MARICOPA COUNTY SUPERIOR COURT
FAMILY LAW DEPARTMENT

Family Law Appellate Case Law Summary

June 7, 2004 To September 20, 2006

I. Family Law Procedure

A. Service By Publication—Personal Jurisdiction. "We hold that a plaintiff pursuing a money judgment against a defendant whose residence is unknown but whose last known residence was within the state, or who has avoided service, can be served by publication in accordance with the requirements of Rule 4.1(n) of the Arizona Rules of Civil Procedure. *Master Financial, Inc. v. Woodburn*, 427 Ariz. Adv. Rep. 36, 208 Ariz. 70, 90 P.3d 1236 (CA 1, 6/7/04) (Publication is sufficient "when a plaintiff has exercised due diligence to personally serve a resident defendant at a last known address within the state and has complied with the publication procedures of Rule 4.1(n).")

B. Post-Decree Bankruptcy Basis To Set Aside Decree Per ARCP 60(c)(6). Husband's filing of a Chapter 7 Bankruptcy approximately 2 months after the entry of the parties Decree of Dissolution resulting in Wife being obligated to pay all community debt and remaining liable for property equalization payments to Husband, created "such a substantial injustice that it overrides the commitment to finality of judgments and on the facts of this case calls for relief under Rule 60(c)(6)." On remand the trial court should determine: 1) Whether to affirm an award of attorney's fees and clarify whether it is in the nature of nondischargeable maintenance or support rather than part of a property division; 2) Whether the bankruptcy discharge resulting in the doubling of Wife's ultimate liability on community debts requires an award of spousal maintenance to Wife; 3) Whether the discharged creditors have reached any agreements with Wife to limit the Wife's obligation on the debts; 4) Whether to reallocate property, debts or equalization payments; and 5) Whether the original allocations were in the nature of spousal maintenance or child support rather than a simple division of property and debt. *Birt v. Birt*, 208 Ariz. 546, 96 P.3d 544 (CA1, 8/12/04) ("We do not imply or hold that a later bankruptcy by a party to a divorce requires or necessarily supports Rule 60(c)(6) relief. Each case must be determined on its own facts.")

C. Closing Argument Can Be Limited. "There is no constitutional or statutory provision that guarantees parties in a civil bench trial the right to present closing argument." *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).

D. Notice of Change of Judge After Appeal. When a case is remanded from an appellate court for "further proceedings" that are substantially "a continuation of the proceedings already held rather than a de novo redetermination of the remanded issues", Father was not entitled to a change of judge as a matter of right pursuant to Rule(f)(1)(E), *Arizona Rules of Civil Procedure*. *Anderson v. Contes*, 471 Ariz. Adv. Rep. 24, 212 Ariz. 122, 128 P.3d 239 (CA1, 2/14/06) ("Absent a remand for a new trial, a party is not entitled to a judge who is ignorant of previous proceedings and may be more sympathetic to his position.")

E. Pro Tempore Part-time Judge Limitations. Rule 81, *Arizona Rules of Supreme Court*, allows a pro temp judge to serve "once or only sporadically" in a family court division and still appear as a lawyer in the division. If the pro temp serves "repeatedly on a continuing scheduled basis", however, the lawyer cannot appear in the division during the time of

that service. In this case an attorney for a family court litigant served as a pro temp 9 times in the 8 months prior to trial but not at regular intervals. His service was not "sporadic" because it was not "both irregular and infrequent". Neither was this service "repeatedly on a continuing scheduled basis" because he was not "on call" as a pro temp and there was no regular pattern to his service. Under these circumstances the attorney's appearance at the subsequent trial in the division was neither explicitly authorized nor explicitly prohibited by Rule 81, but the trial judge's impartiality might reasonably be questioned and should be disqualified. Because of the risk of injustice to the parties, the case was remanded with directions for the trial court to exercise independent judgment in reconsidering several disputed issues. *Kay S. v. Mark S.*, 486 Ariz. Adv. Rep. 25, ___ Ariz. ___, ___ P.3d ___ (CA1, 9/7/06).

II. Marriage

A. Valid Out-of State Marriage Not Void If Also Valid When Parties Residents of Arizona. The 1984 marriage of first cousins validly performed in the state of Virginia was not void in Arizona under A.R.S. §25-101, where the parties moved to Arizona in 1989 before the 1996 amendment to A.R.S. §25-112 declaring the marriage void. A statutory amendment cannot retroactively disturb the **vested substantial right** of marriage. *Cook v. Cook*, 444 Ariz. Adv. Rep. 23, 209 Ariz. 487, 104 P.3d 857 (CA1, 1/13/05). ("Accordingly, in the context of a claim of a 'void' marriage under A.R.S. §25-112(A), we hold that one's right to have an out-of-state marriage deemed valid in the state of Arizona vests upon the following conditions: (1) the marriage was valid in the state where contracted; (2) the parties to the marriage were residents of Arizona prior to the enactment of the amendment to §25-112(A) on July 20, 1996; and (3) that during this period of residency in Arizona their marriage was validly recognized under the statutory scheme then in place in Arizona.")

III. Custody / Parenting Time

A. In Loco Parentis Step-mother Can Be Awarded Visitation Rights With Custodial Mother. A.R.S. §25-415(C) authorizes the court to award reasonable in loco parentis visitation rights to a widowed step-mother "when the stepchild enjoyed good relationships with both legal parents before the father's death and the child is currently parented by his legal mother." *Riepe v. Riepe*, 429 Ariz. Adv. Rep. 30, 208 Ariz. 90, 91 P.3d 312 (CA 1, 6/29/04) (In loco parentis relationship must be present per A.R.S. §25-415(G)(1), the visitation must be in the child's best interests, and the remaining factors of A.R.S. §25-415(C) must be satisfied).

B. Court Is Not Divested Of Jurisdiction Of Grandparent Visitation Issue If Unwed Parents Marry. Because the trial court had jurisdiction over a grandparent visitation action filed with respect to a child born out of wedlock when the parents were not married, it did not lose jurisdiction when the parents subsequently married. When the petition was filed the court had jurisdiction under A.R.S. §25-409(A)(3) and the marriage did not divest the court of jurisdiction (statutory authority) to proceed because: 1) the legislature must explicitly and clearly declare its intent to create divestiture and it did not do so; 2) "'jurisdiction is established at the time of filing of the lawsuit and cannot be ousted by subsequent actions or events' . . . even if those subsequent events would have prevented jurisdiction from attaching in the first place; and 3) public policy "favors retention of jurisdiction rather than divestiture." *Fry v. Garcia*, 213 Ariz. 70, 138 P.3d 1197 (CA1, 7/3/06).

IV. Child Support

A. Administrative Remedies Expire With Statute of Limitations. As a matter of statutory construction, the Arizona Department of Economic Security is **not** entitled to pursue administrative measures provided by statute to collect unpaid child support if ADES fails to request a formal written judgment of arrearages within three years after the emancipation of all of the children as provided in A.R.S. §25-503(H) & (I). *Department of Economic Security v. Hayden*, 455 Ariz. Adv. Rep. 30, 210 Ariz. 522, 115 P.3d 116 (2005) *vacating* Court of Appeals Opinion, Division One, 208 Ariz. 164, 91 P.3d 1007 (CA1, 6/8/04) (Holding that if unpaid child support judgments have not been reduced to a written judgment within three years of the emancipation of the child in question, the statute of limitations set forth in A.R.S. §25-503(I) may prohibit the collection of a *judgment* through the courts, but the State can still pursue statutory administrative remedies to collect the *debt* until the debt is paid.)

B. No Credit For Prior Arrearage or Future Credit For Social Security Disability Benefits. During the period of Father's disability when the child was entitled to receive Social Security Disability Benefits, the court should apply all payments received against Father's child support obligation for the period. He must pay any arrearage for the period, but Father "is not entitled to a credit against arrearage accumulated prior to disability" if the payments exceed the amount due. Nor is he entitled "to any refund for any alleged overpayment" pursuant to Section 25 of the Guidelines. *Clay v. Clay*, 428 Ariz. Adv. Rep. 32, 208 Ariz. 200, 92 P.3d 426 (CA 1, 6/24/04).

C. Child Support & Spousal Maintenance Can Exceed 50% of Disposable Income. A.R.S. §33-1131(C) "limits only the amount of *earnings* that can be subject to *assignment* [to 50% of disposable earnings, but] the statute does not limit the amount of child support and/or spousal maintenance that can be ordered by a trial court." *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).

D. Fault Cannot Be Considered In Determining Child Support. Court cannot consider Father's "deceitful" behavior in having an extramarital affair in determining a child support obligation under A.R.S. §25-320(A). *Fuentes v. Fuentes*, 435 Ariz. Adv. Rep. 61, 209 Ariz. 51, 97 P.3d 876 (CA1, 9/28/04).

E. Application of Support Payments Before & After December 1, 1998. Child support payments "must be calculated pursuant to the law" in effect when the payments were made. Support "payments made before December 1998 must be applied to interest arrearage first and to principal arrearage second" pursuant to the "United States Rule" then in effect. Payments "made after November 30, 1998 [when A.R.S. §25-510(A)(4) became effective], are applied to principal arrearage first and to interest arrearage second." *Alley v. Stevens*, 443 Ariz. Adv. Rep. 19, 209 Ariz. 426, 104 P.3d 157 (CA1, 1/11/05).

F. Subject Matter Jurisdiction To Modify Support Lost When Everyone Leaves State. Pursuant to A.R.S. §25-626, when all case participants permanently relocate outside of Arizona, the superior court loses subject matter jurisdiction to modify, but may continue to enforce, an Arizona child support order entered when the parties resided here. This interpretation applies even if no action to modify the child support order has been filed in the court of another state that has jurisdiction. However, subject matter jurisdiction remains with the Arizona courts to enforce the order. *McHale v. McHale,* 447 Ariz. Adv. Rep. 3, 210 Ariz. 194, 109 P.3d 89 (CA1, 3/8/05).

G. Decree of Annulment of Minor Child's Marriage Revives Child Support Obligation. If a minor child enters into a voidable marriage, that event emancipates that child and

automatically terminates the obligation of that child's parent to pay ordered child support. "However, upon entry of a decree annulling that marriage during the child's minority, or before she would have otherwise become emancipated, her unemancipated status revives and the parent's support obligation recommences." *State v. Demetz*, 474 Ariz. Adv. Rep. 3, 212 Ariz. 287, 130 P.3d 986 (CA1, 3/28/06).

H. Earliest Child Support Modification Date Is Petition Filing Date. Child support automatically terminates without a court order when a minor child emancipates in accordance with *Crook v. Crook*, 80 Ariz. 275, 296 P.2d 951 (1956) and *Guzman v. Guzman*, 175 Ariz. 183, 854 P.2d 1169 (App. 1993). If more than one child is the subject of the support orders, however, the support obligation for the remaining unemancipated child is not automatically reduced. The obligor is required "to make a written request to the court for modification of the order, thereby enabling the court to apply the Guidelines to determine [obligor's] new support obligation." Even if one of the children emancipated prior to the filing of the modification petition, "A.R.S. §§25-327(A) and –503(E) prohibit retroactive modification of a support order to a date earlier than the date on which the written request for modification is filed." *Guerra v. Bejarano*, 476 Ariz. Adv. Rep. 15, 212 Ariz. 442, 133 P.3d 752 (CA1, 4/27/06) (Guideline §25 also clearly directs this result).

V. Spousal Maintenance

A. Party May Seek Relief From Prospective Application of Non-modifiable Spousal Maintenance Order Under Rule 60(c)(5), *Arizona Rules of Civil Procedure* For Extraordinary Circumstances. The parties agreed that Husband would pay Wife spousal maintenance of $1000 per month for 60 months, that spousal maintenance would terminate upon Wife's death, and that spousal maintenance would not be subject to modification. Pursuant to A.R.S. §§25-319(C) and –317(G), this order of spousal maintenance is non-modifiable under "ordinary circumstances", and therefore, modification under A.R.S. §25-327(A) is not available. If, however, the spousal maintenance has "prospective application", and the party seeking relief shows "extraordinary and unforeseeable circumstances that render prospective application of the judgment inequitable", relief from the order may still be available under Rule 60(c)(5), *Arizona Rules of Civil Procedure (now* Rule 85(C)(1)(e), *Arizona Rules of Family Law Procedure)*. Husband, after becoming disabled, was entitled to a hearing to determine if relief from this particular "non-modifiable" spousal maintenance obligation was appropriate under Rule 60(c)(5). The obligation had "prospective application" because: 1) spousal maintenance "addresses primarily future needs and is based on a variety of considerations including the comparative earning capacities and financial resources of the parties"; 2) "even a non-modifiable maintenance obligation may lack a degree of finality due to the existence of contingencies"; and 3) the obligation "would cease upon Mother's death, whereas a money judgment or a decree that divided marital property would continue to be enforceable after death." *Waldren v. Waldren*, 476 Ariz. Adv. Rep. 7, 212 Ariz. 337, 131 P.3d 1067, (CA1, 4/20/06) ("Such relief should be granted only very sparingly.")

VI. Property

A. A.R.S. §25-318(B) Inapplicable Where Catch-all Provisions Dispose of All Property. Husband purchased a single premium deferred annuity policy during marriage identifying himself as annuitant and owner and designating his wife as the beneficiary. Subsequently, they jointly prepared a pre-printed "fill-in-the-blanks" *pro per* petition and did not explicitly mention the annuity, but affirmatively checked boxes stating that each "of the parties shall retain any and all personal property in their respective possessions and/or control", and that the "parties shall retain as their own, any and all pensions and/or retirement benefits pursuant to their employment which are due and/or become due." A

default decree of dissolution based upon the agreed petition was entered. After husband's subsequent death, wife was not entitled to any portion of the annuity pursuant to the omitted property provisions of A.R.S. §25-318(B) because the form catch-all clauses awarded this property to husband and he had "possession and control" of the annuity. Similarly, although husband had not changed the beneficiary designation from wife prior to his death, A.R.S. §14-2804 automatically revoked the beneficiary designation to wife upon entry of the dissolution decree, and wife's argument that husband intended to retain her as beneficiary was ineffectual because: "If a divorced spouse wishes to redesignate the former spouse as the beneficiary post-dissolution, such designation must be in writing and must otherwise comply with applicable policy terms." *Lamparella v. Lamparella*, 454 Ariz. Adv. Rep. 3, 210 Ariz. 246, 109 P.3d 959 (CA1, 3/29/05) ("We hold A.R.S. §25-318(B) does not apply when a decree effectuates an explicit property settlement agreement that disposes of all the parties' marital assets. We also hold the automatic revocation mandated by A.R.S. §14-2804 can not be avoided by spousal inaction.")

B. Cost of Sale Deduction Speculative Unless Sale Imminent & Amount Proven. "In the absence of evidence that a sale is likely to occur in the near future, it is speculative to allow a deduction of the costs of a hypothetical sale from the share of the equity awarded to the spouse not receiving the property. . . . Even if the evidence demonstrates that a sale of the property is imminent, there must be competent evidence upon which a finding can be made of the anticipated costs of sale. . . . Also, it will generally be inequitable to reduce one party's share of the community property by anticipated costs that are not expected to be incurred in the near future. . . . If the trial court has not ordered that the property be sold and the evidence does not demonstrate that a sale is imminent, the anticipated costs of sale generally should not be deducted from the parties' shares of community equity." *Kohler v. Kohler*, 458 Ariz. Adv. Rep. 8, 211 Ariz. 106, 118 P.3d 621 (CA1, 8/18/05).

C. *Kelly* Exemption For Social Security Benefits Applicable Even If Only One Party Has Community Pension Benefits. Wife did not participate in a private retirement plan, but made Social Security contributions during the marriage from her community earnings. Husband made no Social Security contributions during the marriage by reason of his participation in the Arizona Public Safety Personnel Retirement System. Pursuant to 42 U.S.C. §407 (2000) and *Kelly v. Kelly*, 198 Ariz. 307, 9 P.3d 1046 (2000), Wife's Social Security benefits resulting from these contributions must be payable to her alone under federal law. Under these circumstances, however, Husband may be entitled to receive as his sole and separate property a portion of his retirement plan equal to the present value of Wife's Social Security benefit in accord with *Kelly*. *Kohler v. Kohler*, 458 Ariz. Adv. Rep. 8, 211 Ariz. 106, 118 P.3d 621 (CA1, 8/18/05) (This *Kelly* "exemption for pension contributions made in lieu of Social Security should be applied only if necessary to achieve equity", and should not be applied where the Social Security benefits are "miniscule".)

D. Stock Options. Unvested stock options are analogous to pension plans. If "the stock options are intended as compensation for Husband's efforts during marriage, they are community property. If, however, the options are, in part, intended to induce future employment, then, to that extent, they are Husband's separate property." The Court of Appeals declined "to adopt a single formula for valuing stock options upon dissolution." "The primary factor the trial court should consider is the employer's intent in awarding the options." Among the options available to the trial court for division are the competing "time rule" formulas outlined in: 1) *In re Marriage of Hug*, 201 Cal. Rptr. 676 (Cal. Ct. App. 1984) "which is most appropriate for stock options that are granted for past services but cannot be exercised until after the separation or service of process because the formula gives more weight to the employee's entire tenure with the employer during marriage." (Numerator is months of employment until separation and denominator is

number of months from start of employment until each group of options is exercisable.); and 2) *In re Marriage of Nelson*, 222 Cal. Rptr. 790 (Cal. Ct. App. 1986) which "is more appropriate for stock options which are intended to compensate an employee for future efforts." (Numerator is the number of months from the date of grant of each block of options to separation, and the denominator is the period of time from each grant to its date of exercisability.) *Brebaugh v. Deane*, 211 Ariz. 95, 118 P.3d 43 (CA1, 8/23/05).

E. A.R.S. §25-318(B)--Civil Action May Be Proper Remedy For Omitted Property. The Arizona Supreme Court was asked to decide whether a party may bring a separate civil action for relief, rather than file a Rule 60(c), *ARCP*, motion in the dissolution case when the party alleges ownership in real property not disposed of in a dissolution decree. The doctrine of claims preclusion, or *res judicata*, does not apply to bar a civil action in this circumstance because the legislature specifically contemplated in A.R.S. §25-318.B that, "contrary to general principles of claim preclusion, dissolution decrees might not provide for the disposition of all community property. The legislature also specified a remedy for that circumstance: former spouses will hold the property as tenants in common." A separate civil action does not impair the finality of the dissolution decree because all of the terms of the decree remain valid and enforceable. *Dressler v. Morrison*, 474 Ariz. Adv. Rep. 6, 212 Ariz. 279, 130 P.3d 978 (2006) ("We hold that a party who claims to be a tenant in common with a former souse may bring a separate civil action to obtain relief when a dissolution decree fails to mention or does not dispose of real property.")

VII. Debt

VIII. Attorney's Fees

A. Support Judgment Includes Attorney's Fees. A person's "obligation to pay support pursuant to a judgment cannot be terminated when that judgment includes unpaid costs and attorney's fees associated with that support." *Alley v. Stevens*, 443 Ariz. Adv. Rep. 19, 209 Ariz. 426, 104 P.3d 157 (CA1, 1/11/05) ("Section 25-621(21) (2000), A.R.S. defines a support order as including a judgment or order for attorney's fees and costs. Moreover, A.R.S. §25-503(I) (2003) provides that '[n]otwithstanding any other law, formal written judgments for support and for associated costs and attorney fees are . . . enforceable until paid in full.'")

IX. Paternity