MCBA

MARICOPA COUNTY BAR ASSOCIATION

FAMILY LAW SECTION NEWSLETTER

January, 2014

Featured in this edition: articles on Co-Parenting a Child with Special Needs, and Goodwill Valuations

EDITORS' COMMENTS

We are always looking for articles and practice tips.
If you would like to submit something, please contact Kellie, Annette or Sylvina. Our information is on page 5.

TABLE OF CONTENTS

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Published by the Board of Directors of the Family Law Section of the Maricopa County Bar Association.

Editors: Kellie Wells, Sylvina Cotto and Annette Cox

ANNOUNCEMENTS

There are three bills pending in the legislature that will touch upon family law matters:

S1009 – SPOUSAL MAINTENANCE
When determining spousal maintenance, a history of domestic violence against a spouse must now be considered.
First sponsor: Sen. Ableser

S1015 – DECISION-MAKING; ASSAULT; PROHIBITION
A person who is convicted of a sexual assault in which a child is conceived loses rights to decision-making or parenting time with the child.
First sponsor: Sen. Ableser

S1038 – PARENTING TIME; CHILD RELOCATION
Notice is required for any change of residential address, regardless of distance, and the court is required to adjust the parenting time or visitation arrangement to minimize the impact on the party who is not changing address. Effective January 1, 2015
First sponsor: Sen. Barto

JUDICIAL ROTATIONS

(unknown dates)

Judge Rotating	Dept.	Region	Assuming Calendar Currently Assigned To Judge	Dept.	Region
Flores, Lisa	CV	DT	Grant, Larry (New Judge)	JV	DUR
Grant, Larry(New Judge)	JV	DUR	Flores, Lisa	CV	DT
* Warner, Randy	CV	DT	* Rayes, Doug (New Judge)	CV-X	DT
* Rayes, Doug (New Judge)	CV-X	DT	Warner, Randy	CV	DT

Flores rotation to occur upon starting of new judge appointed to replace Judge Grant.
*** Rotation to occur upon Judge Rayes leaving for Federal Bench.**

JUDICIAL ROTATIONS

(June 30, 2014)

Judge Rotating	Dept.	Region	Assuming Calendar Currently Assigned To Judge	Dept.	Region
Anderson, Aimee	JV	SE	Mead, Kathleen	FC	DT
Bailey, Cynthia	CR	DT	Viola, Danielle	FC	NE
Bergin, Dawn	CR	DT	Verdin, M.	CV	DT
Blomo, James	FC	DT	Herrod, Michael	CV	DT
Brotherton, Bill	CR	DT	Myers, Sam	FC	DT
Chavez, Harriett	CR	DT	Whitten, Chris	FC	DT
Crawford, Janice	FC	SE	Anderson, Aimee	JV	SE
Fenzel, Alfred	CV	NE	Bergin, Dawn	CR	DT
Fink, Dean	TX	DT	Chavez, Harriett	CR	DT
Garcia, Jeanne	CR	DT	Padilla, Jose	FC	NW
Hannah, John	FC	SE	Fenzel, Alfred	CV	NE
Herrod, Michael	CV	DT	Blomo, James	FC	DT
Kemp, Michael	FC	NW	** Garcia, Jeanne	**CR**	**DT**
* McCoy, Scott	CR	DT	* McCoy, Scott	**CR**	**DT**
* Mead, Kathleen	FC	DT	Kemp, Michael	FC	NW
Myers, Sam	FC	DT	* O'Connor, Karen	**CR**	**DT**
O'Connor, Karen	CR	DT	Thompson, Peter	JV	SE
Padilla, Jose	FC	NW	Brotherton, Bill	CR	DT
Thompson, Peter	JV	SE	Hannah, John	FC	SE
Verdin, M.	CV	DT	Crawford, Janice	FC	SE
Viola, Danielle	FC	NE	Bailey, Cynthia	CR	DT
*** Whitten, Chris	FC	DT	Fink, Dean	TX	DT

*** Location change only.**
**** Location change to locate two DUI courts on same CCB Floor**
***** Rotation but judge remains in current location.**

COMMISSIONER ROTATIONS

(June 30, 2014)

Commissioner Rotating	Dept.	Region	Assuming Calendar Currently Assigned To Commissioner	Dept.	Region
Albrecht, Richard	CR/RCC	DT	Newell, Julie	FC	NE
Bernstein, Jerry	CR/DUI	DT	Mulleneaux, Christine	CR/MCC	DT
Davis, Jay L.	CR/RCC	DT	Ireland, Jacki	FC/CV/PB	NW
Donofrio, Charles	CR/IA	DT	Miller, Phemonia	CR/DUI	DT
Doody, Jack	CV	NE	Otis, Erin	FC	DT
Hartsell, Roger	JV	DUR	Washington, Eartha	FC	DT
Ireland, Jacki	FC/CV/PB	NW	Davis, Jay L.	CR/RCC	DT
** Kaiser, Brian	CR/MCC	DT	** Bernstein, Jerry	**CR/DUI**	**DT**
Miller, Phemonia	CR/DUI	DT	VandenBerg, Lisa	CR/MCC	DT
Mulleneaux, Christine	CR/MCC	DT	Hartsell, Roger	JV	DUR
Newell, Julie	FC	NE	Albrecht, Richard	CR/RCC	DT
Otis, Erin	FC	DT	Kaiser, Brian	CR/MCC	DT
Rees, Brian	PB	DT	Doody, Jack	CV	NE
* Roberts, Lisa	CR/IA	DT	Roberts, Lisa	CR/IA	DT
VandenBerg, Lisa	CR/MCC	DT	Rees, Brian	PB	DT
Washington, Eartha	FC	DT	* Donofrio, Charles	CR/IA	DT

*** Commissioner Lisa Roberts designated as new IA Presiding Commissioner effective at rotation.**

**** Location change to locate two DUI courts on same CCB Floor**

MARICOPA COUNTY BAR ASSOCIATION

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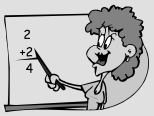
PRESENTATIONS & CLE



CLE Helping Clients Make the Right Choice: Juvenile versus Family Court Options and Private Severances

Save the Date!!! April 10, 2014

Time: 11:00-1:00 pm

Location: MCBA 303 E. Palm Ln. Phoenix, AZ

Description: Learn how to assess the client's options in both juvenile and family court to determine which type of action will best meet the client's goals and long term needs. This will include a discussion about implications for third parties/in loco parentis, grounds for and best interest factors for pursuing severance. The court has issued two important opinions in private severances in the last twelve months. The seminar will include an overview of case law applicable to private severances and the implications of the new case law.

Presenters: Annette Cox, Jennifer L. Kupiszewski and Tawnia Wienke

DV Mentor Project provides legal representation for victims of domestic violence

The DV Mentor Project seeks to make representation available to victims of domestic violence by encouraging experienced family law attorneys to volunteer with VLP and serve as mentors on VLP cases with less experienced attorneys who are being trained to provide family law representation to victims. You can help, whether you are an experienced family law lawyer or whether you have no experience in this area. To receive more information or find out how you can participate, contact VLP Director Pat Gerrich at 602-254-4714 or pgerrich@clsaz.org. Participants in the DV Mentor Project receive primary malpractice coverage, free CLE training and VLP assistance to arrange donated litigation support services, as well as opportunities to network with other outstanding advocates and receive recognition.

News from the Clerk ("The Brief")

eFiling in Family Court

Permissive eFiling of post-initiation family court documents in any family court case in the Superior Court in Maricopa County has been allowed all year and continues as a time and money saving option. Attorneys and self-represented parties can choose which documents to eFile after the case is initiated on paper. eFiling in family court cases is through the Clerk's eFiling Online website, not AZTurboCourt. See the Clerk's website for more information about eFiling: http://clerkofcourt.maricopa.gov/efiling/default.asp. The Family Court section of the eFiling Guidelines provide important information about format and what can and cannot be eFiled. Similar to depository box filings, eFilings that require payment of a fee must be paid at a Clerk's facility or over the phone within one business day of eFiling or they will be rejected for non-payment and the original submission date and time will be lost. The Clerk's Office celebrated 10 years of eFiling in 2013.

Minute Entries Online

Court rules were modified that limited access to minute entries online. Criminal case minute entries appear online unless the crime was a sex offense, had a juvenile victim, or met other restrictions defined in Supreme Court Rule 123. No minute entries are posted online in probate or juvenile cases and some family court minute entries do not appear online. Minute entries can be accessed at http://courtminutes.maricopa.gov/.

Formatting Cautions

Rules of procedure changed how foreign subpoenas are issued and Maricopa County local rules were changed to require the filing party to add language to their subpoenas regarding requests for accommodations and interpretive services. Filers were also reminded to ensure their documents leave a margin at the top of the page of at least two inches, as required by Civil Procedure Rule 10(d). The top left corner of eFiled proposed orders is where the Court's granted or denied language is stamped. Several firms have their firm name or address occupying this part of the page, which distorts or covers the Court's ruling.

Acceptable Forms of Payment

The Clerk's Office will make changes to the acceptable forms of payment after the first of the year. Law firms, attorneys, process servers and runner services account for the majority of the filing fees and services at the Clerk's Office and those customers will not make a complete transition on January 1, 2014. What will be enforced on January 1 for all court customers, including law firms and attorneys, is payment by cash or wire transfer for posting non-criminal bonds in most situations, including performance bonds and appeal bonds. The public, including self-represented parties, will no longer be able to write personal checks for fees and services after January 1, 2014.

ARTICLES & CONTRIBUTIONS

Co-Parenting a Child with Special Needs: Part 2 Incorporating the Need for More Parental Interaction Into the Parenting Plan

By Jennifer Kupiszewski, Esq., **KILE & KUPISZEWSKI LAW FIRM**

Parents of a child with special needs are likely to have more parenting interaction and joint decisions than other parents because they will participate together in team meetings and therapy to meet the child's needs. Most federally funded entitlement programs for children with special needs use a collaborative family/ agency team model to deliver services. Parents are critical team members because they are the child's voice and advocate. The parenting plan is an opportunity to create a foundation for cooperation and full participation of both parents. This is critical for all children with special needs to ensure they receive necessary services and particularly important if a guardian is needed after age the child turns 18.

Most children with special needs receive special education services in school pursuant to the Individuals with Disabilities Education Act ("IDEA"). [1] The child may have an Individualized Education Plan ("IEP") [2] and the parents will attend IEP meetings yearly. At the IEP meeting decisions are made that potentially impact both households. The team will decide which educational services are required to meet the child's needs. This can include placement in special education classes or a different school. The school may discontinue services at those meetings potentially increasing unreimbursed medical expenses.

Parents of a child with special needs must adapt their parenting style to the team service delivery model and it should be incorporated into the parenting plan. The complexity and time consuming nature of these services means that the agency is not likely to make accommodations for parallel co-parenting. Separate fifteen minute parent/ teacher conferences 2-4 times per year won't be encouraged by the school but the request may be accommodated. However, it is unreasonable to ask the school to hold separate IEP meetings due to the time required by school personnel. Parental participation in the meetings and services is critical to maintaining the parent-child relationship and exercising parenting time.

Similarly, the Arizona Early Intervention Program ("AzEIP") and the Division of Developmental Disabilities ("DDD") have Individual Family Service Plan ("IFSP") meetings. At the IFSP meetings the team decides whether the child's therapy will be in the home, at a provider's office or in the community. It is important for each parent to interact with the therapist and, to attend if possible. Parents may be taught exercises to do at home to care for the child and to further the child's development. If the team decides the therapy should be offered at one

[1] Children may also receive services through Section 504, Rehabilitation Act 1973. The team meeting model is similar and will require parental participation and cooperation.
[2] To learn more about the IEP visit: http://idea.ed.gov

parent's home and, as a result, the other parent is prohibited from participating, this may diminish that parent's ability to exercise parenting time.

The co-parenting may never end if the child will need a guardian after age 18. If the parents remain in conflict the "fight" may simply restart in the probate court once the child is legally an adult. If parents cannot cooperate and are combative the result could be that the child becomes a ward of the Public Fiduciary.

The following are ideas to consider incorporating into a parenting plan to build a foundation for the full participation of both parents in raising a special needs child.

- If a child receives disability services the plan should have guidelines for parental participation in meetings services including, their responsibility to participate.
- If a request to modify the parenting plan is based upon allegations related to the child's disability or services the parent must be able to demonstrate prior to filing that they have consulted with the team and have been participating in the services and team meetings.
- Require each parent to request to be on the list of persons notified of meetings and to obtain a copy of the agency service plan. [3]
- Require each parent to contact therapeutic providers to obtain evaluations and therapeutic goals or exercises.
- If in-home services are needed location preference should be given to the parent that will allow the other parent in their home to participate.
- In establishment cases if one parent has been the primary caretaker a plan for parental training should be implemented prior to the finalization of the parenting plan or the parenting plan should have gradually increasing parenting time as training is completed and ability is demonstrated.
- For a child who is over age 12 and will need a Guardian after the age of 18, include in the plan which parent will file for adult guardianship in probate court and that the petition will be filed at least four months before the child's 18th birthday.
- If the parents share joint custody, the plan should state if the parents are willing to be co-guardians and that the current parenting time arrangement should serve as guidance in the adult guardianship.

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[3] These meetings involve multiple people so there is no reason why each parent shouldn't receive notice from the agency organizing the meeting.

GOODWILL HUNTING IN ARIZONA MARITAL DIVORCES

By

Alex Poulos, Tiffany & Bosco, P.A.

Goodwill is an elusive asset that Arizona divorce courts have long struggled to capture.[4] It resides in business entities, including professional practices. It can be enterprise and personal; intangible but marketable or unmarketable; comprised of expected future earnings and earning ability, but divided as community property. Just when you think you've found this chameleon, it changes, because it can be valued in different ways for different people and entities in the same or different cases. Knowing fundamental Arizona community property law is vital to understanding how Arizona courts hunt for goodwill and how you can help find it.

In Arizona, all property acquired during the marriage by either the husband or wife is presumed to be community property.[5] Proving otherwise requires clear and convincing evidence.[6] After service of a petition, community property stays community and any property acquired with community property is community.[7]

Property a spouse owns before marriage or acquires during marriage by gift, devise, or descent, and the increase, rents, issues, and profits from that property are the spouse's

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[4] See *Wisner v. Wisner, 129 Ariz. 333, 337, 631 P.2d 115, 119 (App. 1981) (*declaring, "Admittedly, 'goodwill' value is a term which is elusive of any precise definition, and courts have long struggled to set forth appropriate criteria for its determination."*)*

[5] *A.R.S. §25-211. A.*

[6] See *Cockrill v. Cockrill, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979)*

[7] *A.R.S. §25-211. B.*

separate property.[8] Property acquired after service of a petition if the petition results in a divorce, legal separation or annulment is separate (so long as the property is not acquired in whole or in part with community funds).[9]

Arizona divorce courts must divide community property equitably, though not necessarily in kind, and assign each party his or her respective separate property.[10] "Equitably" means what's fair in each
case, which includes dividing property equally or "substantially equally" unless sound reason requires otherwise.[11]

Now, apply this fundamental law to "realizable" and "unrealizable" goodwill. The former, also called "enterprise" or "business" goodwill, reflects a business entity's value beyond its physical assets.[12] Realizable goodwill can be sold with the business and is valued in numerous, subjective ways, none of which can boast perfect accuracy.[13] The latter, also called "personal" goodwill, exists when a business or profession cannot be sold on the open market.[14]

Professional practices that market the owner's skill and reputation have "unrealizable" goodwill.[15] This goodwill has value to the professional as an ongoing member of his or her profession.[16] Inclusive factors for determining unrealizable goodwill are the practitioner's age, health, past earning power, reputation in the community for

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[8] A.R.S. *§*25-213. A.
[9] A.R.S. *§§* 25-211 A. 2. & 25-213. B.
[10] *A.R.S. §25-318. A.*
[11] See *Toth v. Toth, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997).*
[12] See *Walsh v. Walsh, 230 Ariz. 486, 492, 286 P.3d 1095, 1101 (App. 2012) (citing* Christopher A. Tiso, *Present Positions on Professional Goodwill: More Focus or Simply More Hocus Pocus,* 20 J. Am. Acad. Matrim. Law. 51, 53–54 (2006). (Article defines goodwill and reviews different valuation methods.)
[13] See *Id.*
[14] See *Id.*
[15] See *Id.*
[16] See *Malloy v. Malloy,* 158 Ariz. 64, 66, 761 P.2d 138 (Div. 1. App. 1988) *(Malloy I).*

judgment, skill and knowledge, and comparative professional success.[17] Try putting a dollar value on that.

Then consider that this dollar value is supposed to represent and predict the controlling spouse's enhanced future earning ability resulting from personal goodwill that existed during the marriage.[18] But aren't future earnings separate property? Yes. Find this confusing? Our courts have, too.

In divorce cases from *Wisner* in 1981 to *Walsh* in 2012, Arizona courts struggled in their hunt for goodwill in legal, medical, and accounting professional practices. Our Supreme Court overturned our Division 2 Appellate Court, which ruled that unmarketable (unrealizable) goodwill was not a divisible community asset.[19] Our Division 1 Appellate Court issued two opinions (*Malloy I and Malloy II)* in the same case, twice finding that the trial court misapplied the law on goodwill.[20] Cases before *Walsh* approached goodwill, but didn't quite capture it and left a dusty trail. For example, some believed *Malloy II* held that only "realizable" goodwill was a divisible community asset.[21] *Walsh* distinguished prior cases and strove for clarity by defining realizable and unrealizable goodwill in professional entities, explaining that they both are divisible community assets under Arizona law.

But what about distinguishing future earnings attributable to future labor from enhanced earning ability attributable to goodwill that existed during the marriage? *Walsh* acknowledged the risk that the controlling spouse's separate future earnings may be caught up in a goodwill calculation.[22] But then declared, "In applying [the Wisner factors and

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[17] See *Walsh, 230 Ariz. at 491, 286 P.3d at 1100 (*citing the "Wisner Factors" from *Wisner 129 Ariz. at* 337-8, 631 P.2d at 119-120; see also, *Carriker v. Carriker,* 151 Ariz. 296, 297, 727 P.2d 349, 350 (Div. 2. App. 1986)(noting, the *Wisner* factors are inclusive.)

[18] See *Walsh at 492, 286 P.3d at 1101.*

[19] Compare *Mitchell I,* 152 Ariz. 312, 315, 732 P.2d 203, 206 (Div. 2. App.1985) to *Mitchell II,* 152 Ariz. 317, 320, 732 P.2d 208, 211 (1987).

[20] Compare *Malloy I, 158 Ariz. 64, 761 P.2d 138 (App. 1988) to Malloy v. Malloy (Malloy II), 181 Ariz. 146, 888 P.2d 1333 (App. 1994).*

[21] *See Malloy II, 181 Ariz. at 151, 888 P.2d at 1338.*

[22] Id at 495, 286 P.3d at 1104.

expert testimony], a court must ensure that it does not divide as community property future earnings which are based solely on the professional's post-dissolution work effort."[23]

Is this a demand for perfection? No. *Walsh* was addressing the trial court's decision not to divide personal goodwill, because its valuation required speculation.[24] *Walsh* explained that the "formidable task" of valuing goodwill "should not force any court to shirk its responsibility nor ignore the basic fact that goodwill holds considerable value for the professional."[25]

Walsh didn't explain how to ensure that the division of community goodwill excludes future earnings based solely on future labor. But according to *Cockrill* and *Rueschenberg,* our courts are to select a valuation method that "will achieve substantial justice between the parties" when apportioning community and separate property (including goodwill) that is combined and not easily determined.[26] So, until we mortals achieve mathematical perfection, it appears we must hunt for goodwill in legal ways that achieve substantial justice under the circumstances of each case.

Some basic goodwill hunting rules. Fundamental community property law applies when determining realizable and unrealizable goodwill for any entity.[27] This may seem obvious to Arizonans, but many states don't recognize unrealizable goodwill as a divisible community asset.[28] In Arizona, goodwill has value even if it can't be sold.[29] Any supportable goodwill valuation method may be used so long as it applies to the case facts

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[23] Id at 493 and 495, 286 P.3d at 1102 and 1104. (Emphasis added.)
[24] See *Walsh*, 230 Ariz. at 493, 286 P.3d at 1102.
[25] Id. (quoting *Hollander v. Hollander,* 89 Md.App. 156, 597 A.2d 1012, 1018–19 (1991.)
[26] *Cockrill v. Cockrill, 124 Ariz. 50, 54, 601 P.2d 1338 (1979)(Emphasis added); see Rueschenberg v. Rueschenberg, 219 Ariz. 249, 254, 196 P.3d 852, 857 (App. 2008).*
[27] *See Malloy I,* 158 Ariz. at 66, 761 P.2d at 140; see also *Mitchell II,* 152 Ariz. at 320, 732 P.2d at 211 (comparing goodwill to pension rights: both are community property "in a form in which the enjoyment is deferred.")
[28] See *Walsh, 230 Ariz. at 492, 286 P.3d at 1101 (citing* Christopher A. Tiso, *Present Positions on Professional Goodwill: More Focus or Simply More Hocus Pocus,* 20 J. Am. Acad. Matrim. Law. at 54 (2006)(Article categorizes different state approaches to goodwill.)
[29] See *Walsh* at 491, 286 P.3d at 1100 (citing *Malloy I.*)

and complies with the law.[30] The mandate to equitably divide community goodwill controls the application of corporate and partnership statutes in divorce cases.[31] Entity documents, like stock redemption and deferred compensation agreements, aren't necessarily conclusive, but are one factor to consider in determining goodwill.[32] A non-controlling spouse may show that a controlling spouse's goodwill interest exceeds any value (or non value) set by such agreements.[33]

As for your valuation experts (whether or not jointly retained), make sure they know Arizona law on determining goodwill and can distinguish realizable and unrealizable goodwill in your particular cases. Highlight relevant facts and perhaps address legal arguments that our courts have accepted and rejected. Remember, goodwill is elusive and no experts can pinpoint precise values. They must consider subjective factors in valuing community goodwill – and there lies the risk of capturing separate future earnings. With appropriate attention to detail, your experts can select and implement valuation methods that will guide our courts in achieving substantial justice for both parties.

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He can be reached at (602) 255-6030 or ap@tblaw.com

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[30] See *Walsh* at 490, 286 P.3d at 1099 and at 494, 286 P.3d at 1103, FN 8; see also *Malloy II,* 181 Ariz. at 150, 888 P.2d at 1337 *(citing Mitchell II quoting Wisner.)*
[31] See *Mitchell II,* 152 Ariz. at 321-322, 732 P.2d at 212-213.
[31] See *Walsh, 230 Ariz. at 491, 286 P.3d at 1100 (citing Mitchell II at 321-22,* 732 P.2d at 212-13); see also *Malloy I* 158 Ariz. at 67, 761 P.2d at 141.
[31] See *Walsh* at 49-493, 286 P.3d at 1101-1102; see also *Malloy I* 158 Ariz. at 67-8, 761 P.2d at 141-42.
[32] See *Walsh, 230 Ariz. at 491, 286 P.3d at 1100 (citing Mitchell II at 321-22,* 732 P.2d at 212-13); see also *Malloy I* 158 Ariz. at 67, 761 P.2d at 141.
[33] See *Walsh* at 49-493, 286 P.3d at 1101-1102; see also *Malloy I* 158 Ariz. at 67-8, 761 P.2d at 141-42.

NEW ARIZONA CASES

Abbreviations Used

Please note the following abbreviations commonly used in the analysis of the cases that follow:

C/A	Court of Appeal	H	Husband	P/T	Parenting Time
T/CT	Trial Court	W	Wife	ARS	AZ Revised Statutes
S/C	Supreme Court	S/M	Spousal Maintenance	C/P	Community Property
F	Father	C/S	Child Support	S/P	Separate Property
M	Mother	C/C	Child Custody		

Case reviews are provided by members of the Board of Directors of the Family Law Section.

CASE SUMMARY

Case/Cite	Bennigno v. Ariz. Dep't of Econ. Sec., 233 Ariz. 345, 312 P.3d 861 (App. 2013)

Procedural History

Biological F of SR and LR appeal from a T/C's order to terminate his parental rights on the grounds of mental illness and length of time in court-ordered care. F claims T/C abused its discretion for denying his motion for summary judgment based upon a res judicata claim. Arizona Department of Economic Security or ADES had sought to terminate the biological parents' rights in 2011, however the T/C at that time found ADES had not met its burden of proof to show that termination as to SR and LR was in the children's best interests. ADES continued to provide services to the family and in 2012 filed a new motion to terminate.

Case Summary

SR and LR along with two other children were initially found dependent based upon allegations of neglect and abuse. The family had a history with ADES including that in 2004, a two-year old AR was found at a park by himself. In 2004, a 12-year old PR was

also molested by an uncle (and later impregnated). In 2005, AR at three-years of age was found on a highway, by himself in his underwear. ADES filed a dependency, to which the parents submitted. In 2006, that dependency was dismissed. In 2009, ADES filed another dependency and removed the children for similar allegations of abuse and neglect. In 2010, the parents submitted the issue of dependency and the children were adjudicated dependent.

In 2011, ADES filed a motion to terminate parental rights. T/C found the grounds for terminating (being mental illness as to F and mental deficiency as to M) were met but although ADES had made reasonable efforts to reunify, it failed to show that termination was in the children's best interest given their bond with the parents. Services were continued and in 2012, ADES filed a second motion. This time the T/C found statutory grounds as to both parents and that termination was in the children's best interests because in spite of being bonded to the parents, the children would be adopted by a foster mother and there is no reasonable prospect the children could be returned to the parents' care. F filed a motion for summary judgment arguing that res judicata prohibited ADES from relitigating, which was denied by the T/C.

The A/C found it could reject F's arguments for lack of proper and meaningful argument, but even if properly pled, the T/C did not err. A/C outlined that a denial of MSJ is not reviewable on appeal unless the denial is based on a point of law. F had argued that res judicata bars relitigating the best interest claim if it is "indistinguishable from the last claim that the Court previously ruled on." ADES argued it would introduce new evidence not presented at the first hearing and that material facts precluded granting the MSJ. The T/C in its denial of the MSJ pointed out it was to address what has transpired from the first hearing moving forward.

