

May 2018
STATE BAR OF ARIZONA, FAMILY LAW SECTION, EXECUTIVE COUNCIL
CASE LAW UPDATE

This update contains summaries of 9 memorandum decisions for cases decided in May 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).

MEMORANDUM DECISIONS

Lambert v. Sheets, 1 CA-CV 17-0103 FC (5/22/2018).

Retirement division; Deferred Retirement Option Plan (“DROP”). Vacated order awarding share of cumulative interest accumulated under DROP and remanded for consistent order.

Husband was eligible to retire from PSPRS, but decided to keep working. Though he was eligible to participate in DROP, he elected not to do so. In their Decree, the parties agreed to an equal division of Husband’s PSPRS, and cited *Koelsch*, but did not mention Husband’s DROP. The year after the Decree was entered, Wife sought a DRO, to which Husband objected because it mentioned his DROP. Husband argued that because Wife had “commenced receiving benefits at the earlier date, she would not be funding the DROP account and therefore, was not entitled to any portion of it.” The family court, however, found otherwise, concluding that Husband’s decision to participate in DROP would be the equivalent of him “depositing his entire PSPRS account into an interest bearing deferred compensation account” so “Wife would be entitled to calculate her 50% of the community interest to include interest earned in DROP.” Citing *Koelsch*, the family court held that “the interest earned in DROP constituted an increase due to the ‘intrinsic quality’ of the retirement plan in which Wife would be entitled to share.” The family court awarded Wife 50% of Husband’s PSPRS benefit and a pro rata share of any cumulative interest under DROP.

The dispositive question for the Court of Appeals is “whether Wife’s property interest in the PSPRS benefit will be used to generate the accumulated interest in Husband’s DROP account.” In holding that the family court erred by awarding Wife a share in the cumulative interest in his DROP, the Court of Appeals concluded that Husband is already compensating Wife for her interest in the PSPRS benefit pursuant to the terms of the Decree. Therefore, Wife’s property interest in Husband’s PSPRS benefit will not be used to accumulate interest in Husband’s DROP so she is not entitled to draw on the principal or the interest.

Wife’s argument that the cumulative interest in DROP is an after-discovered asset failed because it incorrectly presumes that the accumulated interest is community property. Citing *Koelsch*, the Court of Appeals reasoned that an increase in the value of a pension benefit is separate property if based on the employee spouse’s efforts after dissolution; it is community property if based on the inherent quality of the pension. Here, Husband would need to continue working after the divorce in order to participate in DROP, so his DROP is his separate property.

Burgoyne v. Smith, 1 CA-CV 17-0408 FC (5/17/2018).

Child Support Arrears. Affirmed family court's judgment for child support arrears.

Parties' consent decree required Father to pay Mother child support of \$842 per month for their two children and provided the standard termination provision. In May 2009, when the older child emancipated, Father owed \$1,679 in arrearages. Thereafter, Father made no payments for four months, after which he made a payment of \$5,063. In December 2009, Father began making sporadic payments of \$400, along with some larger payments in other months. The youngest child emancipated in May 2011, and Father made his last payment in August 2011, at which point he owed \$9,631.50 in arrearages. As of 2016, Father never petitioned to modify child support. That year, Mother petitioned to modify child support and to hold Father in contempt for non-payment. The family court entered judgment against Father for the \$9,631.50 in principal and almost \$7,000 in interest for payments through May 2011. Father appealed, arguing the modification should be retroactive to the date of the older child's emancipation and alternatively argued Mother was estopped from making a claim for arrears as she accepted reduced payments for four years.

The Court of Appeals affirmed the arrears judgment, citing A.R.S. § 25-327(A), which provides that a child support provision may not be modified as to any amount that accrued as an arrearage before the date of the motion or order to show cause to modify or terminate. The Court of Appeals held that although the older child's emancipation automatically terminated Father's duty to support the child, it did not automatically terminate his \$842 per month child support obligation, because the younger child remained unemancipated, and, per the Guidelines, a "child support order is not automatically reduced by an emancipated child's share, instead, a party must make a written request to modify child support before the child support obligation can be recalculated." It was Father's responsibility to have sought a modification of his court-ordered support obligation when the first child emancipated; because he failed to do so, he remained obligated to pay the \$842 per month. The Court of Appeals further reasoned that the family court has no authority to retroactively modify the amount of arrears that had already accrued.

As for Father's estoppel argument, the Court of Appeals disagreed with Father's argument that Mother's silent acceptance of his partial payments was sufficient conduct to form his estoppel defense, which requires clear and compelling evidence of the three elements of such a defense per *Ray v. Mangum* ("(1) conduct by which one induces another to believe in certain material facts, (2) the inducement results in acts in justifiable reliance thereon, and (3) the resulting acts cause injury"). Further, the Court of Appeals reasoned that "prior failure by a parent to make efforts to collect child support arrearages does not mandate a finding of estoppel," citing *Schnepf v. State*.

Baldere v. Stark, 1 CA-CV 17-0458 FC (5/17/2018).

Motion for New Trial/to Alter/Amend; Attorneys' Fees. Affirmed family court's orders denying motion for new trial/to alter/amend and attorneys' fees award.

Parties' decree incorporated stipulation regarding support wherein Husband agreed to pay Wife \$4,000 per month in modifiable spousal support for seven years and \$1,700 per month in child support. Parties informally agreed to reduce his child support obligation after entry of the Decree. Then, Husband petitioned to retroactively modify both support obligations to the date of the informal agreement, wanting to decrease his spousal maintenance to \$1,250, alleging his income

had decreased and parenting time increased, both due to changing jobs and moving from Peru to Arizona. He also argued his monthly expenses had increased due to remarrying. Mother argued Husband's income was based on his pre-Peru historical average income so there was no substantial and continuing change in circumstances warranting modification.

At trial, Husband's only evidence regarding his income was his AFI and estimated 2016 taxes. He conceded that at the time of the Decree, the parties knew his job in Peru was temporary, yielded a higher salary than his prior earnings, and his income would decrease once his job ended. The family court denied Husband's request for modification of spousal maintenance, but reduced his child support to \$305, and awarded Wife her attorneys' fees. Father moved for new trial or to alter or amend the judgment, arguing the family court failed to apply equitable doctrines of estoppel and/or waiver, which doctrines would have made him eligible to modify spousal maintenance and avoid child support arrears. He attached documents to his motion, which were never admitted into evidence at trial. The family court denied his motion, because the "rules do not permit a party to wait until after an adverse final order, and then present new evidence or arguments" and because his motion did not identify any ground for relief under Rule 83(A), and even if he did, he supported his arguments with unadmitted exhibits that existed at the time of trial, not newly discovered evidence. The family court also awarded Wife all of her attorneys' fees based on a disparity in financial resources and Husband's unreasonable positions. Husband appealed the denial, arguing waiver does not apply because he directly appealed the denial of a motion for new trial, and characterized his evidentiary omissions as a simple failure to use technical legal terms. Husband also appealed the family court's award to Wife of her attorneys' fees, arguing the family court should have only considered the parties' incomes after spousal maintenance was accounted for in both parties' incomes.

The Court of Appeals affirmed, partly because Husband did not raise the equitable defenses prior to the filing of his Rule 83 motion, that he had waived those issues on appeal. Regarding the family court's award to Wife of all of her attorneys' fees, the Court of Appeals found that even if the family court had accounted for spousal maintenance when determining the financial resources of the parties, Husband's income was still \$30,000 greater than Wife's. Further, the Court of Appeals found the family court did not abuse its discretion when finding Husband acted unreasonably, and the family court cited specific instances of Husband's unreasonableness, including his unreasonable settlement position, which was contrary to law.

Young v. Young, 1 CA-CV 17-0302-FC (5/17/2018).

Findings; Division of Property; Spousal Maintenance. Vacated family court's distribution of community's interest in retirement account and remanded for reconsideration thereof.

Family court stated on the record at trial that it did not find spousal maintenance was appropriate, but found Husband's counsel's suggestion (Wife showed up late to trial) that Husband's Thrift Savings Plan ("TSP") of more than \$300,000 should be divided via monthly payments to Wife of \$1,500 for seven years. In the Decree, however, the \$1,500 per month for 84 months was "as and for spousal maintenance" while all accrued benefits in Husband's TSP was awarded to Husband.

Wife appealed, arguing the court denied her an equitable share of community property by awarding all of Husband's TSP to Husband and erred in its award of spousal maintenance to equalize an

otherwise inequitable distribution of community property, given that she was entitled to at least \$157,850 of the TSP and the award only amounted to \$126,000. Husband argued the Decree mistakenly characterized the payments as spousal maintenance, but did not abuse its discretion in dividing the community property, given that it ordered him to pay substantial community debts.

The Court of Appeals found the Decree lacked the appropriate findings necessary to divide community property in the way the family court did here and erred in characterizing the payments as spousal maintenance since it made no findings -319 findings and stated on the record that it did not find spousal maintenance appropriate. The Court of Appeals further found the monthly payments were an unequal means of distributing Wife's one-half share of the TSP as they were taxable to Wife and she'd lose considerable value due to the passage of time over 84 months.

Brumley v. Brumley, 1 CA-CV 17-0498 FC (5/15/2018).

Domestic Violence; Legal Decision-Making; Parenting Time; Attorneys' Fees; Supervised Parenting Time Costs; Evaluator's Costs. Affirmed family court's orders granting joint legal decision-making, equal parenting time, award of attorneys' fees, and award of costs for supervised parenting time and psychological evaluation.

Mother obtained an Order of Protection ("OOP") against Father that included their child as a protected person and Father filed for divorce later that same month. Mother sought sole legal decision-making and indefinite supervised parenting time for Father due to a history of domestic violence ("DV"). At the contested OOP hearing, Mother alleged only incidents of verbal abuse and destruction of property that occurred prior to the birth of the parties' child. The family court upheld the OOP and Father did not have contact with the child for over a year. The family court appointed a Court-Appointed Advisor ("CAA"), who concluded that Father yells, verbally attacks, and throws and breaks things. The CAA recommended Father undergo a psychiatric evaluation ("IPE"). Due to Mother's allegation that Father had a history of alcohol abuse, the family court also ordered him to randomly alcohol test. The IPE recommended Father complete adjunct services, noted Father's negative alcohol test results, and was favorable to Father's parenting relationship with his sons not common to the marriage. As a result, the CAA recommended Father be reintroduced to the parties' child via supervised visits to transition to unsupervised.

After the OOP expired, the family court held a temporary orders hearing, found a history of DV existed, and ordered supervised weekly parenting time for Father with other adjunct services. Father completed all adjunct services prior to trial and began supervised parenting time. Neither his counselor nor his therapist recommended supervised parenting time continue. At trial, Mother admitted to throwing a bottle through a glass window, and to arguing, yelling, and fighting with Father and the parties' children from prior relationships. None of the reports of the multiple professionals involved indicated the parties' child was in danger around Father.

In considering whether the DV was "significant," the family court defined "significance" as "a product of three factors: (1) the seriousness of the particular incident of domestic violence, (2) the frequency or pervasiveness of the domestic violence, and (3) the passage of time and its impact." The family court found the DV was not significant, that Father had rebutted the presumption in -403.03(D), and Mother was unreasonable regarding her position on parenting time because she refused to even consider unsupervised parenting time despite the reports of the professionals

involved and Father's negative alcohol test results. Mother's allegations were also found to have expanded the length and cost of the litigation. The family court therefore awarded Father joint legal decision-making, unsupervised equal parenting time, a portion of his attorneys' fees, and half of the costs related to prior supervised parenting time, and all of the costs related to the IPE.

