February 2019
STATE BAR OF ARIZONA, FAMILY LAW SECTION, EXECUTIVE COUNCIL
CASE LAW UPDATE

This update contains summaries of 1 reported opinion and 9 memorandum decisions for cases decided in February 2019.

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

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REPORTED OPINIONS

Quijada v. Quijada, 1 CA-CV 18-0118 (2/19/2019).

Domestic Relations Orders ("DRO"); *Koelsch* Payments when Consent Decree is Silent; Attorneys' Fees. Affirmed order denying Wife's request to modify decree for immediate payout of retirement benefits ("*Koelsch* payments") and order denying Husband's request for fees.

The parties' marriage was dissolved by consent decree in 2009, which did not retain the Court's jurisdiction. In the decree, the parties agreed to divide the community property portion of Husband's PSPRS pension pursuant to a separate DRO. The DRO, signed and entered the same day as the decree, awarded Wife a pro rata share of Husband's PSPRS pension at the same time and in the same manner as payments were made to Husband. The DRO stated that the Court retained jurisdiction over it, but only to amend to establish or maintain its acceptance to PSPRS and supervise the payment of retirement benefits as provided in the DRO. Neither party appealed from entry of the decree or DRO.

In 2014, Husband became eligible to retire but chose to continue working. On appeal, Wife argued that Husband was able to exercise unilateral control over the payout of both his and Wife's separate property benefits by deciding to continue working. After a 3-day trial, the trial court found that the Consent Decree was unambiguous regarding how Wife's benefits would be paid and consequently denied Wife relief. On appeal, Division One ruled that the decree and DRO were unambiguous and disagreed with Wife's argument that she is immediately entitled, as a matter of equity, to her share of retirement benefits when available, but the employee-spouse continues working. The appellate court found that Wife's argument essentially calls for a de facto modification of an unambiguous decree and DRO and is therefore inconsistent with the law. Pursuant to A.R.S. § 25-317 (F), when the division of assets is based upon an agreement of the parties, "entry of the decree shall thereafter preclude the modification of the terms of the decree and the property settlement agreement, if any, set forth or incorporated by reference." The Court therefore concluded that the terms of the decree and DRO are not subject to post-judgment modification unless the trial court is satisfied relief is warranted pursuant to ARFLP 85(b), which would not be possible given that the parties' marriage was dissolved via consent decree, so the order thus tacitly found no circumstances that would justify reopening the consent decree and DRO.

Furthermore, the appellate court distinguished *Koelsch* as a direct appeal from a dissolution entered after a contested hearing versus a case that involves a decree by consent, reasoning that *Koelsch* addressed only whether the family court's original division of community property, entered over the non-employee spouse's objection, was equitable. The appellate court similarly finds that other cases relied upon by Wife address the propriety of the original, contested division of community property and do not authorize the court to modify a property allocation made in a consent decree from which no appeal is taken and over which the court did not retain jurisdiction. The appellate court further reasoned that the facts that the settlement was fair and equitable and free from fraud and undue influence, meant that the court approved the parties' settlement. Wife could not now come back and argue that the decree or DRO were unfair, especially when Husband assumed more debt and received fewer assets in the divorce. Wife could have requested that the decree provided for her to receive *Koelsch*-type payments in the event Husband elected not to retire when eligible, or specifying that the family court would retain jurisdiction to determine the proper division upon maturation. She did neither and did not appeal the decree.

Court of Appeals affirmed family court's decision to not modify decree, which was consistent with the DRO, which only retained trial court jurisdiction to enter an amended DRO. The family court's decision was consistent with "policy interest favoring the finality of property settlements."

With respect to attorneys' fees, the trial court denied husband's request as it found Wife's position had merit and even if Husband prevailed, he was still in a superior economic position. Husband cross-appealed the denial. The Court of Appeals held that the trial court did not abuse its discretion, was not inconsistent regarding Wife's reasonableness of positions, and citing *Cummings*, reasoned that an award of fees in a domestic relations matter does not turn on a party's success or failure. The appellate court further reasoned that the fee-shifting provisions of A.R.S. § 25-324 are intended to insure the poorer party has the proper means to litigate the action, not punish litigants.

