JULY 2022 CASE LAW UPDATE

OPINIONS

J.F. v Como, 1 CA-SA 21-0123 (July 12, 2022)

When there is a conflict between statutory privilege and determining a child's best interests, protection of the child is paramount but with safeguards for the sanctity of the privilege.

Facts: After 7 years of marriage and 3 children, Mother filed for divorce. Both parents sought legal decision-making and parenting time. As part of temporary orders proceedings, it was established that Father had an alcohol-use disorder. Mother asked Father to execute a release for his counseling and alcohol rehab records. He refused, citing privilege under state and federal law. Mother sought restrictions on Father's parenting time.

Following a hearing, the court ordered temporary joint legal decision-making with the children residing primarily with Mother. Father's parenting time was unsupervised and conditioned on him submitting to alcohol testing and continued therapy. A few months later, Father sought an order to increase his parenting time to equal, claiming that he had established an additional four months of sobriety. Yet he continued to refuse having his records released. Another hearing was conducted and the court increased Father's parenting time but also ordered that his counseling records be released. Father filed this Special Action.

Discussion: In the Special Action, Father cited ARS Section 32-2085(A) and asserted that he had never waived the associated privileges. In addressing this issue, the Court of Appeals focused on the mandate that the trial court assess the best interests of the children and that ARS Section 25-403(A)(5) requires the court to consider the mental and physical health of the parties. In addition, the Court of Appeals pointed out that the legislature recognized an adverse presumption that could be made against a parent who abused drugs or alcohol within the prior 12 months. ARS Section 25-403.04(A).

The Court of Appeals noted that a statutory privilege may be waived in writing or through in-court testimony. It may also be waived implicitly by "pursuing a course of conduct inconsistent with the observance of the privilege." *Bain v Superior Court*, 148. Ariz. 331, 334 (1986). This is particularly the case when a party places a specific medical condition at issue as part of a claim or defense. There is even a lesser required showing of implicit waiver when the court is serving as the gatekeeper by first requiring an *in camera* review of the record. Such a review represents "a smaller intrusion" on privacy interests. See *US v Zolin*, 491 U.S. 554, 572 (1989).

Holding: The Court of Appeals recognized the "tension between Arizona child custody laws, which hinge on a child's best interest, and a parent's privacy interest" under a statutory privilege. In doing so, the Court of Appeals stated definitively "when a parent's privacy interest squarely

conflicts with a child's best interest, the child wins." Here, the Court of Appeals found there to be an implied waiver by Father for not only seeking legal decision-making, but also "affirmatively seeking unsupervised parenting time and then a reduced alcohol testing requirement…" Father "wielded" his treatment path as "affirmative evidence to prove that he presents no danger to the children. Having brandished that sword, Father cannot turn around and hide behind the privilege, depriving the court of material it reasonably concluded was necessary to protect the children's safety and welfare."

However, the Court of Appeals stressed "…that courts must narrowly craft their disclosure order to minimize the intrusion on a patient's privacy interests." It is suggested that an *in camera* review is one method to balance these competing interests.

Munguia v Ornelas, 1 CA-CV 21-0620 FC (July 26, 2022)

When the child's given name is contested between the parents, best interest analysis applies

Facts: Mother and Father were never married and had 2 children. By the time their second child was born in April, 2021, they were no longer in a relationship. Immediately after giving birth, Mother named the child *Legend Messiah Ornelas*. Father filed a paternity action and, among other relief, asked that the child's first name be *Angel* (which by Father's family's tradition is the name given to all first-born sons). Mother objected. The trial court ordered that the child's name be *Angel Legend Messiah Munguia Ornelas*. Mother appealed.

Discussion: The standard for review by the Court of Appeals was abuse of discretion and it affirmed the trial court. Therefore, this case does not stand for favoring the granting or denying of a name change under these circumstances. Rather, it addresses what the trial court should consider. In that regard, the Court of Appeals noted that the same consideration applies for addressing a child's first name as applies to a contested surname. Citing *Pizziconi v Yarbrough*, 177 Ariz. 422 (App. 1993), the best interest factors include: "the child's preference; the effect of the change on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; the motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity."

Huey v Huey, 1 CA-CV 20-0547 FC (July 26, 2022)

Indefinite award should not be based upon future uncertainty as to financial self-sufficiency as it places the future burden of proof on the party who is in a lesser position to prove changed circumstances

Facts: The parties married in 2006. They had two children. Wife earned $90,000 per year as a manager as recently as 2015, but was currently unemployed due to Major Depressive Disorder and anxiety, allegedly caused by Husband's treatment of her. Wife filed for legal separation in 2018, which was thereafter converted to a divorce. The trial court found that Wife was eligible for spousal maintenance and awarded her $2500 per month for an indefinite duration on the basis of her mental health condition. There was no evidence that Wife's mental health condition was permanent, but the evidence was that the duration was uncertain.

Holding: An indefinite term of spousal maintenance is inappropriate where the disabling disorder is not permanent.

Discussion: The court acknowledges that spousal maintenance, whether term or indefinite, is modifiable. Under an indefinite order, the burden falls on the payor spouse to demonstrate a significant and continuing change of circumstances. "[i]t would place Father in the untenable position of having to decide whether to challenge Mother's subsequent mental health condition without ready access to mental health records and with a relatively limited basis from which to assess a change in circumstances." The court noted that placing the burden on Husband would also create a likelihood for multiple challenges whenever Husband perceived changes in Wife's mental health condition.

In contrast, a fixed term places the burden on the receiving spouse to show a change in circumstances warranting extending the award beyond the fixed term. The court notes that here the cause of Mother's mental health condition was arguable the relationship with Father. "Thus, after the court imposes a fixed-term award on remand, the subsequent burden properly falls on Mother to demonstrate circumstances showing why a transition toward financial independence should be further delayed to justify future modification." The appellate court noted in footnote that the "superior court on remand should include an express statement to that effect to ensure the records remains clear that Mother may establish a future change in circumstances justifying extension of the award by showing that her condition has not resolved."

Community obligations paid with sole and separate funds after termination of the community may be subject to a reimbursement claim

While the *Huey* case focuses primarily on a challenge to an indefinite award of spousal maintenance, it also addressed reimbursement claims made by Husband for community obligations he paid after the community terminated and while the case was pending. In *Bobrow*, the Court held that post-petition payments made by one spouse using sole and separate funds to satisfy community obligation are not presumed to be a gift to the community and could give rise to a reimbursement claim. *Bobrow v Bobrow*, 241 Ariz. 592 (App. 2017). Here, the parties entered temporary orders requiring Husband to pay a number of community property obligations and pay additional spousal maintenance to Wife. At trial, Wife asked for additional retroactive spousal maintenance. See *Barron v. Barron,* 246 Ariz. 580 (App. 2018). Husband responded by requesting reimbursement for the expenses he paid under temporary orders and

an additional $10,000 he paid towards community tax obligations, which were not included in the temporary orders obligation. The trial court awarded Wife additional retroactive maintenance but denied Husband's request for reimbursement. The Court of Appeals found that the expenses addressed at temporary orders were properly considered in the trial court's discussion of retroactive spousal maintenance. However, the appellate court found that the $10,000 tax debt exceeded temporary orders and was not properly considered by the trial court: "[T]he superior court here did not explain why Father's payment of this community expense should not be reimbursed (at least to some degree) or how it was otherwise accounted for in the property division. Accordingly, we vacate the implicit denial of reimbursement as to 2018 tax payments and remand for the court to address this issue."

MEMORANDUMS

Peralta v Murray, 1 CA-CV 21-0708 (July 12, 2022) (Memorandum)

Limitations on a parent's rights that are inconsistent with Arizona's public policy under 25-103 will be upheld when there is a proper analysis and supportive findings.

The trial court had properly considered best interests in the context of Arizona's public policy in favor of the involvement of parents under 25-103, and that the trial court had made detailed findings.

Picard v Marshall, 1 CA-CV 22-0059 FC (July 19, 2022) (Memorandum)

The failure to meet prior court-ordered conditions on future parenting rights cannot bar a party from seeking modification

The Court of Appeals concluded that whether Father met previously-imposed conditions was irrelevant. The reasoning is that there is a two-step process for modification actions: (1) Has there been a change in circumstances? and (2) What would be in the children's best interests? It didn't matter whether the prior conditions had been met because a "previous court order cannot create time frames and conditions that conflict with the statutory ability of a party to petition for modification. See A.R.S. § 25-411; *Vera v. Rogers*, 246 Ariz. 30, 35, ¶ 20 (App. 2018). Once a court determines that there has been a material change from a previous order, it must evaluate the child's best interests on the current record." To do otherwise denies a party access to the courts.

Russ v Tognetti, 1 CA-CV 21-0563 FC (July 26, 2022) (Memorandum)

A challenge to an acknowledgment of paternity can be barred if untimely

The Court of Appeals found that Mother was 6 years too late in challenging paternity. The appellate court reasoned: parties may establish paternity by a signed acknowledgment (ARS 25-812(A)(1)); an acknowledgment has the same effect as a judgment (ARS 25-812(D)); it may be rescinded within 60 days (ARS 25-812(H)(1)); and it may thereafter be challenged only if there is fraud, duress or mistake of a material fact (ARS 25-812(E)). Since Mother did not make that challenge within 6 months, Rule 85 bars her from bringing that claim 6 years later.

Huey v Huey, 1 CA-CV 20-0547 FC (July 26, 2022) (Memorandum Decision)

In awarding sole legal decision-making, there is no requirement that the court find that the parent not awarded legal decision-making is unfit.

(see also the separate published opinion that addresses spousal maintenance and property-related issues)

The trial court awarded Mother sole legal decision-making authority. Father appealed, arguing that there was no showing that he was unfit and therefore no basis to deny him joint legal decision-making authority. The Court of Appeals rejected Father's argument, noting that the law does not include any such threshold. An award of sole legal-decision making does not first require a showing of unfitness. Rather, the determination is controlled by best interests and the court is required to address and weigh the factors under 25-403(A) in deciding the issue.

A second issue addressed in this case relates to whether the court is bound by the parameters set by the parties in their respective positions. Here, the trial court granted Father less parenting time than Mother offered in her position. The Court of Appeals held that the trial court is required to "adopt a parenting time plan consistent with the child's best interests" and is therefore not limited to the positions taken by the parties.

McDougall v McDougall, 1 CA-CV 21-0752 FC (July 19, 2022) (Memorandum)

Tracing to demonstrate that funds are sole and separate property is required only when there is evidence of commingling.

The process for addressing claims of community versus separate property is as follows: (1) all property accumulated during the marriage is presumed to be community property; (2) the party claiming that the property was sole and separate has the burden of proving that the property is sole and separate by clear and convincing evidence; and, (3) when there is commingling of community and separate funds, the party maintaining that the funds are separate has the obligation to demonstrate the sole and separate portion through tracing. See *Cooper v Cooper*, 130 Ariz. 257, 259-60 (1981). HOWEVER, that burden arises ONLY when there is evidence of commingling. Here, there was no such evidence. Rather, the accounts in question were covered

under the prenuptial agreement and even Wife's expert acknowledged that the funds in the subject accounts were "walled-off" from other funds.

Miller v Miller, 1 CA-CV 21-0611 FC (July 21, 2022) (Memorandum)

Justified self-defense is not DV for the purposes of an Order of Protection

ARS Section 13-3601(B) provides that self-defense, when justified, is not an act of domestic violence. The trial court should first have determined whether there was a trespass by the adult daughter and, if so, should determine whether Father's actions were justified as self-defense under 13-407. The case was remanded for further proceedings.

Harms v Harms, 1 CA-CV 21-0348 FC (July 19, 2022) (Memorandum)

A party need only establish a sufficient disparity in financial resources to be entitled to an award of fees, not that the party seeking the award is without resources.

For the most part, the Court of Appeals decision is based upon there being a sufficient record to support the award and the exercise of discretion. But within the decision, we are reminded that for a party to qualify for consideration of an attorney fee award, "…a spouse must establish only some level of financial disparity, *i.e*., that he or she is financially *poorer* than the other spouse, not that he or she is actually *poor*." Citing *Magee v Magee*, 206 Ariz. 589, 591 (App. 2004).

Shields v Ogden-Shields, 1 CA-CV 21-0240 FC (July 19, 2022) (Memorandum)

Unreasonableness of position for attorney fee purposes is based upon and objective standard.

Before trial, Father sought findings of fact and conclusions of law under Rule 82. When the trial court denied the award of fees, there were not sufficient findings made by the trial court. As such, the findings did not support the denial of fees. The trial court found that each party had acted unreasonably but only cited their "disparate positions." The court did not refer to any other objectively unreasonable positions. It was remanded for further findings.

Manoukian v Manoukian, 1 CA-CV 21-0477 FC (July 12, 2022) (Memorandum)

***Forum Non Conveniens* analysis requires weighing of numerous factors while giving some deference to the chosen forum of the petitioning party**

To obtain dismissal for *forum non conveniens*, the movant must first show there is an available and adequate alternative forum to hear the case… Second, the movant must show that, on

balance, the alternative forum is a more convenient place to litigate the case… This requires the court to balance private and public reasons of convenience… Where factors of convenience are closely balanced, the plaintiff is entitled to [his] choice of forum… This is because unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Mahmood v Turner, 1 CA-CV 21-0625 (July 21, 2022) (Memorandum)

Proof of notice for due process purposes cannot be based upon the self-serving and unchallenged information from the party seeking to proceed in the absence of the other.

On procedural grounds, the Court of Appeals vacated the award and remanded the case for further proceedings. It was determined that Father was denied due process since he had provided his new address to the court but the court apparently did not update its records to reflect the new address, thereby sending notices to the old address. Mother claimed that she verbally informed Father of the scheduled hearing but the Court of Appeals found that "Mother's unsupported, self-serving assurances cannot demonstrate due process." See *Soloranzo v Jensen*, 250 Ariz. 348, 352 (App. 2020), which noted "that there was no adversarial check on the information on which the court ruled."