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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARY KATHRYN DELUCA, Petitioner/Appellant, v. RICHARD F. DELUCA, Respondent/Appellee.	2 CA-CV 2010-0037 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DR95001145

Honorable James L. Conlogue, Judge

VACATED and REMANDED

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B R A M M E R, Presiding Judge.

¶1 Mary Deluca appeals from the trial court's order requiring her husband, Richard Deluca, from whom she had separated in 1996, to pay her a portion of his military retirement pay. She asserts the court incorrectly calculated the payment amount

based on Richard's retirement benefits at the time of her 2009 petition to convert the decree of legal separation to a marriage dissolution, rather than at the time of the decree of legal separation the court had entered in 1996. We vacate the order and remand the case to the trial court for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the trial court's ruling." *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). Mary and Richard married in 1974. After more than twenty years of active duty military service, Richard retired in 1988. Mary filed a petition for dissolution of marriage on October 24, 1995. On February 26, 1996, the trial court entered a stipulated decree of legal separation that did not address the allocation of Richard's military retirement benefits. On March 17, 2009, Mary filed a petition to convert the legal separation to a marriage dissolution. She additionally alleged she was entitled to an interest in Richard's retirement benefits. Although the trial court found it lacked jurisdiction to dissolve the marriage, apparently due to a pending dissolution action in Colorado, it determined it had jurisdiction, based on the separation decree, to determine Mary's interest in Richard's retirement benefits.

¶3 Mary argued she was entitled to 35.317% of Richard's retirement benefits, calculated as of the date of the service of her petition for separation. She asserted Richard then had a disability rating of forty percent from the United States Department of Veterans Affairs, and that his disability rating had increased to one hundred percent in 2006, thereby decreasing his monthly retirement pay. Mary concluded she was entitled

to approximately $300 per month and that Richard additionally "owe[d her] $2,714.78 through November 2009."

¶4 The court agreed that Mary was entitled to 35.317% of Richard's retirement pay but determined it was required to base the value of Mary's share on Richard's retirement benefits "at the time the Court exercises its authority" to allocate those benefits. Basing its calculation on Richard's monthly benefit amount as of March 2009, the court ordered Richard to pay Mary approximately $200 per month from the March 2009 date she filed her petition to convert. This appeal followed.

Discussion

¶5 Mary contends the trial court erred as a matter of law by reading a provision of the Uniformed Services Former Spouses' Protection Act (USFSPA),[1] 10 U.S.C. § 1408(c), to require the court to allocate Richard's disposable retired pay based on the pay's value at the time Mary first asked the court to do so in 2009, rather than the its value as of the February 1996 separation decree. A trial court's interpretation of a statute is a question of law that we review de novo. *Danielson v. Evans*, 201 Ariz. 401, ¶ 13, 36 P.3d 749, 754 (App. 2001). Our goal in interpreting a statute is to discern and implement the intent of the legislative body that enacted the law. *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 28, 218 P.3d 1069, 1080 (App. 2009). We first look to the plain language of the statute as the best indicator of legislative intent. *Id.* Words are given their ordinary

[1]Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982).

meaning unless it appears from the context or otherwise that a different meaning controls. *Id.*

¶6 The USFSPA defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled" less any amount which is "deducted from the retired pay of such member as a result of forfeiture of retired pay . . . or as a result of waiver of retired pay required by law in order to receive[, inter alia, disability] compensation under . . . title 38." 10 U.S.C. § 1408(a)(4)(B), *see* 38 U.S.C. § 1152 (providing "death and disability benefits" shall be granted to persons with compensable status). Another provision of the USFSPA, 10 U.S.C. § 1408(c), specifies how a court may treat retired pay as property of the member and spouse. It provides that "a court may treat disposable retired pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." *Id.*

¶7 Because division of Richard's disposable retired pay was not provided for in the separation decree, A.R.S. § 25-318(D), which governs the character of property omitted from a decree, is the relevant "law of the jurisdiction" of the trial court pursuant to 10 U.S.C. § 1408(c). It provides that "[t]he community, joint tenancy and other property held in common for which no provision is made in the decree shall be from the date of the decree held by the parties as tenants in common, each possessed of an undivided one-half interest." § 25-318(D).

¶8 Accordingly, Richard's retired disability pay was held by him and Mary as tenants in common as of February 26, 1996, the date of the decree of legal separation,

with both possessing an undivided one-half interest in it. Mary's undivided one-half interest in those benefits was then vested, at which time Richard was rated forty percent disabled. *See* § 25-318(D); *Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986) ("When the community property is divided at dissolution 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."); *Danielson*, 201 Ariz. 401, ¶¶ 23-24, 36 P.3d at 756 (concluding rights to military retirement benefits "vested" at time of decree); *see also Zinsmeyer*, 222 Ariz. 612, ¶ 28, 218 P.3d at 1080 (plain language of statute controls unless context suggests contrary meaning).

¶9 Although Richard was rated one hundred percent disabled at the time Mary requested that his retirement benefits be divided, and notwithstanding that a veteran's disability benefits are not subject to division between spouses, Mary's entitlement to her share of the 1996 value of Richard's disposable retired pay was unaffected when the Department of Veteran's Affairs increased his disability rating to one hundred percent. *See* 10 U.S.C. § 1408(a)(4)(B), (c) (excluding disability benefits taken in lieu of retirement pay); *Mansell v. Mansell*, 490 U.S. 581, 588-89 (1989).