Mother appealed, arguing there was a plethora of evidence related to Father's DV, which the family court failed to consider because it did not specifically reference each piece of admitted evidence. Mother also argued the attorneys' fees and other costs awards were error because her trial position was not unreasonable as she had a duty to protect her children from DV. She further argued the costs awards were an extension of punishment in addition to the attorneys' fee award.

The Court of Appeals found the fact that the family court did not reference every single piece of evidence did not mean it failed to consider it, but instead, means the family court did not find certain evidence/testimony credible. Further, Mother offered no evidence at the OOP hearing or in any of the family court hearings that the parties' child was a victim of DV or in danger so her argument that she was reasonable in protecting the children from DV did not hold water. The Court of Appeals found the evidence was sufficient to uphold the family court's rulings, despite the contradictory evidence and the family court's findings were detailed. In reaching this conclusion, the Court of Appeals cited -403(A)(8), which requires the family court to consider whether there has been DV as defined by -403.03(C), and if it does so find, the court then must determine whether the DV itself was significant or the *history* of DV was significant, and if it finds either are significant, it shall not award joint legal decision-making to the offending parent. The Court of Appeals also cited -403.03(D), which is triggered when the family court does not find that the DV was significant and creates a rebuttable presumption that sole or joint legal decision-making to the offending parent is contrary to the child's best interests, but which may be rebutted by consideration of the factors in -403.03(E).

Caprio v. Tomson, 1 CA-CV 17-0396-FC (5/15/2018).

Continuances; Withdrawal of Counsel. Vacated orders allowing Husband's counsel to withdraw and denying trial continuance and remanded.

During the course of the dissolution action, Husband's counsel repeatedly failed to communicate with Wife's counsel, leading to a fee award in favor of Wife, and failed to appear at a scheduled deposition with Husband. The court threatened fees if counsel could not provide proof of an alleged scheduling conflict that he alleged caused the failure to appear, and admonished counsel for his repeated failures and notified him that it would be reporting him to the State Bar. One day before trial, Husband's counsel filed a combined motion to withdraw (without consent) and motion to continue. Counsel alleged Husband had terminated him.

At the time of trial, the court inquired whether Husband wished to terminate his counsel, and Husband stated "I have not terminated [my counsel] yet, but yes, Your Honor. I don't feel like he's been ethical with me[.]" The court granted the withdrawal and denied the motion to continue without further comment. Husband then read a statement to the court enumerating significant issues with his counsel, including counsel's alleged admission of mental illness. Husband then asserted his concern that counsel's "grossly inadequate representation" would unfairly influence the outcome of trial, and again asked for a continuance, which was again denied. Husband

repeatedly asserted his inability to proceed with his case during the trial, and generally ineffectively represented himself. The court entered a dissolution decree, found Husband had acted unreasonably during the litigation and awarded fees to Wife. Husband appealed.

In vacating the family court's orders, the Court of Appeals reasoned that although the family court has discretion to permit or deny motions to withdraw and for continuances, the family court abused its discretion both by granting the motion to withdraw and by denying the motion to continue. Rule 9 requires either signature of a substituting attorney or good cause to permit withdrawal after trial has been set. Counsel's motion lacked either requirement, and the client further indicated his objection to the withdrawal when questioned by the court. Furthermore, Rule 77(C)(1) requires a court to find "sufficient grounds and good cause" before granting a continuance after a matter is set for trial. The facts showed Husband demonstrated good cause, and there was no evidence indicating the motion was in bad faith or for purposes of delay. The situation with his counsel was "unique and serious" as previously recognized by the court. Therefore, the family court abused its discretion in granting the motion to withdraw and denying the continuance.

Lacy v. Lacy, 1 CA-CV 17-0437-FC (5/8/2018).

Spousal Maintenance; Attorneys' Fees. Affirmed denial of spousal maintenance, award of fees against Wife's counsel, and award of fees to Husband.

The parties entered into a Rule 69 interim agreement regarding spousal maintenance to Wife and awarding her interim possession of a trailer so that she could live in it. Wife and her counsel then failed to appear at a status conference and Wife's counsel failed to appear at trial and another status conference, prompting the court to file a petition for civil contempt against him. Wife proceeded to trial with new counsel. At trial, Wife's testimony as to her inability to work due to disability was contradicted by her daughter and her roommate. Her roommate also testified to selectively producing medical records that would support the spousal maintenance claim, and to planning for her to be unemployed during the litigation. Both witnesses also testified that Wife was not living in the trailer and Wife testified that she sold the trailer without permission of the court. The court issued findings and entered a decree finding Wife was ineligible for spousal maintenance and had acted in bad faith in selling the trailer. Wife was ordered to pay Husband's attorney's fees and costs. Wife's counsel failed to appear in court on four separate occasions and, after hearing on order to show cause, was found to have willfully violated two direct orders and to be in violation of Rule 92. The Court issued an arrest warrant against attorney and set bond payable to Husband in partial satisfaction of the fee award. Upon attorney's arrest, the bond was ordered held until further order of the court. Wife appealed.

The Court of Appeals held that because sufficient evidence existed to support the family court's determination that Wife was not credible in her spousal maintenance testimony, the court did not abuse its discretion in finding she was not entitled to an award. The Court of Appeals also found that sufficient evidence existed to support an award of attorneys' fees and costs. Finally, the Court of Appeals found that although the family court initially incorrectly relied upon Rule 92 to impose sanctions against Mother's counsel, it later clarified that the bond was not to be used to pay Husband's attorney's fees as a sanction against the attorney. An independent basis existed for the award of fees against Wife separate from her counsel's misconduct. Therefore, it was not an abuse of discretion to decline to order Wife's counsel to pay Husband's fees and costs as a sanction.

Wright v. Wright, 1 CA-CV 17-0505-FC (5/3/2018).

Relocation. Vacated relocation order and remanded for reconsideration of Mother's relocation petition, and to make specific findings as to all relevant factors.

The parties share joint decision-making and equal parenting time. Mother filed to relocate the children to obtain specialized treatment for the parties' special needs child, and because of availability of an extended support network. The court denied Mother's petition and Mother appealed alleging : "(1) failing to consider that Father's treatment plan for B.W. offers a lesser-quality standard of care and contemplates travel to Phoenix that is contraindicated by his condition and the paucity of emergency medical services en route, and (2) placing undue emphasis upon Father's relationship with the Children."

The Court of Appeals reiterated "In determining best interests, the court is required to consider "all relevant factors," including eighteen specific factors enumerated within A.R.S. §§ 25-403(A) and -408(I)" and that the court must make specific findings of fact with regard to each factor. The family court's ruling "explained in a thoughtful manner the reasons why it believed relocation was not in the best interests of the Children, but its ruling does not reflect any findings regarding, or specific consideration of, the mandatory statutory factors." Therefore, the order was vacated and case remanded for reconsideration and the court directed to make findings as to all relevant factors.

Spoonmore v. Spoonmore, 1 CA-CV 17-0598-FC (5/1/2018).

Default Judgments. Affirmed, upholding the family court's denial of motion for new trial or to set aside default decree.

Appellant/Husband appealed the family court's denial of his motion for a new trial and, in the alternative, to set aside the default decree, arguing that he was denied due process. Using a *de novo* review standard, the Court of Appeals found that due process was complied with, as Appellant/Husband had been given notice several times that if he did not comply with the court's pre-trial orders or appear at scheduled hearings, the family court would proceed by default.