



# FAMILY LAW SECTION NEWSLETTER

October, 2013

*Featured in this edition:  
"Tips from a New Judge" by Judge Suzanne Cohen and  
"Practice Tips" by Judge Bethany Hicks" also  
Sharing the wealth (comment on the Steve Nash case)*

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](mailto:lwilliams@maricopabar.org), by December 12<sup>th</sup>

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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](mailto: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.

The views in this newsletter are those of the contributors and editors and do not reflect the official policy of either the Maricopa County Bar Association or the Maricopa County Superior Court.



## LETTER FROM THE NEW CHAIR

Dear MCBA Family Law Section,

I would like to introduce myself as the new Chair of the MCBA Family Law Section. I am an associate attorney at the law firm of Hallier & Lawrence, PLC, where I practice exclusively in the area of family law. I have served on this Board since 2011 and I am looking forward to be your Chair in 2014.

We are in the midst of planning a number of exciting opportunities for interaction between the bench and bar. On December 5, 2013 we will host the annual Judicial Reception at the MCBA offices. This will be a great opportunity to have one-on-one discussions with our family law judges, and get to know them on a personal level. Looking forward to next year, we are planning the trial advocacy CLE, which is a mock trial format. A panel of sitting family law judges will hear the case and make rulings (as well as provide constructive criticism regarding effective advocacy and pet peeves!) We are also planning the now infamous speed-networking event with the Family Bench in the Spring.

These are all rare opportunities to interact with the family bar outside of the courtroom, and we hope that you plan to attend. Also, if you are interested in presenting at a CLE, please contact me.

Looking forward to a great year!

Family Law Section Chair,  
Tabitha A. Jecmen

## ANNOUNCEMENTS and EVENTS



### **MCBA family law section's annual Judicial Reception**

Thursday, December 5, 2013 from 5:30 p.m. until 7:30 p.m.

Members of the bench and bar mingle over appetizers and drinks in an informal setting at the MCBA offices. The event allows attorneys and judges to get to know each other better both personally and professionally.



### **9th Annual Race Judicata**

*Sponsored by the Young Lawyers Division*  
October 6, 2013

Come walk, run, or stroll your way through our 5K race/ 1 mile walk to benefit the Maricopa County Bar Association Young Lawyers Division and survivors of domestic violence.



## 2013 Bench-Bar Conference

Join us for this great event as judges (trial & appellate) and attorneys to come together in open dialogue about matters of mutual interest.

Highlights of the 2013 Conference:

A ***State of the Courts*** report from the Hon. Norman J. Davis, Presiding Judge, Maricopa County Superior Court

Two Judicial Panel Discussions:

*"Help Us Help You"*

*"I've Read Everything You Have Submitted. What Else Do You Have To Tell Me?"*

**Join us after the program for a reception where judges and attorneys can mingle informally**

*This activity may qualify for up to 3.5 hours toward your annual CLE requirement for the State Bar of Arizona, including 3.5 hour(s) of professional responsibility (Ethics).*

*The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement.*

Judges Confirmed to Date:

**Hon. Diane M. Johnson**, Chief Judge, Arizona Court of Appeals, Division I

**Hon. Peter B. Swan**, Arizona Court of Appeals, Division I

**Hon. Norman J. Davis**, Presiding Judge, Maricopa County Superior Court

**Hon. Robert Oberbillig**, Maricopa County Superior Court

**Hon. Rosa Mroz**, Maricopa County Superior Court

**Hon. Christopher Whitten**, Maricopa County Superior Court

**Comr. Richard L. Nothwehr**, Maricopa County Superior Court

Date: October 11, 2013  
Program: 1:30 p.m. – 5:00  
Location: Hotel Palomar  
2 East Jefferson  
Phoenix, Arizona 85004

Reserve your spot today!



## 2013 BMO Private Bank Pro Bono Golf Classic

**Saturday, November 2**

6:30 a.m. - 1:00 p.m.

