

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
APR 19 2007
COURT OF APPEALS
DIVISION TWO

THOMAS F. WALLACE,)	
)	
Petitioner/Appellee,)	2 CA-CV 2006-0215
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DEROSE WALLACE, nka DEROSE)	Rule 28, Rules of Civil
QUIARAH YUHURU-OHANA,)	Appellate Procedure
)	
Respondent/Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20041261

Honorable David R. Ostapuk, Judge Pro Tempore

AFFIRMED

Marjorie H. Rowland	Tucson
	Attorney for Petitioner/Appellee
Law Office of Stellisa Scott, PLLC	
By Stellisa Scott	Tucson
	Attorney for Respondent/Appellant

E S P I N O S A, Judge.

¶1 Appellant DeRose Quiarah Yuhuru-Ohana, fka DeRose Wallace, appeals from the trial court's denial of her request to amend the decree of dissolution ending her marriage to appellee Thomas Wallace. Seeing no error in the trial court's ruling, we affirm.

Factual and Procedural Background

¶2 DeRose and Thomas were married in 1983 and divorced in October 2005. In September 2006, DeRose filed a petition to amend the decree, seeking to add a requirement that Thomas purchase a Survivors Benefit Plan annuity (SBP) to ensure DeRose would continue to receive her share of Thomas's military retirement benefits in the event he predeceased her. Thomas objected to the proposed amendment, contending DeRose's request for relief was untimely and pointing out DeRose had never asked for SBP coverage at any point during the dissolution proceedings. The trial court denied DeRose's petition, noting that her request for relief may have been untimely but addressing her contentions on their merits.

Discussion

¶3 DeRose contends the trial court erred by rejecting her claim that the SBP was community property that had been omitted from the decree and denying her request to amend the decree pursuant to A.R.S. § 25-318(B). Thomas responds on appeal as he did below "this [is] an entirely new issue which [DeRose] attempted to add nearly one year after the Decree was entered, having never been raised during the dissolution proceedings" and points out there is no authority to support amending a final decree to add the SBP. We review a trial court's denial of a request to amend a decree for an abuse of discretion, *see Waldren v. Waldren*, 212 Ariz. 337, ¶ 12, 131 P.3d 1067, 1069 (App. 2006), but we review the interpretation of statutes *de novo*, *Danielson v. Evans*, 201 Ariz. 401, ¶ 13, 36 P.3d 749, 754 (App. 2001).

¶4 As the trial court correctly noted, “[t]he S.B.P. benefit is purely a creature of Federal Law. Thus, any provisions regarding the allocation of such benefit are governed by Federal Statutes.” DeRose’s argument that the trial court “must order the member to elect the available SBP protection,” and thus amend the decree, is premised on her assertion that, because Thomas “elected to participate in the SBP” at retirement, her post-dissolution inclusion in the program is mandatory. However, the federal statutes do not support this assertion.

¶5 First, contrary to DeRose’s contention, Thomas did not “elect” to participate in the SBP when he retired. Participation in the SBP is automatic and mandatory when the service member is married at the time of retirement. 10 U.S.C. § 1448(a)(1)(A), (a)(2)(A). Non-coverage of the spouse, or coverage at less than the maximum benefit, requires the spouse’s written consent. § 1448(a)(3)(A). If the member’s marriage is dissolved or annulled after retirement, continued coverage for the former spouse requires either a voluntary, post-dissolution election by the member or a court order mandating such coverage.¹ §§ 1448(b)(3)(A)(iii) and 1450(f)(3)(B). Regardless of which method is used to provide continued SBP coverage to the former spouse, it must be requested within one year of the entry of the decree. § 1448(b)(3)(A)(iii). “Where a specific provision governs

¹Former spouses first became eligible for SBP coverage in 1982, although only through a voluntary election by the service member. Act of Sept. 8, 1982, Pub. L. No. 97-252, 96 Stat. 735 (codified at 10 U.S.C. § 1448(b)(2)). In 1986, the law was amended to permit former spouses to be covered pursuant to a court order, Act of Nov. 14, 1986, Pub. L. No. 99-661, 100 Stat. 3992 (codified at 10 U.S.C. § 1450(f)(4)), and has remained unchanged as to former spouses since 1986.

eligibility, the court must apply that provision.” *Flynn v. United States*, 46 Fed. Cl. 414, 418 (2000) (when member was divorced at retirement, subsequent remarriage to former spouse mandated compliance with the subsequent marriage provision in § 1448(a)(5) and not the former spouse provision in § 1448(b)(2) to obtain SBP coverage).

¶6 DeRose and her counsel conceded below that she “[erroneously] believed that the SBP was . . . established and need not be further addressed in the Decree” based on the fact that Thomas had retired after the dissolution petition was filed but before the decree was entered.² But the federal statutes governing the SBP program clearly treat current and former spouses differently, with the entry of the decree, not the filing of a petition, as the relevant event for making that distinction. § 1448(b)(3)(A)(iii). Under *Flynn*, to obtain SBP coverage, DeRose must comply with the requirements of 10 U.S.C. § 1448(b)(3)(A), which applies to former spouses of retired members; she cannot rely on her prior status as Thomas’s spouse at the time he retired. 46 Fed. Cl. at 418.

