AUGUST 2022 CASE LAW UPDATE

OPINIONS

PARENTING RELATED DECISIONS

Hustrulid v Stakebake, 1 CA-CV 21-0073 FC (August 4, 2022)

ARS Section 25-409(A) does not allow a third party to seek an award of joint legal decision-making with a legal parent. If a petition under 25-409(A) is not summarily dismissed, the elements under the statute must still be proven at trial.

This case came before the Court of Appeals by virtue of an appeal filed by Hustrulid after his third-party rights petition was dismissed by the trial court. The Court of Appeals lacked jurisdiction to hear the appeal and elected to treat it as a special action.

Hustrulid and Mears had two children. Their parental rights were terminated and, in 2019, Hustrulid's sister, Nicole Stakebake ("Mother") adopted the children. Hustrulid had limited contact with the children while in prison but claims that, once released, he had seen them regularly until Mother cut of all contact in 2020. He petitioned for third-party joint legal decision-making and placement of the children with him (25-409A) or third-party visitation (25-409C). Mother moved to dismiss, which was granted. Hustrulid appealed.

The Court of Appeals first focused on the impact of terminating a parent's rights. They reasoned that once parental rights are terminated, it would seem contrary to ARS Section 8-117 and 8-539 (which divest a parent of all rights) to then turn around and allow that former parent to seek third-party rights under 25-409. That said, a review of 25-409 does not include any preclusion for a former legal parent to seek third-party rights. Had the legislature intended to preclude former parents like Hustrulid from seeking third-party rights after his parental rights were terminated, it would have done so in 25-409. Therefore, Hustrulid was not barred from bringing the action.

Addressing the merits of Hustrulid's claim, the Court of Appeals reaffirmed the reasoning in *Thomas v Thomas*, 203 Ariz. 34, 37 (App. 2002), which held that a court cannot award joint custody (legal decision-making) between a parent and a third party because the nature of a third-party "custody" award is based upon the notion that awarding "custody" to either parent would not be in a child's best interests. Applied to this matter, if Mother was a fit parent, then there would be no basis to award a third party any decision-making rights under 25-409(A). "Either it is in the child's best interest for a legal parent to have custody

or it is not. The Court cannot reasonably find that it is in the child's best interest for a legal parent to have custody and that it is also in the child's best interest for a non-legal parent to have custody." *Thomas*. Further, the Court of Appeals found that the same logic applies to the "significant detriment" element of 25-409(A)(2). A third party cannot allege a significant detriment to a child if the child remains with a legal parent while also seeking to be awarded joint legal decision-making with that legal parent.

There is one more issue of note that was addressed. A petition under 25-409(A) is subject to an initial review by the trial court. The Court must determine whether the allegations in the petition, if true, establish the elements that a petitioning party must prove in order to seek third-party rights. If it does not, then the petition must be summarily denied. But the question raised is: what is the impact of finding that the petition, if true, establishes the 25-409(A) elements? In answering this question, the Court of Appeals addressed another decision – *Chapman v Hopkins*, 243 Ariz. 236 (App. 2017) – and some confusion that may have arisen therefrom. To ensure that there was not a misapplication of *Chapman*, the Court of Appeals made it clear that an initial finding that a petition passes the first review required under 25-409(A) does NOT mean that any of those elements are deemed established for the contested hearing. Rather, after the trial court hears the evidence, it "then must decide whether the petitioner has proved the 25-409(A) elements." The petitioning party cannot rely upon the fact that the trial court did not summarily deny the petition at the start as somehow being a finding that all of the elements under 25-409(A) have been established.

Link to
Opinion: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV%2021-0073%20FC%20Hustrulid%20v.%20Stakebake%20OP.pdf

CHILD SUPPORT

Brucklier v. Brucklier, 1 CA-CV 21-0106 FC (August 25, 2022)

Reimbursement Claims for Over- or Under-Payment of Temporary Child Support Should be Addressed at Time of Decree.
[this case is also addressed in the property section]

During the divorce proceedings, the court entered temporary child support orders. At trial, the court entered the final child support award, and it was made retroactive to the date of filing of the petition. This resulted in a few months of underpayment by Father and many more months of overpayment, netting an overall overpayment of about $2,400. Father asked the trial court for an offset for the overpayment and his claim was rejected, with the

trial court reasoning that it could not address any alleged overpayment until the support obligation terminated when the child reached majority.

The Court of Appeals provided clear delineation on this issue. It is accurate that overpayment credits cannot be addressed until the support order terminates by operation of law, such as attaining the age of majority, the same is not true for temporary support orders. When the court enters temporary child support pending entry of the decree, any claim for over or under payment arising from the temporary orders must be accounted for at the time of entry of the decree. ARS Section 25-315(F)(1) supports this, noting that the temporary order does not prejudice the rights of a party to later adjudicate the child support amount at subsequent hearings. The trial court should have accounted for Father's overpayment of temporary support at the time of the decree.

Link to Opinion: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0106%20FC.pdf

PROPERTY AND DEBT

Brucklier v. Brucklier, 1 CA-CV 21-0106 FC (August 25, 2022)

Acquisition of an equitable (but not legal) interest in property before marriage maintains the sole and separate nature of the property.

The failure to file taxes in the best net fashion for the community does not result in assigning all of the excess tax to the party who decided to file in that fashion. [this case is also addressed in the child support section]

Father was the sole member of an LLC that invested in real estate. He entered into a contract to purchase a residential investment property ("Falcon Ridge") before the marriage but did not acquire title in the name of the LLC that he owned before marriage until after the date of marriage in 2005. In 2018, Mother filed for divorce. At trial, the court found that community funds had been commingled into separate funds of the LLC account and found that all of the assets of the LLC, including the Falcon Ridge property, were community. The property was ordered to be sold and proceeds divided between parties subject to some offsets. Father appealed.

The Court of Appeals held that the LLC was formed before marriage, thereby rendering it Father's sole and separate property. Further, Father entered into the purchase agreement for Falcon Ridge before the date of marriage and paid $50,000 in earnest money from sole and separate funds. Father then paid for much of the purchase price from the sale of two other properties the LLC owned before the marriage, along with taking out a loan in his name only. From this, the Court of Appeals concluded that the LLC and the Falcon Ridge

property were Father's sole and separate property. When he contracted for and paid the $50,000 earnest money before the date of marriage, the Court of Appeals concluded that Father had obtained an equitable interest in Falcon Ridge. The fact that his "equitable interest did not mature into a title to Falcon Ridge until after the marriage does not alter that he acquired the property before marriage," thereby rendering the property to be his sole and separate property. Any claim that the community may have therein would be through an equitable lien, not as a property owner. The extent of any community lien was remanded back to the trial court for determination.

There is also a tax issue addressed in this opinion. Father filed a separate income tax return for 2017. Mother asserted and the trial court found that this decision caused there to be a greater tax liability than there would have been had the parties filed jointly. As such, Father's request to be reimbursed for the excess taxes he paid was denied by the trial court. The Court of Appeals found this to be error, noting that the allocation of debts must be equitable and "without regard to marital misconduct." Here, the trial court acted in a punitive fashion for the fact that Father decided to file his returns in a more costly fashion. The Court of Appeals concluded that the trial court did not have the authority to do this.

Link to Opinion: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0106%20FC.pdf

MEMORANDUMS

PARENTING RELATED DECISIONS

Haarer v Haarer, 1 CA-CV 22-0015 FC (August 2, 2022)

Relocation determination will not be reversed if supported by findings.

The parties have one child, born in 2011. They were divorced in 2017 and were awarded joint legal decision-making (LDM) and equal parenting time. In 2020, post-decree litigation was initiated by each party. Father alleged mental health and DV claims against Mother. After hearing, the court modified the prior order, awarding sole LDM to Father and supervised parenting time for Mother, but denied Father's request to relocate with the child to Michigan. In 2021, Father filed another relocation petition and, after hearing, the Court granted Father's request to relocate with the child. Mother appealed.

The Court of Appeals affirmed, noting that relocation cases are fact-intensive and that significant deference is owed to the trial court decision when the trial court makes detailed findings, including as to all of the factors set forth in 25-408(I) and 25-403(A).

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV22-0015FC%20-%20Haarer.pdf

Bennie v Johnson, 1 CA-CV 22-0026 FC (August 2, 2022)

An endangerment finding is not required for an award of sole legal decision-making but is required when significantly limiting parenting time for one parent. When restricting parenting time, the trial court may, but need not, create a "reunification" plan to lift those restrictions.

Parties were never married and had one child in common, born in 2014. In 2016, they stipulated to an order for joint legal decision-making (LDM) and equal parenting time. One year later, Father was arrested after shooting a gun at another vehicle's occupant. He pled guilty to a Class 6 felony and placed on probation, which he violated about a year later. Mother petitioned for modification, citing Father's substance abuse issues. Father defended himself by maintaining that he was participating in drug treatment and anger management programs. Despite concerns, the trial court found that if Father continued in his drug treatment and testing, the concerns would be mitigated. Over the subsequent 17 months, Father failed to appear for testing. Then, in early 2021, he was again arrested, this time for threatening his mother with a handgun while the parties' child was in the care of Father. The next morning, Mother arrived at paternal grandmother's house to pick up the child and an argument ensued. Mother petitioned for modification and, after a hearing, the court awarded Mother with sole LDM and Father was relegated to two hours of supervised parenting time per week. Father appealed.

The Court of Appeals affirmed. Among the basis for the decision was that the trial court had made detailed findings under 25-403(A), 25-403.03 (DV statute) and 25-403.04 (substance abuse statute). In addition, there is no legal requirement that the trial court find endangerment before the court may award sole LDM to a parent. In limiting Father's parenting time, the trial court did make specific findings that substantial parenting time to Father would endanger the child, as is required under 25-403.01(D). Additionally, Father alleged that the trial court failed to place a time limit on his restricted access to the child, enter a reunification plan or create a process for periodic review. In denying this claim, the Court of Appeals pointed out that 25-403.02(C) does not require a time limit for restrictions on parenting time or detailing a reunification plan. Rather, the trial court has discretion to do so if it would serve the child's best interests.

Lin to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV22-0026%20FC%20Bennie%20v.%20Johnson.pdf

SPOUSAL MAINTENANCE

Harris v Behnke, 1 CA-CV 21-0459 FC (August 11, 2022)

Establishment of a change in circumstances for child support modification purposes does not then require the court to find changed circumstances for spousal maintenance modification.

At the time of the divorce, Father owned a landscaping business. The parties had 10 minor children. After the 25-year marriage, the trial court awarded Mother $2,000 per month for spousal maintenance. As for the children and based upon the parenting time arrangements, Father could have been awarded approximately $400 per month under the Guidelines. But the trial court ordered that neither party would pay child support to the other. Over the months that followed, Father did not pay his spousal maintenance. Mother brought an enforcement action and Father filed for modification, citing the pandemic as having caused him to suffer significant financial losses. After a hearing, the court awarded Father child support of over $600 per month but declined to reduce the spousal maintenance award. Father appealed.

One argument raised by Father on appeal was that if the trial court found changed circumstances to modify child support, then changed circumstances must have also existed to modify the spousal maintenance award. The Court of Appeals disagreed, noting that child support and spousal maintenance are "considered under different laws" and "involve distinct considerations." *Birnstihl v Birnstihl*, 243 Ariz. 588, 593 (App. 2018).

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV21-0459%20-%20Harris%20v.%20Behnke%20-%20FINAL.pdf

Wilson v Noriega, 1 CA-CV 21-0048 FC and 1 CA-CV 21-0449 FC (August 16, 2022)

Court cannot use installment payments that are for property equalization as a stream of income for determining spousal maintenance

During marriage, the parties operated a masonry building, each being paid about $6,500 per month, with the business also paying may living expenses. Business was valued at over $1,000,000 and after some offsets, the court ordered husband to pay to wife over

$463,000 in installments of $8,000 per month. For the marital home, Husband paid to Wife $275,000 for her interest. Wife was awarded $1,000 per month in spousal maintenance rather than the $5,800 she sought. The lower award took into account Wife's earning ability of about $3,500 per month together with $700,000 of assets that included an income stream of $8,000 per month for the next 5 years. Wife appealed.

The appellate court found that the trial court had erred in treating the $8,000 paid by Husband to Wife for her interest in the business as a stream of income. It was, in fact, property that was awarded to her for her share of the value of the business. Given that she should not have to live off of the principle of an asset awarded to her, it was error to characterize those payments as an income stream. Perhaps income that she could generate off of the $8,000 could be applied against a spousal maintenance award, but she should not have to live of the principal payments that Husband was making in monthly installments. See *Deatherage v Deatherage*, 140 Ariz. 317, 320 (app. 1984). The Court of Appeals vacated the spousal maintenance award and remanded for further consideration.

Wife also asserted that there was error in allowing Husband to pay off Wife's interest in the business over a five-year period at $8,000 per month. She wanted a lump sum. The Court of Appeals found that since Wife was awarded her equal share, the allocation and payment was not inequitable.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CR21-0048FC%20-%20Wilson.pdf

Barnett v Barnett, 1 CA-CV 21-0714 (August 18, 2022)

Waiver of Spousal Maintenance in a Prenuptial Agreement is Enforceable. [This case is also addressed in the property section]

Parties entered into a prenuptial agreement before getting married in 2012. Contained within the agreement was a provision that waived spousal maintenance. In 2019, Husband filed for divorce and sought enforcement of the prenup. As for that provision, Wife testified at trial that she was new to the US at the time of marriage and was told that it was a "standard procedure" to waive spousal maintenance. Following trial, the court went beyond the prenup and awarded Wife $5,000 per month of spousal maintenance for a five-year term. Husband appealed.

The issue on appeal is determined in accordance with the Premarital Agreement Act, 25-201 et seq. Since the agreement was in writing and signed by both parties, Wife had the burden of proving that it was unconscionable or not voluntary. Toward that issue, the Court of Appeals rejected Wife's claim that she did not understand the agreement, that her

attorney did not properly explain the agreement to her, and that she signed it without asking questions. It was found that she had the opportunity to review the agreement with her lawyer and make inquiries. Her failure to do so did not render the agreement involuntary. Further, even though Wife may have been required to seek public assistance without the award of spousal maintenance (25-202 D), the $5,000 per month award "was not tied to the amount necessary to prevent Wife's eligibility for public assistance." **Note:** It appears from this that the trial court could have awarded an amount for spousal maintenance, despite the waiver provision, so long as the amount awarded was at a level needed to avoid public assistance.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0714%20FC%20Barnett.pdf

PROPERTY AND DEBTS

Wheeler v Dexter, 1 CA-CV 21-0451 FC (August 9, 2022)

In awarding assets, the trial court must address and account for the value, if any, in the division of the property.

The parties purchased a house in Cottonwood in joint name. They used Dexter's VA loan for the purchase. Soon after, they separated. At the divorce trial, Dexter testified that once Wheeler moved out shortly after the purchase, she made no payments on the mortgage and had paid only $1,000 toward the purchase. This was not materially disputed by Wheeler. At the time of trial, the balance due on the mortgage for the residence was approximately $345,000. There was no evidence presented as to value, other than testimony from Wheeler that another home similar to this one was worth about $390,000. The trial court awarded the residence to Dexter and ordered her to refinance the mortgage to remove Wheeler's name. No value was set on the residence and there was no division of any equity. Wheeler appealed.

The Court of Appeals pointed out that despite the minimal evidence presented, there was at least some indication that there was equity in the home. While the trial court could have found that there was no equity at the time of trial, it had not addressed the issue at all. Further, the fact that the parties lived separate and apart for some time **before either filed for divorce** did not serve to overcome the presumption that Wheeler's earnings during that period of separation used to pay the mortgage were community in nature. Wheeler may have had a *Bobrow* claim for sole and separate money she used to make payments for the home **after termination of the community.** The Court of Appeals remanded the issue, directing that the trial court set a valuation date, consider any separate contributions to the community asset, consider the appropriateness of an unequal division of whatever equity

existed, or explain how Dexter's share of the equity is accounted for in the overall asset division.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0451%20FC.pdf

Barnett v Barnett, 1 CA-CV 21-0714 (August 18, 2022)

A Pretrial Agreement as to Property Division is binding upon Court, subject to ARS Section 25-317(B).
[This case is also addressed in the spousal maintenance section]

During the marriage, the parties owned and operated a restaurant. In pleadings submitted before trial, the parties agreed that the business was to be sold, although they materially disagreed about the profitability of the business. Despite this pretrial agreement, the court awarded the business to Husband and ordered him to pay an equalization payment. Husband appealed.

The Court of Appeals held that the pretrial agreement constituted a financial settlement agreement, the enforceability of which was controlled by 25-317(B). The agreement was signed by counsel in the pleadings and was binding upon the court unless the terms were unfair. The trial court did not find it to be unfair and likely could not have fully addressed its fairness given the lack of record as to value. The Court of Appeals vacated the award of the restaurant to Husband and equalization payment to Wife and remanded the issue of whether the agreement to sell the restaurant was unfair.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0714%20FC%20Barnett.pdf

Budziskewski v Budziskewski, 1 CA-CV 21-0540 FC (August 25, 2022)

The amount of a sanction against a party that is not tied to the equitable division must be proportionate to the violation and supported by evidence.
[this case is also addressed in the procedural matters section]

Parties were married in 1986, each of whom had children from prior relationships. In 2018, Husband began living in an assisted care facility due to memory issues. One month later, Wife filed for divorce and submitted a Consent Decree and Marital Settlement Agreement signed by both parties. The terms awarded two properties to Wife along with a myriad of other provisions. Shortly after the decree was entered in early 2019, Wife contacted one

of Husband's children, noting that the children must now assume the responsibility of care for their father. No mention was made to the divorce. Husband's daughter then took over and learned about the decree. As his guardian and conservator, the daughter moved to have the decree set aside as it was unfair, was procured by fraud and misrepresentation, and void because of Husband's incompetence. It then gets far more complicated from there, including the filing of a separate civil action for alleged violations of the Adult Protective Services Act, case consolidations, default for Wife's failure to appear, and joinder of Wife's children and grandchild, to whom property was transferred. The trial court awarded judgments to Husband for both the property division and the civil claims. There was also a $50,000 punitive award to Husband based upon Wife's "concealment of community property, for violation of the preliminary injunction, and for excessive and abnormal expenditures." As for property transferred to third parties, the court found those to be fraudulent conveyances but that the judgments were only binding on Husband and Wife since the joined parties had not yet had the opportunity to be heard. Wife and the joined parties appealed.

As for the awards made to Husband, the Court of Appeals found that the amounts awarded were supported by evidence. The Court of Appeals rejected the $50,000 punitive award entered against Wife. It was held that "notwithstanding the great degree of discretion afforded the court in imposing that penalty—the basis for imposition of such a substantial penalty warranted much clearer findings and explanation than what was stated. This, we conclude the court's proffered rationale for the $50,000 judgment is inadequate to support that sanction and otherwise inconsistent with the statutes governing dissolution proceedings." Here, the amount of the judgment was found to be "disproportionate to the violation" and it was vacated and remanded for further proceedings.

As of the joined third parties, the Court of Appeals held that once they were joined as parties, they had the right to be heard and were not given that opportunity to participate in the evidentiary hearing. The orders of the court could have addressed the issues between Husband and Wife but could not authorize collection by Husband against the joined parties.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0540%20FC%20Budziszewski%20v.%20Budziszewski.pdf

Procedural Matters

Rahimian v Rahimian, 1 CA-CV 21-0640 (August 4, 2022)

The trial court cannot, on its own, address issues that were not before it under a pending petition

The parties were divorced in 2013. Father was ordered to pay child support. Not long thereafter, Mother decided to attend nursing school and the children lived full-time with Father. He stopped paying child support. There was serial litigation thereafter regarding Mother's parenting time, but she exercised virtually none of the time. In 2019, Father filed to modify the parenting orders and child support. The trial court then ordered Mother to pay $961 per month. Some months later, Mother filed an enforcement action to recover past support arising from the 2013 decree and Father sought enforcement of the new child support order. After a hearing, the trial court denied Mother's claim but modified the $961 child support obligation of Mother down to zero. Father filed for Rule 83 relief, arguing that Mother had not filed a petition to modify the child support award. The motion was denied, with the trial court finding that other conduct by Father since the 2019 order constituted changed circumstances. Father appealed.

The Court of Appeals pointed out that there are two circumstances where this trial court could have modified the child support award: First, upon the filing of a petition to modify and a finding of changed circumstances. Second, without a petition to modify child support, if the court modifies parenting time, then the court may address whether to modify child support. Neither of those circumstances existed here. The trial court could not modify the child support, *sua sponte*, without first affording the impacted parent their due process rights to have notice and be heard. The modified child support order was therefore vacated.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0640%20FC.pdf

Budziskewski v Budziskewski, 1 CA-CV 21-0540 FC (August 25, 2022)

A failure to appear at a properly noticed hearing does not trigger default provisions under Rule 44

[this case is also addressed in the property section]

The pertinent facts to this case are summarized as under the property division analysis of this decision. For this summary, the important fact is that Wife failed to appear for a properly noticed hearing. The trial court elected to proceed in the absence of Wife. She appealed (on other grounds as well), claiming that her failure to appear should have triggered Rule 44 provisions.

One issue on appeal was that Wife argued that she was defaulted when orders were entered in her absence because she did not appear at a noticed hearing. She relied upon Rule 44 and claimed that the court did not follow the default procedure. This was summarily rejected by the Court of Appeals, noting that the court choosing to proceed when Wife

failed to appear was not a default under Rule 44, it was a sanction under Rule 76.2. Rule 44 is reserved for parties who do not respond to a petition and did not apply here.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0540%20FC%20Budziszewski%20v.%20Budziszewski.pdf