The Legacy Golf Club

6808 S. 32nd Street, Phoenix 85042

Play golf AND help provide legal services to the disadvantaged. This annual golf tournament sponsored by the Maricopa County Bar Foundation supporting the Volunteer Lawyers Program, which in turn helps those with few legal resources. The BMO Golf Classic is produced by the Maricopa County Bar Foundation on behalf of the Volunteer Lawyers Program (VLP), which will benefit from all net proceeds. Established in 1981 by the Maricopa County Bar Association and Community Legal Services, VLP to arranges volunteer lawyers for people who have civil legal problems and cannot afford to hire an attorney. Your participation helps VLP assist more than 10,000 people in Maricopa County each year.



### Phoenix School of Law clinics

Rule 38 certified law students, under the supervision of law professors, are available to assist clients in the following clinics: the Order of Protection Clinic, assisting victims of domestic violence in obtaining an order of protection and in most cases with the hearing to contest the order of protection; and the Family Law Clinic which assists domestic violence victims with family court cases.

Each client's legal issues will be considered on a case-by-case basis to determine whether the clinic can assist. Clients may schedule an appointment by emailing: [jbalsen@phoenixlaw.edu](mailto:jbalsen@phoenixlaw.edu) or calling (602) 464-7800.

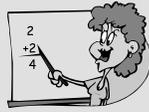


## **MARICOPA COUNTY BAR ASSOCIATION**

**The directors of the Family Law Section for 2013:**

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## PRESENTATIONS & CLE



### **CLE: Social Security Benefits and Claiming Strategies for the Family Law Attorney**

Friday, October 18, 2013 (12:00 PM - 1:30 PM)

This CLE will focus on the issues family law attorneys must consider when a client receives or plans to receive social security benefits. This seminar will provide a basic explanation of social security benefits and rules, as well as address issues specific to divorce including a discussion of the divorced spouses' benefit and the effects of delayed retirement on social security. In addition, this seminar will identify various claiming and planning strategies that will be useful in advising divorcing clients.

Location:



### **ARIZONA FAMILY SUPPORT COUNCIL 2013 Annual Conference**

Friday, November 1, 2013

Doubletree by Hilton  
2100 S. Priest Drive  
Tempe, Arizona 85282

Subjects addressed at this conference include: VA Disability and How It Impacts Child Support, UIFSA- Domesticating Judgments, Social Security – Benefits Process, Kids' Benefits, Timeframes, DES Compares IV-D and Non IV-D ATLAS Systems

PLEASE SEND COMPLETED REGISTRATION FORM TO:  
Arizona Family Support Council  
P.O. Box 45016  
Phoenix, AZ 85064-5016

For additional information contact: Comm. Myra Harris, AFSC President –  
[mharris@superiorcourt.maricopa.gov](mailto:mharris@superiorcourt.maricopa.gov)

## FAMILY COURT NEWS



- **Message from the new Family Court Presiding Judge**

The Family Court is proud to announce its “Self-Service Form Triage Pilot Project.” This six month Pilot Project, which is scheduled to begin shortly, is designed to assist family court pro-per litigants with questions they may have regarding Self-Service Center forms. The Project will be staffed initially by two legal assistants employed by the Court and our Family Court Case Managers. While staff will not be able to provide legal advice to the litigants, they will be available to assist them with questions they have regarding forms. Litigants will be asked to make a good faith effort to fill out the forms in advance of the appointment so the focus of the assistance can be spent on their questions.

If a litigant requests such assistance and there is a legal assistant or Family Court Case Manager available, we will provide immediate assistance. If there is no one available to assist, we will offer the litigant a 30 minute appointment on either a Tuesday morning or a Thursday afternoon.

We are hopeful that this Project will not only provide much needed assistance to our pro-per litigants, but also assist the Court in assessing the quality and content of its forms and instructions.

Judge Barton



## Upcoming Court holidays

Remember, the Superior Court will be closed on the following days:

Veteran's Day, November 11, 2013  
Thanksgiving Day, November 28 and 29, 2013  
Christmas Day, December 25, 2013  
New Year's Day, January 1, 2014



### ● News from the Clerk ("The Brief")

The following information provided by Michael K. Jeanes, Clerk of the Maricopa County Superior Court.



### Reminder: Minute Entry Restrictions

Effective September 1, 2013, the Clerk's Office no longer posts some minute entries to the Clerk's minute entry website online (<http://www.courtminutes.maricopa.gov/>). The documents remain public records and can be viewed at the Clerk's public access terminals, but will not be viewable through the minute entry website.

Parties and their attorneys with an Electronic Court Record Online account may view documents over the internet in their own cases but cannot see other records.

Rule changes were adopted that prohibit the courts from placing records online in cases where there are victims of specifically-defined crimes. In cases with adult victims, the restrictions are based on the crimes charged against the defendant. The restrictions also apply to any case involving a juvenile victim, regardless of the nature of the offense. The rule changes limit the public's online access to minute entries in certain adult criminal cases. The Clerk's Office does not post minute entries online in juvenile court cases.

Examples of cases where minute entries no longer post online but remain public records include: sexual offenses and exploitation, prostitution, and obscenity. For a list of Clerk's Office locations with public access terminals and other ways to get records, visit <http://clerkofcourt.maricopa.gov/copies.asp>.

The rule changes have restrictions that apply to the Court of Appeals and Supreme Court that do not apply to cases in Superior Court. The adopted rules can be viewed online at <http://www.azcourts.gov/Portals/20/2012Rules/120512/R120004.pdf>.



## TIPS FROM THE BENCH



### **TIPS FROM A NEW JUDGE, by the Hon. Suzanne Cohen**

Greetings from one of the newest members of the Maricopa County Superior Court Bench! Not to mention new to the Family Court Bench.

I thought I would approach this topic a bit differently; what to do when you have a new judge and a new judge in family court with absolutely NO prior Family Court experience. As Judge Polk stated in his “Tips from the Bench”, the views herein are solely the views of this author. Judges are human (I know, surprised right?). Our styles vary just as much as individual lawyers.

#### **KNOW YOUR AUDIENCE:**

If I had a nickel for every time a lawyer told me they “googled” me- I could buy well a six pack of diet coke. (One thing to know about this new judge is I am a huge diet coke fan). Of course it is a great idea to have some idea of the new judge’s background. I would not however just rely on google. Talk to lawyers who worked with or practiced against him or her to get a flavor of their personality and style.

Most importantly, **BE PATIENT**. Changing hats (or robes) is going to involve an adjustment period. Call the JA and find out how the judge plans to run his/her court. You may not get an answer right away- the judge may not know. And be prepared for that to change. Like everything in life, there is a learning curve.

One thing I have noticed is that the “culture” in the family arena is very different than the “culture” in the criminal court arena. For example, in the criminal courts, attorneys often talk to the judge in chambers. Find out if that is something the new judge will consider. (Only when there are two lawyers on a case). Don’t forget that is a good way for the judge to get to know you. I cannot stress enough that just as you are getting to know the new judge; the new judge is getting to know you. The judge’s staff is the face of the court. We all hope our staff is professional, courteous and helpful. (And please let us know both the good and not so good about our staff). But it is a two way street. If you are rude to the staff the judge hears about it.

#### **NEW TO FAMILY LAW:**

Let the judge know what the applicable rules are, don't assume they know.

If the judge came from the criminal arena remember civil procedure has not been thought about since law school. And the Family Law Rules can be different than the civil rules.

Let the judge know what case law, if there is any, applies. If there is case law against your position, let the judge know that too. (Don't forget the Ethical rules).

If what you are asking for is new to the judge but another Judge has dealt with this issue in the past feel free to share the theories that have been considered in other matters as well as the legal basis for those approaches. If another court has adopted a particular approach, it likely has some merit for deciding a similar issue that is now before this court.

#### GENERAL THOUGHTS

You have gotten some great specific tips the past two months. So, to quote Judge Coury so as to not render this column redundant.... Here are some general thoughts.

If a motion is fully briefed don't be afraid to call the court and find out the status. Each judge on the family court bench has approximately 22,000 cases. (That is not a typo, I really mean 22 thousand) Now while not all of them are active, the amount of paper that comes into our offices daily is mountainous. (Picture the Andes) Therefore, don't be afraid to call the staff and just check on the status. I hate to break it to you but simply putting "expedited" on the motion does not necessarily make things happen more quickly.

If you file a written motion seeking specific relief, include a proposed order that contains that relief. If you know the opposing party's position – put it in the motion. Otherwise, the court will have to either wait for the response time to run or call the other side. If it is a motion to continue, get the other side on the phone and call the court if you need a response quickly. That way, if it is granted you can pick new dates with everyone's calendar available.

If you go to trial, find out if the court would like an email copy of your pretrial statement. Some of us, especially me, are visual learners. For example, if there are numerous bank accounts, provide a chart for the court to work from during testimony. And email that chart to the division so that the court may put it right in the decree.

If the court issues a ruling and you believe that the court simply made a mistake, clerical or otherwise, again don't be afraid to pick up the phone, with the other party on the line, and call the court. The mistake could be fixed far more quickly than if you file a motion to reconsider. Let me be clear on this one, I am not talking about a ruling against your clients position, I mean an obvious mistake, an example being forgetting to address the marital home or vehicles when they were clearly discussed in the pretrial statements and trial.



#### **PRACTICE TIPS, by the Hon. Bethany G. Hicks**

I am glad to be back on the Family Court assignment. I was the presiding family court judge in 2000-2002. During that time we initiated the settlement conference program in which all family court commissioners managed settlement conferences every Friday. We also asked mental health providers on the court's roster to assume a number of pro bono cases in order to remain on the roster (similar to the arbitration requirement to remain active members of the state bar.) The self-service

center was evolving. We used the Arizona Rules of Civil Procedure. Monthly social events at the University Club were well attended. There was no Northeast Facility. There was no Northwest Facility.

Apart from the obvious, such as being respectful of the court, court staff, opposing counsel and adverse parties, there are a few things that appear to represent recurring problems. Successfully resolving these problems would represent great progress in terms of efficiency and professionalism.

First, counsel for both parties can significantly reduce the time involved in family court proceedings by better cooperation and coordination. Counsel are professionally and ethically obligated to discuss and attempt to resolve issues in good faith. Early and frequent discussions, and the "meet and confer" session, between counsel who act candidly, diligently and reasonably can significantly reduce misunderstandings and conflicts, eliminate unnecessary "emergency" motions and contentious hearings and mitigate the emotions that are invariably a part of family court proceedings. The court will be delighted with the resulting efficiency and your clients will benefit by avoiding unnecessary fees and costs.

Under the same heading of cooperation and coordination, counsel should review proposed exhibits together and stipulate to the admission of as many exhibits as possible. This will reduce the bickering in court and move the proceeding along without avoidable delays. And if a motion is filed at the last minute or even untimely, such as a Motion to Continue Hearing, a Motion to Appear Telephonically, etc, contact opposing counsel to determine his or her position on the matter and then state that position in your motion. .

Second, avoid hyperbole. A pretrial statement should include the facts and nothing but the facts. Do not try to embellish, argue or "play to the audience". For example, a pretrial statement which refers to "Mother's horrific state of mind" does nothing to advance your cause but will likely antagonize the opposing party. A better way of addressing such an issue is "Mother was admitted to Aurora Hospital on May 1, 2013". Motions should be treated similarly. There is no need to be melodramatic when there is no jury. It may even reduce your chances of prevailing since there is a natural tendency to assume that melodrama is precisely that. A judge is perfectly capable of determining the consequences of facts that are described in a pleading.

Third, include a proposed form of order with your motions and, ideally, a self-addressed stamped envelope. Judges and their staffs are being stretched to the limit by constantly increasing responsibilities and constantly reducing budgets. Anything you can do to mitigate that situation is appreciated and also assists in achieving a faster resolution of your matters.

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](mailto:lwilliams@maricopabar.org)

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



## ARTICLES & CONTRIBUTIONS



### Sharing the Wealth: Steve Nash children's affluent needs permit an upward child support deviation

Steve Nash is a legendary basketball player. Known for his passing, dribbling and shooting abilities, the two-time league Most Valuable Player holds a dear place in the hearts of many Arizonans even after being traded last year to Los Angeles. In the mid-to-late 2000s, Nash led the Phoenix Suns to several consecutive playoff appearances, but it was around this time when his marriage of five years ended. But it was just the beginning of litigation that recently concluded in the Arizona Court of Appeals addressing how much child support Nash should pay his ex-wife for their three children.

The *Nash v. Nash* decision answered, among other things, the question of *when is it okay for courts to award greater child support than what the law says it should?*

In most Arizona child support cases, courts determine the amount one parent pays by applying a framework called the Child Support Guidelines (A.R.S. § 25-320). The Guidelines were designed to create a system “consistent with the reasonable needs of children and the ability of parents to pay.” Arizona uses, as do several other states, the Income Shares Model, which is based on two principles: (1) The total child support amount approximates the amount that would have been spent on the children if the parents and children were living together,” and (2) “Each parent contributes his/her

proportionate share of the total child support amount.” (Guidelines, § 1). In addition to sharing combined income, other considerations are added to the mix including, but not limited to: “the cost of the children’s medical, dental and/or vision insurance coverage, if any” also childcare costs “appropriate to the parents’ financial abilities” and “reasonable and necessary” education expenses “when such expenses are incurred by agreement of both parents or ordered by the court.” (Guidelines, § 9(A), (B) (1), (2)).

The Arizona Child Support Guidelines list a monthly maximum income of \$20,000 for both parents, which may pose an arbitrary limit on child support and undermine the children’s actual needs if the parents make more than \$20,000 combined per month. If the children are accustomed to a more affluent lifestyle “a child-support order entered in the dissolution of a marriage of two persons of considerable wealth” should focus on the children’s needs, even if beyond societal norms. (*Nash* decision, pp. 2, 13). To be sure, trial courts possess broad discretion to deviate from the Guidelines when it is appropriate for the best interests of the children. The Court of Appeals knew this when it remanded Steve Nash’s case back to the trial court because it had not addressed all of the children’s needs.

Deviating from the Guidelines is not a typical thing. In order to deviate, a party seeking it “shall bear the burden of proof to establish that a higher amount is in the best interests of the children.” (Guidelines, § 8). This burden compels a parent to show evidence why higher child support is in the children’s best interests. In his case, Steve Nash unsuccessfully argued that his ex-wife failed to prove why the children’s needs were not met by the maximum Guideline child support amount. The Court of Appeals concluded that the trial court erred in failing to “give considerable regard to the reasonable benefits, beyond [the children’s] ‘basic needs,’ accorded to the children during the marriage.” Specifically, the Court of Appeals discussed the children’s past international travel, enjoyment of things normally a part of “affluent” households and the children’s entitlement “to share

reasonably in their parents' economic good fortune.”

The game now goes into overtime for Steve Nash as he re-litigates child support knowing that the court must consider the children's lifestyle factors. Don't go anywhere!

**Michael Clancy**

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## Co-parenting With a Special Needs Child Part 1: The Value of an Assessment and Where To Get One

The incidence of disability and chronic illness is increasing as medical advances prolong and

improve people's lives. One in every twenty-six

American families is raising a child with a disability.

The prevalence of developmental disabilities

increased 17.1% from 1997-2008. <sup>1</sup> Some of these

conditions are easily recognized and the treatments

generally accepted such as, Cerebral Palsy or Down's

Syndrome. Other developmental disabilities such as

Autism and ADHD are more difficult to diagnose, the

cause is unknown and medical professionals do not

have a standard treatment. Families facing these

### Specific Developmental Disabilities in U.S. Children Aged 3-17 Years\*

Disability	Percent Change between 1997-1999 and 2006-2008
Any developmental disability	17.1%^
ADHD	33.0%^
Autism	289.5%^
Blind/unable to see at all	18.2%
Cerebral palsy	-
Moderate to profound hearing loss	-30.9%
Learning disability	5.5%
Intellectual disability	-1.5%
Seizures, past 12 months	9.1%
Stuttered or stammered, past 12 months	3.1%
Other developmental delay	24.7%^

\*Centers for Disease Control and Prevention, National Center for Health Statistics, NHIS, 1997-2008

^Statistically significant trend over four time periods (1997-1999, 2000-2002, 2003-2005 and 2006-2008)

<sup>1</sup> Developmental Disabilities Increasing in US. [http://www.cdc.gov/features/dsdev\\_disabilities](http://www.cdc.gov/features/dsdev_disabilities)

challenges are under more stress and there is a higher potential for conflict. Parents with a special needs child will have more engagement with each other than in a typical case. Sometimes these parents will be parenting together for the life of their child and there is no finish line at age 18. By understanding government benefits and the value of obtaining a comprehensive assessment, the attorney has the opportunity to help their client plan for and navigate the complexities of co-parenting a special needs child.

### **Common government programs for a child with special needs:**

❖ Division of Developmental Disabilities: DDD serves children with a diagnosis of epilepsy, cerebral palsy, cognitive/intellectual disability<sup>2</sup>, autism, or a child who is under age six who is at risk for one of these diagnosis. The child must have substantial functional limitations in three of the seven major life areas.<sup>3</sup> The parent can apply online and DDD is not an income tested program.

❖ Arizona Early Intervention Program: AZEIP provides services to children 0- 36 months of age, who are developmentally delayed or who have an established condition that has a high probability of resulting in a developmental delay.<sup>4</sup> The parent can refer the child online and AZEIP is not an income tested program.<sup>5</sup>

❖ Public Education: Through the Individuals with Disabilities Education Act (IDEA), public schools provide special education services including, special education preschools, psycho-educational evaluations and services through Individualized Education Plans.<sup>6</sup>

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<sup>2</sup> Cognitive/Intellectual Disability was previously referred to as Mental Retardation.

<sup>3</sup> Arizona Department of Economic Security/ Division of Developmental Disabilities, [https://www.azdes.gov/developmental\\_disabilities](https://www.azdes.gov/developmental_disabilities)

<sup>4</sup> Arizona Department of Economic Security/ Arizona Early Intervention Program, <https://www.azdes.gov/main.aspx?menu=98&id=3026>

<sup>5</sup> Arizona Early Intervention Online Referral form. <https://egov.azdes.gov/azeip/AzeipREF/Forms/Categories.aspx>.

<sup>6</sup> Individuals with Disabilities Education Act 20 U.S.C §1400 Et. Seq. For more information visit-<http://idea.ed.gov> and <http://www.wrightslaw.com>.

❖ Arizona Long Term Care System: ALTCS is a Medicaid program providing health insurance to disabled adults and children. Families can receive many services and supports such as respite, rehabilitation, attendant care and many types of rehabilitative therapies.<sup>7</sup> The application is online, if the child is categorically eligible based on their disability this is not an income tested program.<sup>8</sup>

Parents often disagree on the extent of the child's disability and blame the other parent for the child's behaviors. A comprehensive assessment of the child by an objective, qualified professional is critical to providing the parents and the court with a baseline for the child's needs and abilities. Dueling parental perspectives and blaming will not lead to a resolution or a parenting plan that serves the child. An assessment with a private provider that is not covered by insurance can be expensive with an average cost of approximately \$2,500. Currently, many insurance companies do not cover comprehensive assessments related to developmental disabilities so families may need to access government programs. If there are questions about parental ability to meet the child's needs, then an additional evaluation must be done which will not be covered by private health insurance or government programs because it is not medically necessary.

Beginning in 2014, when the Affordable Care Act (ACA) insurance marketplace becomes available, there may be new options for assessments to be covered by health insurance. The preventative care provisions of the ACA require health insurance plans to offer behavioral assessments for children of all ages, developmental screenings for children under the age of three and an autism screening for children ages 18-24 months.<sup>9</sup> While this has the potential to provide some options for families, these screenings and assessments are not clearly defined in the ACA. For more information do not read the 2000+ pages of the ACA, rather, visit the Department of Health and Human Services website that

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<sup>7</sup> ALTCS website, <http://www.azahcccs.gov/applicants/application/ALTCS.aspx>

<sup>8</sup> ALTCS application, <http://www.azahcccs.gov/applicants/application/ALTCS.aspx>

<sup>9</sup> US Department of Health and Human Services. <http://www.hhs.gov/healthcare/rights/index.html>

has an easy to read question and answer format where you can learn more about the preventative care provisions.<sup>10</sup>

Fortunately, there are options to obtain an assessment through government programs. Families are not charged for these assessments or services. Children ages 0-2 can be referred for an assessment by AzEIP. This program is administered by the Arizona Department of Economic Security. If the evaluator finds that the child has a developmental disability, or is at risk, AzEIP provides therapeutic services such as speech, physical or play therapy. For children ages 3-5, the Child Find provisions of the IDEA require school districts to assess children and to provide services through special education preschools at no cost to the parents.<sup>11</sup> These assessments will not address or provide guidance on the child's needs or challenges of sharing two households. However, an objective assessment can provide a foundation for understanding the child's needs and abilities that the parties can use to formulate a functional parenting time plan and legal decision making arrangements that are more likely to be successful.