A/C held that the T/C did not err because new evidence was presented. Establishing the best interest to terminate is only required by a preponderance of the evidence. "To establish best interests, ADES was required to show S.R. and L.R. 'would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship.'" A/C found the T/C carefully weighed the evidence in determining termination was in the best interest of the children. A/C refused to reweigh evidence –which it saw was F's real request – or substitute its judgment for that of the T/C. The A/C also acknowledged that applying res judicata to children's welfare cases should be undertaken with caution. "'[T]o effectively determine the best interests of a child, a court must be free from the imposition fo artificial constraints that serve merely to advance the cause of judicial economy.'" (citing to *State ex. Rel J.J.T.*, 877 P.2d at 164).

NOTE: Fastcase reports this as a memorandum decision, Westlaw does not.

Case/Cite	Christopher K v. Markaa S., 233 Ariz. 297, 311 P.3d 1110 (App. 2013)

Procedural History

Father filed a petition for temporary and permanent modification of custody orders (and to relocate the children to Minnesota) based upon Mother's failure to protect the children from her new husband (Stepfather). Father alleged Stepfather choked and shoved one child against the wall, threw him in the bathtub and forced him to stand under running cold water, forced him to eat his own vomit, forced the other child to sleep overnight in a bathtub, threw water on him, forced him to sleep in a wet bed and intentionally him the child with a shovel handle.

The court denied Father's petition for temporary modification finding that the children were not in serious danger or imminent risk of harm. A custody evaluator was appointed.

The custody evaluator wrote an extensive report and was the principal witness at trial. The evaluator's report referenced her interview with the parties, their children and Stepfather. She noted that CPS had investigated and found the allegations unsubstantiated. Although in her report the evaluator recommended Father be awarded custody, at trial she testified that she no longer knew what she would recommend because Stepfather and Mother were making progress in family counseling. The family counselor also testified and confirmed the progress. Neither Mother nor Stepfather testified.

The trial court denied Father's petition to modify custody and relocate. The judge incorporated by reference the custody evaluator's report with respect to the findings required by A.R.S. § 25-403 and 25-408.

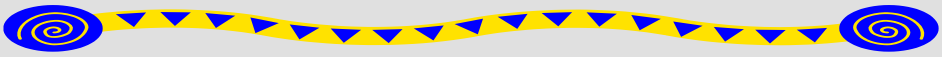
HOLDING AND DISCUSSION

The court of appeals vacated the order denying Father's petition and remanded the case for a new evidentiary hearing. The trial Court was instructed to consider and make express findings on each of the factors prescribed by A.R.S. §25-403(A), 25-403.03(B) and 25-408(H). On remand the court should consider the evidence of Stepfather's conduct and the effect on the children to determine whether the statutory definitions of domestic violence under A.R.S. § 13-3601 have been met.

When physical discipline is at issue in a custody proceeding the court must expressly determine whether the discipline rises to the level of domestic violence. If domestic violence is found to have occurred, then the court shall accord the issue "primary importance" and treat the evidence as contrary to the best interests of the child.

The court itself must weigh the evidence and cannot rely exclusively on the testimony and report of an evaluator for the statutorily required findings. Failure of the court to make its own findings concerning domestic violence constitutes an abuse of discretion. The responsibility of making findings belongs only to the Court. DePasquale v. Superior Court, 181 Ariz. 333, 336 (App. 1995).

Regarding Mother and Stepfather's failure to testify the court of appeals stated that it recognized that the trial court cannot require the parties to present testimony from any particular witness, but noted that it was not possible to make determinations regarding the necessary findings without testimony from witnesses with firsthand knowledge (to determine who was telling the truth and the degree to which the alleged abusive behavior was deleterious to the children). Under these circumstances, a trial court may find that absence of testimony constitutes a failure of proof regarding a specific issue.



Basic Information

Case/Cite	In re Marriage of Dougall, --- P.3d ---- (2013), Arizona Court of Appeals, Division 2. Filed: 12/18/13. Case No. 2 CA-CV 2013-0056

Procedural History

Appeal from Cause No. D20074351 (Pima County). The Honorable Dean Christoffel, Judge Pro Tempore.

Husband appealed the T/CT's post-decree order for the payment of spousal maintenance arrearages to Wife, and the denial of his post-ruling motions.

Case Summary

Facts: The parties were divorced in 2008, and the decree ordered Husband to pay Wife $750.00 per month as spousal maintenance. In 2011, the T/CT entered a judgment against Husband for $4,745, as spousal maintenance arrears, and reduced Husband's spousal maintenance obligation to $500.00 per month. In August 2012, Wife filed a petition to enforce the judgment. After a December 2012 hearing, the T/CT found husband in contempt, and held he could purge the contempt by payment of $200.00 per month toward the arrears judgment. The T/CT also entered an income withholding order, directed at Husband's VA disability benefits.

Issues:

(1) Can a T/CT require a party to pay spousal maintenance arrearages (or support arrearages), directly or indirectly, from VA disability benefits?

(2) Can a T/CT consider those benefits in determining the amount of monthly arrearage payments?

Holding:

(1) No. A veteran's disability benefits are exempt from garnishment or attachment while in the hands of the Administrator. However, once the benefits are received by the veteran, they can be used to satisfy a support order.

(2) Yes. In accordance with ARS § 25-530, the T/CT cannot consider federal disability benefits in determining "whether to award support" or "the amount of a support award." But, the T/CT can consider federal disability benefits in determining what orders to enter for payment on support arrears judgments.

Rationale:

(1) 38 U.S.C. § 5301(a)(1) states: "Payment of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." The Supreme Court, in *Rose v. Rose,* 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987), held 38 U.S.C. § 5301(a)(1) "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid of child support" so, once the benefits are received by a veteran, the state court can require the veteran to use them to satify an order for support. The Court of Appeals determined ARS § 25-530 does not preclude a trial court from considering VA disability benefits in determining the payment of arrears on an award of support; the statute only precludes a trial court from considering the benefits to determine "whether to award support" or "the amount of a support award." The Court of Appeals further determined the VA disability benefits are not subject to garnishment or an income withholding order, but are a source of funds the contemnor can use to make support payments or purge arrearage judgments.

ARIZONA: SELECTED MEMORANDUM DECISIONS

While Memorandum Decisions are printed by the Arizona Judicial Branch with limitations on their use (see below), these decisions often contain informative discussion and review of published opinions and selected topics of interest to family law attorneys. The unpublished opinions discussed should be used for educational purposes only, and should not be cited or relied upon except as permitted under the Rules of Court.

SUPREME COURT WARNING:

CAUTION: Memorandum Decisions issued by Division One of the Arizona Court of Appeals are governed by rules of the Arizona Supreme Court that provide: "Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited." ARCAP 28(c); Ariz. R. Crim. P. 31.24; Ariz. R. Supreme Court 111(c).

Case/Cite	Noel and Noel, 2013 WL 6207013 (Ariz.App. Div. 2)

Procedural History

In 2002, the parties submitted and the court adopted a decree of dissolution. The trial court found the parties had entered into a Property Settlement Agreement and a Partial Marital Settlement Agreement, and that the terms were "fair and equitable." The court further ordered the parties to comply with the agreements, which were attached to the decree and incorporated by reference. The Partial Marital Settlement Agreement provided that Husband would pay $6,000 per month in spousal maintenance through August 2011; however, the Property Settlement Agreement provided that the parties "forever waive[d] any claim for spousal maintenance." In 2004, the court accepted a stipulated amendment to the agreements, which removed the provision waiving the parties' claims to spousal maintenance and replaced it with a provision matching the Partial Marital Settlement Agreement. In 2008, the court accepted a new stipulated amendment which changed Husband's spousal maintenance obligation again.

Husband fell behind on his payments. Husband requested his obligation be terminated. The Court denied Husband's request and he appealed.

Case Summary

Husband argued that the trial court erred by accepting the parties' stipulated spousal maintenance awards because Wife did not meet the requirements of § 25–319(A), the court "had no jurisdiction" to award spousal maintenance when there had been no award in the original decree, that Wife had "waived forever" her right to spousal maintenance, and that the award was "a disguised property settlement."

The Court of Appeals found that Husband was barred by the doctrine of claim preclusion from raising those arguments on appeal. Although claim preclusion does not prevent a party from petitioning for a modification of spousal maintenance based on changed circumstances since the dissolution, it does prevent him or her from obtaining a modification based on facts which could have been raised at the dissolution hearing. Husband was precluded from raising any claim that might have been determined in the dissolution proceedings, including upon

direct appeal from the amended decrees

As to Husband's claim that the trial Court lacked jurisdiction, the Court of Appeals noted that although a judgment is void if it is rendered by a court lacking jurisdiction, the trial court in this case had jurisdiction over the parties and the dissolution proceedings. The judgment was therefore not void, even if it may have been erroneous. Res Judicata consequences are not affected by the fact that a judgment may have been erroneous.

(Void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or over the parties. Erroneous judgments are those which have been issued by a court with jurisdiction but which was subject to reversal on timely direct appeal. *Cockerham v. Zikratch,* 127 Ariz. 230, 235, 619 P.2d 739, 744 (1980)).