

September 2018

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

This update contains summaries of 1 reported opinion and 9 memorandum decisions for cases decided in September 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

Monique B./Donald B. v. Hon. Duncan/DCS, 1 CA-SA 18-0121 FC (9/18/2018).
Special Action; UCCJEA. Accepted special action jurisdiction, but denied requested relief.

Child was born in Alabama, where Mother filed custody petition. In same year, Father and child moved to Arizona to live with paternal grandparents. Two years after Mother filed custody petition, the Alabama court awarded Father sole custody. Father later died and in the same month, DCS filed dependency in Arizona, alleging Mother had abandoned the child. Mother's parental rights were terminated, and the child was placed with paternal grandparents, who were eventually granted adoption of the child and the dependency was dismissed. Meanwhile, Mother filed a modification action in Alabama seeking to modify the custody order that granted sole custody to Father. The Alabama court granted Mother sole custody. Mother then sought to set aside the adoption order and order terminating her rights, asserting that Alabama retained jurisdiction, and asked the courts to hold a UCCJEA conference. At the UCCJEA conference, Alabama expressly retained exclusive, continuing jurisdiction. Arizona concluded it lacked jurisdiction to enter the various orders, which it vacated. Paternal grandparents then sought special action relief.

Alabama later relinquished jurisdiction, finding it was an inconvenient forum and that Arizona was a more appropriate forum. The Court of Appeals accepted special action jurisdiction due to the petition presenting a legal issue of first impression in application of the UCCJEA. The Court of Appeals held that Alabama had initial custody jurisdiction and therefore continuing, exclusive jurisdiction, which meant Arizona had no jurisdiction to enter the termination and adoption orders and there was no "retroactive" applicability of Alabama relinquishing jurisdiction. The Arizona Court properly vacated its orders due to lack of jurisdiction.

MEMORANDUM DECISIONS

Nicaise, Jr. v. Sundaram, 1 CA-CV 17-0518 FC (9/27/2018).
Order of Protection ("OOP"). Affirmed OOP, but vacated Notice of Brady Indicator.

After Mother obtained an OOP against Father (her OOP is not an issue on appeal), Father obtained an OOP against Mother based in part upon two incidents that occurred in their child's doctor's

office five days after Mother's OOP was issued. One of the incidents involved Mother video recording Father against his consent and the other of which involved Mother going on a "rant" about Father's behavior in front of the child's doctor and the child. The family court held a combined evidentiary hearing on Mother's contested OOP and Father's petition for an OOP against Mother. At the hearing, Mother testified first, Father then cross-examined her, and then Mother was redirected. Father was then cross-examined and Mother's counsel asked to put Mother back on the stand, which the family court allowed for purposes of rebuttal, but not without first saying it had "probably heard enough of the evidence at this point to make a determination." No testimony was presented that Mother posed a threat to the physical safety of Father or the child.

The family court upheld Mother's OOP against Father and granted Father's OOP against Mother based on Mother's "rant," which it found to be harassment, but did not find the videotaping to be domestic violence. The family court, however, issued a Notice of Brady Indicator against Mother when granting Father's OOP against Mother. Mother filed a motion for new trial/amended judgment, which the family court denied. Mother appealed, arguing her conduct was not harassment, that she was denied due process because the family court "predetermined the matter and that the Brady Act should not have been applied against her. Father argued Mother's appeal was moot because his OOP against her had expired by the time of the appeal.

The Court of Appeals held Mother's appeal was not moot because Mother may continue to suffer collateral consequences from the expired OOP, such as the OOP being considered by a court in subsequent cases, harm to Mother's reputation, etc. The Court of Appeals further held that the family court did not err in finding Mother's conduct during the "rant" in the doctor's office constituted harassment because the behavior fell squarely under the statutory definition of harassment, as shown by the evidence admitted at the hearing. As for Mother's due process argument, which the Court of Appeals found was without merit, the Court held the family court did not violate Mother's due process because informing the parties of the court's preliminary view after hearing all usual testimony was not improper and did not establish any predetermination by the family court.

The Court of Appeals agreed, however, with Mother that the family court erred in applying the Brady Act against her because the family court failed to conduct the required inquiry regarding Mother's access to firearms so there was no evidence at the hearing of her posing a credible threat of physical violence to Father or the child, which is required by Arizona law to impose a firearm restriction. Therefore, the Court of Appeals vacated the Notice of Brady Indicator.

Vincent v. Shanovich, 1 CA-CV 16-0431 FC (9/25/2018).

Retirement Account; QDRO; Clerical Mistakes under Rule 85(A). Vacated order denying motion to set aside QDRO and remanded for entry of amended QDRO.

Petition for Dissolution was filed on August 25, 2000, which was also the date of service. Parties' Decree entered in 2002 awarded former wife one-half of former husband's ASRS retirement and Mesa Deferred Compensation Plan, including employer contribution and accrued interest as of the date of filing of the Petition for Dissolution to be reflected in a QDRO stating such provisions. Former husband moved for entry of a stipulated QDRO in 2004, which was entered by the family court. The QDRO did not specify the relevant valuation date as provided in the Decree.

When former husband neared retirement, he learned ASRS interpreted the QDRO as awarding former wife half of his entire retirement benefit, including the post-divorce accrued portion. As such, former husband filed a motion to set aside the QDRO under ARFLP 85, and alternatively under 85(A), arguing it contained a clerical mistake, as it omitted the valuation date specified in the Decree and was therefore void. He attached a proposed amended QDRO, which included the filing date of the divorce petition as the valuation date. Former wife conceded the express terms of the Decree and did not argue she was entitled to any more than that which the Decree awarded her, but maintained former husband's motion failed to establish a clerical mistake.

The family court denied former husband's motion to set aside QDRO that former husband filed due to alleged clerical mistake and award of attorneys' fees to former wife. The family court reasoned that the Decree and QDRO were unambiguous and were never appealed. Former husband timely appealed that order. The Court of Appeals initially dismissed former husband's appeal of the denial due to lack of jurisdiction and vacated the fee award. Former husband then filed a petition for review of the lack of jurisdiction issue and the Arizona Supreme Court held an order granting or denying a motion to correct clerical mistakes pursuant to Rule 85(A) was appealable so the Arizona Supreme Court directed the Court of Appeals to consider whether the QDRO accurately reflects the family court's intent expressed in the Decree to award former wife a one-half portion of former husband's retirement as of the date of filing of the divorce petition.

On the second appeal, the Court of Appeals considered the merits and held that the omission of the valuation date from the QDRO was a clerical mistake under Rule 85(A), reasoning that the Decree directed the division date to be the date of filing, which was also the date of service, and is in accord with Arizona law that only community property as of the date of service is subject to division in a Decree. Because the family court's order was unclear as to the division date, the QDRO was not complete and did not accurately reflect the Decree, so contains a clerical mistake. The family court should have corrected the clerical mistake and not doing so was error. The Court of Appeals vacated the denial of the motion to set aside the QDRO and remanded for the family court to enter an amended QDRO reflecting a division date as of the date of filing/ service.

Tairou v. Ayessou, 2 CA-CV 2018-0065-FC (9/14/2018).

Findings Necessary for Parenting Time Order. Vacated parenting time order and remanded for further findings.

In the parties' decree entered after trial, the family court ordered that Mother would remain the primary residential parent, and granted Father parenting time for three weekends to every one for Mother, from the end of school on Friday until 6:00 p.m. Sunday, and each week from noon on Wednesdays until the start of school on Thursday morning. Neither party requested this parenting time schedule. The family court did address each of the -403(A) findings, but did not explain or make the specific findings or best interests explanation as to why granting Mother primary custody or reducing Father's parenting time from the temporary orders was appropriate. Father appealed, arguing the family court failed to make proper -403 findings.

The Court of Appeals found the family court indeed made inadequate findings or explanation why this new parenting plan was implemented or why it was in the best interest of the children and vacated that portion of the decree.

Lopez v. Lopez, 1 CA-CV 17-0736-FC (9/13/2018).

Order of Protection (“OOP”). Affirmed trial court’s order upholding OOP.

Wife obtained an *ex parte* OOP after alleging Husband had been “physically, emotionally, and mentally abusive” towards her during their 18-month marriage, alleging specific dates of such acts of domestic violence. Husband requested a hearing, at which the superior court upheld the OOP, finding Wife proved acts of domestic violence on four of the specific dates mentioned in her petition. The superior court also found that Husband’s testimony was not credible. Husband appealed, arguing the superior court abused its discretion by violating his due process rights because it considered testimony about matters/allegations not sufficiently specified/alleged in Wife’s petition, which he asserts lacked specific dates and acts, and by ordering a firearm restriction under the Brady Act because there was no basis upon which the court could have concluded he posed a credible threat to Wife’s physical safety, and that the superior court abused its discretion because its findings were supported by improper evidence.

The Court of Appeals affirmed, as it will not reweigh the evidence or make credibility determinations, instead deferring to the superior court’s findings in those regards. The Court of Appeals disagreed with Husband’s Brady Act argument, as Wife’s petition requested the court order Husband to not be permitted to possess firearms because of a risk of harm, which was sufficient to put the matter at issue and Husband on notice. The superior court also heard testimony and made findings sufficient to apply the Brady Act.

Downum v. Downum, 1 CA-CV 17-0693-FC (9/13/2018).

Spousal Maintenance; Res Judicata; Overpayment of Child Support; Enforcement of Decree re: QDRO; Attorneys’ Fees. Affirmed orders denying Wife’s petition to modify spousal maintenance, division of ASRS account, but remanded for enforcement of Decree’s QDRO orders.

In this case, the trial court had already modified its spousal maintenance terms set forth in the Decree. Wife filed a subsequent petition and submitted evidence that was for the most part duplicative of the evidence she submitted during the prior evidentiary hearing, including the difficulty she faced finding employment, her sacrifices for Husband’s career, *etc.* Wife argued that Husband’s income had increased, however, the trial court found that such increase was temporary.

The Court of Appeals affirmed the trial court’s determination that Wife failed to show a substantial and continuing change of circumstances since the prior modification order. The Court emphasized that facts known at the time of the prior court hearing could not establish changed circumstances when such changes took place. In this case, Wife argued in part that the emancipation of the youngest child and the termination of the child support obligation constituted changed circumstances. The Court held that the child’s eventual emancipation was known by the trial court at the time of the initial trial and prior modification proceeding and thus did not establish changed circumstances and res judicata prevents Wife from obtaining a modification based on facts which could have been raised in the previous proceedings.

Wife also argued that the superior court failed to consider several claims she raised, but she did not object to the adequacy of the findings to the trial court and thus the Court of Appeals held she waived any objection to the sufficiency of such findings. The Court of Appeals also noted that it

was proper for the trial court to consider Husband's bankruptcy proceedings for purposes of Husband's ability to provide spousal maintenance to Wife.

Regarding Husband's ASRS retirement account, the Court of Appeals agreed with the trial court that Wife was precluded from seeking a modification of the Decree's orders regarding the ASRS account, but remanded to the trial court the issue of enforcement of the Decree's orders regarding the QDRO, including the preparation thereof.

Husband had continued making his child support payments after the younger child's emancipation and thus overpaid his obligation. The Court of Appeals affirmed the trial court's discretion to order reimbursement. Wife had failed to provide a copy of the trial transcript pursuant to her appeal, which defeated some of her arguments including her argument that the trial court erred in determining the amount of the child support overpayment. The Court of Appeals affirmed the trial court's award of attorney fees to Husband associated with the child support overpayment issue.

Matthew v. Robles, 1 CA-CV 17-0494 (9/13/2018).

Modification; Attorneys' Fees. Reversed trial court's orders denying petition to modify child support and award of fees and remanded for child support modification proceeding to occur.

Child support orders were entered in 2013 originally, which required Mother to pay Father approximately \$40.00 in monthly child support. The parties later agreed to terminate her obligation due to Father's increased income. Father then petitioned to modify in 2016, arguing the prior judgment had become "outdated." The family court held an evidentiary hearing and issued an order in 2017 ordering Mother pay Father child support of approximately \$47.05. The order attributed gift income to Father, not based on evidence presented at the hearing, but instead based on a prior finding by the family court attributing over \$1,000 per month in gift income to Father. Father moved to alter or amend the order, which was denied, and filed a new petition to modify child support, which was dismissed because Father had "failed to demonstrate a material change in circumstances." The family court also awarded Mother her attorneys' fees in having to file a response to Father's petition because it "was not reasonably filed." Father appealed.

The Court of Appeals held that Father should have been granted a hearing as he presented a colorable claim of a substantial and continuing change of circumstances in his March 2017 petition. He avowed that he no longer receives recurring gift income and offered an AFI reflecting the same. As alleged, the overall variation in the child support obligation exceeded 15%. Mother did not contest Father's avowals or evidence. The Court of Appeals also reversed the award of attorneys' fees to Mother on the same basis—Father presented a colorable claim.

In Re the Marriage of Plummer & Edwards, 2 CA-CV 2018-0013 (9/13/2018).

Spousal Maintenance. Vacated and remanded modified spousal maintenance orders.

Susan appeals the trial court's order modifying her spousal maintenance and imposing a termination date when it did not find a substantial or continuing change of circumstances to justify modification and instead relied on impermissible factors.

After a 22-year marriage, James was ordered to pay \$3,746 in spousal maintenance. James petitioned to modify, arguing that the improved housing market provided the change of circumstances as it allowed Susan (who had worked as a realtor) to be self-supporting. He also argued he had no discretionary income. Susan countered with a request for increased spousal maintenance. After finding no substantial changes to either party's income or expenses, the court found that after considering other "relevant circumstances," the indefinite award would be changed to a modifiable award of rehabilitative spousal maintenance. The court reduced the award by 50% and set a termination date.

Regarding children living at home, at the time the decree was entered, only a 17 year old resided with Susan. The appellate court noted that it was reasonably foreseeable that the child would not be residing in her home indefinitely. The court also stated that recovery from emotional distress is not an economic or objective factor and recovery would have been anticipated at the time of the decree. The final two factors are speculative as to future income. The trial court's reliance on what Susan could earn was an impermissible basis for modification. Thus, James needed to wait until Susan had begun to financially support herself before filing a petition for modification.

The appellate court noted that the burden is on the party requesting a modification to prove "an actual, objective, unanticipated, and continuing change of circumstances since entry of the decree." Noting no substantial change in the financial circumstances, the trial court found a change based on other, improper circumstances (Susan no longer having 3 children living at home, having recovered from her emotional distress, the improvement of the housing market would allow Susan to be independent if she made reasonable efforts to use her real estate license, and Susan's desire to own a business and be self-supporting), which constituted an abuse of discretion. The Court of Appeals reasoned that instead of relying on the proper, objective, substantial and continuing change in circumstance standard, it modified the award because it thought Susan was capable of working and ought to work. The trial court's order was therefore improper and vacated.

Kennedy v. Wybenga, 1 CA-CV 17-0559-FC (9/11/2018).

Child Support; UIFSA; ADA Accommodations; Appointment of a GAL. Reversed dismissal of petition to modify child support and order appointing a GAL and remanded for reconsideration of petition to modify child support and request for accommodations pursuant to the Americans with Disabilities Act ("ADA").

The parties were divorced in AZ and the original and modified child support orders were issued in AZ. The trial court then permitted Mother to relocate to CA in 2014. Father remained in AZ and moved to modify child support in 2016, he also moved to determine arrearages and grant injunctive relief. Mother argued that the AZ Court did not have jurisdiction over the child support issues. As it relates to child support, initially the AZ Court ruled it did have jurisdiction, and then after a UIFSA conference with the CA Judge, ruled it did not have jurisdiction on the child support issues because the child support orders had been registered in CA. Father contends that CA lacked jurisdiction and improperly registered the child support order for modification in May 2016 because he is an AZ resident; thus, AZ never lost continuing, exclusive jurisdiction over child support issues according to the UIFSA.

The Court of Appeals found that CA could register the AZ order for purposes of enforcement, but lacked jurisdiction to modify it unless both parents lived in CA and the child no longer lived in AZ. There was a discussion of a child support order that was issued in CA, but it was found to be essentially an enforcement order and did not mean that AZ lost its continuing and exclusive jurisdiction to modify child support, which AZ retained because it issued the controlling order under UIFSA and Father lived in AZ where he petitioned to modify.

The trial court addressed Father's request for accommodations under the ADA to allow a cognitive interpreter (not an attorney) because he had difficulty speaking coherently due to disabilities. In relation to this request, the court set a hearing and appointed a GAL to meet with Father and advise the court whether he could represent himself or if a guardianship was necessary. Father contends the court lacked authority to appoint a GAL and violated his due process rights by doing so. The trial court failed to cite any rule or statute authorizing the appointment of a GAL for an adult who has not previously been ruled incompetent or incapacitated.

The Court of Appeals found that the trial court lacked authority and failed to follow the constitutionally-mandated procedures before appointing a GAL. This matter is governed by the Family Law Procedure—rules which specifically preclude the court from appointing a guardian to act on behalf of an incompetent person, except as provided in A.R.S. Title 14. Ariz. R. Fam. Law P. 10(I). The trial court failed to follow the constitutionally-mandated procedures before appointing a GAL. So, the order appointing the GAL was vacated and remanded for reconsideration of Father's request for an ADA accommodation.

Friedman v. Friedman, 1 CA-CV 17-0703-FC (9/11/2018).

Change in Circumstance; Spousal Maintenance. Affirmed denial of petition to modify spousal maintenance.

The trial court initially entered a decree of legal separation following a contested hearing. Both parties were Canadian citizens. Father had a work visa while Mother had a dependent visa. Following the legal separation trial, Mother was awarded spousal maintenance of \$2,800 per month for six years to “allow Mother the time she needs to secure additional employment and arrange for any training she needs to secure appropriate employment”. The superior court also found that “Mother’s immigration situation has affected her ability to gain employment.” In 2015, Father petitioned for dissolution and refused to renew Mother’s dependent visa which was due to expire in 2016. After her visa expired, Mother had to return to Canada (with the minor child).

As part of the divorce proceedings, Mother petitioned to modify her spousal maintenance and claimed her continued unemployment and return to Canada, and her need for further education and training, were unforeseen circumstances that supported a modification of spousal maintenance. The trial court found that such circumstances were foreseeable at the time of the legal separation and thus did not rise to the level of an unforeseen substantial change of circumstances since the entry of the decree of legal separation. Such potential events were addressed at the time of the original hearing / decree, were reasonably anticipated as possibilities, and thus were not unforeseen contingencies. The trial court also found that Mother could have started making steps toward obtaining training and employment after the legal separation but failed to do so.

The Court of Appeals affirmed, holding that foreseeable changes in circumstances do not provide a basis to modify spousal maintenance and the failure to make reasonable efforts to obtain employment / training may defeat argument of inability to meet reasonable needs.

Comment: The case provides detailed case law analysis of changed circumstances, whether such are anticipated and/or foreseeable and the distinction of changed circumstances applied to a fixed term award versus an indefinite award.