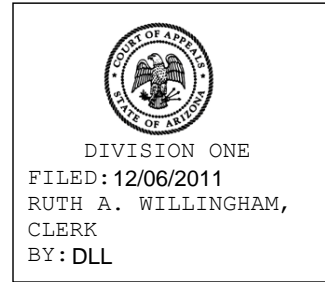


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:) No. 1 CA-CV 10-0817
)
REBECCA ANN NAVARRE GARALCZYK,) DEPARTMENT B
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
MARC PATRICK GARALCZYK,)
)
Respondent/Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2009-091933

The Honorable James P. Beene, Judge

AFFIRMED AND REMANDED

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S W A N N, Judge

¶1 Rebecca Navarre Garalczyk ("Wife") and Marc Garalczyk ("Husband") have divorced. Wife is paying Husband both child

support and spousal maintenance, as ordered by the court. Husband asserts that the court abused its discretion when it chose to defer Wife's obligation to pay him his community interest in her severance package until her actual severance. We conclude that the trial court's decision was not an abuse of discretion and therefore affirm. However, we remand the case so that the trial court can clarify: (1) how Wife should pay Husband once she begins receiving her payments; and (2) whether it would be appropriate at that point for Husband to accrue interest in funds he must wait to receive.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife moved to Arizona in 1992 so that Husband could attend the Scottsdale Culinary Institute to become a chef. Husband had played football in the NFL, but an injury ended his football career in 1991. His culinary career, however, never started: he looked into classes at the institute but did not apply. From 1991 until he and Wife married in 1996, Husband remained unemployed.¹

¹ Apart from occasionally taking photographs for Wife's insurance business, Husband was principally engaged in caring for the couple's three children. Husband was not employed during the dissolution.

¶13 During the marriage, on November 1, 1998, Wife signed a contract with American Family Insurance.² The contract, entitled the "American Family Corporate Agent Agreement" ("the Agreement"), was signed by Wife as the "President of Agent." "Agent" is the Agreement's term for the corporation entering into contract with American Family Insurance: Rebecca Navarre Agency, Inc. Beneath Wife's signature the contract contains a section for shareholders to sign. Neither husband's name nor his signature appear on the document.

¶14 The Agreement makes clear that Wife is not an employee of American Family Insurance. Her corporation is an independent contractor with full control of its own activities and "the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of [the] [A]greement." Under the Agreement's general provisions, Wife, as President, has "full managerial authority . . . of the [corporation]." She also has the duty to "devote all or substantially all of . . . her occupational efforts, on a full time basis" to her responsibilities under the Agreement. In exchange for her efforts, Wife's corporation is paid "pursuant to the provisions

² Our collective term "American Family Insurance" includes three related entities: American Family Mutual Insurance Company, American Family Life Insurance Company, and American Standard Insurance Company of Wisconsin.

of the applicable compensation schedules" that are part of the Agreement.

¶15 Under the Agreement, the corporation and Wife act as fiduciaries for American Family Insurance. For instance, a subsection in the Agreement requires Wife and the corporation to "solicit and place in [American Family Insurance] all eligible applications" for insurance. And the fiduciary relationship is made explicit in the "Collection of Premium" subsection, which requires Wife to "deliver policies and to collect and record as trustee for [American Family Insurance] premiums and other monies due . . . in accordance with [its] rules." The money that Wife collects "belongs to [American Family Insurance] at all times and [Wife's corporation] shall hold such money only as a fiduciary, in trust, as the absolute property of [American Family Insurance]." Furthermore, for "all copies of policies, endorsements, policy records, manuals, materials and supplies" that American Family Insurance provides, Wife's corporation is "deemed the bailee." Those documents, which both Wife and Husband refer to as her "book of business," must be delivered to American Family Insurance within 10 days of the termination of the Agreement.

¶16 Termination is controlled by two provisions. The first allowed either Wife or American Family Insurance to

terminate the Agreement by written notice with or without cause before two years had elapsed from the effective date of November 1, 2008. Now, however, because more than two years have elapsed, American Family Insurance must give Wife "notice in writing of any undesirable performance" and then wait six months before terminating the Agreement if her performance is not corrected. For a year following the Agreement's termination -- initiated either by Wife or by American Family Insurance -- she may not solicit business from policyholders in her book of business.

