

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

MARY JANE KNOX,
Petitioner/Appellant,

v.

STEPHEN EDGAR KNOX,
Respondent/Appellee.

No. 2 CA-CV 2008-0089
Filed November 12, 2014

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Not For Publication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); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. D20074273
The Honorable Deborah Ward, Judge

REVERSED

COUNSEL

Liberty & Bibbens, P.C., Tucson
By Pamela A. Liberty
Counsel for Petitioner/Appellant

West, Elsberry, Longenbaugh & Zickerman, PLLC, Tucson
By Anne Elsberry
Counsel for Respondent/Appellee

IN RE THE MARRIAGE OF KNOX
Decision of the Court

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Mary Knox appeals from the trial court's order granting Stephen Knox's motion to correct a Qualified Domestic Relations Order (QDRO) dividing Stephen's pension. Specifically, she contends that the amendment to the QDRO did not qualify as the correction of a clerical error and that Stephen was not entitled to relief for any other reason. We agree and vacate the amended QDRO.

Factual and Procedural Background

¶2 After marrying in 1975, Mary petitioned for dissolution in 2002. Stephen was working for the federal government and the decree granted Mary one-half of Stephen's Civil Service Retirement System (CSRS) benefits acquired during the marriage. When the decree was filed, Stephen was fifty-one years old. Because of his length of service, he was eligible to retire at fifty-five, in 2007. In late 2003, the court signed the decree as well as a QDRO dividing the CSRS benefits. Neither party appealed. In November 2007, Stephen filed in the superior court a motion to correct mistakes pursuant to Rule 85, Ariz. R. Fam. Law P.

¶3 The trial court granted Stephen's motion and ordered the parties to amend the QDRO. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).¹ See *Crye v. Edwards*, 178 Ariz. 327, 329, 873 P.2d 665, 667 (App. 1993).

¹Mary filed her notice of appeal after the trial court entered a signed order but before the court signed the lodged amended QDRO. She did not file an additional notice of appeal. We ordered supplemental briefing, which the parties timely filed. Although

IN RE THE MARRIAGE OF KNOX
Decision of the Court

Clerical Error

¶4 Mary first argues the trial court erred in amending the order as a clerical error under Rule 85(A), Ariz. R. Fam. Law P. Rule 85(A) is identical to Rule 60(a), Ariz. R. Civ. P., and, as provided by the Arizona Rules of Family Law Procedure, case law interpreting Rule 60, Ariz. R. Civ. P., is applicable. Ariz. R. Fam. Law P. 1 cmt., 85 cmt.; *Duckstein v. Wolf*, 230 Ariz. 227, ¶ 8, 282 P.3d 428, 432 (App. 2012). We review a court's ruling on such a motion for an abuse of discretion. See *Duckstein*, 230 Ariz. 227, ¶ 8, 282 P.3d at 432. A trial court abuses its discretion "when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999), quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶5 Rule 85(A), Ariz. R. Fam. Law P., provides that "[c]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party." A clerical error occurs when the judgment does not reflect the court's intent. See *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 142-43, 750 P.2d 898, 900-01 (App. 1987); 49 C.J.S. *Judgments* § 362 (2014) ("A clerical error does not involve the court's ability to reach the conclusion that it did, but a failure to preserve or correctly represent the court's actual decision on the record."). Rule 85(A) may not be used to correct judicial errors, including the failure to consider an issue. *Egan-Ryan Mech.*

Mary filed an objection to the lodged QDRO, it merely restated the substantive argument on which the court had ruled, noted a typographical error, and objected to language that was not new to the amendment. Aside from the typographical error, the amended QDRO was signed as ordered by the trial court in the minute entry. There was no substantive motion or issue pending at the time the premature notice of appeal was filed. We therefore have jurisdiction. *Baker v. Bradley*, 231 Ariz. 475, ¶¶ 19-20, 26, 296 P.3d 1011, 1017-18 (App. 2013). Additionally, the parties jointly requested briefing extensions to obtain current information from the federal government.

IN RE THE MARRIAGE OF KNOX
Decision of the Court

Co. v. Cardon Meadows Dev. Corp., 169 Ariz. 161, 166, 818 P.2d 146, 151 (App. 1990). In order to correct a clerical mistake, the trial court may look elsewhere in the record. *See Benson v. State*, 108 Ariz. 513, 515, 502 P.2d 1332, 1334 (1972).

¶6 The record, which is devoid of transcripts, contains few references to the retirement plan. We detail those references to determine whether the amended QDRO reflected the trial court's intent. In their pretrial statements, both parties suggested the pension would be equally divided. After trial, the court ordered the parties to submit memoranda regarding whether Stephen must begin paying Mary her portion of his pension if he failed to retire at fifty-five, when his benefits matured; both parties agreed Mary was eligible for payment at maturity even if Stephen had to pay out of his own funds. In its March 3, 2003 minute entry, the trial court concluded Mary was entitled to "one-half of the retirement benefits which have accrued to [Stephen] during the parties' marriage." The court also noted the parties agreed Mary would receive approximately \$1,700 per month starting when Stephen turned fifty-five.²

¶7 Mary lodged a draft decree, which required Stephen to begin paying Mary's share of the retirement benefits, approximately \$1,660 per month,³ when he turned fifty-five, whether or not he retired on that date.⁴ The lodged decree did not reference the dates of marriage or date of service of process. Stephen objected that the lodged decree "should specify that [Mary's] one-half of the asset is valued as of February 20, 2002, the date of service of process." The trial court heard arguments on that and other objections, concluding in its under-advisement ruling that "February 20, 2002" should be

²The trial court also ordered Stephen to maintain a "survivor's benefit" package to protect at least a portion of Mary's share of the retirement package in the event of Stephen's death.

