IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

ARLENE JOYCE CARR,
Appellee,

and

MICHAEL JOSEPH CARR,
Appellant.

No. 2 CA-CV 2020-0045-FC
Filed November 19, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. DO201900047
The Honorable Richard T. Platt, Judge Pro Tempore

AFFIRMED

COUNSEL

Popp Law Firm P.L.C., Tempe
By James S. Osborn Popp
Counsel for Appellee

Raymond S. Dietrich PLC, Phoenix
By Raymond S. Dietrich
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Michael Carr appeals from the trial court's rulings regarding spousal support and the share of his federal retirement benefits due to his former spouse, Arlene Carr. For the reasons that follow, we affirm.

Factual & Procedural Background

¶2 We view the facts in the light most favorable to supporting the trial court's decision, which "will be sustained if there is any reasonable evidence to support it." *Cooper v. Cooper*, 167 Ariz. 482, 487 (App. 1990).

Relevant Dates

¶3 The parties were married in November 1979. In June 1994, Michael began his employment with the U.S. Border Patrol, through which he accrued benefits under the Federal Employees Retirement System ("FERS"). *See* 5 U.S.C. §§ 8401-8480.

¶4 The parties separated on May 1, 2009. They entered into a Marital Settlement Agreement (the "Agreement") in July 2010. A California court issued a Judgment of Dissolution in September 2010 (the "Decree"), terminating the marriage as of that date.

¶5 At the time of the dissolution, Michael still worked for the Border Patrol and was not yet eligible to retire. *See* 5 U.S.C. § 8412. He maintained that employment until November 30, 2018, when he retired pursuant to a federal law mandating retirement on the last day of the month of his fifty-seventh birthday. *See* 5 U.S.C. § 8425(b)(1).

¶6 In January 2019, Michael took the steps to domesticate the Decree in Pinal County pursuant to Arizona's Uniform Enforcement of Foreign Judgments Act, A.R.S. §§ 12-1701 to 12-1708. He began receiving FERS benefits from the Office of Personnel Management ("OPM") in February 2019.

Terms of the Decree

¶7 As the parties expressly agreed, the Agreement was incorporated into the Decree. It stipulated that Michael was to pay Arlene $2,000 per month in spousal support. It established that this obligation would terminate or be modified if, among other things, Michael suffered an "involuntary loss of employment."

¶8 The Agreement further awarded Arlene, "as her sole and separate property":

> One half of [Michael]'s Federal Employees Retirement System (FERS) pension for the period from June [2]6, 1994[1] to May 1, 2009. Together with Survivor Benefits as set forth in the Plan. This benefit to be transferred by means of a Domestic Relations Order[.]

The Agreement established that Michael "shall relinquish all right, title and interest in and to" these portions of his FERS benefits. It then specified that Michael would retain "as his sole and separate property" the balance of his FERS benefits. Finally, both the Decree and its incorporated Agreement established that the trial court would reserve jurisdiction "to make other orders necessary" to carry out their terms.

Spousal Maintenance Obligation

¶9 In October 2018, Michael made a spousal maintenance payment to Arlene for the last time. As noted above, he retired from the Border Patrol on November 30, 2018, the last day of the month of his fifty-seventh birthday, but he made no November 2018 payment to Arlene. In February 2019, Michael filed a notice of his satisfaction of the spousal maintenance obligation. He alleged that he had involuntarily left his employment due to the federal mandatory age retirement and that he had "fully satisfied" his spousal support obligation under the Agreement. Arlene did not oppose the notice.

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[1]Michael testified that the date included in the Agreement—June 6, 1994—must have been a typographical error, as he did not begin his employment with the Border Patrol and his participation in FERS until June 26, 1994. The discrepancy does not affect the parties' arguments or our analysis.

¶10 In August 2019, Arlene filed a verified petition to enforce the spousal maintenance terms of the Decree and for contempt. As grounds, she alleged that Michael had stopped making the required spousal support payments in November 2018 without any termination or modification hearing having occurred or any order concerning maintenance having been entered, other than the Decree itself. She asked the trial court to hold Michael in contempt for violating the spousal maintenance terms of the Decree, order him to "immediately pay past-due spousal maintenance as an appropriate purge to avoid incarceration," and award her attorney fees and costs.

August 2019 Court Order Acceptable for Processing of FERS

¶11 As noted above, in February 2019, Michael both began receiving FERS benefits from OPM and filed the notice indicating he had retired. In April, Arlene requested but did not receive FERS-related information from Michael's counsel of record. In May, Arlene presented a Court Order Acceptable for Processing ("COAP") of FERS to Michael for his signature, so that it could be submitted to the trial court as a stipulated order, but Michael did not return the signed document or otherwise respond. After Arlene sent a follow-up letter on June 5, Michael's counsel promised a response by later that month, which was never sent.

¶12 Accordingly, on July 9, 2019, Arlene filed a motion presenting the FERS COAP Michael had refused to sign and requesting that the trial court enter it.[2] She contended it "divides the asset as directed in the Decree." Arlene further alleged that Michael had collected all FERS benefits as of that date, including her share (her "sole and separate property"), but had transferred none of those funds to her. She alleged that Michael had refused to provide copies of the FERS documentation necessary to calculate arrearage. She argued that, once the COAP was processed by OPM and she began receiving her share of the benefit, "[t]he amount of her share of the benefit w[ould] be known, and the arrearage period c[ould] be determined." She requested an evidentiary hearing and a judgment in her favor "for all FERS benefits awarded to [her], but collected by [Michael], plus interest from the date each payment should have been made," as well

[2]Michael complains that Arlene's efforts in 2019 to obtain a FERS COAP occurred "[a]fter a nine (9) year delay." But Michael did not retire from the Border Patrol until the end of November 2018, and he did not notify Arlene of that retirement or begin receiving FERS benefits until February 2019. Arlene's attempts to gather the necessary information and seek a COAP began two months later, and Michael did not cooperate.

as a finding that Michael had breached his fiduciary duty to her. She further requested a finding that Michael had "acted unreasonably and t[aken] unreasonable positions in this matter" and an award of attorney fees and costs.

¶13 Arlene's motion and the proposed COAP were personally served on Michael's counsel of record on July 22, 2019.[3] Nevertheless, Michael did not respond to the motion within ten days as required by Rule 35(a)(3), Ariz. R. Fam. Law P. (*i.e.*, by August 1). Thus, on August 2, the trial court entered Arlene's proposed COAP. Michael filed a response challenging Arlene's motion for entry of the COAP on August 6—fifteen days after his counsel of record had been served, and after the court had entered the FERS COAP presented by Arlene.