¶17 Following termination, the Agreement provides for "Extended Earnings." The Extended Earnings provision rests on two conditions: (1) that within 10 days of termination Wife give her book of business to American Family Insurance's authorized representative; and (2) that Wife represent American Family Insurance for at least 10 years from the Agreement's effective date.

¶18 Two factors determine the amount of Extended Earnings Wife will receive. The first is the exact number of years from the Agreement's effective date to her termination. The second is the "renewal service fees earned by [her corporation] during the 12 months immediately preceding the month during which this agreement is terminated less any sums owed by [the corporation]

to [American Family Insurance]." The amount of Extended Earnings that Wife receives is a percentage of those renewal service fees, and that percentage is determined by a table that coordinates the number of years worked with increasing percentages.³ For example, if Wife were to terminate the Agreement after "[a]t least 10 years but less than 11 years," she would receive as Extended Earnings 50% of whatever renewal service fees her book of business had generated in the 12 months immediately before her termination. However, if the Agreement were to terminate "[a]t least 20 years but less than 21 years" after the Agreement's effective date, Wife would receive 150% of her renewal fees from the year previous. The highest percentage, which is 200%, is available after 30 or more years.

¶19 The manner in which the Extended Earnings are paid out to Wife will depend on her age at the time of termination. If she is less than 60 when the Agreement terminates, she receives only 60 equal monthly payments. If she is over 65 when it terminates, she will receive payments for life, with the first 60 monthly payments at 66.7% of her Extended Earnings and the remaining payments at 33.3%. But if the Agreement terminates

³ The table that governs Wife's Extended Earnings is set out in an amendment to the Agreement. The amendment is signed by Wife.

while Wife is over 60 but less than 65, the payments that begin to arrive 121 months after termination are less than that 33.3%.⁴

¶10 On May 28, 2009, Wife filed a Petition for Dissolution of Non-Covenant Marriage. Husband and Wife submitted a Joint Pretrial Statement on June 1, 2010. According to that statement, the only issue left to be decided concerning the division of assets was when Husband's interest in Wife's "severance package . . . at the insurance agency" was to be paid. Wife proposed that Husband should be paid his share over 10 years, but only if no spousal maintenance was awarded. If spousal maintenance was awarded, however, Wife proposed that Husband be paid only when she received her own Extended Earnings payments. Husband, on the other hand, proposed that Wife begin paying him equal monthly installments over five years to pay down his share of the present value of the package -- \$113,376.25 -- with interest accruing at the legal rate.

¶11 At trial on June 7, 2010, the court heard evidence from Frank Pankow, an expert witness, to assess the value of Wife's insurance business as of June 9, 2009. The number he gave, \$226,742.51, came from American Family Insurance's corporate headquarters in a report called a "termination

⁴ Alternatively, once Wife turns 60 she can elect to receive a lump-sum payment after receiving 12 equal monthly payments of her Extended Earnings. The lump-sum payment is 43 times the amount of the equal monthly payment.

summary." Pankow agreed that the nature of Wife's interest could be described as a "severance package" and that she could only draw on her share of the \$226,742.51 if she were to terminate her relationship with American Family Insurance. Pankow also conceded that Wife's contractual right to Extended Earnings is somewhat "similar to a defined benefit plan."

¶12 The court entered a Decree of Dissolution of Marriage on June 21, 2010. In that decree, Wife was ordered to pay \$545 per month in child support. She was also ordered to pay \$1,700 per month in spousal maintenance for 36 months. The court also found that at the time of dissolution, Husband's interest in the Rebecca Navarre Agency, Inc., amounted to \$113,376.25. The court's decree stated: "Based on the testimony and evidence presented at trial, [Husband] shall receive his community interest in the insurance business contemporaneous to when [Wife] receives her community interest in the business."

¶13 On October 21, 2010, after the court disposed of Wife's Motion for Post-Trial Relief, Husband appealed from the court's ruling on his community interest in the insurance business. On appeal, he argues that the court abused its discretion regarding his interest in the insurance business because it failed to order either a lump-sum payment or a

payment plan with accruing interest. We have jurisdiction under A.R.S. § 12-2101.