³The record does not indicate why the number changed.

⁴The decree required Stephen to "elect and maintain the maximum survivor's benefit annuity available."

IN RE THE MARRIAGE OF KNOX
Decision of the Court

inserted “to identify the legal date for calculating asset value,” per stipulation of the parties. The decree was then filed in September 2003 as modified with the handwritten statement, “Assets valued as of Feb. 20, 2002. CRP.”

¶8 Mary then lodged a draft QDRO that made no reference to whether subsequent raises earned by Stephen would be included in calculating Mary’s portion of the retirement benefits. It stated, in relevant part:

[Mary] is entitled to a pro-rata share of employee’s gross monthly annuity under the [CSRS]. The marriage began on June 6, 1975 and the community property interest ended on February 20, 2002.

The QDRO was signed and filed in October 2003.

¶9 More than four years later, Stephen filed a “Motion to Correct Mistakes,” contending he had discovered an error in the QDRO as he was preparing to retire.⁵ He sought relief under either Rule 85(A) or Rule 85(C)(1)(f), Ariz. R. Fam. Law P. In his motion, he argued the QDRO “did not mention any asset valuation date,” and to reflect the valuation date of February 20, 2002, additional language would need to be inserted in the QDRO. He contended that due to federal regulations, the amended QDRO would need to read, in relevant part:

[Mary] is entitled to a pro-rata share of [Stephen’s] gross monthly annuity under the [CSRS] as of February 20, 2002. [The Office of Personnel Management] is specifically instructed not to apply any salary adjustments after this specified date in computing the former spouse’s share of the Respondent employee’s annuity. The

⁵Stephen filed the motion in Pima County after the original trial court in Graham County granted the parties’ stipulated request to change venue.

IN RE THE MARRIAGE OF KNOX
Decision of the Court

marriage began on June 7, 1975 and the
community property interest ended on
February 20, 2002.

Stephen contended that federal regulations governing CSRS benefits include consideration of the employee spouse's post-dissolution salary adjustments unless the court order states an exact dollar amount or provides a specific instruction that post-dissolution salary adjustments not be included in the calculation. Code Fed. Regs. 838.622(c)(1)(i)-(ii).

¶10 The trial court held oral argument on the motion, but no additional evidence was introduced, and neither party testified. Relying on the arguments of the parties and the existing court file, the court granted Stephen's motion, concluding the decree and hand-written notation "squarely define[d]" the interest in the QDRO as being valued during the marriage. It further ordered the QDRO amended "to reflect the intention of the parties at the time the decree was entered as well as comply with community property law." The ruling did not indicate whether relief was granted pursuant to Rule 85(A) or Rule 85(C)(1)(f). Stephen lodged the draft amended QDRO.⁶

¶11 To the extent the trial court intended to alter the QDRO on the basis of a clerical error, we find it abused its discretion. Even viewed in the light most favorable to upholding the trial court's

⁶We note that the amended QDRO included an additional change. The original QDRO stated that the cost of the survivor annuity "is to be borne equally by [Mary] and [Stephen]." The amended QDRO changed the paragraph to read, "[Mary] shall be solely responsible for the cost of the survivor benefit annuity related to [Stephen's] CSRS benefits." There was no mention of this change in the motion, and Mary did not object. Although we lack the transcript of the hearing, there is no indication in the record that this change was stipulated to or even mentioned to the trial court, as it is not referenced in the court's under advisement ruling ordering the amendments. In any event, we need not address it because we vacate the amended QDRO.

IN RE THE MARRIAGE OF KNOX
Decision of the Court

decision, the record lacks evidence supporting the court's conclusion. See *Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110. The decree and notation did not mention salary increases; indeed, there is no indication in the record that salary increases were considered until the motion to correct was filed. Based on the notation alone, it is equally likely the valuation date of February 20, 2002, was intended to set the date at which the community interest ended, for purposes of calculating to what fraction of Stephen's total years of service Mary was entitled. Additionally, the order states that it was intended to divide benefits governed by the federal regulations evaluated during trial. The omission of the specific language advocated by Stephen four years later indicates that the parties simply failed to raise the question before the trial court.⁷

¶12 The record does not support the trial court's conclusion that the notation was intended to cut off salary increases as of February 20, 2002. Rather, it supports a finding that the court either concluded salary increases applied or failed to make a decision. In contrast, Stephen's motion for correction asked the court to reach a new legal conclusion, which is not authorized by Rule 85(A). See *Minjares*, 223 Ariz. 54, ¶¶ 26-27, 219 P.3d at 270 (changing interest rate based on statute legal conclusion not properly corrected as clerical error); *Egan-Ryan Mech. Co.*, 169 Ariz. at 166, 818 P.2d at 151 (failure to reference two counts in judgment not clerical error).

