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

This update contains summaries of 1 reported opinion and 6 memorandum decisions for cases decided in May 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

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, Maricopa County), Luke Brown (Chair, Pima County).

REPORTED OPINIONS

Barron v. Barron, CV-18-0234-PR (5/21/2019).

Military Retirement. Vacated paragraphs 24-30 of Court of Appeals' opinion and portion of decree providing for *Koelsch* order, ordering military spouse to pay former spouse her share of military spouse's military retirement pay when military spouse would be eligible to retire, rather than when he actually retired and began receiving payments, and remanded for further proceedings.

Parties married in 2004 when Husband was an active duty Marine, as he remained when the parties divorced in 2017. The family court found Husband could retire in 2023, when he would have 20 years of service and divided the parties' assets, including Husband's military retirement pay ("MRP"). The family court awarded Wife 29% of Husband's MRP, with the assumption that Husband would retire when he became eligible in 2023, or if he didn't, the family court ordered Husband to begin making payments to Wife equivalent to what she would have received as her share of the MRP had he retired.

Husband appealed, arguing the family court improperly ordered him to indemnify Wife if he chose to remain active duty after he was eligible to retire. The Court of Appeals agreed and reversed, reasoning that federal law precludes such indemnification. Wife petitioned for review, arguing that the indemnification order was proper under *Koelsch*.

The Arizona Supreme Court held that federal law preempts a state court from ordering a military spouse to pay a former spouse the equivalent of military retirement benefits if the military spouse continues to work after being eligible to retire. The Arizona Supreme Court distinguished *Koelsch* because that case involved public retirement benefits under state law, not military retirement pay under federal law. Federal law, specifically the Uniformed Services Former Spouses Protection Act ("USFSPA"), provides the "precise and limited" authority to treat certain military retirement benefits as divisible property upon divorce and grants states the authority to divide only "disposable retired pay payable to a member" in divorce proceedings. The USFSPA does not permit states to divide MRP but rather grants them the authority to "treat disposable retired pay"

as community property. “Disposable retired pay” is defined as “the total monthly retired pay to which a member is entitled.” The words "entitled" and "payable" in the USFSPA were key to the Court's holding. “Entitled” as interpreted to mean a member has applied and been approved for military retirement benefits. Further, military retirement based on years of service is discretionary, and thus a member’s interest in MRP is neither vested nor mature until the member retires and benefits are approved, thereby making the pay payable. Thus, "entitled" is not synonymous with "eligible" as Wife argued. Because the USFSPA only permits state courts to divide “disposable retired pay,” and no entitlement to MRP exists until the member retires and is approved to receive such benefits, state courts cannot order service members to make MRP-based payments to former spouses before retirement. Therefore, the Court held the part of the decree providing for a payment to Wife of her share of Husband’s MRP starting when Husband purportedly would be eligible to retire was error.

MEMORANDUM DECISIONS

Newton v. Reeder, 2 CA-CV 2018-0193-FC (5/29/2019).
Attorneys’ Fees. Affirmed attorneys’ fees award.

Court of Appeals upheld trial court’s award of attorney’s fees based in part on the fact that the appellant failed to comply with a clear order of the trial court. The court noted that the appellant cited no legal argument, no legal authority, or citations on the record in her appeal. Instead, she simply argued on appeal that she should not have to pay Father’s attorney fees because “he chose to involve his attorney” in a dispute over who was entitled to claim their daughter for a child tax credit. The court further held that her appellate position was unreasonable and awarded additional attorney fees.

Bowles, et. al. *v. Trznadel*, 1 CA-CV 18-0006-FC (5/28/2019).
Grandparent Visitation. Vacated trial court’s unsupervised grandparent visitation order and remanded.

Parties divorced in January 2016. In April of 2018, Mother was granted sole legal decision-making authority with Father having no parenting time with the children due to his incarceration for his physical abuse of Mother’s third child from a different father. Prior to Father’s arrest, the parties entered into a written agreement wherein it stated that father’s parent’s / Paternal Grandparents (“Grandparents”) would not be used as childcare providers for the children and that the children would not be left alone with them without Father also being present.

At hearings on Grandparents’ request for visitation with the children in January and August of 2017, Mother testified in objection to Grandparents’ request arguing that visitation with them was not in the children’s best interests. Father never testified at either hearing, although his counsel stated on the record that his client supported Grandparents having visitation with the children.

In October 2017, the lower court ordered allowing Grandparents supervised visits two times per month for 2 hours each visit but also expressly stated that more evidence was needed to make a determination as to whether or not ongoing visits should occur, how frequently, and under what conditions. Mother timely appealed this ruling in February of 2018 after the lower court's denial of her motion to reconsider. At a review hearing in April 2018, Grandparents requested a change in the visitation schedule. The lower court held an evidentiary hearing whereat Mother did not testify or present any evidence and in July 2018, the lower court issued a new ruling granting Grandparents regular, unsupervised visitation. In support of its ruling, the lower court concluded that Father's opinion regarding visitation should be given special weight. Mother filed a second motion to reconsider which was stayed pending appeal.

Mother argued the lower court erred by awarding visitation without: 1.) making a finding that Grandparents' visitation was in the children's best interests; 2.) giving special weight to Mother's position while simultaneously affording special weight to Father's position; 3.) making required findings under A.R.S. § 25-409(E); and, 4.) considering Mother's constitutional right to raise her children as she deemed appropriate.

The appellate court reviewed the decision and subsequently held that the lower court did abuse its discretion, because: 1.) the lower court's orders did not contain the statutorily required best-interests findings; 2.) the record contained no admissible evidence regarding Father's position for the lower court to consider his position and the lower court further failed to consider indicate whether special weight was given to Mother's position; 3.) neither the lower court's orders nor the record described which statutory, or other, factors the court considered, how it applied the facts to the statutory factors, or how it arrived at its conclusions despite the language in A.R.S. § 25-409(E) requiring the court to do so.

Citing *McGovern v. McGovern*, 201 Ariz. 172, 175, ¶ 6 (App. 2001), the appellate court further indicated that the record provided no evidence that lower court's July 2018 order was minimally intrusive in its visitation time expansion and schedule.

Roses v. Hon. Blaney/Francis, 1 CA-SA 19-0088 FC (5/21/2019).

Special Action; Non-Party Discovery; Proportionality; Motion to Compel. Accepted Special Action Jurisdiction and granted specifically requested relief, vacating trial court's order.

Trial court granted Wife's motion to compel a business ("MFR") that had a management agreement with Husband to produce subpoenaed records. Wife argued the subpoena properly sought records relevant to the value of Husband's interest in MFR and his earnings and compensation. MFR argued Husband did not have an interest in it and moved for a protective order. Court of Appeals accepted MFR's special action as it would have no adequate remedy by appeal as a non-party. Court of Appeals found the order granting the motion to compel to be entirely erroneous and vacated the order, reasoning that Wife failed to show the records sought were necessary to establish Husband's earnings and compensation from MFR and instead focused on irrelevant issues, such as offers to purchase MFR, listings of real property, and other unrelated

documents, and Wife had obtained substantial information from other sources to calculate Husband's earnings and compensation from MFR. Whether the community had an interest in MFR was a key initial issue necessary for the trial court to have had jurisdiction over such an interest and Wife later conceded that whether there even existed such an interest was unclear. Court of Appeals also found significant that Wife failed to show that the unproduced records would answer the question of whether the community had an interest in MFR, which meant that discovery was not proportional to the needs of the case.

Luis R. Bejarano v. Keshia Y. Castro, 2 CA-CV 2018-0148-FC (5/8/2019).

Modification of Parenting Time. Affirmed trial court's orders changing primary residential parent designation and modifying parenting time from equal to one parent only having three weekends per month.

Parties shared joint legal decision-making and approximately equal parenting time per an agreed-upon parenting plan. Mother then moved to Buckeye from Ajo and filed a motion for a change in the child's school, which Father opposed, arguing such a request would require a modification of parenting time, and he then proceeded to file a petition to modify legal decision-making and parenting time. The trial court denied Father's requested hearing on modification of legal decision-making, but proceeded on his requested modification of parenting time, after which it granted Father designation as primary residential parent and parenting time during the school week and one weekend per month, with Mother awarded the remaining weekends each month. Mother appealed, arguing the trial court erred, as it effectively awarded Father sole legal decision-making authority over education and the trial court failed to find a material change in circumstances warranting modification.

The court of appeals disagreed that the primary residential parent designation and parenting time orders constituted an award of sole legal decision-making to Father, though the court did find that the move by one parent was a change in circumstances and would likely result in the child attending the school district near the father's home. The Court further noted that a change of circumstances materially affecting the welfare of the child was a requirement of a modification of parenting time per our case law, not statute, and once it is established that such a change occurs, then the trial court must consider the best interest of the child. The Court found that even though there was not an express determination of that change in circumstance in the ruling, such a finding could be reasonably inferred. Mother also argued the change in primary residential parent was contrary to the weight of the evidence and challenged whether the findings of fact were sufficient to warrant the change. The court of appeals found sufficient evidence supported the ruling and that the findings were sufficient.

Colby v. Colby, 1 CA-CV 18-0280 FC (5/7/2019).

Default Judgments; Void Judgments; Amended Pleadings; Laches. Reversed and remanded trial court's orders enforcing spousal maintenance order entered by default.

Wife originally requested $1,000 per month spousal maintenance in her initial petition for dissolution. However, in her amended petition for dissolution, she removed such request. When she attended the default hearing, she included an order that Husband pay indefinite spousal maintenance of $1,000 per month in accordance with the original petition. The Court signed and entered such judgment. Wife did not seek to enforce such order for many years, and Husband did not file any post-judgment motions seeking relief from the same. Wife eventually filed a petition to enforce, which the Court ultimately granted. The Court of Appeals found that the judgment was void as the amended petition superseded the initial petition. The court cannot grant relief not requested in the underlying petition for dissolution by default. Husband did not waive such arguments as such involved a void judgment. The Court of Appeals also explained that a void judgment cannot acquire validity because of laches. In conclusion, if the Court enters a default judgment that is inconsistent with the petition for dissolution, the aggrieved party is not entitled to post-judgment relief many years later.

Paredes-Gabriel v. Riva, 1 CA-CV 18-0328 FC (5/2/2019).

Domestic Violence Findings; Legal Decision-Making; Parenting Time. Vacated sole legal decision-making and supervised parenting time orders and remanded.

Trial court found that Father committed significant domestic violence upon Mother warranting an award of sole legal decision-making (due to the presumption against joint) to Mother and supervised parenting time to Father. Trial court explained that "[s]ignificance is a product of three factors: (1) The seriousness of the particular incident of domestic violence, (2) the frequency or pervasiveness of the domestic violence, (3) and the passage of time and its impact." Court of Appeals found the Trial Court was vague in its findings and conclusions and held that the Trial Court did not make sufficient findings to substantiate its conclusion that Father committed the type of significant domestic violence that fell within statutory definitions warranting the orders. The Court of Appeals vacated and remanded to the trial court to review the evidence considering the statutory definitions of domestic violence.