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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-17-1083-KuFS
)
 JAMES L. OSBORN, JR.; CENTRAL) Bk. Nos. 2:14-bk-03079-BKM
 STATES NATURAL GAS, LLC;) 2:14-bk-03080-BKM
 CENTRAL STATES ENERGY, LLC,) 2:14-bk-03081-BKM
) (jointly administered)
 Debtors.)
) Adv. No. 2:16-ap-00061-BKM
)
 SHERYL OSBORN,)
)
 Appellant,)
)
 v.) M E M O R A N D U M *
)
 DAVID M. REAVES, Chapter 7)
 Trustee,)
)
 Appellee.)

Argued and Submitted on October 26, 2017
at Phoenix, Arizona

Filed - November 9, 2017

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Brenda K. Martin, Bankruptcy Judge, Presiding.

Appearances: Chris D. Barski of Barski Law argued for
appellant Sheryl Osborn; Alan R. Costello of
Costello Law Firm argued for appellee, David M.
Reaves, Chapter 7 trustee.

Before: KURTZ, FARIS, and SPRAKER, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Sheryl (Sheryl) and James L. Osborn, Jr. (James)
2 (collectively, the Osborns) entered into a premarital agreement
3 (PMA) in Kansas whereby the parties agreed to hold their
4 existing and future acquired property as separate property. The
5 Osborns agreed that the PMA would be governed by Kansas law.

6 The Osborns moved to the community property state of Texas
7 and executed a waiver of community property laws (Waiver),
8 restating their intent to keep their property separate.

9 The Osborns then moved to the community property state of
10 Arizona where James filed a chapter 11¹ bankruptcy petition
11 which was converted to chapter 7. Sheryl moved for declaratory
12 relief relating to property which she asserted was her sole and
13 separate property and not subject to James' creditors. The
14 chapter 7 trustee, David M. Reaves (Trustee), argued that the
15 PMA and Waiver were not valid as to James' creditors because the
16 Osborns failed to record them as required under Ariz. Rev. Stat.
17 (A.R.S.) § 33-413. The bankruptcy court agreed with Trustee.
18 Sheryl moved for reconsideration, which the bankruptcy court
19 denied. This appeal followed.

20 We are called upon to interpret A.R.S. § 33-413 which
21 requires the recordation of agreements made in consideration of
22 marriage in order to be valid against creditors without actual
23 notice. No Arizona court has interpreted the statute, much less
24 cited it. As an issue of first impression, we predict that the

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 Arizona Supreme Court would interpret A.R.S. § 33-413 as the
2 bankruptcy court did. Accordingly, we AFFIRM.

3 **I. FACTS**

4 James filed an individual chapter 11 petition on March 9,
5 2014. Sheryl, allegedly a member of Central States Natural Gas,
6 LLC (CSNG), signed and filed CSNG's chapter 11 petition on the
7 same date. James, as a member of Central States Energy, LLC
8 (CSE), signed and filed CSE's chapter 11 petition at the same
9 time. The bankruptcy court later entered an order authorizing
10 joint administration of the three cases. Still later, the cases
11 were converted to chapter 7, and Mr. Reaves was appointed the
12 chapter 7 trustee for the estates.²

13 **A. Declaratory Relief: Ownership Of CSNG**

14 Sheryl filed a motion to obtain a declaratory ruling that
15 she was the 100% owner of CSNG, and thus her interest was not
16 property of James' bankruptcy estate. Sheryl asserted her
17 ownership based on an operating agreement which showed her as
18 the sole member.

19 She also relied upon the 1990 PMA whereby the Osborns
20 agreed to keep all property separate. The PMA provided that
21 "separate property" shall include not only all real and personal
22 property owned at the time of their marriage, but also "all
23 other property, assets, or estate which may be purchased,
24 acquired or received in any manner by each of the parties after
25 their marriage, which includes but is not limited to any shares

26
27 ² In CSNG's case, Mr. Reaves was disqualified and replaced
28 by trustee Lothar Goernitz. CSNG's administratively insolvent
case was closed in August 2017.

