IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 10/11/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

In re the Marriage of:	)	No. 1 CA-CV 10-0680
	)	
REGINA PRYOR,	)	DEPARTMENT A
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	Not for Publication
	)	(Rule 28, Arizona Rules
MICHAEL PRYOR,	)	of Civil Appellate Procedure)
	)	
	)	
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2004-005634

The Honorable Randall H. Warner, Judge

AFFIRMED

Law Offices of Mary Kay Grenier, PLC — Scottsdale
By Mary Kay Grenier
Attorney for Petitioner/Appellee

Popp Law Firm, P.L.C. — Tempe
By James S. Osborn Popp
Attorney for Respondent/Appellant

B A R K E R, Judge

¶1 Michael Pryor ("Husband") appeals from the family court's order dividing his Civil Service Retirement System

("CSRS") pension. Husband argues the court improperly modified the property settlement agreement by requiring direct payments to Regina Pryor ("Wife") prior to Husband's retirement and by not dividing the pension pursuant to the reserved jurisdiction method. Additionally, Husband challenges the formula used to make a social security adjustment. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 Husband and Wife married July 27, 1974. Husband is a federal civil service employee who began accruing CSRS benefits on April 10, 1977. Due to his participation in the CSRS, Husband does not participate in the Social Security Retirement System.

¶3 On January 20, 2006, the family court entered a consent decree of dissolution which incorporated a Property Settlement Agreement ("PSA") that provides, in pertinent part:

> **DIVISION OF RETIREMENT, PENSION, DEFERRED COMPENSATION, 401K, OTHER SAVINGS**
>
> Award each party his/her interest in any and all 401(K) plans, retirement benefits, pension plans or other deferred compensation described as including, but not limited to the following: . . . Husband's Civil Service Retirement through the Department of the Interior . . . . The division shall be made as of October 1, 2003.
>
> The parties agree to retain either attorney Richard Underwood . . . or William Kluwin . . . to prepare the necessary Qualified

> Domestic Relations Orders ("QDRO") and any other documentation needed to divide the above-stated plans.

Wife subsequently agreed to a reduced community interest in Husband's pension based on his deemed social security benefits pursuant to *Kelly v. Kelly,* 198 Ariz. 307, 9 P.3d 1046 (2000).

¶4 Husband was eligible to retire on April 10, 2007, when he attained age 55 and completed 30 years of service. Nevertheless, Husband continues to work and plans on retiring in January 2014, after he turns 62.

¶5 In July 2008, Wife lodged a proposed Domestic Relations Order ("DRO") prepared by Richard Underwood. Husband objected to the DRO, the court set an evidentiary hearing, and both parties submitted proposed DROs. After the evidentiary hearing in October 2009, the court rejected both parties' DROs, in part because it determined both violated *Koelsch v. Koelsch,* 148 Ariz. 176, 713 P.2d 1234 (1986), and set forth the following criteria on which to base the DRO:

> 1. The community portion of Husband's CSRS benefit shall be calculated by multiplying the retirement benefit Husband would have received had he retired on April 10, 2007 by a fraction, the numerator of which is 26.47 years (the time of service during the marriage toward which Husband earned CSRS credit) and the denominator of which is 30 years (the total time of service toward which Husband earned CSRS credit up to the maturity date).

> 2. Wife is entitled to one-half of the community portion of Husband's CSRS benefit starting on April 10, 2007, subject to the *Kelly* adjustment set forth below.
>
> 3. Wife's portion of Husband's CSRS benefit shall be subject to a *Kelly* adjustment. Husband's hypothetical Social Security benefit shall be what Husband would have received in Social Security beginning on his 62nd birthday based on his earnings during the marriage up to October 1, 2003. Half of that benefit shall be credited against Wife's portion of Husband's CSRS benefit in one of two ways:
>
> > (a) Wife receives one-half of the community portion of Husband's CSRS benefit from April 10, 2007 through Husband's 62nd birthday . . . and then beginning on Husband's 62nd birthday, Wife's payment is adjusted for Husband's hypothetical Social Security payment.
> >
> > (b) An actuarial calculation is performed to reduce Husband's hypothetical Social Security payment as of his 62nd birthday to a monthly payment as of April 10, 2007, and Wife's payment is adjusted for that actuarially-calculated payment as of April 10, 2007.
>
> 4. Wife shall receive a pro rata share of any cost of living increases.
>
> 5. The order shall direct Husband to immediately begin making the payment to Wife from the date of the order until Wife begins receiving direct payments from CSRS under the DRO.

