



FAMILY LAW SECTION NEWSLETTER

JANUARY 2015

*In this edition: **Bridging the Gap Award**
Recipient: Judge Suzanne Cohen.*

EDITOR'S COMMENTS

Happy New Year! If you have any tips that you think might help other family law practitioners, please send us a short email with your suggestions.

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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,

Hi everyone! I am the Chair of the of the MCBA Family Law Section for 2015. I am looking forward to a busy year with the MCBA family law section. First, a bit about myself. I was born and raised in Nebraska. I am a 2004 graduate of the Creighton University School of Law. I visited Arizona shortly after graduating from law school and quickly realized that I much prefer warm weather over ice & snow (though admittedly I do miss snow days). I moved to Arizona in 2006, took the AZ bar exam and never looked back. I am a partner at Padish & Wells, PLLC in Scottsdale, where I practice exclusively in the area of family law. I live in Scottsdale with my husband, my twin daughters, and my very overweight Welsh Corgi.

The family law board has been working really hard to plan exciting and informative events for our section. Our very popular trial advocacy CLE will be held on May 15, 2015. This year the CLE will focus on the issue of relocation of minor children. This CLE fills up quickly so make sure to keep a look out for the registration materials. Other topics for CLEs planned so far include parenting plans, military issues, ethical issues when dealing with pro pers and what judicial assistants hate, just to name a few.

In addition to the numerous CLEs we have planned, we also have several opportunities throughout the year for members of the family law section to get to know the judges, including our annual judicial reception held in December.

I am looking forward to a busy year. If there is anything I can do to improve the family law section, I am always open to suggestions.

Very Truly Yours,

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ANNOUNCEMENTS



Board member and past chair, Nicole Siqueiros-Stoutner, has accepted a position as an adjunct professor at Arizona Summit School of Law teaching family law. She will also continue her work as an attorney at Hallier & Lawrence.

Maricopa County Superior Court new judges:

1. **Jennifer Green** is a former AUSA and prosecutor at the Maricopa County Attorney's Office, MCBA President, YLD President and Maricopa County Justice Museum and Learning center Board member. **She will be assuming Judge Emmet Ronan's calendar.**
2. **Geoff Fish** is a former criminal defense attorney and is currently a MCBA Board member. **He will be assuming Judge Coury's calendar.**
3. **Frank Moskowitz** is the President of the Maricopa County Bar Foundation. **He will be assigned an FC and probate calendar at NE.**
4. **Jennifer Ryan-Touhill** has been a partner at Touhill Law Offices since 2002, practicing juvenile law and family law. She previously served as Assistant Attorney General for the Arizona Attorney General's Office (1998-2002), and has experience as a judge pro tem as well as a court-appointed best interest attorney, guardian ad litem and parenting coordinator. **She will be assuming Judge Kristen Hoffman's assignment.**

Temporary coverage until the new judges take the bench:

Hon. Steven Sheldon (Ret.) will be covering Judge Christopher Coury's calendar until Judge Fish assumes on 1/26/15.

Hon. Ruth Hilliard (Ret.) and Hon. Stephen Kupiszewski (Ret.) will be covering Kristin Hoffman's calendar until Judge Ryan-Touhill assumes on 2/9/15.

Commissioner Carolyn Passamonte is covering Hon. Benjamin Norris' calendar temporarily.

Comm Shellie Smith is covering Hon. Emmet Ronan's (Ret.) calendar temporarily.



The Honorable Paul McMurdie will be the new Presiding Family Court Judge starting the end of March.



Judge Barton is moving into Central Court Building (CCB) courtroom 703 and will stay there until Judge Paul McMurdie assumes the family court presiding Judge assignment and occupies that courtroom. Judge Barton will be moving to the 5th floor at the Old Court House (OCH).

Accountability Court (for family law obligors not paying their child support) will move from OCH 301 to CCB 703 starting January 13th.

Judges Dan Martin and Cari Harrison, from Durango Juvenile, will be moving to the 3rd floor, OCH. They will have newly created juvenile calendars downtown. Judge Harrison is on medical leave.



The Judge Pro Tempore recruitment is underway, the application period began on January 2 and will run through January 30, 2015. If you know of anyone who might be interested in serving as a Judge Pro Tempore for the FY 2016 (July 1, 2015 – June 30, 2016), please encourage them to log into the website at <http://www.superiorcourt.maricopa.gov/JudgeProTempore/application/index.asp> to complete the application.

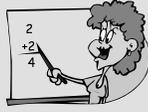
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MCBA FAMILY LAW CLE



Family Court Vs. Probate Court:
Guardianship Issues Between the Courts
January 29, 2015
11:30 am to 1:30 pm at the MCBA:
303 East Palm Lane, Phoenix 85004

Presenters: Commissioner Kerstin LeMaire Probate Bench
Judge Jay Polk Family Bench
Moderator Jennifer Kupiszewski of Kile & Kupiszewski Law Firm

The judicial officers will present on the procedures for navigating between the two courts, common issues that arise when the disabled child is turning 18 and how to plan for them and options for families moving between the two systems. Practice tips from both sides of the bench and both areas of law plus frequently asked questions.

The moderator will provide practical materials for use in your practice. Materials will include minor guardianship templates, sample parenting plan language, and handouts outlining the guardianship process for minors and adults.

Bring your lunch!



Family Law Technology Seminar
Make the Pursuit of Digital Data Work For You and Not Against You

February 10, 2015
1:00 pm to 4:00 pm at the MCBA:
303 East Palm Lane, Phoenix 85004

Craig Reinmuth, CPA, Expert Insights, P.C. will be speaking about gathering and preserving digital evidence and the role a Computer Forensic Expert can play in a family law case

Dan Strange, Maricopa County Attorney's Office will be addressing illegal data access, spyware and criminal prosecutions



Family Law 101/201 series

March 6, 13, 20, and 27 from 11:30 a.m. to 1 p.m. at the MCBA:
303 East Palm Lane, Phoenix 85004

Topics: Estate planning, Bankruptcy, Taxes and Parenting Across Borders



News from the clerk of the Maricopa County Superior Court



Vol. 10, No. 12

December 2014

eFiling Guidelines Updates

With the Supreme Court's issuance of Administrative Order 2014-99, the Clerk's Office has updated the eFiling Guidelines Online. The Guidelines apply to documents electronically filed through both the Clerk's eFiling Online website (criminal and family court cases) and through AZTurboCourt (civil and TX-type tax cases).

Some updates and reminders from the guidelines:

- Documents must have a file size of 10MB or smaller;
- Documents cannot be password protected;
- Documents should be filed in PDF format or with word processing software that produces a .doc or .docx format;
- All proposed orders must be filed in .doc or .docx format;
- Exhibits for the court's consideration in issuing an order must be submitted with a Motion, Notice, or Stipulation to be included in the official case file. Exhibits lodged with a proposed order do not get filed-in.

View the eFiling Guidelines online at <https://efiling.clerkofcourt.maricopa.gov/efilingguidelines/>.

Court Rule Changes and Legislation

January 1 is the effective date for many new court rules and amendments. Family Law Procedure Rule 12 has a provision for sealing records. Note that requests to seal a document or case should be presented directly to the assigned judicial officer. Documents that contain the information sought to be protected from the public could be viewed by the public pending the court's decision if filed first with the Clerk. Documents sealed by court order require another court order authorizing later access.

Following an Arizona Supreme Court decision, the criminal procedure rules were updated to clarify that the pronouncement of sentence in open court is the date of entry of the judgment, regardless of when the clerk files-in related documents. In most case types, the date of entry is the date of filing with the clerk, unless an exception applies.

When drafting pleadings and orders and when stating appearances in court, note that the legislature changed the names of several processes and agencies. For example, Child Protective Services (CPS) is now the Department of Child Safety and case workers and case managers were renamed child safety workers and investigators, respectively. Custody was renamed legal decision making. Visitation remains the proper term for time spent with children by non-parents like grandparents, but visitation was renamed parenting time for parents.



LAW PRACTICE TIPS



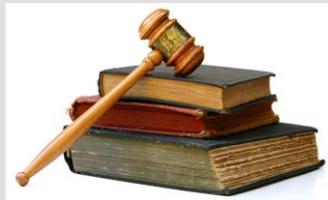
1. Arizona's new minimum wage increased to \$8.05 effective January 1, 2015.
2. Effective January 1, 2015, Rule 111, Arizona Supreme Court Rules, will allow the citation of memorandum cases for persuasive value, but only if it was issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to a depublished opinion or a depublished portion of an opinion.

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



LEAVE IT TO THE GAYS TO MAKE PRENUPS FUN AGAIN! **Claudia D Work**

On October 17, 2014, same-sex couples in Arizona suddenly found themselves with the legal right to marry each other. Some never thought they would be able to marry in their lifetimes. Others who had married in other countries or states that were not recognized in Arizona and, therefore, had little impact on their daily lives, learned that as of October 17, their marriages were "real" now, to their great joy or horror. Later that day, after the champagne bubbles went flat, family law attorneys experienced an uptick in telephone calls from clients wanting to know exactly what this means, and what is this prenup thing they've heard so much about?

For all of their political controversy, same-sex marriages and divorces in Arizona will not look a whole lot different from opposite-sex marriages. Particularly from the perspective of lawyers, with a few exceptions. One area where differences may pop up is with respect to prenuptial agreements. While Arizona lawyers are accustomed to preparing prenups and ensuring compliance with Arizona's version of the Uniform Premarital Agreement Act, a few differences cannot be ignored

when preparing prenuptial agreements for same-sex couples. Their circumstances should lead to a much-needed refreshing of our prenup templates.



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Email Etiquette for Clients
By: Launi Jones-Sheldon

When I speak to my clients, one of the first things I tell them about e-mails is that it is highly likely a judge will be reading their e-mails. If they are good, I'm going to show them to the judge; if they are bad, the other side will show them to the judge. Either way, the judge will likely read them and it will be important for them to communicate appropriately or they could sabotage their case.

Here are some basic rules to follow:

- Do not ever threaten the opposing party – ever! If there is a threat in writing, it very likely will lead to an Order of Protection. An Order of Protection can often interfere with parenting time.
- Be brief. State only what is absolutely necessary. Do not lecture or point fingers. Simply state the facts.
- Do not use all caps or bold. It looks like yelling. I recently heard about a case where a judge admonished an attorney for using bold. The attorney was not attempting to be rude or argumentative, he was simply trying to catch the reader's attention. It backfired. Do not do it.

- Only one topic per e-mail. If you want to assure a response, make sure the other party need only address one issue. Sometimes when two or more issues are contained in the same e-mail, an issue will be overlooked and not responded to – either accidentally or on purpose.
- Do not mix financial issues with parenting time issues. Courts keep these issues separate for a reason. You do not want your client to look as though they are blocking parenting time because they are angry the other parent has not paid child support or medical bills.
- Do not name call
- Do not bring up a new significant other unless absolutely necessary. One party often moves on before the other party. Bringing up the new significant other can cause hurt feelings. While your client may not care that the other person’s feelings are hurt, they need to understand that hurt feelings cause people to act and react differently. If your client wants a peaceful existence with the other person – they should leave references to their new significant other out of their communication.
- No step-parent or significant other communication with the ex-spouse. Step-parents and significant others are largely responsible for parties getting along worse than they need to or really even want to.
- Do not rant or bully. Do not bring up the past. Keep the emails brief, under 100 words if possible.
- Attorneys, clarify the ground rules with your client regarding negotiations with the other party, and who may engage in them - - only counsel or counsel and/or the client. Although settlement negotiations are not admissible for most purposes, they are admissible in court for attorney fees. If your client is acting in bad faith in regard to settlement negotiations, they may be ordered to pay attorney fees and e-mails are regularly used for this purpose. Make sure to set guidelines on those negotiations and make sure you are copied on the e-mails.

As an attorney and Parenting Coordinator, I have not only witnessed people sabotaging their cases and their co-parenting relationships with inappropriate e-mail communications, but also

watched them spend thousands of dollars doing it. This behavior motivated me to develop ProperComm, a web-based company that edits emails between co-parents. ProperComm trains parties to be brief and appropriate in emails.

Judges in Maricopa County are regularly ordering parties to communicate through an e-mail and text message filtering company. Currently ProperComm is the only such company. Attorneys advise their clients to communicate through ProperComm to stop the sabotaging of their case. They also request the parties communicate through ProperComm to stop harassment and abuse, especially of domestic violence victims.

Courts regularly require parties to communicate via e-mail and those emails are very likely to be seen in court. If the parties follow the above guidelines their e-mails will benefit them in Court and they won't be ordered to use an e-mail filtering service, such as ProperComm.

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JUDICIAL REVIEW: WORKING, NEEDS REFORM OR SCRAP IT?

Like the viral You Tube video, Spider Dog, everybody's seen it; Judge Norris was voted out. *See Spider Dog Link below.* It's the first time in 36 years. Some felt vindicated, others relieved but most probably just shrugged their shoulders with indifference. Does this mean that the judicial review system works, that it's failed or that no conclusion can be drawn?

In 1992 voters created a process for evaluating judicial performance. The Judicial Performance Review (JPR) Commission is composed of attorneys, the public and judges sets standards for performance. They rely on surveys from attorneys, witnesses, court staff and litigants.



and it

Judges either "Meet" or "Do Not Meet" the standards and the Commission's decision is published in the Secretary of State's Election Pamphlet.

During the 2014 election the JPR Commission recommended that three judges not be retained, Judges Benjamin Norris, Gerald Porter and Catherine Woods. Only Judge Norris was voted out of office. From the Commission Judge Porter received 11 no votes, Judge Norris 25 no votes and Judge Woods 22 no votes. Judges are rated on communication, legal ability, integrity, temperament, administrative performance, administrative skills and settlement activities.

It sounds like a comprehensive assessment of skill and ability. Unfortunately, the number of returned surveys are terribly low. For Judge Norris there were 491 surveys distributed but only 77 returned. For Judge Porter 557 were distributed and 93 returned. Both Judges were presiding over high volume family court calendars during this JPR. Given the thousands of litigants and attorneys appearing before these judges, the recommendation is based upon a surprisingly small sample. Another concern is that the JPR scores are averaged such that a judicial officer who receives all average scores may score better than one who received all above average scores and one below average score.

Judges have such a profound impact on the lives of litigants that accountability for judicial performance is critical to the integrity of our legal system. They serve the public during the most important and challenging moments in their lives. Potential reforms include term limits and requiring judges to go through the selection process again or changing the standards to capture information more relevant to voters. Ultimately, it appears that the voters' decision not to retain Judge Norris is not proof that the JPR system is working. The other two judges were retained. Rather it highlight it limits of the JPR and that there isn't enough information.



To see JPR Reports: <http://www.azcourts.gov/jpr>

Article on Judicial Retention: <http://azpolicypages.com/judicial-reform/judicial-retention-selection-in-arizona/>

Link to Spider Dog: <https://www.youtube.com/watch?v=YoB8t0B4jx4>





Bridging the Gap Award Recipient: Judge Suzanne Cohen

By Nicole Siqueiros-Stoutner, Hallier & Lawrence, PLC

The “Bridging the Gap” award is presented to a judge on the family law assignment each year at the judicial reception. The winner is selected by the MCBA Family Law section and the award is intended to recognize the judge who has gone above and beyond to connect with the bar, both in and out of the courtroom. Typically the judge has participated in CLEs, attended functions and events, engaged attorneys, and is making positive steps to “bridge the gap” between the judiciary and family law attorneys. The MCBA family law section wishes to recognize this judge as we believe it is in the best interests of the litigants when the bench and the bar have a productive working relationship.

This year’s recipient and the first winner of the award is Judge Suzanne Cohen. Judge Cohen has been on the family law bench since 2013. Prior to that, she was a Deputy County Attorney at the Maricopa County Attorney’s Office. She has been actively involved with the family law section since starting the assignment and her efforts to “bridge the gap” have not gone unnoticed. She agreed to answer a few questions for the Newsletter about her background, judicial philosophy and her opinions on the family court and family law attorneys.

You told me you always wanted to be a judge. Why did you always want to be a judge?

The justice system is an integral party of our society. I loved being a prosecutor and helping people, I found it incredibly rewarding. I wanted to become a judge to widen my horizons as a civil servant. I enjoy listening to both sides of an argument and figuring out the legal parameters and what the correct outcome should be.

In the last year, what are the activities/CLEs/events that you have found most beneficial to you present assignment?

CLE by the Sea and AFCC was great because it was social as well as instructional. The training put on by the court is also very good. We have gotten some family law lawyers involved in some of the training and I think we need to do more of this.

What kinds of educational programs do you think judges on the family law assignment would benefit from?

We get a lot of training about the best interest of children, I think we would benefit from more training on what I will call the money stuff- business valuations, real estate, retirement plans etc.

What do you like about the family court assignment?

I like the people. Most of the people who come to court are usually going through a pretty emotional time. Everyone has a little different story. It’s real life. I get frustrated like everyone else, I am sure, but most days I go home feeling like I have helped someone. And on the days I don’t feel that way; I usually have some pretty good stories.

What do you see as positive attributes in the family law bar?

Most of the lawyers I have encountered get a long fairly well with each other. It seems to be a pretty cohesive group of folks. There is also a lot of CLE available which is good for the newer lawyers.

What can lawyers do to help you in your process?

Clear, concise pretrial statements can be really beneficial. Tell me what your client wants up front, and then tell me why he/she is entitled to it. I have never had a client. So I have never had to argue a position I did not personally support. I struggle when an attorney, whom I admire, argues for things completely unreasonable. I have to wonder “do they really think this is fair?” I am not sure the fix for this, but maybe if folks remember my background they will understand where I am coming from.

How can lawyers who practice in family court improve?

I think because of my trial background I am acutely aware of trial practice. Many lawyers are not comfortable admitting evidence, laying foundation or objecting properly. Interestingly, some who invoke rule 2 (there are not many that do) don’t know the rules of evidence and it gets used against them. Maybe expanding the MCBA Trial Advocacy CLE presentation and actually have the lawyers do mini-trials would help (what did I just agree to ha ha).

What are your pet peeves in the courtroom or in pleadings?

See above. And not having evidence such as Kelly blue book values, at least Zillow estimates for houses, credit card statements and the like so I can actually figure out the value of property and do a competent equalization order.

Who has been your mentor?

Judges Bruce Cohen and David Gass

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NEW ARIZONA CASES



Abbreviations (that might be) 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.



Basic Information

Case/Cite Tina T. v. Dept. of Child Safety, B.H.; Arizona Court of Appeals, Division 1. Filed: 12/11/2014. Case no: 1-CA-CV 14-0092

Procedural History

Appeal from Cause No: JD22619,JS17302, heard by the Honorable Bradley Astrowsky

Appellant appealed T/Ct's finding that the Department of Child Safety (DCS) presented evidence demonstrating a factual basis for the allegations to support termination of parental rights.

Case Summary

Facts: Mother and Father were biological parents of a child BH born in 2012. Mother however had two older children, born in 2002 and 2007 (typo?). In 2003, 911 responded to a call to Mother's apartment that her first child was not breathing. That child later died from shaken baby syndrome. The Mother's boyfriend at the time admitted to shaking the child. Mother claimed she was in the other room disciplining her second child (note the possible typo due to incorrect date of birth). Mother pled guilty to a class 3 attempted child abuse felony in relation to the death. One term of probation was that she would not have contact with any minor children. Upon release from prison, the term was modified to allow supervised contact with the second child. Mother was again charged with child abuse of the second child after a witness saw her punching him in the face at a store. Mother went to prison and was ordered not to have

any contact with children.

Later and after her release, Mother gave birth to the third child. DCS removed and eventually sought to sever both parents' rights (as Father of this child failed to keep Mother away from the child, in spite of DCS' safety plan instructions). Mother initially contested the severance; an adjudication hearing was set; and upon arrival for trial, Mother waived her right to a contested hearing and left the courtroom. DCS presented testimony from the supervisor regarding the prior offenses and history of abuse and argued that because Mother had previously been given services and repeated the abuse that she posed a threat to any child in her care.

In pertinent part, "[w]hen accepting a parent's 'admission or plea of no contest[.],' the court must proceed as follows: ... determine whether a factual basis exists to support the termination of parental rights." The Court found that Mother cannot challenge the sufficiency of the evidence as though a trial had been held. "Construing Rule 66(D)(1) to permit Mother to assert a broad attack on the sufficiency of the evidence would be contrary to her voluntary decision to enter a plea of no contest and would inject uncertainty and delay in the proceedings at a point when timely resolution of the matter is critical for the benefit of the child."

The juvenile court turned to criminal caselaw to address the sufficiency question as it relates to finding a factual basis to a no contest plea and that simply put, the appellate court must simply discern whether "the juvenile court record includes evidence that, if believed, would establish the statutory grounds for termination of Mother's parental rights." A/Ct found that the T/Ct met its burden of proving Mother had willfully abused her children and there was a constitutional nexus between the prior abuse and child BH.

Basic Information

<i>Case/Cite</i>	Roth v. Meek, 1 CA-CV 13-0624
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Procedural History

Post decree case involving a modification of C/S. M filed modification request in July 2012. Hearing held in July 2013, during which parties were not permitted to testify, but exhibits regarding parties' financial circumstances were admitted into evidence. The parties shared equal parenting time and as a result, T/CT refused to consider F's childcare expenses. Issues on appeal: (1) whether F's childcare expenses should have been included, (2) whether F's varying income levels should have been considered for support purposes, (3) the T/CT not retroactively modifying support, and (4) whether health insurance costs were improperly calculated.

Ruling

C/A vacated and remanded case to T/CT in an unpublished decision. Ordered that childcare costs can be included in C/S even with an equal parenting time arrangement. With regard to the remaining issues on appeal, the C/A found that the evidentiary hearing to be inadequate given that the parties did not testify and therefore further evidence regarding F's income was needed. Further, the T/CT did not provide sufficient explanation for deviating from the statutory presumptive effective date of the modification. Although the parties apparently agreed on the health insurance amount, the T/CT used a different number. Finally, the C/A noted the ruling was inconsistent, in one section stating that arrearages were not addressed but then entering an arrearage amount owed in the same order.

Basic Information

*Paul
Anthony
Schlueter*

*Theresa Rose
Haskell*

Case/Cite

No. 1 CA-CV 13-0565 (Memorandum Decision)

Procedural History

M appeals from T/C's order decreasing F's child support obligation.

Ruling

Reversed and remanded.

At the time of entry of the Decree, the parties agreed to an upward deviation from the Child Support Guidelines. The record does not reflect how or why the deviation amount was selected. Three years following entry of the Decree, F filed for a modification of child support because F was no longer willing to pay the deviated amount and because application of the Guidelines to the parties' current financial situation would result in a reduced support amount, even though F's income had increased, M's income had decreased and the child care and health insurance expenses had both decreased. M asserted that because F previously agreed to the deviation, he had to show why he should be relieved of that obligation.

The T/C granted a modification and applied the Guidelines without deviation based upon the parties' current financial circumstances. This resulted in a decrease in Father's child support obligation. The T/C based its ruling on the fact that (1) application of the Guidelines resulted in an order that varied at least 15% from the previous order, (2) F satisfied his spousal maintenance obligation, and (3) F no longer agreed to the upward deviation. M appealed.

M argued that no possible modification could be triggered if all changed circumstances establish that F is better able to pay the original amount of support. The C/A disagreed. A paying parent's ability to pay support is only one factor a court considers to determine the amount of support. A 15% variation is evidence of substantial and continuing circumstances but does not mean that a 15% change is sufficient by itself in all cases to trigger a modification. The T/C retains discretion to determine from all circumstances whether there are substantial and continuing changed circumstances to justify a modification.

Given the unique circumstances of this case, the C/A held that the T/C should have inquired further into whether the amount based on the Guidelines was just and appropriate. The C/A reversed the family court's modified child support order, and remanded so the court may consider evidence of the child's best interests to determine whether a modification is warranted by all the circumstances, and if it is, whether a deviation from the Guidelines is appropriate.

Based on the relative financial resources of the parties, M is awarded attorneys' fees and costs.

Basic Information

Case/Cite *Helland v. Helland*, 236 Ariz. 197, 337 P.3d 562 (App. 2014)

Procedural History

Following judgment in dissolution action heard before the Honorable Robert Van Wyck in Navajo County, W appealed whether benefits received from a disability insurance policy after termination of the marriage were H's sole and separate property and whether she failed to prove a claim of waste. H appealed the trial court's decision to award spousal maintenance, as well as the amount and duration of spousal maintenance.

Case Summary

Facts: H and W were married in 1989. H was an anesthesiologist until 2000, when a disability left him unable to perform that occupation. H began receiving benefits from a disability insurance policy purchased in 1995 during marriage (which paid him approximately \$15,000 per month at the time of trial), despite his continued practice and ability to earn income in another field of medicine. Following disability, H and W established and operated a medical clinic. W filed a dissolution action in 2010. In 2011, H's medical license was revoked due to criminal activities. Before the license was revoked, the medical practice was sold for \$750,000.

Following trial on division of community property and spousal maintenance, the Court ruled that the income from the disability insurance policy became H's sole and separate property when the community terminated. The Court rejected W's argument that H's criminal activities constituted waste that destroyed part of the value of the medical practice. The Court awarded W spousal maintenance in the sum of \$5,000 per month for 7 years.

W argued that the trial court erred in concluding the benefits received from the disability insurance policy after termination of marriage were H's sole and separate property and that the trial court abused its discretion by ruling she failed to prove community waste. H challenged spousal maintenance.

The Court of Appeals noted that the primary purpose of the disability policy is to insure against the risk of loss of the insured's future earning capacity. The Court of Appeals reasoned that a disabled spouse's reduced earning capacity results in a loss to the community only while the marital community exists and noted that Arizona law establishes that any portion of disability proceeds that represents compensation for post-dissolution earnings of the injured spouse is the separate property of that spouse. Recognizing that property acquired during marriage is community property, the Court of Appeals distinguished a disability policy from an annuity policy because there is no expected rate of return and because disability benefits are only paid if the insured is actually disabled. The Court of Appeals affirmed the trial court's ruling that the disability benefits received after the service of the petition were H's sole and separate property.

On appeal, W failed to discuss whether criminal activity could be considered waste, and the Court of Appeals did not address that issue. The Court of Appeals evaluated the evidence presented about waste and found no abuse of discretion that W did not meet her burden to show H's criminal acts decreased the value of the medical practice. Nor did the Court of Appeals find abuse of discretion with respect to H's challenge to spousal maintenance.

Basic Information

*Paul
Anthony
Schlueter*

*Theresa Rose
Haskell*

Case/Cite

No. 1 CA-CV 13-0565 (Memorandum Decision)

Procedural History

M appeals from T/C's order decreasing F's child support obligation.

Ruling

Reversed and remanded.

At the time of entry of the Decree, the parties agreed to an upward deviation from the Child Support Guidelines. The record does not reflect how or why the deviation amount was selected. Three years following entry of the Decree, F filed for a modification of child support because F was no longer willing to pay the deviated amount and because application of the Guidelines to the parties' current financial situation would result in a reduced support amount, even though F's income had increased, M's income had decreased and the child care and health insurance expenses had both decreased. M asserted that because F previously agreed to the deviation, he had to show why he should be relieved of that obligation.

The T/C granted a modification and applied the Guidelines without deviation based upon the parties' current financial circumstances. This resulted in a decrease in Father's child support obligation. The T/C based its ruling on the fact that (1) application of the Guidelines resulted in an order that varied at least 15% from the previous order, (2) F satisfied his spousal maintenance obligation, and (3) F no longer agreed to the upward deviation. M appealed.

M argued that no possible modification could be triggered if all changed circumstances establish that F is better able to pay the original amount of support. The C/A disagreed. A paying parent's ability to pay support is only one factor a court considers to determine the amount of support. A 15% variation is evidence of substantial and continuing circumstances but does not mean that a 15% change is sufficient by itself in all cases to trigger a modification. The T/C retains discretion to determine from all circumstances whether there are substantial and continuing changed circumstances to justify a modification.

Given the unique circumstances of this case, the C/A held that the T/C should have inquired further into whether the amount based on the Guidelines was just and appropriate. The C/A reversed the family court's modified child support order, and remanded so the court may consider evidence of the child's best interests to determine whether a modification is warranted by all the circumstances, and if it is, whether a deviation from the Guidelines is appropriate.

Based on the relative financial resources of the parties, M is awarded attorneys' fees and costs.