1 of stock, partnership interest or similar property from any
2 business or company formed by such party or with any other
3 person." The PMA further stated that the parties intended to
4 make their residence after marriage in the state of Kansas, and
5 thus the agreement "shall be governed by the laws of Kansas."
6 The schedule attached to the PMA listed various assets and
7 liabilities of James and showed his net worth as \$26 million
8 while Sheryl's was \$75,000.

9 In support of her motion, Sheryl also relied upon the
10 Waiver which was executed by Sheryl and James in 1995 after they
11 moved to Texas. There, the parties agreed that any assets
12 titled in their individual names were to remain the separate
13 property of each of them and that they did "not desire to have
14 any of their assets treated as community property." The Waiver
15 stated that the parties each had formed individual trusts and
16 that the assets titled in the name of each of the trusts as well
17 as any assets that were titled in each of their individual names
18 were to remain the separate property of each them, except as may
19 otherwise be provided under the terms of the PMA.

20 Based on the operating agreement, PMA, and Waiver, Sheryl
21 sought a declaration that her 100% ownership interest in CSNG
22 was not property of James' bankruptcy estate.

23 In response, Trustee provided evidence of a different
24 operating agreement which showed James as the sole member of
25 CSNG. Other evidence showing that James was the owner and sole
26 member of CSNG included:

27 • tax returns showing that James was the proprietor of CSNG
28 in 2008, 2009, 2010, and 2011. It was not until 2013 where the

1 tax return showed Sheryl was the proprietor of CSNG.

2 • CSNG applied to the Kansas Secretary of State to do
3 business in Kansas in March 2008. The application showed James
4 as the manager or member, and James signed the application as
5 manager or member. Copies of the 2008, 2010, and 2011 annual
6 reports filed with the Kansas Secretary of State by CSNG showed
7 that the James L. Osborn, Jr. Revocable Trust was the owner of
8 CSNG. These annual reports were signed by James under penalty
9 of perjury.

10 Trustee alleged that the operating agreement submitted by
11 Sheryl was a duplicate copy of James' operating agreement with
12 two simple changes: the name of the sole member in paragraph 5
13 and the signature block. According to Trustee, the preparation
14 and execution of duplicate and essentially identical operating
15 agreements, one for James and one for Sheryl, was "significant
16 and substantial evidence of their fraudulent intent and
17 conspiracy to avoid and defraud creditors." Based on his
18 evidence, Trustee contended that Sheryl's motion should be
19 denied.

20 The bankruptcy court later deemed the contested matter
21 requesting declaratory relief to be an adversary proceeding.³
22 Trustee filed an answer and counterclaim alleging that James'
23 transfer of his ownership interest in CSNG to Sheryl was made
24 with the actual intent to hinder, delay, or defraud creditors.

26 ³ Pacific Western Bank (PWB) filed a motion to intervene in
27 the adversary proceeding which the bankruptcy court granted.
28 James listed PWB as an unsecured creditor holding a civil
judgment against him in the amount of \$2.5 million.

1 Trustee sought avoidance of the transfer under §§ 544 and 548
2 and recovery of the asset for the benefit of the estate under
3 § 550.

4 The matter proceeded to trial in August 2016. At a
5 separate hearing, the bankruptcy court ruled that James was the
6 owner of CSNG and not Sheryl. The court next considered
7 allowing the parties an opportunity to brief the issue whether
8 the PMA and Waiver were valid against James' creditors under
9 A.R.S. § 33-413. Sheryl asserted that the issue was irrelevant
10 due to the bankruptcy court's ruling regarding the ownership of
11 CSNG. Trustee argued that the issue was relevant since the
12 Osborns contended that Sheryl owned substantial jewelry,
13 automobiles, and other business entities as her sole and
14 separate property. The bankruptcy court authorized further
15 briefing by the parties.

16 The court later entered a final judgment denying Sheryl's
17 request for declaratory relief and finding that James was, and
18 always had been, the sole member of CSNG.

19 **B. Applicability Of A.R.S. § 33-413 To The PMA And Waiver**

20 The parties filed simultaneous opening and responsive
21 briefs on the applicability of A.R.S. § 33-413 to the PMA and
22 Waiver. A.R.S. § 33-413 provides:

23 No covenant or agreement made in consideration of
24 marriage shall be valid against a purchaser for
25 valuable consideration, or a creditor not having
26 notice thereof, unless the covenant or agreement is
27 duly acknowledged and recorded in the manner and form
28 required for deeds and other conveyances.

27 Relying on this statute, Trustee asserted that the Osborns'
28 failure to record the PMA and Waiver made them invalid as to

1 James' creditors. In turn, Sheryl argued that under the plain
2 language of A.R.S. § 33-413: (1) the PMA and Waiver were not
3 "agreements made in consideration of marriage" and (2) the
4 statute applied to secured creditors and real property and not
5 to general unsecured creditors or personal property.

6 In support of her first contention, Sheryl noted that other
7 Arizona statutes referred to a premarital agreement as a
8 "premarital agreement" or "marital agreement" and not as an
9 "agreement made in consideration of marriage." A.R.S. § 25-201
10 defines a "premarital agreement" as "an agreement between
11 prospective spouses that is made in contemplation of marriage
12 and that is effective on marriage." A.R.S. § 25-202 provides:

13 A marital agreement must be in writing and signed by
14 both parties. The agreement is enforceable without
15 consideration. . . . The agreement becomes effective
16 on marriage of the parties.

17 Sheryl argued that the "without consideration" language in
18 A.R.S. § 25-202 was important since family practitioners know
19 that marriage is never consideration for a premarital agreement.
20 She further asserted that the Waiver was a postnuptial agreement
21 which could not be "in consideration of marriage" given that it
22 was entered into after the marriage.⁴

23 ⁴ A.R.S. §§ 25-201 and 25-202 are part of Arizona's Uniform
24 Premarital Agreement Act (PMAA) which became effective
25 September 21, 1991. Prior to the enactment of the PMAA, there
26 was no statute in Arizona that defined a "premarital agreement"
27 or "property" in relation to a premarital agreement. See A.R.S.
28 § 25-201 (definitions). The PMAA was enacted in Kansas at the
time the Osborns entered into the PMA. Arizona enacted the PMAA
after the Osborns entered into the PMA, but before their
execution of the Waiver in Texas.

1 In support of her second argument, Sheryl maintained that
2 Title 33 of A.R.S. deals with real property rights and
3 interests, including landmarks and surveys, landlord and tenant,
4 conveyances and deeds, mortgages, deeds of trust, liens,
5 homesteads, condominiums, mobile home parks, timeshares, and
6 homeowners associations. Sheryl argued that A.R.S. § 33-413
7 could not be read in isolation and that overall, the statutory
8 scheme shows that the statute applies to agreements in
9 consideration of marriage that affect real property interests.

10 Sheryl further maintained that unrecorded premarital
11 agreements are binding on unsecured creditors under Arizona case
12 law, citing Schlaefler v. Financial Management Service, Inc.,
13 996 P.2d 745 (Ariz. Ct. App. 2000), and Elia v. Pifer, 977 P.2d
14 796 (Ariz. Ct. App. 1998).⁵

15 In addition, Sheryl pointed to statutes from Texas and
16 California to support her position that A.R.S. § 33-413 applied
17 only to agreements affecting real property. The Texas Uniform
18 Premarital Agreement Act provides:

19 An agreement made under this subchapter is
20 constructive notice to a good faith purchaser for
21 value or a creditor without actual notice only if the
22 instrument is acknowledged and recorded in the county
23 **in which the real property is located.**

24 Tex. Family Code § 4.106(b) (emphasis added).

25 California Family Code § 1502, entitled "Recording of
26 _____
27

28 ⁵ These cases cannot be binding precedent on a point of law,
i.e., that A.R.S. § 33-413 does not apply to unsecured creditors,
when the statute is neither mentioned nor discussed. See
Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th
Cir. 1985) ("[U]nstated assumptions on non-litigated issues are
not precedential holdings binding future decisions.").

1 Agreements," provides:

2 (a) A premarital agreement or other marital property
3 agreement that is executed and acknowledged or proven
4 in the manner that a grant of real property is
5 required to be executed and acknowledged or proved may
6 be recorded in the office of the recorder of each
7 county **in which real property affected by this**
8 **agreement is situated.**

9 Emphasis added.

10 According to Sheryl, A.R.S. § 33-413, unlike Texas or
11 California, does not specify in which county the "agreement in
12 consideration of marriage" must be recorded. Sheryl maintains
13 that if A.R.S. § 33-413 is read literally, without statutory
14 context or common sense, you could seemingly have your pick of
15 which of Arizona's fifteen counties to record in, especially as
16 it pertains to personal property.

17 In sum, Sheryl asserted that all property acquired during
18 her marriage to James was the sole and separate property of each
19 spouse. Therefore, James' creditors had only a claim to his
20 sole and separate assets.

21 Finally, Sheryl asserted that factual and legal issues
22 remained. She contended that she was not permitted to conduct
23 any discovery on whether creditors had actual notice of the PMA
24 and Waiver. She further argued that she did not brief choice of
25 law issues and contended that both the PMA and Waiver were
26 governed by Kansas law, not Arizona law. Without elaborating,
27 Sheryl maintained that the location of the personal property may
28 also be relevant to determining the choice of law or whether
community property laws even apply.

Trustee responded that A.R.S. § 33-413 clearly requires
marital agreements to be recorded, and the plain language of the

1 statute shows that the recording is not limited to agreements in
2 consideration of marriage that transfer real property. Trustee
3 also cited the Arizona Legal Forms, Domestic Relations § 13:17,
4 which addresses A.R.S. § 33-413:

5 One area that is often overlooked is having the
6 agreement, or a summary thereof, recorded. As many
7 individuals are reluctant to record their entire
8 agreement, a notice can be recorded. In situations
9 where the parties are not responsible for the other's
debts, it is imperative that such matter be recorded
in order to place creditors and other third parties on
notice.

10 Catherine A. Creighton and Therese R. McElwee, 4A Ariz. Legal
11 Forms, Domestic Rel. § 13:17 (3d ed. 2016).

12 Trustee further argued that the Texas and California
13 statutes cited by Sheryl expressly refer to real property while
14 the plain and unambiguous language of A.R.S. § 33-413 makes no
15 reference to real property or in any way limits its
16 applicability to real property. According to Trustee, the
17 language in A.R.S. § 33-413 does not place any limitation on who
18 can be a "creditor," secured or otherwise.

19 Finally, Trustee maintained that the statute is not limited
20 to real property by virtue of being included in Title 33,
21 because other statutes within Title 33 apply to more than real
22 property. See A.R.S. § 33-412(A) (requiring the recording of
23 deeds of settlement upon marriage, whether of land, money or
24 other personal property, which must be recorded or are otherwise
25 void as to creditors and subsequent purchasers for valuable
26 consideration without notice). Moreover, Title 33 addresses
27 both real and personal property, including personal property
28 exemptions (A.R.S. § 33-1121 et seq.), and personal property

1 liens (A.R.S. § 33-1021 et seq.) among others. In light of the
2 overall statutory scheme, Trustee argued there was no reason for
3 the bankruptcy court to read an unstated limitation into A.R.S.
4 § 33-413.