¶6 As instructed, the parties submitted new DROs, but primarily disputed *Kelly* adjustment calculation. After a second evidentiary hearing in May 2010, the court adopted Wife's DRO

calculating Wife's one-half community interest in the pension to be $1,598.37 per month. Prior to Husband's retirement, the court ordered the monthly payments to be tax adjusted resulting in direct payments of $1,199.22 per month to Wife. Additionally, the court entered judgment in favor of Wife and against Husband in the amount of $45,570.36 for 38 direct payments of $1,199.22 beginning April 10, 2007.

¶7 The court denied Husband's motion for new trial, to alter or amend the judgment, and to amend the findings, and Husband appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1), (5)(a).

Discussion

1. General Principles of Pension Division

¶8 Pension plans are a form of deferred compensation to employees for services rendered; therefore, the portion of any employee-spouse's pension earned during marriage is presumed community property subject to equitable division. *Johnson v. Johnson,* 131 Ariz. 38, 41, 638 P.2d 705, 708 (1981); *see also Cooper v. Cooper*, 167 Ariz. 482, 487, 808 P.2d 1234, 1239 (App. 1990) (an absolutely equal distribution is not required so long as the distribution is equitable and fair).

¶9 Husband's pension is a defined benefit plan. A defined benefit plan specifies benefits in advance "usually as a

percentage of salary and related to years of service."[1] *Johnson,* 131 Ariz. at 42, 638 P.2d at 709. When the number of years served by an employee is a substantial factor in determining the benefits the employee will receive, "the community is entitled to have its share based upon length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits." *Cooper,* 167 Ariz. at 490, 808 P.2d at 1242. Husband's monthly CSRS benefit will be calculated when he retires based on the number of years of his federal service and the average of his three highest salary years. Additionally, Husband's pension matured on April 10, 2007, when he was entitled to an unconditional right to immediate payment.[2] *Johnson,* 131 Ariz. at 41 n.2, 638 P.2d at 708 n.2; s*ee also Boncoskey v. Boncoskey,* 216 Ariz. 448, 451-52, ¶¶ 15-16, 167 P.3d 705, 708-09 (App. 2007) (noting mature

[1] Conversely, a defined contribution plan involves contributions from the employer, the employee, or both into an invested fund, with the earnings "divided proportionately among all plan participants." *Johnson,* 131 Ariz. at 42, 638 P.2d at 709. Although Husband's pension is a defined benefit plan, Husband does make contributions to his pension plan.

[2] Although not discussed in the family court proceedings, Husband's pension apparently vested after five years of service. *See In re Marriage of Kelm*, 912 P.2d 545, 548 (Colo. 1996). A "vested" right is not subject to forfeiture if the employment relationship ends before the employee retires. *Johnson,* 131 Ariz. at 41 n.2, 638 P.2d at 708 n.2.

pension rights can be more easily valued than unmatured pension rights).

¶10 In *Johnson v. Johnson,* our supreme court identified two methods of apportioning unmatured benefits in a retirement plan: the "present cash value method" and the "reserved jurisdiction method."[3] *Johnson,* 131 Ariz. at 40-41, 638 P.2d at 707-08; *Cooper,* 167 Ariz. at 490, 808 P.2d at 1242. Both methods employ a "time formula," also known as the *Van Loan* formula, to determine the community share of the pension. *Cooper,* 167 Ariz. at 490, 808 P.2d at 1242; *Van Loan v. Van Loan,* 116 Ariz. 272, 569 P.2d 214 (1977). Under the time formula, the community share of a pension is obtained "by dividing the length of time worked during the marriage by the total length of time worked toward earning the pension." *Johnson,* 131 Ariz. at 41 n.4, 638 P.2d at 708 n.4.

