MCBA

MARICOPA COUNTY BAR ASSOCIATION

FAMILY LAW SECTION NEWSLETTER

JULY 2015

In this edition: **The "Double Dip" Issue Of Goodwill And Support In A Divorce,** by David Cantor

EDITOR'S COMMENTS

The Family Law Section of the MCBA Board is in the beginning stages of developing a mentoring program and wants your input! Please see page 3 for more information.

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ANNOUNCEMENTS

The "Who's on What" of Maricopa County Superior Court

- Commissioner Passamonte will cover Judge Brodman's calendar until Judge Ishikawa's position is filled (Judge Ishikawa was slated to take Judge Brodman's calendar at rotation time).
- Judge Campagnolo will assume Judge Hick's calendar effective June 22, 2015.
- Comm. Beresky will cover Judge Ryan's calendar until Judge Davis' position is filled (Judge Davis was slated to take Judge Ryan's calendar at rotation time).
- Judge Kreamer will take judge Porter's calendar
- Retired Judge Wilrich will continue to cover Judge McMurdie's old calendar at SEF until Judge Aceto's position is filled (Judge Aceto was slated to take Judge McMurdie's calendar at rotation time).
- FYI, in the future, the judge who is leaving/rotating typically knows who will be covering/assuming their calendar. You can always just ask them or call their JA.

Courtesy of Ronee Korbin Steiner

A few more changes:

1. Judge Dwain Fox has assumed Judge Aimee Anderson's family court calendar (CCB 6D/604).

2. Judge Aimee Anderson has moved within the family court department to assume retired Judge Carey Hyatt's family and family drug court calendar at the Northeast Regional Center (NE H/104).

3. Commissioner Hartsell will no longer be covering Accountability Court, effective July 12th. Commissioner Morton will be replacing him on that calendar.

4. Judge McMurdie (Presiding Family) will be covering the Enforcement calendar previously covered by Commissioner Morton.

5. Commissioner Jay Davis' IV-D calendar at NW will move to Downtown on Mondays and Wednesdays, and Commissioner Hartsell will cover those matters.

Courtesy of Commissioner Hartsell

Family Court (PHX)	Family Court(NE)	Family Court (NW)
Paul McMurdie, FC PJ	Joe Kreamer	Kathleen Mead, NW PJ
Kay Cooper	Cynthia Bailey	Jeanne Garcia
Carolyn Passamonte	Jennifer Ryan-Touhill	Temporary Coverage
Jackie Ireland	Aimee Anderson	Justin Beresky for Ryan/Davis
Bill Brotherton	Jay Polk	Comm. Passamonte for Ishikawa
Suzanne Cohen	Family Court (SE)	Jackie Ireland for Judge Porter
Geoffrey Fish	Joseph Sciarrotta	Vacant Divisions
Dewain Fox	Boyd Dunn	Judge Aceto (SE)
Pamela Svoboda	Ted Campagnolo	Judge Dunn (SE)
Michael Herrod	Ret. Judge Wilrich	Judge Porter (DT)
Joseph Mikitish	James Smith	Judge Norman Davis (SE)
Tim Thomason	Jennifer Green	
	Justin Beresky	
	Peter Thompson	

From the web site

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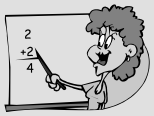
Mentoring Program in the works . . .

Because we recognize the value of fellowship with our esteemed colleagues, the Family Law Section of the MCBA Board is in the beginning stages of developing a mentoring program for current law students with an interest in family law, and lawyers in their first three years of practice. We are looking for experienced family law attorneys who may be interested in acting as mentors for this potential program. Although the specific details of the program have not yet been determined, if you might be interested in participating as a mentor in this program, please email Jennika McKusick at Jennika@ComplexDivorceLaw.com or Ashley Rahaman at Ashley.Rahaman@DeShonPullenLaw.com. Thank you!