Other Grounds for Relief

¶13 Stephen's "Motion to Correct Mistakes" alternatively argued he was entitled to relief under Rule 85(C)(1)(f), which allows

⁷Further, the decree projected an estimated benefit of "not less than" \$1,660 per month, and the only evidence in the record of how that total could have been calculated was a CSRS data sheet that did not cut off salary increases as of February 20, 2002. The data sheet calculated \$63,320 as the "high-3 average salary," even though Stephen had earned that salary for less than a year as of February 20, 2002, and his previous salary was lower. There is no indication in the record that the court had any other projections available for its calculation.

IN RE THE MARRIAGE OF KNOX
Decision of the Court

for relief from a final judgment or order for “any other reason justifying relief from the operation of the judgment.”⁸ Relief under this rule requires “extraordinary circumstances of hardship or injustice justifying relief” which was not available pursuant to Rule 85(C)(1)(a)-(e), Ariz. R. Fam. Law P. See *Hilgeman v. Amer. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 15, 994 P.2d 1030, 1035 (App. 2000); see also Ariz. R. Fam. Law P. 85(C)(1). Here, the missing language in the QDRO was either a mistake, or, as Stephen argues, due to Mary’s misrepresentation in lodging an inaccurate draft QDRO; therefore, Stephen could have sought relief under either Rule 85(C)(1)(a) or (c) had the motion been filed within six months of the QDRO. Because Stephen failed to timely pursue relief, he may only rely on Rule 85(C)(1)(f) if his case is one of “extreme hardship or injustice.” *Amanti Electric, Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, ¶ 6, 276 P.3d 499, 501 (App. 2012), quoting *Roll v. Janca*, 22 Ariz. App. 335, 337, 527 P.2d 294, 296 (1974). We must consider the totality of the facts and circumstances to determine whether relief is appropriate. *Id.* ¶ 7.

¶14 None of Stephen’s contentions could be construed as “extraordinary circumstances” justifying relief. For example, he does not argue that Mary received a windfall under the original QDRO. Mary notes in her opening brief that her payments under the original QDRO were slightly less than the \$1,660 per month estimated in the decree, and after a recalculation under the amended QDRO, are significantly less. Stephen does not contest these calculations.

¶15 Stephen also argues the original QDRO was “unjust” because it permitted Mary “to receive benefits that were clearly [Stephen’s] separate property,” citing *Koelsch v. Koelsch*, 148 Ariz. 176, 183, 713 P.2d 1234, 1241 (1986). *Koelsch*, however, was limited to cases in which pension benefits were matured at or soon after dissolution, 148 Ariz. at 182 n.6, 713 P.2d at 1240 n.6, and Stephen’s benefits did not mature until four years later. See *Boncoskey v.*

⁸ Rule 85(C)(1), Ariz. R. Fam. Law P., is equivalent to Rule 60(c), Ariz. R. Civ. P., therefore we may refer to case law interpreting Rule 60(c), Ariz. R. Civ. P. Ariz. R. Fam. Law P. 1 cmt.

IN RE THE MARRIAGE OF KNOX
Decision of the Court

Boncoskey, 216 Ariz. 448, ¶ 16, 167 P.3d 705, 708-09 (App. 2007) (when a party's pension rights have not yet matured, *Koelsch* is inapposite). Further, although *Koelsch* states that any salary increases earned by an employee who continues to work after his benefits mature are his own separate property, it also allows the non-employee spouse to share in salary increases before the pension matures. 148 Ariz. at 182, 184, 713 P.2d at 1240, 1242 (under "lump sum" approach, "community property portion of the retirement benefit would be calculated by multiplying the lump sum present value of the pension plan *at the date of maturity* by a fraction" representing length of marriage divided by length of employment). It was incumbent upon Stephen to raise the issue of future salary increases at the time of the dissolution. The absence of a per se rule prohibiting the use of future salary increases vitiates Stephen's reliance on Rule 85(C)(1)(f) relief.⁹

Disposition

¶16 For the foregoing reasons, we vacate the amended QDRO.

⁹Stephen also appears to argue the trial court had jurisdiction to alter the QDRO when he retired, because it used the "reserved jurisdiction method" in distributing retirement benefits. This was not raised below, and is therefore waived. *See Miller v. Hehlen*, 209 Ariz. 462, ¶ 21, 104 P.3d 193, 200 (App. 2005). And even were it not waived, the "reserved jurisdiction method" requires a court to determine the formula for division at the time of the decree and reserve jurisdiction only to award the appropriate percentage when the benefits are paid out. *See Johnson v. Johnson*, 131 Ariz. 38, 41, 638 P.2d 705, 708 (1981). Thus, the salary increases should have been part of the formula in the decree.