¶11 The present cash value method is a lump sum distribution "in which the court determines the community interest in the pension [pursuant to the time formula], figures the present cash value of that interest, and awards half of that amount to the non-employee spouse in a lump sum." *Id.* at 41, 638 P.2d at 708. The reserved jurisdiction method allows a court to determine a formula for division at the time of the

[3] The pension at issue in *Johnson* was a defined contribution plan. *Johnson,* 131 Ariz. at 42, 638 P.2d at 709.

decree, but delays division until the participant spouse begins receiving payment. *Id.*; *see also Boncoskey,* 216 Ariz. at 452, ¶ 18, 167 P.3d at 709 (explaining division of pension payments occur "'if, as and when' the pension is paid out.") (citation omitted). The court determines the community interest using the time formula, "multiplies each future pension payment by" the time formula, and "then divides that part between the spouses." *Johnson,* 131 Ariz. at 41 n.5, 638 P.2d at 708 n.5.

¶12 In *Koelsch*, our supreme court addressed "how and when a non-employee spouse's community property interest in an employee spouse's matured retirement benefit plan is to be paid when the employee wants to continue working." 148 Ariz. at 180, 713 P.2d at 1238. There, at the time of dissolution, the husband's pension plan was six months away from maturing, and the husband continued working past the maturity date.[4] *Id.* at 178, 713 P.2d at 1236. The court determined the reserved jurisdiction method of division was inapplicable and the lump sum method was preferable. *Id.* at 183, 713 P.2d at 1241. Nevertheless, "[i]f the lump sum method would be inequitable or impossible, the court can order that the non-employee spouse be paid a monthly amount equal to his or her share of the benefit

[4] *Koelsch* involved consolidated cases, and the facts of the second case concerned an employee spouse whose plan matured prior to the date of dissolution. *Koelsch,* 148 Ariz. at 179, 713 P.2d at 1237.

which would be received if the employee spouse were to retire." *Id.* at 185, 713 P.2d at 1243. Under this approach, "the monthly amount . . . available if the employee spouse were to retire is multiplied by a fraction in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan up to the date of dissolution is the denominator." *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243. One-half of that amount is awarded to the non-employee spouse and, the court has discretion to order the employee spouse to make payments to the non-employee spouse. *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243.

2. Property Settlement Agreement

¶13 Husband argues the court improperly modified the PSA by ordering direct payments prior to Husband's retirement pursuant to *Koelsch*. We review the family court's interpretation of the PSA de novo. *In re Estate of Lamparella,* 210 Ariz. 246, 250, ¶ 21, 109 P.3d 959, 963 (App. 2005).

¶14 When a property settlement agreement is incorporated into a decree, as in this case, the agreement retains its independent contractual status and is subject to contract law's rights and limitations.[5] *MacMillan v. Schwartz*, 226 Ariz. 584,

[5] The purpose of incorporation is "to identify the agreement so as to render its validity res judicata in any subsequent action based upon it." *MacMillan,* 226 Ariz. at ___,

___, ¶ 15, 250 P.3d 1213, 1218 (App. 2011) (citing *LaPrade v. LaPrade,* 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997)). Accordingly, we interpret the PSA according to its plain language in light of the parties' intentions at the time the contract was made. *Harris v. Harris,* 195 Ariz. 559, 562, ¶ 15, 991 P.2d 262, 265 (App. 1999); *Polk v. Koerner,* 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975). If the terms of the agreement are clear and unambiguous, we give effect to the agreement as written. *Goodman v. Newzona Inv. Co.,* 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). If the written language is ambiguous, we consider the surrounding circumstances at the time the agreement was made. *Polk,* 111 Ariz. at 495, 533 P.2d at 662. A court may not modify a property settlement agreement incorporated into a decree, except under limited circumstances inapplicable in this case. A.R.S. § 25-317(F); *see Beaugureau v. Beaugureau,* 11 Ariz. 234, 237, 463 P.2d 540, 543 (App. 1970).

