

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF:

SANDRA HOWELL,
Petitioner/Appellee,

and

JOHN HOWELL,
Respondent/Appellant.

No. 2 CA-CV 2014-0112
Filed December 18, 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NOT FOR PUBLICATION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. D78235
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Law Office of Barry Nelson, Cortaro
By Barry Nelson
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

HOWARD, Judge:

¶1 Appellant John Howell¹ appeals from the trial court's judgment in favor of his former wife, Sandra Howell, on her petition to enforce the decree of dissolution awarding her fifty percent of his military retirement benefits. John argues that the court erred under both state and federal law in awarding Sandra arrearages and ordering prospective payments from John to Sandra to reimburse her for any portion of the fifty percent she did not receive because John had waived a portion of his retirement benefits in favor of military disability pay. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 The facts necessary to deciding this appeal are not in dispute. In 1991, the trial court awarded Sandra fifty percent of John's military retirement benefits to be paid by direct pay order, and payments began in 1993. In 2005, John received a twenty-percent disability rating from the Department of Veterans Affairs ("VA") pursuant to Title 38 of the United States Code, and he waived a portion of his retirement benefits in favor of disability payments, which caused a dollar for dollar reduction in his retirement benefit payments. As a result, the direct payments to Sandra on her share of the retirement benefits also were reduced.

¹John originally filed a cross-appeal in response to Sandra's appeal. Sandra withdrew her appeal, and we now treat John as the appellant.

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¶3 In November 2013, Sandra filed a petition to enforce the military retirement provision in the decree.² In response, John filed a motion to dismiss the petition, alleging that A.R.S. § 25-318.01 prohibited Sandra from seeking indemnification for any reduction in retirement pay resulting from John’s receipt of disability benefits. The trial court denied the motion on the grounds that application of § 25-318.01 would retroactively change Sandra’s vested property rights. After an evidentiary hearing, the court awarded Sandra arrearages³ and ordered that John “ensur[e Sandra] receive her full 50% of the military retirement without regard for disability” going forward. We have jurisdiction over John’s appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Failure to File an Answering Brief

¶4 Sandra failed to file an answering brief in this case. “When an appellant raises debatable issues, the failure to file an answering brief generally constitutes a confession of reversible error in civil cases.” *State v. Greenlee Cnty. Justice Court, Precinct 2*, 157 Ariz. 270, 271, 756 P.2d 939, 940 (App. 1988). But that doctrine is discretionary, and we are reluctant to apply it when there was no error below. *See In re \$26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 20, 18 P.3d 85, 91 (App. 2000). Therefore, we review the merits of John’s appeal.

Applicability of A.R.S. § 25-318.01

¶5 John first argues the trial court erred by concluding that § 25-318.01 did not apply to this case. He contends the statute

²Sandra’s petition is entitled “Request to Enforce Support 50% Retirement Military.” We note, however, the decree awarded her fifty percent of the military retirement benefits “as her sole and separate property,” and not as part of her spousal maintenance award.

³Due to Sandra’s delay in seeking compensation for the reduction in benefits, the trial court applied the equitable doctrine of laches and awarded arrearages only from December 1, 2011, with no prejudgment interest.

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prohibits any post-decree award of other income or property to compensate for “postjudgment waiver or reduction in military retirement.” § 25-318.01. We review de novo the interpretation of statutes governing dissolution proceedings. *See Merrill v. Merrill*, 230 Ariz. 369, ¶ 7, 284 P.3d 880, 883 (App. 2012).

¶6 Before the enactment of § 25-318.01, 2010 Ariz. Sess. Laws, ch. 70, § 2, this court determined that veterans could not frustrate the decree of dissolution unilaterally by waiving retirement pay in favor of other benefits not subject to division as community property in dissolution proceedings by operation of federal law. *Danielson v. Evans*, 201 Ariz. 401, ¶¶ 19-24, 36 P.3d 749, 755-56 (App. 2001); *In re Marriage of Gaddis*, 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (App. 1997). Instead, we required the veterans in those cases to indemnify the former spouse for the loss to their share of the community property resulting from waiver. *Danielson*, 201 Ariz. 401, ¶¶ 19, 33, 36 P.3d at 755, 758–59; *Gaddis*, 191 Ariz. at 470, 957 P.2d at 1013.