STANDARD OF REVIEW

¶14 When the family court apportions community property between the parties at dissolution, its aim is to achieve an equitable division, and, consequently, the court's discretion is broad. *Hetherington v. Hetherington*, 220 Ariz. 16, 19, 202 P.3d 481, 484 (App. 2008) (citing *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007)). We will not disturb the court's allocation of community property absent an abuse of discretion. *Boncoskey*, 216 Ariz. at 451, ¶ 13, 167 P.3d at 708. A sign that the court has abused its discretion in making community property allocations is if it "commits an error of law." *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005) (citation omitted). When we review the trial court's allocation of community property, we consider the evidence in the light most favorable to upholding its ruling. *Boncoskey*, 216 Ariz. at 451, ¶ 13, 167 P.3d at 708 (citation omitted). We will uphold that ruling if it is reasonably supported by the evidence. *Id.*

DISCUSSION

¶15 Both Husband and Wife admit that no case is directly on point, but concede that Wife's Extended Earnings provision is

comparable to a pension plan. In Arizona, "pension rights are generally viewed as a form of deferred compensation for services rendered by employees." *Johnson v. Johnson*, 131 Ariz. 38, 41, 638 P.2d 705, 708 (1981). We recognize that under the Agreement Wife is an independent contractor rather than an employee of American Family Insurance. However, the very name of the relevant provision -- "Extended Earnings" -- suggests that the underlying benefit for Wife is the same as "deferred compensation" for an employee, i.e., to give a present incentive to work by promising a future cash payment during retirement. Further, what the Court said of pension rights in *Johnson* can be said of the Extended Earnings provision here: it is one of Husband and Wife's "most valuable marital assets upon divorce." *Id.* Therefore, we see no obstacle to relying on cases that discuss pension plans as community property as guides to our reasoning here.

¶16 In Arizona, it is well settled that pension rights "are community property insofar as the rights were acquired during marriage" *Id.* As community property, pension rights "are subject to equitable division upon divorce." *Id.* Further, when making that division, the court must ensure that "pursuant to the mandate of A.R.S. § 25-318, each spouse receives an immediate, present, and vested separate property

interest in the property awarded to him or her by the trial court." *Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986).

¶17 Because Husband is requesting that a lump-sum payment or an installment plan be ordered immediately, it is important to point out that although each spouse will receive an "immediate . . . property interest" in the allocated pension plan, a divorced spouse is not necessarily entitled to immediate cash in hand. *Johnson*, 131 Ariz. at 41, 638 P.2d at 708. That kind of contemporaneous payment may result if the family court uses the "present cash value method" of determining the community interest in a pension. *Id.* But under the "reserved jurisdiction method," a divorced spouse will have to wait for payments "if, as, and when" the pension is paid out. *Id.*

¶18 Which of the two methods is appropriate depends on whether pension rights are vested or non-vested and whether they are matured or not. See *Hetherington*, 220 Ariz. at 19-20, ¶ 11, 202 P.3d at 484-85. A pension right is "vested" if "the right to be paid is not subject to forfeiture if the employment relationship terminates before the employee retires." *Johnson*, 131 Ariz. at 41 n.2, 638 P.2d at 708 (citation omitted). It is "non-vested" if it can be forfeited when "the employment relationship terminates before retirement, e.g., because the

employee quits, is discharged, or dies." *Id.* at 41 n.3, 638 P.2d at 708. Pension rights have "matured" when they constitute "unconditional rights to immediate payment." *Id.* at 41 n.2, 638 P.2d at 708. It will often happen that a pension right "vests after a certain term of employment but will not mature until the employee reaches retirement age and elects to retire." *Id.* (citation omitted).