MCBA FAMILY LAW CLE



Leveling the Playing Field:
Receivership and Special Commissioner Appointments, in Family Law Matters

Special Commissioner Appointments ---

Bringing Order to a Chaotic Sales Process

Receivership Appointments ----
Operating Closely-Held Businesses and Real Estate Assets

When: August 19, 2015
11:30 am – 1 pm

Where: Maricopa County Bar Association

Presenter: Beth Jo Zeitzer, Esq., R.O.I. Properties

Five Ethics Tips Every Family Lawyer Should Know

When: Thursday, September 24, 2015
12:00 Noon - 1:00 PM

Where: MCBA
303 E. Palm Ln.
Phoenix, Arizona 85004

Presenter: LINDA SHELY, The Shely Firm PC

2015 MCBA Bench Bar Conference

When: Friday October 2, 2015
Registration begins at 1:00 Program begins at 1:30PM

Where: Sheraton Phoenix Downtown
340 N. 3rd Street
Phoenix, Arizona 85004

Presenter: Maricopa County Bar Association

Same-Sex Marriage in Arizona: One Year Later

Presenters: **Claudia D. Work, Esq.**
David N. Horowitz, Esq.

Date: October 14, 2015
Program: 11:30 am – 1:00 pm.
Location: Maricopa County Bar Association
303 E. Palm Lane
Phoenix, Arizona 85004

What Every Family Lawyer Should Know About the Service Member Civil Relief Act (SCRA)

Program Summary:

This CLE will navigate the family law practitioner with regard to the Service Member Civil Relief Act. The course will provide information on who can invoke the Act, when it is proper for a military member to invoke this Act and the proper procedure for invoking the same. With the large population of active duty military members in the Maricopa County area it is good practice to know this Federal Act and how to properly use it.

Presenters:	**Rebecca L. Owen, Esq. – Rebecca L. Owen, PLLC**
Date:	November 12, 2015
Program:	Noon to 1:30 pm.
Location:	Maricopa County Bar Association 303 E. Palm Lane Phoenix, Arizona 85004

News from the clerk of the Maricopa County Superior Court

Michael K. Jeanes, Clerk of the Superior Court for Maricopa County

THE BRIEF

An electronic update for the legal community providing a brief look at news in the Clerk of the Superior Court's Office

Filing under seal

Requests and orders to file a document under seal are few and far between, compared to the millions of filings the Clerk receives each year. Some basics to keep in mind if the need arises in your practice:

Bring your original petition and the relevant documents on paper directly to your assigned judicial officer for review and determination. This prevents the information from inadvertently being scanned-in to the public record during review. Division staff will work with the courtroom clerk to get the originals filed.

Any documents ordered to be filed under seal must be filed on paper. Putting these documents in an envelope and attaching a copy of the order to seal to the outside of the envelope alerts Clerk staff of the special handling required.

Filers are responsible for their filings. Clerk staff file documents as they are received. Sensitive or restricted information contained within documents will be accessible by the public if the filing party overlooks a filing requirement. Clerk staff do not alter, modify or redact the content of records without a court order.

For more detailed information on sealed documents and sensitive information contained within records, see the Clerk's Corner article in the April 2015 edition of the Maricopa Lawyer. Past Clerk's Corner articles are posted on the Clerk's website at http://www.clerkofcourt.maricopa.gov/clerks_corner.asp.

Fonts, Filings and Fixes

When converting your word processer documents into PDF format for filing, remember to check the final PDF for accuracy. During the conversion process, some software products create symbols in place of words or were originally typed in a font that is not supported in the PDF product. By opening the converted PDF before filing you should see any error messages or variant fonts that need to be corrected. Converted PDFs with symbols instead of words could be rejected or filed-in to the official case record. Periodically checking converted PDFs or checking the final PDF after you've used a new version of software will limit the chance of these problems.

LAW PRACTICE TIPS

NEW CHILD SUPPORT GUIDELINES

The new child support guidelines became effective July 1, 2015.

For a copy of the new guidelines visit **http://www.azcourts.gov/familylaw/** and click on the 2015 child support guidelines.

NEW RULES OF FAMILY LAW PROCEDURE

Nine rules were amended effective January 1, 2015. Please visit **http://www.azcourts.gov/rules/Recent-Amendments/More-Rules/Arizona-Rules-of-Family-Law-Procedure** for the text of each new rule. Below are some highlights.

Rule 12. Interviews of children must be recorded by court recorder or electronic medium. A record of the interview must be provided to the parties unless they stipulate otherwise.

Rule 35(D). Motions for Reconsideration must comply with Rule 84.

Rule 82(B). Questions regarding sufficiency of evidence to support findings of fact may be raised in motion or new trial or amended judgment.

Rule 83. Now addressed motions for new trial or amended judgment.

Rule 84. Now addresses motions for reconsideration or clarification.

Rule 47. Temporary orders rule was amended to conform with statutory changes, e.g. reference to legal decision making instead of custody.

Rule 67. Mediation rule amended to correct reference to subsection.

Rule 74. Adds choice of school to Parenting Coordinator powers.

Rule 97. Changes to Uniform Interrogatories.

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

Musings on Making Mediation Meaningful

By Christina Hamilton

Mediation is great! Clearly, a high percentage of cases that go to mediation settle. Moreover, I readily agree that parties will feel better and will be more cooperative in future if they think they made a deal, versus having one thrust upon them by the court.

However, mediation could be made a lot better. There are times when (no matter how good the mediator) the message being carried either is not a correct expression of what the other side is saying or the "message" is being perceived differently by each camp. This often leads to satellite litigation or a breakdown in achieving resolve which often can be worse than the issues with which the parties started. Thus, I propose the below thoughts as ways to improve the mediation process as well as boost the probability of success at mediation.

First, in almost all family law mediations, the parties submit confidential settlement memoranda that are not shared with the other party. Yet, ARFLP 67(D)(2) encourages the use of a "Pretrial Statement":

> 2. *Memoranda*. Except as otherwise ordered by the court, at least one week before the settlement conference the parties shall furnish the settlement conference officer with their Settlement Conference Memoranda or a Pretrial Statement addressing the following:
>
> a. a general description of the issues in dispute, the party's position on each issue and the evidence that will be presented to support the party's position;
>
> b. where the issues involve financial matters, the memorandum shall include a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrance, and present value;
>
> c. a summary of the negotiations that have previously occurred; and
>
> d. any other information the party believes will be helpful to the settlement of the issues.

Why aren't we encouraging a joint statement or at least memoranda shared with the other party? I think having the parties submit memoranda that the other side sees would better frame the issues and focus the discussions. Let's face it—by the time you get to mediation, what is so "confidential"? And if proposals to settle are what a party wants kept confidential, then why not submit that during the mediation or submit proposal terms confidentially but still publish position statements? In civil litigation, mediating parties do file a joint mediation memorandum that is submitted to the mediator (they are then allowed to file a confidential memorandum, as well). Minimally, at least the joint inventory of property should be submitted so as to identify for the mediator what specific accounts are at issue and what the balance information in dispute involves.

For example, often one party argues that the balances on date of service should be used and the accounts divided based upon those values. Frequently, the opposing party argues the unfairness of that position, because those same balances have been utilized after date of service to pay community expenses. All too often, the mediator simply throws in a generic statement in a mediation agreement that the accounts will be "divided" without any specificity of the balance and without any specificity as to the date of division. This has generated substantial satellite litigation in many cases in which I have participated, because the swing in the account balances can be tens if

not hundreds of thousands of dollars. Having a joint inventory, and having specificity with regard to claims as to the "balances", would give the mediator a road map to address the specific arguments and help the parties reach specific conclusions.

Another idea that I think would be helpful to mediation is to have some periodic meetings between the attorneys and the mediator during the mediation day. Most mediators read the memos the night before, and are not aware of the nuances and intricacies with regard to the issues. I have often heard from opposing counsel that what the mediator said to them is different than what I conveyed to the mediator and/or that if they had understood our offer, it would have been agreeable. Periodic meetings during the day could arrest a lot of these issues.

I also think the mediator needs to recognize that one of their functions is to help explain to the parties what they can expect in court and help the party craft or understand an offer. That does not mean that a mediator should not allow the party and counsel private time to discuss issues. But it should mean that once a mediator hears from the party, he/she helps ground the party in reality. Mediators need to appreciate that just carrying a message between rooms without providing insight or suggestions is doing no one a favor.

Everyone needs to appreciate the limitations of an undocumented ARFLP 69 Agreement no matter how "close" the parties came. I have had lawyers call mediators to testify as to what they "thought" the agreement was (though undocumented) and, sometimes, the court has, for whatever the reason, allowed this. ARFLP 67(A) is clear that anything that has to do with a mediation conference is confidential. The mediator cannot file any written report or statement with the court except as provided in Subsections (B)(7) or (9). Further, ARFLP 67(B)(9) specifically states:

> 9. The mediator may advise the court in writing about the schedule for mediation and any procedural matter related to the mediation, so long as the substance of what was said or done by the parties or their counsel during mediation remains confidential. Other than reporting to the court about matters set forth in this rule, unless otherwise agreed by the parties or required or permitted by law, the mediator shall not report to the court about anything that was said or done before or during the mediation. For

violation of this rule, the court may impose appropriate sanctions as permitted by Rule 71(A).

ARFLP 67(B)(7) simply provides that the mediator shall report to the Court "if no or partial agreement is reached during mediation by filing a brief report with the Court stating that the parties met and attempted to resolve their differences, but the mediation was unsuccessful. The report shall also state any agreements reached and the issues remaining for resolution. The mediator shall not report the positions of the parties and shall not comment upon or offer any opinion about the position of any party."

Under the Rules, in order for an agreement to be "reached", the agreement must be in compliance with ARFLP 69. ARFLP 69(A) provides that an agreement shall be valid and binding if: 1. the agreement is in writing, or

2. the terms of the agreement are set forth on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Administrative Order to accept such agreements, or

3. the terms of the agreement are set forth on any audio recording device before a mediator or settlement conference officer appointed by the court pursuant to Rule 67.

Thus, if there is no ARFLP 69 Agreement, the mediator is prohibited from making any comments to the court as to the general parameters or specific conditions that were being discussed as the terms of the agreement, whether he/she "thought" the parties had reached agreement, or what the mediator "thinks" would be an appropriate resolve of the issue. If there is no "agreement" pursuant to ARFLP 69 then there is nothing, and the mediator is prohibited from commenting, even if there were drafts disseminated of a potential agreement.

In short, while mediation is a good thing most of the time, the problems that can emanate need to be addressed. With more preparation and thought to identifying the procedures and the issues, mediation can become more productive and more result oriented.

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One Dip Or Two…. The "Double Dip" Issue Of Goodwill And Support In A Divorce

By David Cantor

The issue almost always arises when you are dealing with the issue of goodwill in a business (usually a personal service business) and spousal maintenance and/or child support. First and foremost, this article will focus on the accounting aspects of this ongoing issue and I will not address the legal foundation or make legal argument…I'll save that for the attorneys.

For those of you not familiar with the issue, a double dip may occur when the same dollars are counted twice…once as part of the property division and then again in determining support. You may see this when a pension is being divided or allocated and then support is based on the pension benefits or you may see this with the aforementioned business goodwill and support issue. What I will discuss in this article is the issue of when goodwill and support may or may not be a double dip.

We all know that goodwill is an intangible asset and is not easy to assign a value to. When a business valuation is prepared related to a divorce, you have many issues to contemplate in the determination of goodwill (ignoring for a moment whether or not goodwill should even be included). You need to address, among other things, capitalization/discount rates, reasonable compensation, normalizing adjustments and stream of income/cash flow. It is the stream of income/cash flow that may be the hidden, and often overlooked, key in the double dip controversy. In most business valuations prepared outside of the divorce arena, the appraiser will project a stream of income/cash flow into the future and use that stream as a basis for determining the value; including goodwill….which makes perfect sense. However, in preparing a business valuation for a divorce you now have a mixture of business valuation methods, case law and state statutes which can result in conflicting guidance for the person preparing the valuation resulting in really muddy the waters.

So let's start throwing dirt in the water with ARS §25-213(B) which states: "Property that is acquired by a spouse after service of petition for dissolution of marriage, legal separation or annulment is also the separate property of that spouse…". Does this mean that if a business

continues to grow after DOP that the growth is separate property to the spouse running the business, or since the Court has discretion in determine the valuation date, does the separate property commence after the date of valuation, resulting in the value growing after date of petition?

Now I have another clod of dirt for the water, and this may really fine tune the focus on the double dip. As I stated earlier, most valuations are predicated on a projected future stream of earnings/cash flow. For argument's sake, let's assume the business is being valued at DOP. So when preparing my valuation, do I look at projected future earnings/cash flow……which can be construed as separate property of the spouse retaining the business, or do I look at the historical earnings/cash flow up to DOP which were based 100% on community efforts? If you have a business that is growing steadily, any projections will continue this growth, possibly showing income greater than was ever achieved during marriage. If goodwill is based on these projections, isn't it possible that the ultimate value is based in part upon the separate property efforts of the spouse retaining the business……or is it possible that the foundation of the value was based on the efforts of the community during marriage to get the business built up to this point to be able to continue to grow? Let's look at some case law that may clarify this issue….or not.

- Walsh (2012 Arizona) - ¶26: "We underscore, however, that our holding does not equate goodwill with future earning capacity. While future earning capacity may be evidence of goodwill, the earning capacity is not itself a divisible community asset." ¶27: "And we are cognizant of the risk that future income (which is not a community asset), to the extent it is relevant to the valuation of goodwill, is at risk of unlawful division."
- Molloy (1994 Arizona) – "It is true that in Arizona future income is not subject to equitable distribution. However, future income that is a result of goodwill that existed at the time of dissolution and not as a result of the spouse's labors alone is properly included in the marital community estate."
- Blazer (2009 California) – "Whatever method is used, "goodwill may not be valued by a method that takes into account the post-marital efforts of either spouse," because those efforts constitute separate property." Later in its decision, the Court referred to the Grunfeld case (2000 NY): "There is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property."

From an accountant's perspective, it appears that these decisions may be leaning towards not projecting income/cash flow, but instead using historic income/cash flow in arriving at value.

Blazer, via Grunfeld, even says that if you don't use the same income stream for capitalization in the valuation as you are using for maintenance, then there is no double dip.

So now we have vague guidance on calculating goodwill, and we haven't even discussed maintenance. Of course, the primary determination in maintenance is income of the parties. Now we start looking at whether or not that income being used to determine the maintenance was the same income to determine goodwill and therefore raising the issue of a double dip. But, as I like to do, let's throw some more dirt in the water as I pose this question; what if maintenance is based on the marital standard of living or the needs of the parties? Can an argument still be made that there is a double dip since income was not the primary factor in determining maintenance?

Let's be realistic. The source of maintenance is coming from the earnings of the business post date of petition. There is really no way around that one. The big question comes back to; was the goodwill determine based on these same earnings used to pay maintenance or was the goodwill based on earnings that aren't used to pay maintenance?

This is an intricate issue that involves mathematical calculations, valuation theory and legal arguments, none of which are clear cut or clearly defined. More importantly, the facts and circumstances of each case will dictate the approach that is taken when performing the valuation, maintenance calculations and then arguing to the Court what your position is.

With that said, I leave you with the following key points to consider when you may have a double dip issue:

- Carefully consider the income/cash flow stream used in the valuation (either historic, projected or a combination of both)
- Consider the type of business that is being valued (personal service, professional or enterprise).
- In determining maintenance, consider needs and marital standard of living in addition to income.
- Don't let general valuation methods automatically override case law and local statutes.

This is not a cut and dry issue and there are very legitimate arguments for both sides of the issue. But, if you are not prepared, you can leave a lot of your client's money on the table.

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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.

CASE: Shickner v. Shickner 348 P.3d 890, April 16, 2015

1. **Facts:**

   a. The parties were married in 1998. During the marriage they acquired a 50% community interest in Western Medical Eye Center (WME) and a 20% community interest in Physicians Surgery Center (PSC).

   b. At trial, 3 experts testified as to the valuations of the businesses, each using a different standard to assess value.

      i. WME - Husband's 1st expert testified that the value of the parties' jointly held 50% business interest in WME was $475,000 (applying minority share and marketability discounts). Husband's

2nd expert testified the value for WME was between $620,000 and $830,000 (lower end applying minority share and marketability discounts and the higher end not applying either). Wife's expert testified that the valuation of WME was $3,233,000 with the community's 50% interest being $1,617,000.

ii. PSC – As to the 20% interest in PSC, Husband's experts value it at $490,000 (applying minority share and marketability discounts) and $540,000 (not applying minority share or marketability discounts). Wife's expert said the value of PSC was $5,261,000 with the community's 20% interest being $1,052,000.

c. Couple's CPA stated that Husband's income at WME was $500,000, but Husband started taking only a $250,000 salary in order to save in taxes. The remaining $250,000 was being treated as a distribution for his "toil and labor."