In the next newsletter part 2 will address formulating parenting plans to meet the unique challenges of co-parenting a special needs child.

*Jennifer L. Kupiszewski, Esq.*

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<sup>10</sup> <https://www.healthcare.gov>

<sup>11</sup> Child Find in Arizona. AZ Find: <http://www.azed.gov/special-education/az-find/>

## 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).



***Calvin B. v. Brittany B.*, No. 1 CA-JV 12-0197 (Ariz. App. Div. 1 filed June 20, 2013)**

The parties divorced in 2008. At the time of the divorce, the parties agreed that Mother would have sole legal and physical custody of the child. Father’s parenting time would occur based upon his availability at Mother’s house or under Mother’s supervision. In July 2009, Father filed a Petition for Modification requesting additional parenting time. Thereafter, Mother filed two Orders of Protection, and ultimately the Petition for Termination of Parental Rights which is at issue in this appeal. Father also filed various pleadings including a Petition for Contempt and to Enforce Parenting Time.

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**Holding:** A party who persistently and substantially restricts interaction between a parent and the child cannot use abandonment as a basis for termination.

**Reasoning:** The Court abused its discretion in terminating Father’s parental rights. Abandonment is not measured by a parent’s subjective intent, but rather by the parent’s conduct. In this case, Father actively sought more involvement with the child than Mother would allow. Father repeatedly asked for parenting time, and Mother unilaterally limited that parenting time, typically only permitting 15-20 minutes of parenting time at a time. In December 2011, prior to the hearing on termination, the Court found Mother in contempt for failing to allow Father parenting time. Nonetheless, in the months leading up to the July 2012 trial, Mother continued to refused to allow Father parenting time, and even refused to allow him to speak to the minor child on the phone and canceled two visits. Father did not abandon the child.



***Carolina H. v. Ariz. Dep’t of Econ. Sec.*, No. 1 CA-JV 13-0010 (Ariz. App. Div. 1 filed August 13, 2013)**

The Arizona Department of Economic Security (“ADES”) upon investigating a report that Mother struck her child filed a dependency petition. The Juvenile Court found that ADES had failed to prove the abuse allegations, but *sua sponte* determined that there was a dependency finding. Mother appeals.

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**Holding:** The court cannot amend a dependency petition *sua sponte*.

**Reasoning:** ADES failed to demonstrate by a preponderance of the evidence that the child was dependent and that the factual allegations in the petition were true. However, instead of dismissing the petition, the Juvenile Court, determined that there was a “substantial disconnect” between Mother and the child that warranted the dependency finding. A “substantial disconnect” was never alleged in the dependency petition (or added by amendment). Although the court has the power to suggest that a party amend the petition, Rule 15 of the Arizona Rules of Civil Procedure does not grant a court the power to amend a pleading *sua sponte* to conform to the evidence presented at trial. As a result, the dependency finding was not appropriate.



**Ariz. Dep't of Econ. Sec. v. Grant, No. 1 CA-SA 13-0147 (Ariz. App. Div. 1 filed August 15, 2013)**

Mother and Father are the parents of two children (“Parents”). The Air Force transferred Father from Japan to Arizona. A month later, the Arizona Department of Economic Security (“ADES”) received a report from military authorities in Japan that the children had allegedly been abused and neglected by the Parents. ADES filed a dependency petition. The Juvenile Court determined that it lacked subject matter jurisdiction because the Petition referred to events that allegedly occurred in Japan. ADES challenges the dismissal pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). The Court of Appeals accepted special action jurisdiction.

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**Holding:** Even though Arizona does not qualify as a “home state” for the minor children, the Juvenile Court has jurisdiction over the children under A.R.S. § 25-1031(A)(2). If there is no home state, and the child and the child’s parents have a significant connection with this state other than mere physical presence, and substantial evidence is available in this state concerning the child’s care, protection, training and personal relationships, the court has jurisdiction.

**Reasoning:** The children have significant connections with the state. The Parents live in Arizona pursuant to Father’s military assignment. The paternal grandfather lives in Maricopa County, and helps to care for the children. Arizona has the military report of the investigation from Japan, as well as the forensic evaluation of the children that was completed as part of ADES investigation. Lastly, there was also a reported allegation of abuse that occurred in Arizona. The Court of Appeals determined that there was nothing in the child welfare statutes that precluded ADES from investigating and taking action to protect children when acts of alleged abuse/neglect occurred outside the state of Arizona.



**Reeck v. Mendoza, No. 1 CA-CV 12-0158 (Ariz. App. Div. 1 filed June 27, 2013)**

Father appeals from the family court’s (“Court”) child support award to Mother. On the same day, the Court entered a separate ruling explaining the basis for child support, awarding Mother her attorneys’ fees, and authorizing her to file a China Doll Affidavit. Prior to Mother filing her China Doll Affidavit, Father filed a notice of appeal disputing the amount of child support. The Court of Appeals examined whether a final award of attorneys’ fees is a prerequisite to appellate jurisdiction.

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**Holding:** A final award of attorneys’ fees is not a prerequisite to appellate jurisdiction over a family court decision that has been decided on the merits.

**Reasoning:** A recent opinion by Division 2 held that a family court decision does not become final for purposes of appeal until the issue of attorneys’ fees is resolved. *See Ghadimi v. Soraya*, 230 Ariz. 621, 623-24 (App. 2012). Division 1 departed from *Ghadimi* in this case. Division 1 noted that the Arizona Rules of Civil Procedure which addresses finality do not have the same counterparts in the Family Rules. As a result,

the *Ghadimi* rule could allow a successful party in a family law matter to stall an appeal simply by failing to submit an application. Additionally, the Court recognized that although a civil case disposes of all the issues by a single judgment, a family law case can remain open for years, dealing with separate issues through independent decrees, orders, and judgments. Nevertheless, these independent decisions are final by nature, and as a result, there is no prejudice in considering an appeal relative to all issues except attorneys' fees.



***Young v. Van Den Acre*, 1CA-CV 12-0600 (Ariz. App. Div. 1, Unpub., filed June 13, 2013)**

Appellant (“Young”) and Margaret Van Den Acre (“Mother”) lived together as friends between 2001 and August 2009. During that time, Mother gave birth to a son (“Child”) in June 2005. There was no dispute that Young is not the biological father of the Child. Between June 2005 and August 2009, Young, Mother, and the child continued to live together. In August 2009, Young went on a trip and became ill. In December 2009, Young returned to Arizona and tried to initiate contact with Mother and the Child. An altercation occurred and Mother subsequently obtained an Order of Protection against Young. In June 2010, Young filed a Petition for custody or, in the alternative, visitation pursuant to A.R.S. § 25-415 (repealed 2013). During the hearing, Mother’s moved for a directed verdict alleging that Young had not proven by clear and convincing evidence that custody of Child should not be awarded to Mother. The trial court granted Mother’s Motion on the custody issue, and further concluded that it is not in the best interests of the Child for the Court to award visitation. Young appeals.

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**Holding:** The Court did not abuse its discretion in denying visitation to Young.

**Reasoning:** Pursuant to A.R.S. § 25-415(C), the court can grant a person who is not the biological parent of a child reasonable parenting time upon a finding that such parenting time is in the best interests of the child. At the time of the hearing, almost three years had passed since Young had any contact with the Child. The Court found that this was a relevant factor in determining the Child’s best interest. Further, Mother testified that the Child does not ask about Young, and she did not believe that the Child remembered him. The Child was doing well in school and other activities. The Court found that the Order of Protection demonstrated a significant fracture in the relationship, and a history of domestic violence existed, therefore Young was not awarded parenting time.

