

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

This update contains summaries of 1 reported opinion and 6 memorandum decisions for cases decided in January 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

Robert J. Nicaise, Jr. v. Aparna Sundaram, CV-18-0089-PR (1/17/2019).

Legal Decision-Making. Affirmed the trial court's joint legal decision-making with final decision-making authority order and vacated in part the Court of Appeals' opinion in so far as it held final decision-making authority inconsistent with our statutes.

In a case in which a family court awarded joint legal decision-making between parents, the Arizona Supreme Court held that there is a distinction between *final* legal decision-making authority and *sole* legal decision-making authority. Under A.R.S. § 25-401(2), one parent's joint legal decision-making authority is made superior in some circumstances, but the parents retain joint legal decision-making authority, and the "tie-breaking" parent is not granted sole decision-making authority under subsection (6).

MEMORANDUM DECISIONS

Day v. Hartsfield, 1 CA-CV 18-0070 FC (1/24/2019).

Temporary Orders; Legal Decision-Making; Parenting Time. Affirmed trial court's temporary orders, vacated trial court's permanent orders, and remanded.

Parties are parents of one child. In 2013, Mother filed paternity action seeking establishment of various orders, including sole legal decision-making, and alleged Father is a chronic marijuana user. Father failed to appear at trial. Trial court entered temporary orders and set a review hearing, at which Father appeared. Father's drug test was positive and he was ordered to continue testing and not drink. Trial court held several review hearings over the following year and trial for 2017. Weeks before trial, Mother was arrested for forgery and drug-related charges. Father moved for her to be drug tested, which the court ordered. On the day of trial, Father filed an emergency petition and another petition requesting temporary orders due to Mother's substance abuse. Father's petitions were discussed at trial, but the trial proceeded ultimately only on Mother's 2013 complaint. At trial, the court entered permanent orders, including joint legal decision-making and unsupervised parenting time for Father of every other weekend. Two months after trial, the court held a hearing on Father's petitions for temporary orders, filed the day of the prior trial. At the temporary orders hearing, the court issued temporary orders awarding Father sole legal decision-

making, reversing the designation of primary residential parent from Mother to Father, and ordering only limited supervised parenting time for Mother. Father later filed a motion requesting permanent orders, among other relief. Without holding a hearing, the trial court granted Father's requests and converted the temporary orders to permanent orders. Mother appealed.

The Court of Appeals held that it lacks jurisdiction to consider temporary orders, but even if it had jurisdiction to consider the issues, Mother's arguments would fail. However, with respect to the permanent orders issued by the trial court, the Court of Appeals held that the trial court improperly converted the temporary orders into permanent orders and vacated those orders. The Court of Appeals reasoned that the trial court must make specific best interests findings on the record and by not doing including findings in its final order, the trial court did not comply with A.R.S. § 25-403(B). Additionally, the trial court did not hold a hearing when it converted the temporary orders to permanent orders and as such, did not give the parties an opportunity to be heard.

Kadiyala v. Vemulapalli, 1 CA-CV 17-0111-FC (1/24/2019).

Disclaimer Deed; Waste; Tracing/Commingling; Fees. Vacated court's equitable lien on marital residence and remanded for reconsideration; affirmed findings regarding marital waste, attorney's fees, child's travel documents, and special master's fees.

Wife signed a disclaimer deed on the parties' marital residence, so the parties could obtain more favorable financing terms. The disclaimer deed stated that the property was the sole and separate property of Husband "having been purchased with the separate funds of Husband." However, at trial, both parties testified that the large down payment on the home came from community income. Wife argued that the disclaimer deed was invalid alleging fraud and duress, but the evidence presented at trial did not establish these claims. Wife argued that the Court erred by failing to include the community funds used for the down payment when calculating the equitable lien. The appellate court agreed and found that although the disclaimer deed says that Husband's separate funds were used to purchase the house, this does not trump the undisputed facts at trial for purposes of calculating an equitable lien.

Wife appealed from the finding that she did not establish that Husband committed waste. However, the Court's finding was based on the special master's finding that there was no community waste. Neither party objected to the report from the special master so that finding/order was affirmed.

Husband appeals from the finding that he failed to establish that funds in two bank accounts were his separate property. It was insufficient for Husband to show that the balance in two bank accounts in question never fell below the balances that existed prior to marriage. Husband had the burden to trace the commingled funds with clear and satisfactory evidence.

Husband appeals from the decree's language stating "any subsequently discovered property would be deemed to have been held by the parties as tenants in common." Husband wanted to clarify that only undisclosed "community property" would be held by the parties as tenants in common. The appellate court found Husband waived this argument as he did not argue it below. Husband initially denied to have any interest in the undisclosed property, and the Court order describes by legal description the real property that is to be held by the parties as tenants in common. Husband failed to offer any evidence that this property was anything other than community property.

Wife appeals the denial of her attorney's fees and Husband cross-appeals the order that he pay all the special master's fees. There was no abuse of discretion. There was no significant financial disparity and no unreasonableness. Husband was ordered to pay the special master's fees because there would have been no need for a special master, but for his use of concealed accounts.

Connell, III v. Connell, 1 CA-CV 18-0051-FC (1/24/2019, as amended 2/19/2019).
Characterization and Division of Debt with no Community Benefit; Spousal Maintenance.
Affirmed orders regarding characterization and division of debt and spousal maintenance.

Parties were married 6 years. Wife worked as a mortgage broker both during and after the marriage. Wife had a separate property residence with significant value. Trial court divided the credit card debt equally and characterized the mortgage on Wife's home her separate debt. Wife argued that the debt incurred during the marriage for the refinance of her separate property residence should be a community debt. The Court found that Husband sufficiently rebutted the presumption that debts incurred during the marriage are community debts by showing that the debt to refinance Wife's separate property was incurred for the sole purpose of benefitting Wife's separate property to avoid foreclosure due to her failure to timely pay her mortgage payments. Wife argued that Husband should reimburse her for the expenditure of her separate property to pay Husband's separate obligations, or in the alternative that the community should be reimbursed for payment of the same. The appellate court rejected these arguments; the community may have been entitled to a lien on any separate property that was acquired or that increased in value by the community's payment of separate debt. However, in this case there was no property upon which the court could impose a lien. Wife also objected to the division of credit card debt and vehicles. However, Wife did not address how the overall distribution of assets and debts was substantially unequal. The appellate court would not address her claims piecemeal.

Wife appealed trial court's findings that she did not qualify for spousal maintenance under any of the A.R.S. § 25-319(A) criteria, including the trial court's conclusion that she had sufficient property to provide for her reasonable needs because the trial court considered her separate property home. Court of Appeals affirmed the trial court's finding of Wife's ineligibility under all criteria as the trial court received reasonable evidence that supports those findings. The Court of Appeals cited *Deatherage*, finding that the law directs that for spousal maintenance, the court can account for property presently producing income or property capable of producing income or otherwise transformed to do so. Court of Appeals finds that there is no "bright-line standard to determine a lengthy marriage" under that criterion, and that the trial court has broad discretion in assessing the facts of each case. Wife also appealed the trial court's refusal to award her any attorneys' fees, arguing a substantial disparity in incomes and unreasonableness of Husband. The Court of Appeals affirmed, holding that reasonableness of both parties must also be considered and trial court found Wife to have acted unreasonably, which Wife did not dispute on appeal.

Schechter v. Cassidy, 1 CA-CV 18-0150 FC (1/22/2019).
Modification of Child Support; Attorneys' Fees. Affirmed trial court's denial of Father's modification of child support action and award of attorneys' fees to Mother.

Father moved to modify child support without having obtained a forensic accountant to review his business income, which the trial court years prior had ordered as a prerequisite to Father moving to modify in the future. Father also requested credit towards his arrears based upon his argument

that the child had emancipated prior to her 18th birthday due to dropping out of school, no longer living with a parent, and working full time, and he paid child support to the child directly. However, the child had not become legally emancipated via an emancipation order and his alleged direct payments (for which no credible evidence was presented) were not per an agreement between the parties nor were they paid to the Clearinghouse. The trial court denied Father's requests and increased his monthly arrears payments. The Court of Appeals affirmed all support payment orders as well as the attorneys' fees award, due to Father not objecting to Mother's request for fees at the trial court level, thereby waiving any objection on appeal.

De La Rosa v. Ayala, 2 CA-CV 2018-0085-FC (1/18/2019).

Modification of Parenting Time. Affirmed order denying petition to modify parenting time.

Hector and Love worked out a parenting time and legal decision-making agreement in 2016 which gave Love sole decision-making and Hector every other weekend parenting time. In 2017, Love filed two petitions, simultaneously, to modify legal decision-making and to change Hector's parenting time to none unless Love thought best. At hearing, the court denied the modification of decision-making (Love already had "sole"), but affirmed the parenting time for Hector with the modification that he could transport the kids only if he maintained a valid driver's license, once he got one, or have someone who has a license transport the kids. The trial court ordered Child Advocacy Center interview the children and based on their statements, found they didn't have any safety concerns and were comfortable with the present parenting time arrangements.

The appellate court found that Love's claim the trial court did not review her exhibits or pay attention to her allegation of Hector's failure to parent was unfounded. The appellate court approved the trial court's "bottom line is (the two of you) have different parenting styles" reasoning. Similarly, the appellate court found the trial court to have heard the allegations of drug charges, but the trial court acted in its discretion in finding that the 14-month-old drug charge was not a change in circumstance materially affecting the children.

Koester v. Fillmore, 1 CA-CV 18-0884 FC (1/10/2019).

Spousal Maintenance; Property Division. Affirmed trial court's order awarding spousal maintenance and dividing parties' property.

The trial court awarded Wife spousal maintenance of \$500.00 per month for 3 three years and correctly assessed the relevant factors if A.R.S. § 25-319. In doing so, the trial court found that Wife's minimum wage earnings and few items she received as a result of the divorce reasonably supported the award of spousal maintenance. Moreover, the trial court correctly considered the parties' standard of living including Husband's spending patterns.

Husband argued that the trial court improperly valued the parties' community property by allowing an offset of property awarded to one party against the other. The Court of Appeals found that that the trial court's valuation and division was not an abuse of discretion.