MCBA

MARICOPA COUNTY BAR ASSOCIATION

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FAMILY LAW SECTION NEWSLETTER

July, 2013

Featured in this edition:
"Tips from the Bench" by Judge Viola and Judge Coury and "Limited Family Assessments" by Dr. Faren Akins

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 August 2nd

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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. Special contributors this quarter: Haley Schmidt and Tabitha Jecmen.

ANNOUNCEMENTS

- Judge Coury and Judge Crawford are swapping calendars effective July 1, 2013.
- Judge Joseph Mikitish (new appointment) is assuming Judge David Palmer's calendar.
- Judge Ryan Adleman (new appointment) is assuming Judge LeClaire's calendar.
- Judge Glenn Davis retired.
- Please see last newsletter for other rotations.

Changes to the current relocation bill on hold

According to Senator Nancy Barto, SB1072, otherwise known as the "parenting time-relocation of child" bill, was not passed. However, Senator Barto is not discouraged; she believes that supporters of the bill will have a much better outcome in 2014 when they reintroduce the bill as it was amended this session.

Sylvina Cotto

PRESENTATIONS & CLE

June 17—High Asset Divorce Cases Involving Doctors-teleconference (NBI)

June 18—Business Valuation in Divorce (NBI)

June 19—Military Divorce -video webcast (NBI)

July 17-20 - CLE by The Sea - Family Law Track - State Bar of AZ- Coronado Island, CA

July 23—Handling Divorce from Start to Finish-video webcast (NBI)

July 25—Advanced Family Law -video (NBI)

August 6—Bankruptcy in Divorce teleconference (NBI)

How to work with Child Protective Services- an Overview for Family Law Practitioners

What to do if a CPS case worker shows up at your client's house. How to get CPS records and more!

September 12, 2013

8:30 am- 5:00 pm at the Maricopa County Bar.

Click here for more information or to register

MARICOPA COUNTY BAR ASSOCIATION

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FAMILY COURT NEWS

Presiding Judge: Farewell Judge Hyatt, Welcome Judge Barton

By: Tabitha A. Jecmen, Hallier & Lawrence, PLC

On July 1, as part of the judicial rotation, Judge Carey Hyatt will be stepping down from her position as Presiding Judge of the Family Law Division for Maricopa County. During her term as Presiding Judge, Judge Hyatt has been instrumental in facilitating the relationship between the Bench and the Bar, and will likely be remembered as one of the most approachable Presiding Judges by both the Bench and the Bar.

Judge Hyatt dedicated her term to improving the relationship between the Bench and the Bar and assisting with conflict resolution. Judge Hyatt has also been instrumental in increasing the accessibility of the judiciary. For instance, Judge Hyatt promoted the Judicial biographies which are now posted on the Maricopa County Superior Court web site. The biographies not only give the Judge's background, but also provide attorneys and *pro per* litigants information regarding how each judge conducts his/her courtroom, and their preferences for pleadings, testimony, conferences, and disputes. Judge Hyatt has also encouraged the Judges to attend and participate in various CLE's. This has not only increased the Judge's knowledge in the area of family law, but also allowed the judges to be more accessible to the Bar. Judge Hyatt also participates in legislative meetings as the family court's representative, and keeps the bench and bar informed of evolving litigation. We are grateful for Judge Hyatt's dedication to her role as Presiding Judge. She will be missed. Fortunately, she is not going too far! Judge Hyatt will be assuming Judge Gerlach's calendar at the Northeast Courthouse as Judge Gerlach rotates to the civil division. We are excited to have Judge Hyatt back on the bench and in the trenches.

Judge Janet Barton will become the Family Court's new Presiding Judge. Judge Barton has been a Superior Court judge since 2000. She has had rotations on the Juvenile, Civil and Criminal calendars, and has acted as the Associate Presiding Judge for the Juvenile and Civil divisions. Prior

to becoming a Superior Court Judge, Judge Barton was in private practice as a commercial litigator at Snell & Wilmer. Since February 2013, when Judge Pamela Gates rotated to the criminal division, Judge Barton has assumed her calendar. We congratulate and welcome Judge Barton to her assignment as the Presiding Judge, and look forward to the next Bench and Bar meeting.

Major changes to the local rules of practice go into effect July 1

The Arizona Supreme Court on June 12 issued the Amended Local Rules of Practice for the Maricopa County Superior Court, which become effective on Monday, July 1, 2013. Find a pdf of the complete document at:

http://www.azcourts.gov/Portals/20/2013Rules/R120033Order.pdf

The amendments are substantial, including terminology and procedures, especially those relating to eFiling. Awareness of the revised rules is essential to every lawyer practicing in the Maricopa County Superior Court.

Request for practice tips

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

Tips from the Bench

Danielle J. Viola

Judge, Superior Court of Arizona for Maricopa County

1. **Be courteous** to court staff and opposing parties/counsel.

