DIVISION ONE
FILED: 12/20/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	No. 1 CA-CV 11-0078
	)	
DEBORAH LUCILLE BRANT,	)	DEPARTMENT B
	)	
Petitioner/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
MICHAEL LAWRENCE GOSS,	)	
	)	
Respondent/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. DR1989-014047

The Honorable Paul A. Katz, Judge (Retired)

AFFIRMED

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S W A N N, Judge

¶1 Deborah Parmele ("Wife") and Michael Goss ("Husband"), who divorced in 1990, are disputing the characterization of a retirement account that Husband created in 2010. That account, which is similar to the Deferred Retirement Option Plan ("DROP") offered by the state, allows state employees to participate in DROP retroactively and is therefore called "Reverse DROP." The trial court found that the Reverse DROP account was Husband's separate property. Because the trial court had sufficient evidence to make that finding, we affirm its decision.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife married on October 20, 1979, in Scottsdale, Arizona. In November 1989, Wife filed a Petition for Dissolution of Marriage. The court issued a Decree of Dissolution on November 5, 1990.

¶3 On May 29, 1991, the court entered a Qualified Domestic Relations Order ("DRO"). In the DRO, the court found that Husband, an employee of the Maricopa County Adult Probation Office, had become entitled to retirement benefits through the Arizona State Retirement System ("ASRS") on or about September 16, 1977. It determined that Husband's benefits under ASRS were community property to the extent that they accrued from "Husband's first date of employment or from date of marriage, whichever occurred later." Accordingly, Wife was entitled to a one-half share of the community property portion of the benefits

if and when they were paid to Husband. The court expressed Wife's community property interest in the benefits as 50% of the benefits received by Husband multiplied by the fraction:

$$\frac{\text{Total number of months during the marriage that Husband was a member of ASRS}}{\text{Total number of months of Husband's membership in ASRS}}$$

¶4 Approximately ten years after the divorce, Husband decided to purchase years of service that he had accrued in another retirement system and apply them to his ASRS account. Therefore, on April 25, 2001, Husband filed an "Other Public Service Affidavit" with ASRS. The affidavit indicated that Husband had worked in Illinois as a probation officer in the Cook County Juvenile Court. While working at that job, Husband had participated in the Cook County retirement system from approximately March 1973 to June 1976.

¶5 On July 1, 2001, Husband submitted to ASRS an "Irrevocable Payroll Deduction Authorization," which authorized deductions for the "Purchase of Credited Service." The amount to be deducted from each period of Husband's payroll was $120.12, with $28,108.08 set as the total amount authorized for deduction. Those figures would allow Husband to purchase three years of credited service over 234 payments. From July 2001 through March 2010, those deductions came out of Husband's

salary. By the time he retired, Husband had purchased 2.94 years of service.

¶6 In 2007, the Correction Officers Retirement Plan ("CORP") became the default retirement system for Arizona probation officers. Officers (such as Husband) who had already accrued benefits in ASRS were given the choice of remaining within ASRS or transferring their benefits to CORP. If they made no choice, their benefits would transfer to CORP automatically. In July 2007, Husband chose to transfer his retirement benefits to CORP.

¶7 Husband retired on February 26, 2010. To determine his benefit, one of CORP's retirement specialists prepared a document in March 2010 called "Service Retirement Benefit Calculations (Reverse Drop)." This document calculated Husband's length of credited service at the maximum level any employee can be credited: 32 years. The document arrived at that number by adding:

> (a) 2.661 years of service with Husband's current employer (i.e., CORP) to
>
> (b) 33.020 years of his prior service, and then subtracting
>
> (c) 3.661 years within the "Reverse DROP Period."

¶8 Next to that calculation, the document stated the "Reverse DROP Date" as July 1, 2006. Under the statute which

governs the Reverse DROP benefit, A.R.S. § 38-885.01, the Reverse DROP date is not the same as the date that Husband elected to participate in Reverse DROP. The "date the member elects to participate" is the same day that the employee "terminate[s] employment." § 38-885.01(D)(2). The Reverse DROP date is a date used for calculating what goes into the Reverse DROP account. According to § 38-885.01(G), two things go into that account:

> 1. An amount that is credited as though accrued monthly from the [R]everse [DROP] date to the date the member elected to participate in the [R]everse [DROP] and that is computed in the same manner as a normal retirement benefit using the factors of credited service and average monthly salary in effect on the [R]everse [DROP] date.
> 2. An amount that is credited as though accrued monthly and that represents interest at a rate equal to the yield on a five year treasury note as of the first day of the month as published by the federal reserve board.

Participants in Reverse DROP, such as Husband, receive those amounts as "a lump sum benefit in addition to their normal monthly retirement benefit on actual retirement." § 38-885.01(A).

¶9 To determine Husband's normal monthly retirement benefit, the CORP document found his average monthly compensation earned during "a period of 36 consecutive months of credited service in which [the] member received [his] highest base salary within the last 120 months of service." For

Husband, those 36 months ran from July 1, 2003, to June 30, 2006. His average monthly compensation –- calculated at $8,920.93 –- was the basis for calculating his monthly benefit to be $7,136.75. CORP reached that number by applying a formula that added $4,460.47 (i.e., 50% of the $8,920.93) and $2,676.28. That $2,676.28 was 2.5%[1] of the $8,920.93 "for each year of credited service over 20 years (MAXIMUM of 12 years)."

¶10 On March 2, 2010, Husband's lawyer sent CORP a draft DRO for review. This newly drafted DRO divided the CORP benefits between Husband and Wife. CORP approved Husband's proposed DRO on March 23, 2010. On March 31, CORP sent Husband a letter saying that CORP had been "authorized by the Administrative Office of the Court Pension Board to terminate [Husband] from the Reverse DROP Program and begin the process of [Husband's] normal retirement." It went on to state that Husband's "normal retirement benefit" would be $7,136.08. Further, the letter explained that under the DRO, Husband's share would be $5,903.68 after Wife's $1,232.40 was paid directly to her.[2]

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[1] The 2.5% figure comes from A.R.S. § 38-885(C)(1), which governs Husband's CORP benefit. Husband points out that the switch from ASRS to CORP has benefited Wife because under § 38-757(B)(1)(d), which would apply if Husband were still in ASRS, the figure used would be only 2.3%.

[2] Wife began receiving her share from CORP in January 2011, after the trial court affirmed its entry of the new DRO.

¶11 On April 22, 2010, Husband's lawyer sent Wife a copy of the proposed DRO and requested her signature. Wife did not respond. On September 17, 2010, Husband filed a motion to enforce the dissolution decree by entering the proposed DRO.

¶12 On September 30, 2010, Wife filed a response to Husband's motion. The response argued that the proposed DRO was deficient because it "exclude[d] DROP and or Reverse DROP benefits and purchased service credits," thereby depriving Wife of her share in the community property. That argument rested on the major premise that "[a]ll property *acquired during coverture* is presumed to be community property" and two minor premises: Husband and Wife's community property presumptively included "DROP and or Reverse DROP benefits and purchased service credits," and Husband had failed to rebut that presumption with clear and convincing evidence. (Emphasis in original.)

¶13 On October 14, 2010, Husband filed a reply. The reply pointed out that their separate interests in the community property had already been divided by the DRO back in 1991. That old DRO expressed Wife's interest in terms of ASRS. The only effect of the new DRO was to express Wife's already established rights in terms of benefits to be paid by CORP. Husband argued that because those rights were already established and would not be affected, his motion for a new DRO raised no presumptions that he needed to rebut. Husband also argued that the assets in

controversy -- the funds from Reverse DROP, which related to his employment from 2007 through 2010, and the additional years of service he had purchased with his post-divorce income –- did not need to be subjected to the "clear and convincing evidence" standard because they came to him after the dissolution in 1991.

¶14 The Court set a resolution management conference for November 16, 2010. It ordered both Husband and Wife to file resolution statements. In her statement, Wife sought a "properly drafted" DRO that recognized her community interest in Husband's retirement plan. She claimed that Husband's proposed DRO "freezes [her] share, excludes DROP benefits, and excludes service time purchased during the marriage." In his statement, Husband said that "Wife has made no claim that the [proposed] DRO directed to CORP does not award her the benefits she would have received under the 1991 DRO directed to ASRS." The new DRO was ready to be implemented, but Wife was claiming that "she should receive additional benefits" from post-divorce assets, a position Husband characterized as "overreaching and unreasonable."

¶15 As a result of the conference, the court ordered counsel for Husband and Wife to meet jointly with the CORP administrator to confirm that the new DRO accurately divided Wife's community property interest "not including the Deferred Retirement Option Program (DROP)." Husband's counsel was

ordered to notify the court if the parties could not reach an agreement "on the DROP issue."[3] If they failed to agree, Wife had two weeks to file a supplemental memorandum, and Husband had one week from that filing to submit a response.

¶16 On November 23, 2010, Husband filed notice that his counsel and Wife's counsel had both spoken with a CORP administrator. The administrator had "confirmed that all service of [Husband] is covered in [Husband's] CORP Domestic Relations Order."[4] Accordingly, Husband requested the court to sign the new DRO after Wife's two-week objection period.

¶17 On November 30, 2010, the court issued a new DRO to divide Husband's CORP plan between Husband and Wife. This new DRO awarded Wife "a pro-rata share of [Husband's] pension, payable directly by the Plan at the same time and in the same

[3] The record on appeal contains no transcript of the November 16 conference. Wife's Docketing Statement said she intended to submit transcripts; she did not do so; and Husband acknowledges the lack of transcripts on appeal. However, Husband's Response Brief explains that the purpose of meeting with the CORP administrator was to dispel Wife's confusion, which was expressed in Wife's September 30 Response. There, she seemed to be under the impression that the new DRO would award her benefits based only on Husband's years in ASRS and not include his years in CORP.

[4] Along with the notice, Husband included a print-out of an email exchange. In one email, Husband's counsel writes to the administrator: "I had called you previously to make sure that all service was being counted in the fractional formula in the [o]rder." The administrator responded: "I just talk [sic] to [Wife's counsel] awhile [sic] ago and clarified that the member's total service would be used in the denominator of the standard formula (this seemed to be his main concern)."

manner payments are made to [Husband] pursuant to the Plan, excluding any account accumulated due to the deferred retirement option plan ("DROP")(including reverse DROP)." The formula for calculating the pro-rata share is Husband's "Total Retirement Payment" multiplied by the fraction:

$$\frac{\begin{array}{c}\text{Months married as Participant}\\ \text{(including years of service under ASRS}\\ \text{during the marriage)}\\ \text{(but excluding any purchased service)} \times 50\%\end{array}}{\begin{array}{c}\text{Total months of employment of Participant}\\ \text{(including years of service under ASRS)}\\ \text{(including purchased service)}\end{array}}$$

After articulating that formula, the court repeated that Wife "shall have no interest in a DROP account of [Husband] (including reverse DROP)."

¶18 On December 2, 2010, Wife filed an objection to the new DRO and a motion for reconsideration. She argued that reconsideration was appropriate because the new DRO gave her a "time-rule interest" in the CORP plan based on Husband's "total months of employment." Therefore, she should have a community interest in the Reverse DROP benefit as "a plan enhancement that accrued during the total months of employment." Wife then filed a motion for a new trial on December 6, 2010, raising issues identical to those raised in the December 2 motion for reconsideration.

¶19 On December 10, 2010, Husband responded to both motions. He pointed out that neither motion "raised any additional law or facts that change the court's analysis." On December 14, 2010, Wife filed a reply, relying on a single case from the California Supreme Court.[5] The court held a status conference on December 17, 2010. After discussion, the court denied Wife's motion for a new trial and affirmed the November 30 DRO.

¶20 Wife timely appeals. She asks us to address whether the trial court abused its discretion by holding "that [Husband's] DROP benefit was his separate property even though the divorce decree and [DRO] granted [Wife] a time-rule property interest in his state retirement plan." We have jurisdiction under A.R.S. § 12-2101(A)(1). *See Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 12, 167 P.3d 705, 708 (App. 2007) (recognizing this court's jurisdiction over DROs).