¶14 On August 23, 2019, in her petition to enforce the Decree's spousal maintenance terms and for contempt (*see* ¶ 10, *supra*), Arlene noted Michael's failure and refusal to provide any information on or accounting of his FERS benefits, or to make any payment of her portion of those benefits to her, despite her written demand in April 2019 and subsequent requests. Four days later, on August 27, Michael filed a motion to alter or amend the August 2 order entering the COAP. He requested an evidentiary hearing and a stay of the COAP while the trial court considered the motion. He argued the COAP is contrary to Arizona law in a number of respects and he had been denied the opportunity to present his argument to the court at a hearing. He also argued any request for arrearage payments should be denied.

¶15 In October 2019, Arlene filed a motion to compel, alleging that Michael had persisted in his failure to provide sufficient information on the FERS benefits. In November, the trial court conducted an evidentiary hearing. It granted Arlene's motion to compel, heard testimony from Michael, admitted certain exhibits into evidence, heard the arguments of counsel for both parties, and took all pending matters under advisement.

January 2020 Ruling

¶16 On January 21, 2020, the trial court issued its ruling on the matters it had taken under advisement. Rejecting as "not persuasive" Michael's challenges to the COAP, the court denied his motion to alter or amend it and affirmed the order it had entered in August 2019. With regard

[3]Two days later, a notice of appearance was filed indicating that Michael had retained new counsel.

to Arlene's petition to enforce the spousal maintenance judgment and her motion for contempt, the court agreed with Michael that his obligation to pay spousal maintenance had terminated immediately upon his involuntary loss of employment and thus denied Arlene's petition. However, the court ruled that Arlene was entitled to payment for the month of November 2018, because the termination of Michael's employment occurred on the last day of that month. It therefore granted Arlene a judgment against Michael in the amount of $2,000, plus interest. The court then denied both parties' requests for attorney fees and costs, finding that neither party had acted unreasonably in the litigation or knowingly presented a false claim. Finally, the court stated that it denied "any affirmative relief sought before the date of this Order that is not expressly granted above."

September 2020 Order

¶17 On February 6, 2020, Arlene filed a motion under Rule 82(b), Ariz. R. Fam. Law P., requesting amended or additional findings and a judgment in her favor ordering Michael to reimburse her for her share of FERS payments received by him, plus interest. She also sought sanctions under Rule 65(b), Ariz. R. Fam. Law P., due to Michael's failure to comply with the trial court's order compelling disclosure of FERS benefit information, as well as partial attorney fees and costs.

¶18 On February 12, six days after Arlene filed her motion and before the trial court had ruled on it, Michael filed his notice of appeal from the January 21, 2020 ruling. Two minutes later, he filed his response to Arlene's pending motion. The trial court then stayed the matter. On April 20, we suspended the appeal and revested jurisdiction in the trial court, in part to permit it to address Arlene's pending Rule 82(b) motion. In May, the trial court held a hearing on the motion and took the matter under advisement.

¶19 On September 11, 2020, Arlene notified the trial court that OPM had accepted and implemented the FERS COAP entered in August 2019. Based on the information provided by OPM, she argued that—from February 2019 through September 2019—Michael had received and not transferred to her $3,254.18 in FERS benefits that, under the Decree and the COAP, were her sole and separate property.[4] She requested that the court

[4]In October 2019, the month after the trial court entered the FERS COAP, OPM began withholding Arlene's monthly share. OPM began

enter a judgment in her favor in that amount, plus interest. Michael did not file an objection to this notice.

¶20 On September 22, agreeing with Arlene that the retirement assets awarded to her "became her separate property upon entry of the Decree" and had been held since their receipt by Michael as a "constructive trustee," the trial court entered a judgment in Arlene's favor ordering Michael to reimburse her the $3,254.18 in FERS benefits, plus post-judgment interest.

December 2020 Ruling

¶21 On December 2, 2020, the trial court issued another ruling. It affirmed the January 2020 ruling and the September 2020 order. The court then reiterated its orders that Michael pay Arlene the missed spousal maintenance payment from November 2018[5] and FERS benefit arrearage, plus interest until paid in full. It denied all other relief and stated, "no other claims or matters are pending and this order is final and entered pursuant to Rule 78(c)," Ariz. R. Fam. Law P. The next day, Michael filed a supplemental notice of appeal, specifying that he was appealing from the December 2020 ruling. We then reinstated this appeal.

Jurisdiction

¶22 In Arizona, appellate jurisdiction is defined and limited by the legislature. *Yee v. Yee*, 251 Ariz. 71, ¶ 8 (App. 2021). "This court has an independent duty to examine whether we have jurisdiction over matters on appeal." *Camasura v. Camasura*, 238 Ariz. 179, ¶ 5 (App. 2015). Thus, although the parties here did not raise the issue, we requested supplemental briefing on whether *Yee*—decided after the completion of briefing in this case—impacts our jurisdiction over this appeal. The parties submitted briefs in response, and we now address the issue.

¶23 Arlene argues that, under *Yee*, the COAP the trial court entered in August 2019 was a "special order after judgment" subject to

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paying Arlene that share directly in July 2020 and then provided the retroactive payment from October 2019 through June 2020.

[5]The parties agree that the trial court's language, while unclear, was intended to reference the one outstanding $2,000 spousal maintenance payment ordered by the court in January 2020, not a FERS-related reimbursement.

immediate appeal. She contends that, because Michael did not appeal from the COAP within thirty days of its entry, we lack jurisdiction over any issues finally resolved by it.

¶24 *Yee* held that "the family court's resolution of a post-decree motion is a 'special order made after final judgment'" under A.R.S. § 12-2101(A)(2)[6] and is therefore "appealable without certification" under Rule 78, Ariz. R. Fam. Law P., "*but only after* the court resolves all relief sought in the motion." 251 Ariz. 71, ¶ 1. Even accepting *arguendo Yee*'s test, we must reject Arlene's argument that the August 2019 COAP was immediately appealable. That order did not resolve all of the issues raised in Arlene's July 2019 motion, in which she had requested not only entry of the COAP but also: (a) entry of judgment for FERS arrearages; (b) findings that Michael had breached his fiduciary duty to her and acted unreasonably in the matter; and (c) an award of the attorney fees and costs she had incurred in seeking entry of the COAP. Because the August 2019 COAP did not address these other aspects of Arlene's July 2019 motion, it was not an appealable special order, and Michael was not required to appeal within thirty days of its entry. *See id.* ¶ 14 ("Although a special order made after final judgment in family court does not require a Rule 78 statement of finality to be appealable, the family court must have fully resolved all issues raised in a post-decree motion or petition before an appeal can be taken under A.R.S. § 12-2101(A)(2).").

¶25 Michael focuses on what he calls the trial court's "post-decree orders under advisement rulings," which he defines as including only the January 2020 and December 2020 rulings. He argues that these were "special orders" that did not require finality language under Rule 78 and were immediately appealable. He contends that, because he filed notices of appeal within thirty days of the entry of both rulings, we have subject matter jurisdiction over his appeal pursuant to § 12-2101(A)(2). This view is consistent with the standards set forth in *Yee*.

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[6]This statute establishes that "appeal may be taken to the court of appeals from the superior court . . . [f]rom any special order made after final judgment." § 12-2101(A)(2). "To constitute such a 'special order made after final judgment,' an order (1) must involve different issues than 'those that would arise from an appeal from the underlying judgment' and (2) must affect 'the underlying judgment by enforcing it or staying its execution.'" *Yee*, 251 Ariz. 71, ¶ 10 (quoting *Arvizu v. Fernandez*, 183 Ariz. 224, 226-27 (App. 1995)).

¶26 The trial court's January 2020 ruling affirmed the COAP entered in August 2019 and addressed Arlene's request for attorney fees and costs, finding that Michael had not acted unreasonably. It also resolved Arlene's August 2019 filing regarding Michael's spousal maintenance obligation, denying contempt but awarding Arlene $2,000 for the month of November 2018. It did not expressly address the request in Arlene's July 2019 motion for an entry of judgment regarding FERS arrearages or for a related finding that Michael had breached his fiduciary duty by failing to transmit to Arlene her portion of the FERS benefit he had been collecting from OPM. However, it denied "any affirmative relief sought before the date of [the January 2020 order]" not expressly granted in the remainder of the order. Michael is therefore correct that, under *Yee*, the January 21, 2020 ruling was immediately appealable and timely appealed through his February 12 notice of appeal.

¶27 Arlene's February 6 motion for amended or additional findings under Rule 82(b), Ariz. R. Fam. Law P.,[7] again raised the issues of FERS arrearages and the attorney fees and costs she had incurred in seeking her portion of the FERS benefit. In its September 2020 order, the trial court resolved the issue of FERS arrearages. But it did not address Arlene's new request in her February motion for attorney fees and costs based on Michael's ongoing interference with Arlene's collection of her portion of the FERS benefit. Thus, under *Yee*, the September 2020 order was not immediately appealable. *See* 251 Ariz. 71, ¶¶ 1, 14. But, in December 2020, the court resolved all unresolved issues. It expressly affirmed both the January 2020 ruling and September 2020 order as final, ordered the payments for spousal support and FERS arrearages, and denied all other relief, before providing finality language and referencing Rule 78(c).[8]

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[7]Rule 82(b) permits a party to file such a motion for amended or additional findings "not later than 25 days after the entry of *judgment*" (emphasis added), which Rule 78(a)(1) defines as including any decree or order "from which an appeal lies." Under *Yee*, the trial court's January 21, 2020 ruling was a special order that was appealable under § 12-2101(A)(2), and Arlene's February 6 Rule 82(b) motion was both proper and timely.

[8]According to *Yee*, this finality certification was not required in order to render the December 2020 ruling appealable. 251 Ariz. 71, ¶¶ 1, 10, 13-16 ("family court rulings that fully resolve post-decree petitions are appealable special orders entered after final judgment" under § 12-2101(A)(2)). But, because the trial court included it, we need not address whether we would

Michael filed his supplemental notice of appeal the next day, clearly within the required timeframe for doing so. We therefore conclude that, even considering *arguendo* the standards recently articulated in *Yee*, we have jurisdiction over Michael's appeal of the January 2020 and December 2020 rulings, pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Discussion

¶28 Contending "[t]his is a contract case," Michael argues the trial court "made findings of fact and law contrary to the plain meaning of the parties' marital settlement agreement, intent of the parties, and the weight of the evidence" such that those findings should be set aside. He challenges on a number of grounds the legality of the FERS COAP entered by the court in August 2019 and upheld in January 2020.[9] He also challenges the court's

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have had jurisdiction over Michael's appeal of the December 2020 ruling in the absence of the certification.

[9]Michael raised these challenges before the trial court in August 2019, first in his untimely response to Arlene's motion for entry of the FERS COAP, and then in his August 27 motion to alter or amend the COAP entered on August 2. The latter was fashioned as a motion under Rule 83, Ariz. R. Fam. Law P., but it sought alteration or amendment of an order that was not a judgment under Rule 78, even by the standards set forth in *Yee*, as discussed above. *See* Ariz. R. Fam. Law P. 83(c)(1) ("A motion under this rule must be filed not later than 25 days after the entry of judgment under Rule 78(b) or (c)."); *see also Yee*, 251 Ariz. 71, ¶ 19 ("a Rule 83 motion challenging a post-decree order or any ruling other than a Rule 78(b) or (c) judgment is improper and can provide no basis for relief."); *cf. Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶¶ 10-13 (App. 2007) (rejecting assertion that ruling on motion made pursuant to Rule 60, Ariz. R. Civ. P., was appealable as special order after judgment when no final judgment had been entered before motion was made). Nevertheless, we are permitted to look to the substance of the motion, irrespective of how Michael styled it. *Cf. Hegel v. O'Malley Ins. Co.*, 117 Ariz. 411, 412 (1977) ("The notion that only the title of a motion must be examined appears to be contrary to the purpose of the Rules of Civil Procedure which is to insure that every action receives a just, speedy and inexpensive determination."). And, because both Arlene's counsel and the trial court were afforded the opportunity to address Michael's challenges to the COAP below—with the court ultimately rejecting them expressly in its January 2020 ruling—we exercise our discretion to deem those challenges preserved for purposes of this appeal. *See Banales v. Smith*, 200 Ariz. 419, ¶ 6 (App. 2001) (purpose of

orders that he owes Arlene a spousal maintenance payment, arrearage, and interest. Arlene counters that the COAP correctly reflects the terms of the Decree and the Agreement that was incorporated into it, and that the COAP and the orders regarding payments owed to her are correct and should be affirmed.

Applicable Law & Standard of Review

¶29 All of Michael's claims on appeal stem from the parties' Agreement, which was incorporated into the Decree entered by the California court and domesticated in Pinal County. The Agreement stipulates that California law "shall be deemed to apply and prevail" in the Agreement's "construction or execution," no matter where or when undertaken. Thus, California law must guide our interpretation of the Agreement and the Decree.

¶30 A valid final judgment from another state is entitled to full faith and credit by Arizona courts. *See Lofts v. Superior Court*, 140 Ariz. 407, 408, 410-11 (1984). It is an abuse of discretion for an Arizona trial court to fail to enforce such a judgment. *Id*. at 412.

¶31 The parties agree that this case presents questions of law requiring *de novo* review. *See In re Marriage of Lafkas*, 188 Cal. Rptr. 3d 484, 492 (Ct. App. 2015) (interpretation of contracts and statutes); *see also Jordan v. Rea*, 221 Ariz. 581, ¶ 15 (App. 2009) (interpretation of statutes, dissolution decrees, and contracts). However, "[w]e begin our analysis mindful that an 'order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.'" *In re Marriage of Grimes & Mou*, 258 Cal. Rptr. 3d 576, 588 (Ct. App. 2020) (quoting *In re Marriage of Arceneaux*, 800 P.2d 1227, 1228 (Cal. 1990)); *see also Gen. Elec. Cap. Corp. v. Osterkamp*, 172 Ariz. 191, 193 (App. 1992) (judgment is presumed correct and appellant bears burden of showing otherwise).

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waiver rule is that "party must have afforded the trial court and opposing counsel the opportunity to correct any asserted defects" to raise them on appeal); *see also Azore, LLC v. Bassett*, 236 Ariz. 424, ¶ 7 (App. 2014) ("waiver is a procedural concept that we do not rigidly employ in a mechanical fashion, and we may use our discretion in determining whether to address waived issues").

Merger & Extrinsic Evidence

¶32 As an initial matter, the parties dispute whether the Agreement was merged into the Decree. In fact, the Decree not only references and attaches the Agreement; it also establishes that spousal support and property division "is ordered as set forth" in the attached Agreement. The Decree then clarifies that the Agreement—the sole attachment to the Decree—"is incorporated into this judgment, and the parties are ordered to comply with [its] provisions." Such incorporation was clearly intended by the parties, who expressly agreed that the court "shall incorporate the terms of th[e] Agreement into the Judgment of Dissolution of Marriage." Thus, as a matter of law, the parties' July 2010 Agreement merged with the California court's September 2010 Decree. *See Flynn v. Flynn*, 265 P.2d 865, 866 (Cal. 1954) (clear that parties and court intended merger, making "the agreement an operative part of the decree," when decree expressly references and incorporates agreement and includes "express order to perform all or part of the agreement"); *In re Marriage of Corona*, 92 Cal. Rptr. 3d 17, 30 (Ct. App. 2009) (whether marital settlement agreement merged into divorce decree a question of law, and merger clear where agreement "attached to and explicitly incorporated by reference" in judgment).

¶33 But it does not follow—as Arlene has argued both below and on appeal—that the trial court was precluded from considering extrinsic evidence. As Michael puts it, "for purposes of interpretation, it does not matter if the court merged the agreement or not with the decree," because the Agreement "must still be interpreted as to its plain meaning and intent of the parties." And, in California:

> It has long been established that extrinsic evidence is admissible to prove what the parties intended by ambiguous language appearing in a marital settlement agreement incorporated and merged in a judgment of divorce or marital dissolution since ". . . courts do not hesitate to consider all of the admissible extrinsic evidence correctly to interpret their decrees."

In re Marriage of Trearse, 241 Cal. Rptr. 257, 259 (Ct. App. 1987) (quoting *Flynn*, 265 P.2d at 865). Indeed, the court in *Trearse* expressly rejected the conclusion, advanced by Arlene in this case, that parol or extrinsic evidence "is categorically inadmissible to determine the intentions of the parties to a marital settlement agreement incorporated in a judgment of dissolution of

marriage." *Id.* at 260 (referencing "the long history of California law allowing courts to receive extrinsic evidence to ascertain the intent of the parties to a martial settlement agreement even where it is incorporated and merged in a judgment").

¶34 Thus, unless the admission of extrinsic evidence is precluded by statute,[10] "such evidence should be admissible to ascertain the intent of an agreed interlocutory judgment of dissolution of marriage to the same extent such evidence would be admissible to ascertain the meaning of any other written agreement." *Id.* at 261. California courts are permitted to admit extrinsic evidence regarding a contract term that is susceptible to more than one reasonable interpretation, so long as the proffered evidence "supports a meaning to which the language is reasonably susceptible." *In re Marriage of Thorne & Raccina*, 136 Cal. Rptr. 3d 887, 897 (Ct. App. 2012) (quoting *In re Marriage of Iberti*, 64 Cal. Rptr. 2d 766, 769 (Ct. App. 1997)). However, because "extrinsic evidence cannot be relied on to support a meaning to which the agreement is not reasonably susceptible," it is reversible error for a trial court to rely on testimony regarding a party's understanding of a term in a marital settlement agreement when that testimony contradicts the language of the agreement. *Id.*

¶35 These standards are consistent with the approach in Arizona, where "the judge first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 154 (1993). As our supreme court explained in *Taylor*, it is permissible for a judge to "admit the extrinsic evidence conditionally [and] reserve ruling" on a parol evidence objection until the judge decides, in his or her "sound discretion," how best to proceed. *Id.* at 155.

¶36 That is what occurred here. The trial court heard Michael's testimony regarding his intent at the time he and Arlene entered into the Agreement. When Arlene objected to that testimony, arguing that "intent of the parties is not admissible when we are dealing with a decree," the court took the matter under advisement but allowed Michael to continue with his testimony regarding his intent. As reflected in its January 2020 ruling, the court ultimately concluded that Michael's proffered testimony regarding his purported intent advanced an interpretation inconsistent

[10]Neither party has pointed us to any California statute precluding the admission of extrinsic evidence in this case.

with what is "clearly stated in the Marital Settlement Agreement." Thus, notwithstanding his insistence on appeal that his testimony "neither varie[d] nor contradict[ed] the plain meaning of the marital settlement agreement" and was "consistent with the plain meaning" of that Agreement, the trial court concluded that the language of the Agreement is not susceptible to the interpretation advanced by Michael.[11] Michael emphasizes that Arlene did not provide contradictory testimony regarding her own intent. But he cites no authority in support of his implicit argument that, because Arlene did not "refute" or "rebut" his testimony, the court was somehow obligated to admit his evidence, accept his interpretation, and rule in his favor.

Plain Language of Agreement

¶37 We next determine whether the trial court correctly concluded that the terms of the COAP it entered in August 2019 correspond to what the parties had earlier agreed regarding the division of Michael's FERS benefits and, correspondingly, that the language of the Agreement is not reasonably susceptible to the contrary interpretation Michael advanced. Michael raises three separate objections to the COAP, regarding: (a) its application of the time-rule formula in awarding Arlene a pro rata share of Michael's monthly annuity; (b) its awarding Arlene a maximum possible former spouse survivor annuity; and (c) its inclusion of a "payable to the estate" clause.[12] As explained in detail below, we conclude that these

[11] Michael also insists repeatedly that he offered "truthful and credible testimony" regarding his intentions when entering into the Agreement. The credibility of witnesses is, of course, a question for the trier of fact, not this court. *Marriage of Grimes*, 258 Cal. Rptr. 3d at 589; *see also In re Marriage of Foster*, 240 Ariz. 99, ¶ 5 (App. 2016). And the trial court expressly noted in its January 2020 ruling that it had "considered the evidence, including the demeanor of the witnesses" (*i.e.*, Michael, the one witness who testified at the hearing) in reaching its conclusions. Regardless, even "truthful and credible" testimony regarding a contracting party's intent does not permit an interpretation of a contract whose terms are not reasonably susceptible to that interpretation.

[12] The parties do not dispute that pension rights are community property insofar as they were acquired during the marriage and are subject to equitable division upon divorce. *See In re Marriage of Brown*, 544 P.2d 561, 562-63 (Cal. 1976); *see also Johnson v. Johnson*, 131 Ariz. 38, 41 (1981) (also

portions of the COAP comport with the plain language of the parties' Agreement, which is not susceptible to the contrary interpretation advanced by Michael.[13]

Monthly Annuity Based on Time-Rule Formula

¶38 The COAP entered by the trial court establishes that Arlene "is entitled to a pro rata share of [Michael]'s Monthly Annuity under FERS." It also established that, "[f]or purposes of determining a pro-rata share," the marriage—which began before Michael commenced his employment with the Border Patrol and his resulting acquisition of FERS benefits—ended on May 1, 2009. A "pro rata share" means "one-half of the fraction whose numerator is the number of months of Federal . . . service . . . performed during the marriage and whose denominator is the total number of months of Federal . . . service performed by the employee." 5 C.F.R. § 838.621(a); *see also* 5 C.F.R. § 841.102(c)(4) (subpart 838 relevant to court orders affecting FERS benefits). As Michael notes, this is synonymous with the so-called "time rule." *See In re Marriage of Gray*, 66 Cal. Rptr. 3d 87, 91 n.3 (Ct. App. 2007) (defining "[t]he traditional 'time rule'").

¶39 Michael argues the trial court erred in entering a COAP that awards Arlene a time-rule interest, "contrary to the terms of the marital settlement agreement." He contends the language of the Agreement reflects the parties' intention that Arlene would receive "her community interest in his federal retirement benefit that only accrued during the term of the marriage; as outlined by the dates stated in the agreement"—not a time-rule interest calculated based in part on Michael's ending accrued benefit reflecting over nine additional years of service after the parties' separation and resulting end of the community. The court rejected this argument, concluding that applying Michael's proposed "frozen benefit" formula instead of the time rule would be inconsistent with the plain meaning of the Agreement. We agree.

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noting that "pension rights are one of the most valuable of marital assets upon divorce").

[13] Because we reject Michael's arguments that the challenged portions of the COAP are inconsistent with the plain meaning of the Agreement, we need not address his related arguments regarding the limitations on the reopening or modification of judgments under A.R.S. § 25-327(A).

¶40 Michael is correct that the Agreement includes no express reference to the time rule, a fractional interest, or an ending accrued benefit. But federal regulations make plain that such references are not required for the awarding of a pro rata or "time-rule" share to a former spouse; it is sufficient that a court's order awards the former spouse a portion of the employee's annuity as of a specified date before the employee's retirement. 5 C.F.R. § 838.621(c). The Agreement here does so, awarding Arlene one-half of Michael's FERS pension for the period through May 1, 2009—the date of the parties' separation, over nine years before Michael's eventual retirement in November 2018. Indeed, even Michael elsewhere concedes that the disputed text of the Agreement awards a "pro rata share of the FERS annuity."

¶41 As noted above, the Decree also reflects—consistent with the parties' Agreement—that the trial court retained jurisdiction over the subject matter of the Agreement, including the division of the FERS benefits, to effect enforcement of its terms. And, neither the Decree nor its incorporated Agreement include any fixed monetary amounts regarding Arlene's share of the FERS benefit. In such circumstances, "[t]he parties' intent was clearly to allow for later implementation of an in-kind division of the *actual* pension, not to award a particular amount based upon estimates [nearly ten] years before any actual payment." *In re Marriage of Gowan*, 62 Cal. Rptr. 2d 453, 456 & n.2 (Ct. App. 1997) (rejecting employee spouse's claim that parties' agreement was "to somehow 'freeze' the value of the community property pension," particularly when judgment mentions no specific monetary amounts); *see also In re Marriage of Bowen*, 111 Cal. Rptr. 2d 431, 437 (Ct. App. 2001) ("Given the fact that [employee spouse] was not expected to receive retirement benefits for a number of years after the date of the judgment, it was reasonable to expect that future events not contemplated by the parties could have an impact on the parties' rights in the pension benefits.").

¶42 Moreover, the language of the Agreement must be interpreted in light of controlling community property law in California at the time the parties entered into it in 2010. Long before the Agreement was signed and incorporated into the Decree, California courts had characterized the time rule as the "most effective method" for determining "one-half of that portion of [the employee spouse's] services attributable to community effort." *In re Marriage of Judd*, 137 Cal. Rptr. 318, 321 (Ct. App. 1977). Particularly where, as here, a pension is based on total years of service, *see* 5 U.S.C. § 8415(a) (one percent of employee's average pay multiplied by his/her total years of service), "[t]he time rule fairly accounts for both the marital and post-marital years of service because it assigns to

the community only a portion of the pension corresponding to the portion of service during marriage and before separation," *Marriage of Gowan*, 62 Cal. Rptr. 2d at 458; *see also In re Marriage of Lehman*, 955 P.2d 451, 462 (Cal. 1998) (time rule "arrives at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates'" (quoting *In re Marriage of Poppe*, 158 Cal. Rptr. 500, 505 (Ct. App. 1979))).

¶43 The rationale behind the time rule has been explained as follows:

> Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort.

Marriage of Judd, 137 Cal. Rptr. at 321. "Using this rationale, [California] courts have frequently used this method of determining the community's interest where the amount of the benefit is substantially related to the number of years of service rendered." *Marriage of Gowan*, 62 Cal. Rptr. 2d at 457. Indeed, because "the number of years of service factors substantially in determining the amount of the income stream in most defined benefit pension plans," the time rule is—at least in California—"the most frequently employed method of dividing pension benefits." *Marriage of Gray*, 66 Cal. Rptr. 3d at 97.

¶44 At the evidentiary hearing, Arlene argued that Michael had not cited any California law supporting his alternative "frozen benefit" approach in lieu of the time rule. He has not remedied this defect on appeal. Indeed, as he did below, Michael cites only *Marriage of Gray*, and only in support of the more limited proposition that, "[i]n California, application of the time-rule is not mandatory when apportioning benefits pursuant to a divorce decree." But that case involved a union "credit" accrual plan,

with accruals at irregular intervals and uneven accruals year-to-year,[14] 66 Cal. Rptr. 3d at 92-93, not a calendar-based system like FERS, under which benefits accrue on a length-of-employment basis. *See Marriage of Poppe*, 158 Cal. Rptr. at 504 (application of time rule unreasonable where amount of pension benefit not substantially related to years of service but rather variable "points" earned as result of service). Where, as here, the amount of the retirement benefit is substantially related to the number of years of service, the time rule's time-based formula is "appropriate." *Id*. at 503.

¶45 Michael implies that the time rule should not be applied because it somehow awards a former spouse "the *separate property* of the participant spouse." This argument reflects a fundamental mischaracterization of the community property right to retirement benefits. As the Supreme Court of California has explained:

> It is a right to draw from a stream of income that begins to flow, and is defined, on retirement. Hence, it is a right to payments specified in accordance with a formula *as such payments may be specified in accordance with such formula as then obtains*—not to some "pre-retirement" payments specified in accordance with some "pre-retirement" formula. . . . [V]arious events and conditions after separation and even after dissolution may affect the amount of retirement benefits that an employee spouse receives. But not their character. Once he or she has accrued a right to retirement benefits, at least in part, during marriage before separation, the retirement benefits themselves are stamped a community asset from then on.

Marriage of Lehman, 955 P.2d at 459 (citations omitted). Thus, "a nonemployee spouse who owns a community property interest in an employee spouse's retirement benefits owns a community property interest

[14] Even in such a scenario, the court in *Marriage of Gray* did not disapprove of the use of the time rule; it merely determined that the trial court had discretion to select the proper method of equitable apportionment and remanded the matter to allow the trial court to exercise it, "express[ing] no opinion on the proper method of apportionment, i.e., per the time rule or any other particular formula." 66 Cal. Rptr. 3d at 104.

in the latter's retirement benefits as enhanced" after the end of the community, including if that enhancement occurs through additional years of service, an increase in earnings, or an increase in age. *Id.* at 460 (such enhancement still "uncontestedly a community asset"); *see also In re Marriage of Adams*, 134 Cal. Rptr. 298, 302 (Ct. App. 1976) ("When the employed spouse continues working after separation, in many cases the increased retirement benefits will be attributable in part to such spouse's continued earnings, and in part to the previous community property contributions.").

¶46 Accordingly, California courts have "repeatedly rejected" challenges to time-rule awards premised on claims that post-separation service years at higher salaries contributed more to the value of a pension than earlier, married years at lower salaries. *Marriage of Gowan*, 62 Cal. Rptr. 2d at 458; *see also Marriage of Gray*, 66 Cal. Rptr. 3d at 91 n.3 (time rule assigns equal weight to each year of employee spouse's service, "regardless of whether the divorce occurred early in the employed spouse's career (when salary-based pension contribution deductions might be smaller but would have longer to grow) or closer to retirement (when salary-based pension contribution deductions might be greater but would have less time to grow)"); *Marriage of Judd*, 137 Cal. Rptr. at 321-22 (rejecting employee spouse's argument that award should not give equal weight to years of service during marriage and after marriage); *In re Marriage of Anderson*, 134 Cal. Rptr. 252, 253 (Ct. App. 1976) ("first few years of service (during the marriage) must be given just as much weight in computing total service as the last few years (after separation)"). They have also upheld the application of the time rule where the employee spouse returned to employment after the parties' separation, so long as the ultimate pension reflected both marital and post-separation contributions. *E.g.*, *Marriage of Gowan*, 62 Cal. Rptr. 2d at 459 (community contribution to pension "crucial to its final value and to the amount [ultimately] received" by employee despite break in service and salary differential, and time rule therefore acceptable for apportioning parties' interest in pension).

¶47 For all these reasons, we reject Michael's challenge to the COAP's application of the time rule in setting Arlene's monthly FERS annuity.

Maximum Survivor Annuity

¶48 The COAP entered by the trial court states: "[Arlene] is awarded a former spouse survivor annuity. The amount of the former spouse survivor annuity will be equal to the maximum possible survivor

annuity."[15] Michael challenges this portion of the COAP, arguing that Arlene is only entitled to a pro rata share of the survivor annuity, "based on the term of the marriage."[16] He justifies this contention on the ground that, in their Agreement, "the parties expressly identified the community share."

¶49 However, the language of the Agreement identifying "the community share" is contained in the sentence regarding Michael's FERS pension. No such limitation is included in the language regarding the survivor annuity: "Together with Survivor Benefits as set forth in the Plan." When court orders contain such general language, with "no provision stating the amount of the former spouse survivor annuity," by federal regulation they are deemed to provide "the maximum former spouse survivor annuity" permitted under the Plan. 5 C.F.R. § 838.921(a). And, while Michael is correct that pro rata fractions of the maximum survivor annuity are also possible under FERS, court orders must use certain language indicating that only a "share" or "portion" of a survivor annuity is being awarded for the order to be interpreted as awarding a pro rata fractional share of the maximum allowable survivor annuity. 5 C.F.R. § 838.922. Here, the Agreement establishes that Arlene was awarded "Survivor Benefits as set forth in the Plan," not some share, portion, or fraction of the maximum survivor annuity allowable under the Plan (the default interpretation when the language does not otherwise indicate). This language contrasts with that used in the Agreement to describe the monthly annuity. The latter provides the dates of the marriage necessary for calculating a pro rata share, and it also expressly awards Arlene "[o]ne half" of Michael's pension. In short, we must agree with the trial court, and with Arlene's argument below, that Michael's interpretation—no time-based formula on the monthly benefit where one is clearly indicated, but a time-

[15] Under FERS, the maximum possible former spouse survivor annuity is fifty percent of the employee annuity that would otherwise have been paid to the employee. *See* 5 C.F.R. § 842.613(a).

[16]Michael also argues the COAP "improperly" awards Arlene "the separate property portion of the survivor annuity," in violation of A.R.S. § 25-211(A)(2). In support of this proposition, he cites only *Boncoskey v. Boncoskey*, 216 Ariz. 448 (App. 2007). Such Arizona statutes and jurisprudence are irrelevant to the interpretation of the Agreement and Decree at issue here, which—as established above—are governed by California law.

based limitation on the survivor benefit in the absence of any language indicating such limitation—"is the opposite of what the [Agreement] says."

¶50 Finally, Michael advances several arguments regarding his current wife, none of which is persuasive. We are skeptical that, at the time Michael and Arlene (his first wife) entered into their Agreement, he somehow intended that a future third wife would be receiving a share of the survivor benefits. As to the contention that "the result of the superior court's decision is harsh on Michael Carr since he has re-married" and leaves his current spouse "with no protection," federal regulations make plain that later spouses will sometimes be left without protection when former spouse annuities have already been agreed to and ordered by a court. *See, e.g.*, 5 C.F.R. § 842.603(b) ("court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order").

"Payable to the Estate" Clause

¶51 The COAP entered by the trial court stipulates that, if Arlene predeceases Michael, "OPM is directed to pay [Arlene]'s share of [Michael]'s civil service retirement benefits to her estate." Michael contends the parties never agreed to such a term and that its inclusion in the COAP is an impermissible "*de facto* modification of the [D]ecree."

¶52 Arlene concedes the Decree "does not detail the estate payment provision," but she contends this omission "does not create ambiguity." She argues that, because the Agreement affirms "separate property rights" and Michael "relinquish[ed]" claims to her property, her portion of the FERS benefits should properly be paid to her estate if she predeceases Michael, given her "right to control and dispose of her separate property." She further urges that this outcome is consistent with the Mutual Releases provision of the Agreement. We agree.

¶53 The plain language of the Agreement establishes not only that Arlene's portion of the FERS benefits is "her sole and separate property," but also that Michael "relinquish[ed] all right, title and interest in and to" that property. Thus, the Agreement (and therefore the Decree into which it was incorporated) awarded Arlene an unqualified and unrestricted property interest in her portion of the FERS benefits. Nothing in the Agreement indicates that Arlene agreed her portion would revert to Michael if she predeceased him. To the contrary, the Agreement stipulates that he only retained the "[b]alance" of his FERS pension benefits—*i.e.*, the portion that was not awarded to Arlene. And, as Arlene correctly notes, the

Agreement establishes that Michael released and relinquished to Arlene *and* to "her heirs, executors, administrators, and assigns, any and all claims or rights . . . with respect to any property . . . belonging to [Arlene]," including her portion of the FERS benefit.

¶54 All of this language must be interpreted in light of the community property law that controlled in California at the time the parties entered into the Agreement in July 2010. The norm in California is that "community property interests are ordinarily inheritable." *In re Marriage of Powers*, 267 Cal. Rptr. 350, 353 (Ct. App. 1990). Before 1987, there was a judicially created exception to this norm for pensions: a community property interest in a spouse's pension was not inheritable, under one aspect of the so-called "terminable interest rule." *Id.* In particular, the rule established that "the nonemployee spouse's interest in pension benefits terminates upon the death of the nonemployee spouse, so that the nonemployee spouse may not bequeath these benefits by will." *Id.* (quoting *Bowman v. Bowman*, 217 Cal. Rptr. 174, 176 (Ct. App. 1985)).[17]

¶55 However, and crucially for present purposes, California's legislature "abolish[ed]" the terminable interest rule by statute in the 1980s, empowering courts to make "whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits." *Id.* (quoting Stats. 1986, ch. 686, § 1 and former Cal. Civ. Code § 4800.8[18]). And, since at least 1988—well before the parties entered into their Agreement in July 2010—the law in California has been "clear that if the nonemployee spouse dies before the employee spouse, his or her interest in the employee spouse's pension plan *does not revert to the*

[17] Another aspect of the terminable interest rule was that "the community interest in accrued benefits does not extend to pension benefits payable following the death of the employee spouse." *Marriage of Powers*, 267 Cal. Rptr. at 353 (quoting *Bowman*, 217 Cal. Rptr. at 176). "Thus, if Husband died before Wife," after having designated a third party (*e.g.*, a second wife) to receive them after his death, "the remainder of the benefits would go entirely to Husband's second wife, even though they were earned in large part during Husband's marriage to his first wife." *In re Marriage of Taylor*, 234 Cal. Rptr. 486, 488 (Ct. App. 1987).

[18] In 1993, this statute was recodified in California's Family Code at § 2610 without substantive change and remains in force today. *See* Cal. Fam. Code § 2610(a)(1) & cmt.

employee spouse by operation of the terminable interest rule *but becomes part of the nonemployee spouse's estate*." *Id.* at 356 (emphasis added) (citing *Estate of Austin*, 254 Cal. Rptr. 372 (Ct. App. 1988)). When read in light of these controlling legal principles, the language of the parties' Agreement clearly indicates that Arlene's portion of the FERS benefits—her sole and separate property, to which Michael relinquished all right, title, and interest—is to be paid to her estate in the event she predeceases Michael.[19]

¶56 In arguing for the contrary result, Michael cites *Bensing v. Bensing*, 102 Cal. Rptr. 255 (Ct. App. 1972), for the proposition that "a former wife's interest in her husband's retirement benefits terminates upon her death." That 1972 case predated the legislature's abolition of the terminable interest rule and was no longer good law at the time the parties entered into the Agreement, much less today.[20]

¶57 Although California community property law entitles Arlene's estate to her share of Michael's pension, it is hypothetically possible that result could be superseded by a federal statute prohibiting alienation of pension rights including through testamentary transfers. But FERS allows for "payable to the estate" clauses like the one contained in the COAP at issue here. *See* 5 C.F.R. § 838.237(b)(3) ("OPM will honor a court order acceptable for processing . . . that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to . . . [t]he estate of the former spouse.").[21]

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[19]Thus, Michael is incorrect that Arlene "waived a payable to the estate argument when she failed to appeal the [D]ecree." The Agreement, and thus the Decree into which it was incorporated, already implicitly provided for such payments in the event of Arlene's death before Michael's. Moreover, the Decree itself expressly stipulates that the parties waived the right of appeal.

[20]Michael also cites § 25-327(A) and *Quijada v. Quijada*, 246 Ariz. 217 (App. 2019). But, once again, California law—not Arizona law—governs the interpretation of the Agreement and the Decree into which it was incorporated.