MEMORANDUM DECISIONS

Gonzalez, Jr. v . Moraga/Alba, et al., 1 CA-CV 18-0298-FC (2/28/2019).
Grandparent Visitation. Affirmed trial court's dismissal of grandparent's third-party rights petition in favor of Father's parental rights after death of Mother, despite juvenile court's granting of temporary guardianship to Grandparents.

In the underlying family court proceeding, Mother was awarded sole legal custody over the child and Father was awarded parenting time. Eight years later, Mother was killed. After she died, her parents obtained temporary guardianship in juvenile court without Father's knowledge or notice to Father and took care of the child for approximately 5 months. Father then filed a motion in family court seeking temporary modification of the sole legal decision-making and parenting time orders, alleging Grandparents refused to relinquish the child to him. The family court denied his motion, essentially explaining that it was unnecessary as due to Mother's death, Father was the only living parent and only person with parental rights over the child. Father then filed an amended motion to modify custody and a return hearing was held, at which Grandparents served him with an *in loco parentis* Petition under -409(A), in which they sought legal decision-making and physical custody, arguing Father had a history of domestic violence and placing the child in his care would be detrimental to the child. The trial court dismissed the Grandparents' petition after

a hearing at which they, Father, and the child's counselor testified. The trial court's order remarked that Grandparents should have time under -409(E).

Citing *Chapman*, the Court of Appeals affirmed the trial court's ruling that the Grandparents had not adequately pled their *in loco parentis* claim due to insufficient allegations related to their care of the child. To the contrary, the Grandparents' affidavit demonstrated that they did not spend a significant amount of time with the child prior to Mother's death, only housing and caring for the child after Mother died, and thus not standing *in loco parentis* to the child. The Court of Appeals further reasoned that the 5 months the Grandparents cared for the child was not a "substantial period of time" and the only reason Grandparents had the child in their care for so long was due to delays in court scheduling, despite that Father had done everything he could to secure his rights immediately following Mother's death. The Court of Appeals did not address the trial court's conclusion that Grandparents failed to show significant detriment would occur to the child in Father's care or Grandparents' -403.03 argument.

Amedovski v. Amedovski, 1 CA-CV 18-0380-FC (2/26/2019).

Excusable Neglect. Affirmed order denying Former Husband's motion to set aside the decree.

Former Husband did not appear for the parties' trial and the trial court entered a decree granting Former Wife's requested spousal maintenance and divided community property as she requested. A few weeks later, Former Husband moved to set aside the decree under ARFLP Rule 85(b)(1), arguing he made a calendaring mistake regarding the trial date, which he argued constituted excusable neglect, and that his "physical and mental impediments to his cognitive abilities" caused him to make the error. Former Husband did not attach an affidavit to his motion, but did attach medical records. The trial court denied the motion, finding Former Husband's mistake was careless and did not constitute excusable neglect. The Court of Appeals affirmed, reasoning that "carelessness does not equate with excusable neglect," that Former Husband had ample notice of the correct trial date, did not present evidence that his medical issues prevented him from exercising due care to properly calendar the trial date, and he had historically failed to diligently participate in the divorce proceeding.

In Re the Marriage of Krause, 2 CA-CV 2018-0101-FC (2/25/2019).

Legal Decision-Making. Vacated award of sole decision-making authority to Father since final decision-making was permitted and affirmed increase in parenting time.

In their divorce decree, the court awarded joint legal decision-making to Mother and Father and gave Father three weekends a month in parenting time. A year later, Father requested a modification of parenting time to be a reversal of the previous order and to relocate with the children.. In her response, Mother objected to not having majority time, asked that Father's weekends be reduced to every other week, and requested she be given final decision-making authority. The trial court granted Father his change in parenting time and also awarded him sole legal decision-making. During their hearing, Father asked for joint decision-making to continue, but also made the request that he be given the final authority on disputed matters. The trial court ruled it could not give final say to either party in a joint legal decision-making order in light of the Court of Appeals' *Nicaise* opinion, and could only grant either joint decision-making or sole decision-making. So, the court said "sole" to Father.

