JUNE 2022 CASE LAW UPDATE

OPINIONS

Gish v Greyson, 1 CA-CV 21-0472 FC (June 28, 2022)

The court, not an appointed professional, must decide whether parenting time may be increased.

Appointment of a behavioral health expert must be based upon parties' ability to pay.

Facts: Parties have one child, who has been diagnosed with autism spectrum disorder. From the time of divorce in 2017 through 2021 the parties were engaged in highly contentious litigation. Much of it centered around Mother's resistance to facilitating Father's parenting time. In 2019, despite concerns about Mother, the court maintained to award of joint legal decision-making with Mother having final say in the event of a dispute. Father was limited to supervised parenting time as directed by a therapeutic interventionist (TI), who was to determine when unsupervised parenting time would be appropriate. While progress was made, the TI reported continuing concerns about Mother's influence over the child. A few months later, the child refused contact with Father. The TI was "at a loss about how to move forward." Father then filed a petition to modify, claiming that Mother was sabotaging his contact and not cooperating with the TI. The TI continued working in this matter but had concerns about Father as well. The hearing on Father's petition was held in April, 2021, and the trial court found that the parties could not work cooperatively although there were also concerns about awarding either party sole legal decision-making authority. Despite the misgivings, the trial court awarded Father sole legal decision-making authority, but the child resided with Mother and Father exercised supervised parenting time. The TI was to continue and the increase of Father's parenting time toward equal time would be at the direction of the TI. Each party was directed to pay one-half of the fees for the TI. Mother appealed and while the appeal was pending, Father asked that a Court-ordered behavioral interventionist (COBI) be appointed to replace the TI. Over Mother's objection, the court granted Father's motion and appointed a COBI, ordering each parent to pay one-half of the fees.

Discussion: There were a number of issues addressed by the Court of Appeals. The key issues, and the court's reasoning in addressing those issue, are as follows:

Jurisdiction of Superior Court While Appeal is Pending- The COBI was appointed while this matter was on appeal. Generally, the filing of a notice of appeal divests the trial court of jurisdiction to proceed other than to issue orders to further the appeal or address matter unrelated to the appeal. See *In re Flores and Martinez*, 231 Ariz. 18, 21 (App. 2012). There are exceptions, including that the superior court retains jurisdiction while the appeal is pending to

take actions necessary to "enforce it previously entered judgment." *Henderson v Henderson*, 241 Ariz. 580, 589 (App. 2017). Also, when an appeal is pending, a modification action may be considered by the superior court so long as it is based upon changed circumstances arising since the last order. Ultimately, this issue was not addressed by the Court of Appeals for other reasons, but this remains usable guidance when issues return to court while an appeal is pending.

Can Superior Court Award Sole Legal Decision-Making Authority to the Parent Who Has Limited Parenting Time? Yes. There is no statutory provision that links an award of decision-making authority to the amount of parenting time the sole legal decision-maker has with the child. Rather, it is determined through a best interests analysis.

Weight to be Given to Child's Wishes- Mother argued that the trial court erred by not considering the child's wishes, who was 12 years old. The Court of Appeals rejected this argument, noting the trial court had found the child not to be of suitable age and maturity. This finding was supported by the TI's reports that the child was "unduly susceptible to Mother's influence."

Court Must Consider Whether the Parties Have the Ability to Pay for a TI- The trial court ordered that the fees be paid one-half by each parent. While Rule 95(b) authorizes an order for engagement in behavioral health services, the court "must determine on the record whether the parties have the ability to pay for services as well as allocate the costs of those services." See Rule 95(a). Here, the trial court failed to make an on-the-record determination as to whether either party have the resources to pay for the services.

Trial Court Cannot Delegate Authority- The 2021 parenting order along with the COBI appointment order delegated the decision as to Father's parenting time to the appointed professional. This is impermissible. See *DePasquale v Superior Court*, 181 Ariz. 333, 336 (App. 1995). Rather, 25-405(B) and 406(A) allows the court to seek advice from an appointed professional, leaving the best interest determination solely with the court. Importantly, this does not prohibit the trial court from establishing milestones for a parent to receive additional parenting time, so long as those "milestones are self-effectuating." Otherwise, the court, and not the behavioral health expert, must determine whether the requirement has been met.

Editorial Note: The COBI was developed following years of appointments of TIs in refuse-resist cases. By its design, the trial court must first determine that there are no parental fitness issues that impede implementation of the specific parenting-time orders entered by the court. Upon meeting that threshold, the COBI is to work with the parties and the child to implement the court-ordered schedule and to advise the court along the way. This is a different model than what has historically been ordered under the appointment of a TI. The *Gish* decision suggests that use of the COBI (and TI for that matter) must be as part of a pending action, not ordered for services following entry of final orders.

Ferrill v Ferrill, 1 CA-CV 21-0553 FC (June 30, 2022)

A defense to a reimbursement claim for post-filing community mortgage payments using sole and separate funds is "ouster," which must be based upon factual findings.

Facts: Parties were married in 1990. Husband moved out of the marital residence in July 2019 and Wife filed for divorce in October 2019. Wife remained in the home and made the monthly community mortgage payments using her sole and separate funds. Wife sought reimbursement for the payments she made using sole and separate funds and Husband countered that those payments should be offset by the benefit Wife had by virtue of exclusive possession of the home. The trial court denied Wife's reimbursement claim because of Wife's exclusive occupancy in the home while the matter was pending. Wife appealed.

Discussion: There is a presumption of a gift when one spouse uses separate funds to pay a community obligation during marriage. *Baum v Baum*, 120 Ariz. 140, 146 (App. 1978). But that presumption does not exist following the filing of a petition for dissolution. *Bobrow v Bobrow*, 241 Ariz. 592, 596 (App. 2017). Rather, the paying spouse "is generally entitled to reimbursement for the expenditure of separate funds on community debt." This is true even if the paying spouse exclusively occupies the residence for which the payments are made, reasoning that because "…parties have a right to use community property, one party's use of the property alone does not provide a basis for denying that party's right to reimbursement for paying a community debt with separate funds." A defense to such a reimbursement claim is "ouster." Such ouster cannot be based solely on how untenable it would be to share a home when going through "the emotions of divorce." In fact, other states have applied this notion of "constructive ouster," but the Court of Appeals rejected this doctrine. Rather, whether ouster has occurred must be based upon the facts of a case. Ouster may be found through the actions of the party in possession to deny the rights of the other party that demonstrate a decisive intent and purpose to occupy the residence to the exclusion of the other party. Here, the Court of Appeals found it to be unclear as whether that occurred. On remand, if Husband can demonstrate ouster, he may then seek an offset for one-half of the fair market rental value of the residence during the time period in which Wife had exclusive occupancy but he would have the burden of proof to establish that value.

Memorandum Decisions

Dole v Dole, 1 CA-CV 21-0665 FC (June 14, 2022) (Memorandum)

Section V(F) of the Guidelines instructs how to calculate the parenting time adjustments when the children of the parties have differing parenting time schedules.

The correct approach (when children have differing parenting schedules but one parent does not have more than half the parenting time with any of the children) is detailed in Section V(F) of the 2022 version of the Guidelines, which reads, in pertinent part, as follows:

If the parents have multiple children with different parenting plans ***but one parent does not have more than half of the parenting time with any of the children****, prepare only 1 Child Support Worksheet. The child support obligation is determined by using an average of the total number of parenting days by adding the total amount of parenting days for each child and dividing that number by the total number of children.*

If one parent has the majority of time with one child and the other parent has the majority of time with the other child, there is a "two-worksheet" method also detailed in Section V(F). It reads as follows:

If the parents have multiple children and ***each parent exercises more than half of the parenting time with at least 1 child,*** *2 Child Support Worksheets are prepared. Each worksheet will calculate the child support owed based on which parent has the most parenting time with the child. The amount of child support to be paid by the parent having the greater child support obligation is reduced by the amount of child support owed to that parent by the other parent.*

Bovaird v Bovaird, 1 CA-CV 21-0698 FC (June 16, 2022) (Memorandum)

Remarriage serves as a basis for terminating spousal maintenance only if there is an actual remarriage of the recipient former spouse

Wife had a "commitment ceremony" with family and friends. Husband claimed Wife remarried and moved to terminate spousal maintenance. While the trial court found that Wife's conduct could reasonably lead Husband to believe that Wife and Edward had married, a *de facto* marriage or cohabitating relationship did not constitute a legal marriage under Arizona law. The petition to terminate the spousal maintenance award was denied. Citing *Smith v Mangum,* 155 Ariz. 448, 450 (App. 1987), the Court of Appeals held that under Arizona law, "the existence of a co-habitation agreement or '*de facto* marriage' between a spouse receiving maintenance and a cohabitant **is not a sufficient basis**, in itself, for termination or reduction of spousal maintenance." (emphasis added).