¶7 DeRose argues, however, the SBP is community property that was omitted from the decree and thus “subject to division pursuant to A.R.S. § 25-318(B).”³ Thomas responds the SBP is not community property and the trial court properly refused to apply

²This argument lacks merit based on A.R.S. § 25-211, (emphasis added) which states “[a]ll property acquired by either a husband or wife during the marriage is . . . community property . . . *except for property . . . [a]cquired after service of a petition for dissolution of marriage . . . if the petition results in a decree of dissolution of marriage.*”

³Section 25-318(B), A.R.S., reads: “The 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(B). “We view all the evidence and reasonable conclusions therefrom in the light most favorable to supporting the trial court’s decision regarding the nature of property as either community or separate.” *Hatcher v. Hatcher*, 188 Ariz. 154, 157, 933 P.2d 1222, 1225 (App. 1996). We review the interpretation of the statute *de novo*. *Danielson*, 201 Ariz. 401, ¶ 13, 36 P.3d at 754.

¶8 Community property is “[a]ll property acquired by either husband or wife during the marriage,” unless it is acquired “by gift, devise or descent” or “after service of a petition for dissolution of marriage . . . if the petition results in a decree of dissolution.” A.R.S. § 25-211. During the marriage, each spouse has “an equal, immediate, present, and vested interest in the community assets.” *Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986); *Hatch v. Hatch*, 113 Ariz. 130, 131, 547 P.2d 1044, 1045 (1976). At dissolution, community property is divided equitably pursuant to § 25-318, *see Martin v. Martin*, 156 Ariz. 452, 455-56, 752 P.2d 1038, 1041-42 (1988), and each spouse receives an “immediate, present, and vested separate property interest in the property awarded to him or her by the trial court.” *Koelsch*, 148 Ariz. at 181, 713 P.2d at 1239. A trial court has “great discretion in the apportionment of the community assets and obligations.” *Neal v. Neal*, 116 Ariz. 590, 594, 570 P.2d 758, 762 (1977). And, the “court is not required to divide the property evenly, only equitably.” *McClennen v. McClennen*, 11 Ariz. App. 395, 398, 464 P.2d 982, 985 (1970). Because DeRose never presented the SBP issue during the dissolution

proceedings, the trial court was not able to evaluate the effect of ordering the SBP and the costs to provide it against the overall division of property.⁴

¶9 In Arizona, retirement benefits are community property to the extent they were earned through community effort or purchased with community funds. *Parada v. Parada*, 196 Ariz. 428, ¶ 16, 999 P.2d 184, 188 (2000); *Van Loan v. Van Loan*, 116 Ariz. 272, 273, 569 P.2d 214, 215 (1977) (“[A]ny portion of the [retirement benefits] earned during marriage is property of the community.”). But the SBP for a former spouse is not earned simultaneously with the retirement benefits; instead it is paid for through deductions from the benefit payments made to the member following retirement. 10 U.S.C. § 1452.

¶10 But “[s]urvivors’ benefits are paid only after the community has been terminated” by the death of one spouse and “therefore, are not community property.” *Parada*, 196 Ariz. 428, ¶ 19, 999 P.2d at 188, quoting *Lack v. Lack*, 584 S.W.2d 896, 899 (Tex. Civ. App. 1979). In *Thurston v. Judges’ Retirement Plan*, 179 Ariz. 49, 50-51, 876 P.2d 545, 546-47 (1994), our supreme court noted that survivors’ benefits are only a contingency until the covered person dies and at that point, the benefits become property of the designated survivor. As Thomas is still alive, any potential benefit under the SBP is contingent and not yet the property of whomever he designates as his beneficiary. Also,

⁴Because it is undisputed DeRose never requested SBP coverage below, we do not address her argument that it was somehow awarded to her in the original temporary orders entered in 2004. In any event, those orders were superseded by the entry of the final decree, and thus, the decree governs the disposition of property. See A.R.S. § 25-315(F)(1), (4) (the effect of temporary orders is that they “[do] not prejudice the rights of parties . . . which are to be adjudicated at the subsequent hearings” and “[t]erminate[] when the final decree is entered”).

given the contingent nature of survivors' benefits, Thomas, as the covered person, could never hold the undivided one-half interest that would arise from the application of § 25-318(B).