2. Procedure:

a. Wife appeals from 2 provisions of trial ct's decree that the ct:

i. Undervalued the two jointly-owned business interests, WME and PSC; and

ii. Erroneously found Wife was not entitled to ½ of the money that was distributed to Husband from those business interests during the 3-year period between the filing of the divorce and the entry of the decree.

b. In 2010, Husband filed for divorce. Early on, Wife filed a motion for temporary orders seeking a declaration that pending a final decree, she was entitled to receive a ½ share of all distributions made from WME and PSC. Court heard testimony of couple's CPA, Brandon Bull. In regards to the Temporary Orders, the trial court determined that "no matter how the distributions are characterized, the parties must report the same as taxable income. There were no reductions in capital accounts. The distributions are appropriately characterized as salary or earned income." Trial ct denied Wife's request for ½ distributions made to Husband.

c. As to the distributions, trial court rejected Wife's claim that she was entitled to her ½ share of the payments Husband received that exceeded his $250,000 salary.

d. Trial ct rejected Wife's claim that she was entitle to her ½ share of the payments Husband received that exceeded his $250,000 salary from

WME because a small business relies on Husband's toil and labor to remain profitable and therefore all the post-filing distributions are his separate property.

e. Wife filed a motion to amend and a motion for reconsideration, which the trial ct denied. Then Wife appealed.

3. Issue(s):

a. Primary contested issues were the valuations of WME and PSC for the purpose of determining the amounts Husband owed to Wife for acquiring her share of the marital community's interest in the two businesses.

b. Wife argues that the court improperly applied a minority share discount to the valuations.

c. Wife argues that the distributions are not Husband's sole and separate property.

4. **Rule(s):**

a. General rule is that the court must divide community property "equitably, though not necessarily in kind." As a general principle, "all marital joint property should be divided substantially equally unless sound reason exists to divide the property otherwise."

b. A discount for a minority shareholder is appropriate when the minority shareholder has no ability to control salaries, dividends, profit distribution, and day-to-day corporate operations. To determine whether applying a minority share discount is appropriate, the court will consider:

i. The minority shareholder's degree of control;

ii. The lack of marketability; and

iii. The likelihood of a sale of the minority interest in the foreseeable future.

c. Characterizations of property –

i. "Property takes its character as separate or community at the time of acquisition and retains that character throughout the marriage." The community is generally "entitled to the profits and gains attributable to community assets."

ii. Although property acquired by either spouse after service of

divorce papers is the separate property of the acquiring spouse, the service of a petition for dissolution does not alter the status of preexisting community property.

iii. Burden of Proof - Because property acquired during marriage is presumed to be community property, the spouse seeking to overcome the presumption has the burden of establishing the separate character of the property by clear and convincing evidence.

d. Distributions of WME $250,000 post-filing –

i. "Where either spouse is engaged in a business whose capital is the separate property of such spouse, the profits of the business are either community or separate in accordance with whether they are the result of the individual toil and application of the spouse or the inherent qualities of the business itself."

ii. Determining the amount of Husband's compensation, for the purpose of deciding whether it is sole and separate property, must take into account that the source of the compensation is an asset owned by both spouses. Therefore, the amount must be reasonable given the totality of the circumstances.

5. **Holding:** Court of Appeals vacate the ct's ruling regarding the character of the WME and PSC distributions and remand to determine the amount of compensation Husband reasonably received from WME and PSC for his toil and labor.

a. WME - Trial ct abused its discretion by valuing WME at $602,000. Court of Appeals remands for a revaluation and equitable distribution of the community's interest in WME.

i. Trial ct's valuation is not supported by evidence. Husband is no a minority shareholder because he has a 50% community interest and there is only one other member of the LLC. Husband holds significant power regarding financial decisions, as evidenced by his decision to convert ½ of his salary to distributions as a tax-saving strategy.

b. PSC – Trial ct did not abuse its discretion in using a minority share discount to value this community interest. Valuation proper because Husband only owns a 20% share in business.

c. Post-filing distributions – Husband bears the burden of establishing the

separate nature of the all the distributions he received. Trial ct's finding that all monies paid to Husband by WME and
PSC are Husband's sole and separate property is not supported by the records because it failed to adequately consider Wife's community interest in the two businesses. Trial court did not place the burden on Husband to prove by clear and convincing evidence that the distributions he received from both businesses over the 3-year period should be deemed his sole and separate property.

Basic Information

Case name/Cite - Cox v. Aames 2 CA-CV 2014-0148 (Memorandum Decision)

Procedural History

Following judgment in a dissolution action heard before the Honorable Daniel A. Washburn, in Pinal County, Wife moved for a new trial and for reconsideration. Wife's motion for new trial was granted in part regarding the disposition of community property. After a bench trial, the Court entered a ruling on the division of community property. Wife, again, moved for a new trial and for reconsideration of the judgment, which the T/C denied. Thereafter, Wife appealed.

Ruling

Dismissed for lack of jurisdiction.

Wife's appeal was dismissed for lack of jurisdiction given that the appeal was not timely filed. A notice of appeal must be filed no later than thirty days after the entry of the judgment from which the appeal is taken. However, when a party timely files a time-extending motion, the time for filing an appeal is extended to thirty days after entry of the court's ruling on the motion. A timely filed motion for new trial is a time extending motion. A motion for new trial must be filed within 15 days after entry of the judgment. Here, Wife's motion for a new trial was not timely filed such that it would extend the time within which she could file her notice of appeal. Wife's motion for reconsideration was timely filed but a motion for reconsideration is not a time-extending motion.

Basic Information

Case name/Cite: *Milinovich v. Womack*, 1 CA-CV 12-0657

Procedural History

Respondent/Father appealed from TC determination of: (1) usage of retirement money as gross income, and (2) child support award.

Father, a retired professional athlete, used money that was primarily obtained from deferred compensation to set up two separate retirement plans. The first was a "short-term" account and to be used to sustain Father and his family until 2015. The second plan was a long-term annuity designed to provide income to Father and his family for the rest of their lives. The short term investment generated income of $5,000 per month. Father used this plus approximately $35,000 per month of principal to pay monthly living expenses. TC attributed income of approximately $42,000 per month, which it determine was roughly equivalent of the amount Father withdrew each month from the short-term account.

Father secondly objected to what he characterized as an upward deviation from the child support guidelines.

Ruling

C/A upheld TC ruling. Child Support Guidelines provide for TC to include voluntary principal withdrawals from an investment account in gross income when such actions by a party are used to satisfy their living expenses.

C/A rejected Father's argument that the TC inappropriately ordered an upward deviation finding TC applied the guidelines and the increase resulted from childcare and health insurance.

Basic Information

Manriquez v. Manriquez,

Procedural History

The Court of Appeals considered an appeal from a trial court's order denying a motion to set aside a QDRO, which granted the husband's former wife a portion of his retirement benefits.

In 2001, the wife in *Manriquez* initiated a dissolution action and a decree was entered by consent. The actual decree was a legal form, which permitted the parties (a) to check a box indicating that each would be awarded his or her interest in all retirement benefits, pension plans, or other deferred compensation of the community or (b) to check a box indicating that each party would waive his or her interest in such assets. The parties checked the former; however, no further description of how the retirement benefits would be distributed was included in the decree.

The husband retired in 2013, and in 2014, the wife filed a petition seeking a QDRO, including arrearages and interest. No response being filed by the husband, the trial court entered a QDRO. The QDRO was silent on arrearage and interest, and the Wife filed a motion to amend, which the trial court granted. Subsequently, the husband filed a motion to set aside the QDRO, which was denied. The husband appealed the trial court's ruling denying the motion and the order amending the judgment.

The husband's motion was filed pursuant to Rule 85(B), ARIZ.R.FAM.PROC., which allows for the correction of a clerical error in a judgment or an order. The husband argued that the parties mistakenly checked the wrong box on the decree. Because the clerical error was not with the QDRO, but with the original decree, the trial court construed the motion as one for relief pursuant to Rule 85(C).

On appeal, the husband argued that the trial court erred in refusing to consider parol evidence to interpret the decree. The Court of Appeals noted that the Arizona Supreme Court has unequivocally stated that the parol evidence rule "does not apply to a judgment" (*see In re Marriage of Zale*, 193 Ariz. 246, 972 P.2d 230 (1999)), and therefore, "general rules of construction for written instruments" must be used. The Court of Appeals concluded that the decree did not contain a clerical error and noted that the husband cited no evidence to suggest that the award was contrary to the trial court's intentions.

Ruling

The Court of Appeals held that because the trial court did not err in refusing to consider the husband's offered parol evidence, it did not abuse its discretion in denying his motion to set aside the QDRO.

Basic Information

Case name/Cite: **Purnomo v. Guntoro**, No. 2CA-CV 2014-0108, (Ariz. Ct. App. 4/15/2015). This decision does not create legal precedent.

Procedural History

Trial court awarded a decree of dissolution to the parties regarding parenting time, relocation of Mother to Indonesia, joint legal decision making and security for compliance with decree. Mother was awarded primary parenting time. The decree allowed Mother to relocate to Indonesia because she was not going to be permitted to stay or work in the U.S., but she had opportunity to work in Indonesia where her and Father were married and citizens of that country. Mother also had support in Indonesia from both sides of the child's family. Child also more bonded with Mother. In order for Mother to make the move, she was to deposit $20,000 as a retainer for Father to hold as security for upholding her end of the decree while in Indonesia because that country would not recognize a U.S. decree.

Father filed both a notice of appeal and a motion to stay the relocation determination pending the appeal.

Holding: Affirmed the trial court's rulings in the decree of dissolution and dismissed Father's appeal form the post-decree order setting $20,000 as security for Mother's compliance.

Ruling

1. **Parenting Time** – Father argued that the trial court abused its discretion granting primary parenting time because the court's findings were inadequate to satisfy the requirements of A.R.S. § 25-403(B) because the court's best-interest determination was "meaningless and inherently not in the best interests of the child" because the Indonesia court will not recognize the decree. The rule is that if the trial court fails "to make specific findings regarding the reasons why its decision is in the child's best interest, pursuant to the rule, then the order or on the record is an abuse of discretion. The exception to that rule is that so long as the court makes the requisite findings, then the appellate court will not disturb those findings if substantial evidence in the records supports them. The appellate court stated the rationale for requiring specific findings to provide the appellate court with a "necessary baseline" to measure any future petitions by either party based on changed circumstances. Here, the decree fulfilled the "necessary baseline" because it provided specific reasons why Mother should have primary parenting time.

   The appellate court also denied Father's appeal that the trial court failed to consider that Indonesia is not a signatory to the Hauge Convention on the Civil Aspects of International Child Abduction and thus the trial court was undermining A.R.S. Sec. 25-103(B) encouraging substantial parenting time with both parents. Here, the trial court had considered that fact at the time the decree was entered and the appellate court would not second guess the trial court's determination, nor were they prepared to adopt a bright-line rule that allowing relocation to a non-Hague-signatory nation is not in the best interest of the child.

   Father's last argument was that the trial court made clearly erroneous factual findings. However, Father failed to include in the records transcripts of all proceedings containing evident relevant to that judgment, findings or conclusion.

2. **Relocation** – Father argued the trial court abused its discretion in granting the relocation because the court did not make specific findings of the factors for relocation listed in A.R.S. § 25-408(H) and that there was substantial evidence against relocation. The rule is that to raise the lack of specific findings on appeal, however a party is "required to bring the lack of…findings to the attention of the trial court to preserve the issue." Otherwise he waives the issue. The doctrine of waiver applies when the court appears to have "made every attempt" to comply with its duty to consider all the statutory factors relevant to the best interests of the child and the lack of complete findings on the records appears to have been "a simple oversight."

   Here, the appellate court determined that although the trial court did not address all of the factors listed in A.R.S. § 25-408(H), Father did not object to this lack of specific findings before the trial court, or at his post-decree motion to stay the relocation, or in his motion to impose a bond or security for Mother's compliance with the decree. The trial court did consider each of the § 25-403 factors as required by § 25-408(H)(1), plus the provisions listed in the decree regarding Father's parenting time once the child relocated to Indonesia, the difficulty Mother may have returning to the U.S. for visitation, Father also had not obtained permanent residence status even after waiting 7 years to obtain it. Since Father failed to raise these issues, he waived them.

3. **Security for compliance with Decree** – Father was going to retain $20,000 for Mother's compliance with the divorce decree while in Indonesia, however, this issue was a specific order after judgment on the decree and the issue would need to be brought by separate appeal. The rule is that a post-judgment order is appealable when the order involves an issue distinct from the underlying judgment and immediately affected a party's rights. Since Father failed to file a notice of review the order and the propriety of the amount set as security. In the absence of a timely notice of appeal following entry of the order sought to be appealed, then the appellate court has no jurisdiction to determine the propriety of the order sought to be appealed.