2. **Check out the judicial profile** for your assigned judge for helpful information about policies and procedures/pet peeves, etc. at: http://www.superiorcourt.maricopa.gov/JudicialBiographies/judicialList.asp?title=1

3. **Do not forget your record**. Many courtrooms are equipped with (FTR) to record the proceedings. The FTR system typically does not pick up voices that are not near a microphone. To ensure a good record, consider remaining seated at counsel table or use the podium. Avoid questioning the witness while you are walking to and from the witness stand or counsel's table.

4. **Call opposing counsel or the opposing party** *before* filing a motion to continue, motion for telephonic appearance of a witness or party, or motion for extension of time. If opposing counsel/party agrees with your request, please include that in your motion. We spend a great deal of time contacting parties to ask about objections or waiting for the response time to elapse. Your motion will be processed more quickly if we know the other side agrees with your position. If the motion is not opposed, consider titling your motion accordingly.

5. **Be cautious when requesting "Emergency" or "Expedited" relief.** We receive many emergency or expedited requests with a mailing certificate showing that the document was mailed via regular US mail to the other party. It is difficult to conclude that an emergency exists if you did not find it important enough to hand-deliver to the opposing party (or at least deliver by fax and email as well as regular mail). Do not forget to include the delivery information in the mailing certificate.

6. **Review Rule 45 of the ARFLP (and 25-403 and 25-403.02 if children are involved) *before* you submit a consent decree or a stipulated parenting plan.** Create a checklist for you and your staff to make sure that you have addressed all of the items required by Rule 45 and the applicable statute. If your decree is rejected, please consider including a red-line with the amended or revised decree (or a statement of the changes and the page and line numbers where the changes can be found). The most common reasons for rejection include the following: 1) failing to include a child support worksheet; 2) failing to attach the parent information class certificates for both parties; and 3) failing to address all of the factors in 25-403.02(C)(1)-(7).

7. **Be specific when submitting stipulated orders.** The stipulated order should clearly recite what pleadings or motions have been resolved as a result of the stipulation. Consider including the title of the pleadings and the filing dates in the order.

8. **Keep the applicable statute in mind when presenting your case.** For example, let the judge know what topic you are going to address next with a witness so the judge can be better prepared to consider the evidence. Many judges take notes to correspond with the statutory factors. For example, if custody is at issue, consider structuring your examination to follow 25-403.

9. **Provide testimony regarding exhibits.** Make sure you know why you are offering an exhibit and how it might be helpful for the Court in making a decision. Consider Rule 1006 of the Arizona Rules of Evidence when you offer voluminous records.

10. **Remember to copy your client** when you file a motion to withdraw and make sure you let us know you have done so. Review Family Rule 9(A)(2) or 9(B)(2) and Rule 6.2(C), Local Rules of Practice for the Superior Court of Arizona for Maricopa County. If you do not send your client a

copy of the motion then it will be rejected. 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.

11. **Do not underestimate the value of meeting with opposing counsel to resolve discovery disputes.** Many discovery disputes can be resolved with an in-person meeting. The more common approach is to send letters back and forth with the threat of a motion to compel. The letter campaign often fails to include any specifics as to the nature of the alleged deficiencies. We often receive motions to compel that lack specificity and instead complain about a general failure to produce complete records with a request that the other party produce the requested documents or information. If you seek to compel production of documents or information, you should be able to articulate the deficiencies and identify the specific documents or information that you are requesting. If you have produced documents, you should be prepared to identify when and how the documents or information were produced.

12. **Let us know if you settle.** As you know, the Family Court calendars are busy and we often set aside three hours for trial. Filing a timely notice of settlement will make it more likely that we can use the time set aside to help other parties or to tackle our in-boxes. While we look forward to reading your concise and articulate pre-trial statements, we also appreciate knowing in advance that we do not need to spend the time reviewing documents and preparing for a trial that settled last week.

Tips from the Bench

Christopher Coury

Judge, Superior Court of Arizona for Maricopa County

In the last edition of the MCBA Family Law Newsletter, Judges Jay Polk and Tom LeClaire offered keen insights into practicing in Family Court. They provided numerous helpful tips that practitioners in Family Court would be wise to consider. Many of the practice pointers that I would ordinarily discuss were included among their topics. So as to not to render this column redundant in its second edition, I selected other topics to comment upon.

1. Be Professional. The overriding thought I offer relates to how you practice. Work to be a consummate professional. Take pride in what you do. Strive to produce your best work on a consistent basis. There are many attorneys practicing in Family Court who practice in this manner. Learn from them. Make your filings and court appearances count, not only for your client, but for your own professional reputation.

2. **File Meaningful Documents.** Many documents filed appear to have little apparent purpose on their face. Just as you find it wasteful to have to review meaningless documents prepared by an opposing party, so too does it frustrate judges to feel that their time is being wasted by reviewing such documents. Some thoughts for your consideration:

- Before writing a document, ask yourself: "Why am I doing this and what do I hope to gain for my client?"
- When writing, make sure you are clearly providing the information the judge needs to make a decision. Statements such as "calculate child support according to the guidelines" are absolutely worthless if they are not accompanied by the information / raw data needed to make a decision.
- After writing, but before filing, ask yourself if your document provides realistic solutions. When attorneys can offer both a clear description of the problem and potential solutions, judges do listen with appreciation and appreciate the thoughtfulness.

3. Discovery.

- If you have not already propounded discovery, consider bringing a copy of the discovery you intend to propound to the initial court hearing. Ask the Court if the record can reflect that the opposing party has been provided with discovery. This eliminates service issues and questions down the road.
- If an opposing party fails to respond to discovery, it is quite common for that party to claim that he or she has never received the discovery request. Bring a duplicate copy of the discovery request to the discovery dispute hearing.
- The time to complain that discovery has not been answered is NOT in a Pretrial Statement.

4. Rule 69 Agreements (and disagreements). If you reach a resolution at ADR, but you disagree on the language of one or two provisions in the final Decree, frame the issue so that the Court can understand and assist in resolving your dispute. Here is one method I suggest:

- Prepare a form of Decree containing everything that has been agreed-upon. Have the parties sign-off on what is agreed-upon, and file the document.
- If the parties cannot agree on what the language of the Decree should be for an agreed-upon term, consider using the following strategy.
    - Include in the Decree the following language: "On the issue of _____ (the issue in dispute), the parties agreed at the ADR as follows: (quote the ADR agreement). The parties cannot agree on the final language for this term. Each party's final proposed language for this term is set forth in Exhibit "A" attached hereto."
    - Have each party list in Exhibit "A" that party's proposed provision for the Court's consideration.
- By doing this, you have made it easy for the judge to (a) identify what is agreed-upon, (b) make a decision on the terms in the dispute, and (c) have the Decree incorporate what the final terms will be.
- If one party refuses to sign a final Decree, but the language used in the Decree is consistent with a Rule 69 Agreement reached at ADR, counsel for the non-signing party should remember to consider his or her obligations as an officer of the Court.
- Do not expect the Court to re-negotiate a Rule 69 Agreement for you, or to add or modify terms that your client no longer cares for unless there is an agreement by both parties to modify the Rule 69 Agreement.

5. Technological limitations. The judicial officers on Family Court are not looking to increase legal fees for your clients. However, court hearings need to be meaningful and conducted efficiently. Unfortunately, Family Court divisions are not housed in the state-of-the-art South Court Tower, and

some divisions have courtrooms with technological limitations. In some cases, even telephonic appearances with one party can be problematic. Keep these limitations in mind.

6. Pre-Trial Preparations. What you file before Trial, and when you file it, is important:

- DO NOT blow-off or give short shrift to your client's Pretrial Statement. In many respects, this becomes your opening statement to the Court. It provides a road-map of the remaining issues to be tried, and it is your way of familiarizing your audience (the judge) with both the big picture and discreet issues to be tried.
- Observe deadlines for the submission of the Pretrial Statement and Exhibits. Timing IS important. Why? First of all, our clerks need time to mark your exhibits. Second, it gives your judicial officer time to review the Pretrial Statement at the time he or she is preparing for your hearing. Because of time constraints imposed on judges due to their calendars, judges can and often do mull over tricky issues on weekends before trial. Your client is spending hard-earned money on the preparation of a Pretrial Statement. Let them get the "bang for their buck" – don't be an attorney that is constantly filing such documents the morning of Trial.

7. Try To Streamline Things, Not Create More Work, For Your Judge's Staff: The judicial staff in Family Court works incredibly hard. There are volumes of papers to process, and many telephone calls (often with self-represented parties) that need to be fielded. The clerks who prepare our Minute Entries are spread thin, and they have the increasingly difficult task of accurately and thoroughly typing up minutes from hearings. You can help both with what you do, and don't do (and please share these tips with your assistants as well):

- DON'T submit Orders where the signature line appears on a blank page. Many judges will not sign these. (Think of all the mischief that can happen with a page containing only a judge's signature. Fraudulent pages could be attached in front of the signature page, and people could be duped).
- DO make sure that your Consent Decrees contain required information, such as:
    - A statement addressing all minor and unborn children;
    - The findings required for a deviation from child support guidelines;
    - All referenced exhibits (this is commonly overlooked).
- DO consider offering to e-mail certain documents to judicial divisions in MS Word. This is particularly true for Pretrial Statements. When preparing rulings, judicial staff needs to re-type your work from scratch. By receiving the parties' Pretrial Statement(s) in MS Word, certain text can be copied – particularly with respect to property issues (bank accounts,

retirement accounts, VIN numbers and debts). This saves time and helps us get our rulings to you more efficiently. The Court has allowed me to establish an email account for my division to which ***filed*** Pretrial Statements can be e-mailed prior to Trial. The email address is courystaffdocuments@mail.maricopa.gov. This email account is reviewed by my staff; it is not a replacement for filing documents, but is an opportunity for you to help streamline the process and make the Court run even more efficiently.

8. Requests to extend hearings into calendar gaps: Just because there is a calendar gap after your hearing, do not presume that the hearing will be allowed to go into "overtime." We use these gaps to handle UCCJEA conferences, attend meetings, prepare for future calendars, consider and work on rulings for under advisement matters, and deal with *ex parte* filings and emergencies. Unless you ask for and are granted the ability to extend the length of a hearing, anticipate that your hearing will conclude within the time limits allotted.

Limited Family Assessments

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Nationally, Family Courts in many jurisdictions are now using Brief Focused Assessments to answer important questions about families through a format abbreviated from traditional comprehensive custody evaluations. In 2009, the Association of Family and Conciliation Courts (AFCC) published extensive guidelines for conducting such "BFAs" (Association of Family and Conciliation Courts. Guidelines for brief focused assessment. (2009). Madison, WI: Author).

Family Court in Maricopa County now regularly uses our equivalent of the BFA - "Limited Family Assessments" (LFAs) - as a fact-finding tool separate and different from Comprehensive Custody Evaluations (CCEs). [LFAs may also be referred to as Limited Focused Assessments or simply Focused Assessments.]

Sometimes there is confusion about the differences between Limited Family Assessments and Comprehensive Custody Evaluations as evaluative processes. But, LFAs are not merely scaled-down CCEs with a briefer process, although they use fact-finding methods similar to CCEs. There are some key differences:

-LFAs have a narrower scope,

-reports are more descriptive than analytic in reporting data,

-analyses do not address all statutory factors the court must consider in make findings in child custody matters, and an LFA does not make recommendations about parenting-time plans or parental legal decision-making authority.

PROCEDURAL DIFFERENCES

Referral Questions Addressed

LFAs are used to address narrowly defined referral questions excluding ultimate-question issues.

A qualified behavioral health provider would not use an LFA to make recommendations about comprehensive parenting-time or parental legal decision-making authority. For example, the following areas are not appropriate or suitable for an LFA:

-initial parenting-time determinations (relative percentages of parenting time)

-move-away/relocation evaluations

-allegations of substantial, complex and severe estrangement, disaffection and alienation issues

-allegations of physical/emotional abuse of a child where CPS or police investigations have not been completed

-recommendations for sole v. joint decision-making authority

LFAs do address significant issues that are circumscribed and where the fact-finding and data are specific. Here are some examples:

-One parent has been absent from a child's life for a substantial amount of time. An LFA could address under what conditions it might benefit the child to establish a relationship with the parent and what might be the risks to the child and current caretakers?

-There are allegations of instability in a parent's functioning or parenting capacity. An LFA might address in what ways a parent's alleged substance abuse or mental health condition impair his/her ability to provide a safe and nurturing environment for the child during his/her parenting time and offer possible treatment interventions and likelihood of the parent stabilizing.

-A child is very young or has special needs. An LFA might examine what sort of parenting schedule would be developmentally appropriate? [Assuming there is already parental agreement or court ruling on the total relative amounts of parenting time.]

Other questions or issues where LFAs can be helpful and appropriate include:

-Child maltreatment allegations (e.g., inadvertent/isolated incidents of maltreatment)

-Child interview (e.g., parenting-time preference of a child and whether preference is based on developmentally appropriate reasoning)

-Home study (e.g. safety concerns)

-Mental health and parenting capacity evaluation of one parent (e.g., substance abuse, mood disorder, personality disorder, criminal history)

-Ability to co-parent, use mediation effectively, or work successfully with a Parenting Coordinator

-Relationships and dynamics of child with parents and/or significant others (e.g. siblings, Step-parents, Grandparents)

Scope

The scope of CCEs and comprehensive relocation evaluations are determined by statute (A.R.S. §§ 25-403, A.R.S. 25-408, etc.). Custody evaluators are encouraged to follow professional guidelines detailed by AFCC (Association of Family and Conciliation Courts. (2006). Model standards of practice for child custody evaluation. Madison, WI: Author), the American Psychological Association (American Psychological Association. (2009). Guidelines for child custody evaluations in family law proceedings. Washington, DC: Author), and other professional organizations.

On the other hand, different professional guidelines exist for conducting LFAs (see AFCC citation). And, the scope of LFAs are fixed by the specific referral question(s) the behavioral health professional is authorized to address under the authority of his or her court appointment. It is therefore crucial that parties, counsel, and the court agree to the specific matters that the assessor is to address. This should be spelled out in the LFA appointment order and later clarified by phone conference between attorneys and assessor at the commencement of the process.

If in the process of completing an LFA, the assessor determines that there are important issues that should be addressed other than those which are the subject of the LFA as ordered, the assessor should report that to the legal representatives and the court. A modification of the existing LFA, a new/additional LFA, or a CCE may then be considered and potentially ordered by the court.

Fact-finding

With CCEs, evaluators are expected to conduct thorough fact-finding which may include reviewing voluminous documents, interviewing numerous collaterals, and conducting significant psychological testing. It is perhaps fair to say that the nature and and extent of fact-finding in this situation is less determined by the evaluator than by requirements of statute and professional standards.

With LFAs, the fact-finding is more narrowly executed so as to address specific referral questions. Data obtained and reviewed is acquired at the discretion of the assessor, although the assessor must always justify why some data was sought and considered while other information was not.

Cost

Normally the cost of an LFA is expected to be less than a CCE because the time needed to address more limited questions requires less investment of a professional's time. Consider that a national survey found that CCEs average 43.5 hours of professional time to complete [Ackerman, M. J., & Pritzi, T. B. (2011). Child Custody Evaluation Practices: A 20-Year Follow-Up. Family Court

Review, 49(3), 618-628]. Comparable data for LFAs is obviously unavailable, but one pilot study did find that for a small sample of assessors in northern California, the average time per focused assessment was about 19 hours. [Perlmutter, K. (2012). Brief Focused Assessments in San Mateo County: A Pilot Project. AFCC-CA Newsletter, Issue #5, March and personal communication with the author available at drperl@earthlink.net]

But while LFAs may cost less than CCEs, it is important to again note that LFAs are not merely scaled-down CCEs and one cannot substitute for the other. A limited assessment is limited in scope relative to a CCE, but not necessarily limited in process. For example, comprehensive evaluators are expected to fully analyze allegations as well as all factors of A.R.S. § 25-403. This is contrary to a limited assessment in which the professional will not fully assess the statutory factors. Ultimately, attempting to make significant recommendations about parenting-plans or legal decision-making authority through an LFA may be unethical because insufficient data is obtained and considered. [Insufficient fact-finding and process were highlighted as problematic in a Pennsylvania licensing board case where a psychologist was held to have improperly conducted a custody evaluation with very limited information - Grossman v. State Board of Psychology, 825 A2d 748 (Pa. Commw. 2003)].

Caution should be exercised in using LFAs for their properly intended function. LFAs are not just as a way to do less for less and somehow hope to squeeze out the same analysis and recommendations consistent with a properly conducted comprehensive custody evaluation.

ADVANTAGES OF LFAs

Usefulness at Different Stages of the Legal Process

LFAs are intended for use in cases in which there are discrete issues, limited in scope, that do not require a comprehensive family evaluation. These narrowly defined issues can be assessed at different stages in the legal process, whenever the judge requests a focused assessment to assist in judicial decision making. Thus, Judges can order LFAs pre-dissolution and post-dissolution, while CCEs are primarily used when parenting plans or legal decision-making determinations are being adjudicated pre-dissolution.

Faster Result Times

LFAs of specific issues, as defined by the appointing judicial officer, can be a parsimonious and helpful method of supporting better informed judicial decision making and timely resolution of issues, which helps reduce delays in the legal process that can exacerbate family tensions.

Less Intrusive

By their nature, LFAs involve a more circumscribed inquiry into the family issues and are therefore likely to be less intrusive to the family than comprehensive CCEs. When considering concerns about confidentiality of sensitive information, this is often a very important advantage for litigants.

May Obviate Need for CCE

LFAs may, in some situations, obviate the need for a CCE and keep a case on track toward resolution.

Resolution of Differences Between Parents

BFAs may advance the parents' ability to resolve their differences by elucidating an area of prior disagreement without risking an extensive delay in the litigation process or focus on frivolous allegations.

Litigation Efficiency

Unfortunately, CCEs often offer participants the opportunity for unfettered access to a professional assessment. Some strategize that if you "throw enough mud something will stick." An LFA restricts such tactics, forcing participants to consider the foundation for an allegation when seeking an LFA rather than allowing for an infinite scope of investigation.

FINAL COMMENTS

While Limited Family Assessments are not a replacement for Comprehensive Custody Evaluations, but they can be a helpful, efficient means of addressing significant matters for courts and families. If you have questions about the use of LFAs in a particular case, seek consultation from a qualified behavioral health professional. Many can be found on the provider roster of the Superior Court at: www.superiorcourt.maricopa.gov/SuperiorCourt/FamilyCourt/Rosters.

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	Atwood v. Riviotta, Memorandum Decision; Arizona Court of Appeals, Division 1. Filed: 5/16/2013. Case no: 1-CA-CV 12-0280

Procedural History

Appeal from Cause No: FN2011-093631, heard by the Honorable Eartha K. Washington, Judge Pro Tempore

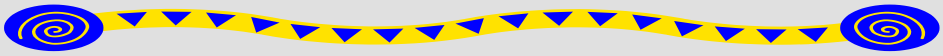
Plaintiff appealed T/CT's order dismissing a petition to annul her California marriage to Defendant.

Case Summary

Facts: Plaintiff and Defendant, both female residents of Arizona, were married in California in 2008. In 2011, Plaintiff filed a petition for an annulment of the marriage in Maricopa County Superior Court. Plaintiff argued that the marriage was void under Arizona law. T/CT denied the petition and dismissed the case, reasoning that it did not have authority to annul the marriage since same-sex marriages are not valid in Arizona. Plaintiff appealed this dismissal.

Reviewing the T/CT's decision de novo, the C/A reversed and remanded the T/CT's dismissal based on the following:

Though Arizona law generally determines the validity of out-of-state marriages based on the laws of the place of marriage, same-sex marriages are void in Arizona even if they are valid in the place where the marriage occurred. Based on this, the T/CT reasoned that it could not annul the parties' marriage because to do so would recognize that the marriage was valid in the first place, which would constitute a breach of Arizona law. The C/A dismissed this concern, reasoning that "an action to annul a marriage is based on the premise that the marriage is void." As such, the C/A held that the T/CT has the authority not only to void the parties' same-sex marriage, but also to divide the parties' property upon annulment.



Case/Cite	Ludwig v. Glacy, Memorandum Decision; Arizona Court of Appeals, Division 1. Filed: 5/28/2013. Case no: 1-CA-CV 12-0186

Procedural History

Appeal from Cause No: FC2005-007187, heard by the Honorable Julie Newell, Judge Pro Tempore

Father appealed an order of protection entered against him by T/CT on behalf of his children and Mother.

Case Summary

Facts: Father and Mother are the parents of two children, A. and J. In family court proceedings, Father and Mother agreed to share joint legal custody of the children, with Mother being the primary residential parent. Father subsequently married another woman who has a son, A.B., from a prior relationship.

In October 2011, Mother sought an order of protection based on allegations that A.B. had molested A., and that Father had both witnessed and responded inappropriately to one of these acts. The order was granted, but a hearing on the order was

scheduled in January 2012 at Father's request.

The parties arrived at the hearing with an oral agreement, but the T/CT rejected this agreement and additionally rejected the parties' proposal to make amendments to it. These rejections were based on the T/CT's belief that the agreement was not in the best interests of the children. The T/CT then held a hearing in which Mother presented evidence, but Father declined to do so since the two CPS witnesses that he had subpoenaed had not shown up to the hearing. After the hearing, the T/CT affirmed the order of protection.

Father appealed this ruling. While his appeal was pending, the T/CT held another evidentiary hearing concerning an additional order of protection obtained by Mother. This subsequent order of protection was quashed by the T/CT after the hearing, prompting Mother to move to dismiss Father's appeal of the earlier order of protection decision.

Reviewing the T/CT's decision for abuse of discretion, the C/A affirmed the decision based on the following:

Though the subsequent order of protection had been quashed, the C/A found that Father's appeal of the earlier order was not moot because of this ruling. The C/A reasoned that the two orders were legally independent with their own ongoing legal consequences. As such, Father was entitled to separate process concerning the earlier order of protection. Thus, Mother's motion to dismiss Father's appeal based on mootness was denied.

Father argued on appeal that T/CT had denied him due process when upholding the order of protection by misconstruing the burden of proof and focusing on improper factors, forcing him to proceed with a hearing that he was not properly prepared for, and reaching a decision before Father had presented a case.

The C/A found that the T/CT articulated and properly applied the proper preponderance of the evidence burden of proof during its hearing. Additionally, the C/A found that even though best interests is not an enumerated factor of A.R.S. § 13-3602(E), it is a factor that the T/CT is required to consider when ruling on a protective order under Ariz. R. Prot. Ord. P. 4(B)(4).

The C/A also held that the T/CT had not deprived Father of a hearing. Though Father did not present a case, he was afforded an opportunity to do so at the hearing. Despite the fact that his two witnesses did not appear in court, the C/A held that he was not precluded from testifying himself, cross-examining Mother, or making an offer of proof as to what the missing witnesses would testify to.

Finally, the C/A held that the T/CT did not reach a decision before hearing the evidence. The record of the T/CT's hearing demonstrated that the T/CT was familiar with the case and that it gave the parties opportunity to present evidence and testimony.

Case/Cite	Nold v. Nold, Opinion; Arizona Court of Appeals, Division 1. Filed: 5/30/2013. Case no: 1-CA-CV 12-0214

Procedural History

Appeal from Cause No: FC2010-052627, heard by the Honorable Douglas Gerlach, Judge

Father appealed the T/CT's parenting time order and allocation of certain property to Mother.

Case Summary

Facts: Mother filed a petition for legal separation and obtained an order of protection in July 2010. The order was later quashed after a hearing, but Father responded to the petition for legal separation by requesting that it be converted to a petition for dissolution of marriage.

After Father moved out of the family home, the parties began a routine of sharing physical custody of their three children on an alternating week schedule. At trial, Father sought to have this arrangement continue, while Mother requested that the alternating week schedule only apply during the summer. During the school year, Mother's proposed schedule gave Father custody every other weekend and Mother the remainder of the time. The T/CT adopted the recommendation of an independent custody evaluator, which was consistent with Mother's proposed plan, but did not make any findings concerning the factors listed in A.R.S. § 25-403 in issuing this decision.

In addition to the disputed parenting time issue, the parties also disagreed over property allocations. On her pretrial statement, Mother listed three contested items that were omitted in Father's pretrial statement: a 401k, an IRA, and a life insurance policy. Father brought up the items at trial, but Mother objected on the grounds that Father had waived his claim to the items by not stating said claim in his pretrial statement. The T/CT agreed with Mother's argument and awarded her all three items.

After his motion for a new trial was denied, Father appealed the T/CT's rulings on these issues

Reviewing the T/CT's decisions for abuse of discretion, the C/A reversed and remanded the decisions based on the following:

A.R.S. § 25-403 requires that the T/CT make specific findings in a contested parenting time decision to demonstrate that its decision is in the best interests of the children involved. Father argued that the T/CT in this case did not comply with that rule. Mother contended that the T/CT complied because its order adopted the custody evaluator's assessment of the § 25-403 factors. The C/A agreed that the T/CT has adopted the custody evaluator's assessment, but found that this did not satisfy § 25-403's requirement for specific *judicial* findings to demonstrate that the T/CT's decision was in the best interests of the children. The C/A ruled that this failure of the T/CT constituted an abuse of discretion. Additionally, the C/A disagreed with Mother's position that Father had waived this argument by not presenting it in his petition for a new trial.

The C/A also disagreed with Mother's argument concerning the property allocation. Mother argued that Father had waived his claim to the three items of disputed property by not asserting the claim in his pretrial statement. The C/A disagreed on two grounds; First, Mother had listed the three disputed items as contested issues in her pretrial statement, bringing them to the attention of the T/CT. Second, the C/A reasoned that the T/CT has an obligation under A.R.S. § 25-318.A to equitably divide clearly identified community property. The C/A ruled that this obligation is not automatically waived if one or both of the parties fails to list the asset in a pretrial statement, as long as exhibits are admitted and testimony regarding the asset or assets is given at trial.

Case/Cite	Padilla v. Godinez, Memorandum Opinion; Arizona Court of Appeals, Division 1. Filed: 5/23/2013. Case no: 1-CA-CV 12-0683

Procedural History

Appeal from Cause No: FC2010-071120, heard by the Honorable Eileen Willett, Judge

Husband appealed the T/CT's termination of his loco parentis visitation rights.

Case Summary

Facts: Husband and Wife married in 2004. Husband was not the father of Wife's child, born in 2001, but he had known the child for two years before the marriage and became father figure for the child during his marriage to Wife. After an incident in September of 2010 in which the police were called and Husband admitted to making threats to hurt Wife, Wife filed a dissolution petition. Wife additionally asked for and was granted an order of protection against Husband based on possible past acts of domestic violence and the potential for future acts of domestic violence.

During the divorce proceedings, Husband alleged that he stood in loco parentis to the child and requested joint custody and visitation. Wife opposed both requests. T/CT determined that Husband had an in loco parentis relationship with child, and further determined that it was in the child's best interest for Husband to have visitation with the child so their relationship could continue. The order of protection was thus amended to allow for monthly visits and certain telephonic contact with child. However, after an incident in 2012 in which Husband had a confrontation with Wife's boyfriend in front of the child, Wife petitioned to terminate Husband's visitation rights. In response, Husband filed his own petition seeking increased contact. In response to these petitions, T/CT set a parenting conference and appointed someone to oversee it.

After the parenting conference, the overseer made a recommendation of joint legal custody and increased visitation for Husband to the T/CT. However, after an evidentiary hearing in which testimony was offered implicating Husband in incidents of aggression, violence and controlling behavior around the child, T/CT elected to grant Wife's motion and terminate Husband's visitation rights. Husband appealed this ruling.

Reviewing the T/CT's decision for an abuse of discretion, the C/A affirmed the decision based on the following:

Generally, a rebuttable presumption exists that a fit parent's decision to deny or limit in loco parentis visitation was made in the child's best interests. Here, the T/CT determined that the evidence established Wife as a fit parent. The T/CT can grant in loco parentis visitation over the fit parent's objections if it is determined to be in the child's best interests, which is how Husband got his initial visitation in the first place.

However, the family court is afforded considerable discretion when determining in loco parentis visitation arrangements in these scenarios. Such arrangements will only be disturbed by the C/A when it is clear that a judge has mistaken or ignored evidence. In the case at hand, the C/A determined that the T/CT properly reviewed the evidence presented and made a reasonable conclusion that visitation was no longer in the child's best interest. A.R.S. § 25-403(B) requires that the family court consider such evidence of domestic violence as being contrary to the best interests of the child. As such, the C/A determined evidence of Husband's prior acts of domestic violence and aggressive behavior were properly considered by the T/C.

Husband argued that the determinations made be the T/CT were not supported by evidence. The C/A declined to reweigh the evidence on appeal, citing the T/CT's superior posture for weighing evidence, observing parties, and judging the credibility of witnesses. Thus, despite the findings made at the parenting conference that supported Husband's position, C/A held that the T/CT made reasonable findings based on the evidence presented, which included testimony from Wife, her boyfriend, and Husband himself.

Case/Cite	Smith v. Smith, Decision Order; Arizona Court of Appeals, Division 1. Filed: 5/28/2013. Case no: 1-CA-CV 12-0723

Procedural History

Appeal from Cause No: CV2011-001955

Wife appealed T/CT's decree of dissolution of marriage and T/CT's denial of her motion for a new trial.

Case Summary

Facts: T/CT issued a decree of dissolution of marriage dissolving Husband and Wife's marriage. The T/CT rendered its final judgment when it entered a minute entry on July 13, 2012 awarding attorneys' fees. Wife filed a motion for a new trial on July 26, 2012. This motion was denied by the T/CT as untimely. Wife appealed both the decree of dissolution and the denial of her motion for a new trial.

Reviewing the T/CT's decision for abuse of discretion, the C/A affirmed the vacated the T/CT's denial of Wife's motion for a new trial and remanded based on the following:

The C/A held that the T/CT improperly concluded that Wife's motion for a new trial was untimely. ARFLP Rule 83(A) requires that a motion for a new trial be filed no later than 15 days after the entry of final judgment. The T/CT interpreted the decree of dissolution to be its final judgment, but the C/A held that final judgment was not actually entered until the final issue was resolved by the minute entry filed on July 13, 2012. Therefore, Wife's motion for a new trial filed on July 26, 2012 was in fact timely. As such, the C/A remanded the matter to the T/CT for consideration of the merits of Wife's motion.

Case/Cite	In re the Marriage of Nowak, No. 1 CA-CV 11-0610 (Ariz. App. Div. 1 filed Apr. 2, 2013)

Procedural History

Wife filed a petition for dissolution in 2009. Husband had worked from the time of their marriage, 1963, until he became eligible for disability in 1998. The trial court found that the disability policy was a substitute for income and was therefore separate property after dissolution of marriage. Wife claims that she maintained several separate accounts not subject to their community property. The trial court agreed. Furthermore, the trial court found that Wife was entitled to spousal maintenance. Wife appeals the value of the spousal maintenance and its taxability. Husband appeals the decision to view certain accounts as Wife's separate property.

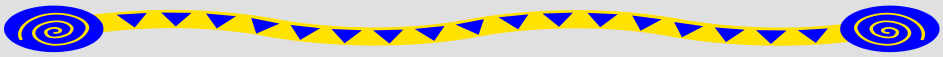
Case Summary

A disability policy is separate property when replacing expected income, rather than viewed as retirement. Just as a spouse's income post-dissolution is separate property, disability benefits that replace income are likewise separate property of the disabled spouses. In Arizona, payment for the policy with community funds does not make a disability payment community property except to the extent that it replaces income lost to the community. Both parties testified that the husband planned to work for many years, and never discussed retirement, before he became disabled. Because the policy only pays benefits when the husband is disabled, and he had planned to work rather than draw retirement, the policy proceeds should be seen as income and not retirement. Therefore the disability policy is separate property belonging to the husband.

Because the court found the husband was not retired for the purpose of disability benefits, it held also, that the wife should not be considered retired. Since the wife was not retired for the court's purposes, she would not be required to deplete her retirement assets and therefore held that she was eligible for spousal maintenance. However, the trial court was found not to have abused its' discretion by not awarding the wife spousal maintenance in the amount of her monthly expenses.

A spouse showing that spending was not wasteful will not be required to repay those community funds. Although Husband took several withdrawals from the couples' Home Equity Line of Credit, most of the expenses associated with these withdrawals occurred before service when property was still community. Furthermore, the superior court upheld the finding that Husband's expenses were not excessive and wasteful. The spouse alleging wastefulness must make a prima facie showing of waste, after which the spouse who spend the funds must demonstrate that the expenditures are legitimate.

Where no evidence of comingling of funds exists assets may be considered separate. Wife's assets could be traced back to inheritance and gifts from her parents. Since no comingling of funds was shown to occur, Wife maintained these assets as separate property.



Case/Cite	In re the marriage of Featherstone, No. 2 CA-CV 2012-0104 (Ariz. App. Div. 2 filed May 21, 2013)

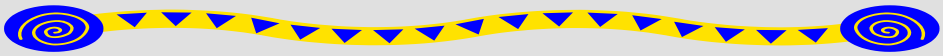
Procedural History

Husband filed for dissolution in 2003. In a marital settlement agreement Husband and Wife transferred their home form community property to tenants in common so each would have a one-half ownership interest. Wife was granted exclusive possession until her remarriage or cohabitation with a man. In 2012 Husband filed a motion to enforce decree of dissolution claiming that Wife was cohabitating with her boyfriend. Wife claims that Husband no long has an interest as he quit-claimed it to her several years before. The trial court found that Wife had not cohabitated and that Husband has mistakenly filed the deed under the impression that he was required to do so. Wife appeals the trial court's order setting aside Husband's quitclaim deed stating that the trial court lacked jurisdiction over nonmarital property of parties.

Case Summary

The superior court has jurisdiction to hear all matters relating to a dissolution action. The property at issue here was disposed of in the decree of dissolution. The settlement agreement provided that either party could enforce the agreement by appropriate remedy in any proper jurisdiction. In order for the trial court to resolve questions relating to the decree the court had to address the validity of the quitclaim deed concerning the property and was authorized to do so under § 25-311(A) A.R.S.

A court cannot be precluded from addressing separate property. The trial court's actions were authorized when they affected a post-decree transaction separate property because the separate nature is irrelevant. All property becomes separate upon dissolution. A court in an enforcement action cannot be broadly precluded form addressing separate property. The post-decree transaction involved only parties to the decree and concerned property that was included in the decree.



If you have any comments or suggestions, please contact Kellie, Annette, or Sylvina. Our contact information is on page 4.

We want to give special thanks to Haley W. Schmidt, law student at the Phoenix School of Law for her help with the case law summaries section.