

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

This update contains summaries of 1 reported opinion and 7 memorandum decisions for cases decided in April 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

Paul E. v. Courtney F., 1 CV 18-0111 PR (4/25/2019).

Legal Decision-Making. Vacated in part Court of Appeals' ORDER, vacated all of trial court's orders, and remanded to trial court.

The Arizona Supreme Court held that, under A.R.S. § 25-410(A), when a family court designates one parent as the sole legal decision-maker for a child, unless the parties agree otherwise, the court may limit the decision-maker's authority only as necessary to prevent endangering the child's physical health or significantly impairing the child's emotional development. Here, where the parents disagreed about the existence of and how to address child's gender dysphoria, the family court exceeded its statutory authority by appointing specific treatment professionals for the child and otherwise limiting the parent's sole legal decision-making authority when none of the expert evidence supported a finding that father's exercise of his authority would harm or significantly impair the child.

MEMORANDUM DECISIONS

Taylor v. Taylor, 1 CA-CV 18-0310-FC (4/25/2019).

Spousal Maintenance. Affirmed spousal maintenance order.

After trial on petition for dissolution, trial court awarded Wife, 45 years old, 48 months of spousal maintenance in the amount of \$400.00 per month, to allow Wife “to secure additional employment and arrange for any training needed to secure appropriate employment as well as time to hopefully control her bi-polar and anxiety.” Wife appealed, arguing only that the duration was too short, and argued she established through testimony and SSA documents that she could not return to work due to her medical conditions.

The court of appeals affirmed the award, noting that physical and emotional health is only one of many factors in determining spousal maintenance. Furthermore, the evidence from SSA did not establish that Wife could not return to work, Wife had only been receiving the benefits for under a year, and had historically worked before and during the marriage. The court characterized Wife as the recipient spouse who “has neither been absent long from the job market nor lacks the skills needed to presently pursue employment, the marriage was of moderation duration, and the evidence does not conclusively establish” that she is unlikely to return to work. Accordingly, the Court of Appeals held that the 48 month spousal maintenance award is supported by the evidence where the recipient spouse worked before and during part of the marriage and could receive medication and training for medical needs.

Fleck v. Antti, 1 CA-CV 18-0408-FC (4/23/2019).

Legal Decision-Making; Parenting Time; Modification; Attorneys’ Fees. Affirmed trial court’s orders modifying parenting time, continuing joint legal decision-making with Father having final decision-making authority, and awarding Father a portion of his attorneys’ fees.

Father originally had primary physical custody and Mother had supervised parenting time every other weekend, although the parties shared joint legal decision-making with Father having final decision-making authority. Mother filed a petition to modify, seeking 50/50 parenting time and final decision-making authority for medical and educational decisions. Father eventually offered 50/50 parenting time, joint legal decision-making with neither parent having final authority, and having the child remain in current school and transition to middle school in different district. Mother rejected the proposal, asked for 60/40 parenting time in her favor, and final decision-making authority on all major decisions. The parties proceeded to a hearing and Father requested attorneys’ fees due to Mother’s unreasonable positions. The family court awarded 50/50 parenting time and continued joint legal decision-making, with Father having final decision-making authority, and awarded Father a portion of his attorneys’ fees.

The court of appeals affirmed, noting that Mother’s petition sought equal parenting time, Father offered that, and Mother then rejected it and sought more parenting time for herself. Thus, the award of attorneys’ fees based on unreasonableness was supported by the record. The court also rejected Mother’s argument regarding Father’s untimely disclosure of witnesses and exhibits, which was only one day late and a month before the hearing. Accordingly, the court of appeals held that where a parent seeks equal parenting time in a modification action, rejecting an offer of equal parenting time is unreasonable and can support an attorneys’ fee award.

Huver v. Huver, 1 CA-CV 18-0268-FC (4/23/2019).

Child Support; Effective Date of Modification; Due Process. Affirmed trial court’s orders modifying child support.

Father paid child support for two children who primarily resided with Mother under the divorce decree. In June 2014, the older child began living with Father, and in November 2014 Father petitioned to modify, among other things, child support, and Mother filed a counter-petition. The

parties reached partial agreement, and the court ordered that child support terminated as of March 1, 2015, and recalculation would be pending as of June 1, 2015, when the older child turned 18 and graduated high school. The trial court dismissed Father's petition but not Mother's, and eventually held a hearing in January 2018. The trial court held that the February 2015 order suspended the child support obligation until June 1, 2015, and child support for the younger child recommenced on June 1, 2015. The court entered two child support orders; one for June 1, 2015 to October 1, 2016, and November 1, 2016 forward due to increased incomes.

On appeal, Father argued the trial court could not modify his child support because it had terminated March 1, 2015, and Mother did not file a new petition to establish. The court of appeals held the February 2015 order was temporary, and only suspended child support until June 2015, but did not end it. Furthermore, the court never dismissed Mother's counter petition, and the issue of child support was properly before the court. The retroactivity to June 2015 was appropriate as well, due to the February 2015 in effect. The court did not remand for new financial evidence due to Father's failure to provide the transcripts on appeal, and after the court noted that Father had listed several financial exhibits but failed to offer them into evidence. Accordingly, the Court of Appeals ruled that where a court order only terminates child support temporarily until a stated date, and a petition is still pending, retroactivity until the stated date is appropriate and there is no denial of due process as the issue is still before the court.

Sawalqah v. Sawalqah, 1 CA-CV 18-0226-FC (4/18/2019).

Consent Decree; Due Process; Attorneys' Fees. Vacated portions of family court's decree and remanded for proceedings consistent with opinion.

During divorce proceedings, the parties disagreed on issues but ultimately agreed to settlement terms on everything except a community lien. Parties filed a notice of settlement and request to vacate trial, and either party could request a hearing to resolve the lien. Disputes arose regarding the community lien, keeping another property on the market, and division of medical expenses. Husband lodged a decree and Wife objected. The family court adopted the decree without an evidentiary hearing.

The Court of Appeals found that Wife timely requested a hearing on the contested issues and objected to the proposed decree. Rule 45 did not provide a basis for adopting the decree because both parties must sign, which Wife did not. The Court of Appeals also awarded Wife her attorney fees on appeal due to disparity in resources, despite Husband not taking an unreasonable position on appeal. As such, the Court of Appeals held that adopting a proposed consent decree without consent from the other spouse and declining to hold a hearing to resolve disputed issues violates procedural due process.

Halloum v. Hasasneh, 1 CA-CV 18-0353-FC (4/16/2019).

Expert Disclosure Deadline; Attribution of Income for Child Support Purposes. Affirmed family court's orders precluding expert report as untimely disclosure and attributing income to Husband for purposes of child support.

Wife and Husband ran a business together and kept large amounts of cash and jewelry in the marital home. After Wife filed for divorce, Husband shut down the business within four months, and removed the cash and jewelry from the home. The family court set a trial date and an expert disclosure date 60 days prior to that date. Husband filed a motion to continue trial after the disclosure deadline had passed. The court granted the motion to continue, but precluded Husband's expert report because it did not comply with the original disclosure deadline. At trial, the family court attributed \$20,000 per month in income to Husband.

On appeal, the Court of Appeals distinguished *Johnson v. Provoyeur*, where the trial court continued the trial and expressly reset the disclosure deadline. Here, Husband missed the expert disclosure deadline and then filed his motion to continue, and did not request an extension for disclosures. The Court of Appeals affirmed the allocation of the cash and jewelry due to Husband's lack of credibility and Wife's testimony being credible. Finally, the Court affirmed the trial court's imputation of income for child support purposes, noting that the trial court applied all five *Pullen* factors and made findings as to each one. Furthermore, Husband shut down the business to minimize financial obligations to Wife, and the change in income was not justifiable or reasonable. As such, the Court of Appeals held that a trial continuance does not automatically extend the deadline for expert disclosures unless otherwise expressly stated and that shutting down a business to minimize financial obligations to a spouse may result in attribution of income.

Reiss v. Reiss, 1 CA-CV 18-0395-FC (4/16/2019).

Modification of Parenting Time; Sanctions. Affirmed orders modifying parenting time and entering contempt sanctions.

The parties were divorced in 2017, and the trial court awarded them both parenting time with the children. In June 2017, Father requested a modification of Mother's parenting time due to Mother's violation of court orders regarding therapy sessions. Mother was ordered to schedule an evaluation with a mental health professional, which she agreed to do, and then refused until the trial court suspended her parenting time. The trial court eventually awarded Mother back parenting time but sanctioned her for failing to follow court orders and ordered her to reimburse Father for child support he paid while he had the children full-time, and other expenses he had paid.

The Court of Appeals rejected Mother's argument that the family court failed to make -403 findings. Rather, the Court of Appeals held that modification of parenting time is governed by A.R.S. § 25-411, which requires certain facts but does not require findings reduced to writing as -403(B) does. The court also held the failure to cooperate with orders may result in monetary sanctions under a court's inherent authority and A.R.S. § 25-324, and upheld other reimbursements to Father. As such, modification of parenting time does not require written -403 findings and.

Coburn v. Rhodig, 1 CA-CV 18-0194 FC (4/9/2019).

Spousal Maintenance Arrears; Rule 69; Duress. Affirmed spousal maintenance arrears order.

Parties' Consent Decree required Husband to pay \$3,000 per month in non-modifiable spousal maintenance to Wife for 60 months, beginning December 2009. Husband stopped paying Wife in August 2010. Husband threatened to leave the state or commit suicide if Wife enforced the decree in court, so the parties signed an agreement that Husband would pay Wife a \$5,000 lump sum payment plus \$1,000 per month for 12 months, with the "final payment" due December 15, 2011. Wife agreed to "waive any other unpaid support owed her by [Husband]." Husband paid all payments due under the parties' agreement, but Wife still filed a Petition to Enforce in 2014 for arrearages she claimed were due under the Decree. Husband argued the parties' agreement was enforceable and supported the equitable defenses of waiver, estoppel, and laches. The family court concluded it lacked jurisdiction to modify spousal maintenance or hear Husband's equitable defenses and granted Wife's petition to enforce, entering a judgment for spousal maintenance arrears for \$136,000 plus interest, which Husband appealed.

On the first appeal, the Court of Appeals reversed, holding the family court had jurisdiction to consider Husband's equitable defenses and remanded for an evidentiary hearing. On remand, the family court found Husband's failure to pay support to Wife pursuant to the Decree, his assertion that he will not be forced to pay support, and his threats to commit suicide constituted economic/financial duress or improper threats and induced Wife to sign the agreement, thereby invalidating the agreement, rejected Husband's equitable defenses, and reinstated the arrears judgment with interest. Husband appealed from the judgment and the order denying his motion for new trial.

On the second appeal, Husband primarily argued the agreement was a valid Rule 69 agreement under Rule 69 in effect when the agreement was signed in 2010. Husband also argued that because Wife did not cite the Restatement (Second) of Contracts §§ 175 (duress) and 176 (improper threats) below, she therefore waived her arguments that these Restatement sections support a finding of duress on appeal. As to the latter argument, the Court of Appeals agreed in general that arguments not raised below are deemed waived, but then concluded that waiver is a procedural and not jurisdictional rule and if application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for the Court to consider the issue. The Court of Appeals found that the evidence supports the conclusion that Wife entered into the agreement under duress and Husband's suicide threat was improper, as were his threats to leave the state and ensure she would not receive any support payments if she enforced the Decree in court. The Court of Appeals also found Husband's threats caused an unfair exchange in that Wife was induced to forego substantial spousal maintenance payments due to Husband's threats and that Wife had no reasonable alternative but sign the agreement in light of Husband's threats. Husband's threats were also found to constitute oppressive tactics with emotional consequences.

Husband's arguments based on equitable defenses of waiver, estoppel, and laches also failed. The Court of Appeals did not find Husband's positions on appeal were unreasonable, and had no evidence of comparable financial resources, so did not award any attorneys' fees to Wife.