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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Matter of:

KATHY CHILDERS, *Petitioner/Appellee*,

v.

THOMAS CHILDERS, *Respondent/Appellant*.

No. 1 CA-CV 14-0714 FC
FILED 8-4-2016

Appeal from the Superior Court in Coconino County
No. S0300DO201000248
The Honorable Elaine Fridlund-Horne, Judge

VACATED AND REMANDED

COUNSEL

Catherine Fine Attorney at Law, Flagstaff
By Catherine Fine
Counsel for Petitioner/Appellee

Gary E. Robbins PC, Flagstaff
By Gary E. Robbins
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Thomas Childers ("Husband") appeals the superior court's resolution of his post-decree petition to modify spousal maintenance. For reasons that follow, we vacate and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2010, Husband and Kathy Childers ("Wife") divorced after 26 years of marriage. The parties resolved their dissolution in a consent decree. The decree specified that Husband would pay Wife "spousal support" of $3,000 per month (reduced to $1,800 after five years) on the basis that Wife lacked sufficient property to meet her needs and that the marriage had been of long duration and Wife's age precluded self-support through employment. *See* Ariz. Rev. Stat. ("A.R.S.") § 25-319(A)(1), (4).[1] The decree further specified that the spousal maintenance award was non-modifiable and would terminate if Wife remarried:

> [Wife] is entitled to $3000.00 per month from [Husband's] Civil Service Retirement System benefits. The United States Office of Personnel Management is directed to pay [Wife's] share directly to [Wife]. The *non-modifiable* amount of $3000.00 per month to [Wife] will continue for five years from the date of divorce. After the five years, the amount will be changed to $1800.00 per month. This *non-modifiable* $1800.00 will continue each month until [Husband's] death or *the remarriage of [Wife]*.

(Emphasis added.) After discussing the terms with the parties, the superior court found the agreement to be "fair and reasonable under the circumstances" and entered the consent decree.

[1] Absent material revisions after the relevant date, we cite a statute's current version.

¶3 In 2011, Husband unsuccessfully petitioned to reduce spousal maintenance, asserting that the maintenance payments were in fact intended to provide for the parties' three children (two of whom were adults and one seventeen years of age at the time of dissolution). Husband argued that the spousal maintenance award should be reduced because the children required less financial support. The superior court denied Husband's petition, finding that (1) Wife "was given $1,800 per month from [Husband's] Retirement Pension" to be paid out "indefinitely"; (2) "$1,200 is considered as care for the children"; and (3) the consent decree "advises numerous times that the Support Order is non-modifiable." This minute entry order was never signed.

¶4 Three years later, Husband again petitioned to modify spousal maintenance, again arguing that the spousal maintenance award was intended to provide support for the parties' children and should be reduced because the children (the youngest of whom was then twenty-one) required less financial support. After Wife disclosed that she had remarried, Husband also argued that spousal maintenance should be terminated based on Wife's remarriage.

¶5 Following a hearing, the superior court granted Husband's petition in part by "reducing the $1,200.00 sum paid by Husband to Wife"—which the court had previously characterized as targeted to "care for the children"—to "$400.00 per month effective September 1, 2014." The court declined, however, to modify the $1,800 payment (the balance of Husband's "spousal support" obligation), reasoning that it reflected a property division and thus would be inequitable to terminate based on Wife's remarriage.

¶6 Husband timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(2).

DISCUSSION

¶7 Husband argues that, because the decree specified that maintenance would end on Wife's remarriage, the superior court erred by failing to terminate his spousal maintenance obligation in its entirety. We agree in part.

¶8 A decree is "an independent resolution by the court of the issues before it and rightfully is regarded in that context and not according to the negotiated intent of the parties." *In re Marriage of Zale*, 193 Ariz. 246, 249, ¶ 11 (1999). We review de novo the superior court's interpretation of

an existing dissolution decree. *See Cohen v. Frey*, 215 Ariz. 62, 66, ¶ 10 (App. 2007).

¶9 Arizona law permits divorcing parties to agree to non-modifiable spousal maintenance. A.R.S. § 25-319(C). Entry of a decree incorporating such an agreement "prevents the court from exercising jurisdiction to modify the decree . . . regarding maintenance." A.R.S. § 25-317(G). The Arizona Supreme Court strictly interprets these statutes:

> The legislature has expressly provided that parties may specifically agree to prospectively deprive courts of the ability to modify spousal maintenance provisions of a decree, even if substantial changes in circumstances occur. . . . These statutes [A.R.S. §§ 25-319(C), -317(G)] demonstrate a clear legislative directive that once a decree meeting the statutory requirements has been entered, courts lack jurisdiction to modify the decree regarding spousal maintenance.

In re Marriage of Waldren, 217 Ariz. 173, 175, ¶ 9 (2007).

¶10 Here, Husband and Wife entered into a consent decree containing a non-modifiable spousal maintenance provision with two stages: (1) a non-modifiable obligation of $3,000 per month for five years, with no provision for early termination based on death or remarriage, and (2) a non-modifiable obligation of $1,800 per month thereafter, terminating on Husband's death or Wife's remarriage. The parties acknowledged grounds for a spousal maintenance award under A.R.S. § 25-319(A), and in executing the consent decree, avowed that its terms were fair and equitable. Both Husband and Wife signed the decree, agreeing "to be bound by [its] terms and conditions." In approving and entering the consent decree, the superior court found that "the provisions of the Decree [were] fair and reasonable under the circumstances." *See* A.R.S. § 25-317(B); *see also Sharp v. Sharp*, 179 Ariz. 205, 210–11 (App. 1994) ("[I]t is the court's duty to ensure that any separation and property settlement agreement reached by the parties is fair and equitable."). The consent decree thus set forth a valid non-modifiable spousal maintenance provision.

¶11 The superior court's ruling modified the spousal maintenance provision in two ways: (1) characterizing one portion of the $3,000 obligation as effectively a proxy for child support and reducing this amount from $1,200 to $400 because the children required less financial support and (2) characterizing the other $1,800 as a property settlement that should not terminate upon Wife's remarriage. But the decree expressly characterized

the obligation as spousal maintenance (not child support or property settlement), and provided that the maintenance provision was non-modifiable. Accordingly, under §§ 25-319(C) and -317(G), the superior court lacked authority to modify the decree's non-modifiable spousal maintenance provision, and the court erred by doing so. *See Waldren*, 217 Ariz. at 175, ¶ 10. Instead, the parties were bound by the terms of the non-modifiable maintenance provision. Thus, Wife was entitled to $3,000 per month for five years despite her remarriage, because the first portion of the maintenance provision did not provide for early termination based on remarriage. After five years, however, Husband had no ongoing $1,800 obligation because the second portion of the maintenance provision expressly specified that the obligation would end on Wife's remarriage (which had already occurred).

¶12 Wife argues that Husband's current appeal is foreclosed because he failed to appeal from the superior court's 2011 ruling denying his first modification petition, in which the court first parsed the spousal maintenance award into "$1,800 per month from [Husband's] Retirement Pension" and "$1,200 [] considered as care for the children." But this minute entry ruling was never signed and thus, contrary to Wife's assertion, it was never appealable. *See* Ariz. R. Civ. P. 58(a); *Klebba v. Carpenter*, 213 Ariz. 91, 93, ¶ 7 (2006) (explaining that Rule 58(a) "requires that the decision be in writing, signed by the court, and entered before an appeal can be taken").

¶13 Finally, Wife argues that the superior court did not err by treating the $1,800 monthly payment as a property settlement and leaving this portion of Husband's obligation in place, based on the parties' understanding that the spousal maintenance provision "was always intended to represent a property division and care for the children." The superior court found that $1,800 of the monthly maintenance payment was in effect a means of dividing community property (Husband's retirement benefits earned during marriage, *see Miller v. Miller*, 140 Ariz. 520, 522 (App. 1984)), and some record evidence supports this characterization.

¶14 But the parties chose to characterize the $3,000 as non-modifiable spousal maintenance. Thus, Wife's argument is foreclosed by A.R.S. § 25-317(G). Moreover, even if $1,800 of the spousal maintenance award were construed to be a property settlement, Arizona law does not allow modification of a property division "unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." A.R.S. § 25-327(A). Here, the superior court's ruling modified the decree's directive that Husband pay Wife "each month until

. . . the remarriage of [Wife]" by instead mandating the payment ($1,800) continue "indefinitely." Neither party, however, established conditions justifying the reopening of their divorce decree. *See* A.R.S. § 25-327(A). Accordingly, even if a portion of the payments could be construed as a property settlement, the court lacked authority to modify that provision in the decree.

¶15 Accordingly, the superior court erred by modifying the decree's agreed-upon non-modifiable spousal maintenance provision. We therefore vacate the court's modification order and remand.[2] Under the terms of the decree, Wife was entitled to payments of $3,000 per month from the date of dissolution for five years; because Wife remarried before the non-modifiable $1,800 payments were to commence, she is not entitled to these ongoing payments. On remand, the superior court should calculate and refund any overpayment by Husband.

¶16 Husband requests an award of his attorney's fees on appeal. Husband did not provide a statutory basis for an award of fees, however, and we deny his request. *See* ARCAP 21(a)(2); *In re Marriage of Williams*, 219 Ariz. 546, 550, ¶ 16 (App. 2008). As the prevailing party, Husband is entitled to recover his taxable costs upon compliance with ARCAP 21.

CONCLUSION

¶17 For the foregoing reasons, we vacate the superior court's order and remand for further proceedings consistent with this decision.

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[2] Because we vacate the superior court's ruling based on the language of the decree itself, we need not address Husband's parol evidence arguments. *See Freeport McMoRan Corp. v. Langley Eden Farms, LLC*, 228 Ariz. 474, 478 ¶ 15 (App. 2011).