¶15 A valid contract requires, among *other* things, "a sufficiently specific statement of the parties' obligations[] and mutual assent." *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997). There is no contract if essential terms are so indefinite and uncertain that there is no basis on which to understand the obligations involved, determine a

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¶ 15, 250 P.3d at 1218 (quoting *LaPrade v. LaPrade,* 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997)).

breach, or fashion a remedy. *Pyeatte v. Pyeatte,* 135 Ariz. 346, 351, 661 P.2d 196, 201 (App. 1982); *AROK Constr. Co. v. Indian Constr. Servs.,* 174 Ariz. 291, 297-98, 848 P.2d 870, 876-77 (App. 1993).

¶16 Here, the PSA awards each party "his/her interest" in all retirement benefits, including Husband's pension, and states "[t]he division shall be made as of October 1, 2003." Further, the PSA provides one of two attorneys would prepare "the necessary [QDROs] and any other documentation needed to divide the above-stated plans." The family court explained the PSA "does not specify what Wife's interest in the CSRS was, how that interest would be calculated, how that interest would be paid or when Wife would be entitled to start receiving payment." Therefore, the court determined the parties "deferred resolution of these critical and difficult issues to another day." We agree with the family court.

¶17 The PSA is silent as to division of the pension and the terms of the QDRO. *See, e.g., Ruggles v. Ruggles,* 860 P.2d 182, 199 (N.M. 1993) (the absence of a provision from an agreement concerning when payments from a retirement plan would begin does not mean the parties agreed to wait until the employee spouse retired to begin making payments). Because the agreement is silent about when payments would begin and what formula would be used, the agreement did not prohibit the

superior court from ordering direct payments prior to Husband's retirement. *See id.* at 200 (if there is a determination that there is no agreement on a particular issue, meaning the parties did not consider it or agree how to resolve it, a search for their intent would be "fruitless") (citing Restatement (Second) of Contracts § 204 cmt. b). Without an agreement pertaining to division of Husband's pension other than to create a QDRO, the court had discretion to set forth the terms of the QDRO in an equitable manner. *See, e.g., Janson v. Janson*, 773 A.2d 901, 903-04 (R.I. 2001).

a. Application of Koelsch

¶18 Husband argues *Koelsch* does not apply because his pension was not mature at the date of dissolution. This argument is not persuasive because *Koelsch* involved division of a pension that matured six months after dissolution. *Koelsch,* 148 Ariz. at 178, 713 P.2d at 1236. Similarly, Husband's CSRS benefits matured fifteen months after dissolution. Despite the longer time frame involved in this case, under these circumstances, we find the principles enunciated in *Koelsch* fully applicable to the case at hand. *Accord Ruggles,* 860 P.2d at 184 n.1, 187, 198 n.18 (holding immediate distribution is the preferred method for vested and matured pensions and noting "the employee spouse's interest was due to mature a little less than two years after" the dissolution trial). Accordingly, because

Husband's pension matured within a short time after dissolution, and prior to entry of the QDRO, and there was no error in applying *Koelsch*.

¶19 Nevertheless, Husband contends this case is similar to *Boncoskey* where this court vacated a DRO in part because the family court erroneously directed application of *Koelsch*. There, the husband's pension benefits were not set to mature until fourteen years after entry of the dissolution decree. *Boncoskey,* 216 Ariz. at 451, ¶ 16, 167 P.3d at 708. The court noted the importance of distinguishing between mature pension rights and "rights that have not yet matured and will not do so for *many years*." *Id.* at 451, ¶ 15, 167 P.3d at 708 (emphasis added). Because the husband's benefits were not mature, or close to maturing, *Koelsch* did not apply. *Id.* at 451-53, ¶¶ 16-17, 21, 167 P.3d at 708-10. Further, the court noted "the parties did not stipulate that *Koelsch* should control [the] calculation." *Id.* at 451, ¶ 15, 167 P.3d at 708.

¶20 Because the husband's pension in *Boncoskey* was many years away from maturing, the parties would have needed an agreement for *Koelsch* to apply. Conversely, in the present case, Husband's pension was close to maturing at the time of dissolution. Because the parties did not agree a different method would apply, the court did not err by applying *Koelsch*. Moreover, *Koelsch* instructs that when a pension is mature and

payable "the method of division must be based on a determination of present value." *Koelsch,* 148 Ariz. at 183, 713 P.2d at 1241.

¶21 Husband also argues the family court's ruling violates *Koelsch* by awarding Wife cost of living increases. We disagree.

¶22 Cost of living adjustments ("COLA") are an "inherent quality" of pension plans and are considered community property. *Id.* at 184 n.9, 185, 713 P.2d at 1242, 1243 n.9; *see also Everson v. Everson,* 24 Ariz. 239, 243, 537 P.2d 624, 628 (App. 1975). In *Koelsch,* the court explained when valuing a pension for a lump sum division, "future increases in the value of the pension plan attributable to the 'inherent qualities of the asset itself[,]'" are considered. *Koelsch,* 148 Ariz. at 184, 713 P.2d at 1242 (quoting *Everson,* 24 Ariz. at 243, 537 P.2d at 628). If, however, monthly payments are ordered, the non-employee spouse receives his or her community interest essentially as a percentage of what the employee spouse would receive "if the employee spouse were to retire." *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243. That percentage does not change, but if the value of the pension adjusts due to COLA, the non-employee spouse will share in such adjustment by virtue of his or her calculated community interest.[6] *Id.*

[6] As noted in *Koelsch,* any increases in the pension based on the employee spouse's efforts after dissolution is separate property. *Koelsch,* 148 Ariz. at 184 n.9, 713 P.2d at 1242 n.9.

¶23 For instance, using the fraction the court ordered in this case, the community interest in the pension is 88.23%.[7] That percentage will not change, nor will Wife's entitlement to 44.16% as her one-half community interest. Therefore, because Wife's share of the pension is based on a percentage value of the pension, if the pension value changes due to COLA, Wife will share in those changes.[8] The court's ruling is consistent with *Koelsch*.

b. Reserved Jurisdiction Method

¶24 Next, Husband argues the court erred by not following the reserved jurisdiction method for dividing the pension. Husband, however, makes this argument for the first time on appeal. Therefore, it is waived. *See Airfreight Exp. Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (arguments raised for the first time on appeal are waived).

¶25 Even putting aside waiver, this argument fails. Husband's argument is based on the incorrect premise that there are only two methods to divide pensions, the present cash value

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[7] The numerator of the fraction is 26.47 divided by the denominator 30.

[8] At the second evidentiary hearing, Underwood explained there will be no COLA until Husband actually retires and Wife starts receiving benefits directly from the plan as opposed to monthly payments from Husband.

method and the reserved jurisdiction method. As explained in *Koelsch*, however, there is another method of division, which is appropriate under these circumstances: periodic payments. *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243. Additionally, our supreme court has found different circumstances require different methods of apportionment; therefore, a family court may select the method that will achieve substantial justice between the parties. *Cockrill v. Cockrill,* 124 Ariz. 50, 54, 601 P.2d 1334, 1338 (1979); *see also* Susan J. Prather, Comment, *Characterization, Valuation, and Distribution of Pensions at Divorce,* 15 J. Am. Acad. Matrim. Law 443, 455 (1998) ("no one method can accomplish justice in every case [and courts should] be able to take advantage of reasonable alternatives and adjustment in order to accomplish an equal distribution in an equitable manner in all situations.") (citing *Mechana v. Lambert,* 635 So.2d 747, 749 (La. App. 1994)).

¶26 Husband contends that by providing for division of the pension by a QDRO, the parties agreed to the reserved jurisdiction method of division. By agreeing to a QDRO, the parties did not automatically agree to the reserved jurisdiction method of division. *See* Sherry A. Fabina, *The Retirement Equity Act: An Accommodation of Competing Interests*, 63 Ind. L.J. 131, 153-55 (1988) (comparing a QDRO to the reserved jurisdiction method). A QDRO is a type of DRO that recognizes an alternate

payee's right to receive a portion of the benefits payable under the participant's pension plan. *See Boggs v. Boggs,* 520 U.S. 833, 846 (1997).

¶27 By providing for a QDRO, the parties implicitly agreed not to apply the lump sum method of division. Indeed, the family court stated one of the two things specified in the PSA was that "Wife would receive her interest by [Q]DRO (as opposed to a lump sum)." As explained in *Koelsch,* when the lump sum method of division "would be impossible or inequitable" the court can instead order monthly payments to the non-employee spouse. *Koelsch,* 148 Ariz. at 185, 713 P.2d at 1243. Additionally, in non-mature pension cases when the lump sum method of division is not available, "there is no alternative . . . but to reserve jurisdiction to award the pension *when it does mature*." *Koelsch,* 148 Ariz. at 183, 713 P.2d at 1241 (emphasis added). Here, the court found applying the time formula indefinitely into the future was inequitable in this case because the maturity date already passed. Accordingly, the court determined it was appropriate to value the pension as of the maturity date, which is consistent with *Koelsch*.

c. Valuation Date

¶28 Husband also challenges the court's interpretation of the PSA concerning the October 1, 2003 division date. In the proceedings below, Husband maintained that Wife was not entitled

to any CSRS benefits that accrued after October 1, 2003, and the pension should be valued as if Husband stopped working on that date. The court disagreed and explained:

> The court rejects Husband's argument that, by virtue of the decree, the court must use October 1, 2003 as the date for measuring the pension benefit. That date reflects when the parties agreed the marital community terminated. The court interprets their agreement to mean only that the community's interest in Husband's pension plan terminated on October 1, 2003, such that the numerator of the time rule fraction must be based on that date.

¶29 On appeal, Husband states that by rejecting his argument that the CSRS benefits should freeze as of October 1, 2003, "the court was obliged to enter a DRO that divided the CSRS benefit upon receipt, using October 1, 2003, in the numerator of the marital fraction." The family court did use October 1, 2003 in the numerator of the fraction to determine Wife's community interest in the pension. To the extent Husband's argument is that the court erred by not using the reserved jurisdiction method of division or by ordering direct payments pursuant to *Koelsch,* we reject these arguments for the reasons previously explained.

***3. Kelly* Adjustment**

¶30 Last, Husband argues the court erred in its application of the *Kelly* adjustment because the court did not follow the specific formula set forth in that case. This

argument is waived because Husband raises it for the first time on appeal. *Airfreight Exp. Ltd*, 215 Ariz. at 109-10, ¶ 17, 158 P.3d at 238-39. Even if the argument was not waived, it fails.

¶31 In *Kelly,* the husband participated in the CSRS and the wife participated in a separate retirement system that allows participants to collect social security upon retirement. *Kelly,* 198 Ariz. at 308, ¶ 1, 9 P.3d at 1047. Although social security "would ordinarily be considered community property" subject to equitable division, "federal law prohibits state courts from dividing social security." *Id.* at 308, ¶¶ 2, 5, 9 P.3d at 1047; *see also* 42 U.S.C. § 407. To equalize the treatment of the two pensions, the husband characterized a portion of his retirement as being "in lieu of" social security benefits, and thus, separate property not subject to equitable division. *Kelly,* 198 Ariz. at 308, ¶¶ 1-3, 9 P.3d at 1047. Our supreme court determined an equitable solution was necessary because "spouses who do not participate in Social Security must be treated the same as spouses who do participate and who therefore enjoy an exemption of that asset from distribution upon dissolution."[9] *Kohler v. Kohler,* 211 Ariz. 106, 109, ¶ 12, 118 P.3d 321, 624 (App. 2005) (citing *Kelly,* 198 Ariz. at 309, ¶ 9, 9 P.3d at 1048). Accordingly, the *Kelly* court determined:

[9] According to the record, Wife participates in the Social Security system.

> [A] present value, measured as of the date of dissolution, should be placed on the social security benefits [*Husband] would have received had he participated in that system during the marriage*. This necessarily will require a reconstruction of his wages. The social security calculation can then be deducted from the present value of [Husband's] CSRS pension on the date of dissolution. The remainder, if any, is what may be divided as community property.

Kelly, 198 Ariz. at 309, ¶ 11, 9 P.3d at 1048. The court expressly limited its decision to the "present facts" and noted other issues might arise in future application of this rule. *Id.* at ¶ 13.

¶32 When addressing *Kelly* after the first evidentiary hearing, the family court explained:

> The challenge, however, is that Wife is entitled to pension benefits as of the date of maturity, when Husband was 55, but Husband would not be entitled to start taking Social Security until age 62. *Kelly* does not address what to do in this circumstance, but there are two possible solutions. One is to determine the hypothetical Social Security payment at age 62 and begin applying the adjustment to the pension benefit when he turns 62. The other is to use an actuarial calculation to convert a lifetime Social Security stream beginning at age 62 to an equivalent stream beginning at the date of maturity.

¶33 Underwood calculated the social security offset under the second option, and the court found that calculation "better achieves substantial justice than the calculations of [Husband's] expert." As the *Kelly* court noted, community

property must be divided equitably, and "equitable" is a concept of fairness that depends on the facts of the particular case. *Id.* at 309, ¶ 8, 9 P.3d at 1048 (citing *Toth v. Toth,* 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997)). Husband does not set forth any reason, nor does he explain why the family court's guidelines for the *Kelly* adjustment are inequitable in this case. Accordingly, we cannot conclude that the court abused its discretion in setting forth and adopting an equitable calculation of the *Kelly* adjustment.

¶34 Husband also argues the court's *Kelly* guidelines were inequitable because unlike the calculation for the CSRS benefits, there was no COLA adjustment. During the second evidentiary hearing, Underwood explained he did not include COLA for the *Kelly* adjustment, but did include COLA for the CSRS calculation because he compared benefits that accrued through April 10, 2007, and did not think it was appropriate to use a "projected inflated number" at age 62 for the deemed social security benefits. The court found Underwood's calculation reasonable. The court also stated Husband did not present any evidence regarding how Underwood's calculation would differ had social security COLA been considered. Further, the record shows Husband's expert did not provide a calculation incorporating COLA into the social security adjustment. Finally, Husband cites no authority for his argument that COLA should be included

in the *Kelly* adjustment. *See Cullum v. Cullum,* 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts "will not consider arguments posited without authority"). In absence of evidence and authority supporting Husband's argument, we cannot say the family court abused its discretion.

4. **Attorneys' Fees**

¶35 Wife requests attorneys' fees on appeal pursuant to A.R.S. § 25-324.[10] Section 25-324(A) gives the court discretion to award attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25–324(A) (Supp. 2010). There is no information in the record concerning the financial resources of either party, other than the information regarding Husband's employment. Further, Husband's position on appeal is reasonable. Accordingly, we deny Wife's request for attorneys' fees. As the prevailing party, however, we award Wife her costs on appeal. A.R.S. §§ 12-341, -342.

[10] Wife also cites A.R.S. §§ 12-341, -342; however, these provisions relate to costs, not attorneys' fees.

Conclusion

¶36 For the foregoing reasons, we affirm the family court's orders.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A.SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge