MEMORANDUM DECISIONS: *GOOD LAW THAT CAN'T BE CITED*

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Do not cite as authority

- Mangan v. Mangan, 609 Ariz. Adv. Rep. 49 (App.2011)
  - "We also conclude that the award of attorneys' fees is appropriate as a sanction pursuant to Rule 25, ARCAP, **based on Mother's counsel's misrepresentation of the record and reliance on a memorandum decision as legal authority**. Accordingly, to discourage like conduct in the future, responsibility for the award of attorneys' fees to Father **shall be equal and joint and several between Mother and her appellate counsel**." (Emphasis Added)

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- Reasons to pay attention to memorandum decisions:
  - 90% of what appellate judges rule on is via memorandum;
  - Issues that have no published decision;
  - No reason to reinvent the wheel;
  - Arguments and case law to cite in trial court;
  - Cite pursuant to Rule 28 on appeal for publication, reconsideration, petition for review;
  - Check on panel prior to oral argument;
    - Search by Judge name and issue;

Student Loans

- Leas v. Leas 2013 WL 3514599, Ariz.App. Div. 1, July 11, 2013 (NO. 1 CA-CV 11-0712)
  - ¶ 24 "A debt incurred by a spouse during marriage is presumed to be a community obligation[.]" *Hrudka v. Hrudka,* 186 Ariz. 84, 91–92, 919 P.2d 179, 186–87 (App.1995). The party contesting the community nature of the debt must overcome this presumption with clear and convincing evidence. *Id.* at 92, 919 P.2d at 187.
    - ¶ 25 Husband failed to meet this burden. Indeed, he repeatedly acknowledged that the parties used the loan proceeds not only for tuition, but also for rent and "community bills." Wife testified that the funds also covered living expenses for school. On this record, we conclude that the trial court abused its discretion in allocating the debt solely to Wife and failing to treat it as a community obligation of the parties subject to equitable division

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Student Loans

- In re Marriage of Davis 2013 WL 872405, Ariz.App. Div. 2, March 08, 2013 (NO. 2 CA-CV 2012-0132)
  - Jeffrey argues that Christina's student loan is "presumptively characterized as a sole and separate liability," despite the fact that it was incurred during the marriage. We disagree. "A debt incurred by a spouse during marriage is presumed to be a community obligation," and Jeffrey presented no evidence contesting the community nature of this debt, although he bore the burden of overcoming the presumption by clear and convincing evidence. *Hrudka v. Hrudka,* 186 Ariz. 84, 91–92, 919 P.2d 179, 186–87 (App.1995).

Student Loans

- Patterson v. Patterson, 2011 WL 493983, Ariz.App. Div. 1, February 10, 2011 (NO. 1 CA-CV 10-0118)
  - A debt incurred during marriage is presumed a community obligation. *Hrudka v. Hrudka,* 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (App.1995). As discussed above, Father presented no evidence contesting the community nature of the debt, although he bore the burden of overcoming the community presumption "by clear and convincing evidence." *Id.* at 92, 919 P.2d at 187. Thus, on this record, the family court should not have characterized the loan as a separate obligation of Mother.[FN3] *See Boncoskey v. Boncoskey,* 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App.2007) (family court's equitable division of community property reviewed for abuse of discretion). Therefore, we reverse the ruling of the family court characterizing the student-loan debt as Mother's obligation and remand to the court with instructions to characterize the debt as a community obligation. On remand, the court shall then equitably divide the community debt.
- Peace v. Peace, 2011 WL 192896, Ariz.App. Div. 1, January 20, 2011 (NO. 1 CA-CV 09-0668)
  - To the extent Husband contends that the trial court erred by apportioning one-half of Wife's student loan debt to him, we likewise conclude that substantial evidence supports the trial court's finding that the student loans were used to provide for the family's living expenses and are therefore a community obligation

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Student Loans

- Fuller v. Pulsifer 2013 WL 507100, Ariz.App. Div. 1, February 12, 2013 (NO. 1 CA-CV 12-0409)
  - Father is a practicing attorney with an established private practice and earns approximately $217,100 per year, or $18,100 per month. Father argued to the family court that he and Mother should be jointly responsible for the $104,000 in outstanding student loan debt because the money was used, in part, to support the family during the time he attended law school. The court, however, concluded that Father "disregards the fact that if he had not gone to law school, he could have been working and that debt would not exist."
  - Relying on *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (App.1981), Father argues that the family court abused its discretion in allocating to Father all of the student loan debt incurred by the parties while Father was pursuing his education because Mother had already benefited financially during the marriage from Father's earning capacity as an attorney and benefited further by a substantial award of community property that was accumulated through Father's law practice. We disagree.
  - Based on Father's current income and the opportunity for him to continue to benefit financially from his education well into the future, the family court did not abuse its discretion in allocating the debt associated with that future earning capacity to Father.

Child Support Deviation

- Coleman v. Robinson, 2013 WL 5676076, Ariz.App. Div. 1, October 17, 2013 (NO. 1 CA-CV 12-0749
  - Although IRS regulations may be instructive in appropriate cases, the superior court is not bound by IRS valuation standards used for federal income tax purposes—for example, the vehicle cents-per-mile automobile valuation rule to which Father testified, *see* 26 C.F.R. § 1.61–21(e)–when assessing the benefit actually received by Father for child support purposes. [FN8] Accordingly, the superior court did not abuse its discretion by determining an upward deviation in Father's child support obligation was necessary to reflect the full value of fringe benefits of his employment.
- Stant v. Twine, 2013 WL 3148655, Ariz.App. Div. 1, June 18, 2013 (NO. 1 CA-CV 12-0609
  - $42 prior to deviation – Court deviated to $0.00
  - In its modification order, the family court explained why the deviation was appropriate and in the children's best interests:
  - The parties are [in] extremely high conflict; this conflict is greatly exacerbated by disputes over child support. The parties['] continued conflict is not in the children's best interests. In addition, the parties share equal parenting time. Both parties have sufficient financial resources to provide for the children when they are in each parent's care.

    ¶ 20 Given this explanation—which, based on our review is supported by the record—and because the family court had calculated Father's child support obligation without the deviation, *see supra* ¶ 4, the family court made all the required findings. Therefore, the family court did not abuse its discretion in reducing Father's child support obligation to zero.

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Other Child Support Costs

- Harries v. Harries, 2013 WL 950599, Ariz.App. Div. 1, March 12, 2013 (NO. 1 CA-CV 12-0221)
  - Trial Court did not indicate who was to pay private school.
  - Nor are we able to conclude that the family court abused its discretion by not allocating the educational expenses and, in effect, requiring the parents to negotiate between themselves regarding the extent to which each party would contribute to the children's future educational expenses.

Attorney's Fees for Pre-Nup

- **Large v. Large**, 2012 WL 1057598, Ariz.App. Div. 1, March 27, 2012 (NO. 1 CA-CV 11-0073)
  - Court enforced premarital agreement
  - With respect to the attorneys' fees provision, however, the court found that it was not explained to Mother and that she did not understand it. The court observed that the provision "makes Mother liable for attorney fees and costs if she challenges the agreement and loses, even if she has a good faith basis for the challenge." As a result, the court ruled the provision unconscionable.
  - Moreover, despite Father's argument, he has not cited, and we have not found, any case law suggesting that a person's ability to understand one provision of an antenuptial agreement is conclusive evidence of understanding them all. In fact, his argument is undermined by the fact that the antenuptial agreement contains a severability clause that provides that if any provision of the agreement is declared unenforceable or invalid, then the parties intend for the remainder of the agreement to be enforced. Consequently, we find the argument unpersuasive.

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Right to Travel

- Abdelkarim v. Abdelrahman; 2012 WL 5963442 (Ariz.App. Div. 1)
  - Father also maintains that the court's order "infringes upon his constitutionally protected right to travel." We agree with Father that the right of a United States citizen to interstate travel is protected by the constitution. *See Jones v. Helms,* 452 U.S. 412, 418 (1981). The Due Process Clauses in the United States and Arizona constitutions preclude the state from "infring[ing] on a fundamental liberty interest 'unless the infringement is narrowly tailored to serve a compelling state interest.' " *Standhardt v. Superior Court,* 206 Ariz. 276, 279, ¶ 8, 77 P.3d 451, 454 (App.2003) (citation omitted). The family court did not, however, restrict Father's right to travel outside of Arizona; it only restricted Father's right to travel outside of Arizona with the children, unless he first obtained a court order.[FN6] Thus, Father's constitutionally protected right to travel was not compromised.

Disclaimer Deeds

- In re Marriage of Simmons v. Dudley, 2009 WL 936886, (Ariz.App. Div. 1 Apr 07, 2009) (NO. 1 CA-CV 07-0586)
  - Disclaimer Deed
  - Distinguishes Bell-Killbourn
    - The Marital Residence was acquired in 1996 during the parties' marriage for $257,000. When the parties purchased the Marital Residence, they made a down payment in the amount of $148,000. The record supports the trial court's finding that the proceeds of $48,196.21 from the sale of Husband's sole and separate residence on Orangewood Drive were used as part of the down payment to purchase the Marital Residence. But Husband did not meet his burden to prove by clear and convincing evidence that the remaining monies used as a down payment were from his separate funds.
    - In both *Bell-Kilbourn* and the case upon which it relied, *Bender v. Bender,* 123 Ariz. 90, 597 P.2d 993 (App.1979), there was no contention that the disclaimer deed had been procured by fraud.
    - Husband's conduct in obtaining the deed "appeared to have been calculated to deceive"

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Tracing

- In re Marriage of Simmons v. Dudley, 2009 WL 936886, (Ariz.App. Div. 1 Apr 07, 2009) (NO. 1 CA-CV 07-0586)
  - The family expense/exhaustion formula is an indirect method of tracing that looks to the unavailability of community funds in an account on the date of the purchase of the asset. If it is not possible to accurately assess the community property or the separate property in an account, a minority of courts have allowed the use of recapitulation. This approach allows the spouse claiming that separate funds were used to purchase an asset to show that, over a span of time, aggregated community expenditures exceed the aggregated community income. *See* Zemke v. Zemke, 116 N.M. 114, 860 P.2d 756, 764 (N.M.Ct.App.1993).
  - ¶ 26 Under the recapitulation method, to adequately overcome the presumption of community property, Husband must present "evidence that community expenses exceeded community income at the time of acquisition." *See,* 415 P.2d at 780, 51 Cal.Rptr. at 892. "Only when, through no fault of the husband, it is not possible to ascertain the balance of income and expenditures at the time property was acquired, can recapitulation of the total community expenses and income throughout the marriage be used to establish the character of the property." *Id.* Even if such a mode of proof were acceptable in Arizona, the record does not support Husband's theory here.

Splitting K-1 Income

- In re Marriage of Dee, 2008 WL 4108053, Ariz.App. Div. 1, March 06, 2008 (NO. 1 CA-CV 07-0123)
  - ¶ 12 Husband next argues that the arbitrator erred in splitting the K-1 profits between the parties because K-1 profits are not "property" as contemplated by A.R.S. § 25-318(A) (2007) and thus cannot be distributed in a dissolution proceeding. *See Martin v. Martin,* 156 Ariz. 452, 456, 752 P.2d 1038, 1042 (1988) ("[In a] dissolution action ... the trial court has only such jurisdiction as is granted by statute."). Section 25-318(A) grants the trial court authority to "divide the community, joint tenancy and *other property* held in common equitably, though not necessarily in kind, without regard to marital misconduct." (Emphasis added.) Husband argues that "[r]eportable profit shown on an IRS K-1 form, determined strictly for tax filing purposes, but which does not exist as distributable cash, is not 'property' under the statute." We disagree.
  - ¶ 13 Section 25-318(A) does not define property. The parties cite us to no Arizona cases defining the term in this context. "[W]e construe words left undefined by the legislature according to their common and approved usage." *Sheehan v. Flower,* 217 Ariz. 39, ----, ¶ 12, 170 P.3d 288, 290 (App.2007) (quotations and citations omitted); A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of the language."). "Technical words and phrases and those which have acquired a peculiar and appropriate meaning in the law shall be construed according to such peculiar and appropriate meaning." A.R.S. § 1-213.
  - *3 ¶ 14 Black's Law Dictionary defines property as commonly meaning "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible ...; everything that has an exchangeable value or which goes to make up wealth or estate." Black's Law Dictionary 846 (6th ed.1991). This definition of property is supported by other Arizona statutes, such as § 13-105, which states that " '[p]roperty' means anything of value, tangible or intangible."
  - ¶ 15 Here, the 2004 profitability clearly has some value. Profit, according to one dictionary definition, is "a valuable return; GAIN"; "the excess of returns over expenditure in a transaction or series of transactions; *esp:* the excess of the selling price of goods over their cost." Merriam-Webster's Collegiate Dictionary 928 (10th ed.2001). That the parties agreed that MTD may have profits at year-end 2004 is made clear by their agreement to withhold divisions of funds to cover any amount owed by one to the other on the basis of that profitability. Because we find that the 2004 profitability of MTD met the definition of property as provided for in A.R.S. § 25-318(A), we reject Husband's argument that the arbitrator erred in dividing it between the parties.

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ARS 25-411 and PC Role

- Petrenco v. Hannah, 1 CA-SA 13-0313 (12/19/2013)
  - The petition, based primarily on the parental coordinator's detailed report, showed a change of circumstances since July 2012 that CP and SP were both exposed to domestic violence at Mother's home, and that CP was extremely unhappy with the custody arrangement. These were not conclusory allegations, but detailed facts sufficient to require an evidentiary hearing on the petition. *See* A.R.S. § 25-411(L) (providing that modification petition shall set forth detailed facts in support of the request); *Pridgeon v. Superior Court*, 134 Ariz. 177, 182, 655 P.2d 1, 6 (1982) (holding that conclusory allegations under A.R.S. § 25-411 are insufficient to trigger the need for a hearing). Because the court was faced with a sufficient verified petition and a rebutting verified response, it could not hold a trial by affidavit, but "must hold" an evidentiary hearing. *Id.* at 181, 655 P.2d at 5. Although the superior court might have been justifiably concerned that the petitions to modify might be a tug of war between the parents, the solution was to hold an evidentiary hearing given the allegation of domestic violence and the coordinator's report supporting that allegation.
  - **¶11** Mother contends the superior court properly dismissed the petition because Father had not certified that he had brought the dispute to the coordinator again. We disagree. The court's August 2013 order provided that before either party can file any petition regarding parenting time, the parties "shall first consult with the Parenting Coordinator, *unless there is an emergency related to the child's health, safety and welfare*." (Emphasis added.) The detailed allegations of domestic violence coming on the heels of the coordinator's report that CP and SP were witnesses to and victims of domestic violence in Mother's home are an emergency and were sufficient to order an evidentiary hearing despite the consultation order. Moreover, the court did not deny the second petition based on the certification issue, but because it did not think the petition was sufficient to order a hearing.
  - **¶12** We recognize the superior court's concern that some of the disputes over custody and parenting time should be considered and resolved first by the coordinator if possible. However, given the allegations and the coordinator's findings of domestic violence, an evidentiary hearing at least on those allegations is necessary. Nothing in this order precludes the court from referring the non-domestic violence allegations to the coordinator for her recommendations and possible resolution.

ARS 25-403(B) and Temporary Orders

- Barkley v. Blomo, 1 CA-SA 13-0167 (8/6/2013)
  - Petitioners argue that the express findings requirement contained in A.R.S. § 25-403(B) only applies to final custody orders, and that temporary custody orders entered pursuant to A.R.S. § 25-404 are not subject to this requirement. We disagree.
  - The plain language of A.R.S. §§ 25-403(A) and (B) is not limited to final custody orders, but applies to any contested custody determination by the court. Moreover, A.R.S. § 25-404 clearly states that when either party objects to a proposed custody order, "[t]he court may award temporary legal decision-making and parenting time *under the standards of section 25-403* after a hearing...." A.R.S. § 25-404(A) (2012) (emphasis added). *See DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (holding that a trial court could not award temporary custody without independently determining the child's best interests).

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