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

This update contains summaries of 1 reported opinion and 14 memorandum decisions for cases decided in October 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

Amadore v. Lifgren, 1 CA-CV 17-0024 FC (10/16/2018; amended 10/18/2018).
Modification of Child Support and Spousal Maintenance. Affirmed orders terminating spousal maintenance and modifying child support, but vacated as to the effective dates of both orders and remanded for redetermination based on when the changed circumstances were proven to be substantial and continuing. Also vacated Father's child support obligation reduction and remanded for reconsideration and recalculation of any overpayments and vacated order awarding Father attorneys' fees. Affirmed order assigning responsibility for uncovered medical expenses.

Mother petitioned for divorce in 2013 and a default decree was entered against Father. Father was ordered to pay spousal maintenance in the amount of $2,000 per month indefinitely and child support in the amount of $3,000 per month which was consistent with the parties' agreement and an upward deviation. Father was also assigned 100% responsibility for uncovered medical expenses. In 2014, Father moved to modify the Decree seeking a modification in legal decision-making, equal parenting time, and modified child support. Thereafter, Father moved to modify spousal maintenance.

The trial court modified the Decree by reducing child support to a Guideline amount and terminating spousal maintenance. As a result, there was an overpayment ($31,464 in child support and $14,000 in spousal maintenance) due to the retroactive effective dates applied by the Court (based upon service of father's Petition). The Court ordered that father's future child support obligation was reduced by $500 per month until father's overpayment was offset. The Court ordered the parties to equally divide the uncovered medical expenses for the children.

The Court of Appeals found that the Superior Court erred to the extent that it ruled Mother's obtaining of a real estate license/working as a realtor and relocating to pursue better opportunities constituted the necessary change in circumstances resulting in a modification or termination of spousal maintenance. Mother did not have the resulting income increase related to her employment. Father only offered conclusory statements that Mother should be attributed a higher income. Moreover, Father impermissibly attempted to shift the burden to Mother, when it was his burden to prove and provide evidence that her income had increased for some time or that her

income was voluntarily reduced as a matter of choice necessitating the retroactive effective dates of support and child support described *supra*.

Pursuant to A.R.S. § 25-327(A), modifications are effective the 1st day of the month after service of the Petition unless a Court finds good cause to do otherwise. A court errs if it applies a retroactive effective date for support that predates the required change in circumstances needed for modification in any particular case. To hold otherwise would ignore the changed circumstances requirement. In this case, the Court erred by not finding "good cause" given the circumstances necessitated selecting a later effective date and the orders were therefore vacated.

Even though the effective dates were vacated, new effective dates are appropriate based on the date of the actual substantial change in circumstances. The question that arises is whether Father's child support obligation may be properly reduced to offset overpayments. The Court of Appeals found any order the superior court might issue in reimbursing Father for overpayments must, at a minimum, comply with the Guidelines'' deviation requirements. The issue was remanded.

The Court of Appeals found the superior court did not abuse its discretion when it found that Mother did not meet her burden of showing an upward deviation of child support (as was ordered in the parties' Decree) was in the children's best interests.

The Court of Appeals found Mother's argument that uncovered medical expenses should be divided in proportion to income, not simply equally, was unpersuasive in light of the income shares model and the purpose of the Guidelines. Further, there is no explicit language requiring they be divided in proportion to income. The Trial Court was affirmed.

MEMORANDUM DECISIONS

Butler v. Butler, 1 CA-CV 16-0442-FC (10/30/2018).
Spousal Maintenance; Characterization of Property; Reimbursements. Vacated trial court's spousal maintenance order and remanded or reconsideration of that issue, but affirmed all other orders of the trial court.

Parties both had college degrees and jobs by time they married in 1994. Two children were born of the marriage, during which the family moved states many times due to Mother's medical school and career. Husband worked various jobs during the marriage, including part-time while he was a stay-at-home parent during Mother's residency. In 2006, the parties moved to Lake Havasu when Wife received a partner/shareholder job opportunity at AEMS. Wife was to be paid as a 1099 employee, and she formed MP Butler as a tax strategy. She also became part-owner of another entity. Meanwhile, Husband briefly became a partner in a Taekwondo studio. In 2009, the parties purchased the Lakeland home ($57,000) and the Holly home ($35,000), both in Lake Havasu, as investment properties free and clear. Two years later, Wife filed for divorce. Husband was served in August of 2011. The parties each received approximately $60,000 from accounts and Wife moved out of the former marital residence ("Oakwood home"). Wife voluntarily paid Husband $50,000 in spousal support over the next year and paid all community expenses, including the Oakwood home mortgage. In 2012, the family court entered temporary orders requiring Wife to pay Husband $6,000 per month in spousal maintenance and $1,000 per month

in child support (with equal parenting time), and to continue paying all community expenses, except those related to the Oakwood home. Wife paid all payments for the nearly five years between the date of service and entry of the decree on June 14, 2016 ($314,000 in spousal maintenance). During that timeframe, Husband did not seek or obtain employment, instead earning a MBA in 2014. The same year, he obtained a job at a bank, making $24,000 per year.

Despite finding that Husband had been allocated sufficient property to provide for his reasonable needs, that his income potential is higher than he is earning, and he has adequate earning ability to be self-sufficient, at trial, Wife was ordered to pay spousal maintenance of $8,000 per month for six years until 2022. The trial court found this would allow Husband time to gain sufficient experience to improve his earning potential, and to secure improved employment, without explaining the basis for the finding, except mention of the parties' child's emancipation. The total value of community assets and property awarded Husband, after subtraction of the Oakwood home's mortgage, was $573,152, which included almost $300,000 in bank account funds, and was in addition to the $60,000 cash received upon separation and the +$300,000 Wife paid in voluntary spousal maintenance. Wife received community assets and property valued at approximately $912,000, including the parties' home in Peoria ("Remuda home") with negative equity of $252,000, the three businesses valued at more than a million dollars, and $38,442 in bank accounts. She also was assigned her student loan debt of almost $134,000 and was credited with having paid some community expenses. Wife was also ordered to pay $47,500 towards Husband's attorneys' fees. Wife appealed and Husband cross-appealed.

Spousal Maintenance

On appeal, Wife argues the decree is clearly erroneous and constitutes an abuse of discretion by awarding $8,000 per month in spousal maintenance for almost six more years (approximately $560,000) after she had already paid $314,000 in voluntary and court-ordered spousal maintenance for approximately five years pending the dissolution decree. Wife conceded that Husband contributed to her educational opportunities and some spousal maintenance was warranted. However, she argued that the stated purpose for spousal maintenance—achieving independence—had been achieved once Husband received his MBA and had sufficient time to establish greater earning potential. She also argued that the record provides no basis for the time frame in the decree. Husband focused on Wife's ability to pay rather than the decree's findings.

The Court of Appeals held that the decree was clearly erroneous in not only awarding Husband spousal maintenance for an additional six years, but also substantially increasing the amount, neither of which were supported by the record. Husband's calculated decision to effectively "under-employ" himself pending (and potentially after) the divorce is a burden that should not continue to be borne by Wife. The decree also should have considered the income-earning capabilities of the Lakeland and Holly homes, both of which were awarded to Husband.

Businesses

Wife also argues the court abused its discretion in finding that AEMS and MP Butler were separate businesses for valuation purposes. She maintains MP Butler is merely a bank account, or holding company, that receives the income she earns for her work with AEMS and pays out taxes. As

support for her argument, Wife notes MP Butler has no assets, office, or supplies and derives its income from AEMS. The Court of Appeals found that the extensive testimony of Husband's business evaluation expert, Lynton Kotzin, supports the court's conclusion and the record makes clear that AEMS and MP Butler are two distinct legal entities and that each has independent value.

Citing *Schickner,* Husband argued the family court erred in failing to address any community interest in excess distributions above Wife's reasonable compensation regarding AEMS and MP Butler. The Court of Appeals found that Husband waived this issue as it was not addressed in his Pretrial Statement or his motion for new trial and even had he not waived it, the trial court was aware of *Schickner* as Husband's own expert testified about *Schickner* principles.

Remuda Home and Reimbursements

Husband argued the family court should have considered that Wife could short sell the Remuda home, but the decree expressly referenced the negative equity in the home and entered appropriate orders regarding sale/refinance/removal of Husband's name from the loan. Ultimately, the home was retitled into Wife's name alone. The Court of Appeals rejected Husband's argument as he provided no proof or citation to the record or authority to support his claims.

Wife also argued that she should have been given an offset credit for interest-only payments she made to service the mortgage and other expenses on the Remuda home she lived in during the pendency of the proceedings. Because Wife provided no authority or much development for her argument, and her documents contained inaccuracies or were otherwise illegible, the Court of Appeals affirmed the trial court's orders, noting that Husband was also not given any offset credit for payments he made to the Oakwood home.

Lopez v. Lopez, 1 CA-CV 17-0640 FC (10/30/2018).

Waste; Due Process. Affirmed trial court's division of proceeds from previously sold property and award of spousal maintenance.

In 2016, Husband file a petition for dissolution against Wife. The couple had been married since 2001. In her response, Wife listed the community property that she believed should be divided, including a plot of land in Tonopah, Arizona, and requested spousal support. In the months before trial, Wife's attorney withdrew and Wife failed to file a pretrial statement. At trial, Husband testified that he purchased the Tonopah land for $10,000 in 2008, but that in 2015 the land was taken away when he was no longer able to make payments; Husband offered two quitclaim deeds reflecting the alleged purchase and loss, both of which listed him as an unmarried man. Wife testified that Husband was lying about the property, and she offered a notarized document showing that Husband received the property (plus $4,000 cash) in repayment of a $37,000 debt owed to him. Wife had not disclosed the document prior to trial, but recognizing the importance of the document, the trial court continued the trial instead of precluding the document in order to give Husband time to prepare an explanation. At the continued trial date, Wife testified that Husband did not lose the property, but sold it and that she did not receive any share of the proceeds of the sale. In the decree, the trial court found that Husband had not been truthful about the Tonopah property and that his credibility had been placed at issue. The court awarded Wife half the value of the Tonopah property ($33,000) and $500 in monthly spousal maintenance. Husband appealed.

Regarding the Tonopah Property, Husband argued that the superior court did not have the authority to divide the value of the Tonopah property because it was not owned by the community at the time of the dissolution. The appellate court found that the trial court exercised its authority to consider a party's waste, including the fraudulent disposition of community property, when dividing community property.

Husband also argued that the trial court deprived him of due process by considering the waste argument even though Wife failed to file a pretrial statement. The appellate court found that Husband had "sufficient notice" that Wife would seek an equal division of the Tonopah property. The court cited Wife's Response to Husband's Petition and her RMC Statement, seeking an equal division of the property, and the fact that Husband had a three-month continuance of the trial after Wife argued and presented evidence that Husband lied about the property.

State/DES v. Torres, 1 CA-CV 17-0695 FC (10/30/2018).

Child Support. Affirmed order allowing DCSS to withdraw money from inmate's bank account to be paid towards child support arrears.

Torres was an inmate at the Arizona Department of corrections (ADOC) and owed over $20,000 in child support arrears. The Arizona Division of Child Support Services (DCSS) was enforcing his child support arrears. Torres' mother deposited $120.00 into his inmate trust account as a Christmas gift. DCSS issued a limited income withholding order (LIWO) to ADOC to garnish money from his inmate trust account to satisfy his child support arrears. Pursuant to the LIWO, ADOC garnished $90.07 from Torres' inmate trust account and sent it to the Clearinghouse, the money was then applied to his child support arrears. Torres challenged that garnishment of his inmate account.

The Court takes us through the statutory trail of how this garnishment was authorized. If you are looking for a good reference for child support garnishment statutes, this is the case.

First, the Court found that this was a garnishment pursuant to a LIWO under A.R.S. § 25-505, which allows DCSS to "issue a limited income withholding order to any employer, payor or other holder of a non-periodic or lump sum payment that is owed or held for the benefit of an obligor." This was not a garnishment of Torres' wages but rather of his inmate trust account. So any statutory limitations under A.R.S. § 31-254 as to what can be garnished from an inmate's wages for child support did not apply here.

Second, Torres attempted to argue that the deposit into his account was not a lump sum payment. The Court stated that to be a lump sum payment it did not need to be one of the listed examples under A.R.S. § 25-505 as the statute used the words "lump sum payment *includes…*" The Court stated that this is an enlargement term not a limiting term and found that the deposit was "under the plain meaning of the term" a lump sum payment.

Third, Torres attempted to argue that this deposit could not be garnished as it was a gift and not money owed to him. Again, the court looks at the LIWO statute and compares and contrasts it to A.R.S. § 25-504 (Order of Assignment). Income is defined under A.R.S. § 25-504 as money "owed" to a person. The Court found that A.R.S. § 25-505 does not have that limitation and as it

states a LIWO can be issued to a "holder of a . . . lump sum payment that is . . . held for the benefit of an obligor." The deposit made by his mother was a lump sum payment to his inmate trust account which ADOC held for his benefit, thus it was subject to a LIWO.

Finally, Torres attempted to argue the garnishment of his money before a hearing was held was a violation of his due process rights. Court found that the withholding order was merely a restriction on his freedom to use his money in a particular way not an absolute deprivation of the benefit of the money thus, not a due process violation.

Uthe v. Uthe, 1 CA-CV 18-0021 (10/25/2018).

Modification of Legal Decision-Making and Parenting Time; Contempt; Attorneys' Fees. Affirmed trial court's denial of Father's petition for modification, award of fees to Mother, and order applying credit to Father's share of outstanding community debts; vacated contempt citation and remanded for recalculation of Father's portion of retirement account and apply it to his past due child support and tax debt.

Parties were married 10 years and had two children. Father owned a firearm business and related thereto, the parties owed $100,000 in tax debt to the state. In the decree, Mother was designated as the primary residential parent and was granted final decision-making authority. The decree also set forth pre-requisites for Father to complete prior to petitioning for modification and set forth the property/debt division. Father appealed the decree and the Court of Appeals found no error aside from the lack of specificity regarding how much each party would receive from Mother's 401(k). On remand, the trial court ordered the 401(k) be split equally.

After the appeal, many post-decree petitions and motions were filed. The family court further ordered that the past due child support be deducted from Father's half of the 401(k) and set hearing for November 2017 on the remaining issues. Father appealed the family court's denial of his petition to modify legal decision-making and parenting time, the order that his portion of the 401(k) and the estimated $10,000 owed to him by Mother for selling Father's guns be applied as a "credit" to the outstanding ADOR tax debt Father failed to pay, and the award to Mother of her attorneys' fees granted due to disparity in financial resources and Father's unreasonableness.

The Court of Appeals affirmed the denial of Father's petition to modify as the family court correctly determined no change in circumstance had occurred because Father never completed the requirements per the decree prior to seeking to modify. The family court's order holding Father in contempt, however, was improper as Mother had never sought a finding of contempt regarding the tax debt issue; Mother only filed a petition to enforce that order, but did file for contempt as related to Father's failure to pay child support. As such, the Court of Appeals vacated the trial court's order finding Father in contempt for failing to pay the tax debt. The Court of Appeals also affirmed the family court's order applying Father's share of the 401(k) to reduce his share of the tax debt as Father provided no proof of payment of the debt. The Court remanded for the family court to calculate Father's share of the 401(k) after deducting Father's outstanding child support arrears and use the remainder to pay towards the tax debt. Father's argument that the family court erred in only valuing his guns that Mother sold at $10,000 was also affirmed as Father provided no proof of the value. As for the award of attorneys' fees, the Court of Appeals reasoned the family court properly granted Mother her fees pursuant to A.R.S. § 25-324.

Savage v. Crippa, 1 CA-CV 17-0659 (10/25/2018).
Name Change of Child. Remanded for a new trial, vacating trial court order that denied Mother her request to change the child's last name.

Separately from the family court case, Appellant/Mother applied in the trial court to change her child's last name, but did not request a best interests finding. Appellant/Mother's request was denied, and she moved for a new trial. After the trial court denied her motion, she appealed. The Court of Appeals found that the trial court abused its discretion by denying the name change based on the rationales it stated on the record and in its order (that Mother was using the application as leverage in a family court matter and that a name change would "only cause more disharmony), and the Court vacated the trial court's order denying the name change. Because the order was vacated, the Court of Appeals found the issue regarding Appellant/Mother's motion for a new trial to be moot.

State of Arizona v. Myers, 1 CA-CV 17-0734 FC (10/25/2018).
Establishment of Paternity. Reversed and remanded, vacating trial court order that established paternity in a separate case.

In an earlier dissolution case not involving the Appellee, non-paternity was established against the husband, and the Superior Court ordered that the husband's name be removed from the birth certificate. In the later Superior Court paternity action in this case, genetic testing by the state created a presumption that Appellee was the father of the child in the dissolution case, but summary judgment was nevertheless denied to the state and an order was entered in favor of the Appellee, as the Superior Court found that it lacked jurisdiction when it established non-paternity in the dissolution case, further ordering that the husband's name be reinstated on the birth certificate. The Court of Appeals reversed and remanded for summary judgment in favor of the state and vacated the Superior Court's order in the paternity case that re-established the husband's paternity. The Court held that because Appellee did not timely seek to join the dissolution action or seek to have the parties to the dissolution action joined in his paternity case, he did not offer sufficient evidence to prove or disprove his paternity to raise a genuine issue of material fact as required.

Banasik v. McLaughlin, 1 CA-CV 17-0778-FC (10/23/2018).
Property/Debt Division; Attorneys' Fees. Affirmed orders regarding valuation of home, characterization of child support received for non-common child, assignment of community debt, and denial of attorneys' fees award.

Valuation of the Marital Home

After a two-day trial, the lower court determined the fair market value of the parties' home to be that as listed in a previous sale agreement for the home that failed to close. The determination was made in light of the lower court's finding that no other reliable evidence was presented by either side at trial to determine a different market value. Husband argued that the lower court improperly undervalued the home by using the valuation at the date of dissolution rather than the date of service. He further argued that the undisputed amount testified to by both parties should have been used by the court.

The appellate court found no error. Applying *Sample v. Sample*, 152 Ariz. 239, 242 (App. 1986), the higher court held that the superior court has broad discretion in determining the value of community assets for distribution under A.R.S. § 25-318. The appellate court further held that Arizona law does not require the court to value the marital home as of any particular date. In this case, the lower court was allowed to utilize alternative valuation dates. Thus, the lower court did not abuse its discretion as competent evidence supported its decision.

College Fund

The parties had no children together; however, Wife had a child from another man and was depositing child support payments from him into the community bank account, prior to her transfer of these funds to a discrete bank account set up for her daughter's college education. Husband argued that Wife's funding of the community bank account with these monies amounted to commingling and thus created a community interest in them. The appellate court agreed with the trial court's conclusion that the child support payments in the education account were Wife's separate property since she did not earn these support payments during marriage, but rather accepted them from her daughter's biological father for child's benefit.

Community Debt

Husband argued that the lower court erred by ordering him to reimburse Wife for one-half of the mortgage payments after separation and contended that he should only be charged for those payments that she paid during months when the house was vacant. Husband offered no legal authority and the appellate court concluded the lower court did not abuse its broad discretion.Husband also argued that he should have received credit for $32,000 in community debt that was discharged by way of his bankruptcy. The appellate court disagreed, holding that while Wife enjoyed some level of protection during the marriage under U.S.C. § 524(a)(3), she was still accountable for the credit card debt after the parties' divorce because she did not join in Husband's bankruptcy petition.

Attorney's Fees

Husband argued the lower court erred in not granting him attorneys' fees because Wife's income was larger than his and because Wife engaged in unreasonable conduct during the proceeding, including Wife's breach of their settlement agreement and her removal of his name from a health insurance policy while the Preliminary Injunction was in effect. The appellate court found that Husband failed to offer any authority for his proposition and, after holding that the lower court did not abuse its discretion on this issue, affirmed the lower court's ruling.

Coffee v. Hon. Ryan-Touhill/Appling, 1 CA-SA 18-0217 FC (10/18/2018).
Special Action; Temporary Orders; Due Process. Accepted Special Action Jurisdiction, denied specifically requested relief, but remanded to trial court to hold new trial.

Parties had long distance parenting plan whereby Father was primary residential parent. Mother moved to modify parenting time and child support via a petition to modify and emergency motion alleging Father was unsafe and asked the trial court to reverse the roles. The trial court deemed

the emergency motion a Rule 48 motion for temporary orders without notice. Father responded and counter-petitioned to modify legal decision-making and alleged there was no emergency as the parties had been working together regarding the child's mental health (the child had a summer therapist in Kansas). The trial court denied the emergency motion and set a return hearing where only testimony was set to be heard. At the return hearing, however, the trial court relied on the child's therapy notes provided by Mother, which had not been disclosed to Father. The trial court ordered the child to relocate without ordering specific parenting time for Father, scheduled a telephonic status conference for months later, but did not enter child support or legal decision-making orders. Because the orders were temporary in nature, Father filed for special action relief.

The Court of Appeals remanded for the trial court to hold a new trial on all issues that were pending before it, holding that Father's due process rights were violated, that the trial court failed to follow procedural and statutory rules and law regarding entry of temporary orders, and did not even consider the -403 factors. Additionally, Mother's emergency motion did not even cite Rule 47 or A.R.S. § 25-404 nor did she request temporary orders.

Strobel v. Rosier, 1 CA-CV 16-0644-FC (10/18/2018).
UIFSA; Validity of Foreign Child Support Arrears Order; Res Judicata. Affirmed enforcement of foreign child support order.

The parties were divorced in 1997 in the Dominican Republic. Father than moved to New Hampshire and Mother moved to Arizona. There were no child support orders entered. In 2008, Father filed a motion to clarify, requesting a child support order. Father alleged that instead of ordering child support Mother agreed to save to pay for college, and Mother admitted holding an interest in real estate valued at $150,000 for that purpose. The New Hampshire court ordered Mother to liquidate the real property and place the funds in an appropriate account. Although there has not been a child support order entered, the New Hampshire court found that it had jurisdiction over Mother "to establish, enforce, or modify a support order" and that the parties' 1997 agreement was valid and enforceable. Mother did not appear at this hearing.

After Mother failed to provide an accounting, Father filed a petition for contempt asking for an order stating that Mother owed $105,000 in child support arrears. Mother was incarcerated and informed the court she could not appear. The court continued the hearing but also issued an *ex parte* order and found Mother in contempt.

In a later letter, Mother stated she could not afford to attend the continued hearing, and that the real estate was subject to probate so she could not liquidate it. The New Hampshire court again found Mother in contempt for failure to pay child support, ordered her to pay $25,000, and found her to be $202,500 in arrears. The court calculated arrears at $105,000 due immediately, or a payment plan that added $10,000 a year through March, 2020. A corresponding support order issued and Mother was ordered to pay $10,000 a month.

Father sought to enforce the order in Arizona. Mother sought to vacate the orders in New Hampshire and was denied. Almost 4 years later, this case was heard in Arizona and Mother made several arguments pursuant to A.R.S. § 25-1307(A) and the Full Faith and Credit for Child Support Orders Act.

First, Mother argued that the New Hampshire court did not have subject matter jurisdiction to enforce the agreement to pay college expenses as a child support order or to enter an arrearage when there was no child support order. While Mother characterized these as subject matter jurisdiction arguments, her arguments were based on the correctness of the ruling. Allegations of legal error do not constitute a lack of subject matter jurisdiction. Mother argued that the New Hampshire court did not have subject matter jurisdiction to issue or enforce any order for the payment of college expenses. The appellate court noted that the underlying orders at issue did not order her to pay for college so the orders did not fall under the provisions of law cited by Mother.

The court also noted that Mother was attempting an impermissible collateral attack on the New Hampshire orders, as she had had the opportunity to challenge the New Hampshire court's subject matter jurisdiction and had failed to do so. This argument was barred under the doctrine of res judicata. Mother's claims that the orders were based on fraudulent representations by Father were raised or could have been raised at the prior hearings in New Hampshire.

Mother argued the orders were entered by default, and thus do not have preclusive effect, relying on *Schilz v. Superior Court*, 144 Ariz. 65 (1985). In contrast, in *Schilz*, neither Father nor counsel appeared at the initial hearing, thus the foreign judgment was not entitled to full faith and credit. Here, Mother appeared, or had the opportunity to appear, in the proceedings and had the opportunity to raise her defenses and objection. In fact, in 2014 Mother raised many arguments against the enforcement of the orders. This also supported the application of res judicata.

Mother's claim that she was denied due process, alleging she was not served with a 2009 order, a motion to clarify, or the child support order as they were sent to a wrong address was denied. The court found the documents were sent to the address on file and Mother failed to correctly provide an updated address, as well Mother provided inconsistent testimony. She also claimed a violation of due process when a request for a telephonic appearance was denied along with a request to appoint counsel. While there was nothing in the record regarding the telephonic appearance, the appellate court noted that trial counsel may be appointed when there is the risk of incarceration and when the defendant may be treated unfairly. Mother failed to establish this argument.

Finally, Mother argued that she had a defense under A.R.S. § 25-1307(A) as the order Father sought to enforce was a contractual obligation to pay for college and not child support and the court cannot enforce this by way of contempt. This was determined to be another impermissible collateral attack on the New Hampshire Order, as "correctly or incorrectly" the New Hampshire court found the parties' agreement to be a valid and enforceable child support order.

Howitt v. Wrinkle, 1 CA-CV 17-0760 FC (10/18/2018).

Modification of Spousal Maintenance; Ambiguous Decree terms. Reversed and remanded to the Trial Court to correct clerical error in the Decree.

The Court ordered Husband to pay Wife spousal maintenance in the amount of $1,100.00 per month for 15 years. At the time of divorce in 2012, the Court entered what appears to be a form of Decree. The parties marked an "X" in front of an option in the Decree form that provided that spousal maintenance would not be modifiable. Further down, the parties marked an "X" in front of an option that provided spousal maintenance would be modifiable. In 2017, Father filed a

Petition to Modify Spousal Maintenance alleging his cancer diagnosis was a change in circumstances. Wife objected and the family court agreed with Wife's argument that spousal maintenance was non-modifiable pursuant to the Decree. Husband appealed. The Court of Appeals found that the terms of the parties' Decree were ambiguous given the conflicting language. Thus, the Court must consider extrinsic evidence of intent. Given the ambiguity, the Court of Appeals reasoned that a clerical error exists and that the trial court has the power to correct that error at any time. Thus, the matter was remanded to the trial court to "correct the apparent clerical error" then, if spousal maintenance is modifiable, consider Husband's Petition.

Johnson v. Johnson, 1 CA-CV 18-0137 FC (10/18/2018).
Domestic Relations Order ("DRO"); Attorneys' Fees. Affirmed trial court's denial of Husband's Motion for Relief from DRO.

Former Husband was PSPRS participant during the marriage, meaning he did not contribute to Social Security. Parties' 1999 Consent Decree ordered equal division of Former Husband's PSPRS retirement via DRO and in 2008, parties stipulated to entry of DRO. In 2017, Former Husband moved for relief from the DRO pursuant to ARFLP 85(C)(1)(f) "for any other reason justifying relief," citing a change in the law, specifically, *Kelly v. Kelly*, decided in 2000, for the proposition that a portion of his PSPRS should have been deemed Social Security, *i.e.*, his separate property because Former Wife contributed to Social Security (also known as a *Kelly* exemption). Trial court denied Former Husband's Motion for Relief as untimely, which the Court of Appeals affirmed, given that ARFLP 85(C)(2) requires such a motion to be filed "within a reasonable time," and *Kelly* pre-dated the DRO, *i.e.*, the change in the law actually occurred pre-DRO, not after. Former Wife's attorneys' fees were denied on appeal due to no authority being cited in brief.

Krakana v. Haass, 1 CA-CV 17-0747 FC (10/11/2018).
Legal Decision-Making. Affirmed denial of Motion for New Trial as to award of joint legal decision-making and equal parenting time based upon court evaluating the required factors.

Parties have a lengthy history of contentious behavior. Father attempted unsuccessfully to sever Mother's parental rights to two minor children prior to trial. The trial court awarded the parties joint legal decision-making, finding concerns about both parties' domestic violence, anger, and parenting decisions. The court did not find it best to award one party sole legal decision-making. Father wanted a new trial stating the court failed to properly assess Mother's alcohol issues, poor decisions, and improperly ordered the parties into counseling. Court of Appeals held that the record supported the trial court's findings and found a denial of the Motion for New Trial proper.

Ridley v. Ridley, 1 CA-CV 17-0521 FC (10/11/2018).
Characterization of Property and Debt; Disclaimer Deed. Affirmed determination that house was community asset despite Wife's signing of disclaimer deed due to fraud and affirmed determination that Wife's student debt incurred during the marriage was a community debt.

The parties married in 2000 in Columbia and relocated to the United States in 2003. After their arrival, they purchased a home, though Wife executed a disclaimer deed renouncing any interest in the home and acknowledging that the home was Husband's sole and separate property. During the marriage, Wife obtained a bachelor's and master's degree in English and worked at various

jobs while attending school. She incurred approximately $68,000 in student debt. Husband paid the mortgage and other expenses for the home from his income earned during marriage.

The parties separated in 2012 and Husband filed for divorce in 2015. At issue, among others, was whether Husband's house was separate property based on the disclaimer deed and whether Wife's student loan debt should be considered a community debt. After trial, the lower court found Wife to be more credible than Husband regarding the circumstances surrounding the disclaimer deed and subsequently concluded that Husband failed to prove his case by clear and convincing evidence that the home was his sole and separate property. The lower court also found Wife's student loans to be community debt. Thus, the lower court divided these equally between the parties. Husband timely appealed.