¶10 In *Danielson*, we concluded neither Congressional intent nor the Supremacy Clause of the federal constitution were circumvented or violated by the trial court's order requiring a disabled veteran to make "'payments-in-kind'" to "'make up'" for reduced payments to a former spouse as a result of the veteran's election to receive disability benefits in lieu of retirement pay. *Danielson*, 201 Ariz. 401, ¶¶ 20-24, 36 P.3d at 755-56; *see also Harris v. Harris*, 195 Ariz. 559, ¶¶ 8, 13, 991 P.2d 262, 264-65 (App.

1999) (concluding wife's entitlement to husband's retirement pay not reduced by husband's unilateral post-decree waiver of non-disability retirement to receive additional disability benefits); *In re Marriage of Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997) (concluding "Arizona law does not permit, and federal law does not require" wife's community interests in husband's retirement benefits be reduced by amount husband waived to receive civil service compensation).

¶11 Here, the trial court characterized 10 U.S.C. § 1408(c), which granted it the authority to allocate Richard's disposable retirement pay in accordance with Arizona law, as a "limit . . . apply[ing] at the time the Court exercises its authority." But Arizona law transmuted that portion of Richard's disposable retired pay accumulated during the time of the marriage from community property to a tenancy in common on February 26, 1996, the date of the decree of legal separation. § 25-318(D). Nothing in 10 U.S.C. § 1408 either expressly or implicitly limited the court's authority to allocate in 2009 Richard's 1996 disposable retirement benefits. *See* 10 U.S.C. § 1408(e) (limitations on 10 U.S.C. § 1408(c) unrelated to time that disposable retired pay is valued). To the contrary, as noted above, Arizona law—which 10 U.S.C. § 1408(c) directs the court to apply—vested Mary's rights to Richard's retirement benefits at the time the separation decree was entered on February 26, 1996. *See* § 25-318(D); *Zinsmeyer*, 222 Ariz. 612, ¶ 28, 218 P.3d at 1080; *Danielson*, 201 Ariz. 401, ¶¶ 23-24, 36 P.3d at 756.

¶12 Richard contends, however, that the trial court did not err because its award was in accordance with *Mansell*. There, the United States Supreme Court concluded the plain language of 10 U.S.C. § 1408(c) granted judges only the power to divide

"disposable retired pay," and not a veteran's total retired pay. 490 U.S. at 588-89. More specifically, the court held that because Congress had defined "disposable retired pay" to exclude disability payments received in lieu of retired pay, courts had no authority to allocate those disability payments between ex-spouses. *Id.*

¶13 Nothing in *Mansell* compels the trial court's conclusion that it could only allocate Richard's disposable retired pay based on its current value rather than its value in 1996. As *Danielson*, *Harris*, and *Gaddis* demonstrate, a spouse's rights in disposable retired pay vest at the time of the decree, and a veteran's unilateral post-decree waiver of retirement pay cannot change those rights. *See Danielson*, 201 Ariz. 401, ¶¶ 20-24, 36 P.3d at 755-56; *Harris*, 195 Ariz. 559, ¶¶ 8, 13, 991 P.2d at 264-65; *Gaddis*, 191 Ariz. at 469, 957 P.2d at 1012. To require a veteran to "make up" payments to account for reductions in a spouse's pay based on the veteran's unilateral post-decree waiver does not violate the plain language of 10 U.S.C. § 1408(c) or *Mansell*. *See Danielson*, 201 Ariz. 401, ¶¶ 19-33, 36 P.3d at 755-59. Accordingly, the court erred as a matter of law when it concluded 10 U.S.C. § 1408(c) limited its ability to allocate Richard's disposable retired pay.

¶14 Richard additionally argues that, because the trial court was precluded from allocating his disability pay, and because Mary did not ask the court to award her "a make up payment to compensate her for the difference between [Richard's] disposable retired pay as of October 31, 1995 and December 2, 2009," she has waived such a claim on appeal. *See Mansell*, 490 U.S. at 594-95 (federal law prohibits division of veterans' disability benefits upon divorce); *Maher v. Urman*, 211 Ariz. 543, ¶ 13, 124 P.3d 770,

775 (App. 2005) (arguments not raised in trial court waived on appeal). But Richard misconstrues the request for relief Mary made below. She did not assert the court should have divided his disability pay, only that her interest in his retirement pay vested in 1996 and that she is entitled to an allocation based on his retirement pay at that time instead of basing the allocation on his current retirement pay. Richard cites no authority, and we find none, suggesting Mary's claim was improper or incomplete, or that she needed to make a specific request for a "make up payment" rather than generally assert her vested interest in his retirement benefits as of a particular date.[2]

¶15 To the extent Richard argues we may affirm the trial court's ruling because Mary failed to "establish what [his] disposable retired pay was at" the time she filed the petition for dissolution in 1995, he is incorrect. Even assuming Mary presented insufficient evidence of his 1996 retired pay, that fact would not provide a basis to affirm the court's ruling. As we have explained, the court erred as a matter of law in calculating Mary's share of Richard's retirement benefit based on his retirement pay as of March 2009 instead of the date the decree of separation was filed. *See* § 25-318(D). Whether Mary has presented, or the record contains, sufficient evidence for the court to make that perfunctory calculation is not before us.

Disposition

¶16 For the reasons stated, we vacate the judgment awarding Mary 35.317% of Richard's March 2009 retirement pay and remand the case to the trial court for further

[2]We observe that it would have been helpful to the trial court had Mary expressly described this procedure. Her failure to do so, however, does not constitute waiver.

proceedings consistent with this decision. In our discretion, we deny the parties' requests for attorney fees on appeal.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge