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

This update contains summaries of 1 reported Arizona opinion and 23 memorandum decisions for cases decided in March 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).

REPORTED OPINIONS

Birnstihl v. Birnstihl, 1 CA-CV 17-0278 FC (3/6/2018).

Changed Circumstances for Modification of Child Support; Simplified Procedure; Claim Preclusion. Reversed dismissal of petition to modify child support via simplified procedure.

Father obtained a child support modification via simplified procedure in June 2016, cutting his obligation in half by using an understated income (he did not attach supporting documentation to his petition) and equal parenting time, despite that the Decree gave him no parenting time with two of four children. Mother did not timely request a hearing or respond to Father's Petition (she did request a hearing and counter-petitioned 10 days after entry of the modified support order, neither of which the court ruled on, and were therefore, deemed denied). After retaining counsel, Mother moved to correct the modified support order pursuant to Rule 85(C) and also moved to modify child support via simplified procedure twice, arguing in her motion and petitions that the modified support order was based on inaccurate information, and attaching to the second petition to modify Father's income tax return showing he made much more than that which was used to calculate the modified support order, resulting in a 15% variance from the modified support order, which constitutes evidence of substantial and continuing change of circumstances per the Guidelines. The superior court denied the 85(C) motion and Father moved to dismiss both petitions to modify arguing the allegations did not meet A.R.S. § 25-503(E)'s required showing of substantial and continuing changes in circumstance. The superior court dismissed both petitions.

On appeal, the court held that "claim preclusion did not prevent the superior court from considering whether Father's child support obligation should be modified" due to incorrect information used in a previous calculation and that "Mother presented a colorable claim that applying the guidelines results in a 15% variation in Father's child support obligation," and therefore, the court should have held a hearing before ruling on the motion to dismiss. The court found that the superior court incorrectly interpreted the Guidelines when stating in its order granting the motion to dismiss that Mother conceded the requisite change in circumstances did not occur during the relevant time period since the modified support order. The court reasoned that changed circumstances under the Guidelines in child support modification proceedings (as opposed to spousal maintenance proceedings) may be that incorrect information was used in a prior order (whereas in spousal maintenance modifications the changed circumstances must have occurred after the prior order

was entered). In this case, Father did not even comply with the simplified procedure's requirement to accompany his petition with supporting documentation of his income since he alleged his income was less than at the time of the Decree. As such, the court ruled that "the parent seeking modification must present a colorable claim that there has been a change in relevant factors, or that an error occurred in determining the relevant factors, such that applying the Guidelines results in a fifteen percent variation from the current child support order."

MEMORANDUM DECISIONS

McBroom v. McBroom, 1 CA-CV 17-0221 FC (3/29/2018).
Characterization of Debt/Community Presumption; Burden of Proof; Child Support. Reversed and remanded orders characterizing debt as separate and childcare credit in worksheet.

Appellant/Husband appealed from a decree of dissolution that characterized a debt as his sole and separate obligation and wherein child care costs were attributed to both parents in their child support worksheet.

Husband argued that debt incurred on a line of credit for purchases made during the marriage was community debt, while Wife argued that the credit line used for the purchases existed prior to the parties' marriage and was, therefore, Husband's separate obligation. Finding that the Husband could not identify what community obligations or assets were purchased during the marriage using the credit line, the trial court assigned the line of credit debt to Husband. Husband appealed arguing that the trial court improperly assigned the burden of proof to him when it was Wife's burden to establish that the debt acquired on the line of credit during the marriage was Husband's separate debt, not Husband's burden to show that the purchases were community debt. The Court of Appeals reversed, holding that it was Wife's burden to establish by clear and convincing evidence that the debt incurred during the marriage was Husband's separate obligation.

Regarding the daycare expenses, Husband argued that the trial court erred in attributing childcare costs to both parties in an equal, monthly amount despite that Husband was the party who paid the daycare costs during the school year and that Wife would only be paying childcare for herself during the summer months only. The Court of Appeals reversed, holding that the amounts for childcare costs reflected in the child support worksheet were not supported by the evidence. The matter was reversed and remanded to the trial court.

Rivera v. Bruce, 1 CA-CV 17-0370 FC (3/29/2018).
Division of Real Property; Disclaimer Deed; Equitable Lien. Vacated in part and remanded orders characterizing home disclaimed by Wife as community property.

Appellant/Husband challenged the trial court's ruling regarding the division of real property in the parties' dissolution proceeding.

The parties married in 2007 and in 2011, Wife signed a disclaimer deed as part of a transaction for Husband's purchase of a home. The disclaimer deed, along with a special warranty deed conveying the house to Husband as his sole and separate property, was thereafter recorded. After trial, despite title of the home being in Husband, the lower court determined the house to be

community property since it was acquired during the marriage and because both parties contributed their earnings towards the purchase of the home and to household expenses. The home was ordered to be sold and the proceeds split equally. Husband appealed, arguing that the trial court erred in finding that the home was community property since Wife signed a disclaimer deed and, therefore, had no community interest in the home.

The Court of Appeals agreed with Husband, holding that the disclaimer deed rebutted the presumption that the home was community property. The Court of Appeals vacated the lower court's ruling that the home was community property and that the house be sold and proceeds split however, the matter was further remanded for a determination as to whether the community had an equitable lien against the house for any community funds that were used to pay the mortgage or enhance the value of the house.

Phillips v. Cabrera, et al, 1 CA-CV 17-0390 FC (3/27/2018).
Grandparent Visitation; Due Process; Attorneys; Fees. Affirmed denial of grandparent visitation and award of attorneys' fees to parent.

Appellant/Intervenor Paternal Grandmother challenged the lower court's ruling denying her petition to establish grandparent visitation and awarding Appellee/Respondent Mother her attorney's fees and costs.

Mother and Appellee/Petitioner Father were married in August of 2010 and divorced in October 2015. At the time of the divorce, the parties had two minor children, ages 4 and 5. In May of 2016, Paternal Grandmother filed her petition for grandparent visitation. Mother thereafter filed a petition to modify legal decision-making authority and parenting time as to Father based upon concerns regarding his mental health, substance abuse, domestic violence, and threats of self-harm. Father subsequently agreed to suspend his parenting time and engage in an inpatient substance abuse rehabilitation program.

At hearing on her petition for grandparent visitation, Paternal Grandmother admitted to not having seen the children since 2011, blaming the situation on a falling out she had with Mother in 2010, before Mother and Father were divorced. Paternal Grandmother did not provide the lower court with any evidence that Mother was an unfit parent. Mother testified that she did not believe contact between Paternal Grandmother and the children was in the children's best interests since Paternal Grandmother had not attempted to have a relationship with them and they did not even know who she was to them. Father's statements as to whether Paternal Grandmother should have visits with the children were inconsistent. After taking the matter under advisement, the lower court denied Paternal Grandmother's request and awarded Mother her attorney's fees and costs.

Paternal Grandmother appealed, arguing that:

1.) The lower court erred in preventing her from access to records regarding Mother's health, employment and other activities in 2010 that were relevant to Mother's "fitness" as a parent and were necessary to challenge Mother's credibility;
2.) She was deprived of due process when the lower court denied her request for additional time to present her case;

3.) The lower court made various other errors within its findings and analysis; and,
4.) The lower court erred in awarding Mother her attorney's fees and costs on the basis that Paternal Grandmother acted unreasonably in filing her petition for grandparent visitation.

As to Paternal Grandmother's first argument, the Court of Appeals agreed with the lower court's finding that the records Paternal Grandmother sought of Mother predated the parent's marriage and birth of the younger child and were, therefore, not relevant to the children's best interests or Mother's ability to parent. The appellate court further held that events occurring in 2010 had no bearing on Mother's veracity at the 2017 hearing without any prior indication that Mother's veracity was compromised at the time of the hearing.

As to the second argument, the appellate court found no evidence that the lower court erred in placing limitations upon Paternal Grandmother's presentation at trial as the parties had previously agreed that the one hour, 15 minute hearing on Paternal Grandmother's request was sufficient and the record reflects that she had ample opportunity to present her theory of the case.

As to the third argument, the appellate court held that the record supports the trial court's rulings and Paternal Grandmother failed to prove any errors on the part of the lower court.

As to attorney's fees and costs, the lower court did not abuse its discretion in awarding Mother her attorney's fees and costs since Paternal Grandmother's decision to file her petition for grandparent visitation was unreasonable given the circumstances presented in the case, namely that she knew she lacked a relationship with the children yet requested excessive visitation with them, made no contact with Mother to attempt to get to know the children and she made the claim that Mother was unfit despite having no evidence to support her claim.

Diaz v. Dutson, 1 CA-CV 17-0336 FC (3/27/2018).

Relocation; Legal Decision-Making; Parenting Time. Affirmed denial of relocation request, modification of legal decision-making with final decision-making authority to Father, and parenting time to Mother.

The parties had joint legal decision-making with Mother having final decision-making authority and Father parenting time every other weekend. Mother moved to Colorado with the child and Father filed a petition to enforce parenting time. The trial court ordered Mother to return with the child to Arizona. Less than a month later, Father filed another petition to enforce, since Mother had moved with the child again to Colorado. She again returned the child to Arizona and Father. Mother then filed a petition to relocate and to modify legal decision-making, requesting the court award her sole legal decision-making authority, and to modify parenting time. The trial court denied Mother's relocation request, ordered joint legal decision-making continue, but awarded final decision-making authority to Father, and modified parenting time.

Mother appealed saying her due process rights were violated since Father did not request to modify decision-making or parenting time as required by A.R.S. § 25-411(L). Relying on *Sundstrom v. Flatt*, 244 Ariz. 136 (App. 2017), the appellate court affirmed, saying a petitioning party must be expecting the possibility of being ruled against. Also, the appellate court said it would not reverse for not complying with A.R.S. § 25-411 "absent a showing of prejudice."

No mention of *Nicaise* was made here, in spite of the appellate court approving the trial court's designation of joint legal decision-making with final decision-making authority to Father. This order is certainly not approved by *Nicaise*'s statement that "when one parent has the final say, that parent's rights are superior and the authority is not joint as a matter of law."

Tulliani v. Leach, 1 CA-CV 17-0235 FC (3/27/2018).
Modification of Legal Decision-Making; Injunction. Affirmed dismissal of petition.

While Father was learning to fly, Mother told him not to take the children with him on the plane without her permission. Father received his pilot certification in October and in December took the children for a plane ride. Mother filed a post-decree petition seeking a preliminary injunction to stop Father from piloting with the children aboard. Mother alleged: (1) the children may suffer serious bodily injury or death; (2) her concerns were "reasonable and appropriate" given the "danger an inexperienced pilot may pose;" and (3) a single engine aircraft piloted by a man with his children aboard crashed near Payson at some point prior to her petition. The trial court dismissed the petition and denied the preliminary injunction.

The Court of Appeals found Mother's bare assertions "were void of specific facts clearly showing harm will result" and do not satisfy the "detailed facts" requirement of Rule 91 and A.R.S. § 25-411, nor do they establish "adequate cause" to hold a hearing. Finding instead that her allegations amounted "to unsubstantiated fear of misadventure inherent in any number of leisure activities a parent may undertake with their children." Even though Mother was self-represented and improperly relied on A.R.S. § 25-403 and Rule 94(H), the Court of Appeals did not cite to the *Smith v. Rabb* standard of holding self-represented litigants to the same standard as lawyers. Instead, the Court of Appeals gave Mother leniency in the pursuit of "substantial justice" and treated her as if she did cite the correct rule—Rule 91(D)—seeking a petition to modify legal decision-making pursuant to A.R.S. § 25-411.

Gilchrist v. Jensen, 1 CA-CV 17-0441 FC (3/27/2018).
Order of Protection. Affirmed trial court's order upholding Order of Protection.

Order of protection was upheld after hearing. Jensen, the appellant, was accused of assaulting Gilchrist and her grandson, J.J. (Jensen's nephew). Gilchrist testified that in a dispute over her car needing service, Jensen threw a beer bottle at her head, and threatened to burn down her house with her dogs in it. There was a video of Jensen verbally assaulting J.J. while under the influence. In a separate incident involving "a dispute over Chinese food," it was claimed Jensen poured beer on Gilchrist and while she was trying to stop Jensen from assaulting J.J., was pushed down. J.J. then hit Jensen over the head with a table leg, which to quote the opinion, "result(ed) in Jensen ceasing the assault . . ." In defense, Jensen testified that Gilchrist and J.J. set him up to being attacked and he was acting in self-defense against J.J. and only bumped into Gilchrist because J.J. knocked him into her. He did not throw a bottle and did not threaten to burn the house. Jensen also showed criminal records where he is the "victim" and J.J. is the "suspect," as well as his Order of Protection against J.J. Court of Appeals held that the trial court did not abuse its discretion.

Santoro v. Santoro, CA-CV 18-0497-FC (3/26/2018).
Modification of Legal Decision Making and Parenting Time; Safe Haven Records. Affirmed order excluding counselor's report.

In June 2017, parties were awarded JLDM and equal parenting time with the child despite Mother's history of substance abuse. In September 2017, the parties agreed and the court ordered that the child attend "Safe Haven" Counseling. In December 2017, Mother used meth and DCS removed her other children from her care. Father filed a petition for SLDM and supervised parenting time to Mother. After a temporary orders hearing, the court entered orders, which continued JLDM to the parties with FDM authority to Father regarding education but awarded Mother supervised parenting time on Saturdays only. Between the temporary orders and final hearing, Father obstructed Mother's parenting time with the child by refusing to agree upon a supervisor. A final hearing on Father's Petition to Modify was held in July 2018. Prior to the trial, Mother had been submitting clean UAs and the dependency case was dismissed as to her other children. After hearing, the court continued JLDM with FDM to Father as to education, but awarded Mother unsupervised parenting time with the child three weekends a month. The court also required that Mother continue to submit to drug testing.

Father appealed, arguing the lower court erred in refusing to admit a progress report from the child's Save Haven counselor and erred by considering the dependency case dismissal and failing to do an independent assessment of this child's best interests.

Did the court err in refusing to admit the counselor's report? NO

The court of appeals distinguished this case from *Hays*. The Court held that the lower court did not refuse to admit the report as a sanction upon Father, but rather it did so to "preserve the protection and confidentiality of the child's safe haven counseling". The counselor in this case was not appointed pursuant to A.R.S. § 25-405(B) to do a "one-time" evaluation to assist the court, but rather was hired to provide ongoing counseling to the child. The court further held that there was sufficient other evidence in the record from which the court could determine the child's best interest. As such, the court held that the lower court did not abuse its discretion in refusing to admit the counselor's report to preserve the trust and confidential relationship between the child and the Safe Haven counselor.

Did the court solely rely on the juvenile court's dismissal and fail to do an independent assessment of this child's best interests? NO

The court of appeals found that the lower court made specific findings as to each factor under A.R.S. § 25-403 and that the lower court's findings and conclusions demonstrated that it carefully considered the evidence. As such, the court found that the lower court did not just adopt the juvenile court's orders and carefully considered the child's best interests. The court also discussed A.R.S. § 25-403.04's requirement that a court make findings that its orders would appropriately protect a child. The court stated that Arizona law gives courts discretion to determine the degree of protections warranted in a case. By limiting Mother's parenting time and requiring continued drug testing, the lower court satisfied the statutory requirement that its order appropriately protect the child.

Drexler v. Wilson, 2 CA-CV 2017-0130-FC (3/26/2018).
Child Support. Affirmed child support order, including imputation of income to Father due to voluntary unemployment and no travel expenses due to Mother's relocation.

The relevant facts include that the original 2014 child support order set the obligation for both parties at zero dollars. Mother later moved to Indiana. Father maintained primary physical custody of the child at issue and he remained voluntarily unemployed. In 2016, Father petitioned the court to adjust the obligation based on changed circumstances. Mother asked that the obligation remain at zero for both parties. After hearing, the trial court affirmed the 2014 order of zero dollars and further required the parties to evenly split travel costs.

In its decision, the Court of Appeals noted that the Child Support Guidelines permit the trial court to attribute income to a party when a party is voluntarily unemployed without reasonable cause. Here, the trial court reasoned that Father's voluntary unemployment was reasonable when the child was young, but became increasingly unreasonable as the child aged. However, the court did not make a definitive finding regarding whether Father's unemployment was reasonable. The court attributed double the hourly minimum wage to Father in its order. Because Father essentially asked the Court of Appeals to reweigh the evidence, the Court denied his claim. Additionally, the Court found that the trial court did not abuse its discretion in deviating the obligation to zero dollars or allocating travel expenses to both parties. It acknowledged that the trial court has broad discretion to modify child support and its reasoning was sound.

Herrera v. Rivero, 1 CA-CV 17-0236 FC (3/22/2018).
Pretrial Statement, Failure to Present Evidence. Affirmed Decree in which alleged community asset not divided due to failure of party to present evidence on issue at trial.

Wife filed a Petition for Dissolution requesting, inter alia, division of the alleged proceeds of sale of a community butcher shop. Wife included her request in her pretrial statement. At trial, the trial court did not list the business proceeds as an issue to be tried, and Wife did not present evidence about division of the proceeds. The Court entered a Decree that did not address division of the alleged proceeds. Where Wife requested equitable division of alleged proceeds of sale of community butcher shop in her pretrial statement, but failed to present evidence regarding the asset or the sale, the trial court did not abuse its discretion by not dividing the alleged asset.

Jimenez v. Jimenez, et al, 1 CA-CV 16-0627 FC (3/22/2018).
Davison of Community Business, Fraudulent Disposition, and Joinder. Affirmed order awarding half of community's interest in goodwill and additional value of business to Wife.

Husband used community funds to open two restaurants in girlfriend's name. After Wife filed her initial petition, and at temporary orders, the trial court allocated the value of the first restaurant 25% to girlfriend, 50% to Husband's goodwill, and 25% to the community funds investment, and used that allocation to establish a value for the respective shares as part of its temporary spousal maintenance analysis. Wife then filed an amended petition asserting claims for conversion, fraudulent conveyance, and constructive trust relative to the restaurants and Husband's actions. Upon Wife's motion, the girlfriend was joined as a party. At trial, in which all parties participated, the family court made several findings, including: the restaurants had been fraudulently placed in

girlfriend's name to avoid Wife's community interests; Husband and girlfriend failed to disclose business records and assets; Girlfriend and Husband had hid goodwill profits, and Husband's goodwill was a community asset that existed at the time Wife filed her petition. The Court awarded Wife an equalization payment equal to her half of the community interests in the goodwill and additional value of the restaurants.

Appellants made a number of interesting, yet wholly unsuccessful, claims on appeal, the most noteworthy of which are: 1) the family court did not have subject matter jurisdiction to hear the civil claims, 2) the equalization payment was an improper award of money damages, 3) the court improperly considered marital misconduct, and 4) the court was required to join the girlfriend at the time of temporary orders as the court made findings regarding the restaurants. The Court affirmed the trial court in full.

Analysis:
1) The Court reiterated that the superior court is a "single unified trial court of general jurisdiction," and the separation of the superior court into divisions is "purely imaginary and for convenience only." *DiPasquale v. DiPasquale*, 243 Ariz. 156 (App. 2017). The separation of the court into divisions does not "partition its general subject matter jurisdiction." Furthermore, A.R.S. § 25-318(A) permits the court to equitably divide community property taking into account "excessive or abnormal expenditures and the concealment or fraudulent disposition of community property." Therefore, no error.

2) Award of an equalization payment is within the court's authority to divide the community assets, the calculation was tied to the value of the community assets, and the award was, therefore, not "money damages."

3) Consideration of the factors in A.R.S. § 25-318(C) in determining the equitable division of assets does not equate to improper consideration of "marital misconduct." "[A]bnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common" are specifically allowed to be considered by statute.

4) Although not raised below, the defense of failure to join a necessary party may be raised for the first time on appeal. *Gerow v. Covill*. However, joinder at temporary orders was not required in this case as the only relief granted was temporary spousal maintenance. Girlfriend fully participated in the final proceedings allocating the varying interests in the businesses between the parties, at which time the court made new findings regarding the allocation of the restaurant interests and values of the interests.

Woehler v. Stough, 1 CA-CV 17-0264 FC (3/22/2018).

Unequal Distribution. Affirmed unequal distribution due to Husband's intentional delay of sale of home, resulting in foreclosure.

Husband delayed in recording a deed transferring title to the marital residence from a third party to the parties and failed to cooperate with the Special Master appointed to sell the residence, resulting in the residence being sold at foreclosure for below fair market value, with excess proceeds of $153,000. The trial court awarded Wife $122,500 of the proceeds, the full amount

requested by her, which Wife testified was one-half of the equity that existed at time of sale based upon her belief as to the fair market value of the residence. The trial court found that Husband intentionally delayed recording the deed to frustrate and delay the sale, Husband was the primary cause of the foreclosure, and the residence could have sold for the value placed upon it by Wife had Husband not delayed.

Noting that A.R.S. § 25–318(A), requires the family court to divide community property "equitably, though not necessarily in kind," the Court found that the facts of this case support the trial court's unequal distribution. Citing *Toth* and A.R.S. § 25–318(C), the Court found that the court may consider excessive or abnormal expenditures on the property and its destruction, concealment, or fraudulent disposition, as well as any other equitable factors that bear on the outcome of an equitable division when dividing community property. Given the facts of Husband's actions, the trial court did not abuse its discretion by awarding Wife a greater percentage of the excess proceeds.

Greenham v. Hope, 1 CA-CV 17-0263 FC (3/20/2018).

Personal Jurisdiction; Rule 85 Set Aside. Affirmed family court's order denying Mother's motion to vacate part of child support order.

Mother and Father have three children, and were divorced in South Carolina in 2011. Pursuant to the parties' agreement incorporated in their divorce decree, Mother would be the primary residential parent living in Arizona, and Father who lived in New York would pay child support. Mother remarried and moved to Mexico with the children. In 2011, Father filed the decree in Maricopa County and sought custody of the children. The court awarded sole custody, and in 2012 the trial court modified child support. Mother failed to attend the modification hearing, and the trial court eliminated Father's child support and ordered Mother to pay Father.

After two appeals in which the court of appeals ruled that the superior court had subject-matter jurisdiction and the parties agreed South Carolina child support order was properly registered, Mother moved to vacate the June 2015 order finding that the court had personal and subject-matter jurisdiction, arguing that Father never properly served his petition to modify in 2012. The trial court denied the motion to vacate. Mother appealed, arguing that the trial court did not have subject matter jurisdiction due to the lack of proper service.

On appeal and de novo review of the Rule 85(c)(1)(d) denial, the court of appeals noted that Mother was challenging personal jurisdiction, not subject-matter jurisdiction. The court held that it had already upheld the subject matter jurisdiction challenge. As far as personal jurisdiction, Mother repeatedly appeared and participated in the modification action, and thus waived any personal jurisdiction challenge. Accordingly, the Court of Appeals held that a motion to set side based on purportedly invalid service is a challenge to personal, not subject-matter, jurisdiction under Rule 85, which may be waived by appearing and making court filings in a case.

Cryan v. Cryan, 1 CA-CV 17-0341 FC (3/20/2018).

Property and Debt Division; Imputation of Trust Income; Child Support Calculation. Affirmed trial court's order imputing trust income to Mother, vacated child support order and portions of decree addressing property/debt division, and remanded.

The parties had two children, and majority of trial addressed allocation of property and debts for calculating income for child support purposes. The trial court had ordered Father to pay child support in temporary orders, but after trial reduced the amount resulting in a $13,000 overpayment which the ruling did not address. The ruling also did not address allocation of property or debt, and travel expenses related to long-distance parenting time. The trial court directed the parties to submit a consent decree for review and signature, which Father did. Father's proposed decree provided for Mother to repay the child support overpayment within a month. Mother objected and asked for the court to wait until she could submit her own decree weeks later, past the deadline given by the court. The court adopted the Father's decree without explanation, and denied Mother's later proposed decree and motion for reconsideration.

On appeal, Mother argued that the trial court could not adopt Father's proposed decree instead of making an independent decision upon disputed issues. The court of appeals agreed, noting that a consent decree is one entered by stipulation of the parties, and Father's decree did not comply with ARFLP 45 because it was not the product of a consensual agreement. Even if the trial court could order proposed findings of fact and conclusions of law, they have to be consistent with the trial court's independent review of the facts, and the trial court heard no testimony or received evidence on the allocation of property and debt. Thus, the court of appeals vacated the decree portions addressing property and debt division and remanded for further proceedings.

Mother also argued the trial court erred by including trust distributions as recurring income, retroactively modifying the child support order using higher earnings, and failing to account for undisputed childcare costs. On the first point, the court of appeals affirmed the trial court's use of Mother's trust distributions, finding that the Child Support Guidelines were flexible enough to include such funds and there was sufficient evidence in the record to support the finding. On retroactivity, the court of appeals agreed and vacated the child support order. The petition for dissolution was filed in June 2015, and the first trust income distribution was not made until February 2016, and then Mother got a higher paying job in April 2016, and the trial court used the trust income and higher income job to retroactively modify child support to August 2015. The court of appeals determined there was insufficient evidence to support retroactivity to this time, and directed the trial court to complete separate child support worksheets for relevant time periods. On childcare costs and travel expenses, the court directed the trial court to consider evidence and adjust as appropriate.

Regarding the lump sum payment for child support overpayment, Father agreed in his answering brief that the overpayment should be applied as a credit against future payments. The court of appeals directed the trial court to recalculate based on other issues, and then impose the remedy agreed upon by the parties, which would appear to be credit toward future payments. Accordingly, the Court of Appeals held that the trial court abuses its discretion when it adopts a consent decree that the parties do not agree upon, but does not abuse its discretion in including recurring trust income as gross income for child support purposes.

Lee v. Lee, 1 CA-CV 16-0585 FC (3/20/2018).
Characterization of Property; Business Valuation; Spousal Maintenance. Vacated family court's property division and spousal maintenance orders and remanded.

The parties owned a mail-delivery business and a lot that stored the company's vehicles. At trial, the parties' joint valuation expert, including the lot, valued the business at a figure both parties believed was incorrect; Husband believed it was too high while Wife believed it was too low. The trial court deviated from the expert's opinion by adding back in "outside services" listed on the 2013 corporate tax return for the business, noting that the court was "not convinced those are appropriate deductions for valuation purposes."

On appeal, the court of appeals reversed the business valuation determination, finding that while the trial court was free to give the expert's opinion whatever weight it thought best and was free to reject the expert's opinion in whole or in part, "it could not adopt a modified version of his opinion in the absence of evidence to support the modified value." The court also vacated and remanded the spousal maintenance award because of inconsistencies between the award and the child support calculations and the lack of a duration on the award.

Kostadinova v. Stephens, 1 CA-CV 17-0099 FC (3/15/2018).
Sanctions Against Counsel Pursuant to Rule 31. Affirmed sanctions against Counsel.

The parties entered into a temporary agreement regarding parenting time, which included exchanging the child at a police station. No residential addresses were revealed in the agreement, although the agreement stated that Father would exercise his parenting time primarily at his residence. During the course of the proceedings, Mother made several allegations of sexual abuse against Father, all of which were determined to be unfounded. Father later relocated and did not provide his address to Mother, alleging safety concerns for his family. The parties later entered into a final parenting plan which required that each parent notify the other of any change in address, *etc.*, within 10 days of the change. The P.C. also recommended that both parents know where the child is sleeping during overnights. The Court ordered Father to disclose his address or file a request for protected address; the Court took Father's request for attorney's fees under advisement (Father argued that Mother's allegations of sexual misconduct were unreasonable). Father filed a request for protected address claiming that he feared Mother would disclose his address to former business associates, who would harm his family. Mother's counsel responded that "Mother has done nothing vindictive in this case." The Court found that Mother acted unreasonably in the litigation and granted Father's request for protected address. The Court suggested Father file a memorandum on sanctioning Counsel for Mother pursuant to Rule 31. After the parties briefed the issue, the Court sanctioned Counsel and found her positions to be "objectively unreasonable." Counsel appealed.

Counsel argues that the trial court erred by (1) failing to make specific findings regarding elements necessary to sanction Counsel pursuant to Rule 31; (2) sanctioning Counsel without holding an evidentiary hearing; and (3) awarding sanctions unrelated to Counsel's Response.

Failure to make specific findings: The trial court must make specific findings to justify its conclusion that a party's claims or defenses are frivolous. The reasonableness of the factual inquiry

depends on the totality of the circumstances and may change as the case progresses. In the present case, the Court did make specific findings sufficient to satisfy the appellate court. **Of note: Division 1 found that, because Father's address was not an area of concern at temporary orders, Mother's claim that she needed the address after-the-fact was "entirely pretextual."

Mandatory Evidentiary Hearing: The court found that Counsel's due process rights do not extend to a mandatory evidentiary hearing on sanctions. The imposition of sanctions should be preceded by some form of notice and opportunity to be heard, but that opportunity was satisfied through the memorandum and response. Rule 31 does not mandate a hearing.

Sanctions unrelated to the Response: The amount of sanctions was not excessive. The court found that Father's attempts to keep his address protected prior to Counsel filing her Response were related closely enough to be included in the award.

Chandler v. Ellington, 1 CA-CV 17-0312 FC (3/13/2018).

Record on Appeal/Transcript. Affirmed trial court's continuation of Order of Protection.

Appellant failed to provide a copy of the transcript to the Court of Appeals, which was appellant's obligation when contesting the sufficiency of the evidence; failing to do so meant the appellate court would assume the evidence was sufficient to support the trial court's findings.

Alvarado v. Apodaca, 1 CA-CV 17-0331 FC (3/13/2018).

Child Support; Rental Income; Adjustments for Other Children; Attorneys' Fees. Affirmed in part and remanded in part for more sufficient findings or recalculation of child support.

Mother and Father have one child together. When the child was 10, the Court designated Mother as the primary residential parent and awarded her sole legal decision-making authority. Father was ordered to pay $792 per month in child support. Approximately two years later, Father filed a petition for modification of legal decision-making, parenting time, and child support. *Pendente lite*, the trial court reduced Father's child support below $300 per month. At trial, the court awarded Father joint legal decision-making, additional parenting time, and reduced his child support to $590 per month, and awarded Mother her attorney's fees and costs, finding a disparity of incomes and that Father acted unreasonably. Father appealed.

On appeal, Father argues that the trial court erroneously calculated the child support amount and established an incorrect effective date. Father also argues that the trial court erred in awarding Mother attorney's fees.

Mother's income: Father argued that the trial court falsely deducted property taxes from Mother's gross rental income. The Court found that gross rental income means gross receipts minus ordinary and necessary expenses required to produce income, including property taxes. The Court did not err in determining Mother's income.

Father's income: Father argues that the trial court erred by not adjusting his income for his two minor children with his current wife. The appellate court noted that this adjustment is discretionary. However, Father received the adjustment in the original child support order and

there was no explanation in the record for why the adjustment was removed, and the appellate court could not tell, based on the record, if the omission was intentional or in error. As such, the appellate court remanded for the trial court to include the adjustment or to explain why it declined to continue the adjustment.

Effective date: Father argued that the trial court erred in making the new child support order effective March 2017 as opposed to May 2015 (the first day of the month after Mother was served). The appellate court found that this was Father's misunderstanding. The new child support order was effective May 2015, but the IWO would commence March 2017. However, the appellate court could not understand how the trial court calculated the ordered arrears amount. As such, the appellate court remanded to allow the trial court to explain the calculation or recalculate the arrears.

Attorney's Fees: Father challenged the award. Specifically, he claimed that Mother filed one day past the deadline. The superior court has the discretion to extend its own deadlines and to consider untimely filings. *State v. Zimmerman*, 166 Ariz. 325, 328 (App. 1990). Nonetheless, the appellate court remanded for the trial court to reconsider attorney's fees in light of the changes listed above.

Carroll v. Carroll, No. 2 CA-CV 2018-0098 (3/11/2018).

Income for Spousal Maintenance Purposes; Retirement. Affirmed spousal maintenance award, vacated retirement valuation date orders, and remanded.

After a 34-year marriage, Husband filed for divorce. During a settlement conference 10 months later, Husband agreed to pay temporary spousal maintenance to Wife of $2,200 per month. Six months later, at the age of 65, Husband decided to retire, cutting his income from $8,000 per month to $3,200 per month. Citing *Pullen*, the trial court concluded Husband's retirement was voluntary and attributed his pre-retirement income to him in calculating the permanent maintenance award of $2,900 per month for six years, until Wife was eligible for her portion of Husband's pension and Social Security, at which time the amount decreased to $1,900 and then terminates in 2044.

Husband appealed, arguing *Pullen* does not apply to retirement, rather *Chaney* controls, which involved modification of spousal maintenance upon the obligor's retirement. In a 13-page decision, the appellate court preliminarily dismisses Husband's *Pullen* vs. *Chaney* distinction because Husband failed to raise the argument below (similar to his argument on appeal that his retirement was involuntary, though the appellate court analyzed this issue and found his retirement was indeed voluntary) and he expressly addressed the *Pullen* factors in his closing argument. The appellate court provides a terrific explanation of when *Pullen* is applicable to the retirement issue (at inception of spousal maintenance determination) and when *Chaney* controls (modification of spousal maintenance due to retirement) and provides an in-depth analysis of the *Pullen* factors as applicable to this case. The appellate court also analyzed at length how to balance a decision to retire at a normal retirement age against the other spouse's entitlement to support.

Another issue on appeal was the valuation date of Husband's 401(k), which the trial court—despite Wife agreeing Husband's contributions after the date of service were his separate property—held that the valuation date should be 8 months after the date of service, representing "the date all contributions are due for the tax year-end 2016." The appellate court vacated this order, finding

Sample inapplicable, and holding the trial court lacked authority to award Wife a portion of Husband's sole and separate property pursuant to A.R.S. § 25-318(A).

This opinion also gives a good lesson on when the word "jurisdiction" is used "imprecisely" when what is meant is not the power to do something, but doing something that is prohibited. That is, "authority" instead of "power."

Ervin v. Mills, 1 CA-CV 17-0407 FC (3/8/2018).
Parenting Time and Attorneys' Fees. Affirmed restoration of unsupervised parenting time and award of fees.

Mother filed an establishment action and the parties settled with Mother having sole legal decision-making and Father having two weekends per month with 72 hours notice to Mother, during which Father would stay at Mother's home, but could go on outings with the child until 7 p.m. Father later filed to modify parenting time. Mother counter-petitioned seeking supervised parenting time due to domestic violence, anger issues, lack of parenting skills, criminal history, and substance abuse and obtained an Order of Protection against Father that did not include the child. Mother also filed for temporary orders seeking to completely suspend Father's parenting time pending trial, but the parties temporarily agreed to supervised parenting time. After trial, the superior court affirmed legal decision-making, but granted unsupervised parenting time to Father at least six days each month, making all requisite best interest findings. The superior court did not find there was a safety issue for the child in Father's care and found Mother's claims not credible. The superior court further found Mother's failure to comply with past orders unreasonable and awarded Father attorneys' fees. One month after the ruling, Mother filed for emergency orders, alleging Father burned the child, and the court ordered supervised parenting time pending hearing. After hearing, Mother's underlying petition to modify was denied based on no material change in circumstance and Father's parenting time was reinstated, as the court found no credible evidence of Mother's claims. The superior court found Mother's positions grossly unreasonable and again awarded Father his fees. The superior court also expressed significant concerns regarding Mother's mental health and ordered her to submit to a mental health evaluation.

The court of appeals affirmed, rejecting Mother's argument that the superior court erred in failing to make new best interest findings, and reasoned that "if a parent cannot show a material change in circumstance has occurred, the prior best interest findings remain the law of the case," and the court complied with A.R.S. § 25-411 because it found no imminent risk of harm to the child so Mother's petition filed less than a year after the prior order was rightfully deny. The court of appeals also found proper the superior court's order that Mother undergo an evaluation, rejecting Mother's argument that the court was prohibited from doing so because Father did not make such a request in his pretrial statement. The court reasoned that the superior court had just cause to order the evaluation, which would have been an abuse of discretion pursuant to Rule 63, which requires notice of the evaluation, but Mother waived that argument on appeal as having not raised the argument in her opening brief. Mother also waived her argument that the attorneys' fees award was error due to Father never filing an Affidavit of Financial Information required by Rule 91(S), as Mother did not raise the issue below, and regardless, the superior court based its attorneys' fees ruling on Mother's unreasonableness. The court of appeals granted Father's fees on appeal due to Mother's continued unreasonableness.

Esquer v. Ruiz, 1 CA-CV 17-0407 FC (3/8/2018).
Forum *Non Conveniens*. Reversed dismissal of petition for dissolution dismissed on forum *non conveniens* grounds.

Parties were married in Mexico in 1987, moved to California two years later, where they remained for almost 30 years, then moved to Arizona in April 2016, and then Husband moved back to California in December of 2016 after the parties separated. Wife filed for divorce in Arizona three months later. A month after that, Husband filed in Mexico and another month after his filing, moved to dismiss Wife's Arizona petition for lack of personal jurisdiction (arguing the parties had no community property in Arizona) and insufficiency of process. Wife argued the superior court had jurisdiction over Husband, but would have to apply law of Mexico to the division of property in Mexico. Husband raised forum *non conveniens* for the first time in his Reply in support of his motion to dismiss, arguing Mexico is the more convenient forum. The superior court granted the motion to dismiss without prejudice based on forum *non conveniens*, did not make any findings (though neither party requested them so the court was not required to make findings), and did not explain its decision in any way. The court of appeals reversed, finding that the superior court "abused its discretion by implicitly finding Husband had shown the availability of an alternative forum" and Father indeed failed to demonstrate such availability because "nothing in the record shows Mother was served in Mexico, neither party provided any information regarding whether they are amenable to process in Mexico, and neither party has agreed to stipulate to the jurisdiction of a Mexican court." The court further reasoned that even if Husband had made the requisite showing, the superior court still would have abused its discretion "by implicitly finding Husband had presented facts and argument sufficient to overcome the deference properly accorded to Wife's decision to file suit in Arizona" and by failing to hold hearings to develop factual issues prior to dismissal. The court of appeals could not assess the court's analysis with respect to forum *non conveniens* because there was no analysis in the ruling.

Hendricks v. Love, 1 CA-CV 17-0782 FC (3/7/2018).
Modification of Child Support. Affirmed child support orders.

Mother petitioned to reduce her child support obligation due to significant financial hardship because she elected to enroll in a full-time doctoral program and could only work part-time (12-15 hours per week). The trial court found Mother's reduction in income was voluntary and attributed Mother a significantly greater income, but did not attribute her an amount equal to her prior full-time earning capacity and did not deviate from the Guidelines in calculating child support. The Court of Appeals affirmed the trial court's decision finding that the ruling was within the trial court's discretion after considering the testimony and evidence.

Ossman v. Talib, 1 CA-CV 16-0098-FC (3/1/2018).
Continuances; Attorneys' Fees. Affirmed trial court's denial of motion to continue trial and award of fees.

The record showed that Husband's counsel had provided him his file and all records necessary to present his case. Court of Appeals found that trial court's denial of his motion to continue trial due to his counsel's late-stage withdrawal was proper, he was not denied due process as he had a fair opportunity to present his case, and the trial court's orders were supported by the evidence. The

Court reasoned that although the withdrawal of counsel may constitute sufficient grounds for a trial continuance, such is generally within the trial court's discretion. The Court of Appeals did note that Husband did not object during the prior hearing as to the trial date, but only did so when he later filed his motion to continue. As such, trial court did not err where it denied Husband a trial continuance when his counsel withdrew close to the trial date. Regarding attorneys' fees, the trial court assigned unreasonableness to Husband alone, which the Court of Appeals found sufficient to constitute a finding regarding Wife's lack of unreasonable conduct and found the fee award proper.

Wellman v. Waits, 1 CA-CV 17-0251 FC (3/1/2018).
Establishment of Child Support; Pretrial Statement; Attorneys' Fees. Affirmed child support order, but reversed and remanded attorneys' fees ruling.

Child was born out of wedlock in June 1997. Paternity was not established at the time and there was no contact between the parties. Child began communicating with Father via social media in 2013 at the age of 16. In May 2015, right before child's 18th birthday Mother filed to establish paternity, legal decision-making, parenting time, and child support. Mother originally requested $432,000 in past support however, during settlement negotiations she sent an offer for $65,000.00. Father initially rejected the offer, but in December 2016, he agreed to pay this amount to Mother by February 2017, but Mother withdrew her offer.

The matter went to trial as to child support issues only, as by the time the matter was heard, the child had emancipated as of May 2016. Mother in her pretrial statement and at court argued for past support pursuant to A.R.S. § 25-320. The trial court awarded mother $23,652.00 in past support considering only the period of June 2015 through May 2016. The trial court declined to award attorney's fees to either party finding the two factors in A.R.S. § 25-324 offset one another, finding, "Father's substantial financial resources favor an award to Mother, but Mother's conduct has been more unreasonable in comparison to Father's." In weighing reasonableness, the trial court opined that it was likely Mother strategically waited; however, Father knew or should have knew he had a child to support and he did not do so. Mother appealed the trial court's order awarding her less child support than she requested and denying her request for attorney's fees.

The Court of Appeals affirmed the child support ruling, but vacated and remanded the ruling regarding attorneys' fees for the trial court to reconsider the reasonableness of Mother's positions during litigation. In her pretrial statement, Mother argued for past support under A.R.S. § 25-320. Further, her attorney in closing statement stated that it was in the Court's discretion whether or not to go back three years from the date of filing. Mother for the first time on appeal raised the issue that past support should have been determined under A.R.S. § 25-809 requiring that the court award three years of past support. Citing *Leathers v. Leathers* and *Trantor v. Fredrikson*, the Court of Appeals held Mother waived this argument by not raising it in the lower court. Regarding attorneys' fees, the Court of Appeals reversed and remanded for the trial court to consider Mother's conduct only *during the litigation, e.g.*, Mother's withdrawal of her settlement offer of $65,000.00.