Characterizing the House as Community Property

Husband argued the lower court erred by determining the house was community property despite evidence of Wife's signing of the disclaimer deed. Specifically, Husband argued that the lower court incorrectly shifted the burden of proving the property's character from Wife to Husband and that, even if the burden was correctly applied, there was insufficient evidence to support Wife's claim that the deed was fraudulently induced.

The appellate court held that, by submitting the signed disclaimer deed, Husband rebutted the presumption that the home was community property. However, Wife challenged the enforceability of the deed on the basis of fraud and the lower court considered several factors in its consideration of Wife's claim that Husband misled her regarding the purpose of the deed. Ultimately, the appellate court held that the lower court's legal analysis on the issue and implicit finding that Wife met her burden of proving that the deed was the result of fraud, properly shifted the burden of proof that the house was not community property back to Husband, and Husband's failure to "prove by clear and convincing evidence that the parties intended the property to be [his] sole and separate property does not reflect that the court applied an incorrect standard."

Dividing Wife's Education Debt

Husband contends that the lower court's division of Wife's education debt was inequitable because the community received no benefit from Wife's education. In its consideration, the appellate court determined: 1.) that Wife's student loan debt was incurred to finance an education that Husband demanded Wife obtain prior to starting a family, and that Husband did not contest that he imposed the requirement; 2.) that Husband did not suggest that his career or educational goals were affected by Wife's time in college; 3.) that Wife's employment throughout the marriage, however brief, increased her earning potential during the time between her graduation and the divorce; and 4.) that Husband did not make a prima facie case of waste despite his claim that Wife inappropriately spent student loan money on international trips and plastic surgery. Ultimately, the appellate court determined that the record supported the court's conclusion that Wife's loans were intermingled with other community funds and were primarily used for education expenses. Accordingly, the appellate court held that Husband did not make a prima facie showing of waste, thus the lower court's ruling that Husband pay half of Wife's education debt was not in error.

Coghill v. Mowry, 1 CA-CV 18-0038-FC (10/2/2018).
Grandparent Visitation; Failure to File Answering Brief Constitutes Confession of Error. Reversed trial court's order denying petition to establish grandparent visitation and remanded for proceedings consistent with decision.

Child was born in 2013 to unmarried parents. Father was named as father on birth certificate and until Father died the eight months after the child's birth, the parents held Father out as the child's father. Five months after the child's birth, Father moved in with his father, where Father would care for the child, with his father's assistance at times. After Father's death, Mother and the child moved in to paternal grandfather's home, where they remained for over a year and a half. During the year and a half that Mother and the child lived with him, paternal grandfather cared for the child while Mother was either in school or working. Mother and the child moved out after there was an argument over Mother's boyfriend at the time (later husband). Mother and the child came back for one visit after that, but she essentially cut off paternal grandfather and Father's family because of her new husband.

Paternal grandfather filed a petition to establish visitation with the child. Mother responded alleging Father was not the child's father, that he had a drinking problem, and other allegations. Mother requested an Order of Protection and a DNA test, which the trial court denied, finding she had not established good cause and her request was untimely. After trial, the family court found the child's birth certificate established paternity and because one of the child's parents was deceased, the child was born out of wedlock, and her legal parents were unmarried at the time the petition for grandparent visitation was filed, the threshold requirement of A.R.S. § 25-409 had been met. After considering all of the statutory factors, which appeared to weigh in favor of paternal grandfather, the family court denied paternal grandfather's petition for grandparent visitation, concluding that he did not meet his "substantial burden" of showing that "denial of visitation would clearly and substantially impair [the child's] interests" to rebut Mother's opinion on visitation, which the court gave "robust deference" to as required by *Goodman v. Forsen*, 239 Ariz. 110 (App. 2016), *disavowed by In re Marriage of Friedman and Roels*, 244 Ariz. 111 (2018). The family court denied paternal grandfather's motion for new trial and he appealed.

The Court of Appeals reversed because Mother failed to file an answering brief, which constitutes confession of error, and because the trial court relied on an opinion, which is no longer good law (*Goodman*). In *Marriage of Friedman and Roels*, the Arizona Supreme Court rejected Goodman's "broader interpretation of 'special weight'," and held that a nonparent need not be subject to "a heightened burden of proof beyond that required under *Troxel* and *McGovern*." *Friedman*, 244 Ariz. at 116-17, ¶¶ 19, 20. In light of *Friedman*, the Court of Appeals reversed and remanded to the trial court to reconsider whether grandparent visitation is in the child's best interests.