STANDARD OF REVIEW

¶21 "[W]e review the record in the light most favorable to upholding the decision of the trial court regarding the nature of the property as community or separate." *Cooper v. Cooper*, 130 Ariz. 257, 260, 635 P.2d 850, 853 (1981). Absent an abuse of discretion, we will not disturb the trial court's

[5] That case was *In re Marriage of Lehman*, 18 Cal. 4th 169, 955 P.2d 451 (1998), which we discuss below.

distribution of community property. *Boncoskey*, 216 Ariz. at 451, ¶ 12, 167 P.3d at 708. We will find an abuse of discretion if the trial court "commits an error of law" when it allocates community property. *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005) (citation omitted).

DISCUSSION

I. THE COMMUNITY PROPERTY PRESUMPTION

¶22 On appeal, Wife contends that the court failed to observe a fundamental principle articulated in *Bender v. Bender*, i.e., that "property acquired by either or both spouses during coverture is presumed to be community property." 123 Ariz. 90, 92-93, 597 P.2d 993, 995-96 (1979). As *Bender* also states, that presumption can be rebutted only by "clear and convincing evidence." *Id.* at 93, 597 P.2d at 996. Because the court did not specifically require clear and convincing evidence from Husband about Reverse DROP (which Wife refers to only as "DROP" in her opening brief), Wife argues that the court abused its discretion when it found Reverse DROP to be Husband's separate property. But Wife does not mention *Bender*'s fundamental tenet, which serves as the basis of the presumption: "The status of property in Arizona, as to whether it is community or separate property, is established at the time of its acquisition." *Id.* at 92, 597 P.2d at 995.

¶23 Husband presented the court with evidence about the timeline of relevant events: Husband's premarital employment from 1973 to 1976; the couple's marriage in 1979 and divorce in 1990; Husband's purchase of the premarital years of service starting in 2001; Husband's transfer into CORP in 2007; and his retirement in 2010. Further, the court heard a sensible explanation of how Reverse DROP fits into that timeline:

> Husband retired after 32 years, but because he purchased three years of premarital benefits from Cook County, Illinois with separate money, he was able to elect Reverse DROP for the additional three years he purchased over and above the 32 years of service that were counted toward his retirement benefit. He only elected DROP as the years in excess of the 32 years available for benefits and the 32 years he physically worked. Almost all of the excess years were purchased by Husband 11 or more years after the divorce with his sole and separate property from his employment in the early seventies before his marriage in 1979.

¶24 Presented with those facts and that explanation, the court was not facing a situation in which Husband's Reverse DROP was property clearly acquired "during coverture." *Bender*, 123 Ariz. at 92-93, 597 P.2d at 995-96. The status of the Reverse DROP account as separate property was well established by the undisputed sequence of events: postmarital income was spent on premarital years of service. The court had no reason to require Husband to rebut a presumption that never arose.

¶25 Therefore, not subjecting Husband's Reverse DROP account to the "clear and convincing evidence" standard was no abuse of discretion.

II. REVERSE DROP AS AN ENHANCED BENEFIT

¶26 Wife insists that when one examines Husband's Reverse DROP account more closely, especially in the light of California case law, it is seen to be a "retirement plan *enhancement*" and therefore community property. [Emphasis in original.] She cites *In re Marriage of Lehman*, which reasons in this way:

> It follows that a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest in the latter's retirement benefits as enhanced. That is because, practically by definition, the right to retirement benefits that accrues, at least in part, during marriage before separation underlies any right to an enhancement.

18 Cal. 4th at 179-80, 955 P.2d at 456.

¶27 Wife argues that "[Husband's] right to participate in the DROP enhancement would not exist but for his having accrued the retirement rights that he did, at least in part, that accrued during the marriage." This is true as far as it goes: "but for" the community property years entering into the equation, Husband would not have been eligible to elect Reverse DROP. But this argument does not go far enough.

¶28 The years of service in which Wife has a community property interest might be a factual cause of Husband's Reverse DROP account "having occur[ed]." The next question to ask, though, is whether that kind of factual causality "result[s] in liability." In other words, does Husband owe something to Wife out of the Reverse DROP account because her community property years helped make it a possibility?

¶29 Even *Lehman* tells us that the answer is "no." There, the court asked "whether a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits under such a plan owns a community property interest in the latter's retirement benefits as enhanced." *Id.* at 177, 955 P.2d at 454. There, the husband elected to retire early under his company's Voluntary Retirement Incentive program ("VRI"), causing him to receive $708.91 per month more than he would have received had he not participated in VRI. *Id.* at 176, 955 P.2d at 453. In holding that the wife's community property interest extended to that $708.91 enhancement, the court explained that the "enhancement" was "a modification of an asset [and] not the creation of a new one." *Id.* at 186, 955 P.2d at 460.

¶30 The *Lehman* court explained the reason the wife had a right to that modification through a metaphor: her right to the husband's benefits was like "a right to draw from a stream of income that begins to flow on retirement." *Id.* at 177, 955 P.2d

at 455 (internal quotations omitted) (citations omitted). The volume of the stream's flow, depending on "various events or conditions after separation and even after dissolution," was largely a matter of chance: it might be greater than expected, but it could also be worse than feared. *Id.* at 178, 955 P.2d at 455 (citations omitted). Because the wife in *Lehman* had to run the risk that her right would fall in value if the retirement benefit fluctuated downward, she was also entitled to any enhancements in value caused by unexpected surges in the stream, "as when the employer increases the per-service-year multiplier of the retirement-benefit formula, or when the employee spouse lives to a greater than expected age, or serves more than expected years, or attains a higher than expected final compensation." *Id.* at 178-79, 955 P.2d at 455 (internal citations omitted).

¶31 Here, the new DRO allows Wife to share in the modification that was made to Husband's retirement benefits when he switched from ASRS to CORP. That modification was an "enhancement" because the switch resulted in Husband's per-service-year multiplier increasing from 2.3% to 2.5%. That kind of increase was one of the unexpected boons listed in *Lehman*. Husband does not dispute Wife's right to draw from that enhancement.

¶32 What Husband does dispute, however, is a claim that finds no support in *Lehman* or in Arizona law: Wife's claim that she has a right to draw on the Reverse DROP account. Her basic argument is that the Reverse DROP account enhances Husband's retirement and that *Lehman* illustrates the necessity of recognizing that kind of enhancement as community property.

¶33 Husband's Reverse DROP account is different from the enhancements discussed in *Lehman*. The Reverse DROP account is not an enhancement that resulted from an unexpected rise in the stream of retirement income -- it is an asset that he purchased after the end of the marriage. Based on the facts that the trial court had before it, one could say -- extending *Lehman*'s metaphor -- that Husband by his own efforts and separate resources tapped into a pool of pre-marital service. By using post-marital funds, he channeled those years into the stream and artificially increased its volume.

¶34 In more literal terms, the record shows that Husband acquired the Reverse DROP account by adding his premarital years of service to his underlying retirement account. A.R.S. § 25-213(A) ("A spouse's real and personal property that is owned by that spouse *before marriage* . . . is the separate property of that spouse.") (emphasis added). He added those years by using post-marital funds. A.R.S. § 25-213(B) ("Property that is acquired by a spouse *after . . . legal separation or annulment*

is also the separate property of that spouse . . . .") (emphasis added). On those facts, Husband's Reverse DROP account seems, as *Lehman* might put it, less like a "modification of an asset . . . [and more like] the creation of a new one." *Id.* at 186, 955 P.2d at 460.

¶35 The trial court, therefore, had sufficient evidence to find that the Reverse DROP account was Husband's separate property.

ATTORNEY'S FEES

¶36 Both Husband and Wife request attorney's fees on appeal under ARCAP 21 and A.R.S. § 25-324. In the exercise of our discretion, we deny both requests.

CONCLUSION

¶37 We affirm the trial court's finding in the November 30 DRO that the Reverse DROP account is Husband's separate property, and we uphold its December 17 decision to affirm that finding.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge