

Patterns of Nonprecedent: What Memoranda Decisions Teach Us About Success at Trial and on Appeal

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History of Memorandum Decisions

- ◉ Prior to 1973 all appellate decisions were precedent.
- ◉ 1973 – Arizona Supreme Court modified the rules to allow for Memorandum Decisions
 - Done to reduce workload, and for West reporters.
 - NOTE: All Judges review published decisions – not just 3 Judge panel
- ◉ 1997 – Rules modified to allow for citation to memorandum decisions in certain circumstances
- ◉ July 2007 – Both Division 1 and Division 2 put memorandum decisions on websites
 - Division 1 - <http://www.cofad1.state.az.us/memod/memorandumindex.htm>
 - Division 2 - <http://www.apltwo.ct.state.az.us/ODSPlus/recentmemos.cfm>
- ◉ Memorandum Decisions available on Westlaw and Lexis

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Rule 28, Arizona Rules of Civil Appellate Procedure

(a) Opinion; Memorandum Decision; Order; Publication.

- (1) An opinion is written disposition of a matter which is intended for publication under subdivision (4) below.
- (2) A memorandum decision is a written disposition of a matter not intended for publication.
- (3) An order is any disposition of a matter before the court other than by opinion or memorandum decision.
- (4) Publication is the distribution of opinions for reporting by publishing companies in compliance with the provisions of A.R.S. § 12-107, § 12-108 and § 12-120.07.

(b) When Disposition to Be by Opinion. Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it:

1. establishes, alters, modifies or clarifies a rule of law, or
2. calls attention to a rule of law which appears to have been generally overlooked, or
3. criticizes existing law, or
4. involves a legal or factual issue of unique interest or substantial public importance, or
5. if the disposition of a matter is accompanied by separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

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Rule 28, Arizona Rules of Civil Appellate Procedure

(c) Dispositions as Precedent.

Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.

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Changes to Rule 28 Petition R10-0032

- Rule 111 Arizona Rules of the Supreme Court and Rule 28 Arizona Rules of Civil Appellate Procedure
- Comment Deadline is May 20, 2011
- **(c) Dispositions as Precedent and Citation.** Memorandum decisions issued by the Arizona Supreme Court or Arizona Court of Appeals shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Memorandum decisions issued by other jurisdictions may be cited for these purposes. Memorandum decisions issued by other jurisdictions may also be cited to any Arizona court for persuasive purposes unless citation for such purposes is prohibited by the issuing jurisdiction. If a party cites a memorandum decision that is not available in a publicly accessible electronic database, the ~~Any~~ party citing such a memorandum decision ~~pursuant to this rule~~ must attach a copy of it to the motion or petition in which such decision is cited.

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Our Research

- Reviewed 381 Family Law appeals from July 2007, until October 2010.
 - Division 1 Published – 36
 - Division 1 Memorandum – 294
 - Division 2 Published – 2
 - Division 2 Memorandum - 49
- 90% of cases decided by Memorandum Decision
- If you read only Opinions, you miss 90% of Court reasoning

Disclaimer – It is possible that we missed some cases in our research, but 381 is still a significant sampling.

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General Data

	% Affirmed Abuse of Discretion	% Reversed Abuse of Discretion	% Affirmed De Novo	% Reversed De Novo
Division 1 Published	18.75 %	12.50 %	29.17 %	39.58 %
Division 1 Memorandum	77.96 %	13.51 %	2.91 %	7.48 %
Division 2 Memorandum	87.34 %	10.13 %	0.00 %	2.53 %

Issue Reversal Rates

Issue Reversal Rates - Highest

Division 1 Published		Division 1 Memorandum		Division 2 Memorandum	
QDRO	- 67%	UCCJEA	- 66%	Lien's	- 67%
Spousal Maint.	- 67%	Property Classification	- 58%	Custody Modification	- 33%
Child Support	- 67%	Child Support	- 37%	Property Distribution	- 23%

Issue Reversal Rates - Lowest

Division 1 Published		Division 1 Memorandum		Division 2 Memorandum	
Relocation	- 33%	Spousal Maint.	- 12%	Parenting Time/Modif.	- 0%
Property Distribution	- 33%	Valuation	- 12%	Child Support	- 0%
		Attorney's Fees	- 15%	Attorney's Fees	- 0%

Who Cares?

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;

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Reversal Percentage by Standard of Review

	When Issue is De Novo	When Issue is Abuse of Discretion
Division 1 Published	58%	40%
Division 1 Memorandum	72%	14.9%
Division 2 Memorandum	100%	10%

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Why De Novo = Success

- Court is free to ignore trial court reasoning
 - Does not mean you can raise arguments for the first time on appeal
- Resources and scrutiny at the appellate level are greater than at the family court
 - Three judge panel;
 - Law clerks;
 - Staff attorneys.
- “Writing is thinking on paper.”
- Potential that decision will be precedential

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De Novo – The prized standard of review

How Frequently Issue is Considered *De Novo*

Division 1 Published	Division 1 Memorandum	Division 2 Memorandum
QDRO - 67%	Interpretation of Decree - 100%	Lien's - 67%
Spousal Maintenance - 67%	UCCJEA - 100%	Custody Modification - 33%
Child Support - 67%	Property Classification - 58%	Property Distribution - 23%

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Framing Issues as *De Novo*

- ◉ Difference between “factual findings” and “legal conclusion.”
- ◉ Legal conclusions are reviewed de novo. See Southwest Soil Remediation v. City of Tucson, 201 Ariz. 438, 442, ¶ 12, 36 P.3d 1208, 1212 (App.2001); Enterprise Leasing Co. v. Ehmke, 197 Ariz. 144, 145, 3 P.3d 1064, 1065 (App.1999).

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Framing Issues as *De Novo*

EXAMPLE

- ◉ Husband transferred \$100,000 into jointly held account
- ◉ No funds were added or removed from the account
- ◉ As the parties did not discuss transfer, the \$100,000 was gift to the community

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Framing Issues as *De Novo*

FINDINGS

- Husband transferred \$100,000 into jointly held account
- No funds were added or removed from the account
- The parties did not discuss transfer

CONCLUSION

- The \$100,000 was gift to the community

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Framing Issues as *De Novo*

Property Issues

- **Property Distribution - Abuse of Discretion**
See In re Marriage of Pownall, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App.2000).
- **Property Classification - *De Novo***
See Bell-Kilbourn v. Bell-Kilbourn, 216 Ariz. 521, 523, ¶ 4, 169 P.3d 111, 113 (App. 2007);
- ***Apply correct standard for waste – De Novo***
See Aileen H. Char Life Interest et al. v. Maricopa County, 208 Ariz. 286, 290, ¶ 6, 93 P.3d 486, 490 (2004).

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Framing Issues as *De Novo*

Valuation Issues

- Factual determination that must be based on the facts and circumstances of each case – Abuse of Discretion

See In re Marriage of Molloy, 181 Ariz. 146, 150, 888 P.2d 1333, 1337 (App.1994).

- Items included in valuation- *De Novo*

See Aileen H. Char Life Interest, 208 Ariz. at 290, ¶ 6, 93 P.3d at 490.

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Framing Issues as *De Novo*

Custody Issues

- Custody determination- Abuse of Discretion

See Owen v. Blackhawk, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App.2003).

- Failure to make A.R.S. 25-403(A) findings- *De Novo*

See Downs v. Scheffler, 206 Ariz. 496, 501, ¶ 19, 80 P.3d 775, 780 (App.2003)

- *UCCJEA jurisdiction to modify custody order – De Novo*

See Melgar v. Campo, 215 Ariz. 605, 606, ¶ 6, 161 P.3d 1269, 1270 (App. 2007).

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Framing Issues as *De Novo*

Child Support

- **Child Support Determination- Abuse of Discretion**

See In re Marriage of Robinson & Thiel, 201 Ariz. 328, 331 ¶ 5, 35 P.3d 89, 92 (App.2001).

- **Interpretation of the Guidelines- *De Novo***

See Mead v. Holzmann, 198 Ariz. 219, 220 ¶ 4, 8 P.3d 407, 408 (App.2000).

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Attorney's Fees on Appeal

- Division 1 Published – 39% requested
29% granted
- Division 1 Memorandum – 59% requested
18% granted
- Division 2 Memorandum – 41% requested
30% granted
- Percentage of requests without statutory citation – 5-10%

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Attorney's Fees on Appeal

- Change to ARCAP 21
 - Petition R 10-0033
 - Comments due May 20, 2011

(c) **Claim for Attorneys' Fees.** (1) When attorneys' fees are claimed pursuant to statute, decisional law or contract, a request for allowance of attorneys' fees in connection with the prosecution or defense of the appeal or the prosecution or defense of the case in the superior court shall be made in the briefs on appeal, or by written motion filed and served prior to oral argument or submission of the appeal. ALL REQUESTS FOR ATTORNEYS' FEES SHALL SPECIFICALLY STATE THE STATUTE, RULE, DECISIONAL LAW, CONTRACTUAL BASIS, OR OTHER AUTHORITY AUTHORIZING AN AWARD OF FEES. CITATION TO THIS RULE 21 IS NOT, BY ITSELF, SUFFICIENT. If a petition or cross-petition for review is filed, a request for allowance of attorneys' fees shall be made in the petition or cross-petition for review or response thereto. If recovery of attorneys' fees is allowed by the court in its decision or order, a statement of the amount claimed for such fees may be included in the statement of costs prescribed by Rule 21(a).

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Examples of Interesting Law

- Kelly v. Faizi, No. 1 CA-CV 008-0583 (September 29, 2009)
 - **Issue:** Court's ability to withhold passport due to concern of kidnapping to non-Hague country (Pakistan)
 - No published case on this issue
 - Due process analysis
 - Review of New York, California, Washington, Utah law.

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Examples of Interesting Law

- Stathakis v. Stathakis, No. 1 CA-CV 05-0094 (March 30, 2006)
 - Issue: Value of Medical Practice and Enterprise versus Personal Goodwill
 - No published case on this issue
 - Utilizes Washington law for analysis; Hall v. Hall, 692 P.2d 175 (Wash 1984).
 - Distinguishes Arizona goodwill cases of Mitchell, Molloy, and Wisner.

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Examples of Interesting Law

- Fouch v. Fouch, No. 1 CA-CV 09-0480 (June 10, 2010)
 - Issue: Post-Decree use of QDRO to enforce unpaid property equalization
 - No published case on this issue
 - The Court found that ERISA's anti-alienation provisions were inapplicable to a state court order constituting a QDRO under 29 U.S.C. § 1056(d)(3)(A).

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Examples of Interesting Law

- **Salas v. Hernandez, No. 1 CA-CV 09-0366 (July 13, 2010)**
 - Issue: Time for appeal from unsigned order deny motion for new trial.
 - Appeal period tolled for more than 6 months.
 - Signed order required to start 30 day period ticking.

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Examples of Interesting Law

- **Gallagher v. Gallagher, No. 1 CA-CV 07-0250 (January 1, 2008)**
 - Issue: Can one party lodge a decree that contains "boilerplate terms" not in Rule 69 agreement.
 - Parties signed written settlement agreement; Judge Pro Tem entered decree prepared by Husband over Wife's objection
 - Decree contained "boilerplate terms" –
"each parent would bear total financial responsibility for extracurricular activities chosen by that parent"
 - Court of Appeals remanded, holding:
Provisions in the decree that add to or vary the terms of the parties' agreements, even if arguably "fair," cannot be inserted by Husband's counsel and adopted by the court.

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Sources for Updates on Memorandum Decisions

- State Bar Case Law Update Committee
 - Includes Memorandum Decisions in updates
- Maricopa County Bar Association
 - Includes Memorandum Decisions in Newsletter
<http://www.maricopabar.org>
- Family Law Section Newsletter Articles
 - "Hiding in Plain Sight: What Memoranda Decisions Teach Us About Family Law In Arizona" by Keith Berkshire and Taylor Young
- The Cavanagh Law Firm's Appellate Blog (forthcoming)
 - <http://www.cavanaghlaw.com>

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