IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ELIZABETH ANNE BARR, *Petitioner/Appellant*,

v.

DENNIS EUGENE BARR, *Respondent/Appellee*.

No. 1 CA-CV 20-0701 FC
FILED 2-3-2022

Appeal from the Superior Court in Maricopa County
No. FN2018-004955
The Honorable Bradley H. Astrowsky, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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By Kristina L. Cervone
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MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge David D. Weinzweig and Judge Paul J. McMurdie joined.

S W A N N, Judge:

¶1 The appellant in this dissolution case challenges the superior court's characterization of her former spouse's severance-package benefits as his separate property. We hold that the court correctly classified the benefits as separate property because they were not acquired until after the community ended. We therefore affirm that characterization. We hold, however, that the record is insufficient to show whether the employee spouse forfeited community property when electing the severance package. We therefore vacate and remand in part.

FACTS AND PROCEDURAL HISTORY

¶2 Elizabeth Barr ("Wife") and Dennis Barr ("Husband") married in 1983.

¶3 Husband began working for The Kroger Company in 1997. Kroger offered Husband a voluntary retirement package in January 2017, but he declined. He was still working for Kroger in September 2018 when Wife served him with a petition for dissolution, and in July 2019 when the parties entered a Rule 69 agreement dividing all property, including Husband's retirement accounts with Kroger.

¶4 But in October 2019, before the parties filed any settlement documents with the court, Kroger reorganized and eliminated Husband's position. Kroger offered Husband, alternatively, an early retirement package or a severance package. He accepted the severance package. The severance package provided that Husband would receive severance pay, a lump sum payment equal to the cost of twelve months of COBRA coverage, pay for any accrued unused vacation, and any earned annual bonus. By accepting the severance package, Husband forfeited unvested stock options that in the Rule 69 agreement he had agreed to hold in trust and split equally with Wife when they vested.

¶5 Wife moved the court to characterize the severance-package benefits as community property, divide them equitably, and make her

whole for the loss of the unvested stock options. After holding an evidentiary hearing, the court concluded in a July 2020 order that Wife was neither entitled to share in the benefits nor entitled to a remedy based on the elimination of the unvested stock options.

¶6 The court dismissed Wife's motion to alter or amend the July 2020 order but invited her to file an amended motion, which she did. After full briefing, the court denied the amended motion. Wife filed a notice of appeal from that ruling. The superior court later made its order denying the original motion to alter or amend appealable, and approved a consent decree specifying that Wife did "not waiv[e] her right to appeal" concerning the severance-package dispute.

JURISDICTION

¶7 Husband contends that we lack jurisdiction to consider Wife's appeal. We evaluate our jurisdiction by examining the procedural history.

¶8 We start with the July 2020 order. In that order, the superior court made contrary statements concerning the applicability of ARFLP ("Rule") 78(c), which provides that "[a] judgment as to all claims, issues, and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 78(c)." First, the court stated that the order was "signed by the Court pursuant to Rule 78(C), but as this matter remains pending, it is not an appealable Order, and the appropriate remedy to address this Order further would be through Rules 83–85, ARFLP, or via a Special Action." But then, the court stated that the order was signed "as a formal order of this Court pursuant to Rule 78(c)" and that "[n]o further issues remain pending before this Court concerning this matter." Regardless of which of those inconsistent statements the court intended to adopt, the court's invocation of the rule was improper and ineffective. By its terms, Rule 78(c) had no bearing on whether the court could or could not sign its order. Further, by its terms, Rule 78(c) could not apply because no consent decree had yet been entered—so any purported certification under that rule was ineffective. *See* ARFLP 69(b) (providing that Rule 69 agreement is not binding on court until submitted and approved by court); *cf. Madrid v. Avalon Care Ctr.-Chandler, LLC*, 236 Ariz. 221, 223, ¶ 6 (App. 2014) (holding that a statement of finality under Ariz. R. Civ. P. 54(c) does not make a judgment appealable when claims remain pending).

¶9 Because the July 2020 order was not entered under Rule 78(c) (and did not cite Rule 78(b)), the court erroneously instructed Wife to seek

relief under Rule 83. By its plain language, "Rule 83 . . . is limited to a motion to alter or amend a Rule 78(b) or (c) judgment." *Yee v. Yee*, 251 Ariz. 71, 77, ¶ 19 (App. 2021). But though the court lacked authority to entertain a motion under Rule 83, it could consider motions for reconsideration. *See* Rule 35.1 (providing that parties may move for reconsideration of court orders); *Zimmerman v. Shakman*, 204 Ariz. 231, 236, ¶ 15 (App. 2003) (holding that law of the case doctrine does not prevent a court from reconsidering nonfinal rulings). Because Wife styled her motions for relief as Rule 83 motions at the court's express direction, we view them as motions for reconsideration.

¶10 The court did not initially sign its order denying Wife's first motion, so that order was not appealable when entered. *See* Rule 78(a), (g)(1) (providing that all appealable orders must be written and signed by an authorized judge or court commissioner). The court did, however, sign and certify under Rule 78(c) its order denying Wife's amended motion, which she submitted consistent with the court's express direction. But again, the Rule 78(c) certification was ineffective because a decree still had not been entered. *See supra* ¶ 8.

¶11 Wife's notice of appeal specified that she appealed from the order denying her amended motion. But because that order was not appealable, her notice of appeal was ineffective. Further, because her notice of appeal specified only the denial of the amended motion, the notice was not rendered effective when Wife later obtained—at this court's instruction—a signature and Rule 78(b) certification for the order denying her initial motion. *See Baker v. Emmerson*, 153 Ariz. 4, 8 (App. 1986) (holding that notice of appeal must specify judgment from which it is taken, that specification of wrong judgment is not technical error, and that appellate court may not read into the notice something that is not there). We further note that though the eventual consent decree stated that it was approved "[p]ursuant to ARFLP, Rule 78" and "[n]o further matters remain pending," it did not specifically cite subsection (c) as that rule requires.

¶12 Based on the foregoing, we find no basis for direct appellate jurisdiction. However, on this record, it is apparent that the jurisdictional deficiency was the product of the judiciary's express directions to Wife, which she diligently followed. We therefore exercise our discretion to treat Wife's appeal as a petition for special action, and accept special action jurisdiction. *See Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35 (App. 2001).

DISCUSSION

I. THE SUPERIOR COURT PROPERLY CHARACTERIZED THE SEVERANCE PACKAGE'S SEVERANCE-PAY AND COBRA-PAY BENEFITS AS HUSBAND'S SEPARATE PROPERTY.

¶13 On appeal, Wife challenges only two aspects of the severance package: the superior court's characterization of the severance pay and the COBRA pay. We review de novo the court's classification of property as community or separate. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4 (App. 2007).

¶14 Property acquired after the end of the marital community, which occurs upon service of a petition for dissolution that results in a decree of dissolution, is not community property. A.R.S. § 25-211(A)(2). By contrast, property acquired during the marriage is community property even if it is not received until after the community ends. *See, e.g.*, *Koelsch v. Koelsch*, 148 Ariz. 176, 181 (1986) ("[P]ension plans are a form of deferred compensation to employees for services rendered, and any portion of the plan earned during marriage is community property."). Accordingly, severance pay received after the end of the community is community property only if it constitutes deferred compensation for work performed during the marriage—it is not community property if it represents compensation for the loss of future, post-community earnings. *See* 41 C.J.S. Husband and Wife § 289; *Bowser v. Nguyen*, 249 Ariz. 454, 455, 457, ¶¶ 2, 12 (App. 2020).

¶15 Wife contends that Husband's severance benefits were community property under *Bowser v. Nguyen*. We find *Bowser* distinguishable. In *Bowser*, we held that a severance package negotiated and paid after the community ended was community property—but in that case, unlike here, the employment contract formed during the marriage guaranteed the severance package. 249 Ariz. at 455, ¶¶ 2–4. In other words, the employee spouse acquired the severance package during the marriage. Here, by contrast, nothing in the record indicates that Husband had any right to any of the benefits set forth in the severance package before Kroger offered it to him after the community ended.