5 In her responsive brief, Sheryl argued that the resolution
6 of the enforceability of the PMA and Waiver would not resolve
7 all issues relating to her property. Sheryl asserted that the
8 bankruptcy court should import no binding effect to any ruling
9 on the PMA and Waiver on other property as those consequences
10 were not before the court factually. Sheryl pointed out that
11 there were no factual findings whether any creditor of the
12 estate had, or did not have, actual notice of the PMA and
13 Waiver.

14 On January 25, 2017, the bankruptcy court issued its ruling
15 in favor of Trustee. The court found A.R.S. § 33-413
16 unambiguous, noting that its plain language did not limit its
17 application to a lien creditor, and therefore it applied to all
18 creditors. The court further found that the PMA and Waiver were
19 agreements made in consideration of marriage and thus within the
20 scope of the statute. Although Trustee was instructed to
21 prepare and upload an order reflecting this ruling, he did not
22 do so until May 22, 2017.

23 **C. The Motion For Reconsideration**

24 On February 22, 2017, Sheryl filed a motion for
25 reconsideration under Civil Rule 59(e). The basis for the
26 motion was that "further research" showed that the terms
27
28

1 "marriage settlements" and "marriage contracts"⁶ emanated from
2 common law England whereby an unmarried woman essentially
3 forfeited all of her property to her husband upon marriage.
4 These marriage settlements or marriage contracts were creations
5 of the common law that were almost universally upheld by the
6 Courts of Chancery in England to preserve a woman's property for
7 her own benefit. Sheryl maintained that these antiquated
8 "marriage settlements" were in no way comparable or analogous to
9 a modern-day divorce decree. Likewise, these dated "marriage
10 contracts" were not analogous to a premarital agreement or
11 postnuptial agreement as the court so ruled.

12 Trustee responded that the motion was untimely because
13 under Rule 9023, a Civil Rule 59(e) motion must be filed no
14 later than fourteen days after entry of judgment. Since Sheryl
15 filed the motion for reconsideration twenty-eight days after the
16 court's ruling, it must be denied. Trustee maintained that
17 Civil Rule 59(e) could not be used by a losing party who failed
18 to raise available arguments in the first place.

19 On March 2, 2017, the bankruptcy court denied the motion as
20 untimely. Sheryl filed a timely appeal from this ruling.

21 Subsequently, the Panel ordered Sheryl to show that a
22 separate order had been entered or file a response as to why the
23 January 25, 2017 ruling was sufficiently final to support the
24 Panel's jurisdiction. On May 22, 2017, the bankruptcy court
25

26 ⁶ The term "deeds of settlement upon marriage" is contained
27 in A.R.S. § 33-412, entitled "Invalidity of unrecorded
28 instruments as to bona fide purchaser or creditor." The term
"marriage contract" is found in the title of A.R.S. § 33-413.

1 entered an order regarding its ruling on the PMA and Waiver.
2 Accordingly, the Panel found that all issues in the adversary
3 proceeding were finally resolved.

4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction over this proceeding
6 under 28 U.S.C. §§ 1334 and 157(b) (2) (A). We have jurisdiction
7 under 28 U.S.C. § 158.

8 **III. ISSUES**

9 Did the bankruptcy court err in finding that the PMA and
10 Waiver were "agreements made in consideration of marriage" and
11 thus within the scope of A.R.S. § 33-413?

12 Did the bankruptcy court err in finding that A.R.S.
13 § 33-413 was not limited to marital agreements affecting real
14 property?

15 Did the bankruptcy court err in denying the motion for
16 reconsideration?

17 **IV. STANDARDS OF REVIEW**

18 We review a bankruptcy court's legal conclusions, including
19 its interpretation of state law, de novo. Roberts v. Erhard
20 (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005), aff'd,
21 241 F. App'x. 420 (9th Cir. 2007).