[21]Michael points to the fact that, under 5 C.F.R. § 838.237(a), "the former spouse's share of an employee annuity terminates on the last day of the month immediately preceding the death of the former spouse, and the former spouse's share of [the] employee annuity reverts to the retiree," unless the COAP in question "expressly provides otherwise." But it does not follow, as he contends, that payment to a former spouse's estate is

¶58 For all these reasons, we reject Michael's challenge to the COAP's instruction to OPM that it pay Arlene's share of the FERS benefits to her estate if she predeceases Michael.[22]

Payments Ordered

¶59 As outlined above, the trial court ordered Michael to pay Arlene the outstanding $2,000 spousal maintenance payment from November 2018 and over $3,250 of Arlene's FERS funds that had been received by Michael, both plus interest. Michael challenges these rulings, insisting that he does not owe any arrearage payments and that those orders should be set aside.

¶60 Arlene contends the trial court's $2,000 spousal maintenance judgment is correct. We agree. According to his own testimony, Michael's employment continued through all of November 2018, and he therefore owed Arlene spousal maintenance for that month. Michael's argument that Arlene did not oppose the notice of termination is unavailing. He and Arlene agreed that spousal maintenance would end upon his involuntary

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"atypical" under FERS, or that the "default" for federal employees in California is for the service annuity to revert to such employee upon the death of a former spouse. Such result would be contrary to now-settled California law, under which the equal division of retirement benefits mandated by statute necessarily includes the nonemployee spouse's right to devise her portion of the benefits at her death and *no* reversion to the employee spouse is expected. *See Marriage of Powers*, 267 Cal. Rptr. at 356; *see also* Cal. Fam. Code § 2550 (requiring equal division of community property). Thus, 5 C.F.R. § 838.237 contemplates and allows for the precise result here: a COAP reflecting that Arlene's interest in the FERS benefit will be payable to her estate if she predeceases Michael, consistent with both the text of the parties' Agreement and longstanding California law.

[22]As to Michael's alternative argument that Arlene's estate "should only receive the FERS benefit until the community *contributions* have been exhausted," he failed to raise the argument before the trial court and has cited no California (or even Arizona) law in support of it on appeal. We therefore decline to address it. *See Davis v. Davis*, 230 Ariz. 333, ¶ 28 (App. 2012) ("Without commenting on the merits of Husband's argument, we find the argument to be waived because he failed to raise it with the family court and on appeal failed to support it with . . . legal authority.").

retirement from federal service, not the month before, and she sought to enforce that agreement.

¶61 Arlene also argues the FERS arrearage judgment is proper and should be affirmed. Again, we agree. According to Arlene's Notice of OPM Findings and Arrearage Calculation, on which the judgment was based and which Michael did not dispute, he collected Arlene's portion of the FERS benefit from February 2019 through September 2019. The trial court correctly concluded that those funds were Arlene's separate property when Michael received them in 2019, as they had become her separate property and Michael had lost all control over them upon the entry of the Decree in 2010. *See Koelsch v. Koelsch*, 148 Ariz. 176, 181 (1986) ("When the community property [including pension plans] is divided at dissolution . . . each spouse receives an immediate, present, and vested separate property interest in the property awarded to him or her by the trial court," and "a former spouse loses any interest in and control over that separate property.").[23] The court also correctly concluded that Michael received the funds as a constructive trustee, justifying an order that he be required to convey them back to Arlene, to whom they belong. *See Nitrini v. Feinbaum*, 18 Ariz. App. 307, 311 (1972) (constructive trust, which "courts do not hesitate to impose . . . when necessary to obtain complete justice," is used to compel one who unfairly holds a property interest to convey it to the party to whom it belongs); *see also Harmon v. Harmon*, 126 Ariz. 242, 244 (App. 1980) (same, and noting that "wrongful holding of property which unjustly enriches" one party at the expense of another is "conduct which will lead to the imposition of a constructive trust").

¶62 Michael argues this result is somehow inequitable because Arlene did not seek a COAP regarding the FERS benefit until 2019, which he has characterized as untimely and a "negligen[t]" and "unreasonable delay." But, it cannot have come as a surprise to Michael that some portion of the FERS benefit he received from OPM would—as he had expressly agreed and the California court had ordered—need to be paid to Arlene.[24]

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[23] Michael is incorrect that Arlene "does not have an immediate vested property interest in the FERS benefit." To the contrary, that sole and separate property interest arose when the California court entered the Decree in September 2010, which ordered the parties to comply with the community property division outlined in their Agreement. *See Koelsch*, 148 Ariz. at 181.

[24] Michael points out that the Agreement directs the FERS benefit to be "transferred by means of a Domestic Relations Order" and that he never

Moreover, Michael was not eligible to retire when the parties divorced in 2010, and no FERS benefits were actually paid by OPM until early 2019. Arlene promptly attempted to collect FERS-related information from Michael for the purposes of obtaining a COAP shortly after he notified her that he had retired and had begun receiving the benefit from OPM. Michael did not cooperate in the process of preparing the COAP, or even timely respond to Arlene's motion seeking its entry. Thus, any "delay" between Michael's retirement and the trial court's entrance of the COAP is attributable in large part to Michael's own behavior.

¶63 Finally, the burden is on an appellant "to ensure that 'the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised.'" *Blair v. Burgener*, 226 Ariz. 213, ¶ 9 (App. 2010) (quoting *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995)); *see also* Ariz. R. Civ. App. P. 11(c)(1)(B) (party challenging trial court's judgment, finding, or conclusion as unsupported by or contrary to evidence "must include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion"). Michael has not provided this court with the transcript from the May 2020 hearing at which the FERS arrearage issue was addressed. Without that transcript, we must presume the evidence and arguments presented at the hearing supported the trial court's findings and order regarding the arrearage owed. *See Blair*, 226 Ariz. 213, ¶ 9; *see also Cooper*, 167 Ariz. at 487 (where transcript not provided and partial record insufficient to decide issue, appellate court "will assume the trial court was correct in its assessment").

Attorney Fees & Costs

¶64 Both parties request attorney fees and costs on appeal pursuant to A.R.S. § 25-324. Given the trial court's findings that an award of fees was not warranted under either subpart of the statute and the complicated issues presented involving not only Arizona law, but also California law and federal regulations, we decline to award attorney fees. However, as the prevailing party, Arlene is entitled to her costs on appeal, A.R.S. § 12-341, upon her compliance with Rule 21, Ariz. R. Civ. App. P.

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agreed to pay Arlene directly "pending the submission of a retirement order." But the Agreement's reference to a domestic relations order in no way permitted Michael to receive and retain Arlene's portion of the FERS benefit, which is her "sole and separate property" to which he "relinquish[ed] all right, title and interest."

Disposition

¶65 We affirm the rulings of the trial court.