

March 2019
STATE BAR OF ARIZONA, FAMILY LAW SECTION, EXECUTIVE COUNCIL
CASE LAW UPDATE

This update contains summaries of 1 reported opinion and 15 memorandum decisions for cases decided in March 2019.

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, Maricopa County), Luke Brown (Chair, Pima County).

REPORTED OPINIONS

Gibson, Jr., v. Theut, et al., 1 CA-CV 17-0562 (3/12/2019).

Judicial Immunity; Guardian Ad Litem (“GAL”); Negligent Hiring. Affirmed in part and reversed in part Court of Appeals’ opinion, and remanded to trial court.

While criminal charges were pending against minor and his family for planning and carrying out killing of minor’s father, paternal grandparents brought a civil complaint in probate court against family, including minor, for wrongful death. The probate commissioner appointed a GAL for minor, and another attorney for minor in the civil action. Both attorneys allowed entry of a \$50 million damages judgment and presented no evidence or argument to support mitigation, prompting the minor to file a negligence action against both for failing to inform him of the damages hearing, secure his presence, and failing to defend against the summary judgment motion. Both appointed attorneys appeared on a government-maintained list, and the trial court held both were entitled to absolute judicial immunity and dismissed them from the negligence action.

On appeal, the court held that the GAL and appointed civil attorneys were not entitled to judicial immunity, reasoning that their functions were not judicial but rather were active participants in the litigation. The court also held that the minor’s claim against the government defendants under vicarious liability were barred as a matter of law, but the negligent hiring claim against them survived to the extent of the government’s involvement in pre-qualifying or selecting the attorneys to serve as appointed counsel.

The Court of Appeals held that GAL and attorney appointed by superior court are not entitled to absolute judicial immunity. Minors have standing to sue their attorney for legal malpractice. Government entities may be held liable under a theory of negligent hiring when they authorize the appointment of a legal representative who lacks competence to handle a matter.

MEMORANDUM DECISIONS

Salazar v. Guevara, 1 CA-CV 18-0443 FC (3/28/2019).

Order of Protection. Court of Appeals modified OOP to remove one minor child.

Father was arrested for punching his 13-year-old child when his 2-year-old was present. Father denied all allegations. The charges were dropped and DCS unsubstantiated. However, the trial court, after hearing, upheld the OOP including both children. Father argued that the court failed to make specific findings on the record when it simply found “sufficient grounds” to uphold the OOP. Court of Appeals modified the OOP to remove the 2-year-old as there was insufficient evidence regarding harm or potential future harm. The 13-year-old remained on the OOP. Case reminds us that before granting an OOP prohibiting contact between a parent and a child, “the judicial officer must consider: (1) whether the child may be harmed if the defendant is permitted to maintain contact with the child, and (2) whether the child may be endangered if there is contact outside the presence of the plaintiff.” Ariz. R. Protect. Ord. P. 35(b).

Espinoza v. Espinoza, 1 CA-CV 18-0239 FC (3/28/2019).

Parenting Time. Reversed trial court ruling re-instituting Father’s parenting time after temporary orders suspended his parenting time due to his concerning behavior.

Mother, BIA, and witness presented sufficient evidence to create concern as to whether Father’s behavior might endanger the “physical, mental, moral or emotional” health of the child pursuant to A.R.S. § 25-403.01(D). As a result, the trial court must make specific findings to adequately address Father’s issues, misbehavior, lack of candor, and most importantly, the best interests of the child. Case provides a good analysis of the competing interests of public policy of substantial parenting time vs. a parent who refuses to abide by court orders to the detriment of the child.

Santoro v. Santoro, 1 CA-CV 18-0497-FC (3/26/2019).

Modification of Legal Decision-Making and Parenting Time; Evidence; Dependency. Affirmed order denying petition to modify legal decision-making and parenting time.

The parties agreed and the family court ordered that the parties’ child attend Safe Haven counseling. A few months later, Father filed to modify parenting time and legal decision-making arguing emergency circumstances created by the removal of the parties’ child and two other children from Mother’s custody. At the evidentiary hearing, Father attempted to introduce a progress report from the child’s counselor, but the court excluded it, ruling that admitting it would violate confidentiality. The trial court also considered the juvenile court’s determination that the other two children previously removed were returned to Mother’s care and the dependency dismissed, and ultimately granted Father’s modification petition only in part.

On appeal, the Court of Appeals found that under *Hays v. Gama*, the trial court acted within its discretion by excluding the counseling progress report. Unlike in *Hays* where the exclusion was

a sanction, here the trial court's decision was based on confidentiality with the child's counselor under Safe Haven. As such, the exclusion of a minor's progress report by a counselor does not violate *Hays v. Gama* where it is done to preserve protection and confidentiality of Safe Haven counseling, and there is no "especially significant effect" on the court's ability to determine a child's best interests. Furthermore, unlike a professional appointment under 25-405(B) or Rule 12, who assists the court with legal decision-making or parenting time determinations, the counselor was appointed per agreement only to give the child a space to discuss ongoing conflict between the parents, not help make determinations on Father's modification petition.

The Court of Appeals also held that considering determinations made in dependency proceedings in order to determine legal decision-making and parenting time was not an abuse of discretion, and that the trial court made specific findings regarding the -403 factors. The court considered Mother's drug use and limited Mother's parenting time and required her to continue to submit to drug testing, and thus joint legal decision-making was appropriate even under -403.04.

In Re Marriage of McQuay, 2 CA-CV 2018-0091-FC (3/26/2019).

Rule 63 Mental Health Evaluation; Due Process; Grandparent Visitation; Legal Decision-Making; Relocation. Affirmed trial court's denial of Mother's relocation and Rule 63 evaluation requests, vacated grandparent visitation and legal decision-making orders, and remanded for reconsideration of those orders.

Parties were divorced in Missouri in 2014 and have one child, who is 10 years old. Parties shared joint legal decision-making and parenting time under the Missouri orders, which provided for parenting time as if the parties lived in different states (Mother successfully requested relocation to Tucson from Missouri Court, but Father later moved to Tucson, as well, and parties co-parented under deviated terms). In 2017, Mother petitioned to relocate the child to Massachusetts, to which relocation Father objected. Mother also sought a Rule 63 evaluation of Father due to various mental health diagnoses, but Father argued those issues had been litigated in Missouri. After an eight-day trial, the trial court denied Mother's relocation request, granted visitation to Mother's parents, did not order Father to undergo the Rule 63 evaluation, and granted Mother sole legal decision-making regarding counseling and medication.

Mother appealed, arguing the trial court erred by failing to compel Father to be evaluated pursuant to Rule 63, that her due process was violated because she was prevented from gathering information necessary to cross-examine Father (because he was not ordered to submit to a Rule 63 evaluation), and that the trial court erred when it treated Father's participation in the evaluation as something he could choose to do or not do. Father cross-appealed, contending the trial court lacked jurisdiction to award grandparent visitation absent a petition and that the trial court erred in modifying legal decision-making absent a petition.

The Court of Appeals agreed with Mother that the mental health of all involved is a consideration for the trial court in a relocation case and the trial court was indeed permitted to order a party to complete a Rule 63 evaluation. The Court of Appeals, however, found that just because the trial

court was permitted to order as such, did not mean it erred in declining to do so, and in this case, the court's decision is supported by reasonable evidence and reflects no abuse of discretion. As for Mother's violation of due process argument, the Court of Appeals deemed Mother's argument lacking in any authority or merit given that she could have obtained evidence regarding Father's mental health from other sources for presentation during the eight-day trial. The Court of Appeals interpreted Mother's last argument as one wherein she contends the trial court erred by not drawing a negative inference from Father's decision not to voluntarily submit to the Rule 63 evaluation, but she again provided no authority requiring the court to do so.

With respect to Father's cross-appeal, the Court of Appeals agreed that absent a petition, the trial court lacked jurisdiction to grant third party rights and modify legal decision-making to award Mother the sole decision to enroll the child in counseling and refill his prescription.

In Re Marriage of Queen and King, 2 CA-CV 2018-0149-FC (3/26/2019).

Timing of Notice of Appeal. Reversed trial court ruling extending time to file notice of appeal.

The appeals court found that the trial court erred when it extended the time for Husband file a notice of appeal. The court cited A.R.F.L.P. 9(f), which had three conditions that must have been met for the trial court to properly reopen the time to file a notice of appeal. The appeals court found the court failed to follow the legal requirements of that rule and exceeded its authority in extending the time for filing a notice of appeal.

Perkins v. Perkins, 1 CA-CV 18-0496 FC (03/21/2019).

Burden of Proof following Temporary Order/Agreement. Vacated order and remanded due to improper shift of burden of proof to show change in circumstances from temporary order.

In post-decree matter, Father filed to modify joint legal decision-making and parenting time after Mother's step-son sexually assaulted the youngest daughter. At a return hearing, the parties entered a Rule 69 Agreement to prevent contact between the minors. At the trial, the court improperly affirmed the no contact order, finding that Mother had failed to show a material change in circumstances to allow reunification of the children. Court of Appeals vacated the order because the trial court improperly shifted the burden to Mother to show a material change in circumstances justifying removal of the temporary no contact order. Court of Appeals reasoned that Father, as the party who moved for modification, had the burden to prove a material change in circumstances since the entry of the decree.

Petrizze v. Johnson, 1 CA-CV 18-0401 FC (03/21/2019).

Legal Decision-Making; Parenting Time; Child Support. Affirmed joint legal decision-making, parenting time, and child support orders despite DUI conviction and domestic violence.

The trial court properly awarded the parties joint legal decision-making of two children despite Father's DUI conviction within the past 12 months and testimony of DV during the relationship. Father rebutted the presumption against joint legal decision-making by showing he had successfully completed substance abuse counseling, random drug testing, and denied any current

use of drugs. The court also found the DV in the case was dated and did not involve the children directly. Thus, Mother failed to show by a preponderance that the DV was significant. Further, because the self-support reserve amount exceeded Father's income, the trial court properly exercised discretion to deviate child support to zero.

Brittner v. Lanzilotta, 1 CA-CV 18-0088 FC (3/12/2019).

Judicial Immunity; Therapeutic Intervention. Affirmed order dismissing civil action.

During divorce proceeding, custody evaluator was appointed who recommended therapeutic intervention to rehabilitate the relationships between Mother and minor children, establish rules, make referrals for therapy, and facilitate conflict resolution, in addition to giving recommendations to the court. During the divorce, the custody evaluator resigned from her role, and Mother brought a civil action against the custody evaluator for intentional infliction of emotional distress, abuse of power, breach of fiduciary duty, and breach of contract. The custody evaluator moved to dismiss arguing she was entitled to judicial immunity as a court-appointed TI, which the trial court granted.

On appeal, the Court of Appeals rejected Mother's reliance on *Paul E.* In that case, the therapist was not ordered to report to the court, but here, the custody evaluator provided therapeutic services and was ordered to give recommendations to the court, which the court relied upon to issue its final order. The court also rejected Mother's argument that not all of the services should be cloaked in immunity, noting that it does not parcel out the services from the court-reporting functions, and such a task "is neither practical nor possible." As such, the Court of Appeals held that an interventionist acts as a nonjudicial officer when performing a court ordered function assisting the court in making a final custody order, and therefore, judicial immunity applies to the professional.

Pacheco v. Miller, 1 CA-CV 18-0299 FC (3/12/2019).

Sanctions. Reversed default and prohibition of involvement in trial for failure to follow pretrial requirements and affirmed that findings are always necessary.

Mother appeared at trial, but failed to timely file a pretrial statement. Trial court found no good cause for delay and refused to hear from Mother on any issue, including legal decision-making and relocation of the child. Father's relocation request was granted. Court of Appeals held that the trial court abused its discretion when it precluded Mother from participating, as even a defaulted party has a right to participate. Further, the court is required to make specific findings on all relevant factors, even in a default case. Court of Appeals also noted that when entering sanctions, the family court must consider other, less severe, sanctions before entering the most extreme to comply with *Hays v. Gama*.

In Re the Marriage of Carroll, 2 CA-CV 2018-0098 (3/11/2019).

Modification of Child Support, Deviations, and Child Support Orders. Affirmed trial court's order reducing child support.

After a 35-year marriage, Husband filed for divorce. Four months later, he decided to retire, cutting his income by 60%. Wife had income of \$830 a month from working and social security. Trial court decided Husband's retirement was voluntary and attributed his previous income to him in

calculating maintenance. Husband appealed. The appellate court analyzed at length how to balance a decision to retire at a normal retirement age against the other spouse's entitlement to support. In a terrific explanation of when *Pullen* applies to the retirement issue (at inception of spousal maintenance order) and when *Chaney* controls (modification due to retirement).

This is one of those wonderful cases that teach us how to practically apply established law to a specific fact situation—a great map of how to present these retirement/maintenance cases. This opinion also gives a good lesson on when the word “jurisdiction” is used “imprecisely” when what is meant is not the power to do something but doing something that is prohibited. That is, “authority” instead of “power.”

Alm v. Grantham, 1 CA-CV 18-0348 FC (3/7/2019).

Order of Protection; Social Media. Affirmed trial court's order denying OOP.

Sondra and Howard were romantically involved for periods throughout 2015-2017. In 2018, Sondra sought an OOP, alleging nonstop harassment based on cyberstalking, including that Howard sent her a social networking invitation with a picture of her naked body, sent her text messages with a threat, sent her an email with a picture of her neck and rambling, and posted a damaging interview review using a pseudonym in addition to accessing one of her social media accounts. The trial court denied the ex parte order and set a pre-issuance hearing, after which the court found that Sondra failed to establish that Howard had committed or may in the future commit domestic violence, and awarded Howard his attorney fees.

The court of appeals affirmed. The email was work-related and was not intended for Sondra, but related to artificial intelligence in facial recognition, and Sondra was not depicted in the email. The social media evidence showed that “jack trip” and “Shawna S.” were the authors, but provided no evidence to support her allegations that Howard controlled those accounts. Finally, the text messages contained yoga poses related to a medical condition, and contained no threats of violence

Lehn v. Al-Thanyyan, 1 CA-CV 17-0756 FC (3/7/2019).

Property Allocation; Parenting Time; Uniform Child Abduction Prevention Act (“UCAPA”) (NOT adopted in AZ); Expert Witness; Attorneys' Fees. Affirmed trial court's orders assigning substantial debt to Husband, valuing Wife's interest in business, parenting time orders, and attorneys' fees award.

Trial court unequally allocated community property and debt in Mother's favor, considered Moher's international law expert's testimony and report and found Father posed a risk of abducting the children to Kuwait under the UCAPA, ordered Father to exercise parenting time in Arizona unless Mother agreed in writing and was given the children's passports, required Father to post cash bond of \$2.5 million for each child to secure safe return from Kuwait, which is not a signatory to the Hague Convention, and awarded Mother her attorneys' fees.

Court of Appeals affirmed, reasoning that allocation of property was equitable due to Father's attempt to hide the community's interest in his Kuwaiti businesses and the income from those businesses. Where a party's own "obstructionist behavior" prevents an accurate determination of the community's interest in an asset, the court may award one party a greater share of community assets. *See Hrudka v. Hrudka*, 186 Ariz. 84, 93-94 (App. 1995), *superseded by statute on other grounds as stated in Myrick v. Maloney*, 235 Ariz. 491, 494 ¶ 8 (App. 2014); *see also Thomas v. Thomas*, 142 Ariz. 386, 392 (App. 1984) (a party's concealment of income or assets may be considered when dividing community property). Court of Appeals affirmed trial court's consideration of Mother's expert, as doing so was within its discretion, and affirmed trial court's analysis under the UCAPA despite that Arizona has not adopted the UCAPA because the trial court has discretion to rely on those factors in absence of specific statute to contrary as long as trial court also considers the children's best interests. Bond was appropriate as trial court has discretion to impose the cash bond under its authority to determine parenting time in the children's best interests, and the amount was not an abuse of discretion given the degree of risk that Father might relocate the children to Kuwait and fail to return them to Mother. Further, the court properly awarded Mother attorneys' fee because it found that a substantial financial disparity existed between the parties and noted unreasonable conduct of Father. Mother's ability to pay is not dispositive as A.R.S. § 25-324 does not require "a showing of actual inability to pay as a predicate" for an award; "all a party need show is that a relative financial disparity in income and/or assets exists between the parties." *Myrick*, 235 Ariz. at 494 at ¶ 9 (quoting *Magee v. Magee*, 206 Ariz. 589, 589 ¶ 1 (App. 2004)).

Hendricks v. Love, 1 CA-CV 17-0782 FC (3/7/2019).

Modification of Child Support; Deviations. Affirmed trial court's order reducing child support.

Mother petitioned to modify child support. The trial court granted Mother's petition and reduced child support because she was enrolling in a full-time doctoral program and could only work part-time. Father appealed the trial court's ruling arguing that the trial court did not make appropriate written findings for a deviation, and that Mother's income reduction was voluntary.

The Court of Appeals, Division One, found the trial court did not make a "downward deviation." Instead, the trial court has broad discretion. The trial court acknowledged Mother's decision to reduce her income and attributed her more income than she is making – but not her prior full-time earning capacity. This is not a deviation.

Alcoverde, Jr. v. Rodriguez, 2 CA-CV 2018-0026-FC (3/6/2019).

Civil Contempt; Jurisdiction. Affirmed trial court's orders denying and partially granting several of the requests contained in Father's petition to enforce, his motion for contempt, and his subsequent motion for new trial and to amend the court's ruling on his petition.

Father ("Rene"), a judge in another jurisdiction, representing himself, appeals from a denial of application of strict evidence under ARFLP 2(a), "various evidentiary rulings," failure to make

findings, not finding Mother (“Rodriguez”) (who also represented herself and didn’t file a brief or appear in the appeal) in contempt, and lack of jurisdiction once he filed his appeal.

After being ruled against, Rene filed a Motion for New Trial and to Amend, most of which was denied, but the court set a hearing on the child support issues. Rene filed a notice of appeal and asked the new hearing to be vacated. Judge said no, finding the notice premature and affirmed the hearing. No one showed for the hearing and the trial court found Rene had waived his opportunity on the pending child support issues and ruled against him. Rene appealed.

The appellate court pointed out that one cannot appeal from a civil contempt order, which Rene did. One must go the Special Action route. Many of the evidence objections raised were either waived by Rene or inconsequential since the court ruled in his favor. And he didn’t ask the trial court for findings before or after the hearing, so the appellate court affirmed saying Rene waived the right to ask for findings.

On the issue of when the trial court is “divested” of jurisdiction, the appellate court held the trial court can determine its own jurisdiction “if the issue is clear,” and, if there is no final judgment or a “time-extending motion is pending,” the notice is “ineffective and a nullity.” It was correct for the trial court to ignore the notice, affirm the hearing date and proceed with the hearing even when both parties did not show up.

Practice Tip: Don’t count on the Notice of Appeal to mean all hearings set at the time of filing will be vacated. If the court confirms a hearing date, do yourself a favor—show up. And as politely and humbly as possible explain why the court lost its power to rule.

Judicial Practice Tip: Even if you are a judge, don’t use “Hon.” in describing yourself, especially if you are representing yourself. Three reasons: it’s bad form, it’s probably a violation of the Code of Judicial Conduct, and, the Court of Appeals frowns upon it (here, the Court called Rene’s use of the appellation in this case “disturbing”), and will point it out.

Garner v. Duario, 1 CA-CV 18-0224-FC (3/5/2019).

Modification of Legal Decision-Making, Parenting Time, and Child Support. Affirmed trial court’s orders awarding Father sole legal decision-making, restricted parenting time to Mother, and child support order.

Mother petitioned to modify legal decision making, parenting time and child support, alleging that Father had been physically abusive to the child. DCS initially proposed a substantiated finding of abuse, but later amended the finding to unsubstantiated after Father sought review. The DCS records, to include the amended finding, were disclosed to Mother.

Just before trial Mother moved to continue the hearing asserting Father had withheld information regarding the amendment of the proposed finding by DCS. The motion was denied.

During trial, Father referenced an audio recording with DCS that had not been disclosed. Father testified the DCS records reflected the contents of the recording. Father disclosed the audio recording the next day, pursuant to the court's order.

In the Ruling, the trial court awarded Father sole legal decision making and found that unrestricted parenting time by Mother would harm the child's mental, moral, or physical health. Intensive intervention was implemented. The court also found that Mother did not establish by a preponderance of the evidence that Father committed an act of child abuse.

Mother moved for a new trial arguing that the refusal to grant a continuance was an irregularity in the proceedings and an abuse of discretion and that Father's misconduct deprived her of a new trial. Mother also alleged that the failure to continue trial constituted deprivation of procedural due process and that several of the court's findings were not warranted by the record. Her motion was denied. The superior court also found that the audio recording was new evidence not available at trial but the failure to disclose did not affect its decision.

On appeal, Mother made the same arguments, also arguing that the court abused its discretion in failing to find that Father abused the child.

With respect to the denial of the continuance, the Court found that Father did timely disclose the information except for one letter, but the hardship was minimal as Mother was aware of the information in the letter. The Court found that Mother's due process was not violated with respect to time limits imposed as she had ample time to examine and cross examine witnesses and even stated she anticipated finishing without needing more time and did not ask for more time. This was I contrast to *Volk*, which notes that due process is violated when the court allows either no time to hear testimony or allow time for meaningful examination of each witness.

The Court also affirmed that the trial court did not abuse its discretion in failing to set a supplemental evidentiary hearing on the basis of the audio recording. Rule 83(b) provides that a court may take additional testimony, however, the court set oral argument, listened to the audio recording, and found that the failure to disclose the recording did not affect its decision.

Finally, the Court agreed with the trial court's denial to find that Father abused the child. Reviewing for clear error, the Court confirmed that "a finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists," citing *Castro v. Ballesteros-Suarez*, 222 Ariz. 48 (App 2009). A finding of child abuse must be established by a preponderance of the evidence, and substantial evidence supported the trial court's conclusion despite the conflicting evidence. The trial court noted that initially the DCS notice of proposed finding of substantiation was based on the referral to the County Attorney, but the County Attorney declined to prosecute. A custody evaluator also conducted a comprehensive evaluation and found no persuasive evidence to support the conclusion that Father had committed "clinically significant child abuse or maltreatment."