22 Denial of a motion to amend or alter judgment under Civil
23 Rule 59(e) is reviewed for an abuse of discretion. Dixon v.
24 Wallowa Cty., 336 F.3d 1013, 1022 (9th Cir. 2003). To determine
25 whether the bankruptcy court abused its discretion, we conduct a
26 two-step inquiry: (1) we review de novo whether the bankruptcy
27 court "identified the correct legal rule to apply to the relief
28 requested" and (2) if it did, whether the bankruptcy court's

1 application of the legal standard was illogical, implausible or
2 "without support in inferences that may be drawn from the facts
3 in the record." United States v. Hinkson, 585 F.3d 1247,
4 1261-62 (9th Cir. 2009) (en banc).

5 **V. DISCUSSION**

6 Under § 541(a)(2), the debtor's estate includes all of the
7 debtor's and the non-filing spouse's interests in community
8 property. Given this interest, creditors are entitled to a full
9 accounting of a debtor's assets, which may be affected by the
10 presence or absence of valid agreements that purport to
11 determine whether property is community or separate property.
12 If the PMA and Waiver are not valid as to James' creditors who
13 have neither actual nor constructive notice of the agreements,
14 Sheryl's separate property may⁷ be deemed community property,
15 and it would become part of James' bankruptcy estate under
16 § 541(a)(2).

17 **A. Interpretation Of A.R.S. § 33-413**

18 Whether the PMA and Waiver are valid against James'
19 creditors depends upon whether those agreements fall within the
20 ambit of A.R.S. § 33-413. The statute, entitled "Invalidity of
21 unrecorded marriage contract as to bona fide purchaser or
22 creditor," provides:

23 No covenant or agreement made in consideration of
24 marriage shall be valid against a purchaser for
25 valuable consideration, or a creditor not having
notice thereof, unless the covenant or agreement is

26 ⁷ Although the PMA and Waiver are void as to James'
27 creditors, we do not decide in this appeal whether other law or
28 rules are relevant to the separate/community property
determination.

1 duly acknowledged and recorded in the manner and form
2 required for deeds and other conveyances.

3 When we interpret state law, we are bound by the decisions
4 of the applicable state's highest court. Kekauoha-Alisa v.
5 Ameriqurest Mortg. Co. (In re Kekauoha-Alisa), 674 F.3d 1083,
6 1087 (9th Cir. 2012). And when, as here, the state's highest
7 court has not interpreted the dispositive state law, we do our
8 best to predict how that state's highest court would decide the
9 issue. Id. at 1087-88. The court may use "decisions from other
10 jurisdictions, statutes, treatises, and restatements as
11 guidance." Assurance Co. of Am. v. Wall & Assocs. LLC of
12 Olympia, 379 F.3d 557, 560 (9th Cir. 2004).

13 In interpreting Arizona statutes, the Arizona Supreme Court
14 has stated that its duty is to determine the intent of the
15 legislature at the time of enactment. Jackson v. Phoenixflight
16 Prods., Inc., 700 P.2d 1342, 1345 (Ariz. 1985). "Where the
17 language of the Legislature is clear and leaves no opportunity
18 for interpretation, the language must be followed." Id. And
19 "clear language in a statute is given its usual meaning unless
20 impossible or absurd consequences would result." Ruben M. v.
21 Ariz. Dep't of Econ. Sec., 282 P.3d 437, 441 (Ariz Ct. App.
22 2012); Marriage of Gray, 695 P.2d 1127, 1129 (Ariz. 1985).

23 **1. Common Law "Marriage Contracts"**

24 Sheryl asserts that the term "marriage contract" as used in
25 the title of A.R.S. § 33-413 is an "antiquated legal
26 arrangement" to avoid outdated concepts preventing married women
27 from owning property and thus has no applicability to modern
28 premarital and postnuptial agreements.

1 By the rules of the common law the husband, upon the
2 marriage, becomes the absolute owner of the wife's
3 personal property in possession. This transfer of her
4 property by the marriage may be provided against by
5 contract. The Virginia act, and all similar acts, are
6 passed to notify all persons that the property did not
7 vest in the husband by the marriage, but was reserved
8 to the separate use of the wife.

9 Morgan v. Elam, 12 Tenn. 375, 379 (Tenn. 1833). The "marriage
10 contract" had the effect and intent of preventing the wife's
11 property from vesting in the husband by virtue of the marriage.
12 Id. at 383-84.

13 Using a trust, a woman was able to stay in possession and
14 control of her property during marriage in contravention of the
15 common law's rules regarding a married woman's property. "A
16 marriage settlement, then, is a conveyance of property upon
17 defined trusts, as a marriage contract is an agreement that it
18 shall be made, enforceable in a court of equity, and its effect
19 to give a different direction to property from that which would
20 result from a marriage without any settlement, or contract for
21 settlement, and looks most usually to the interest of the wife
22 and the issue of the marriage union." Sullivan v. Powers,
23 6 S.E. 395, 396 (N.C. 1888).

24 Statutes were enacted to require the registration of
25 marriage contracts and settlements to prevent fraud on the
26 husband's creditors. See Saunders v. Gerrill, 23 N.C. 97 (N.C.
27 1840) (registered and written marriage settlements and marriage
28 contracts were the only evidence against husband's creditors
that "any estate has been secured to the wife.').

Although this history is interesting, it is of little
assistance in our statutory interpretation when the Arizona

1 Supreme Court instructs us to follow the plain language of the
2 statute. Sheryl also places too much emphasis on the words
3 "marriage contract," which is in the title of A.R.S. § 33-413.
4 "While words in the title of a statute or the heading of a
5 section can shed light on the meaning of an ambiguous word or
6 phrase in the text of a statute, they cannot create an ambiguity
7 where none otherwise would exist." Nat. Res. Def. Council v.
8 U.S.E.P.A., 915 F.2d 1314, 1321 (9th Cir. 1990). "Since the
9 text is not ambiguous, the caption does not aid our
10 interpretation." Id.

11 Finally, if A.R.S. § 33-413 has no applicability to modern
12 marriage contracts (i.e., pre and postnuptial agreements), it is
13 up to the Arizona legislature, not this court, to repeal the
14 statute.

15 **2. Agreements Made In Consideration Of Marriage**

16 The PMA and Waiver both constitute "agreements made in
17 consideration of marriage." As the bankruptcy court noted, one
18 definition of "in consideration" is "a taking into account."
19 Consideration, Merriam-Webster, [https://www.merriam-
21 webster.com/dictionary/consideration](https://www.merriam-
20 webster.com/dictionary/consideration) (last visited October 30,
22 2017). Both the PMA and Waiver were agreements made taking into
23 account the parties' marriage. But for their pending marriage,
24 there would have been no reason for them to have executed the
25 PMA. And, but for their marriage and move to Texas, a community
26 property state, there would have been no need for them to amend
27 or restate their intentions to keep their existing and future
28 property separate through execution of the Waiver. In short,
although the PMA and Waiver may not be "marriage contracts" in

1 their historical sense, they are "agreements made in
2 consideration of marriage" on their face.⁸ Cf. Sullivan, 6 S.E.
3 at 396 (a marriage contract is an agreement and its effect to
4 give a different direction to property from that which would
5 result from a marriage).

6 **3. Real And Personal Property**

7 We are also not convinced by Sheryl's argument that A.R.S.
8 § 33-413 applies solely to marriage contracts affecting real
9 property. The plain language of the statute states that it
10 applies to "creditors" without actual notice of the marital
11 agreement and without distinction. It also does not state that
12 recordation is required only for those agreements that affect
13 real estate. If the Arizona legislature meant to protect only
14 secured creditors, it could have done so in plain language and
15 directed the agreement to be recorded in the office of the
16 county recorder of the county in which the real property was
17 located. Cf. A.R.S. § 33-411 (providing that no instrument
18 affecting real property gives notice of its contents to
19 subsequent purchasers unless recorded in the office of the
20 county recorder of the county in which the property is located).

