SEPTEMBER 2022 CASE LAW UPDATE

OPINIONS

PROPERTY AND DEBT

Saba v. Khoury, CV 21-0023-PR (September 14, 2022)- Az Supreme Court

In determining the amount of the marital community's interest in sole and separate property (equitable lien), the court is to start the analysis using the Drahos/Barnett formula.

NOTE: This is a long-awaited Opinion that addresses the disparate approaches for valuing an equitable lien claim of the community against separate property, as espoused by Division One of the Arizona Court of Appeals in its holding in *Saba* [250 Ariz. 492 (App. 2021)] versus the decision in *Femiano v Maust* [248 Ariz. 612 (App. 2020)].

Husband and Wife were married in 2009. In 2010, they purchased two properties, one using community funds for the down payment and the other using both community and Wife's separate funds for the purchase. Both properties were placed in Wife's name only. A divorce action was filed in 2017 and, at trial, Husband made a claim for his share of the community's equitable lien. The trial court applied the *Drahos/Barnett* formula and held that the community was entitled to approximately 20% of the appreciation in one property and approximately 15% of the appreciation in the other. Husband appealed, claiming the community was entitled to all market-based appreciation proportionate to the funds contributed by the community. And since the community paid for one property using only community funds, he argued that the community was entitled to 100% of the appreciation, consistent with the holding on *Femiano*. The Court of Appeals disagreed with the reasoning in *Femiano* and affirmed the trial court's holding. Husband then filed his petition for review before the Arizona Supreme Court.

The Supreme Court provides a detailed history of the evolution of equitable lien claims of the community against sole and separate property. The Court acknowledged that there is difficulty in determining whether and to what extent appreciation in value during the marriage is attributable to community contributions versus other causes, such as market appreciation. Citing the lead case on equitable liens [*Cockrill v Cockrill*, 124 Ariz. 50 (1979)], "increases in separate property's value during the marriage are presumed to be the result of the community's contributions, absent clear and convincing evidence." *Id.* at 52. However, the *Cockrill* court went on to say that "seldom will the … increase in value

of separate property during marriage be exclusively the product of the community's effort or exclusively the product of the inherent nature of the separate property." *Id.* at page 53.

Since *Cockrill* was handed down, there have been cases that have assisted in how the community's value of its equitable lien is to be determined. The *Drahos v Rens* case (149 Ariz. 248 (App. 1985)) has been acknowledged to be one method for making this determination. The *Drahos* formula in C + (C/B x A), where "A" is the appreciation in the separate property's value during marriage, "B" is the appraised value of the separate value as of the date of marriage, and "C" is the community's contribution to principal. And while this formula has been routinely applied ever since, the Supreme Court had "…never opined on the use of the *Drahos/Barnett* formula, its application, or whether the community is entitled to a share of the equity even where the community contribution did not actually enhance its value." Now, the Supreme Court has held that the *Drahos/Barnett* formula "…**is an appropriate starting point for courts to calculate a martial community's equitable lien on a spouse's separate property for property that <u>appreciates</u> in value**." (Footnote 3 makes it clear that the issue of what to do when the separate property depreciates in value was not before the court.)

The words "starting point" are critical. The Supreme Court makes it clear that they are not mandating that courts apply the formula in all cases, writing that "…the uniqueness of each circumstance cuts against strict adherence to any one formula." Rather, the formula "…is a baseline from which courts can evaluate whether the facts of a specific case warrant a modification of or departure from the formula. If the equities do warrant such a departure, the trial court may measure the lien using a different method, but only if the equitable lien amount reflects—at a minimum—the amount of the community contribution and a division of equity reflecting the increase in value due to the community contribution consistent with a market rate of return on that contribution." **They remind us that "the object is a *fair reimbursement of community funds*, not an *equitable division of property*."**

Link to
Opinion: https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2022/CV210023PR.pdf

<u>MEMORANDUMS</u>

<u>PARENTING RELATED DECISIONS</u>

Upshaw v Winiker, 1 CA-CV 21-0727 FC (September 1, 2022)

A petition for in locos parentis relief under 25-409 does not require an allegation that there would be significant detriment to the child; it is sufficient if there are factual allegations to support such a conclusion.

Child was born in 2014 substance exposed. About 7 months later, Father moved in with his girlfriend, Upshaw, who was not the child's mother. Three years later, DCS filed another petition against Father, who was found unconscious in the car while with the child in the backseat. DCS turned the child over to Upshaw, who moved out with the child from Father's home. That DCS case was eventually dismissed, but within a few months Father again relapsed on drugs. The child was again placed with Upshaw, who in 2020 filed an *in loco parentis* petition in the family court. Father filed to dismiss, alleging that Upshaw had not demonstrated significant detriment to the child under 25-409. The motion to dismiss was denied and the hearing proceeded in September 2021. Upshaw noted the numerous drug relapses. Ultimately, the trial court granted Upshaw's *in loco parentis* petition and ordered that Father would need to demonstrate at least 12 months of sobriety, among other things, for the court to find that he no longer presented a substantial detriment to the child. Father appealed.

The court of appeals pointed out that the originally filed Petition need not contain "uncontroverted evidence of significant detriment" but it must contain sufficient factual allegation that the child will suffer a "significant detriment if the child remains with the legal parent." While Upshaw's petition did not articulate significant detriment, it contained sufficient factual allegations to avoid summary judgment.

In analyzing evidence, the trial court found that Father was less than credible, that the change in environment would be detrimental to the child, and that there were continued concerns about substance abuse. The trial court also made detailed findings under 25-403(A), along with noting the close relationship between the child and Upshaw. Since there was substantial evidence to support the trial court's ruling, the trial court was affirmed.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0727%20UPSHAW%20v.%20WINIKER.pdf

Miley v Phelps, 1 CA-CV 22-0118- FC (September 8, 2022)

While not required, a UCCJEA Conference (ARS Section 25-1010) should be conducted on the record with the parties and counsel participating so as to identify and allow parties to be heard on any factual disputes.

Parties were never married and had two children, one born in Arizona and the other born in New Hampshire. Paternity had not been formally determined. The parties split their time between New Hampshire and Arizona. Most recently they lived in Arizona from December 12, 2020 until June 18, 2021 and then lived in New Hampshire from June 18, 2021 until August 2021. Father filed a petition for legal decision-making in New Hampshire and, after she was served (which included an injunction for her not to leave with the children), Mother returned to Arizona with the children. Mother then filed a similar petition in Arizona. She alleged that the parties lived in Arizona for four years and took "annual summer trips" to New Hampshire. She also alleged that Father had committed DV and that some of their "summer trips" had been extended by Father against her will. Father countered the Arizona action with a motion to dismiss. He argued that New Hampshire was their primary residence since 2017 until Mother "fled' to Arizona. He asserted that they had agreed to raise the children in New Hampshire. A UCCJEA Conference was held between the judges of the two states but without either party or their counsel present. The two judges conferred about the facts as they understood them and concluded that New Hampshire "had the greater claim to jurisdiction." The Arizona court dismissed Mother's petition. Mother appealed.

ARS Section 25-1010(A) allows the two courts to communicate in the event of a jurisdictional question. In doing so, the court may, but is not required to, allow the parties to participate in that communication. See ARS Section 25-1010(B). But this same statutory subsection provides that if the parties do not participate, the court must give them an opportunity "to present facts and legal arguments before a decision on jurisdiction is made." Here, Mother was not afforded that opportunity.

Link to
Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV%2022-0118%20FC%20MILEY%20v.%20PHELPS.pdf

Stevens v. Stevens, 1 CA-CV 21-0726 FC (September 22, 2022)

The Court's award of primary residential status of the children to Father was supported by the record.

Parties were married with two children. Mother moved to North Carolina in June 2019 without telling Father about her plans or securing his consent. Father filed for divorce in July 2019. Two weeks later, Mother secured an Order of Protection for herself and the children against Father. Father contested the Order of Protection and, following a hearing, the children were removed from the order but Mother's OOP remained in effect. At an evidentiary hearing in October 2021, the trial court dissolved the marriage, ordered joint legal decision-making and designated Father as primary residential parent, awarding

Mother with one weekend per month parenting time. The Court found that Mother intentionally alienated children from Father. Mother timely appealed the dissolution. A few weeks later, Father filed an enforcement petition because Mother refused to turn the children over to his care. Before the hearing, the parties reached an agreement that resolved the enforcement action but agreed that the issues on appeal would proceed.

On appeal, Mother challenged the parenting time provisions, including having the children reside primarily with Father. The Court of Appeals assessed whether there was ample evidence to support the trial court's ruling. It found that there was certainly evidence to support not only Father's prior close relationship with the children, but also Mother's efforts to thwart that relationship. As for the DV allegations, she presented no credible evidence of past DV. Lastly, Mother argued that the children's opinions were ignored. The appellate court found that the trial court had considered and then rejected the children's wishes because Mother had influenced or controlled the children's preferences.

Link to case: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0726%20FC%20-%20Stevens%20v.%20Stevens%20-%20FINAL.pdf

CHILD SUPPORT

Thomas v Thomas, 1 CA-CV 21-0745 FC (September 6, 2022)

Inclusion of Child Care Costs in the Child Support Calculation is discretionary with the trial court.

At trial, the court did not include Mother's claimed child care expenses into the child support calculation. Mother appealed.

On appeal, the Guidelines were referenced and it was shown that whether to include child care expenses in the calculation is permissive for the trial court, not mandatory. Even though the children were five years of age and mother needed the childcare to be employed, the court found that Mother was not working at the time of the proceedings. Despite claims by Mother that she was unable to work due to an accident, the Court found that there was no credible evidence to support such a factual finding, which Mother did not challenge. This left the inclusion or exclusion of the child care expenses to the discretion of the trial court.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0745%20FC%20Thomas.pdf

Vazquez v Vasquez, 1 CA-CV 21-0615 FC (September 6, 2022)

The court is not obligated to include overtime pay as income for child support purposes.
(see also Property and Procedural Matters sections)

Parties were married in 1992. Father was the main financial support for the family. Mother petitioned for dissolution in 2017. At trial, Mother argued that the Father's income should include his historic bonuses and overtime pay. Father testified that he could no longer earn overtime at his current job. The trial court did not include the historic overtime income for calculating the child support obligation. Mother appealed.

As specifically referenced in the Child Support Guidelines (Section II.A.3.), overtime income is generally not included when determining income because a parent should have the choice of working additional hours through overtime of a second job without that resulting in an increase in their child support obligation.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0654%20FC%20-%20Vasquez.pdf

Gilbert v Beach, 1 CA-CV 21-0686 FC (September 8, 2022)

If a parenting modification action is before the court, issues regarding possible modification of child support must be considered, even if the parenting modification petition is denied.

Parties were married in 2019 and under the terms of the Consent Decree, they were awarded joint legal decision-making and equal parenting time to their one child. At that time, their incomes were almost the same amount and, as such, neither was ordered to pay child support to the other. In late 2020, Father petitioned for modification of legal decision-making and parenting time, alleging that mother was abusing drugs. A temporary hearing was held after Father secured emergency orders restricting Mother's parenting time. By then, Mother had responded to Father's petition and had cross-petitioned for her to be awarded sole legal decision-making and to reduce Father's time to alternating weekends. She also sought child support from Father. At that expedited hearing, the court vacated the emergency orders. Within a few days thereafter, Father refused to abide by the court order. Following the full hearing on the petitions, the trial court denied Father's petition, granted Mother's cross-petition, in part, by awarding Mother sole legal decision-making but retained the equal parenting time. The court did not modify the "no child support order" because there was no change in the parenting time or substantial change in income. Father appealed.

On the issue of child support, the Court of Appeals held that the superior court "is statutorily obligated to consider whether a child support modification is warranted, even when the parties do not specifically request it." (see *Heidbreder v. Heidbreder*, 230 Ariz. 377 (App. 2012)). It therefore follows that when a party seeks a modification of parenting orders and there is a change in income, the court must address child support. Since Mother's income had increased substantially, the trial court erred in not addressing the child support (even if parenting time was not modified).

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0686%20FC%20Gilbert.pdf

Lagman v Lagman, 1 CA-CV 22-0060 FC (September 13, 2022)

If a party fails to timely object to the registration of a foreign decree that includes an affidavit as to the amount of arrears, that party is barred from challenging the amount of arrears in later proceedings.

Parties have three children. They were divorced in California in 1998, at which time Father was ordered to pay $600 per month or child support, $200 for each child. Father later moved to Arizona and, in October of 2020, Mother registered the California order in Arizona and claimed in an accompanying affidavit that Father owed over $225,000 in arrears. Father was served with all of the documents. More than 20 days after being served, Father filed an objection to the registration of the order and the allegation as to arrears. The trial court then issued an order confirming the registration of the California order, finding that Father's objection was untimely under ARS Section 25-1305(B)(2). Father appealed.

The Court of Appeals held that Father had the opportunity to object and when he failed to do so in a timely fashion, he waived his objections under ARS Section 25-1307(A). Father's failure to object to the arrears total that Mother included in her affidavit for registration of the California order precludes him from challenging the amount, even though no court had made an arrears determination prior thereto.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2022-0060%20FC%20-%20Lagman%20v.%20Lagman.pdf

State v Castorena, 1 CA-CV 21-0741 FC (September 13, 2022)

If a support order is entered by default and there are issues as to service, the obligated party must raise any personal jurisdiction issues at the next proceedings or is deemed to have waived those objections.

In 2017, the State petitioned to establish paternity and sought child support under a IV-D action. They filed a certificate of service that stated that the paternal grandmother has accepted service on behalf of Father. When Father later asserted that he had not live in his Mother's home since 1998, ADES countered that Father had used that address in proceedings involving another child support matter. In any event, Father did not appear for the September 2017 hearing and an order was entered awarding Mother $657 per months for child support as well as nine months of arrears. About six months later, mother petitioned to enforce the child support award. At the hearing, Mother, Father and the AG's Office (appearing for ADES) were present. The State informed the Court that Father was claiming that he had never been served with the 2017 establishment petitions. But he did not at that time object to the 2017 order and agreed to pay the child support arrears. Two years later, Father moved to vacate the 2017 order, claiming it was void for lack of service. The trial court denied the motion as untimely. Father appealed.

The Court of Appeals held that regardless of the proceedings that led to the 2017 orders, Father appeared at the 2019 hearing, accepted service and agreed to pay the arrears. He therefore had actual knowledge of the prior orders and did not raise a claim that those orders were entered without establishing personal jurisdiction over him as to the 2017 orders. Even if Father was no properly served in the 2017 proceedings, the 2019 orders were valid and those orders adopting the terms of the 2017 order.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0741%20FC%20STATE%20et%20al.%20v.%20CASTORENA%20Final.pdf

SPOUSAL MAINTENANCE

Lopez v. Hernandez, 1 CA-CV 21-0637 FC (September 20, 2022)

The exercise of discretion in awarding spousal maintenance and is setting the amount and duration requires findings to support the award.

Father and Mother had three children. They divorced in 2020. Court awarded child support to Mother, along with $500 per month for 80 months in spousal maintenance. Father was awarded parenting time on Wednesdays and alternating weekends. Father appealed.

He challenged the award of spousal maintenance. The Court of Appeals concurred. Father asserted that he did not have greater financial resources than did Mother and that he did not have the ability to meet his own financial needs if required to pay the spousal maintenance. The trial court had equalized the division of property and the income of the parties was not significantly different. The Court of Appeals noted that the trial court "did not explain what greater financial resources Father possesses or how Father has to ability to meet his own financial needs while also meeting Mother's maintenance needs." Here, the end result of the award would be that Mother would have more income (including the spousal maintenance award) than would Father. The lack of specific findings and support from the record rendered the trial court's exercise of discretion to be "essentially unreviewable." The spousal maintenance order was vacated and the issue was remanded to the trial court.

Link to case: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0637%20-%20%20Lopez%20v.%20Hernandez%20-%20FINAL.pdf

PROPERTY AND DEBTS

Vazquez v Vasquez, 1 CA-CV 21-0615 FC (September 6, 2022)

The signing of a disclaimer deed does not serve to waive a later claim for an equitable lien.
(see also Child Support and Procedural Matters sections)

Parties were married in 1992. Father was the main financial support for the family. Mother had limited work history and poor credit. In 2004, Father purchased the marital residence and Mother signed a disclaimer deed. In 2017, Mother petitioned for divorce. At trial, Mother argued that the residence should be treated as community property. The trial court disagreed, found that she had signed the disclaimer deed and had waived any rights to the residence. Further, the court held that Mother had not met her burden to establish a community interest because she failed to provide the information necessary to assess the extent of any community claim to the residence. Mother appealed.

As established by prior case law, including in *Bell-Kilbourn v bell-Kilbourn*, 216 Ariz. 521 (App. 2007), the signing of a disclaimer deed serves a clear and convincing evidence that overcomes the presumption that all property acquired during the marriage is presumed to be community property. Absent proof of fraud or mistake, such property is the separate property of the person to whom the interest was disclaimed. That then gives rise to the possibility of an equitable lien claim. Here, the court of appeals concluded that Mother had not waived her claim to an equitable lien by signing the disclaimer deed.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0654%20FC%20-%20Vasquez.pdf

Hodges v Hodges, 1 CA-CV 22-0091 FC (September 8, 2022)

If a Decree incorporates a PSA that includes provisions for division of retirement accounts, the non-participant's claims to his or her share of those accounts become vested, regardless of when the QDRO is entered.

Parties were divorced in 2007. Their Property Settlement Agreement provided that each party would receive a 50% community interest in Husband's retirement, pension and other employee benefits through his employment. The community interest was for the period from August, 1983 until March, 2006, together with gains or losses. The parties were then to retain an attorney to assist with the QDRO. Until 2021, neither party acted on the actual division of the benefits. When Wife asked Husband to do so, he did not comply. Wife then filed an enforcement petition against Husband. In response, Husband asserted that since the Property Settlement Agreement was not merged into the Decree, Wife was barred from bringing the action more than 6 years after the agreement was reached (ARS Section 12-548). His motion was denied. After hearing the matter, the trial court found that the PSA vested rights to the accounts, not the QDRO. The court also denied Husband's claims of laches because he could not demonstrate that he had been harmed or had relied upon Wife's inaction. The court ordered compliance by Husband. He appealed.

The Court of Appeals held that a PSA that is not merged into a Decree retains its independent contractual status. As such, contract law and statute of limitation issues would apply. However, the court here held that ARS Section 12-548 does not apply because this was not an action for debt. Upon entry of the Decree, the court divided the assets, which gave wife an "immediate, present and vested separate interest in her community share of Husband's retirement. *Koelsch v Koelsch*, 148 Ariz. 176, 181 (1986). As such, Husband lost his interest over Wife's share therein. The absence of a QDRO is of no effect because a QDRO does not vest the interest, it merely recognizes the non-participant's rights to the benefits. Also, even if the underlying claim is contractual in nature, the fact that a court

has separate departments to manage cases, such as civil and family, it remains a court of general jurisdiction and any superior court judge has the jurisdiction to act.

Link to Decision:
https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV%2022-0091%20FC%20HODGES%20v.%20HODGES.pdf

Koizumi v Morogiello, 1 CA-CV 21-0683 FC (September 15, 2022)

When a party testifies in their self-interest that certain property is sole and separate, the court cannot reject that "interested" testimony if it is corroborated.

Community debts paid with separate funds of a party during marriage are deemed gifts to the community, absent an agreement of the parties

The sole witnesses at trial for the dissolution of marriage were the two parties. Following the trial involving mostly asset claims, the trial court found that Husband had proved by clear and convincing evidence that certain stocks transferred into the parties' E*TRADE account were from property inherited by Husband from his father's estate. That portion was affirmed to be Husband's separate property. The Court further ordered the equal division of an IRA account that was in Wife's name. Wife appealed.

The Court of Appeals concluded that Husband's documentary evidence corroborated his trial testimony that the stocks were from his Father's estate. Even though his testimony was from an "interested party," and could be rejected for that fact alone, if the testimony is supported by "disinterested corroboration," a rejection of the evidence would be an arbitrary action by the court. (see *Dumes v Harold Laz Advert. Co*., 2 Ariz. App. 387, 388 (1965)). Wife then asserted that if Husband's testimony was sufficient to establish his separate interest in the stock account, her testimony that a portion of her IRA was comprised of pre-marital funds should also suffice. However, she testified that she did not have any documentation to support her position and could not prove that any portion was her separate property.

Wife also challenged the denial of her claim for reimbursement for tax debts that she paid to satisfy Husband's tax liability from his father's estate. The Court of Appeals noted that "Arizona presumes that when a spouse makes a voluntary payment using their separate property to pay a community expense during marriage, that payment is a gift to the community." See *Baum v Baum*, 120 Ariz. 140, 146 (App. 1978). The spouse paying the obligation is entitled to reimbursement only if there is an agreement to reimburse. Here, Wife offered no evidence as to any purported agreement.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0683%20FC%20Koizumi%20v.%20Morogiello.pdf

DeCosta v. DeCosta, 1 CA-CV 21-0547 FC (September 20, 2022)

A lien placed on an account as security for other payments is binding on the account holder, not the institution at which the funds are held.

Husband filed for divorce in 2019. Parties entered a Rule 69(a)(2) agreement. The agreement provided that Husband would pay Wife $6,000 per month spousal maintenance beginning 2/1/2021 for the remainder of her life. The terms of the agreement provided that Husband's counsel would draft a lien for $1 million. Husband was to check with Chase to see if he could create a lien. At a status conference, Husband's counsel confirmed that Chase bank would not agree to this. Husband's counsel submitted a consent decree that created a community lien in a separate account at Chase bank with a $1 million deposit. Wife objected. She stated that the account was insufficient unless Husband 1) funded the account; 2) filed proof of the account from Chase with an account statement; and 3) obtained a written statement from Chase's legal department that Chase had reviewed the lien language and would comply with the terms. Husband's counsel filed a new consent decree that implied consent with the above terms except for Chase bank's part because Chase would not honor the lien. Wife again objected and requested a hearing. The trial court signed the consent decree, overruling her objection. Wife timely appealed.

On appeal, Wife contends that she does not have a securable lien because Chase bank stated they will not honor the lien. The appellate court pointed out that a lien is not secured by the bank but rather by the creditor, in this case Husband. Husband and his successors/heirs could not withdraw, pledge as security, merge or transfer the funds held in the account without Wife's consent or a court order. The terms of the consent decree adequately expressed a lien. The appellate court took pains to point out that the lien is not between Chase and Wife but rather between Husband and Wife with Chase acknowledging the existence of the lien. The appellate court found no error by the trial court and affirmed the decision.

Link to case: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV%2021-0547%20DeCosta%20v.%20DeCosta.pdf

Holley v. Holley, 1 CA-CV 21-0692 FC (September 20, 2022)

When a servicemember's retirement pay is to be divided, federal law controls as to what constitutes the disposable retirement pay that is subject to the division.

Husband and Wife divorced in 2020. Court entered decree of divorce, including division of community's interest in Husband military pension. Neither party appealed. In February 2021, Wife sought to enforce decree seeking to have Husband make monthly payments to Wife for her 4.7% interest in his pension plus arrears. Husband responded stating Wife's share should be reduced by the Survivor Benefit Plan premiums (SBP) since those premiums were being paid by Husband from the gross amount that he was due solely to preserve Wife's benefit. Husband appealed.

The Court of Appeals cited federal law on how a state court may treat the pension. 10 U.S.C. Section 1408(c)(1) states that Husband's "disposable retired pay" may be treated as community property under the laws of the state in which the award is entered. That calculation begins with the servicemember's total monthly retired pay as of the date of the decree plus cost-of-living adjustments. Deductions are then allowed for any annuity paid to a former spouse and this could include the premiums paid for the SBP before the division of the disposable retired pay between the servicemember and the former spouse. However, Husband failed to meet two other criteria under federal law. First, he must show that Wife is "THE" SBP beneficiary. He did not designate her as "THE" beneficiary. Second, he did not show that the payments to Wife were mandated by a court order.

This case does not provide a clear line as to the deduction of the SBP premiums from the total monthly benefit. Rather, it shows that such a deduction from the total amount (so as to arrive at the divisible portion of the disposable retired pay) is subject to specificity in order to qualify under federal law.

Link to case: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/CV21-0692%20-%20Holley.pdf

Carrion v Carrion, 1 CA-CV 22-0135 FC (September 22, 2022)

When issues arise regarding whether a QDRO is proper, the trial court is tasked with entering a QDRO that is consistent with the terms of the Decree, even if that requires details that were not necessarily expressed in the Decree.

Husband was a participant in two employer retirement plans, Arizona Public Safety Personnel Retirement System ("PSPRS") and a City of Peoria 401(a) Plan. At the time of the divorce in 2014, he had 14 years of service in the plans, all of which was community. Each party was awarded their respective shares of Husband's retirement and their settlement expressed that it was understood that he would retire at 20 years, which would be July, 2020. No QDROs were issued at the time of the divorce. In 2021, an action was brought to address the retirement accounts. Husband unsuccessfully argued that Wife had no interest in his City of Peoria 401(a) account because the settlement agreements referenced a 401(k) account, which did not exist. This was a clerical error and nothing more. The trial court also issued the QDRO what Wife submitted for dividing the PSPRS Plan. Husband appealed.

The Court of Appeals affirmed the trial court's ruling on the 401(a) account, noting that Wife was found to be more credible as to what the parties intended regarding the City of Peoria 401(a) account. This 2021 correction by the trial court was not a modification of the decree, as Husband argued; it was an order that implemented the parties' intent.

The PSPRS issue was far more interesting. Normally, the percentage interest of the community is number of years married in the plan divided by the total number of years in the plan. Applying this formula to a 20-year participant in the plan under which the community existed for 14 years would be 14 over 20 or a 70% community interest. But Husband argued that he did not retire on his 20-year anniversary of employment and, in fact, continued under the plan. At the time of the hearing, he had over 21 years in the plan and asserted that the formula should be 14 over 21, or 66.7. That percentage would drop for so long as her remained employed. The Court of Appeals affirmed the trial court's ruling that the community's interest was 70%. That decision "was consistent with the plain language of the decree and not modification of the decree."

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2022-0135%20FC%20Carrion.pdf

Lanier v. Hall, 1 CA-CV 21-0664 FC (September 27, 2022)

Property acquired during the marriage is presumed to be community and the party contesting that presumption must demonstrate by clear and convincing evidence that the property was separate property.

Parties were married in 1986. Wife petitioned for divorce in 2019. After a Rule 69 agreement, Husband and Wife went to trial over the few remaining issues, namely the

nature of three marital properties – separate or community. All three properties were acquired during the marriage, although two of them were in Husband's name only and came from an account he maintained in his own name since 2008. Following trial, the court ruled all three properties were community property, not separate property. Husband appealed.

The Court of Appeals noted the character of the properties is presumed to be community property because they were purchased during the marriage. This presumption applies even if the property acquired during the marriage is titled only in one party's name. Absent a showing by clear and convincing evidence by the party seeking to overcome that presumption, the properties remain community property and the trial court order is affirmed. In the present case, Husband failed to provide any disclaimer deeds and failed to demonstrate that the monies used to pay for the properties was anything other than community property in a separate account.

Link to case: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0664%20FC%20Lanier%20v.%20Hall%20-%20Memorandum%20Decision.pdf

Anderson v Logue-Anderson, 1 CA-CV 21-0769 FC (September 29, 2022)

If a party signs a quit claim deed in favor of the community to what might be separate property, the failure to record the deed does not defeat a claim of a gift to the community.

Parties were married in July 2019. Husband petitioned for divorce in September 2020. They disputed the characterization and disposition of a house in Goodyear. At trial, it was found that the parties had lived together for years in a house owned by Husband. That house was sold in 2018 and proceeds were used as the down payment for Goodyear property, which was purchased in July 2018, one year before the parties were married. Despite that, title was taken in both names. In February 2020, after the parties were married, Wife signed a disclaimer deed in favor of Husband. She claimed that this was solely for refinancing purposes. To support this, she provided a quit claim deed that Husband signed after the refinancing was complete. While the deed was signed, it was never recorded. The trial court found that the March 2020 quit claim deed, which transferred all interest from Husband to the parties, constituted from Husband to the community. Husband appealed.

Among his arguments on appeal, Husband asserted that the failure to record the quit claim deed resulted in this being an incomplete gift. The Court of Appeals was not persuaded, holding that the deed and Wife's testimony was sufficient to show that a gift was made. Also, Husband's failure to record the deed did not eliminate his obligation to indemnify Wife for his failure to record (See ARS Section 33-411.01).

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0769%20FC.pdf

***Estrada v Estrada*, 1 CA-CV 20-0554 FC (September 29, 2022)**

Money withdrawn before the filing of a petition is not subject to the preliminary injunction but may be subject to a waste claim under Gutierrez.

Before the filing of the divorce petition, Husband withdrew over $28,000 from one of his retirement accounts. Wife made a claim for one-half thereof at trial, and the trial court found that this withdrawal violated the preliminary injunction, erroneously concluding that the withdrawal had been made after the petition was filed. The trial court awarded Wife one-half thereof as an equalization payment. Husband appealed.

The Court of Appeals vacated the equalization payment because the money had not been taken since the petition was filed. However, the Court of Appeals pointed out that there could be a waste claim against Husband since Wife asserted that the monies were not expended for a community purpose. This should have triggered an analysis under *Gutierrez v Gutierrez*, 193 Ariz. 3433 (App. 1998). Under *Gutierrez*, once one party makes *prima facie* showing that funds have been dissipated without knowing where and why, the burden of proof shifts to the expending party to demonstrate that it was expended for the benefit of the community. The matter was remanded for the trial court to determine whether waste had occurred.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2020-0554%20FC%20-%20Estrada%20v.%20Estrada%20-%20Memorandum%20Decision.pdf

Order of Protection

***Polk v Bailey*, 1 CA-CV 21-0615 FC (September 6, 2022)**

For an Order of Protection to be sustained, the petitioning party must meet the threshold for one of the specifically proscribed acts under ARS Section 13-3601(A).

Polk secured an Order of Protection against Bailey. A hearing was held when the order was contested by Bailey. At the hearing, the court limited it to instances of DV allegedly committed by Bailey over the immediate past 12 months (ARS Section 13-3602(E)(2)). The court affirmed the Order of Protection based solely upon the claim that Bailey had filed a false police report against Polk. Bailey appealed.

The Court of Appeals reversed the trial court. It found that the filing of a false police report failed to meet the statutory threshold under ARS Section 13-3601(A). For Bailey's actions to have formed a basis for an Order of Protection, ARS Section 13-2921(A)(5) required that such act occur on "more than one occasion." Here, there was only one such incident.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0615%20FC%20Polk.pdf

Harris v Richardson, 1 CA-CV 21-0626 FC (September 8, 2022)

At an OOP contested hearing, the child of the parties may be competent to testify but there is no claim for abuse of discretion in not hearing from the child unless a party actually seeks to have the child testify.

Mother sought an Order of Protection against Father and in so doing, asked the court to include the parties' child under the order as well. The trial court issued the order for Mother but did not include the child. Father was served and requested a hearing. At the hearing, the parties' son attended and Mother indicated that she wasn't sure whether he would be a witness. The court asked the child how old he was and when he indicated he was 15, the court stated the he was "not old enough to testify in one of these proceedings," to which Mother responded "okay." Mother did not object or ask the court to reconsider whether their son could testify. The hearing went forward. The court found that while both parties were credible, Mother failed to prove that Father had committed an act of DV. Mother appealed.

The Court of Appeals held that since Mother did not object to the trial court's statement that the child was not old enough and never asked for him to be a witness, she could not assert that there was an abuse of discretion. Once can infer that had Mother actually attempted to call their son as a witness and was then precluded by the court from doing so, there would be a valid claim on appeal.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0626%20FC%20Harris.pdf

Procedural Matters

Vazquez v Vasquez, 1 CA-CV 21-0615 FC (September 6, 2022)

Temporary orders, even when signed by the court, terminate and are unenforceable upon entry of the decree unless the decree provides otherwise. (see also Child Support and Property and Debt sections)

In 2017, Mother petitioned for divorce. Soon thereafter, she sought and secured temporary orders, including interim attorney fees of $3,000. The court signed the order. Father failed to pay. Following the trial, the temporary orders were not incorporated into the decree. Mother appealed.

The Court of Appeals referenced ARS Section 25-315(F)(4), which provides that a temporary order terminated when the final decree is entered or the underlying petition is dismissed. However, in this case, Mother had raised the issue at trial and the trial court failed to include that claim in its rulings. As such, the matter was remanded to the trial court to amend the decree to include the $3,000 interim attorney fee claim.

Link to Decision: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2022/1%20CA-CV%2021-0654%20FC%20-%20Vasquez.pdf

CASES NOT SUMMARIZED

- *Woodham v Woodham*, 1 CA-CV 21-0735 FC (September 1, 2022)- Memorandum- Involves an order of protection appeal that came before the court after the underlying OOP would have expired and was therefore moot.

- *Rabin v. McGhee*, 1 CA-CV 22-0063 FC (September 20, 2022)-Memorandum- appeal decided on procedural defects of not providing transcript and waiver.