¶19 Generally, the present-cash-value method is preferable to the reserved-jurisdiction method because it avoids the future "entanglement" of the divorced spouses. *Hetherington*, 220 Ariz. at 19, ¶ 11, 202 P.3d at 484 (citing *Johnson*, 131 Ariz. at 41-42, 638 P.2d at 708-09). But the present-cash-value method depends on two "if"s: the court should use it "if the pension rights can be valued accurately and if the marital estate includes sufficient equivalent property to satisfy the claim of the non-employee spouse without undue hardship to the employee spouse." *Johnson*, 131 Ariz. at 42, 638 P.2d at 709 (citation omitted). In contrast, the reserved-jurisdiction method is appropriate if "there [are] no community assets available to satisfy the non-employee spouse's community interest and the pension right [has] not yet matured." *Hetherington*, 220 Ariz. at 19-20, ¶ 11, 202 P.3d at 484-85 (citing *Boncoskey*, 216 Ariz. at 451, ¶¶ 16-17, 167 P.3d at 708-09).

¶120 Either way, the court's choice of one alternative rather than another "depends on the equities of the individual case." *Koelsch*, 148 Ariz. at 185, 713 P.2d at 1243. The trial court, in applying community property principles to pension plans at dissolution, is urged to be "as creative and flexible as possible." *Id.* Those traits are necessary if the court is required to simultaneously "guarantee that the non-employee spouse will receive his or her share of the pension benefits and . . . avoid the undesirable consequence of encouraging employees to retire against their wishes." *Id.*

¶121 We think the trial court's decree regarding Husband's interest in Wife's insurance business is a reasonable means of accomplishing those two goals. Under the decree, Husband will receive the share of Wife's Extended Earnings to which he is entitled. To avoid forcing Wife to retire against her wishes -- i.e., terminate the Agreement before she is entitled to receive her Extended Earnings for life and at the most desirable rates -- the court's decree requires Husband to receive his share of the Extended Earnings "contemporaneous to" the Wife's receipt of her share. The decree, therefore, comports with the principles underlying the reserved-jurisdiction method of allocating pension benefits.

¶122 Furthermore, the court heard evidence that justified it in finding that the conditions in which the reserved-jurisdiction method is appropriate -- i.e., the lack of sufficient community funds -- were present here. Wife refinanced the family home to pay Husband his share of the home's value, which increased her monthly mortgage payment. And that increased mortgage, added to the spousal maintenance and the child support payments, left Wife without "any resources to pay [Husband]" for his interest in the insurance business. The court, therefore, did not abuse its discretion when it deferred that payment to Husband to a time when Wife would receive the funds to pay him.

¶123 Husband, however, argues that the trial court failed to expressly reserve jurisdiction. He claims that absent expressly reserved jurisdiction, the court has somehow failed to do what *Johnson* and *Koelsch* require it to do: i.e., "to award the appropriate percentage of each pension payment if, as, and when, it is paid out." *Koelsch*, 148 Ariz. at 183, 713 P.2d at 1241 (quoting *Johnson*, 131 Ariz. at 41, 638 P.2d at 708). We disagree. The order states: "Based on the testimony and evidence presented at trial, [Husband] shall receive his community interest in the insurance business contemporaneous to when [Wife] receives her community interest in the business."

Because the court is ordering Wife in the present to pay Husband with funds that she can only receive in the future, reserved jurisdiction is implied.

¶24 Husband also insists that the decree creates the situation that *Koelsch* forbids. *Koelsch* says that "the employee spouse cannot unilaterally deprive the non-employee spouse of his or her property." 148 Ariz. at 185, 713 P.2d at 1243. The court in *Koelsch* was addressing the issue of how to allocate pension benefits when one of the spouses had a vested, matured pension right but chose to continue working rather than to draw on the pension. *Id.* at 180, 713 P.2d at 1238. Here, though, Wife does not have a fixed pension that she is choosing not to draw on.

¶25 The Agreement with American Family Insurance creates something that is like a pension but that falls short of the kind of financial creature discussed in *Koelsch* and the cases above. For example, at this point in her career, Wife is entitled to receive Extended Earnings (though at a fairly low monthly payment and only for 60 months following her termination), so they are in a sense both "vested" and "matured." But she could forfeit the Extended Earnings -- if she were to fail to turn her book of business back to American

Family Insurance, say -- and so in another sense her Extended Earnings plan is "non-vested."