Milham v Milham, 1 CA-CV 21-0581 (June 2, 2022) (Memorandum)

Upon being awarded a share of retirement benefits, it becomes a vested interest and the failure to have a QDRO issued does not serve to waive that party's proportionate share of payments later received by the party who accrued the retirement benefit.

Husband and Wife divorce, and Wife is awarded an interest in Husband's retirement. The Decree did not order Husband to pay Wife directly, and the Decree did not provide for a QDRO to be entered. Wife eventually secured a QDRO, but not until after Husband started receiving payments. Husband refused to pay Wife her share of what he received because she failed to timely secure her share. The Court of Appeals, disagreed, holding that:

"Wife possessed an immediate and vested interest in her share of the retirement benefits upon entry of the decree. *See Koelsch v. Koelsch*, 148 Ariz. 176, 181 (1986) (when community property is divided at dissolution, each spouse receives "an immediate, present, and vested separate property interest in the property awarded to him or her by the trial court"). The decree entitles Wife to her share of the retirement benefits "if and when" Husband retires. Contrary to Husband's contention, the failure to enter a domestic relations order at the time of the decree does not extinguish Wife's vested interest. *See id.* Instead, the lack of a domestic relations order, or other payment provision in the decree, meant Wife needed to proactively enforce her right to the benefits. She did exactly that when she contacted DFAS in advance of Husband's retirement. Despite her efforts, Husband initially received all the retirement benefits. The judgment thus properly ordered Husband to return Wife's separate property to her."

Jackman v McCann, 1 CA-CV 21-0525 FC (June 7, 2022) (Memorandum)

Court has discretion in offsetting division of assets for amounts owed by one party to the other.

The Court of Appeals affirmed the trial court, noting that the trial court has broad discretion in apportioning community assets and there was no error in offsetting the proceeds from the sale of the marital residence against other amounts owed by Mother to Father. (see *Boncoskey v Boncoskey*, 216 Ariz. 448, 451 (App. 2007)).

Sembower v Sembower, 1 CA-CV 21-0498 FC (June 21, 2022) (Memorandum)

When community debts are paid with sole and separate funds following the filing of a divorce action, there is a basis for a reimbursement claim to be brought by the paying spouse.

The 2020 divorce decree required the parties to sell two jointly owned properties and equally divide community debt. Following entry of the decree, Husband paid the community obligations on the properties but thwarted efforts to sell the properties. He filed an enforcement action to recoup one-half of the payments and Wife countered with a contempt action based upon Husband's obstruction. Husband's reimbursement claim was denied and Wife's contempt action was granted. Husband appealed.

The Court of Appeals found that the trial court erred in denying Husband's reimbursement claim. The decree ordered each party to pay one-half of the obligations and Husband

subsequently paid those community debts, including Wife's share thereof. Here, Wife had not demonstrated that those payments made by Husband were gifted to her. For her to be successful on such a claim, she would have the burden of proof by clear and convincing evidence that a gift was made. See *Bobrow v Bobrow*, 241 Ariz. 592, 596 (App. 2017).

Principe v Principe, 1 CA-CV 21-0562 FC (June 7, 2022) (Memorandum)

While certain underlying acts may not be among the offenses defined to be domestic violence under 13-3601, the combination of the behaviors may support a finding of harassment, which is one of the proscribed crimes.

Parties were divorced in 2012 and have one minor child. In 2020, Mother secured an Order of Protection against Father, alleging among other things that Father harassed her by sending excessive messages via Our Family Wizard and that he had stalked her. She also claimed he used her name on a contract for liability for his new dog at a pet hospital. He also had the management company of the timeshare that was awarded to Mother change the contact information to his address. Father requested a hearing. The trial court found that Mother had not met her burden of proof on the harassment or stalking claims but had met the burden for harassment based on the two fraud-related claims. The court found Father's testimony to lack credibility. Father appealed.

While fraud is not among the listed offenses for an order of protection, harassment is. Here, the trial court concluded that the actions by Father were part of a pattern of harassment (ARS Section 13-2921). The Court of Appeals affirmed, noting that the record supported the trial court's conclusion.