

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

This update contains summaries of 10 memorandum decisions for cases decided in August 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).

MEMORANDUM DECISIONS

In re Marriage of Garcia, 2 CA-CV 2017-0137 (8/31/2018).

Spousal Maintenance. Affirmed trial court's orders regarding spousal maintenance.

The parties were married in 1991, moved from Mexico to Santa Cruz County, Arizona in 2007, and separated in 2015. Wife filed her petition in 2016, and the parties subsequently agreed to a division of assets and debts. The matter proceeded to trial on the issues of spousal maintenance, attorneys' fees, and the filing of tax returns. The trial court divided the parties' assets and debts pursuant to the parties' agreement, and ordered that Husband pay Wife decreasing spousal maintenance for a period of 90 months. The trial court further found that Husband failed to provide his financial affidavit and failed to meet his continuing duty to disclose, and awarded Wife her attorney's fees.

Husband appealed from the trial court's award of spousal maintenance to Wife, order for Husband to pay Wife's post-separation debts, failing to "grant" his proposed findings of fact, and ordering him to pay Wife's attorney's fees. Regarding spousal maintenance, Husband argues that the trial court could not consider the years when the parties were married and lived in Mexico because under Mexican law, Wife would not be entitled to spousal maintenance. The appellate court rejected this argument and affirmed trial court's application of Arizona law, even though the parties were originally married in Mexico before moving to and eventually divorcing in Arizona. The appellate court found that Husband waived his remaining arguments because he failed to develop his legal argument to support these positions.

State/DES, et al. v. Martinez, 1 CA-CV 17-0247-FC (8/30/2018).

Notice of Dismissal; Jurisdiction. Vacated superior court's and commissioner's orders because party had filed motion to dismiss own petition for modification.

Father filed a child support modification in 2016, and later to modify parenting-time and child support. He also filed a petition to enforce parenting time. The trial court denied the enforcement petition due to the child reaching majority, but did not address the child support or parenting time

modification petitions. Father filed a motion to dismiss his petition for modification, but the court instead referred the petition to the Title IV-D commissioner. The commissioner held a child support hearing, where Father failed to appear. The commissioner increased the child-support payment and denied Father's motion to dismiss as moot.

On appeal, the court of appeals agreed with Father that the court should have granted the motion to dismiss, because it functioned as the equivalent of a notice to dismiss, and no responsive pleading had been filed by Mother or the State before Father's motion to dismiss. Because no response was filed beforehand, Father's motion to dismiss terminated all jurisdiction of the court over the matter. Thus, the superior court and commissioner's orders were without jurisdiction, and the court of appeals vacated both.

Hieger v. Hieger, 1 CA-CV 17-0753 FC (8/30/2018).

Legal Decision-Making; Parenting Time; Child Support; Attorneys' Fees. Affirmed trial court's denial of Mother's motion to modify, determination of gross income for child support, and award of attorneys' fees.

Mother and Father were awarded joint legal decision-making and equal parenting time for their three minor children (F.H., C.H. and J.H.) pursuant to their 2012 divorce decree. In 2014, Father moved to modify the legal decision-making and parenting time provisions of the decree on the basis of a substantial and continuing change of circumstances, arguing that Mother inadequately supervised the children, engaged in parental alienation and refused to follow court orders. The superior court determined that a sufficient and material change in circumstances existed to modify the parenting plan, but that joint legal decision-making was still in the children's best interests. As to parenting time, the lower court determined that equal parenting time was still in the best interests of J.H., but ordered that C.H. was to reside with Father.

In 2017, while in Father's care, J.H. left Father's home and went to Mother's home. J.H. refused to return to Father's home. Mother allowed J.H. to reside with her and refused to assist Father in exercising his parenting time. Father filed a petition to enforce his parenting time to which Mother responded with the filing of a petition to modify legal decision-making, parenting time and child support. Mother twice petitioned the court to interview J.H., which the lower court denied reasoning that J.H. (age 14) was not of suitable age per A.R.S. § 25-403(A)(4). The lower court denied Mother's petition to modify parenting time and legal decision-making finding that such request was not in J.H.'s best interests.

The court further modified the child support amount after finding that Mother's gross monthly income failed to include \$9,000 of additional income from rental property that she failed to report. The court further awarded Father his reasonable attorney's fees and costs, but deferred on determining the amount awarded pending the submission of appropriate documentation. Mother timely appealed, but did so before the lower court rendered its decision on the amount of attorney's fees to be awarded, so that decision was not considered by the appellate court as it lacked jurisdiction over the issue.

Alleged Failure to Consider Child's Wishes

Mother argued the lower court erred by not considering J.H.'s wishes with respect to legal decision-making and parenting time. The appellate court held that the lower court did not abuse its discretion by declining to modify parenting time despite uncontested evidence that J.H. wanted to live with Mother. In reaching this holding, the appellate court considered: 1.) that Mother did not show that the superior court failed to consider J.H.'s wishes; 2.) that evidence showed Mother inappropriately involved the children in the case by providing them with information related to the dispute; 3.) that Mother engaged in alienating behavior by allowing the children to refer to their Father by his first name and by fostering an environment that allowed the children to gain favor by making negative remarks about Father; 4.) that evidence showed Mother was coaching J.H.; and 5.) that Mother provided a much less structured environment than Father, which may have tainted J.H.'s wishes. Ultimately, the appellate court held that although a court may interview a minor child per Rule 12(A) of the Arizona Rules of Family Law Procedure, such interview is not required under A.R.S. § 25-403(A)(4).

Best Interests

Mother argued the lower court erred by finding a modification of parenting time was not in J.H.'s best interests, asserting that the strained relationship between J.H. and his Father demonstrated both a change in circumstances and that the modification was in J.H.'s best interests. The appellate court acknowledged the finding of a strained relationship as this point was undisputed, but held that Mother's argument was essentially one asking for the appellate court to reweigh evidence on appeal, which the appellate court will not do.

Mother's Income

Mother argued the superior court erred in its determination of her gross monthly income because it failed to deduct expenses from her rental income in its calculation. The appellate court reviewed the ruling for an abuse of discretion but affirmed the lower court's ruling after determining that Mother failed to provide documentation substantiating her expenses at trial. For this reason, her income was a credibility determination to which the appellate court would defer.

Withrow v. Mizelle, 1 CA-CV 17-0585-FC (8/28/2018).

Collateral Attack on a Termination of Parental Rights. Affirmed order denying Father's Motion to Enforce Right to Direct the Upbringing of Daughter.

Father initiated a parenting time action in February 2015. The family court stayed this action in May 2015 when it learned about a severance action in juvenile court. In February 2017, the juvenile court terminated Father's parental rights. In July 2017, Father filed a Motion to Enforce Right to Direct the Upbringing of Daughter. The trial court denied this Motion with prejudice because Father's rights had been terminated and the minor child had been adopted.

Father appealed stating that the family court should have held hearings concerning paternity under the Parent's Bill of Rights, failed to investigate the dilatory representation of court appointed counsel, and violated his constitutional rights by delegating the decision (re: termination) to the juvenile courts.

The appellate court viewed Father's motion and appeal as an attempt to circumvent the juvenile court's order terminating his parental rights. Father had previously appealed and the trial court was upheld on appeal. Since Father was no longer a legal parent he could not bring an action to enforce parental rights.

Russell v. Sahl, 1 CA-CV 17-0729-FC (8/28/2018).
Attorneys' Fees. Affirmed order awarding fees.

Father requested reallocation of parenting time transportation expenses due to Mother's behavior which caused the previous order to be unworkable. Upon reallocation of the transportation expenses, Father requested fees due to Mother's unreasonable behavior (not detailed in this opinion). Mother failed to respond to Father's fee request and Father was granted the majority of his requested fees. Mother appealed, alleging the court failed to review her financial information prior to awarding fees. Because Mother was given the opportunity to submit a fee application and affidavit, and neither party requested findings of fact or conclusions of law, the court found it was left with presuming that the superior court judge knew and followed the law. The court of appeals held that the court presumably found every fact necessary to support its ruling and affirmed.

Barroso v. Barroso, 1 CA-CV 17-0347-FC (8/23/2018).
Retroactive Spousal Maintenance; Findings; Restricted Stock Units ("RSUs"); Attorneys' Fees. Reversed trial court's retroactive spousal maintenance order, vacated property division orders, and remanded for sufficient findings. Affirmed attorneys' fees award.

The trial court ordered spousal maintenance retroactive for 16 months prior to the ruling. The appeals court found that there was no authority to support imposition of a retroactive maintenance obligation that places a party in arrears from the outset, reasoning that retroactive maintenance is available only in the context of a modification action. The Court of Appeals further reasoned that the retroactive order was inconsistent with the trial court's rationale that Mother "will" need 30 months to secure employment.

The court upheld the trial court's finding that RSUs were community property, but remanded for findings regarding the division of property because the court did not make such findings in spite of a request by the husband and so it could determine whether it divided community assets that no longer existed, which would be erroneous. The case was also remanded for findings about whether father's income should have been reduced because of his verbal testimony that he had made payments on the mortgage and upkeep of a rental property owned by the parties.

The trial court awarded attorneys' fees to Mother, finding a substantial disparity of financial resources and Father's unreasonable positions. On appeal, Father argued that the financial-resources finding ignored the fact that he owed equalization payments, spousal maintenance, and child support. In affirming the fee award, the court of appeals found that regardless of the trial court's orders, Father still had a long-term, high-paying job and Mother was in debt and struggling to reenter the workforce. The court of appeals found Father's position initially requesting supervised parenting time and later agreeing to joint legal decision-making and no supervised parenting time as having been unreasonable.

Smith v. Lewis, 1 CA-CV 17-0762 FC (8/9/2018).

Legal Decision-Making; Findings regarding Domestic Violence. Affirmed, upholding trial court's legal decision-making ruling and order that party complete DV counseling.

After trial on Father's petition to establish legal decision-making and parenting time, the trial court ordered joint legal decision-making for the parties 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.

Hart v. Hart, 1 CA-CV 17-0502-FC (8/7/2018).

Findings regarding Modification of Parenting Time. Affirmed, upholding trial court's denial of petition to modify parenting time.

After the trial court denied Appellant/Father's petition to modify the court's order that his parenting time be supervised, Appellant/Father appealed. Appellant/Father argued on appeal that the trial court erred by not specifically enumerating its findings of fact and conclusions of law. The Court of Appeals found that the trial court was not required to make express written findings, as the case involved only a modification of an order pursuant to A.R.S. § 25-411, not -403(B), not even when Father filed a Rule 82 request for findings of fact/conclusions of law because that Rule only requires the court to find the facts specially, which the court of appeals found the trial court did in its ruling denying Father's petition to modify.

Zak v. Hammerschmidt, 1 CA-CV 17-0612-FC (8/7/2018).

Child Support (Imputation of Income); Therapeutic Intervention Expenses. Vacated orders regarding child support and T.I. fees and remanded for recalculation of child support and reallocation of T.I. expenses.

Father was employed with the Arizona State University. Father also had some additional income from working in other positions, including summer courses and consulting. Father submitted various financial affidavits for 2015 and 2016 with various amount of income. Mother asked the court to consider the additional income; Father argued that the Child Support Guidelines do not support inclusion of the additional income, plus the summer positions were not guaranteed. The trial court found Father's 2014 salary as the best indicator of Father's historical income. Mother appealed the trial court's exclusion of Father's supplemental income from its child support calculation, when it determined such income was speculative. The court also ordered that the parties pay for the therapeutic intervention in proportion to their incomes, based on the incomes used to calculate child support.

On appeal, the court stated that Father's own various financial affidavits, which listed his income significantly higher than his 2014 base pay, belied this finding. The appellate court also dismissed Father's claim that Mother's tuition waiver, which was reflected as income on Father's taxes, should not be considered income, as it was a cash-like benefits received by the parties (citing *Milnovich v. Womack*, 236 Ariz. 612 (App.2015)).

The appellate court also noted that the Guidelines provide that income which is not continuing or recurring in nature need not necessarily be deemed income for child support purposes, but the court may consider income that is actually earned that is greater than what would have been earned at full-time employment if that income was historically earned from a regular schedule and is anticipated to continue into the future. In this case, the appellate court found that Father's additional income for at least two years was not speculative, but historical and anticipated to continue in the future. Thus, Father's additional income from other positions fell into the definition of gross income under the Guidelines. Because the calculation of Father's income was incorrect, the trial court must also reallocate the T.I. fees once Father's income is recalculated for purposes of child support.

Heath v. Mayer, 2 CA-CV 2018-0005 (8/1/2018).

Enforcement of Domesticated Decree; Full Faith and Credit Clause; Res Judicata; Personal Jurisdiction. Affirmed writ of execution to enforce domesticated divorce decree.

Parties were divorced in Michigan in 2016. In the same year, Wife domesticated the decree in Arizona to enforce it against Husband's property in this state. Husband did not object to the domestication within the prescribed time period in A.R.S. § 12-1704(C) and Wife obtained a writ of general execution, but could not serve it. Months later, she obtained another writ, which was served, but returned unsatisfied as Husband refused to allow officers onto his property. When Wife sought a third writ of execution and a writ of attachment, Husband objected. After hearing, the trial court affirmed the writ of execution and Husband appealed.

On appeal, Husband argued that because the Michigan judgment was void, Arizona erred in enforcing it. Husband contended that he did not consent to the divorce in Michigan and therefore the trial court had no authority to impair his marriage contract. Husband also challenged the trial court's jurisdiction over him. The Court of Appeals disagreed, finding that even if Husband was correct, his opportunity to argue as such was during the domestication proceeding. Even if his objections were timely, the Full Faith and Credit Clause requires a final judgment entered in a sister state must be respected by the courts of this state absent a showing of fraud, lack of due process, or lack of jurisdiction in the rendering state. As such, his attack on the merits of a foreign judgment is precluded under res judicata. The Court of Appeals wholly rejected Husband's claims that the trial court lacked jurisdiction over him as he failed to provide any relevant legal support for his position or any citation to the record, nor did he even draft an argument that would permit appellate review.