¶11 Moreover, as Thomas notes, the right to designate a former spouse as the beneficiary is created at dissolution and remains exclusively with the member. 10 U.S.C. § 1448(b)(3)(A)(iii). As observed above, for DeRose to participate in the SBP after dissolution, the decree must have ordered her inclusion or Thomas must have voluntarily and expressly included her. Because this right to designate a beneficiary did not exist until after the community had been dissolved, it could not be community property.⁵ *McCready v. McCready*, 168 Ariz. 1, 4, 810 P.2d 624, 627 (App. 1991) (property acquired after dissolution is “never ‘marital property’ and thus [not] subject to any of the provisions of Title 25”). Accordingly, the trial court correctly concluded that “[t]he S.B.P. is not a community, joint or common property[] which by provisions of A.R.S. § 25-318(A) shall be . . . divided[] equitably between the parties.” *See Hatcher*, 188 Ariz. at 157, 933 P.2d at 1225.

¶12 DeRose cites a number of cases from other jurisdictions to support her argument that the SBP is community property. But in each of these cases, the trial court's determination of SBP coverage was being challenged on appeal. None hold that SBP coverage is community property or that a trial court must amend a final decree that was

⁵During the marriage, the federal statutes mandated coverage for DeRose and required her written consent to any reduction in her benefits. *See* 10 U.S.C. § 1148(a)(3)(A)(ii). The SBP program permits only one beneficiary and Thomas could not designate a beneficiary until the marriage was dissolved.

never challenged on appeal to add SBP coverage that was not considered during the dissolution proceedings. See *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. Ct. App. 1995) (“[W]e also do not view the Survivor Benefit Plan as a separate asset awarded to wife. Instead, we view it as an equitable mechanism selected by the trial court to preserve an existing asset, *i.e.*, wife’s interest in the military pension.”); *Haydu v. Haydu*, 591 So.2d 655, 657 (Fla. Dist. Ct. App. 1991) (award of SBP coverage a factor in determining equitable distribution of property; error to award if no evidence of value of military pension); *In re Marriage of Lipkin*, 566 N.E.2d 972, 976 (Ill. App. Ct. 1991) (finding husband’s cancellation of survivors’ benefit plan “was interference with a provision of the separate maintenance settlement agreement which, like the [husband’s] right to his pension benefits, was adopted by the dissolution judgment” and enforcing decree as entered); *Matthews v. Matthews*, 647 A.2d 812, 815-16, 818 (Md. 1994) (appeal of post-decree ruling stating trial court did not have authority to require provision of SBP for former spouse; holding state court did have authority and not addressing whether SBP was form of marital property); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (challenge to court’s order of survivors’ benefits or other “equal insurance” to be provided for wife); *Harris v. Harris*, 621 N.W.2d 491, 498 (Neb. 2001) (trial court did not abuse its discretion by ordering service member to pay for SBP in decree); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (trial court has discretion to order “security [for spouse’s interest in pension] by use of the [SBP]”); *Smith v. Smith*, 438 S.E.2d 582, 585 (W.Va. 1993) (spouse appealed denial of SBP in decree,

and appellate court held proper to require SBP coverage “in order to assure her continued support should [the service member] predecease her”).

¶13 The property divisions in a final decree of dissolution are not subject to modification unless conditions exist that would justify reopening the judgment. *LaPrade v. LaPrade*, 189 Ariz. 243, 246, 941 P.2d 1268, 1271 (1997); *In re Marriage of DeGryse*, 135 Ariz. 335, 337-38, 661 P.2d 185, 187-88 (1983). Here, DeRose has not shown that any extraordinary conditions exist to justify disturbing the decree. The Arizona cases DeRose cites to support her contention that the decree must be amended are inapposite because they involved the award of actual monetary retirement benefits, not a contingent benefit arising from participation in the retirement system. *See Carpenter v. Carpenter*, 150 Ariz. 62, 65, 722 P.2d 230, 233 (1986) (distinguishing state pension from military pension, awarding community property share of decedent’s death benefit under state pension as former spouse’s share of pension benefits omitted from decree); *Cooper v. Cooper*, 167 Ariz. 482, 487-88, 808 P.2d 1234, 1239-40 (App. 1990) (private pension benefits omitted from decree properly divided between spouses as community property); *Beltran v. Razo*, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (App. 1990) (modification of decree to award community property share of pension benefits not available to former spouse under federal law when decree entered). The monetary retirement benefits accrued through Thomas’s military service were divided in the decree, consistent with these cases.

¶14 Finally, DeRose complains about the trial court’s reference to *In re Estate of Lamparella*, 210 Ariz. 246, 109 P.3d 959 (App. 2005), in refuting her contention below that

“the catch-all personal property provisions of the decree awarded S.B.P. benefits to her as a former spouse.” But DeRose has not asserted on appeal that she was entitled to the SBP based on the catch-all provision. Therefore, we do not address the merits of this issue. *See* Ariz. R. Civ. App. P. 13(a)(5), 17B A.R.S., *Van Loan*, 116 Ariz. at 274, 569 P.2d at 216.

Disposition

¶15 The trial court’s denial of the request to amend the decree is affirmed. DeRose and Thomas have both requested attorney fees on appeal, although both have failed to cite any basis for awarding them. In our discretion we decline to award fees to either party.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge