

**SELECTED CASES, STATUTES AND RULES ON
TRUSTS AND RELATED ISSUES
(JURISDICTION/JOINDER/DISBURSEMENT)
IN FAMILY LAW/PROBATE CASES¹**

By Steven H. Everts

I. JURISDICTION

A. Personal Jurisdiction

1. ***Hoag v. French*, __P.3d__, 2015 WL 4911651, 719 Ariz. Adv. Rep. 40 (9/2/15).** Wells Fargo obtained \$2.5 million default judgment against Hoag personally and his revocable family trust. Wells Fargo initiated garnishment proceedings and issued subpoenas to produce records from several institutions it believed were holding Hoag's assets and distributions in three Unitrusts. Hoag resigned as trustee and appointed a corporation in the Bahamas as successor trustee. **Held: trial court had no personal jurisdiction over successor trustee without minimum contacts required to confer personal jurisdiction over trustee in Arizona.**

2. ***In re Estate of Rodriguez*, 215 Ariz. 358, 160 P.3d 679 (App. 2007).** Wife created an Arizona will and trust after Arizona marriage leaving certain property to siblings and husband. After wife's death in Mexico the Arizona probate court determined that husband was still married to a prior spouse at the time of the marriage to wife. **Held: (1) Arizona had jurisdiction to determine validity of marriage; (2) Arizona had subject matter jurisdiction regardless of domicile; (3) Arizona had personal jurisdiction over husband because marriage occurred here; (4) Arizona law applied to void the marriage; but (5) invalidity of the marriage did not revoke wife's will and provisions which became fixed upon her death.**

3. ***In re Marriage of Bengé*, 151, Ariz. 219, 726 P.2d 1088 (App. 1986).** Post-decree enforcement action where wife claimed husband failed to make payments of \$2,000.00 per month on equalization judgment of \$400,000.00. Trial court found that

¹ Appreciation is expressed to Lindsay Olivarez, one of Mr. Everts' associates, for most of the legal research in these materials.

after dissolution husband did not make all payments and transferred assets to several corporations and to a profit-sharing and retirement trust to avoid wife's collection efforts. As a result of husband's fraudulent transfers, the trial court imposed liens and ordered an interest in the trust to wife. The Court of Appeals affirmed and **held: (1) Arizona had jurisdiction over the trust although it was administered in New York and the directors and administrative committee were not necessary parties to the action because the amounts available for distribution were subject to husband's control; (2) liens could be imposed against the trust under A.R.S. § 25-318(C); and (3) the trial court's judgment was a valid QDRO putting the trust on notice that wife had a valid interest in the trust which could not be defeated by husband.**

4. ***Tippit v. Lahr*, 132 Ariz. 406, 646 P.2d 291 (App. 1982).** Prior to the 1980 Supreme Court holding in *Jurek v. Jurek*, 124 Ariz. 596, 606 P.2d 812 (1980), that a claim for personal injuries is the separate property of the injured spouse, husband and wife agreed in their 1969 PSA, which was incorporated in the decree, to equally divide husband's substantial personal injury proceeds between husband and the four common children. Husband challenged the division 11 years later after the law changed. The trial court granted husband's request and modified the decree without joining the children in the action. The Court of Appeals reversed and noted the trial court's disregard of Rule 19, ARCP, which nullified the children's substantial interest in husband's tort recovery. As a result, the Court **held that the trial court had no jurisdiction over the adult children or minor children in wife's custody.** Also, the children were not required to intervene to protect their own interests because going forward impeded their ability to protect their interest in the proceeds.

5. ***Cocke v. Cocke*, 13 Ariz. App. 57, 474 P.2d 64 (1970).** While still married, prior to filing divorce, husband and wife agreed to divide their separate and community property with wife placing her share in an irrevocable trust for the benefit of herself and the children. Wife transferred her interest in the property to the trustee with herself as a life tenant and the remainder to the children. In the divorce, wife attempted to set aside the agreement. The children and trustees were joined in the divorce action. The trial court upheld the agreement. Thereafter in a post-decree enforcement action, wife sought her share of payments arising from the sale of land that had been jointly removed from the trust. Relief was granted by the trial court. The Court of Appeals affirmed and held that husband was estopped from asserting the irrevocability of the trust where his actions were consistent with the trust being revocable. **Also, the trial court properly exercised jurisdiction without notice to the minor beneficiaries where their rights were determined by the trust instrument itself.**

B. Subject Matter Jurisdiction

1. ***Russell Piccoli, P.L.C. v. O'Donnell*, 2015 WL 4944090 (Memorandum Decision 8/20/15).**² Challenge to attorney's fees award to law firm for services rendered to wife **dismissed for lack of jurisdiction where husband and trustee were not aggrieved parties on appeal.**

2. ***In re The Francis E. O'Donnell, Jr., Irrevocable Trust #1 to #10*, 2013 WL 709650 (Memorandum Decision 2/26/13).** Arizona Probate Court had **subject matter jurisdiction over wife's marital property interests in 12 irrevocable trusts even though dissolution action was pending in Missouri where husband had named Arizona attorney as trustee and she administered the trusts in Arizona.**

3. ***In re Estate of Rodriguez*, 215 Ariz. 358, 160 P.3d 679 (App. 2007).** Wife created an Arizona will and trust after Arizona marriage leaving certain property to siblings and husband. After wife's death in Mexico the Arizona probate court determined that husband was still married to a prior spouse at the time of the marriage to wife. Held: **(1) Arizona had jurisdiction to determine validity of marriage; (2) Arizona had subject matter jurisdiction regardless of domicile because wife appointed U.S. Bank as trustee; (3) Arizona had personal jurisdiction over husband; (4) Arizona law applied to void the marriage; (5) but invalidity of the marriage did not revoke wife's will and provisions which became fixed upon her death.**

4. ***Dressler v. Morrison*, 212 Ariz. 279, 130 P.3d 978, 4 Ariz. Adv. Rep. 6 (2006).** A party claiming to be a tenant-in-common with former spouse who fraudulently induced him to transfer his share of community property to her separate property real estate trust **may bring separate civil action**, as opposed to a post-trial motion in the family court action, to obtain relief.

5. ***Lee v. Lee*, 133 Ariz. 118, 649 P.2d 997 (App. 1982).** Trial court has **jurisdiction to order sale of land**, rather than partition in kind, **but not to order a direct transfer of community funds to pay a creditor** in full payment of the alleged balance due. The creditor, although a witness, did not intervene, was not ordered to join, and was not a party to the proceedings. Thus, the allocation of community liabilities

² Memorandum Decisions are cited for instruction and informational purposes only, not as precedent. See Rule 111, Rules of Supreme Court of Arizona, amended 1/1/15.

determines the rights and obligations of parties before the court only with respect to each other.

II. JOINDER

A. Statute

A.R.S. § 25-314(D) states the court may join additional parties necessary for the exercise of its authority.

B. Rules

1. Rules 19 (Indispensable) and 20 (Permissive), ARCP, not applicable. Under Rule 2(A), ARFLP, ARCP applies only when incorporated by reference.

2. Rules 19 and 20, ARCP, not in Correlation Table.

3. Rule 33 Counterclaims, Third Party Practice

- a. statutory claim against another party or third party without prior leave of court
- c. Court may join additional parties
- d. Court may allow intervention
- e. Misjoinder or non-joinder not grounds for dismissal
- f. File and serve motion to join or intervene
- g. 20 days for response
- h. If joinder or consolidation permits jury trial then ARCP governs proceedings

4. Rule 37(C) allows substitution of or joinder with the original party of a person to whom a transfer of interest has occurred.

C. Cases

1. **Gerow v. Covill**, 192 Ariz. 9, 960 P.2d 55, 268 Ariz. Adv. Rep. 38 (App. 1998). Husband discontinued community information systems business after date of service and became president and director of new business producing electronic brochures with his brother and sister-in-law. Sister-in-law contributed \$2,500.00 start-up costs. No other person contributed capital. Two of the four corporate clients from

old business became clients of new business. Husband's salary in new business increased plus bonus. Trial court found fraudulent conveyance of business interests which entitled wife to 50% of husband's stock ownership in new business. Court of Appeals affirmed and held: (1) **sister-in-law and new business were not indispensable parties because the trial court was able to fashion the relief in their absence without adversely affecting any rights they may have;** (2) a fraudulent conveyance of the community interest in the original business occurred (elements set forth); and (3) husband's fiduciary duty to wife did not cease upon filing of Petition, but continued until termination of the marriage.

2. ***Tippit v. Lahr*, 132 Ariz. 406, 646 P.2d 291 (App. 1982).** Prior to the 1980 Supreme Court holding in *Jurek v. Jurek*, 124 Ariz. 596, 606 P.2d 812 (1980), that a claim for personal injuries is the separate property of the injured spouse, husband and wife agreed in their 1969 PSA, which was incorporated in the decree, to equally divide husband's substantial personal injury proceeds between husband and the four common children. Husband challenged the division 11 years later after the law changed. The trial court granted husband's request and modified the decree without joining the children in the action. The Court of Appeals reversed and noted the trial court's disregard of Rule 19, ARCP, which nullified the children's substantial interest in husband's tort recovery. As a result, the Court held that the trial court had no jurisdiction over the adult children or minor children in wife's custody. Also, **the children were not required to intervene to protect their own interests because going forward impeded their ability to protect their interest in the proceeds.**

3. ***Pioneer Nat. Trust Co. of Arizona (Trustee Under Trust No. 218948) v. Pioneer Nat. Trust Co. of Arizona (Trustee under Trust Nos. 10359 and 10376)*, 115 Ariz. 511, 566 P.2d 312 (App. 1977).** In action where trustee/vendee of real estate lots was entitled to partial release of lots upon payment of release price, **beneficiaries of the trust were not indispensable parties.** The time-honored categories of "indispensable," "necessary" and "proper" parties have been discarded with emphasis now placed on the practical realities of joinder. **Parties will not be considered indispensable if they are beneficiaries of a trust whose interest the trustee may adequately represent.**

4. ***Cocke v. Cocke*, 13 Ariz. App. 57, 474 P.2d 64 (1970).** While still married, prior to filing divorce, husband and wife agreed to divide their separate and community property with wife placing her share in an irrevocable trust for the benefit of herself and the children. Wife transferred her interest in the property to the trustee

with herself as a life tenant and the remainder to the children. In the divorce, wife attempted to set aside the agreement. The children and trustees were joined in the divorce action. The trial court upheld the agreement. Thereafter in a post-decree enforcement action, wife sought her share of payments arising from the sale of land that had been jointly removed from the trust. Relief was granted by the trial court. The Court of Appeals affirmed and held that husband was estopped from asserting the irrevocability of the trust where his actions were consistent with the trust being revocable. Also, **the trial court properly exercised jurisdiction without notice to the minor beneficiaries where their rights were determined by the trust instrument itself.**

5. ***Brought v. Howard*, 30 Ariz. 522, 249 P. 76 (1926).** An “old” and “childless” couple, previously married to each other and divorced, agreed to remarry and make their wills so that the one first to die should leave all of his or her property to the other. In furtherance of the agreement they executed wills and quit claim deeds and delivered them to a third party. They married a year later, but before husband died he transferred a parcel of real property to an old flame. Wife sought enforcement of the agreement. The trial court denied wife’s request. The Supreme Court affirmed the trial court and found the agreement in violation of the statute of frauds and unenforceable. In doing so, the court held that **the administrator was not a necessary party as it was a matter of indifference to him which contender received the lot.**

III. DISBURSEMENT OF ASSETS

A. Cases

1. ***Austin v. Austin*, 348 P.3d 897, 2015 WL 1959070, 711 Ariz. Adv. Rep. 5 (4/30/15).** **Operating Agreement of LLC (with two Grantor Retained Income Trusts [GRITS] as members), was a post-marital agreement subject to the heightened requirements of *In re Harber’s Estate*, 104 Ariz. 79, 449 P.2d 7 (1969), instead of ordinary contract principles.** Therefore, it was husband’s burden to prove by clear and convincing evidence that the agreement was not fraudulent or coerced, or that it was not unfair or inequitable. As a result, arbitration clause was not binding on the parties.

2. ***Romero v. Romero*, 2008 WL 2790157 (Memorandum Decision 7/15/08).** **Living Trust, created after marriage, which contained language related to division of proceeds from sale of marital residence, was subject to equitable distribution and broad discretion by trial court.**

3. ***In re Estate of Rodriguez***, 215 Ariz. 358, 160 P.3d 679 (App. 2007). Wife created an Arizona will and trust after Arizona marriage leaving certain property to siblings and husband. After wife's death in Mexico the Arizona probate court determined that husband was still married to a prior spouse at the time of the marriage to wife. Held: (1) Arizona had jurisdiction to determine validity of marriage; (2) Arizona had subject matter jurisdiction regardless of domicile; (3) Arizona had personal jurisdiction over husband; (4) Arizona law applied to void the marriage; (5) but **invalidity of the marriage did not revoke wife's will and provisions which became fixed upon her death.**

4. ***Gerow v. Covill***, 192 Ariz. 9, 960 P.2d 55, 268 Ariz. Adv. Rep. 38 (App. 1998). Husband discontinued community information systems business after date of service and became president and director of new business producing electronic brochures with his brother and sister-in-law. Sister-in-law contributed \$2,500.00 start-up costs. No other person contributed capital. Two of the four corporate clients from old business became clients of new business. Husband's salary in new business increased plus bonus. Trial court found fraudulent conveyance of business interests which entitled wife to 50% of husband's stock ownership in new business. Court of Appeals affirmed and held: (1) sister-in-law and new business were not indispensable parties because the trial court was able to fashion the relief in their absence without adversely affecting any rights they may have; (2) a **fraudulent conveyance** of the community interest in the original business occurred (elements set forth); and (3) husband's fiduciary duty to wife did not cease upon filing of Petition, but continued until termination of the marriage.

5. ***Martin v. Martin***, 156 Ariz. 440, 752 P.2d 1026 (App. 1986). Husband's sole and separate 1/5 interest in **farm trust** generated additional income for purchase of oil stock and an additional 2/5ths interest in trust. Court of Appeals affirmed trial court and held that additional purchases were community property **subject to equal division** because they were acquired during the marriage and the funds from the trust were deposited into a joint bank account and commingled.

6. ***In re Marriage of Benge***, 151, Ariz. 219, 726 P.2d 1088 (App. 1986). Post-decree enforcement action where wife claimed husband failed to make payments of \$2,000.00 per month on equalization judgment of \$400,000.00. Trial court found that after dissolution husband did not make all payments and transferred assets to several corporations and to a **profit-sharing and retirement trust** to avoid wife's collection

efforts. As a result of husband's fraudulent transfers, the trial court imposed liens and ordered an interest in the trust to wife. The Court of Appeals affirmed and held: (1) Arizona had jurisdiction over the trust although it was administered in New York and the directors and administrative committee were not necessary parties to the action because the amounts available for distribution were subject to husband's control; (2) **liens could be imposed against the trust under A.R.S. § 25-318(C); and (3) the trial court's judgment was a valid QDRO putting the trust on notice that wife had a valid interest in the trust which could not be defeated by husband.**

7. ***Pantano v. Pantano***, 21 Ariz. App. 541, 521 P.2d 640 (1974). Trial court properly ordered **husband to hold certain savings accounts and bonds in trust for the benefit of his children** until they were emancipated where he had previously made gifts of such property to his children and the order did not have the effect of divesting him of his property that he had already divested by himself.

8. ***Cocke v. Cocke***, 13 Ariz. App. 57, 474 P.2d 64 (1970). While still married, prior to filing divorce, husband and wife agreed to divide their separate and community property with wife placing her share in an irrevocable trust for the benefit of herself and the children. Wife transferred her interest in the property to the trustee with herself as a life tenant and the remainder to the children. In the divorce, wife attempted to set aside the agreement. The children and trustees were joined in the divorce action. The trial court upheld the agreement. Thereafter in a post-decree enforcement action, wife sought her share of payments arising from the sale of land that had been jointly removed from the trust. Relief was granted by the trial court. The Court of Appeals affirmed and held that **husband was estopped from asserting the irrevocability of the trust where his actions were consistent with the trust being revocable**. Also, the trial court properly exercised jurisdiction without notice to the minor beneficiaries where their rights were determined by the trust instrument itself.

B. Attorney Fees

1. ***Russell Piccoli, P.L.C. v. O'Donnell***, 2015 WL 4944090 (Memorandum Decision 8/20/15). Challenge to attorney's fees award to law firm for services rendered to wife dismissed for lack of jurisdiction where husband and trustee were not aggrieved parties on appeal.

2. *Shacknai v. Shacknai*, 2015 WL 3767157 (Memorandum Decision 6/16/15). Wife entitled to award of attorney's fees in dispute over language of two trusts contemplated by PSA despite lack of AFI, evidentiary hearing and language of PSA, where parties submitted matter to trial court for ruling on written briefs.

IV. ADDITIONAL REFERENCES

1. Construction and Application of Limited Liability Company Acts-Issues Relating to Formation of Limited Liability Company and Addition or Disassociation of Members Thereto, 43 A.L.R. 6th 611 (2009, updated).