21 Furthermore, recording statutes are generally for the
22 purpose of providing constructive notice to third parties. The
23 placement of A.R.S. § 33-413 in Title 33, Article 2 (which
24 addresses the recording of documents in general) evidences the

25
26 ⁸ Indeed, construing "in consideration of marriage" as not
27 including premarital agreements would lead to the absurd result
28 of making the statute inconsistent with Arizona's Official Form,
entitled "Notice of Premarital Agreements." See Creighton and
McElwee, 4A Ariz. Legal Forms, Domestic Rel. § 13:17.

1 Arizona legislature's intent to protect creditors who transact
2 with spouses that have entered into what would otherwise be
3 secret agreements which alter the character of the spouses'
4 marital property from community to separate. In short, without
5 any language showing that the Arizona legislature intended to
6 leave unsecured creditors unprotected under the statute, we
7 cannot import such a limitation.

8 **B. Conflict Of Laws**

9 Sheryl also complains that the bankruptcy court ignored the
10 choice of law clause in the PMA, which refers to Kansas law. In
11 her opening brief, Sheryl contends that CSNG is a foreign
12 corporation with all of its principal assets formerly located in
13 Kansas. Sheryl thus asserts there is no legitimate basis to
14 apply Arizona law as there is in an enforceable choice of law
15 provision in the PMA and all the assets of the entity were
16 located in Kansas. This argument has no merit. The bankruptcy
17 court decided that James was the sole member and owner of CSNG,
18 and that finding is not on appeal.

19 Furthermore, although the bankruptcy court did not
20 expressly decide the choice of law issue, Arizona courts review
21 choice of law determinations de novo. See Garcia v. Gen. Motors
22 Corp., 990 P.2d 1069, 1075 (Ariz. Ct. App. 1999). The choice of
23 law clause in the PMA provides:

24 The parties intend to make their residence after
25 marriage in the State of Kansas, and accordingly this
26 Agreement shall be governed by the laws of Kansas.

27 This provision shows that the parties intended Kansas law to
28 govern their contractual rights and obligations under the
agreement as between themselves because they intended to reside

1 in Kansas. It does not overtly state that the clause covers a
2 wide range of claims, disputes, or controversies, including
3 disputes about the validity of the agreement as to third party
4 creditors. The narrow scope of the choice of law clause
5 indicates that it has no application to the present dispute.

6 In addition, the plain language of A.R.S. § 33-413
7 expressly requires agreements made in consideration of marriage
8 to be recorded in order to be valid against creditors without
9 actual notice of those agreements. The statute does not give a
10 court discretion to ignore the recording laws based on choice of
11 law provisions in marital contracts to the detriment of third
12 parties which the statute intends to protect. It would be
13 anomalous to allow parties to avoid Arizona's recording statutes
14 by choice of law clauses in private contracts. In sum, A.R.S.
15 § 33-413 applies to the PMA and Waiver notwithstanding the
16 choice of law provision in the PMA.

17 **C. The Motion For Reconsideration**

18 Even if there were error in the bankruptcy court's decision
19 to deny Sheryl's motion for reconsideration based on timeliness,
20 we can affirm on any basis supported by the record. See Brown
21 v. State Bar of Ariz. (In re Bankr. Petition Preparers),
22 307 B.R. 134, 140 (9th Cir. BAP 2004) (a reviewing court may
23 affirm on any basis supported by the record). The bankruptcy
24 court did not abuse its discretion by denying Sheryl's motion
25 for reconsideration. She did not present newly discovered
26 evidence, demonstrate clear error, or show an intervening change
27 in controlling law. See 389 Orange St. Partners v. Arnold,
28 179 F.3d 656, 665 (9th Cir. 1999) (setting forth grounds for

1 reconsideration under Civil Rule 59(e)); see also Rule 9023
2 (incorporating Civil Rule 59(e) in bankruptcy proceedings).

3 **VI. CONCLUSION**

4 For the reasons stated, we AFFIRM.

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