MCBA

MARICOPA COUNTY BAR ASSOCIATION

Where the Legal Community Connects

FAMILY LAW SECTION NEWSLETTER

April, 2013

Featured in this edition: *"Tips" and "Hints" from Judge Polk and Judge LeClaire respectively, regarding what to do and what not to do in court.*

The MCBA is proud to announce the return of the family section newsletter. The newsletter will be generated quarterly.
If you would like to submit any articles, contributions, practice tips or news that you believe would be helpful to other family law practitioners please contact Laurie Williams at lwilliams@maricopabar.org, by June 5.

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Family Law Section contact information

For membership information or information about this newsletter, a Family Law meeting or program from the Maricopa County Bar Association, please contact: Laurie Williams: lwilliams@maricopabar.org, (602) 257-4200

Published by the Board of Directors of the Family Law Section of the Maricopa County Bar Association. Editors: Kellie Wells, Annette Cox and Sylvina Cotto. Contributors this quarter: Jared Sandler, Judge Polk and Judge LeClaire.

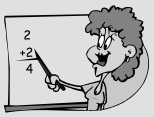
ANNOUNCEMENTS

Judicial rotations this year will occur as usual during the Judicial Conference (scheduled for June 26 through the 28). New calendar assignments will start on Monday, July 1, 2013. The judges rotating this year are listed below.

Judge Rotating	Dept.	Region	Assuming Calendar Currently Assigned To Judge	Dept.	Region
McVey, Michael (New Judge)*	CV	NE	LeClaire, Thomas	FC	DT
LeClaire, Thomas*	FC	DT	McVey, Michael (New Judge)	CV	NE
Ballinger, Ed (New Judge)*	JV	SE	Palmer, David	FC	DT
Palmer, David*	FC	DT	Ballinger, Ed (New Judge)	JV	SE
Barton, Janet	FC	DT	Hyatt, Carey	FC	DT
Bassett, Edward	CR	DT	Klein, Andrew	PB/CV	DT
Brodman, Roger	CR	DT	Kiley, Dan	FC	DT
Foster, George	CV	DT	Barton, Janet	FC	DT
Gerlach, Doug	FC	NE	Foster, George	CV	DT
Hyatt, Carey	FC	DT	Gerlach, Doug	FC	NE
Kiley, Dan	FC	DT	Bassett, Edward	CR	DT
Klein, Andrew	PB/CV	DT	Mroz, Rosa	PB	DT
Martin, Dan	CR	DT	Udall, David	JV	SE
Mroz, Rosa	PB	DT	Brodman, Roger	CR	DT
Pineda, Susanna	CR	DT	Steinle, Roland	JV	DUR
Ronan, Emmett	CV	SE	Sanders, Teresa	FC	SE
Sanders, Teresa	FC	SE	Pineda, Susanna	CR	DT
Steinle, Roland	JV	DUR	Martin, Dan	CR	DT
Udall, David	JV	SE	Ronan, Emmett	CV	SE

* Possible early move upon start of new judge

PRESENTATIONS & CLE



As Family Court Judges See It: Top Mistakes Attorneys Make in Litigating Divorce

May 3, 2013 from 9:00 AM - 4:30 PM

A panel of Family Court judges will present and address issues including such topics as local procedures and culture; temporary orders; custody and time-sharing factors; spousal maintenance; handling assets and debts; and best practices for presentation of the case and communication. These judicial practices are not found in the rule books, but will provide insight directly from the decision-makers. The scheduled presenters include: Hon. James Blomo; Hon. Susan Brnovich; Hon. Christopher Coury; Hon. Janice Crawford; Hon. Pamela Gates; Hon. Thomas LeClaire; Hon. Sam Myers; Hon. Jay Polk; and Hon. Teresa Sanders.

Location: Phoenix Airport Marriott, 1101 North 44th Street, Phoenix, AZ 85008

This six credit CLE is sponsored by the National Business Institute. For more information or to register contact www.nbi-sems.com.

MCBA Annual Ethics Update on Ethics with Gary Stuart

Wednesday, May 29, 12:00-1:30 p.m.

Location: 303 East Palm Lane, Phoenix, AZ 85004 United States

1.5 hours professional responsibility CLE

Free lunch!

EVENTS

Speed Network with the New Family Law Judges!

Thursday, April 25, 2013, 5:30-7:30 p.m.
MCBA, 303 E. Palm Lane, Phoenix

Drinks and light refreshments served

Using the speed networking model, judges will be seated in various parts of the room and you'll have the opportunity to move from judge to judge throughout the evening.
It's a fun and casual way for the bench and bar to exchange information and engage in conversation outside the courtroom.

Joining us will be judges:

Carey Hyatt George Foster
Glenn Davis Jay Polk
Janice Crawford Danielle Viola
And more...

Make your reservation by **Monday, April 22** by contacting:
Bree Boehlke at bboehlke@maricopabar.org or (602) 682-8588.

Family Court Bench & Bar Meeting

Friday, May 10, 2013, 12:15 pm to 1:15 pm

Location: Northeast Regional Courthouse, Courtroom #110
18380 N. 40th Street, Phoenix, AZ. 85032

video conferencing will be available from all courthouses

MARICOPA COUNTY BAR ASSOCIATION

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FAMILY COURT NEWS

News from the Clerk ("The Brief")

The following articles are provided by Michael K. Jeanes, Clerk of the Maricopa County Superior Court. For additional information, contact: Chief Deputy Clerk, Chris Kelly: **602-506-2309**

Fee Increase Reminder

The Arizona Judicial Council approved a fee increase of approximately five percent for most filings and services, effective March 18, 2013. Base filing fees and charges are set by Arizona Revised Statute 12-284. The statute allows the Judicial Branch to increase fees, limited by the average consumer price index. The Board of Supervisors in each county has authority to assess additional fees based on the cost and type of services provided or required in each county. The Clerk's Office has posted the fees for filings and services in the Superior Court in Maricopa County online at http://www.clerkofcourt.maricopa.gov/fees.asp.

DEFAULT DECREE

A video is now available on line regarding how to Get a Default Decree in Maricopa County Superior Court:

http://www.youtube.com/user/SuperiorCourtAZ?feature=watch

Cradle to Crayons

The new Maricopa County Child Welfare Center located at 3445 W. Durango St. in Phoenix is now open. The Center is located in a former juvenile drug-treatment facility and is part of the new Maricopa County Cradle to Crayons program. The purpose of the program is expedite permanency for infants and young children up to the age of 3, who are going through the juvenile dependency process. The child welfare center serves as a central location for providing services such as supervised visitation, counseling, and substance abuse treatment. The C2C program also includes assignment of select Judicial Divisions –both at Durango and Southeast - to handle cases involving this particularly vulnerable population.

For more information contact:

Superior Court of Arizona in Maricopa County
Juvenile Court
Cradle to Crayons Child Welfare Center
3445 W. Durango St.
Phoenix, AZ 85009

Tips from the Bench[1]

by

Jay M. Polk
Judge, Superior Court of Arizona for Maricopa County

1. Provide the assigned judicial officer with a ***conformed*** copy of a filed document; otherwise, the assigned judicial officer and staff won't be able to tell whether the document actually has been filed with the Clerk of Court as required by Rules 43(D)(1) and 43(E), Arizona Rules of Family Law Procedure ("Family Rule").

[1] The views expressed herein are solely the views of the author and in no way are to be construed as the views of the Superior Court of Arizona for Maricopa County or any other judicial officer. As with most things in life, your mileage may vary, depending upon the judicial officer before whom you appear.

2. Interoffice mail is slow; have your runner deliver the document directly to regional courthouse to which the case is assigned, especially if time is of the essence.

3. Don't combine multiple issues in a single motion unless the issues are directly related to one another.

4. Don't file a motion to dismiss (or other dispositive motion) less than five weeks before trial and expect it to be ruled upon before the trial. *See* Ariz. R. Fam. L. P. 35(A) (setting forth time periods for the filing of responses and replies to motions).

5. When filing a motion to withdraw as counsel, comply with Family Rule 9(A)(2) or 9(B)(2) or Rule 6.2(C), Local Rules of Practice for the Superior Court of Arizona for Maricopa County. If you file a motion to withdraw that does not bear your client's written consent, the motion will be lodged for a response just like any other motion. In contrast, if the motion bears your client's written consent, it can be ruled upon *ex parte*, without waiting for any response to be filed.

6. Do your best to work out discovery disputes with opposing counsel; seek relief from the court only as a last resort—but don't wait too long (i.e., don't ask for relief the day before trial).

7. Use requests to seal files/documents sparingly. If a document or file is sealed, it is inaccessible electronically to everyone, including the assigned judicial officer.

8. A lawyer's or client's lack of planning is not an emergency.

9. When asking for expedited/accelerated relief, send the opposing attorney/party a copy of the document by hand-delivery, e-mail, or fax and clearly indicate you have done so on the mailing certificate.

10. When a particular exhibit consists of numerous pages but only one or two of them are relevant or critical to your case, offer just those one or two pages rather than all the pages.

11. Find out whether the judicial officer before whom you are appearing likes bench copies of exhibits. (I prefer to have a bench copy of the exhibits so I can follow allow and highlight/annotate the bench copies during the trial. However, other judges will not accept bench copies of exhibits.)

12. Make sure the numbers on the bench copy of the exhibits match the actual exhibit numbers. When the bench copy of the exhibit has a different number

than the actual exhibit, it takes me longer to find the exhibit, which can slow down the trial.

13. Meet with opposing counsel prior to marking exhibits to:

    - Ensure consistent numbering,
    - Avoid duplicate exhibits, and
    - Reduce unnecessary documents/pages.

14. Provide testimony regarding exhibits so the judge has some context as to why you are offering the exhibit (this applies even when opposing counsel has stipulated to the admission of the exhibit).

15. If an exhibit has more than a few pages, be sure the pages are individually (and sequentially) numbered so the judge can easily find the relevant page.

16. When submitting a stipulation, both counsel should sign not only the stipulation but also the proposed form of order (otherwise, the judge will have to take time to make sure the order is consistent with the stipulation by comparing the two documents).

17. When submitting a stipulated order or consent decree in a case with an active trial setting (or any other court events), have the order specifically vacate the trial (or any other pending court events). Also, the stipulated order should clearly recite what pleadings have been resolved as a result of the stipulated order (e.g., only the motion for temporary order or the underlying petition).

18. Treat the pretrial statement as your opening statement. Thus, for example, when legal decision-making or parenting time is a disputed issue, address all 25-403 factors (including 25-403.01, -403.03, -403.04) factors in the pretrial statement. Similarly, if relocation is an issue, address the 25-408 factors in the pretrial statement. If spousal maintenance is an issue, address the 25-319 issues in the pretrial statement. If third party legal decision-making or visitation is an issue, address the 25-409 factors in the pretrial statement. If child support is an issue, explain what figures you believe the court should use and why (and include a sample child support worksheet); don't just say child support should be awarded consistent with the guidelines.

19. Talk to opposing counsel <u>before</u> the status conference, resolution management conference, hearing, etc., about possible stipulations (both procedural and substantive); don't wait until your case is called to try to negotiate agreements.

20. When the other party is self-represented, be aware of legalese and avoid doing things (including using a tone) that will cause the other party to become defensive. In the long run, such tactics will end up being counter-productive and make it harder for you to settle the case.

21. If your case is set for a settlement conference, be sure to timely submit a settlement conference memorandum unless the judge pro tem specifically tells you not to submit it.

22. My courtroom has uses an audio and video recording system (FTR) to make the record. The FTR system typically does not pick up voices when counsel stand at counsel tables or are in the well of the courtroom. Consequently, to ensure a good record, I prefer to have counsel either remain seated at counsel table or use the podium. Avoid questioning the witness while you are walking in the well (e.g., obtaining exhibits from the clerk, etc.).

23. When presenting your case, let the judge know what topic you're about to address next with the witness so the judge has the opportunity to orient himself/herself (e.g., "Now, Mrs. Doe, let's address your request for spousal maintenance . . . .").

24. During trial, manage your time wisely: Be sure to save time to cross-examine the opposing party, but also be sure to save time to examine your own client too.

25. Be courteous to court staff.

Helpful Hints

by

Thomas L. LeClaire

Judge, Superior Court of Arizona for Maricopa County

Time (Mis?)Management

"Those who make the worst of their time most complain about its shortness." – La Bruyere

Of all of the legal disciplines practiced in the Superior Court, it seems Family Court is the most time constrictive. Most basic custody (legal decision-making), parenting time, and child support cases are tried in one to three hour increments. By

comparison, civil litigation may devote a corresponding one to three *weeks* to a similar amount of litigation. The whys and wherefores for that result occurred long before I assumed the bench; suffice it to say it is now all of our realities.

Whatever the reason for the short presentations, successful management of the limited time is a continuing problem for new and experienced attorneys alike. A week does not pass when I do not see a capable attorney merely watch critical testimony go unchallenged because mismanagement of time has eliminated any time for cross-examination. (And isn't that what you live for? Making all the points you want while forcing someone to agree with you. Try that on your significant other!) No practitioner enjoys looking at the smirk of opposing counsel who is piling in unchallenged evidence because poor time management has forced counsel to sit idly by instead of engaging in cross-examination. And, yes, we judges know that your speaking objections under those circumstances is an attempt to circumvent that limitation.

So, here's a few observations:

- Limit the "bad guy/gal" testimony to just a few minutes – most of it is not outcome determinative. Let your client get in some venting if they cannot be deterred from doing so, but get to the real issues quickly and efficiently. Here's a helpful hint: if the judge has stopped writing (or appears contemplative to the point of snoring), it's probably time to move on;
- With all due apologies to James Fennimore Cooper and "horse shedding a witness," it is okay to go over testimony with the witnesses. You have to have a general dress rehearsal just to know if you can get all of the material covered in the amount of time allocated. And <u>then</u> there's the substance. Don't let the real court day be the first dress rehearsal. It is very clear when the witness is hearing the questions for the first time. In the end, it's not efficient;
- Get stipulations to admit evidence long before the day of trial. If not, add that time to your presentation time allotment. In this vein, also consider what is really needed. Seldom do the 50 plus exhibits submitted pretrial make it into the trial;
- Look at the elements (factors) of the issue (25-403A and 25-408, etc.) and determine the evidence for each factor. Make sure that you spend enough time on each one – they tend not to be weighted – but not so much on any one that most are left uncovered;
- Don't expect the court to grant you three more hours of trial time two hours into the hearing. That's not a plan; that's a Hail Mary pass. Unless your name is Flutie, it seldom works;

- Save time for cross-examination. It is a brutal day if you do not (did the court clock actually stop!?!). Set a watch timer with __ minutes as your cross-examination time. Don't override your alarm;
- Think about sometimes calling the opposing party first in your case-in-chief. It gets out most of the same information, makes the other side take the brunt of the initial surge of questions, and you can cross-examine them (ARE 611(C)) – something you try to do on direct anyway all while your opponent is objecting and the court is sustaining. Lead on, Macduff!;
- If there are going to be issues before the trial, don't wait for the trial date to discuss them. This approach typically eats up 30 minutes or more of precious testimony time. Try getting a shorter pretrial hearing to address these issues or file motions in limine;
- Don't raise a discovery issue for the first time on the trial date. The rules are clear how those should be addressed. Engage the judge much earlier in the process if *true* discovery issues arise; and,
- Remember the three Bs of litigation: Be precise. Be brief. Be seated!

If you have a law practice tip you would be willing to share, please send it to the Family Law Section newsletter, c/o Laurie Williams (MCBA Representative) at: lwilliams@maricopabar.org

When submitting a law practice tip, please let us know if you would like your name included or not.

ARTICLES & CONTRIBUTIONS

If you have an article or contribution you would like published in this newsletter, please send it to the Family Law Section newsletter, c/o Laurie Williams (MCBA Representative) at: lwilliams@maricopabar.org

When "I don't" turns back into "I do": How to help a client when their irretrievably broken marriage become retrievable

By Jared Sandler

It is not uncommon for family law attorneys to receive calls from former clients who are divorced inquiring if the attorney can "undo" their divorce as the parties have reconciled. While the couple is free to once again marry, the idea of quashing the divorce and creating the legal fiction that the divorce never occurred is an enticing and cathartic prospect to a client who has reconciled with their former spouse. The notion that the divorce never occurred and that the family is whole, not just pieced back together afterward, can help heal the wounds created by the dissolution process and provide solace to a client, especially whose religious convictions oppose divorce.

Any attorney faced with these types of clients need only to look back thirty one years to a Arizona Division 2 Court of Appeals case of first impression regarding whether the court in a marriage dissolution proceeding has jurisdiction to vacate a decree of dissolution upon joint application of the parties. In Matter *of Brother's Estate*, 134 Ariz. 536, 538, 658 P.2d 189, 191 (Ct. App. 1982) a couple was married and a year later divorced. Within eight months of their divorce the parties jointly petitioned for an order vacating the decree of dissolution which was granted by the Court. Wife

passed away a few years later and Wife's brother, on behalf of Wife's estate, objected to Husband's appointment as personal representative by order of the probate Court. Wife's brother claimed that the order vacating the decree of dissolution was void for lack of jurisdiction. The Court of Appeals found, in part:

> "We believe Arizona law to be most consistent with the view that the court has jurisdiction to vacate a decree of dissolution jointly addressed by the parties to the discretion of the court. The law of this state has repeatedly recognized jurisdiction to amend or vacate even those portions of a decree not dealing with support or property division. *See Blair v. Blair, supra;* *Srock v. Srock*, 11 Ariz.App. 483, 466 P.2d 34 (1970). We note in particular that a court vacating a default decree (and whose power to do so has not seriously been questioned) is actually exercising jurisdiction identical to that which the appellant denies. "
>
> In its analysis, the Court further determines:
>
> "A.R.S. § 25–325 clearly indicates that the finding that the marriage is irretrievably broken may be reviewed on appeal. By implication, therefore, the appellate court must have the power, upon discovering clear error in that finding, to vacate the decree. It is difficult to imagine why the trial court should not possess the same power when a reconciliation of the parties has demonstrated that the finding essential to the decree—that the marriage was irretrievably broken—was erroneous."

Many of the rulings from other jurisdictions which the Court of Appeals reviewed to determine this issue relied upon the sacrosanct nature of marriage to overlook such procedural and logistical roadblocks that even include the passage of 13 years since the divorce. Their analysis placed a high value on the sanctity of marriage. So high in fact, that it outweighed the logistics related to the voiding of a divorce decree and the implications that can stem from voiding all of the orders associated with the decree.

The ruling does require that neither party has been married during the interim. There is the potential for abuse if a former spouse were so displeased with the result of the decree that they fraudulently reconciled to void the decree only to file another petition at a later date. A litigant's nefarious attempt to get a "redo" on the divorce decree is in sharp contrast with the Court's holding that values family and the sanctity of marriage as an ideal. While there is potential for abuse, the Court's holding in *Brother* can provide reconciled couples the opportunity to once again become whole.

Jared is an associate at BELLAH & ASSOCIATES PLLC in Glendale, Arizona and can be reached at (602) 252-9937 or jsandler@bellahfirm.com

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.

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	**Foster v. Foster**, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 1/24/2013. Case no: 1-CA-CV 11-0717

Procedural History

Appeal from Cause No: FC2009-004355, heard by the Honorable Christopher Whitten, Judge

Father appealed the T/CT's order denying Father's petition to modify child custody/relocation, or in the alternative, modify parenting time.

Case Summary

Facts: Mother and Father divorced in Florida in 2008 and had two minor children. Mother was designated the primary residential parent and the parties shared responsibility for making all major decisions affecting the welfare of the children. Shortly after the parties' divorce, Mother moved to Arizona with the minor children. Father moved to Colorado shortly before the divorce was finalized.

In 2010, Father petitioned the T/CT to be named the primary residential parent in order to relocate the minor children to Colorado. Mother filed a counter-petition seeking sole custody of the minor children. The T/CT denied both petitions based on the parties' failure to show a substantial and continuing change of circumstances.

Reviewing the C/CT's decision for an abuse of discretion, the C/A affirmed the decision based on the following:

Father claimed a substantial and continuing change in circumstances based on his son's school grades and behavior had suffered, that Father's employment had changed and Mother enrolled in school, and that the environment in Mother's home had changed because Mother had developed a strong drinking problem.

Based on the son's poor behavior and struggling in school, the C/A found that the T/CT did not abuse its discretion because Mother had taken an active role in attempting to improve the son's behavior. Additionally, Father and the son were able to Skype for 30 minutes each day to work on homework.

For the environment change in Mother's home, the C/A found that the T/CT did not abuse its discretion because there was no evidence to show that Mother actually had a drinking problem. Mother had voluntarily undergone drug testing and had repeatedly come back negative. Moreover, investigative "trash runs" were done by the best interest attorney for the son on Mother and never turned up any evidence to show Mother had been binge drinking.

For Father's change in work and Mother enrolling in school, the C/A found that the T/CT did not abuse its discretion in finding that these were not substantial and continuing changes because the parties planned on these changes during their dissolution trial in 2008. Father had already switched his employment, and the Florida T/CT allowed Mother to relocate to Arizona with the minor children and conditioned her spousal support based on her full time enrollment in school.

The C/A also held that the T/CT did not have to reach the question of whether modification was in the best interest of the minor children because the T/CT properly found that there was no substantial and continuing change in circumstances. Moreover, the C/A held that the T/CT did not have to consider the factors in ARS § 25-408 (relocation) because the statute does not apply where one parent is not living in Arizona.

Case/Cite	**Olivares v. Teran**, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 1/17/2013. Case no: 1-CA-CV 11-0270

Procedural History

Appeal from Cause No: FC2009-010984, heard by the Honorable Harriet E. Chavez, Judge

Husband appealed the T/CT's order dissolving the marriage and determining that Husband had wasted community assets. In the Decree, the T/CT found that Husband had wasted $38,500 in community assets and offset the waste by awarding Wife all of her retirement accounts, which the court valued at $60,102. The T/CT also awarded Wife $6,000 in attorney's fees as a result of Husband's unreasonable failure to provide financial discovery.

Case Summary

Regarding Wife's retirement accounts, Husband argued that the T/CT inequitably offset Husband's community waste by awarding Wife the full value of her accounts and the Wife misled the Court by failing to provide a full disclosure regarding these accounts.

At trial, Husband offered two exhibits presenting information regarding the value of these accounts. After entry of the decree, Husband subpoenad additional records and found Wife's retirement to be worth nearly $80,000.00, as opposed to the $60,000.00 value that was adopted by the T/CT.

The C/A found that Husband's argument came too late. The C/A based this finding on the fact that both Husband and Wife included the retirement account issue in their pretrial statements and knew that it would be an issue at trial. Rather than subpoenaing records before trial, however, Husband waited until after the entry of the Decree. Also, the T/CT based their value of the retirement accounts based on Husband's exhibits. Husband did not object to the exhibits at trial. Regarding the T/CT's finding of waste by Husband, Husband argued that the T/CT abused its discretion in finding waste because Wife did not specifically raise the issue in her pretrial statement. Husband also argued that the T/CT had insufficient evidence to support a finding of waste.

At trial, Wife presented testimony and evidence that Husband had sold a community vehicle worth $26,000 for only $7500. Wife also presented evidence that Husband withdrew nearly $23,000 over a ten-day period. Husband claimed that he sold the vehicle because he was in desperate need of cash to pay family expenses. He also could not account for how he spent the $23,000. For these reasons, the T/CT found that Husband had committed waste.

Based on Husband's argument that the T/CT abused its discretion by considering waste when Wife had not argued it in her pretrial statement, the C/A, found that the family court is specifically authorized to consider excessive or abnormal expenditures and the concealment or fraudulent disposition of community property, even where not included in a pretrial statement. Additionally, the C/A found that the T/CT was within its discretion to weigh evidence against Husband and find that there was waste based on evidence presented.

Regarding Attorney's fees, Husband argued that Wife's award of $6,000 was an abuse of discretion because the parties' incomes were relatively equal. The C/A held that this award was not an abuse of discretion as a result of Husband's failure to provide financial discovery when Wife sought an order to compel and Husband ignored the order.

Case/Cite	**Sharp v. Fausett**, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 1/03/2013. Case no: 1-CA-CV 12-0219

Procedural History

Appeal from Cause No: DR1999-097119 heard by the Honorable Benjamin R. Norris, Judge

Husband appealed the T/CT's order terminating Wife's spousal maintenance obligation.

Case Summary

Facts: Wife was ordered to pay Husband spousal maintenance of $700 per month until he remarried. He had a long-time girlfriend. Spousal maintenance was awarded based on parties' gross incomes at the time of trial. After the trial, Wife invested in real estate hoping to increase her income. The market crashed. Her income increased but her expenses significantly increased as a result of her post-dissolution investments. Husband argued that her decision to make a bad investment post-dissolution is not a change in circumstances. Husband also argued that Wife could have let the rental houses "go", thereby reducing her expenses.

Reviewing the C/CT's decision for an abuse of discretion, the C/A affirmed the decision based on the following:

Wife presented evidence that her expenses had increased post-dissolution and that she did not increase the expenses solely for the purpose of avoiding spousal maintenance.

Husband's argument regarding the potential foreclosure was rejected by Husband failed to show that it would have made economic sense to let them "go" given the amounts Wife had already invested.

Case/Cite	**Elliott v. Guerrero**, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 1/22/2013. Case no: 1-CA-CV 11-0820.

Procedural History

Appeal from Cause No: FC2010-001471, heard by the Honorable Thomas L. LeClaire, Judge

Wife appealed the T/CT's Decree granting the parties joint legal custody and entering a child support award based on a prospective parenting time order.

Case Summary

Facts: The parties agreed to a temporary parenting time order which required Father's parenting time to be supervised. Mother started to withhold the children, in violation of the temporary order, alleging that the parenting time was not being adequately supervised. The Court appointed a Therapeutic Interventionist for Father and the oldest child and granted Father's request to modify his time with the younger children. The court lifted the supervision requirement based on its concern that Mother withholds the children from Father. The court granted the parties joint custody.

Reviewing the T/CT's decision for an abuse of discretion, the C/A remanded the custody and parenting time orders and affirmed the remaining orders:

As to custody and parenting time, the court based its decision, in part, on Mother's bipolar disorder. Though the Decree references other's admission that she has the disorder and had previously taken medication for the disorder, nothing in the record suggested that Mother had ever been diagnosed with the disorder. Because it could not be determine whether the court would have entered the same custody and parenting time orders, absent this finding, the custody and parenting time orders were remanded for reconsideration without reliance on this mental health condition which was unsupported by the record.

Though Mother argued that the Court delegated its authority to make parenting time orders to the Therapeutic Interventionist, the C/A found that the T/CT made detailed findings regarding the children's best interests and the relevant custody and parenting time factors.

As to child support, Mother argued that the T/CT erred in applying a parenting time adjustment based on a prospective parenting schedule which would take affect after Therapeutic Intervention successfully restored Father's parenting time with all children. The C/A found that Mother made a colorable claim that likely made sense but nonetheless affirmed the order because it was not clear that the T/CT abused its discretion.

Mother argued that joint custody was inappropriate due to the significant history of domestic violence. Since credibility plays a big role in custody decisions, the C/A deferred to the T/CT's determination that the domestic violence was not significant.

Basic Information

Case/Cite	**Gersten v. Gersten**, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 1/24/2013. Case no: 1-CA-CV 11-0714

Procedural History

T/CT entered a decree, Father appealed and the C/A issued an opinion and memorandum decision and remanded the case back to T/CT.

After the second trial, Father appealed and Mother cross-appealed various T/CT rulings made after the case was remanded.

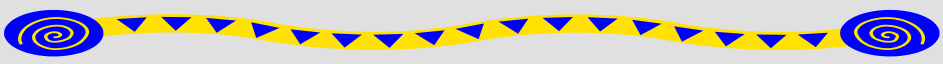
Case Summary

1. **Mother's annuity**. Mother's employer offered her and she accepted an annuity, if she would agree to resign. Father argued the annuity was community property because Mother received the annuity only because she had worked for her employer a number of years and also because Mother signed the agreement to receive the annuity prior to service of the petition for dissolution. The C/A agreed with Father. If the employer intended to compensate the employee for past or current service then the benefit is a community asset. In this case the form Mother signed to receive the annuity stated it was a severance payment an not a fringe benefit or condition and term of employment. The severance was payment to induce Mother to retire early. This benefit is similar to the Early Leaving Incentive Program discussed in another (Nebraska) case that was found to be a marital asset. Also, Mother signed the agreement and resigned, before Father served her with the petition.

2. **Request for findings of fact.** Although Father made a request for findings of fact almost one year before the second trial, he did not mention it in his pre-trial memorandum and the request was therefore not timely.

3. **Child Support pursuant to A.R.S. 25-320.** The record supported a finding that Father and son had failed to meet their burden with "persuasive, competent evidence" to show son was severely disabled before turning 18. Father presented a letter from a doctor that first saw son when he was 21, stating son's disability began when the boy was 16. But the letter did not state that son was "severely disabled" before reaching 18, such that he was unable to live independently and be self-supporting. Another letter from a different doctor (from when son was 17) said son's condition was in remission. Son attended college, lived away from home and had not applied for social security, medicare. Son was driving and helped Father prepare pleadings.

4. **Father's insurance policies.** Father argued his life insurance policy was not C/P although it was purchased during the marriage because he had put a down payment on the policy with S/P. Father acknowledged the monthly premiums had been paid with C/P. Mother argued Father failed to rebut the presumption that all property acquired during the marriage is C/P. C/A remanded this issue back to T/CT to apportion the value of the S/P and the value of the C/P by applying "the most equitable method to achieve substantial justice" between the parties.



This is our first stab at producing this newsletter. If you have any comments or suggestions, good or bad, please contact Kellie, Annette, Tom or Sylvina. Our contact information is on page 5.