¶16 Wife further relies on *Sebestyen v. Sebestyen*, 250 Ariz. 537 (App. 2021). We find *Sebestyen* distinguishable as well. In *Sebestyen*, we held that because the employee spouse's disability pension was calculated based solely on his years of service, the employer intended the pension to serve as deferred compensation such that the community had an interest.

250 Ariz. at 539, 541–42, ¶¶ 2, 16. Wife contends that Husband's severance pay was similarly calculated—she emphasizes that Kroger selected Husband for the severance package based partly on his "skill, ability, [and] record of past performance," and that the package established a tiered severance-pay system linked to years of service. She ignores that *Sebestyen* concerned a pension, not severance benefits. The fact that Kroger decided to offer Husband severance benefits based partly on the skills and experience he obtained during the community's existence did not change the fact that Kroger did not offer the benefits—and Husband therefore could not acquire them—until after the community ended. The record is insufficient to show that any of the severance benefits constituted deferred compensation.

¶17 Wife contends that even if the COBRA-pay benefit was not community property, the court should have equitably disgorged half of that benefit to her because it was calculated based on the cost of COBRA insurance coverage for both parties for one year. We disagree. The pay was not deferred compensation acquired during the marriage, and Husband fulfilled his obligation to maintain Wife's insurance coverage, *see* A.R.S. § 25-315(A)(1), until she notified him that she no longer needed his coverage because she had obtained coverage from her new employer.

II. THE CHARACTERIZATION OF UNVESTED STOCK OPTIONS DEPENDS ON THE PURPOSE OF THE OPTIONS, AND WIFE IS ENTITLED TO A HEARING ON THAT ISSUE.

¶18 Arizona law is settled that "unvested stock options are analogous to pension plans." *Brebaugh v. Deane*, 211 Ariz. 95, 98, ¶ 7 (App. 2005). To that end, the court must determine whether the unvested stock options that Husband forfeited when accepting the severance package were intended to compensate him for work performed during the marriage, or whether they were intended to incentivize future work. *Id.* at 98–99, ¶¶ 9–10, 15. In the former instance, the unvested options would be community property, *id.*, and Husband's waiver of the right to receive those options in favor of the severance package would amount to a post-petition disposition of community property, meaning Wife would have a right to receive a portion of the value of that transaction, *see* A.R.S. § 25-318.

¶19 We cannot determine on this record whether the unvested stock options were community property. We therefore vacate the portion of the superior court's ruling concerning the unvested stock options and remand for the court to determine the nature of the options.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING WIFE'S REQUEST FOR ATTORNEY'S FEES.

¶20 Wife contends that the superior court abused its discretion by denying her request for attorney's fees. Under A.R.S. § 25-324(A), the court may award attorney's fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." We review the denial of fees for abuse of discretion. *Graville v. Dodge*, 195 Ariz. 119, 131, ¶ 57 (App. 1999).

¶21 Here, finding that Husband had more financial resources than Wife, Wife took unreasonable positions in the severance-package dispute, and Husband acted unreasonably by failing to timely provide full discovery regarding the severance package, the superior court concluded "[i]n balance . . . that neither party is entitled to an award of attorney's fees." On this record, we perceive no abuse of discretion in the court's conclusion that Wife took unreasonable positions and was not entitled to fees. Wife conceded at trial that her position regarding the characterization of Husband's vacation-pay severance benefit was incorrect, and, as set forth above, the court correctly rejected her arguments that she was entitled to share in the severance- and COBRA-pay benefits.

CONCLUSION

¶22 We affirm in part, and vacate and remand in part, for the reasons set forth above. In our discretion, we deny both parties' requests for attorney's fees on appeal. Wife is entitled under A.R.S. § 12-342(A) to recover her costs upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA