

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

This update contains summaries of 4 reported opinions and 6 memorandum decisions for cases decided in December 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

Pacific Western Bank, et al., v. Castleton, 1 CA-CV 17-0667 (12/27/2018).

Judgment Liens. Affirmed entry of superior court's preliminary injunction order enjoining sale of home owned by trust.

Court of Appeals held that a judgment creditor may not attach a judgment lien pursuant to A.R.S. §§ 33-961 to -964 to property exempted by the homestead statutes under A.R.S. §§ 33-1101 to -1105, but instead may execute on its judgment only by way of a forced sale of the property under A.R.S. § 33-1105, even when the value of the property exceeds the amount of the homestead per *In re Rand*, 400 B.R. 749 (Bankr. D. Ariz. 2008). Pursuant to the judgment lien statutes, a recorded judgment becomes a lien on all real property owned by the judgment debtor (*see* A.R.S. § 33-961(A)), unless the property is “exempt from execution, including homestead property” (*see* A.R.S. § 33-964(A)). Pursuant to the homestead statutes, an individual or a married couple may claim a homestead exemption in their personal residence of up to \$150,000 in equity, which is “exempt from attachment, execution and forced sale.” *See* A.R.S. § 33-1101(A). Any person entitled to a homestead exemption “holds the homestead property free and clear of the judgment lien.” *See* A.R.S. § 33-964(B).

Plaintiff argued that this general rule does not apply here because the introductory phrase of A.R.S. § 33-964(B)—“[e]xcept as provided in § 33-1103”—creates an exception that allowed its judgment lien to attach to Defendants’ home, which was transferred to a trust. Specifically, Plaintiff relies upon A.R.S. § 33-1103(A)(4), which provides that homestead property is not exempt “[t]o the extent that a judgment or other lien may be satisfied from the equity of the debtor exceeding the homestead exemption.” A.R.S. § 33-1103(A)(4). In disagreeing with this argument, the Court of Appeals reasoned that the homestead statute and the judgment lien statute both conceive of the “homestead” as being the real property, not the equity value of such real property. As such, the Court construed the homestead statutes liberally, giving effect to their purpose, which is to protect Arizona homeowners from the forced sale of their homes. The Court of Appeals also disagreed with Plaintiff’s argument that even if the homestead exemption prevented the judgment

lien from attaching to the home, the homeowners prior to the home being conveyed to the Defendant abandoned the protection of the homestead pursuant to A.R.S. § 33-1104(A), which provides that a homestead may be abandoned by “[a] transfer of the homestead property by deed of conveyance or contract for conveyance” or “[a] permanent removal of the claimant from the residence.” The Court of Appeals reasoned that when a homestead exemption is abandoned by a conveyance of the property, the judgment lien does not re-attach to the property upon the sale because a judgment lien does not “revive” upon the sale of homestead property. *See Sec. Tr. & Sav. Bank*, 29 Ariz. 325, 332 (1925).

Davis v. Davis, 1 CA-CV 18-0037 FC (12/11/2018).

Evidence and Interpretation of Rules 10 and 12 Arizona Family Law Procedure. Affirmed order that Court-Appointed Advisor (“CAA”) is not bound by Rule 12 and even if recordation was required, Father did not show any prejudice from the admission.

The Court appointed a CAA pursuant to Rule 10, which does not require a CAA to record contact with children, as opposed to Rule 12 that requires a “court” interview be recorded. The Court of Appeals held that CAAs are not bound by Rule 12 and not included in the definition of “court,” which includes the assigned judge, Conciliation Services, or other third party professional. The Court of Appeals further found that even if the CAA was required to record the child interviews, Father was unable to show he was prejudiced due to the admission of the Report as the record was full of other evidence supporting the Court’s orders, including some orders that were contrary to the CAA’s recommendations.

Prouty v. Hughes and Prouty v. Kafka, 1 CA-CV 16-00397 FC and 1 CA CV 16-0402, consolidated (12/11/2018).

