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

This update contains summaries of 4 reported opinions and 9 memorandum decisions for cases decided in July 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

Barron v. Barron, 1 CA-CV 17-0413-FC (7/31/2018).
Parenting Time; Military Retirement Pay and Federal Preemption; *Bobrow* Reimbursements; Attorneys' Fees. Affirmed trial court's reimbursement orders; reversed orders regarding parenting time, military retirement pay, and attorneys' fees, and remanded to trial court for orders consistent with appellate opinion.

Paragraphs 24-30 of opinion vacated by later Supreme Court Opinion in 2019

Issues:
1. Improper conclusions and presumptions contrary to statute in awarding parenting time.
2. Military retirement pay and benefits and federal preemption
3. Reimbursement issues (*Bobrow*)
4. Reduction of paralegal rate for purposes of attorney fees and costs analysis

Parenting Time
The Trial Court entered findings following the evidentiary hearing regarding parenting time. Although the Husband had equal parenting time pursuant to temporary orders, the Court granted Husband alternate weekends and one evening overnight following the evidentiary hearing. In its findings, the trial court found that Wife should be the primary residential parent for various reasons including (1) Wife had been the primary care provider historically; (2) the children had not fully adjusted to equal parenting time and need to spend more time with the wife; (3) Husband's military duties often make him unavailable during his parenting time during which the children are watched by the paternal grandparents; (4) the female children will naturally gravitate more toward Wife; (5) it is unlikely both parents will remain in Yuma and changing equal parenting time now would be less disruptive than in the future; (6) the children should have a primary home and bedroom and that such promotes stability and continuity for the children.

Holding: (1) the trial court legally erred by applying a presumption against equal parenting time. Per A.R.S. § 25-403.02(B), each party's parenting time should be maximized when consistent with a child's best interests, and no evidence was provided in support of the trial court's ruling; (2) prior primary caregiver status is no longer a statutory factor, although the children's relationship with

the parents remains a factor; (3) dissolution of marriage will disrupt the family dynamic and the primary care provider status often changes when the former primary caregiver must return to employment; (4) it was premature to base a decision on whether parties would likely move – such should be determined in light of the circumstances when such change takes place; (5) the fact that Husband is sometimes unavailable to parent due to military obligations was not material as Husband had his parents to watch the children, and also the parties agreed to a care provider of choice provision. In this case, both parents often needed child care as a result of their employment and training; (6) no evidence supported the conclusion that the children had not adjusted to equal parenting time during the pendency of the temporary orders or that they want to spend more time with Wife; (7) no expert evidence was submitted to support Wife's verbal contentions against equal parenting time.

Analysis: None of the Court's decisions were surprising. This is a great case to cite when a party argues against equal parenting time on grounds such as primary parent, changing work schedules, third party care providers, gender arguments, and other arguments that are outside of the factors set forth by A.R.S. § 25-403.

Military Retirement Pay and Benefits – THESE PARAGRAPHS VACATED

Court of Appeals overruled the trial court's order that if Husband voluntarily continues to serve after he becomes eligible to retire, he must pay Wife what she would have received if he had retired citing *Howell*, 137 S. Ct. at 1405-1406 and applicable federal statutes. *Koelsch* was inapplicable because such does not address the division of military retirement pay, a matter exclusively governed by federal law.

The Court of Appeals reversed the trial court's order that Husband could not reduce his retirement pay pursuant to payments he might make to buy a survivor benefit for a future spouse. Again, such an order was inconsistent with federal statutory law.

The Court of Appeals remanded to the trial court the issue of Wife's proportionate share of any cost of living or other post-retirement increase to define only what the community is entitled to share based upon pre-dissolution service.

Equalization *Bobrow* Issue

The trial court did not err by denying Husband's request for reimbursement for community expenses paid during the pendency of the proceedings because Wife would have otherwise been entitled to interim spousal maintenance. The superior court did not apply a gift presumption, but rather determined that such order was equitable. Order affirmed.

Attorney Fees Issue

The trial court erred by reducing paralegal charges from $175.00 per hour to $50.00 per hour where such issue was not raised, and no evidence was submitted that such was excessive. Addressed importance of paralegal contributions.

Analysis: May also be cited where the Superior Court reduces attorney fees based upon an excessive hourly rate. Without sufficient evidence of an unreasonable rate, this may be beyond the Superior Court discretion. The question thus remains whether such requires expert testimony or if an argument that such hourly rate is excessive will suffice.

Doty-Perez v. Doty-Perez, 1 CA-CV 16-0734-FC (7/31/2018).
Standing; Third Party Rights; Equal Protection; Adoption. Vacated trial court's order finding A.R.S. § 25-409(C)(2) unconstitutional and remanded for proceedings consistent with opinion.

Same-sex couple married in Iowa in 2011, and later moved to Arizona. Tonya alone adopted four children, and although both parties parented children, Susan did not adopt them. Susan later filed a petition for dissolution, and sought rights as a parent and in the alternative, third-party visitation rights. The trial court denied Susan's request to be declared a legal parent, which was affirmed by the court of appeals and denied review by the Arizona Supreme Court. Susan then proceeded to seek third-party visitation under A.R.S. § 25-409(C)(2), which allows visitation to be granted if in the child's best interests and the child is born out of wedlock. Tonya moved to dismiss, arguing that because the children were adopted, they were not born out of wedlock, citing Sheets v. Mead, 238 Ariz. 55 (App. 2015). The trial court found the statute unconstitutional as applied, because it treated "adopted children differently than natural born children."

The court of appeals reversed, holding that A.R.S. § 25-409(C)(2) as applied to adopted children is constitutional and does not violate equal protection. The court noted that in several scenarios, the statute treats adopted and biological children similarly, but does treat them differently if Tonya had given birth to them while not married, because then Susan could seek third-party visitation as they would have been born out of wedlock. Under A.R.S. § 8-117(A), Arizona has a legitimate interest in treating adopted children as if they were born in lawful wedlock to prevent stigma. Noting that third-party visitation rights is a matter for the legislature, the court held that the statute demonstrates concerns about visitation petitions by biological parents whose parental rights had been terminated, or extended family members, and thus the legislation served legitimate state interests. Thus, the classifications under § 25-409(C)(2) rationally serve those interests. The court rejected Susan's arguments regarding whether there were alternatives, noting that the issue was only whether the legislation was constitutional, not if there were a different or better alternative. The court also noted that while the results may be harsh, the statute is constitutional and applies with equal force to opposite-sex marriages where one parent adopts a child and the other does not.

Johnson v. Provoyeur, 1 CA-CV 17-0276-FC (7/26/2018).
Untimely Disclosure. Affirmed trial court's preclusion of the custody expert's supplemental report based on lack of timely disclosure.

Mother appeals the trial court's order denying her petition to modify primary physical residence of the parties' children, and argues that the court abused its discretion by precluding her expert's supplemental report due to her failure to timely disclose the report pursuant to the scheduling order.

During the litigation, Mother initially disclosed her custody expert's original report one week after the scheduling deadline. In response, Father requested and the trial court permitted a continuance of the trial dates and reset the disclosure deadlines, requiring the parties to make all disclosures at least 60 days prior to the disclosure deadline. Thereafter, Mother disclosed a supplemental report from her expert only two weeks prior to trial. Father filed a Motion in Limine to preclude the supplemental report, which the trial court granted. The trial court allowed the expert to testify and present evidence regarding the contents of the original report.

The appellate court found that Mother untimely disclosed the supplemental report (Rule 49H). The Court further found that the untimely disclosure was not harmless and prejudiced Father. The appellate court stated, "The untimely disclosure deprived Father of a fair opportunity to obtain [the expert]'s notes, to schedule and complete a deposition, or to allow his expert witness the necessary time to prepare a rebuttal report." The appellate court rejected Mother's argument that Father had ample time to cure his prejudice, and held that the rules do not require an opposing party to "remediate or avoid prejudice caused by the other party's disclosure violation." The appellate court further held that Mother failed to establish good cause for her delay, emphasizing the fact that Mother failed to request a continuance, seek leave from the court for late disclosure, or otherwise alert anyone to the pending disclosure.

Mother also argued that the preclusion of the custody expert's report was a violation of the court's holdings in *Hays v. Gama*, 205 Ariz. 99 (2003). The appellate court found that *Hays* is distinguishable from the present case. In *Hays*, the trial court precluded evidence from a child's therapist as a contempt sanction, not as a result of a discovery sanction. In contrast to *Hays*, Mother failed to comply with the disclosure rules and failed to show good cause for her non-compliance. Rule 65(C) therefore authorizes the exclusion of evidence. The appellate court further found that the exclusion of the *supplemental* report did not exclude evidence that had an "especially significant effect" on the court's ability to determine the child's best interests.

The appellate court further distinguished its decision from *Reid v. Reid*, 222 Ariz. 204 (App. 2009) and *James A. v. Dep't. of Child Safety*, 1 CA-JV 17-0195, 2018 WL 1542028 (Ariz. App. March 29, 2018).

Ruffino v. Lokosky, 1 CA-CV 17-0353 FC (7/12/2018).

Service by Publication. Affirmed trial court's order setting aside default judgment as void for lack of jurisdiction where access to defaulted party's e-mail address, phone number, and social media account were known, yet publication was chosen method of service.

Ruffino appeals the trial court's order setting aside a default judgment against Lokosky. In 2015, Ruffino filed a lawsuit against Lokosky for statements that she made on her website and on social media sites. Ruffino attempted to serve Lokosky; his process server conducted a "skip trace" on Lokosky, discovered three possible addresses, and attempted service (once) on all three addresses. Ruffino then moved for an order authorizing alternative service or leave to serve by publication. The trial court denied the motion, noting that the process server had only made one attempt on each address. Nevertheless, Ruffino served Lokosky by publication. He did not mail a copy of the summons or complaint to any of the possible addresses. When Lokosky failed to appear, the trial court entered default judgment against her. Lokosky moved to set aside the default judgment. The trial court set aside the default judgment after finding that Ruffino had other channels and did not exercise those options to let Lokosky know of the suit (leaving documents with her mother, mailing them, online channels, *etc.*).

The appellate court affirmed. In affirming, the court reasoned that Rule 60(b)(4), *ARCP*, allows a party to vacate a judgment if the judgment is void. A judgment is void if it was entered without jurisdiction because of lack of proper service.

Rule 4.1(l) provides that service by publication may be made "only if" (1) "the serving party, despite reasonably diligent efforts, has been unable to ascertain the person's current address," or (2) "the person to be served has intentionally avoided service of process," *and* (3) "service by publication is the best means practicable in the circumstances for providing the person with notice." The appellate court affirmed that Ruffino did not make reasonably diligent efforts to ascertain Lokosky's address nor did Lokosky avoid service. The appellate court cited *Preston v. Denkins*, 94 Ariz. 214, 222 (1963), for the premise that the serving party must show that the residence is unknown, not merely that the residence is unknown to the plaintiff. The appellate court further cites that Ruffino had many ways to contact Lokosky (e-mail, phone number, social media) and that Ruffino had previously communicated with Lokosky through these channels, yet Ruffino did not attempt to contact Lokosky through these channels to confirm her address or notify her of the suit. The appellate court further found that service by publication was not the best means practicable under the circumstances, again citing that modern means of communication (e-mail, phone) were more likely to give Lokosky actual notice of the suit.

MEMORANDUM DECISIONS

Torrez v. Bombard, 1 CA-CV 16-0758 (7/31/2018).
UCCJEA; Subject Matter Jurisdiction; Third-Party Visitation; Attorneys' Fees. Reversed award of third party visitation and attorneys' fees and remanded for reconsideration of those issues.

The parties lived together when Bombard gave birth to twins after conception by artificial insemination with donor eggs and sperm. The parties intended to raise the children together and entered into an agreement setting forth a parenting schedule in the event they separated. Torrez eventually moved out, but continued to exercise her parenting time. Bombard later informed Torrez that she was no longer allowed to see the children and subsequently moved to New York.

Torrez filed a petition to establish legal decision-making, parenting time and child support in Arizona and, alternatively, for visitation per A.R.S. § 25-409. The lower court found that Torrez stood *in loco parentis* to the children and, in October 2014, awarded Torrez Skype visitation twice each week and weekend visitation once each month. Torrez later filed a contempt petition against Bombard alleging that Bombard failed to comply with the October 2014 order. In 2016, the lower court found Bombard in contempt for failure to allow visitation as ordered, granted Torrez's request for enforcement of visitation and awarded Torrez her attorney's fees.

Bombard objected to Torrez's application for attorney's fees, arguing that the superior court had not yet issued a final ruling on the petition to establish visitation. The lower court concluded that the 2014 order was a final ruling on the petition though the visitation schedule was a temporary order. The court further awarded Torrez $12,662.50 in attorney's fees. Bombard timely appealed.

Subject Matter Jurisdiction

Bombard argued the superior court lacked subject matter jurisdiction under A.R.S. § 25-402 since the children were permanently residing in New York. The appellate court reviewed the matter *de novo* and determined: 1.) that the children lived in Arizona with Bombard and Torrez until two weeks before Torrez filed her petition; 2.) that New York declined jurisdiction of Bombard's

petition for custody after conferring with the Arizona court; and, 3.) that Torrez, was listed as "a full and complete parent to the children" in the parties' co-parenting agreement, remained in Arizona. Accordingly, the Arizona court had home state jurisdiction to make an initial custody determination and retained continuing, exclusive jurisdiction over the matter.

However, Bombard further argued that a third party seeking legal decision-making or parenting time must file a petition under A.R.S. § 25-402(B)(2), which requires that said petition be filed in the county in which the child resides; and since the children permanently resided in New York, the proper county for filing was located in New York and not Arizona. The appellate court held that the well-defined jurisdictional requirements of A.R.S. § 25-402(A) meant that A.R.S. § 25-402(B)(2) is best interpreted to be a venue requirement focusing on which part of the state is the appropriate forum, thus having no effect on subject matter jurisdiction.

Bombard also argued that the superior court failed to make the required jurisdictional findings per A.R.S. § 25-402(A). But the appellate court held that the statute does not require that lower court to make such findings in writing or on the record, and Bombard did not file any request for the court to make such findings or conclusions of law under Rule 82 of the ARFLP. Thus, the appellate court presumes the trial court found every fact necessary to support the judgment.

Court of Appeals also held: 1) by issuing a temporary order, the lower court confirmed its authority to do so under the UCCJEA, thus satisfying A.R.S. § 25-402(A); and 2) the court implicitly confirmed its jurisdiction by denying Bombard's motion to dismiss for lack of jurisdiction.

Third-Party Visitation

Bombard argued the superior court erred by not giving special weight to her decision to deny Torrez's visitation and that the court improperly made the 2014 order a permanent one. The appellate court reviewed the ruling *de novo* and determined that, because the lower court stated that Torrez's request was a temporary one that had no precedential effect on future rulings either by agreement or at trial, the lower court's 2014 order was a temporary one and thus non-appealable under *Gutierrez,* despite the court's signing of the 2014 order as a final order under Rule 81 of the ARFLP. Thus, the lower court's reliance on the 2014 order as a basis for granting visitation in the 2016 order deprived Bombard of her right to have the lower court issue a final ruling.

The appellate court reversed the 2016 order and remanded for further proceedings, indicating that the lower court should apply analytical principles reflected in the Arizona Supreme Court's decision in *In re Marriage of Friedman*, 244 Ariz. 111 (2018).

Attorneys' Fees

Because the underlying order was reversed by the appellate court, the superior court's award of attorney's fees was also vacated, and remanded for reconsideration in conjunction with reconsideration of the third-party visitation petition.

In light of its disposition, the appellate court declined to address Bombard's constitutional challenge to A.R.S. § 25-409.

Aguiniga v. Aguiniga, 1 CA-CV 17-0299 (7/31/2018).
Legal Decision-Making; Findings regarding Domestic Violence. Affirmed, upholding trial court's legal decision-making ruling and order that party complete DV counseling.

After a trial on Appellant/Father's petition to establish legal decision-making and parenting time, the trial court ordered joint legal decision-making and that Appellant/Father complete counseling regarding domestic violence. Appellant/Father appealed, arguing that the trial court erred by ordering domestic violence counseling when, he claimed, no findings were made of domestic violence between the parties. The Court of Appeals affirmed the trial court's ruling, finding that the trial court specifically found that Appellant/Father had committed domestic violence against Appellee/Mother and others and that Appellee/Mother had an order of protection against him.

Kidd v. Firth, et al., 1 CA-CV 17-0420 (7/31/2018).
UCCJEA. Affirmed trial court's orders dismissing petition due to lack of continuing, exclusive jurisdiction and finding Michigan was child's home state.

The original orders pertaining to child support and visitation were entered out of the California Superior Court in 2010. In early 2013, Father was incarcerated for drug offenses and thereafter, Mother and the child moved to Arizona to live with paternal grandmother. After Father's release from custody in October of 2013, Mother relocated to Michigan with the child near Mother's family. In December of 2013, Father registered the California order in Arizona for the purposes of moving for a temporary order for modification of legal decision-making and parenting time in the Maricopa County Superior Court; after a conference between the California and Arizona courts, Arizona retained exclusive jurisdiction of the matter. Shortly thereafter in 2014, Grandmother petitioned for, and was awarded, third-party visitation of the minor child.

In March of 2017, Grandmother filed to enforce her third-party visitation rights, alleging that Mother was not permitting phone calls and visits as ordered. The next month, Father filed a petition to modify legal decision-making, parenting time and child support; Grandmother was granted intervenor status in Father's action. Mother responded to both petitions arguing Arizona no longer had jurisdiction because she and the minor child had moved to Michigan several years ago. The superior court dismissed Father's action on the basis that Arizona no longer had exclusive and continuing jurisdiction to modify the existing orders, specifically finding that substantial evidence regarding the child's care, protection, training, and personal relationships was no longer available in Arizona. A subsequent emergency petition filed by Grandmother in her third-party matter was also dismissed by the judge in that court on the same basis. Grandmother timely appealed from the superior court's dismissal in Father's action finding that Arizona no longer had continuing exclusive jurisdiction and that Michigan was the minor child's home state.

The appellate court found Grandmother's arguments unpersuasive in consideration of the jurisdiction factors set forth in A.R.S. § 25-1032(A). The Court of Appeals affirmed the lower court's ruling, holding that given the absence of any significant connections between the minor child and Arizona, the superior court did not err in declining to exercise jurisdiction over the minor child and in its determination that Michigan was the child's home state.

Lite v. Lite, 1 CA-CV 17-0680 (7/26/2018).
Order of Protection ("OOP"). Affirmed OOP in part and vacated OOP in part.

Wife filed for an order of protection against Husband in October 2017, which included a request that Husband not be allowed at the parties' residence in Arizona, Wife's place of work in Laughlin, Nevada, and her daughter's school in Boulder City, Nevada. Wife offered no evidence relating to her daughter, including her name or place of residence and no other witnesses were called. The trial court affirmed the OOP, finding Husband committed disorderly conduct. Husband timely appealed and the appellate court reviewed the matter for an abuse of discretion.

The appellate court disagreed with Husband's argument that the lower court was required to specify the enumerated and various methods of committing domestic violence he allegedly committed. As the record reflected Husband's admission to the behavior supporting the disorderly conduct finding, the appellate court could not find that the lower court abused its discretion in affirming the protective order as to the parties' prior mutual home. The appellate court did find, however, that there was no basis for the lower court's protective orders as to Wife's work or the daughter's school in Nevada. Thus, those orders were vacated due to an abuse of discretion.

Lynum v. Tavares, 1 CA-CV 17-0342 FC (7/26/2018).
Spousal Maintenance Arrears. Affirmed trial court's judgment for spousal maintenance arrears.

The parties were divorced by consent decree in January 2010. Per the decree, Wife was awarded spousal maintenance in the amount of $3,500 per month, plus a percentage of every dollar Husband earned between $100,000 and $999,999 annually. Each time Wife petitioned the court to enforce Husband's payment of support in 2010 and 2011, Husband became current on payments shortly after Wife's filing. However, in August 2015, Wife filed another enforcement petition asserting that Husband had not paid support from June 2014 to August 2015. In her petition, Wife calculated spousal maintenance arrears at $87,500, but in preparation for hearing, Wife requested Husband's financial information from 2012 to 2014 to enable her to determine the total amount of spousal support owed. In October 2015, the State also notified both parties that a determination of Husband's income was necessary to calculate arrearages and requested that the parties provide their financial information.

Husband did not respond to Wife's petition, instead filing his own petition to modify child support wherein he alleged a decrease in his income since the entry of the decree. Wife responded to Husband's petition, alleging Husband owed more than $200,000 in support arrears but that she could not be sure of Husband's income until he disclosed his financial information so that it could be analyzed by an accountant.

After hearing, the lower court determined Husband owed Wife $388,689.72 in spousal maintenance arrearages and further attributed income to Husband beyond the amount he claimed, reasoning that personal expenses for Husband that were paid for by his company should also be counted as income to him. Husband timely appealed after the lower court denied his motion for a new trial.

Total Arrearages

Husband argued the superior court erred by awarding Wife $388,000 in spousal maintenance arrearages because Husband did not receive proper notice of the amount she was claiming and because Wife was judicially estopped from claiming a greater total of arrearages that was stated in her petition. Specifically, Husband argued that he did not receive notice from Wife that she was seeking more than $87,500 in arrears as stated in her petition to enforce.

The appellate court held that Father's knowledge of, and agreement to, the maintenance terms as stated in the parties' consent decree placed him on notice that his income could be at issue and that he could be liable for an amount claimed beyond the minimal amount of spousal maintenance as contemplated in the decree. The appellate court further held that Wife's previous request for Husband's financial information, along with the State's notice in October 2015 and Wife's claim in her response to Husband's petition that he owed her at least $200,000 in spousal maintenance arrears, also placed Husband on notice.

Husband also argued that Wife untimely disclosed her expert witness report a week prior to hearing, *i.e.*, insufficient notice, but the appellate court found the delay in disclosure was due to Husband's failure to respond to Wife's request for his financial documents.

Husband further cited *Armer v. Armer*, 105 Ariz. 284, 288 (1970), arguing that Wife cannot claim arrearages beyond the amount specifically pled. The higher court found Husband's reliance on *Armer* to be misplaced and further distinguished this case from *Armer* by holding that Wife's pleadings clearly indicated to Husband that his income was in dispute and that the amount owed was potentially greater than $87,500.

Husband's claim that Wife was judicially estopped from arguing an amount of arrearages greater than what she asserted in her petition also fell short. Citing *In re Marriage of Thorn*, 235 Ariz. 216, 222, ¶ 27 (App. 2014), the appellate court held that judicial estoppel requires, *inter alia*, that a party successfully asserted, in a prior judicial proceeding, a position inconsistent with a newly asserted position. Because Wife's petition was not a prior judicial proceeding and because Husband did not cite any prior judicial proceeding that was resolved in Wife's favor based on a position inconsistent with what Wife asserted in this case, the appellate court found Husband's argument for judicial estoppel inapplicable.

Attribution of Income

Husband next argues that the superior court erred in determining his income because the parties' decree unambiguously states his "gross income" is to be used to determine spousal maintenance and his gross income for tax purposes is the relevant amount to be used in the calculation. However, the appellate court determined that gross income can be calculated differently in different contexts, especially since section 5(D) of the Arizona Child Support Guidelines indicates that gross income for purposes of child support is expressly different than gross income for tax purposes and may include "[e]xpense reimbursements or benefits received . . . in the course of employment . . . or operation of a business . . . if they are significant and reduce personal living expenses." In this case, Husband provided no compelling reason for the lower court to depart from its calculation under the Guidelines for purposes of spousal maintenance.

Clarritt v. Scott, 1 CA-CV 17-0511 FC (7/26/2018).
UIFSA; Setting Aside Registration. Affirmed order denying motion to set aside registered foreign support order.

A child was born to Father and Mother in 1992, and in 1996 a child support order was entered against Father in the amount of $100 per week. In 2011, a Kentucky court granted a judgment against Father for unpaid child support in the amount of $111,305.57, including interest (calculated at rates for both the New Jersey and Kentucky courts), after specifically stating that Father did not appear for the hearing by telephone as instructed.

Mother registered the Kentucky judgment as a foreign support order per A.R.S. § 25-1302. Father was advised by the court by mail that he had 20 days from the date of mailing to contest the validity or enforcement of the registered order. The document further notified Father that his failure to timely respond "precludes further contest of the order with respect to any matter that could have been asserted." Father's attorney accepted service of Mother's motion to register the foreign judgment and associated documents 190 days later, after which he filed a response disputing the principal and interest calculations. Father also filed a motion to partially set aside the registered child support judgment under Rule 85(C)(1)(d) of the ARFLP, asserting that the Kentucky judgment used incorrect interest rates making the judgment void "as a matter of law as it lacked jurisdiction to render judgment." The lower court denied the motion and signed it pursuant to Rule 81. Father timely appealed.

Father argued on appeal that the Arizona court lacked jurisdiction to make the order because the Kentucky judgment incorrectly calculated pre- and post- judgment interest thereby making it void. He further argued that Arizona had jurisdiction to correct the domesticated foreign support order. Reviewing the trial court's ruling on a motion to set aside a judgment for an abuse of discretion, the appellate court disagreed with Father.

The appellate court stated that A.R.S. § 25-1304(C) requires Arizona courts to enforce foreign support orders and collect arrears and interest due on foreign judgments. And while A.R.S. § 25-1307, "Contest of registration or enforcement," sets forth eight separate defenses available to challenge the validity or enforcement of a foreign support judgment, an erroneous calculation of arrears is not one of the listed defenses. Furthermore, the only mention of jurisdiction in this statute is of personal jurisdiction, which was not argued by Father. Thus, the appellate court found no error of law or abuse of discretion in the trial court's denial of Father's motion to partially set aside the Kentucky Judgment.

El-Sharkawy v. El-Sharkawy, 1 CA-CV 17-0425-FC (7/19/2018).
Property/Debt Division; Spousal Maintenance; Income for Child Support Purposes; Bias. Reversed trial court's orders dividing property/debt in unequal manner as offset against spousal maintenance, failing to factor separate contributions to community debts post-service under *Bobrow*; affirmed trial court's orders including second job income for child support purposes.

The parties proceeded to trial in February 2017 wherein the trial court made spousal maintenance findings, awarded Wife indefinite spousal maintenance, and ordered Husband to assume all community debts. The trial court reflected that such unequal division of debts would be

incorporated pursuant to a reduced spousal maintenance award. The trial court included both Husband's full-time airlines employment and part-time adjunct professor income for purposes of its child support analysis. Husband argued that the trial court should only include his full-time employment income and that the trial court misapplied the amount that he earned. Husband had paid the mortgage payments on the home during the pendency of the appeal and argued that he should be provided credit, which the trial court rejected. Husband appealed.

The Court of Appeals affirmed the trial court's ruling, which included both Husband's full-time and part-time employment income. Although Husband argued that the trial court included more income than what he earned in full-time employment, Husband failed to provide documentation other than his hourly wage, which the trial court merely multiplied by 40 hours per week and 52 weeks. Regarding his part-time employment, Husband had earned such in varying amounts during the last eight years of the marriage. Although he stated he did not desire to work such hours in the future, it was within the trial court's discretion to determine if such claim was credible. Pursuant to Guidelines Section 5(A), the trial court had the discretion to determine whether "that income was historically earned from a regular schedule and is anticipated to continue into the future." In the same regard, the record did not suggest that teaching one class per year as he had been doing required an "extraordinary work regime." The family court did not err by concluding that Husband's historical work at MCC would likely continue.

As for the property / debt allocation, the Court of Appeals vacated the trial court's ruling because the court cannot offset community debts against spousal maintenance, although it can, under some circumstances, order an unequal division of debt and offset same in the division of property, but not as an offset against spousal maintenance. The Court of Appeals affirmed the trial court's findings of fact for purposes of spousal maintenance, but remanded the decision to consider the elimination of the disparate debt distribution. The Court of Appeals thoroughly explains the burdens of proof for spousal maintenance and principles.

With regard to Husband paying the mortgage during the pendency of the case, the Court of Appeals remanded the issue to the trial court (citing *Bobrow*) (noting efforts to service community debt and maintain community assets with post-petition separate property "must be accounted for in an equitable property distribution").

Finally, the Court of Appeals rejected Husband's claim of bias on the part of the trial judge. The determinations by the trial judge regarding Husband's lack of credibility were supportable by the record and did not rebut the strong presumption that trial judges are free from bias and prejudice.

Krenzen v. Katz, 1 CA-CV 17-0367-FC (7/17/2018).

Characterization of Property; Attorneys' Fees. Reversed trial court's orders awarding one spouse's separate property to other spouse and attorneys' fees and remanded.

The parties were divorced by decree in November 2013. The decree provided that "Father's Marker Advisors 401K shall be divided so that a*ll funds contributed during the marriage* (and all proceeds of such funds) are divided 50/50." (Emphasis added). Husband argued that such language was ambiguous and that the order must be interpreted to mean all funds contributed up to service of process (subject to gains or losses) consistent with Arizona law. Wife argued that

such language must be interpreted literally, as all funds contributed up to entry of the decree, *i.e*. since the parties were technically married until the entry of the decree.

The trial court ruled that the language was ambiguous and held that such should be interpreted as including only contributions through service of process. The trial court denied both parties' requests for attorney fees and costs pursuant to A.R.S. § 25-324 finding both parties unreasonable. Wife appealed.

The Court of Appeals found that it did not matter if the order was found ambiguous, as the trial court did not have the discretion to award the community post-service contributions as such constituted Husband's separate property.

> Comment: Such furthers the concept that despite the technical language of the decree, which could arguably support Wife's argument, the statutory definition of community versus separate property ultimately controlled.

Wife also appealed the trial court's denial of her request for attorney fees. Such was remanded by the Court of Appeals for the trial court to consider both the reasonableness factor and the comparative financial resources factor. The Court of Appeals stated that the trial court must consider both factors per A.R.S. § 25-324, although it can award fees based upon either factor.

> Comment: The case facts are not detailed regarding the trial court's findings regarding the attorney fees issue other than to state that the trial court found both parties unreasonable. Apparently, the trial court did not consider the parties' comparative financial resources. The decision does not suggest that the trial court must make formal findings of fact if such are not requested, but the ruling does need to at least reflect that it considered both factors.

In Re the Marriage of Sosa, 2 CA-CV 2017-0170-FC (7/3/2018).

Division of Real Estate Proceeds; Child Support/Childcare Credit; Parenting Time; School Choice; Attorneys' Fees. Affirmed orders regarding division of proceeds, child support/childcare credit, parenting time, and attorneys' fees; vacated school choice order and remanded for redetermination of that issue.

During the marriage, husband gifted $3,000 to his uncle to purchase a house for husband's parents. Uncle titled the property in the name of himself and husband and wife. Upon uncle's death, the property was owned by the parties. Husband's mother made mortgage payments until the property was sold. The parties did not dispute that the proceeds from the sale were community property. The trial court divided the proceeds equally. Husband argued he should be credited his $3,000 gift and all of the mortgage payments his mother made, giving him a 90% share of the proceeds.

The appellate court noted the presumption that all property acquired during the marriage is community and considered the factors in determining what is an equitable division, but disagreed with husband. The $3,000 came from husband's 401(k) during the marriage, which included pre and post-marital earnings. There was no evidence that husband's mother's mortgage payments

were made to benefit husband alone, and husband was unable to rebut the presumption by clear and convincing evidence.

Husband also challenged the trial court's acceptance of Wife's testimony regarding her child care costs. Wife testified she paid $175 a week for one child (the parties had two) and she was credited with $650 per month in childcare costs in the worksheet. She also admitted at times that family members watched the children at no charge. The appellate court found the trial court did not abuse its discretion in crediting wife with less than she testified to regarding her childcare expense.
The trial court significantly modified the temporary equal/week on/week off parenting time schedule, over the recommendation of the best interest attorney, and ordered less than equal time for Husband. The trial court found that the schedule was unfeasible due to the distance between their residences and required the children to spend hours in the car each day. Husband was also vague on his work schedule and could not get the children to school. The appellate court noted that the recommendations of a best interests attorney are merely advisory and the best interests attorney's positions are not evidence. As the trial court's ruling was supported by the evidence at trial regarding the best interest of the children, the appellate court affirmed the trial court's ruling.

Conciliation Services performed a Family Assessment prior to trial and recommended, among other things, that the children attend school where wife teaches, with the recommendations contingent on the best interests attorneys' findings. The trial court ordered the children to not return to the school they had been attending, instead ordering them to attend the school where wife worked, which the trial court found to be in their best interest. The appellate court explained that at the time of the Decree, *Jordan v. Rea* was the prevailing authority on school choice and *Nicaise*, which departed from *Jordan*, determined trial courts do not have the authority to make such decisions that the parents should decide. However, *Nicaise* had not yet been published at the time of the trial court's decision, so the appellate court had to apply it retroactively given that the appeal of the trial court's decision as pending at the time *Nicaise* was decided.