Mother appealed, arguing that the court was wrong in giving Father sole legal decision-making when he did not request this change in his petition. The appellate court affirmed although Father did not request it in the pleadings, since Mother did request a modification, citing *Sundstrom v. Flatt* for the proposition that the party ultimately granted sole decision-making need not be the petitioning party. Having affirmed the change, the appellate court still remanded the case based on the Supreme Court holding in *Nicaise* that giving a parent final authority over certain matters "are common and commendable and do not convert joint into sole legal decision-making."

Kitchen v. Fleming, Sr., 1 CA-CV 18-0241-FC (2/21/2019).
Presentation of Evidence; Parenting Time; Spousal Maintenance; Attorneys' Fees. Affirmed.

Parties were married 16 years and have four children, three of whom are disabled. Father was self-represented at trial while Mother had an attorney. Father attempted to present his case by reading from his notes to which Mother's counsel objected and the Court sustained the objection, guiding Father through the categories. On appeal, Father argued "the court's refusal to allow him to read from prepared statements denied him due process of law because he 'could not testify in a meaningful manner as he felt most appropriate for the proceeding and just ended up answering questions of the [c]ourt in its view of what it might have thought was essential.'"

The Court of Appeals affirmed the trial court's rulings, reasoning that the family court "is not required to indulge inefficient uses of time" and asking questions, "rather than simply observing Father reading from his prepared documents, was within the court's discretion as an aid in resolving the conflicting evidence and determining Father's credibility." The Court of Appeals also reiterated that a self-represented litigant is held to the same standard of a lawyer. In response to Father's arguments that he was not able to present testimony regarding certain issues, the Court of Appeals cited to Father's pretrial statement, which did explain his positions and the trial court confirmed it had reviewed Father's pretrial statement before the hearing.

As for the parenting time issue, the family court ordered unequal parenting time for reasons detailed in findings related to each -403(A) factor. The family court did the same with respect to its spousal maintenance order, making detailed findings under -319. Regarding attorneys' fees, the family court found Father had greater resources and took somewhat unreasonable positions. As such, the Court of Appeals affirmed the trial court's orders as none were an abuse of discretion.

Oram v. Oram, 1 CA-CV 18-0141-FC (2/19/2019).
Prenuptial Agreements; Interlocutory Orders; Consent Decrees. Affirmed trial court's order enforcing prenuptial agreement.

The parties entered into a prenuptial agreement ("prenup") in 2008. At the time of divorce, the trial court ruled that the prenup was not unconscionable and was enforceable. The parties then negotiated a consent decree which incorporated the trial court's ruling and was entered as a final order. Wife appealed the trial court's interlocutory ruling regarding the validity of the prenup. The Court of Appeals, Division 1, found that Wife did not reserve any objection to the Court's interlocutory ruling in the Decree. The Decree is deemed to be the parties' entire agreement. Thus, absent limited exceptions, a party cannot appeal from a judgment to which he or she consented.

Savoca v. Savoca, 1 CA-CV 18-0366-FC (2/19/2019).
Order of Protection ("OOP"). Affirmed in part and remanded in part order upholding OOP.

Mother obtained OOP against Father that included their child and her parents as protected persons. Father admitted that the allegations in the OOP were true during DCS and Phoenix PD questioning. A couple months later and after additional incidents occurred, Mother obtained an Amended OOP. Father contested the Amended OOP and at the end of the hearing, Father asked the court to address the factors in ARPOP Rule 35(b). "The court acknowledged that Rule 35(b) provides for consideration of two factors, which it summarized as whether Father was 'likely to cause physical injury' or whether 'there was domestic violence committed towards the child.'" The court concluded there was domestic violence committed toward the child and upheld the OOP, but removed Mother's parents as protected persons. Father's argument that the court failed to consider the Rule 35(b) factors at the OOP hearings was successful on appeal.

The Court of Appeals found that the superior court misstated the Rule 35(b) factors because the Rule requires the court to consider "whether the child may be harmed if the defendant is permitted to maintain contact with the child," and "whether the child may be endangered if there is contact outside the presence of the plaintiff" before granting an OOP prohibiting contact with a child with whom the defendant has a legal relationship. Here, the superior court summarized the factors incorrectly and never addressed whether Father was "likely to cause physical injury" to the child. The Court of Appeals remanded as it could not determine whether the superior court's error was harmless given that the superior court declined to consider the Rule 35(b) factors and therefore used the wrong standard, in which case remand is necessary.

Driss v. Driss, 1 CA-CV 18-0243-FC (2/12/2019).
Business Valuation/Goodwill; Spousal Maintenance. Affirmed business valuation, but reversed and remanded for reconsideration of spousal maintenance.

Each party called an expert witness to testify regarding the value of Husband's medical practice. Wife's expert said the practice was worth $193,000 while Husband's expert said there was no value. The Court found Mother's expert's calculation of value was more appropriate because it provided a value for goodwill. Father's expert said there was no value for goodwill. Husband appealed the decision on the basis that the record did not support a finding of goodwill value. According to Husband, goodwill is a mathematical conclusion based on whether he earns more than his peer group. Husband's expert testified that Husband did not earn more than his peer group and therefore there was no goodwill value. Husband also argued that for purposes of the spousal maintenance award to Wife, the trial court failed to consider that the property awarded to Wife would generate some interest income and abused its discretion by considering income that Husband earns from two part-time jobs in addition to his medical practice.

On appeal, Husband's goodwill argument was rejected by the Court because goodwill is not based on one element, but is determined after consideration of many factors, such as the practitioner's age, health, past earning power, reputation in the community for judgment, skill and knowledge, and his or her comparative professional success. The Court of Appeals affirmed the trial court's decision on goodwill as there was no abuse of discretion.

Regarding spousal maintenance, the Court of Appeals found Wife was entitled to $2,200.00 per month for five years and held that the trial court abused its discretion by failing to attribute any interest income to the substantial financial assets that Wife was awarded. The Court of Appeals cited *Deatherage* for the proposition that the court must consider "all property capable of providing for the reasonable needs of the spouse seeking maintenance." The Court of Appeals found that there was no abuse of discretion when the Court considered Husband's income from two part-time jobs in addition to his full-time medical practice because Husband has historically worked the additional jobs and chose to continue to do so.

Fiori v. Lanini-Fiori, 1 CA-CV 18-0121-FC (2/5/2019).

Untimely Disclosure; Evidence and Findings regarding Domestic Violence; Rebutting Presumption Against Joint Legal Decision-Making; Income for Purposes of Child Support; Attorneys' Fees under A.R.S. § 25-415. Affirmed order awarding Mother sole legal decision-making authority, child support, and attorney's fees, as well as a separate post-decree order sanctioning Father's unreasonable conduct.

Trial court awarded sole legal decision-making to Mother after adopting a finding made in a prior temporary orders hearing that Father had committed significant domestic violence and allowing two untimely disclosed witnesses to testify at trial. Father argues that the trial court erred by adopting a finding from a temporary orders hearing without allowing him to present additional evidence at trial to rebut the presumption against awarding joint legal decision-making authority and violated his due process rights by not extending trial time by 15 minutes and allowing the untimely disclosed witnesses to testify, for whom Father had no ability to prepare cross-examination. Father's appeal further argues that the trial court erred in calculating child support because it 1) improperly included income from his second job, 2) failed to attribute to Mother funds she received from her parents, and 3) failed to account for Father's support of his other children. Regarding attorneys' fees, Father argued the trial court erred in awarding attorney's fees in the decree because the evidence did not show a disparity in income.

The Court of Appeals held that the record did not support Father's argument that he was denied an opportunity to present evidence to rebut the presumption. The Court of Appeals found that the trial court did not simply adopt findings made from the temporary orders hearing, but specifically found at trial that Father's testimony at the temporary orders hearing regarding the version of events was not credible. As for the untimely disclosed witnesses, the trial court was allowed to hear those witnesses for good cause and based on *Hays v. Gama*, the Court of Appeals found it appropriate for the court to allow the witnesses to testify. The Court of Appeals dismissed Father's argument that he had insufficient time at trial as the time was not objected to, he did not ask for the trial to be extended 15 minutes and most importantly, he chose to focus his time on Mother's alcohol abuse rather than the untimely disclosed witnesses' testimony regarding DV. Similarly, the Court dismissed Father's argument that just because he was later acquitted of the criminal DV charges, this meant the parenting orders should be reversed. The Court of Appeals reasoned that the burdens of proof in criminal court and family court are different, and in family court, the court's finding of significant DV only requires proof by a preponderance of the evidence.

Regarding child support, the Court of Appeals held that substantial evidence supported the trial court's decision to include income from Father's second job. Father had earned an income from

his consulting business every year since 2014 and had earned substantial income the year of the child support hearing. Therefore, it was not erroneous for the court to include this income as it was regularly and historically part of Husband's income. There was no evidence to support Father's claim regarding recurring gifts to Mother from her parents. There was no error in the trial court refusing to provide an adjustment to Father's income for the support of children who were not the subject of this child support determination. Father did not pay any support for two of his other minor children and he was the primary residential parent of his third minor child from another relationship, for whom the trial court provided an adjustment to Father's income.

The Court of Appeals found that the trial court awarded fees under A.R.S. § 25-415(a)(1), which does not require evidence of a disparity in income. The purpose of A.R.S. § 25-415(a)(1) is to act as a deterrent to parties presenting false claims and the trial court had found Father presented seven (7) knowingly false claims. Husband also objected to a second award of fees to Wife related to the enforcement of a settlement agreement. Husband framed the issue as if the attorney's fees award was a sanction against Husband under Rule 92. However, the Court of Appeals found it was not pursuant to Rule 92, but instead pursuant to the court's "inherent power to regulate attorney misconduct." There was no dispute regarding the conduct described in the court's order awarding fees and therefore, no abuse of discretion. Unfortunately, there is no detail regarding the false claims or attorney misconduct in the memorandum decision.

Geisel v. Bean/Ades, 1 CA-CV 18-0209-FC (2/5/2019).
Child Support; Non-Preclusive Effect of Vacated Judgment. Reversed and remanded for reconsideration of child support arrearage calculation.

The parties' 2007 New York divorce decree contained the controlling orders for maintenance and child support. In 2008, Mother filed a petition for violation of the support orders in New York, which was dismissed by a New York appellate court; the dismissal was just days before the New York trial court issued an order determining the amount of child support and spousal maintenance arrearages. In 2011, Mother filed a petition to enforce the support arrearages determination in Arizona based on the last New York arrearage order (which was entered days after Mother's underlying petition was dismissed).

In the Arizona proceedings, the trial court found Father in contempt for failing to pay support obligations and ordered a purge amount, but the court did not enter an arrearage judgment because the parties failed to provide a specific accounting. In 2018, DES entered the case and filed a proposed arrearage calculation. Father filed a motion for relief from the 2011 order, objecting to the arrearage calculation based on the fact that the New York arrearage calculation was invalid because the 2008 proceeding through which the calculation was issued was dismissed, which thereby vacated those orders. The superior court found that Father could not challenge arrearage findings in the 2011 Arizona case.

Father objected to entry of an arrearage judgment claiming that the calculations were improper.

The Court of Appeals found that the 2011 order was not an arrearage calculation. In addition, the doctrine of claim preclusion did not prevent Father from challenging the arrearage calculation because "a vacated judgment cannot have any preclusive effect."