¶126 More importantly, the Extended Earnings plan, although it shares some features of a defined-benefits plan, is not all that well defined. The index for calculating her Extended Earnings depends on Wife's efforts and success in the last year of her work. As she told the court: "[I]f my book of business increases, my termination benefits will increase." Likewise, if the book decreases, so do the benefits. The benefits she will receive, therefore, are somewhat contingent. Given the contingency of Wife's Extended Earnings plan, it makes little sense to characterize Wife's choice to continue working as unilaterally depriving Husband of his property. Wife's choice to continue working or to retire will depend on factors that are not entirely within her control. In that light, the court's ruling appears permissibly "creative and flexible." *Koelsch*, 148 Ariz. at 185, 713 P.2d at 1243.

¶127 It was also permissible for the court to decide not to award Husband interest accruing from the date of dissolution. Neither of the cases he cites proves otherwise. In *McCune v. McCune*, the trial court erred in not awarding the wife interest payments when it ordered the husband to pay her \$650 a month for her community property in his drywall business. 120 Ariz. 402,

404, 586 P.2d 651, 653 (App. 1978). But the reason that the order was "inequitable in effectuating a division of community property" was that it amounted to an "interest-free loan" to the husband. *Id.* It was an interest-free loan because of the character of the community property: the wife was a minority stockholder in the husband's drywall business. *Id.* at 403, 586 P.2d at 652. Here, Husband's community property in the insurance business is not like the wife's in *McCune*, which was a direct interest in an ongoing venture. Husband has community property in a fund of money that has not yet materialized. Because Wife is not receiving a direct commercial benefit, the court's order deferring Husband's receipt of that property is not an "interest-free" loan.

¶128 Husband also cites *Miller v. Miller*, 140 Ariz. 520, 683 P.2d 319 (App. 1984), to support his claim that because he must wait to receive his share of the Extended Earnings, then he should share in some way -- i.e., by accruing interest -- in the increasing value of Wife's Extended Earnings. This is too broad a claim for *Miller* to support. In *Miller*, there was insufficient expert testimony to determine the present cash value of the wife's community property in her husband's pension plan. *Id.* at 523, 683 P.2d at 322. The court held that, given that uncertainty, the reserved-jurisdiction method was

appropriate even though the wife would potentially benefit from the husband's increased pay after their divorce. *Id.* Here, there's no uncertainty about the present value of Husband's community property. And, even though he must wait to receive it, nothing in *Miller* required the court to award him interest accruing in that property right now.

¶129 However, there is a question of whether Husband might be entitled to interest accruing in unpaid funds once Wife does begin to receive her Extended Earnings. Evidence established that Husband is entitled to 50% of Wife's Extended Earnings until he has received his full community property interest of \$113,376.25. The logic of the underlying facts and the court's order could suggest that Wife, once she begins receiving her monthly payments, may divide each payment and give Husband one half until his community property interest is satisfied. But the order could also mean that Wife is free to give Husband less than half of each payment, in which case it might very well be appropriate for Husband to accrue interest in funds he must wait to receive. Alternatively, the order could compel wife to give the whole of each payment to Husband until the \$113,376.25 is paid. Because the order is susceptible to different readings, some of which raise questions about the propriety of accruing interest, we remand to the trial court so that it can clarify

how Husband is to be paid his share of the Extended Earnings once Wife begins to receive them.

ATTORNEY'S FEES ON APPEAL

¶30 Both Wife and Husband ask for attorney's fees stemming from this appeal. Husband, citing A.R.S. § 25-324, asserts that he is entitled to attorney's fees "because of the unreasonable position Wife has taken."⁵ We disagree. Wife's position, rooted in facts established at trial and analogous case law, was not unreasonably maintained. Nor was Husband's appeal frivolous. We therefore deny both parties requests for attorney's fees. See *Hetherington*, 220 Ariz. at 24, ¶ 33, 202 P.3d at 489.

CONCLUSION

¶31 Because the trial court did not abuse its discretion in regard to Husband's community property interest in Wife's insurance business, we affirm the court's June 23, 2010 Decree of Dissolution denying Husband both an immediate lump-sum payment and an immediate installment plan for his share of Wife's Extended Earnings. We remand for the trial court to clarify how Wife must pay Husband once she receives her Extended

⁵ "The court from time to time, after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under [Chapters 3 & 4 of Title 25]." A.R.S. § 25-324.

Earnings payments and whether Husband will be entitled to accruing interest at that point.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

DONN KESSLER, Judge