

Appellate Child-Related, OOP, and Procedure Cases (2024)

By Steve Everts

Acknowledgements

- Bruce Cohen
- Ken Connelly
- Mel Dailey
- Stefanie Barker (slides)

Outline/Overview

Child-Related, OOP and Procedure Cases

10 Published Opinions

90 Selected Memo Decisions (citable >2015)

- No way to Cover them all
- Focus on Principle

Materials

- Cases in Subject Matter Order
- All Opinions and Memo Decisions



Observation

- A.R.C.P. = 157 pages or 110 w/o Forms
- A.R.F.L.P. = 192 or 120 w/o Forms



10 Published Opinions

- State ex rel. DES v. Pennel (Alternative Method of Service, Due Process)
- Sobrino v. Fisk (Change of Judge)
- Melbye v. Dennis (Default, Procedure in Trial Court)
- Yanez v. Sanchez (Freedom of Speech, FFCL, Modification of PT/LDM)
- Nicaise v. Bernick (Jurisdiction Pending Appeal)
- Flynn v. Flynn (OOP)
- Martinez v. Estes (OOP)
- Martinez v. Zuniga (OOP)
- In re M.N. (Termination)
- Douros v. Morse (Grandparent Visitation)

STATE OF ARIZONA

DIVISION ONE

Mark F. nchem,
Plaintiff/Appellant,

v.

Adrian Fontes, *et al.*,
Defendants/Appellees.

Court of Appeals
Division One
No. 1 CA-CV 23-0064

Maricopa County
Superior Court

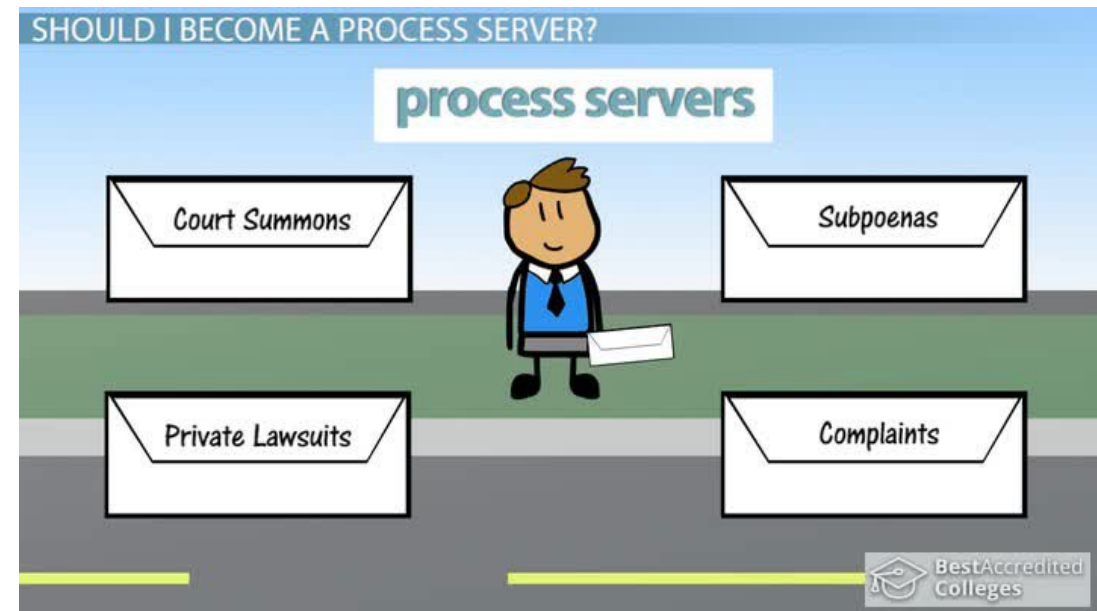
VICTORY

Sobрино v. Fisk

- The filing of each post-decree petition is a “new action” under Rule 23(a)(11) and permits the filing of a Notice of Change of Judge.
- A monumental procedural decision that may result in a rule change going forward!

DES v. Pennel (Alternative Method of Service)

- Mother, in a paternity case, tried to serve Father, a professional football player, at his Colorado and Missouri addresses.
- Mother tried personal service in Colorado four times, but she only sent a letter return receipt requested to Missouri, not Colorado.
- The trial court granted alternative service and directed Mother to send a copy of all documents to Father's Facebook/Instagram account and leave a copy at Father's last known address.
- The Court of Appeals vacated and remanded, finding that Mother failed to show that the social media alternative service was justified or reasonably calculated to give Father notice.
- The Court of Appeals cautioned courts to take great pains to ensure the requests for alternative service through social media avenues satisfy due process.
- The use of social media must show concrete evidence of the identity of the user and proof that the person to be served regularly uses the platform.



State/DES & Williams v. Williams

- Mother unsuccessfully attempted to serve Father the petition for dissolution on numerous occasions, so the court permitted service by email and mail, which was accomplished.
- When Father failed to answer or appear, she proceeded by default and was awarded fifty percent of the marital residence and child support.
- The order did not address or make any findings regarding service or notice to Father.
- Father's Rule 85 motion, alleging fraud and misconduct by Mother, was denied.
- The Court of the Appeals reversed and remanded holding that an application for default must be mailed to the opposing party if the party applying for default knows the whereabouts of the other party.
- Fraud and misconduct were questions of fact that needed to be resolved before denying any motions raising service of process or notice questions.





Termination of
Parental Rights

In re R.S.

- Paternity case.
- After lengthy Family Court proceedings.
- Mother petitioned to terminate Father's parental.
- Process server made several unsuccessful attempts.
- Process server located Father's correct address (gated community).
- Mother filed an emergency motion for alternative service.
- The trial court granted the motion (E-mail, certified mail, publication).
- Father did not appear at the initial severance hearing.
- Father filed a motion to set aside the termination order.
- On appeal, Mother conceded it was err for the trial court to determine Father's motion was untimely because a void judgment may be challenged at any time.
- the Court of Appeals reversed the trial court's denial of Father's motion and ordered a hearing.
- At the remand hearing the trial court found that alternative method of service was appropriate.

Melbye v. Davis (Default Procedure)



This is a civil case (with relevance to family law).

A protected person filed suit for exploitation of a vulnerable adult.

Defendant filed a motion to dismiss which was denied.

Defendant failed to timely file an answer, leading plaintiff to seek default.

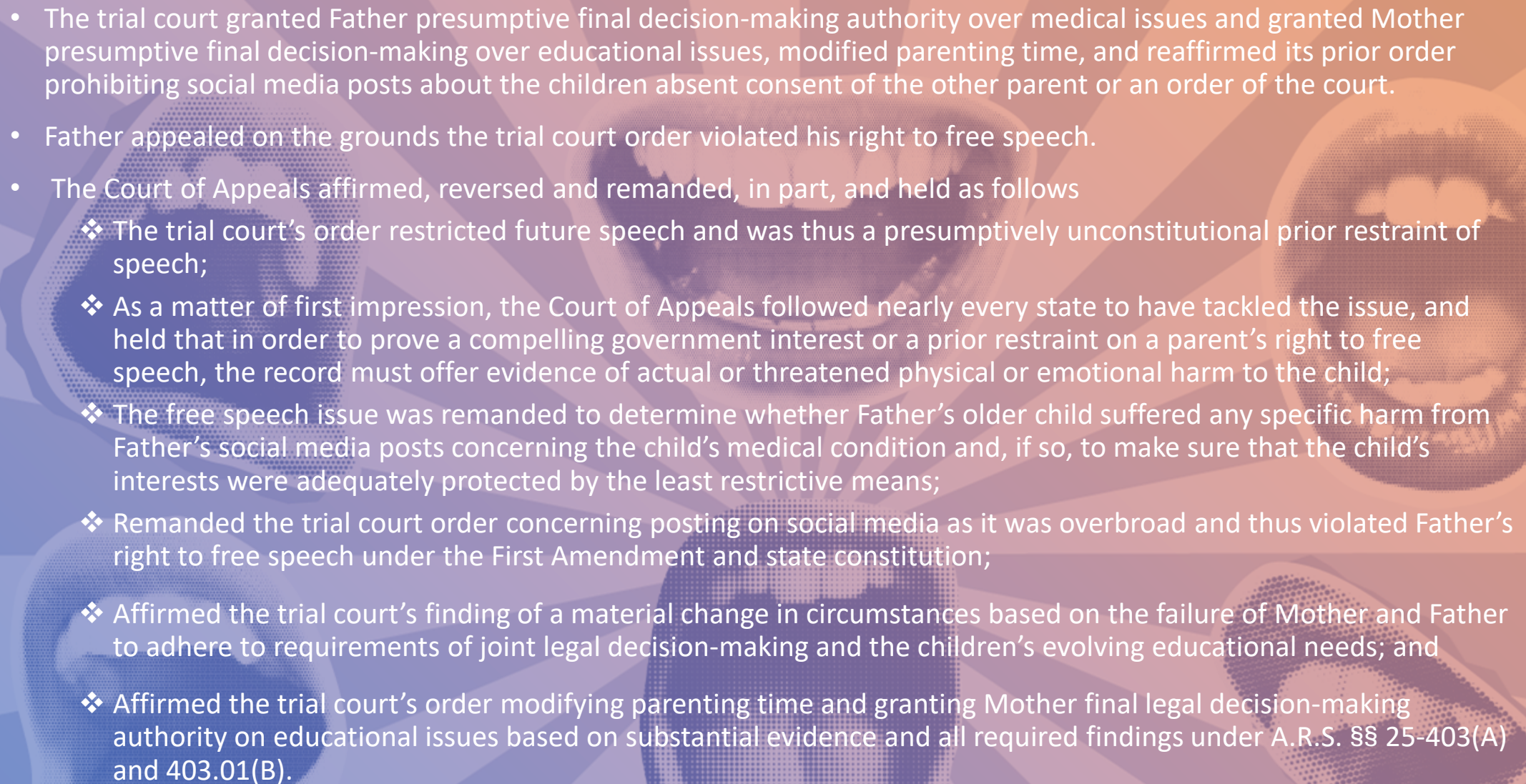
Two months later defendant filed an answer and motion to set aside the default.

Court of Appeals affirmed general rule, default judgement is not appealable. Should seek to set aside Order first.

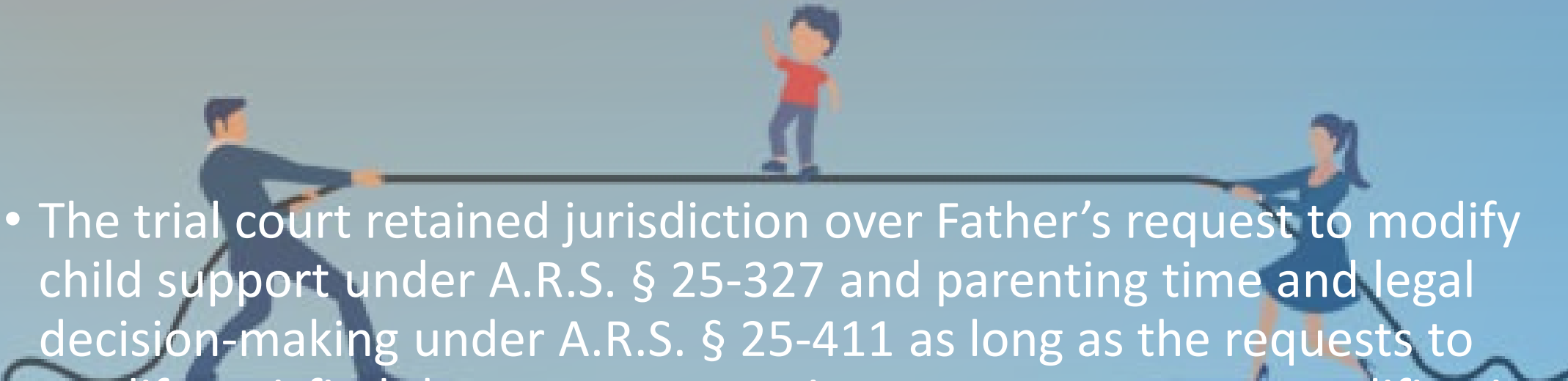
Court of Appeals also noted the body of a pleading, and not the title determines true nature of its legal import.

Yanez v. Sanchez (Freedom of Speech)

- In the Decree Mother and Father agreed to joint legal decision-making with Father having final say over educational decisions and Mother final say with medical decisions.
- Child had epilepsy and seizures.
- Prior order provided that neither parent was to post on social media, publish, or otherwise publicize any information including pictures without written consent of the other parent or order from the court.
- Mother filed a post-Decree proceeding to modify joint legal decision-making authority requesting final legal decision-making authority on educational and medical decisions and for more parenting time during the school year.
- Father filed a petition to modify parenting time and to award him sole legal decision-making authority.
- Mother testified that Father posted a video of the older child having a seizure on social media, which she argued violated the child's rights for medical privacy.
- Father, director of a non-profit that supplied parents of medically challenged children, claimed to have posted the video to find help for the child's condition, not for any financial gain.

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- The background features a stylized, halftone-style graphic of several faces in various orientations (top-down, side-profile, and front-facing) and a smartphone. The color palette is a mix of light blue, purple, and orange. In the top right corner, there are three small icons: a plus sign, a solid circle, and an open circle.
- The trial court granted Father presumptive final decision-making authority over medical issues and granted Mother presumptive final decision-making over educational issues, modified parenting time, and reaffirmed its prior order prohibiting social media posts about the children absent consent of the other parent or an order of the court.
 - Father appealed on the grounds the trial court order violated his right to free speech.
 - The Court of Appeals affirmed, reversed and remanded, in part, and held as follows
 - ❖ The trial court's order restricted future speech and was thus a presumptively unconstitutional prior restraint of speech;
 - ❖ As a matter of first impression, the Court of Appeals followed nearly every state to have tackled the issue, and held that in order to prove a compelling government interest or a prior restraint on a parent's right to free speech, the record must offer evidence of actual or threatened physical or emotional harm to the child;
 - ❖ The free speech issue was remanded to determine whether Father's older child suffered any specific harm from Father's social media posts concerning the child's medical condition and, if so, to make sure that the child's interests were adequately protected by the least restrictive means;
 - ❖ Remanded the trial court order concerning posting on social media as it was overbroad and thus violated Father's right to free speech under the First Amendment and state constitution;
 - ❖ Affirmed the trial court's finding of a material change in circumstances based on the failure of Mother and Father to adhere to requirements of joint legal decision-making and the children's evolving educational needs; and
 - ❖ Affirmed the trial court's order modifying parenting time and granting Mother final legal decision-making authority on educational issues based on substantial evidence and all required findings under A.R.S. §§ 25-403(A) and 403.01(B).

Nicaise v. Bernick (Jurisdiction Pending Appeal)

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- An illustration showing a man in a dark suit on the left and a woman in a dark dress on the right, both leaning forward and holding a thin black tightrope. A small child in a red shirt and blue pants is standing on the tightrope in the center. The background is a light blue sky with a darker blue ground below. The text of the list item is overlaid on the illustration.
- The trial court retained jurisdiction over Father's request to modify child support under A.R.S. § 25-327 and parenting time and legal decision-making under A.R.S. § 25-411 as long as the requests to modify satisfied the statutory requirements to pursue a modification, even though Mother's appeal of a previous petition for modification of legal decision-making and parenting time was still pending in a Petition for Review before the Arizona Supreme Court.

A close-up photograph of a hand in a dark suit jacket with a white cuff, moving a black chess piece (a king) on a chessboard. The chessboard is black and white, and several other pieces are visible on the board. The background is dark and out of focus.

Flynn v. Flynn (OOP/Firearms)

- The *Brady* restrictions for firearms were upheld, even though the trial court failed to engage in the ARPOP Rule 23(i)(1) inquiry, where the trial court made the requisite findings under federal law that the defendant: (1) was afforded a hearing; (2) had an order entered that restrained contact with an intimate partner; and (3) the order prohibited conduct that could cause bodily injury.

Martinez v. Estes (IAH/“Series of Acts”)

A 6-year-old daughter told Father that Mother’s friend improperly touched her thigh and chest. Father obtained an Injunction Against Harassment (IAH) which, after hearing, was continued on the grounds the touching constituted a “series of acts” required under A.R.S. § 12-1809(T)(1)(a).

The Court of Appeals agreed with Mother’s friend and vacated the IAH, confirming that an IAH requires a “series of acts” and evidence establishing a temporal separation between the alleged acts of harassment. The Court went on to discuss that recent case law “has become muddled when the acts alleged to have occurred close in time,” which occurred here, and Father failed to establish temporal separation between the alleged acts of harassment.

The Dissent [Judge Thumma] argued the separate acts can occur in any amount of time, no matter how short, so a touch to the thigh and then the chest qualified as separate acts under A.R.S. § 12-1809.

Martinez v. Zúñiga (OOP/Jurisdiction)

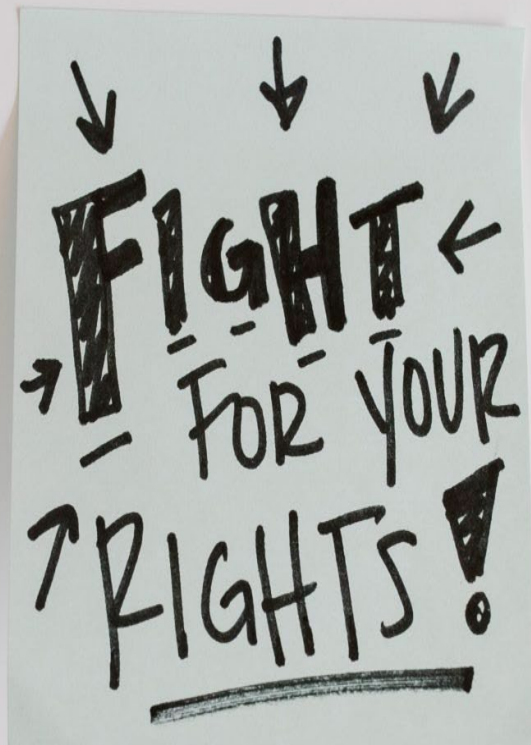


Jurisdiction

- Ms. Martinez secured an Order of Protection against Ms. Zuniga in Maricopa County despite the defendant's residence in California and the alleged events took place in California. Defendant filed a limited appearance and Motion to Dismiss. The trial court denied the motion and found it had jurisdiction.
- The Court of Appeals vacated the Order of Protection for lack of jurisdiction and discussed two forms of personal jurisdiction, general and specific, under *Goodyear Dunlop Tire v. Brown*, 564 U.S. 915, 919 (2011), finding that while the defendant had some contacts by visiting and participating in some unrelated litigation in Arizona, such contacts were insufficient to establish she had "continuous and systematic" contacts with Arizona.
- The Court of Appeals also refused to follow states holding that personal jurisdiction over a defendant in protective order proceedings was unnecessary.

In re M.N. (Termination)

- Juvenile and Family Law
- Mother had Child with Father while living with boyfriend.
- Mother and Boyfriend placed Child for adoption with agency.
- Agency filed termination of Mother and boyfriend.
- Family Court ordered paternity testing – 99.9% Father’s.
- Family Court stayed proceeding.
- Agency amended in Juvenile Court to allege Father abandoned Child because he never filed a notice of paternity under A.R.S. § 8-106.01.
- Father’s rights were terminated.
- Father appealed.
- Court of Appeals reversed and remanded and held that with completed genetic testing Father was not just a “putative” Father under law.
- Therefore, Father did not have a requirement to file a Notice of Claim of Paternity within 30 days after DOB.



↓ ↓ ↓
→ **FIGHT** ←
FOR YOUR
↑ **RIGHTS!**



Douros v. Morse (Grandparent Visitation)

- Grandmother's son died.
- Mother allowed significant contact between Grandmother and grandson until 2023.
- Grandmother filed for visitation.
- Trial Court awarded significant visitation.
 - Monday-Thursday every other week, 2 weeks in June + 2 weeks in July, Father's Day weekend.
 - A day before or after Thanksgiving and Christmas.
 - Reasonable video calls.
- Mother appealed.
- Court of Appeals vacated and remanded for consideration of Special Weight standard for parents.
 - As minimally invasive as possible.
 - Unconstitutional as denial of fundamental liberty interest of parent.
 - Special Concurring Opinion would award zero visitation.
- Petition for Review pending.
- While pending Trial Court denied Grandmother's Petition.

Children Testifying/Change of Name – Sparks v. Cobb

- Mother and Father were awarded joint legal decision-making and equal parenting time in the Decree. Six years later Mother filed a civil change of name proceeding to hyphenate the child's last name Sparks-Cobb based on the alleged desires of the 8-year-old daughter.
- Mother listed the child as a witness for trial. Father filed Motion in Limine.
- The trial court addressed the Motion in Limine at the commencement of trial, including Mother's request that the court interview the child.
- After discussion, Mother agreed not to call the Child as witness on the condition that the child's desires and exhibits would be admitted over any hearsay objections.
- The trial court denied name change and Mother appealed.
- Court of Appeals found Mother's claim, that the trial court "excluded" the child's testimony, was inaccurate and misleading where Mother agreed that both parents would testify and neither would object to other hearsay evidence reflecting the child's position on the request of the name change.
- Because Mother agreed that the child would not testify, did not later seek to call the child as a witness, and did not argue due process to the trial court, she waived the issue on appeal.
- The Court of Appeals also found the appeal frivolous and groundless under ARCAP Rule 25 where Mother failed to cite the record appropriately, mischaracterized parts of the record and omitted that she agreed not to call the child as a witness.
- As a result, the Court of Appeals sanctioned Mother by awarding Father a portion of his attorney's fees and costs on appeal.





Alternatives to Children Testifying – Leonard v. Myers

- Best Interest Attorney
- CAA
- Child's Attorney
- Court Interview
- Forensic Interview
- Counselor
- Admit Hearsay



Child Abuse

Dias v. Mady

- After the decree was entered, Father obtained an Order of Protection against his own daughter, alleging she falsely accused him of physical abuse and lied to law enforcement and DCS.
- Mother filed an emergency motion seeking sole legal decision-making authority and modification of Father's parenting time to zero with both children.
- Father also filed a petition seeking sole legal decision-making authority and an order permitting Mother only supervised and reduced parenting time with both children.
- After a hearing, the Superior Court awarded Mother sole legal decision-making with equal parenting time regarding their son but no parenting time between Father and their daughter.
- The Court of Appeals affirmed and rejected Father's argument there was an abuse of discretion, holding that the trial court did not abuse its discretion in awarding Father no parenting time with the daughter where the factors in both A.R.S. § 25-403(A) and A.R.S. § 25-403.01(B) were properly analyzed and made orally on the record during the hearing.

A hand holding a blue pencil is positioned over a document with a grid pattern. The background is blurred, showing a desk and a lamp. The text 'Reynolds v. Spencer (Due Process)' is overlaid on the left side of the image.


Reynolds v. Spencer (Due Process)

- Father sought modification of a Wyoming decree granting him joint legal decision-making and primary care due to Mother's alleged failure to abide by the parenting plan and withholding the children during the summer.
- At trial the court admitted evidence that the Wyoming Department of Family Services was investigating allegations that Father had committed domestic violence against the children.
- The investigation report was completed after the trial and submitted to the trial court before it ruled.
- The trial court concluded that this created an irrebuttable presumption against awarding joint legal decision-making and awarded Mother sole legal decision-making authority and designated her the primary residential parent with Father awarded supervised parenting time every other weekend.
- The Court of Appeals vacated and remanded on due process grounds holding that due process entitles a party to notice, a meaningful opportunity to be heard and offer evidence, and a chance to confront adverse evidence.
- The Court further stated that updated documents submitted to the court after trial cannot substitute for admissible exhibits and testimony subjected to adversary testing at the trial itself.

Tia C. v. Gabriel

- Mother alleged that Father physically and sexually abused the children.
- The Police and DCS investigated and found no grounds to take action.
- The trial court, CAA and BIA concluded that Mother was coaching the children to make abuse allegations against Father.
- The trial court awarded Father sole legal decision-making authority and awarded Mother unsupervised parenting time for two hours each week, plus 2 additional hours each month.
- The trial court found that “Mother’s behavior since 2017 is among the most pervasive and upsetting this Court has seen,” marked as it was by her “years-long campaign . . . to limit Father’s contact with the children via manipulation” and the “reckless weaponization of the Department of Child Safety, law enforcement, and this Court in perpetuating the unsupported allegation that Father has committed one of the worst crimes one can be accused of is apparent, the sexual abuse of his children.”
- The trial court also ordered Mother to undertake a forensic psychological exam and participate in individual counseling if the court were to consider increasing her parenting time.
- The Court of Appeals affirmed and held that a “pattern of conduct” and the extensive history of unproven allegations of abuse and wrongdoing can formulate a basis for modification of legal decision-making and parenting time in favor of the parent wrongfully accused.





Stoney v. Stoney (Counseling for Child/Parents)



- Mother and Father were awarded joint legal decision-making authority as to both of their children in their divorce.
- A year later, Mother petitioned for sole legal decision-making authority and requested supervision of Father's parenting time with their son and cessation of parenting time with their daughter, based on allegations that Father threatened the daughter and more generally, emotionally and verbally abused Mother and the children.
- The Superior Court denied all these requests.
- A year later Father grabbed their son's leg to discipline him, Mother and son subsequently obtained an Order of Protection against Father.
- Mother then filed for sole legal decision-making.
- At the temporary orders hearing the court reaffirmed joint legal decision-making authority but awarded Mother final decision-making authority and ordered supervised parenting time for Father with their daughter.
- In final orders the Superior Court reaffirmed its legal decision-making determinations and limited Father's parenting time to bi-monthly unsupervised weekend visits.
- Mother was also ordered to participate in counseling at her expense, the parties were ordered to split the cost of children's counseling equally.
- The Court of Appeals further held that while the Superior Court has the power to order counseling and mental health treatment under Rule 95(b), in that it has authority to seek the opinions of professionals to guide it in its decisions concerning legal decision-making and parenting time under A.R.S. § 25-405(B), once those decisions are made, the court's power expires, and on-going counseling cannot be ordered.

Archuleta v. Vargas (Claim Preclusion)



Claim Preclusion covers the facts actually litigated and issues which might have been litigated.



Father was precluded from challenging paternity, which was acknowledged, but not challenged in prior proceeding.



Domestic Violence/Order Of Protection

Ingram v. Hernandez

- Father challenged Mother's Order of Protection on the grounds: (1) the Superior Court should have consolidated the Order of Protection with the dissolution case; (2) he was not properly served; and (3) the trial court erred in denying his motion to continue the dissolution trial.
- The Court of Appeals rejected Father's arguments and affirmed the Order of Protection. In doing so, the Court stated that although a family court may conduct a joint hearing on an Order of Protection, it may not consolidate the cases under Rule 5(a)(4).
- Also, service by the police officer was valid as long as the defendant was physically present while attempting to pick up his children from Mother for his supervised parenting time and he had not yet been served. Additionally, Father waived service by requesting a contested hearing.
- Moreover, denial of Father's motion to continue was affirmed because it was based on the erroneous consolidation argument.
- Finally, the due process challenge was rejected because Father had the required notice and opportunity to be heard and the parties' mutual discovery and disclosure failures did not prevent the trial court from proceeding with the scheduled hearing.

Riddle v. Martin

- Mother obtained an Order of Protection against Father where the child was listed as a protected person. The trial court continued the Order regarding Mother, but amended the order to remove the child and the firearms restriction finding that Father did not present a credible threat to the physical safety of Mother.
 - The Court of Appeals affirmed and held that although a heated argument between the parties in the vicinity of the child's crib qualified as domestic violence against Mother, it was not sufficient with regard to the child because mere proximity was not sufficient to justify continuing to include the child as a protected person in a contested protective order.
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Due Process (Spar v. Reaume)

- After the divorce, Mother informed Father she wanted to move from Phoenix to Tucson with the child.
- They agreed the child would complete the school year in Phoenix and would then join Mother in Tucson. Mother gave “official notice,” and Father filed a modification action, but the hearing was not held until after school had begun for the next school year with the child attending in Tucson.
- After a one-hour hearing, the trial court affirmed joint legal decision-making and awarded Father primary care in Phoenix where the child would attend school.
- Mother claimed her due process rights were denied where both before and at the end of the hearing she asked for more time.
- The Court of Appeals vacated the order and remanded for further proceedings, confirming the trial court’s discretion to manage its docket and impose reasonable time limits under *Backstrand*.
- The Court distinguished *Volk v. Brame*, 235 Ariz. 462 (App. 2014), but made noteworthy comments about unreasonable time limits for hearings.



© Mike Lester.

Ethics (Salcido v. Hamilton)

- A lawyer was referred to the State Bar for submitting a Consent Decree not consistent with a Rule 69 Agreement.

Ethical

Unethical



Evidence (Nelson v. Nelson)

Although not a child-related case, there are several evidentiary and procedural issues that apply in multiple areas.

The Court of Appeals held that although it may be an abuse of discretion to rely on evidence that is not admitted, such error will be considered harmless when the evidence is merely cumulative.

It further held that because it is not a fact-finder, the Court of Appeals will not ordinarily take judicial notice from public websites and outside sources.

The Superior Court's initial determination that a party's discovery behavior was unreasonable does not constitute the law of the case with respect to its ultimate determination as to whether attorney's fees should be awarded to either party.



Harmless Error (In re Marriage of Griffin)

- There must be new changed circumstances to warrant a modification action.
- However, when summarily dismissing a petition to modify the superior court must provide an opportunity to correct the deficiency under Rule 91(i)(1)
- This option may not apply if such would constitute harmless error because of other motions that were considered after the hearing.





Findings of Fact/Conclusions of Law (Griebel v. Philips)

- Mother filed a modification action regarding legal decision-making and parenting time against Father.
- The trial court established joint legal decision-making and parenting time, providing for the Family Bridges intensive reunification program and allocating the costs of that program between the parties. Mother had filed a request for findings of fact and conclusions of law, but she did not object to them as inadequate prior to appealing.
- Nevertheless, the Court of Appeals chose not to treat the issue as waived and proceeded to remand several of the trial court's decisions so it could make more detailed findings of fact. Specifically, as to legal decision-making and domestic violence, the Court concluded that the trial court's "findings of no significant domestic violence and no significant history of domestic violence were conclusory and reliant on unexplained facts."
- Note: there was no allegation of significant DV or significant history of DV in Mother's Petition or Pretrial Statement.
- The Court of Appeals also found the parenting time orders lacked specific findings explaining the reasoning and conclusion showing how the parenting time would not endanger the children or significantly impair their emotional development under the factors in A.R.S. § 25-403.
- The Court held that under Rule 82(a) [Findings and Conclusions by the Court] the Superior Court's factual findings regarding legal decision-making, domestic violence and parenting time may not be conclusory and reliant on unexplained facts, but must explain how or why the court settled on the decision that it reached.


SUBPOENA

Medical Records (In re Marriage of Pisani)

- Child was in therapy and Father subpoenaed the records from the therapist, but the trial court quashed the subpoena where the child had emancipated.
- Despite the due process and constitutional issues involved, the Court of Appeals found the issue moot.
- Nevertheless, Judge Cohen has suggested the constitutional issues may appear to be valid under *Troxel v. Granville*, 530 U.S. 57 (2000).
- There are also due process issues in Father's right to be prepared for and present his modification action and statutory issues under A.R.S. §§ 25-403.06 and 408(K) [Parental access to prescription medication and records/Access to prescription medication and records].
- Under such circumstances, Father's rights to the records would likely have to be weighed against the potential harm to the child.
- In that regard, any limitation on either or both parents' access to the therapy records would require findings and would need to address the due process concerns.



Modification of Legal Decision- Making/Parenting Time (Campbell v. Newell)

- After the divorce, Father petitioned to modify legal decision-making from joint to sole over their 11-year-old daughter with significant behavioral issues, claiming Mother refused to co-parent and the parties disagreed regarding the best medical and educational route for their daughter.
 - The trial court awarded Father final decision-making authority based on his willingness to consider Mother's input.
 - However, Father subsequently used final say to override Mother's objections on numerous issues, treated Mother dismissively, used disparaging language in his communications, and violated the court's order by failing to respond to Mother within 24 hours.
 - As a result, Mother moved to modify and sought final legal decision-making authority, which the trial court granted after finding that Father's use of final legal decision-making authority had been unreasonable.
 - The Court of Appeals affirmed and held that final legal decision-making authority obligates the parties to engage in good-faith consultation. It is not a sole legal decision-making order.
 - The Court of Appeals affirmed and held that final legal decision-making authority obligates the parties to engage in good-faith consultation. It is not a sole legal decision-making order.
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Servin v. Quezada



- The trial court found at a post-decree hearing that Father had committed significant DV against his current spouse while the children were present and Father was suffering from mental health issues, so the court entered an order of sole legal decision-making authority to Mother and restricted parenting time for Father.
- The trial court set out the potential for later expansion of Father's parenting time if Father sought specific services to address his issues.
- After unsuccessfully appealing the ruling, Father later filed a petition to modify parenting time.
- The trial court denied the modification finding insufficient change of circumstances.
- The Court of Appeals affirmed the lack of change circumstances and held that a parenting time order that restricts a parent's rights, but sets forth steps to allow a parent to seek later expansion of those rights, which are completed, does not automatically form a basis for a finding of changed circumstances warranting a modification.



Parenting Time Domestic and International (DeGuzman v. DeGuzman)

- The trial court may order substantially unequal parenting time under A.R.S. § 25-403.
- The Court of Appeals statement regarding a presumption of equal or substantially equal parenting time is just a starting point for a best-interests analysis and not a legal burden of proof.

Procedure In Trial Court

Evans v. Evans

- Mother obtained a default decree ordering Father to pay \$7,000 per month spousal maintenance for 10 years (in a 4-year marriage), \$6,279 in monthly child support and \$25,116 in arrears.
- Father filed a Rule 85 motion to set aside, claiming fraud, plus hardship and injustice under Rule 85 subsection (6).
- The trial court granted Father's motion and set aside the default finding on the grounds that Mother misled the court as to Father's income and the family's financial standing.
- Specifically, Mother alleged Father earned an income of \$300,000 per year, but he was able to show his average annual income was less at \$161,000 per year. Mother appealed.
- The Court of Appeals concluded the superior court did not err in setting aside the judgment and affirmed the superior court's order granting the motion.
- The Court stated that Rule 85(b)(6) [Grounds for Relief from a Judgment] requires that: (1) relief be sought within a reasonable time [the 6-month limitation does not apply to this subsection]; (2) the claimant meet a relatively "minimal burden" of establishing a meritorious defense; and (3) a showing be made to demonstrate "injustice."
- The Court noted that there is no "outer limit as to what is reasonably prompt under Rule 85(B)(6) and determining what is a 'reasonable time' is thus a fact-specific determination."
- Finally, the Court noted that excusable neglect was not required, and a movant need only demonstrate one of the six grounds to prevail under Rule 85.



Vargas v. Vargas



- Mother failed to appear at a hearing and the trial court found, based on Father's testimony that Mother had an opioid addiction, that awarding Mother sole or joint legal decision-making was not in the children's best interests.
- Father was awarded sole legal decision-making and Mother's Rule 83 motion for new trial was denied.
- Mother appealed, arguing the trial court violated her due process rights and that excusable neglect and/or inadvertent mistake justified a new trial.
- The Court of Appeals rejected Mother's arguments and affirmed the decision of the trial court.
- It held that a motion to alter or amend a judgment under Rule 83 does not include mistake, inadvertence, surprise, or excusable neglect as stated in Rule 85, but even if it did, "pure carelessness is not a sufficient reason to set aside a judgment."



Procedure on Appeal

Failure to provide a transcript.

Deficiencies in brief or failure to file answering brief.

Inadequacy of Trial Counsel – In re Marriage of Ryberg.

Relocation



Bumekpor v. Shaw

- After Father filed to establish legal decision-making and parenting time for his two sons, he obtained a Preliminary Injunction prohibiting removal of the children from Arizona.
- Although Mother was properly served, she moved to Indiana with the children within a week of being served.
- Father filed for contempt and Mother alleged consent.
- At temporary orders the court ordered joint legal decision-making and designated Mother the primary care parent in Indiana, with Father awarded one week of parenting time a month.
- Father appealed, arguing the trial court erred by failing to make the requisite findings under A.R.S. § 25-408 and failed to rule on his motion for contempt.
- The Court of Appeals held that the requirements of A.R.S. § 25-408 do not apply where a party has already relocated prior to a court order or agreement.
- Rather, the statute applies only when both parents reside in the state and there is a written agreement or court order establishing that both parents are entitled to joint legal decision-making or parenting time.
- As to contempt, the Court conceded that the Preliminary Injunction had the force and effect of a court order, but Father failed to provide evidence in a transcript from the hearing, so the Court presumed the actions of the trial court were supported by the missing transcript.

Schubert v. Ryman




- Mother moved from South Dakota to Arizona, so Father filed a paternity action in South Dakota. Mother then filed a paternity action in Arizona, resulting in a UCCJEA conference, but Father did not participate believing that jurisdiction would go to Arizona anyway.
- Both parents participated in parenting-related proceedings in Arizona and orders were entered. Father moved to set aside the orders under Rule 85.
- The relief was denied and Father appealed.
- The Court of Appeals held that Arizona did not have jurisdiction under the UCCJEA because subject matter jurisdiction by agreement or waiver cannot be conferred, only personal jurisdiction and South Dakota was the home state of the child.
- In addition, the Court of Appeals held that Arizona could not proceed even though Father waived his challenge and then participated in the Arizona proceedings.

Rule 69 Agreements (In re Marriage of Cooper)



- When Father petitioned to terminate his child support obligation and other relief, he and Mother reached an agreement resolving all pending issues.
- The court accepted the agreement and directed Father's counsel to submit a proposed order.
- However, within a few weeks thereafter, Mother filed a motion for reconsideration and attempted to withdraw from their agreement.
- The trial court denied Mother's request and the Court of Appeals affirmed, holding that once a Rule 69 agreement is accepted, the trial court loses authority to modify or reject the terms. *See, Engstrom v. McCarthy*, 243 Ariz. 469 (App. 2018).



Temporary Orders (Smith v. Gentry)

- Mother filed an expedited motion to modify the temporary agreement regarding parenting time.
- The trial court granted Mother's request without a hearing because Mother had relocated.
- The Court of Appeals vacated the temporary order and held that temporary orders can only be entered after allowing both parties to be heard or if there is proof of irreparable harm to a child.
- The Court of Appeals reasoned that under Rule 47 the trial court was required to hold a hearing and there was no allegation of irreparable injury.
- As a result, the trial court did not allow Father to present evidence, confront witnesses, or even respond to Mother's allegations and his due process rights were violated.



UCCJEA (In re Marriage of Puskaric & George)

- Arizona made an initial custody determination under the UCCJEA as the home state of the child.
- Thereafter, Mother moved to Mississippi with the child and Father filed a petition in Arizona.
- Mother moved to dismiss the petition for lack of subject matter jurisdiction on the grounds that Arizona was not the home state of the child.
- The trial court dismissed the case and Father appealed.
- The Court of Appeals held that the trial court mistakenly applied A.R.S. § 25-1031 and ruled that once a parenting order is entered that state continues with exclusive continuing jurisdiction for any future parenting issue under A.R.S. § 25-1032, not home state jurisdiction.

Wishes of the Child (Aros v. Rocha)

- Father requested sole legal decision-making, and Mother did the same by claiming Father committed domestic violence.
- When Father failed to appear on the second day of trial, the trial court granted Mother's request for sole legal decision-making authority and awarded Father limited parenting time.
- The Court of Appeals affirmed as to legal decision-making based on the domestic violence testimony by Mother.
- As to parenting time, the Court of Appeals also affirmed and found that the trial court had considered one child's request to have more time with Father, but decided that school year stability argued for a different course.
- The Court pointed out that a child's wishes are only one of several factors the court considers when determining the child's best interests for purposes of parenting time and the trial court did not err.



If you have any questions or would like to request these materials, please contact:

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A graphic with the words 'THANK YOU' in a playful, hand-drawn style. The word 'THANK' is in uppercase letters, with 'T' in black, 'H' in pink, 'A' in orange, 'N' in yellow, and 'K' in purple. The word 'you' is in lowercase letters, with 'y' in yellow, 'o' as a red circle with white segments, and 'u' in teal. The graphic is set against a white background within an orange-bordered box.

THANK
you