¶7 In 2010, our legislature enacted § 25-318.01 and its counterpart A.R.S. § 25-530. 2010 Ariz. Sess. Laws, ch. 70, §§ 2, 3; *see also* 2014 Ariz. Sess. Laws, ch. 239, §§ 1, 2 (expanding statutes to encompass both Title 10 and Title 38 disability pay). Section 25-318.01 applies when the superior court “mak[es] a disposition of property pursuant to [A.R.S. §§ 25-318 or 25-327]” and prohibits the court from considering “any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of disability benefits” awarded under Title 38, chapter 11 of the United States Code or 10 U.S.C. § 1413a.

¶8 Section 25-318 governs the disposition of property “in a proceeding for dissolution of the marriage, or for legal separation.” Section 25-327 governs the modification or termination of “the provisions of any decree respecting maintenance or support,” and the modification or revocation of “the provisions as to property disposition . . . [under] conditions that justify the reopening of a judgment under the laws of this state.” Sections 25-318 and 25-327 do not concern proceedings for the enforcement of the terms of the decree of dissolution. Accordingly, § 25-318.01, by its plain language, does not apply to post-decree enforcement proceedings.

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See In re Marriage of Gibbs, 227 Ariz. 403, ¶ 10, 258 P.3d 221, 225 (App. 2011) (we interpret statutes according to their plain language).

¶9 The original property distribution in this case under § 25-318 occurred in 1991. Sandra did not attempt to modify the property distribution pursuant to § 25-327. Therefore, A.R.S. § 25-318.01 did not apply to the enforcement proceedings initiated by Sandra, and the trial court was not prohibited from considering the reduction in her share of the retirement pay occasioned by John's receipt of disability pay. Rather, the 1991 decree entitled her to a full fifty-percent of the military retirement, and John must indemnify her for any reduction she suffered due to his unilateral waiver in favor of disability pay. *See Danielson*, 201 Ariz. 401, ¶¶ 19-24, 33, 36 P.3d at 755-56, 758-59; *Gaddis*, 191 Ariz. at 469-70, 957 P.2d at 1012-13.

¶10 John points to language from our decision in *Merrill* to support his contention that § 25-381.01 prohibits the trial court from considering waiver or reduction due to disability pay in any post-decree proceedings. In *Merrill*, we stated that the application of § 25-318.01 to a "postjudgment waiver or reduction in military retirement" suggested the statute applied to "'postjudgment' proceedings" as well as "an original decree of dissolution." 230 Ariz. 369, ¶ 24, 284 P.3d at 886. But this statement is dictum. *Id.* ¶¶ 24-25; *see also Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App. 1996) ("Dictum is not binding precedent . . ."). And we made it with reference to the statute's application to proceedings under § 25-327, "which governs a court's power, *inter alia*, to modify a dissolution decree's distribution of community property." *Merrill*, 230 Ariz. 360, ¶ 24, 284 P.3d at 886. As noted above, the reference in § 25-318.01 to § 25-327 indicates its applicability to post-decree proceedings for the modification or revocation of property distribution, not for the enforcement of a decree's property settlement terms.

¶11 Because we conclude that § 25-318.01 does not apply to these enforcement proceedings, we need not address John's second argument that the trial court erred by ruling the application of § 25-318.01 would have changed Sandra's vested property rights retroactively.

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Federal Preemption

¶12 John further argues that 10 U.S.C. § 1408(a)(4)(B), (c), which allows the division of “disposable retired pay” as community property in dissolution proceedings, but which subtracts from “disposable retired pay” amounts waived in order to receive disability pay under Title 38, prohibited the trial court’s consideration of waived retirement pay. Yet he did not raise this argument below and therefore has waived review of the issue on appeal. See *Chopin v. Chopin*, 224 Ariz. 425, ¶ 22, 232 P.3d 99, 105 (App. 2010).

¶13 John claims in his opening brief that he raised this argument in his motion for reconsideration filed after the trial court ruled on the applicability of § 25-318.01. But to support this claim, he points only to one sentence in a block quote from our *Merrill* decision that states, “Federal law precludes division of [disability] benefits as community property.” 230 Ariz. 369, ¶ 8, 284 P.3d at 883, citing 10 U.S.C. § 1408(a)(4)(C). And the only argument John made in his motion for reconsideration was that the application of § 25-318.01 in this case would have been prospective rather than retroactive, and therefore constitutional.

¶14 John’s passing mention of the preemption issue in a block quote intended to support his argument on a different issue did not suffice to raise the issue to the court below. See *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238-39 (App. 2007) (trial court “must have had the opportunity to address the issue on its merits”). Moreover, even if he had raised it in his motion, we do not review issues raised for the first time in a motion for reconsideration, and we would nonetheless deem the issue waived. See *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 18, 235 P.3d 285, 290 (App. 2010).

Disposition

¶15 For the foregoing reasons, we affirm the trial court’s ruling.