UCCJEA Jurisdiction to Modify Foreign Child Custody Order; Registration Requirements. Affirmed trial court’s rulings that it had jurisdiction under A.R.S. § 25-1033 to modify foreign custody order and that registration of custody order was not required to modify the custody order under the UCCJEA, as it would be to enforce or modify a support order under UIFSA.

In 2008, Mother and Kafka (“Father”) entered into a custody agreement regarding their daughter in Illinois, which awarded Mother sole legal decision-making, primary physical custody, and unspecified parenting time to Father. Thereafter, Mother and daughter moved to Arizona after Mother began a relationship with Hughes.

In 2012, while a Nebraska resident, Father filed the Illinois order in Arizona and a petition to modify the Illinois order with an *ex parte* motion for temporary orders. Mother, Father, and Hughes entered into a Rule 69 agreement resolving Father’s temporary orders motion, whereby Mother, Father, and Hughes agreed that Hughes would have temporary physical custody of the child, Mother would have supervised parenting time, and Father would have parenting time in Arizona once a month. Father’s petition to modify for final orders remained pending.

In May 2013, Father filed to modify the temporary orders. At the hearing, the Arizona Court requested he register the Illinois order pursuant to A.R.S. § 25-1055, which he did in August 2013. Also in August 2013, Mother took the daughter back to Illinois, without notice. In November

2013, the Arizona court entered additional temporary orders, including granting Father and Mother temporary joint legal decision-making, ordering the daughter to reside exclusively with Father, and issuing a warrant to take physical custody of the daughter. When Father attempted to enforce the warrant in Illinois, Mother obtained an emergency restraining order, alleging Arizona did not have jurisdiction over the daughter as she and Mother were only in Arizona “temporarily,” their primary residence was Illinois, and Father had not registered the Illinois orders properly because he did not personally serve Mother. Father then filed an emergency motion in Arizona to enforce the warrant and in December 2013, the Arizona Court entered findings of fact and conclusions of law affirming the warrant and all prior orders, including that Mother and the daughter resided in Arizona and that Mother had conceded Arizona was the home state of the child under the UCCJEA.

Shortly after entry of the December 2013 Arizona orders, the parties appeared in Illinois court, where the court also found Arizona was the proper forum and ordered the Arizona custody warrant was immediately enforceable.

Mother then urged the Arizona court to reconsider its December 2013 orders, arguing she did not receive proper notice of the registration as it was not sent to her Illinois address. The Arizona court upheld its December 2013 orders and found that the fact that Mother failed to update her address with the Court did not invalidate registration or enforceability. Four months after failing on her Motion for Reconsideration, Mother filed a Motion to Dismiss for lack of jurisdiction in Arizona, which the Court also denied and again affirmed its December 2013 findings and orders.

After Father filed a petition for contempt in Arizona in May 2014, the Arizona court set a UCCJEA conference with the Illinois court due to Father’s supplement to his petition indicating Mother was trying to serve Father with an OOP, listing the daughter as a protected person. The Illinois court again found Arizona was the proper forum under the UCCJEA, that Mother was using the Illinois courts because she disagreed with the Arizona orders, and vacated the OOP.

In January 2016, the Arizona court held a 2-day trial, after which it granted Father’s petition to modify legal decision-making and parenting time on a final orders basis.

Mother appealed, arguing Arizona did not have subject matter jurisdiction to modify the Illinois order because it was not properly registered, and therefore, all subsequent orders were void. Mother cited to *Glover* in support of her arguments on appeal.

The Court of Appeals distinguished *Glover*, as the order at issue in that case was one of support, governed by UIFSA. The Court of Appeals found that unlike UIFSA, the UCCJEA does not require a foreign *custody* order be registered in order to confer jurisdiction on the Court before it is modified as the language in A.R.S. § 25-1055(A) regarding registration is permissive (uses the word “may”) and specific provisions for modifying another court’s custody order are set forth in the UCCJEA at A.R.S. § 25-1033, regarding jurisdiction. The Court of Appeals cited heavily to the comments to UIFSA, which form the basis for the Court’s conclusion that Father was not required to register the Illinois custody orders for purposes of modification, as the “UCCJEA places its focus on the factual circumstances of the child, primarily the ‘home state’ of the child; personal jurisdiction to bind a party to the custody decree is not required” as it is under UIFSA, since personal jurisdiction is necessary to bind an obligor to the payment of a support order. The

Court of Appeals further found that all of the A.R.S. § 25-1033 jurisdictional requirements were satisfied by virtue of the trial court's findings.

Vera v. Hon. Rogers/Chaidez, 1 CA-SA 18-0229 (12/4/2018).

Order of Protection; Temporary Orders; Joint Hearing. Denied Father's request that family court amend OOP after OOP had already been affirmed by another superior court judicial officer.

In April 2018, Mother obtained an Order of Protection ("OOP") against Father in municipal court, which included the children. Father then petitioned to establish parenting orders in superior court and after realizing Mother had left the state with the children, Father filed for emergency temporary orders, seeking an immediate return of the children to Arizona. Father's emergency motion was denied on an *ex parte* basis, but was set for a hearing. In the meantime, Father was served with the OOP, which he had transferred to the superior court for consolidation with the family court case, but the superior court assigned the OOP case a new FC number.

At the temporary orders hearing, prior to which Father filed a pretrial statement notifying the court that the OOP had been transferred to the superior court, the family court awarded Mother sole legal decision-making and ordered long-distance parenting time for Father. The family court made no mention of the OOP, which prohibited Father from having contact with the children. Both parties challenged the temporary orders as conflicting with the OOP, among other grievances. The family court denied both parties' requests for reconsideration and mistakenly noted that the OOP had not been transferred to the superior court under a new case number, despite that there was a case note in the digital files stating it indeed had been, of which the Court of Appeals took judicial notice.

Due to the family court's ruling, Father requested a hearing on the OOP, which occurred before a different judicial officer. The commissioner handling the OOP hearing determined that the temporary parenting time orders would become effective only if the court modified the OOP so it proceeded with the hearing on the OOP. The commissioner affirmed the OOP. Father then filed for special action relief, requesting an order that the family court amend the OOP so that the family court's temporary parenting time orders could be effectuated.

The Court of Appeals found the issue one of first impression, as it concerned "the interplay between the procedural rules and statutes governing protective orders and family law proceedings." The Court of Appeals ruled that the superior court has authority to hold a joint hearing regarding temporary parenting time orders and OOPs, but is not required to do so. The Court of Appeals further held that the family court does not have authority to amend the OOP, reasoning that though the superior court may act to harmonize parenting-time and OOPs, its authority to do so is limited by the authority granted in the statutes and rules regarding OOPs, and it cannot engage in horizontal appellate review of another judicial officer's decision to affirm an OOP, as once it is affirmed, it is final, and the litigant's only recourse thereafter is appeal. The Court of Appeals distinguished *Courtney* as in that case, the OOP had been issued, contested, and affirmed in the municipal court before being transferred to the superior court, which is where the mother in that case asked the OOP be amended due to the pending proceeding. Once the hearing on the OOP is held in superior court, an affirmed OOP can only be amended by the superior court on request of the protected person or by appeal, neither of which occurred here.

The Court of Appeals further reasoned that Father had two options after the family court denied his motion to reconsider the inconsistent orders: (1) file a special action petition challenging the denial based on the court's erroneous factual premise that it could not harmonize the temporary parenting time orders and the OOP because the OOP case had not been transferred to the superior court; or (2) ask for a hearing on the OOP. Father chose the latter option, did not prevail at the hearing, and then sought relief from the Court of Appeals to circumvent the OOP ruling. Under the Rules of Protective Order Procedure, Father is bound by the strategy he chose.

MEMORANDUM DECISIONS

Yazbeck v. Yazbeck, 1 CA-CV 17-0676 FC (12/27/2018).

Child Support Deviation. Affirmed trial court's finding of a substantial and continuing change of circumstances warranting modification of child support, but remanded for reconsideration of child support amount.

The parties agreed that after Father's spousal maintenance obligation to Mother terminated he would pay Mother an upwards deviated child support amount of \$5,000 a month until the child graduated from high school. Father petitioned to modify the support alleging his income had decreased and Mother's income had increased. The family court found the decrease in Father's income to be a continuing change of circumstances, but in determining the new support obligation reduced the support to \$3,900 which the court explained was the same 22% proportionate decrease in Father's income. The court further noted the parties had previously agreed to the upwards deviation. Father appealed and Mother cross-appealed.

First, Mother claimed the child support amount was non-modifiable, as the parties had agreed the support would continue until the child graduated from high school. The appellate court noted the difference between the statutory authority for non-modifiable spousal maintenance pursuant to A.R.S. §§ 25-317 and -319, and the statutory authority for modification of child support pursuant to A.R.S. §§ 25-317 and -503. A court is not bound by any agreement as to child support and may consider a change of circumstances. Mother then argued that there was no change of circumstances based on Father's income. The court, however, noted that Mother's own increase in income was a substantial and continuing change of circumstances.

Father challenged the court's presumptive deviation, and the appellate court agreed. Citing *Nia v. Nia*, the court noted that once the court has found a change of circumstances from a prior deviated order, the court must review the situation anew. There is no presumption of a deviation. The burden is on the parent wishing for the deviation to show anew that the application of the Guidelines is inappropriate or unjust and then the court must examine the best interests of the child.

In this case, the court started with the deviated amount, and reduced it in proportion to Father's reduction of income, which was an error. The court must find evidence to support a deviation, other than a prior deviation. Neither party presented any evidence regarding the child's reasonable needs or lifestyle. Thus, the matter was remanded to determine if the court should consider whether Mother's claim for an upwards deviation was appropriate.

Cerny v. Cerny, 1 CA-CV 18-0065 FC (12/20/2018).

Spousal Maintenance. Affirmed dismissal of petition to terminate spousal maintenance.

Parties entered into agreement for non-modifiable spousal maintenance to Wife of \$8,000 per month for 90 months. Nine months after the divorce, Wife shot Husband in the chest. Husband stopped paying maintenance and Wife filed for contempt. Husband responded by requesting termination of maintenance. Court of Appeals held that the trial court properly dismissed Husband's request as the parties' agreement removes jurisdiction from the court to modify or terminate a non-modifiable spousal maintenance provision in the Decree. The court does retain jurisdiction to assess an equitable defense to collection proceedings. An evidentiary hearing must be conducted to determine the validity of an equitable defense.

Tyrrell v. Tyrrell, 1 CA-CV 18-0096 FC (12/18/2018).

Spousal Maintenance. Affirmed order terminating spousal maintenance.

Parties married in 1957 and divorced in 1997. The Decree ordered Husband to pay \$1,750 to Wife until either party died or Wife remarried. Husband moved to modify or terminate spousal maintenance in 2017 because he was 82 years old, his company was in serious debt, and he wanted to retire. At trial in 2017, Husband presented evidence regarding his income and potential assumption of his business and the business debt by someone else. Wife also presented evidence of her assets, income, and debts, which the trial court found was sufficient to sustain Wife's reasonable needs. The trial court found that Husband had met his burden of proof as to a substantial and continuing change in circumstances. The court then analyzed the factors set forth in A.R.S. § 25-319(B), noted that both parties were in their 80s and unable to earn an income in the work force, and ordered spousal maintenance to terminate on January 1, 2018. Wife moved for a new trial, which was denied, arguing in part that the business acquisition was speculative.

The Court of Appeals found that the trial court's consideration of Husband transferring ownership of the business and his retirement were inappropriate as neither of those circumstances had yet occurred. However, sufficient other evidence supported the trial court's decision finding that a change in circumstances warranted a modification of spousal maintenance. As such, the court did not abuse its discretion by terminating Husband's spousal maintenance obligation.

Burkhalter v. Jangula, 1 CA-CV 18-0139 FC (12/18/2018).

Sole Legal Decision-Making. Affirmed award of sole legal decision-making to Father.

In August 2017, Mother petitioned the lower court to establish legal decision-making, parenting time and child support for the parties' minor child. Both Mother and Father were seeking sole legal decision-making authority and to be named as the primary residential parent. Mother was further seeking an order that Father's parenting time be supervised and that Father be ordered to pay child support to her. The lower court granted Father sole legal decision-making authority and further granted both parties unsupervised parenting time. The lower court also ordered Father to pay child support to Mother. Mother timely appealed.

Mother argued the lower court erred by granting Father sole legal decision-making because the court's findings were hearsay, untrue and based on Father's lies. Father argued that Mother waived her contentions because she failed to cite to the record in her opening brief. The appellate court agreed with Father's point that Mother's opening brief was lacking but declined to apply waiver, instead preferring to resolve the case on its merits in consideration of the child's best interests.

After consideration, the appellate court determined that the lower court did apply the relevant statutory findings in its ruling. Therefore, the appellate court reviewed the lower court's decision for an abuse of discretion. Applying *Hart v. Hart*, 220 Ariz. 183, 185-86, ¶ 9 (App. 2009), the appellate court held that the lower court did not abuse its discretion as it: 1.) properly considered the factors set forth in §§ 25-403(A), -403.01(A), and -403.01(B); 2.) made appropriate and specific findings regarding all relevant factors; and, 3.) stated the reasons for its decision in the best interests of the parties' child.

Prouty v. Hughes, 1 CA-CV 16-0397-FC (12/11/2018).

Trial Time; Attribution of Income; Discovery Sanctions; Attorneys' Fees. Affirmed all trial court orders in this Memo Decision (also see Published Opinion issued same date).

The case involved legal decision-making and parenting time issues involving the fathers of two of Mother's children. Mother engaged in various overt actions contrary to the best interests of the children including relocating without parental or court consent, refusing to return Daughter despite Court orders and various other actions that the trial court found unreasonable. The trial court also addressed Mother's mental health issues, her threat to kill herself and Daughter, and her false accusations against the respective fathers. The case went to trial in January 2016. The superior court awarded each father sole legal decision-making. Mother was ordered to undergo counseling prior to exercising supervised parenting time with both children. The court awarded one of the father's child support and both attorney fees. Mother timely appealed regarding various rulings.

The Court of Appeals affirmed the trial court's time limitations as they applied to Mother, ruling that a superior court has broad discretion to impose reasonable limitations on trial proceedings. The superior court repeatedly cautioned Mother that she was spending time on issues previously decided and that were not relevant to the permanent custody orders. Mother was late returning from a break and failed to comply with pretrial deadlines. Mother was able to still present evidence, cross-examine both fathers, and a parenting time supervisor. Mother presented evidence that addressed the major issues. The Court of Appeals emphasized that courts need not "indulge inefficient use of time by parties or their counsel". In addition, Mother must show prejudice as a result of the trial time limitations and she did not provide an affirmative showing of what additional evidence or witnesses would have made a material difference. The Court of Appeals concluded that Mother had a meaningful opportunity to be heard and that her inability to manage her trial time in an efficient manner did not constitute a denial of due process as the trial court is not required to indulge inefficient uses of trial time

As for the admission of the custody evaluation, Mother did not object to admission in her pretrial statement. The reason for her later objection was because the evaluator did not interview the children. However, such was based in part because Mother did not pay the evaluator as she was ordered to do. The trial court properly found that such failure to personally observe the children went to the weight rather than the admissibility of the report. Mother also argued that there was no foundation laid for the admissibility of the report as the evaluator did not testify. Again, Mother failed to make such objection at trial, had the opportunity to call the evaluator as a witness herself, and had ample notice of the Court's appointment of the evaluator. The trial court also did not rely entirely upon the evaluator's report and made specific findings supported by other witness testimony and evidence presented. Mother's objections pursuant to Rule 702, were deemed waived as such were not addressed in her pretrial statement.

Regarding the child support order, the trial court precluded Mother from presenting evidence regarding her income, financial resources, and health of her youngest child (from a third father) that she claimed required her to stay at home and not work. Despite prior court orders, Mother did not provide disclosure regarding such issues and did not answer discovery requests regarding same. The Court of Appeals held that the trial court properly attributed income to Mother based upon prior years' earnings and a prior job offer because the trial court may disallow testimony regarding income as a proper sanction where a party did not comply with discovery requests and court orders. The court may then attribute income based upon other evidence. Mother did not establish why her failure to comply with the discovery requests or orders were reasonable, thus the trial court's sanctions were appropriate pursuant to Rules 65(B)(2)(b) and 76(D)(1). Mother also argued that such finding was contrary to a prior finding that she was indigent in 2012. However, the trial court had the discretion to find Mother's testimony not credible and received additional evidence after the 2012 finding that supported the conclusion that Mother was no longer indigent.

Regarding the attorney fees award in favor of the fathers, the Court made findings that Mother made false accusations against the fathers, violated discovery orders, and filed petitions and motions that were not in good faith, not grounded in fact or law, and/or were filed for an improper purpose. As such, the trial court's award of fees was no longer discretionary and became mandatory pursuant to A.R.S. §§ 25-324(B), -414(C), -415(A), and Rule 65, ARFLP. Because such award was not pursuant to A.R.S. Section 25-324(A), the party's respective financial resources was not relevant.

Withrow, et al. v. Mizelle, 1 CA-CV 18-0090-FC (12/4/2018).

Grandparent Visitation. Affirmed dismissal of petition for grandparent visitation.

The child was born in 2015 to parents who were both incarcerated on drug charges. Mother gave her sister permission to care for the child and the child has since lived with the aunt. The month after the child's birth, Father filed a paternity petition and the aunt filed a petition a few months later in juvenile court to terminate Father's parental rights, on the basis that she had Mother's consent to adopt the child. The same month, Father's parents also petitioned for third party custody and grandparent visitation. The trial court stayed the family court proceedings pending a final

determination of all matters in the Juvenile Court, observing that it is not in the interests of judicial economy to litigate the Grandparents' petition when there is a pending action to terminate their son's parental rights to that same child.

The juvenile court indeed terminated Father's parental rights finding severance was in the child's best interests and that he had been convicted of a felony and would be incarcerated for a length of time that would deprive the child of a normal home for a period of years. Father appealed, and the Court of Appeals affirmed. Father filed another action pursuant to the Parents' Bill of Rights, which was summarily dismissed as he had no parental rights. Paternal grandparents then moved to lift the stay in the family case and proceed with their petition. In the meantime, maternal aunt filed a petition in juvenile court to adopt the child and an order of adoption was entered. Aunt thereafter moved to dismiss the family court case, which motion was granted with prejudice. Father then appealed the court's orders dismissing his action based on the Parents' Bill of Rights. The dismissal was affirmed. Then his parents appealed the superior court's dismissal of their petition for grandparent visitation. Father also appeared as an appellant, but his appeal was dismissed as he had no standing to sue given his parental rights were terminated.

On appeal, the grandparents argue they were denied due process. However, they filed for legal decision-making, which they were not eligible for as they did not allege they stood *in loco parentis* to the child. Thus, the trial court properly summarily denied that part of their petition. They also requested visitation, but any visitation rights the court might have granted under A.R.S. § 25-409(C) would have automatically terminated when the child was adopted by Aunt, and issues surrounding the child's adoption cannot be raised in this appeal, as the Court of Appeals lacks jurisdiction to address that Order if not contained in the Notice of Appeal.