# November 2018
## *STATE BAR OF ARIZONA, FAMILY LAW SECTION, EXECUTIVE COUNCIL*
## CASE LAW UPDATE

**This update contains summaries of 2 reported Arizona opinions and 5 memorandum decisions for cases decided in November 2018.**

**Arizona Supreme Court and Court of Appeals (Divisions 1 and 2) Opinions and Memoranda Decisions may be accessed at: http://apps.supremecourt.az.gov/aacc/default.htm**

**This update has been prepared by the Case Law Update sub-committee of the State Bar of Arizona Family Law Section, Executive Council, Timea R. Hanratty (Chair).**

## REPORTED OPINIONS

*Roe v. Austin*, 2 CA-CV 2017-0194 (11/29/2018).
**Marital Settlement Agreements/Contracts; Parol Evidence.** Reversed trial court, which inappropriately admitted extrinsic evidence to contradict the agreement's terms.

Case is the most recent example of an appellate opinion laying out contract law as related to Marital Settlement Agreements ("MSA"), including contract interpretation and parol evidence. In this case, the MSA awarded Former Wife ownership of a ranch so she later demanded that the ranchers living on the property vacate. Ranch workers filed a declaratory judgment arguing they held a life estate in part of the property. As relevant to family law, Former Wife sued Former Husband, because their MSA had an indemnification clause in it, which she argued required Former Husband to defend and indemnify her against the ranch workers' life estate claim. Former Husband argued the indemnification clause was reasonably susceptible to more than one interpretation and his interpretation was that the indemnity clause is modified by a later clause sentence in the MSA, and therefore, admitting parol evidence to interpret the MSA was proper.

Trial court allowed extrinsic evidence in at the jury trial, as it found the term was susceptible to more than one reasonable interpretation. Jury awarded the ranch workers a life estate and found Former Husband had not breached the indemnification term of the MSA. Former Wife appealed the trial court's denials of her renewed motions for judgment as a matter of law. Court of Appeals reversed the trial court, holding that the trial court erred in finding that the MSA was reasonably susceptible to more than one interpretation, and instead found that the indemnification clause and other terms of the MSA clearly and unambiguously required Former Husband to defend and indemnify Former Wife in this specific situation.

The Court of Appeals reasoned that not even Arizona's permissive approach to the parol evidence rule would allow Former Husband's extrinsic evidence in because it varied and contradicted the plain terms of the MSA. So while the trial court could properly consider extrinsic evidence to determine whether the term was reasonably susceptible to Former Husband's interpretation, the correct conclusion would have been that the term was not reasonably susceptible to his interpretation because his interpretation would contradict the term and would render numerous other terms of the MSA meaningless.

*Berrier, Jr. v. Rountree*, 1 CA-CV 18-0081 FC (11/27/2018).
**Parenting Time, Relocation, and Legal Decision-Making.** Remanded to allow parties to file appropriate pleadings to address issues (if properly raised).

The parties' 2014 Decree provided that they would share joint legal decision-making with mother exercising presumptive decision-making authority. The parties exercised a long-distance shared parenting time plan wherein the child spent 2 weeks at mother's California home followed by 2 weeks at father's Arizona home. Father filed a petition to modify parenting time when the child became eligible to attend kindergarten in 2017, asserting that school attendance would necessitate an adjustment in parenting time. Mother contended that parenting time should be changed due to school attendance, but argued that the Decree authorized her to select the child's school, which she wanted to be in California. Thus, the child should reside primarily with her.

The Superior Court found father had not properly sought to modify legal decision-making and mother's choice of California school prevailed because she had "final say." And, "father failed to prove her decision was contrary to the child's best interests." As for parenting time, the Superior Court awarded father once monthly weekend parenting time for 7 months and additional time over breaks and holidays – making Mother the primary residential parent. Father appealed this ruling. The Court of Appeals found that neither party had properly met the strict standard required in requesting the Court reassess legal decision-making and the pleadings framed only the issue of parenting time. However, more was at stake than parenting time as the Court had to select a primary residential parent and a "home state" due to the long-distance parenting plan. This means the issue of relocation was also present and the trial court had failed to address the relocation factors in A.R.S. § 25-408.

Significantly, the Court opined that: "Even a parent with sole legal decision-making authority does not have the inherent power to relocate his or her child to another state. While we express no opinion as to the ultimate result in this case, any decision concerning Child's future home state must be made in accordance with A.R.S. § 25-408."

## MEMORANDUM DECISIONS

*Herter v. Bridges-Herter*, 1 CA-CV 18-0047 FC (11/29/2018).
**Attorneys' Fees.** Affirmed award of attorneys' fees and denial of motion for amended judgment.

Mother filed petition to modify parenting time after continued disputes over Father exercising his parenting time. The parties came to many agreements via the joint pretrial statement, but child support and attorneys' fees remained at issue. The family court ruled in favor of Mother regarding an upward deviated child support amount and awarded her attorneys' fees based on financial disparity. Father filed for an amended judgment, arguing the fee award exceeded the court-defined scope of attorneys' fees and the evidence did not support the award. The family court denied his motion and found it had not limited permissible fees to any single issue. Father appealed.

In affirming the trial court's orders, the Court of Appeals reasoned that the award was less than the fees incurred in the litigation after the petition was filed. Father's argument that the fees should have been limited to the remaining issues at trial versus all issues, most of which were settled, was

without merit since Mother obviously incurred fees in having to negotiate and settle those issues. Similarly, the Court of Appeals affirmed the denial of Father's motion for new trial/amended judgment as the basis therefor was the same as the attorneys' fees appeal—that the court limited the scope for the fee award.

*Wilson v. Wilson*, 1 CA-CV 17-0704 FC (11/29/2018).
**Findings; Spousal Maintenance; Res Judicata.** Remanded for new determination of spousal maintenance with sufficient findings.

Pursuant to the decree of dissolution, Husband was ordered to pay Wife spousal maintenance of $800.00 per month. Subsequently, Husband petitioned to terminate his spousal maintenance award as a result of permanent disabilities that happened after the decree. Husband's disability was less than 50% of his prior income, and Wife's income had increased. The trial court only reduced the spousal maintenance by $100.00 per month.

The Court of Appeals held that the trial court must make sufficient findings under A.R.S. § 25-319, even if findings of fact are not requested, and the evidence must support its decision. The Court of Appeals disagreed with Husband's argument that the trial court had to reassess Wife's eligibility pursuant to A.R.S. § 25-319(A). Such issue is res judicata. Thus, only A.R.S. § 25-319(B) factors are subject to review pursuant to a termination or modification proceeding. The Court of Appeals found that the trial court did not provide sufficient explanation of why it only reduced Husband's obligation by $100.00 per month in light of the evidence. The factors presented did not reasonably support a basis for an ongoing award. The Court of Appeals remanded the case to the family court to reconsider its findings, and explained that the trial court may supplement its order that would subject it to meaningful appellate review and/or leave it to the court's discretion whether the taking of additional evidence or briefing would be necessary or helpful.

*Ariola v. Reed*, 1 CA-CV 16-0743-FC (11/27/2018).
**Service of Process; Void Judgments; Relief from Order.** Affirmed trial court's denial of Mother's motion for relief from 2013 order.

In September 2016, Mother asked the trial court to relieve her from a 2013 child support order on the basis that it was void due to lack of service, arguing she had never been served with the actual petition to modify child support (she had signed an acceptance of service of only the order to appear for the hearing on the petition), and further arguing that she had suffered an "extreme miscarriage of justice and prejudice." However, she arrived over an hour late and missed the hearing and the court had already entered the child support order by default. The trial court reopened the hearing, though, to address Mother's income for purposes of child support and Mother testified about her income.

The court of appeals stated that even assuming mother was not served with the petition, she nonetheless had notice of the hearing by virtue of accepting service and participated in the hearing by providing testimony to the court. Thus, the Court of Appeals found the order was not void because a party "who appears in the matter and litigates it on the merits waives any objection over the failure to properly serve [her] with process." The Court of Appeals further found that Mother's

Motion for Relief was untimely because she waited three years to file her motion, which was not a reasonable time under the circumstances.

In an interesting footnote, the court of appeals stated that the trial judge conducted the hearing in a manner unbecoming of the judiciary. The court noted that the judge told the litigants to "shut up," threatened them with contempt in which case they would go "right from here to jail" and stated that if contempt sanctions were issued, "you won't get your kids." The court pointed out that that it did not condone such treatment of the public by the court.

## *Terepocki v. Grim-Moore*, 1 CA-CV 18-0050 FC (11/15/2018).

**Order of Protection.** Affirmed OOP.

Terepocki is Grim-Moore's daughter. Terepocki obtained an OOP against her mother, referring to matters that had occurred many years prior, despite that the court stated it would not consider any incidents that occurred more than a year ago. Moore did not, however, object to testimony regarding those incidents, and therefore, waived this argument on appeal. Based on the testimony and evidence presented below, the Court of Appeals found the trial court properly issued the OOP.

## *Hanger v. Hanger*, 1 CA-CV 17-0721-FC (11/1/2018).

**Child Support; Rule 69 Agreements.** Affirmed superior court's denial of Father's motions to set aside; reversed denial of Father's petitions for simplified modification of child support; remanded for a hearing on whether child support should be modified.

At a conference following Father's petition to modify child support, Mother and Father stipulated to a child support order. One week later, Father moved to set aside the order and also to modify child support because (1) Mother's counsel surprised Father by communicating with him before the hearing, (2) Mother's counsel and the conference officer engaged in misconduct, and (3) Father was coerced into signing the Stipulated Order.

The Court of Appeals found Father's arguments unavailing regarding his motions to set aside. First, the Stipulated Order was in writing and signed by both parties. Father failed to present undisputed facts to rebut the presumption of validity. Next, Father mischaracterized the Stipulated Order as both an upward deviation and an attribution of income. Despite Father's argument to the contrary, the superior court did not attribute income to Father; rather, Father himself agreed that his income was $75,000. Because the court did not attribute income to Father, the court was not required to explain the reason for an attribution. The superior court did not abuse its discretion by denying Father's motions to set aside.

Although the Court agreed that Father's motions to set aside were correctly denied, it also addressed his motion to modify child support which was filed at the same time as his motions to set aside. The Court of Appeals found that the fact that Father previously stipulated to a higher income does not preclude him from seeking modification. That is true, if Father is able to demonstrate through credible evidence that his income has changed and he presents a colorable claim that there is a 15% variation in child support, he may be entitled to a modification via simplified procedure. Thus, the Superior Court should have held an evidentiary hearing and the matter was remanded to have this hearing addressing whether a change in circumstances occurred necessitating a modification of child support.