented to it, then the court ordered Wife's counsel to submit a proposed form of decree reflecting the agreement within thirty days.

¶14 After 13 months, Wife had not submitted the proposed decree. The court held a hearing and ordered Wife's counsel to file a proposed decree that reflected the agreement set forth on the record at the October 2004 hearing. Wife's counsel filed the proposed decree, but neither she nor Wife signed it because, Wife asserted, she had not understood the agreement made at the October 2004 hearing and did not believe it was in her best interests. The court entered the decree of dissolution on February 7, 2006.

¶15 As noted, the decree awarded Wife approximately \$208,000 from Husband's 401(k) plan, plus additional amounts agreed upon by the parties. The court ordered the parties to execute and deliver all documents necessary to effectuate the provisions of the decree within 30 days, and specifically directed Wife to pay the cost of creating a Qualified Domestic

² Such agreements now are governed by Arizona Rule of Family Law Procedure 69, which became effective January 1, 2006.

Relations Order ("QDRO") to divide the 401(k). Because Wife did not timely have the QDRO prepared, on May 30, 2006, Husband moved the court to enforce that part of the decree. Wife opposed the motion, and at the same time asked the court to set aside the decree pursuant to Arizona Rule of Family Law Procedure 85(C)(f) on the ground that its terms were "harsh and unfair" because the award of the 401(k) was not an adequate substitute for spousal maintenance. The court refused to consider Wife's request to set aside the decree because she had not brought the request in a separate motion. The court granted Husband's petition and ordered Wife to have the QDRO prepared. The court entered the QDRO on February 27, 2007.

¶16 On March 8, 2010, Wife filed a petition to modify award of spousal maintenance, in which she asserted that the court had awarded her the proceeds of Husband's 401(k) as spousal maintenance and asked the court to modify that amount based upon a change in circumstances.³ She argued the cost of her health insurance had increased dramatically and constituted a substantial change in circumstances that warranted

³ In the alternative, she asked the court to reopen the judgment pursuant to A.R.S. § 25-327(A) (2011), which permits a court to revoke or modify a property disposition only if it finds the existence of conditions that justify the reopening of a judgment under Arizona law. (We cite the current version of the statute because no revisions material to this decision have since occurred.)

modification. Husband moved to dismiss the petition on the ground that the court had not awarded spousal maintenance to Wife in the decree and therefore lacked jurisdiction. He argued that even if the court considered his payments of Wife's health insurance premiums to be spousal maintenance, that obligation had terminated one year earlier and could not be modified. The court granted Husband's motion and dismissed Wife's petition. Wife timely appealed.

¶17 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (2011).

DISCUSSION

¶18 Wife contends the superior court erred by failing to recognize that the "true nature" of the decree's award of the 401(k) proceeds was an award of spousal maintenance. We review the superior court's interpretation of a decree of dissolution *de novo*. *Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 10, 157 P.3d 482, 486 (App. 2007).

¶19 As relevant, the decree states:

[Wife] shall receive the entire proceeds of [Husband's] On Semiconductor 401(k) Plan through his employment as of the date of filing the Petition for Legal Separation, April 9, 2003, which is approximately \$208,000.00. The proceeds shall rollover into an interest bearing Roth IRA, an IRA, or a Medical Trust for the benefit of [Wife]. Any penalties resulting from the division of the 401[(k)] shall be the sole responsibility of [Husband]. **The 401[(k)]**

division proceeds shall generate a monthly income to support [Wife's] reasonable needs in accordance with the criteria used for a spousal maintenance award found in A.R.S. § 25-319. The 401[(k)] division herein is made instead of an award for spousal maintenance and the 401[(k)] division is expected to assist in supporting [Wife's] reasonable needs. In addition to this sum, [Wife] shall also receive out of [Husband's] On Semiconductor 401(k) Plan an additional \$17,000.00.

(Emphasis added.)

¶10 Wife argues that the award of the 401(k) was made according to the criteria in A.R.S. § 25-319 for an award of spousal maintenance and it therefore should be characterized as an award of spousal maintenance subject to modification. In the alternative, she contends the language is ambiguous and reasonably subject to her interpretation.

¶11 "The parties to a divorce may, by agreement between themselves, settle and adjust all property rights growing out of the marital relation and, in the absence of fraud or undue influence, such an agreement is binding upon the parties." *Keller v. Keller*, 137 Ariz. 447, 448, 671 P.2d 425, 426 (App. 1983); see also A.R.S. § 25-317(B) (2011). Although the court may reject or modify the parties' agreement if it finds it unfair, once the court accepts the agreement and enters the decree, it cannot alter its terms. *Keller*, 137 Ariz. at 448, 671 P.2d at 426. A final decree is "an independent resolution

by the court of the issues before it and rightfully is regarded in that context and not according to the negotiated intent of the parties." *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 11, 972 P.2d 230, 233 (1999). Nonetheless, if a portion of a decree is ambiguous, the court has discretion to interpret and clarify that portion in a way that comports with a reasonable and effective construction of the decree's language. *Paxton v. McDonald*, 72 Ariz. 378, 382-83, 236 P.2d 364, 367 (1951); *Cohen*, 215 Ariz. at 66, ¶¶ 11-12, 157 P.3d at 486. We apply general rules of construction and will determine that a decree is ambiguous only when the language used is reasonably susceptible to more than one interpretation if construed according to its natural meaning and with reference to related provisions in the decree. *Cohen*, 215 Ariz. at 66, ¶ 11, 157 P.3d at 486.

¶12 We cannot accept Wife's proposed interpretation of the decree. As is clearly set forth in the second highlighted sentence in the above excerpt, Wife received the 401(k) monies *instead of* an award of spousal maintenance. The decree explains that the proceeds of the 401(k) were to generate a monthly income for Wife that would assist her in supporting her reasonable needs. Section 25-319 allows a court to grant an award of spousal maintenance if it finds that the spouse seeking maintenance "[l]acks sufficient property, including property

apportioned to the spouse, to provide for that spouse's reasonable needs." A.R.S. § 25-319(A)(1).

¶13 Rather than establishing that the court was awarding Wife spousal maintenance, the decree's reference to A.R.S. § 25-319 evidences the court's determination that Wife did not qualify for spousal maintenance because the 401(k) provided her with sufficient assets to assist her in providing for her reasonable needs. If we were to read the decree as Wife suggests, it would render meaningless the statement, "[t]he 401[(k)] division herein is made instead of an award for spousal maintenance." See *Stine v. Stine*, 179 Ariz. 385, 388, 880 P.2d 142, 145 (App. 1994) (when interpreting a decree, court may not assign a meaning to one provision that would render another provision meaningless). Accordingly, the superior court did not err in determining that the decree was unambiguous and denying an award of spousal maintenance to Wife.

¶14 Further, we agree with Husband that the only amounts in the decree that might be viewed as spousal maintenance were his payments of the mortgage and utilities for the marital residence and of Wife's health insurance premiums. Because those payments ended a year before Wife requested modification, her request was untimely. See *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989) (court may modify spousal maintenance obligation while payments are being made).

¶15 The superior court correctly determined that the decree's award of Husband's 401(k) monies to Wife did not constitute a modifiable award of spousal maintenance and any potential right to modification of spousal maintenance lapsed once Husband was no longer obligated to pay Wife's health insurance premiums.⁴

CONCLUSION

¶16 For the foregoing reasons, we affirm the superior court's order. Husband asks us to sanction Wife pursuant to Arizona Rule of Family Law Procedure 31(A), Arizona Rule of Civil Appellate Procedure 25 and A.R.S. § 12-349 (2011). In the exercise of our discretion, we decline to do so. We also deny Husband's request for an award of attorney's fees pursuant to A.R.S. § 25-324 (2011). Because Husband is the prevailing party on appeal, we award him his costs on appeal conditioned upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
ANN A. SCOTT TIMMER, Judge

⁴ Accordingly, we do not consider Wife's argument that a substantial and continuing change of circumstances warranted a modification of spousal maintenance.