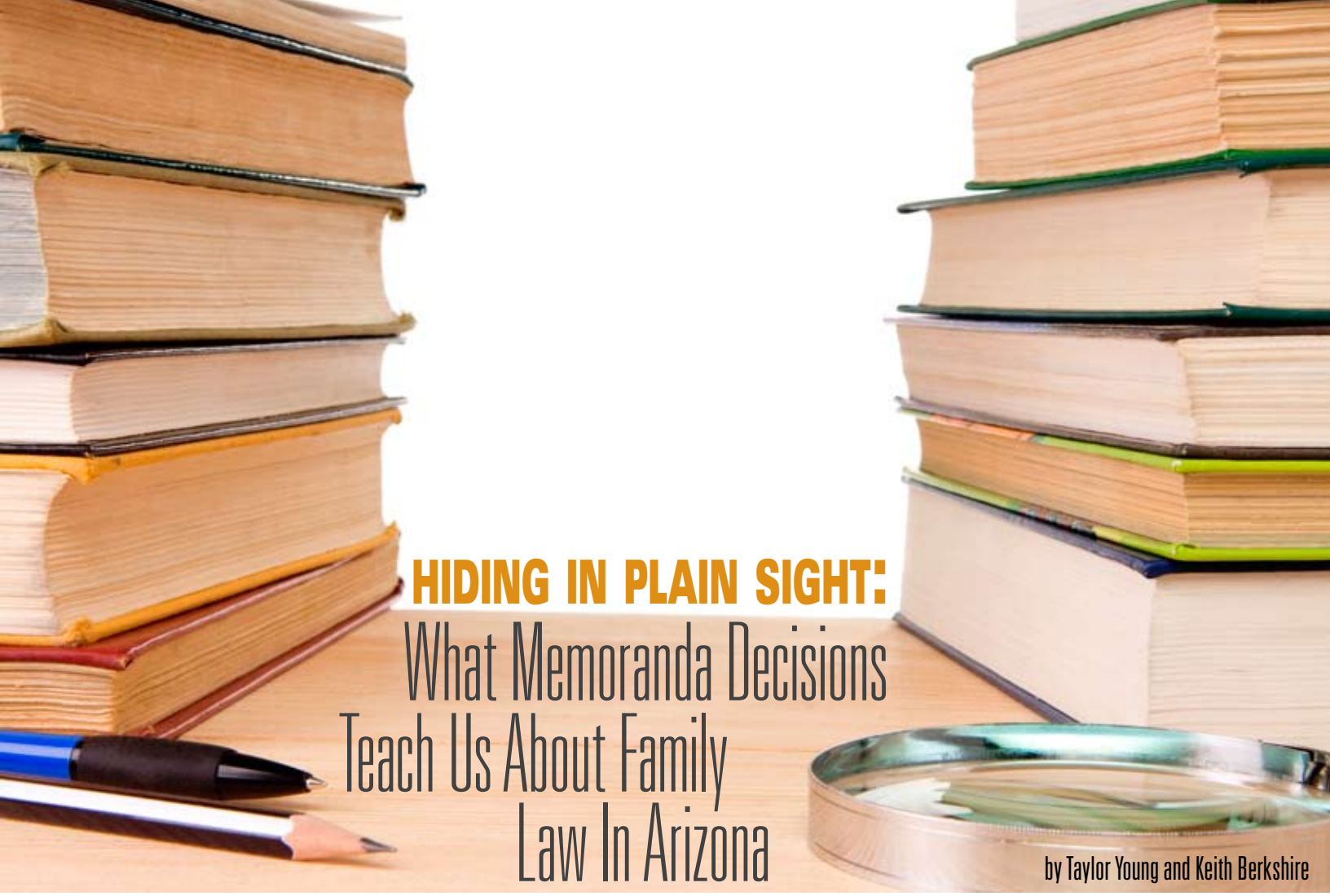

HIDING IN PLAIN SIGHT: What Memoranda Decisions Teach Us About Family Law In Arizona

by Taylor Young and Keith Berkshire

The Project: Review A Large (and Largely Ignored) Body of Law

When the Arizona Court of Appeals began making memoranda decisions available online in July of 2007, it gave practitioners new insight into how this court approaches family law issues. A simple review of the family law decisions issued since then shows that Division One has published a mere 36 opinions, while deciding 294 cases by memorandum. Division Two has even lower publication rates with only 2 published family law cases since July, 2007, while 49 cases were decided by memorandum. Even a family law practitioner who reads all of the published decisions from the Court of Appeals in this area only has a window into between 5 and 11% of the actual decisions made by the court. Although memoranda decisions may not be cited in court, they provide invaluable insight into the Court of Appeals' reasoning and disposition toward various issues. The thoughtful practitioner can use this to their advantage at both the trial court and appellate levels.

It was with this in mind that your authors sat down and reviewed the 381 published and memorandum family law decisions issued between July 2007, the date when memorandums became available online, and this writing. We tracked every appealed issue, the success rate for each issue, and the standard of review for each issue. We separately noted which cases were reversed, and in which cases the appellant attained the big prize—*de novo* review. We also categorized and listed every *de novo* issue and every case that had any issue that was reversed. Over the course of the next few newsletters, we will present a thorough analysis of our findings, as well as the conclusions and lessons that can be learned from this research.

Why Does the Court of Appeals Issue Memoranda Decisions, Anyway?

Under ARCAP 28(a) the Court of Appeals has the discretion to issue its decisions as either memoranda decisions or opinions. Memoranda decisions are not precedent, not intended for publication, and can only be cited for two reasons: (1) establishing the defense of res judicata, collateral estoppel, or the law of the case, or (2) informing the appellate court of decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or in the case of the Supreme Court, grant a petition for review.

Our common law system depends upon publication and citation to prior decisions of the appellate courts. So why has so much of the Court of Appeals' actual work been hidden from the public and deemed off limits to practitioners through the use of memoranda decisions? Memoranda decisions are the product of West's "official reporter" system, which originally published *all* appellate decisions out of the federal courts.[1] As the volume of *those* volumes began to grow exponentially, the various federal circuits enacted policies to restrict publication of decisions unless the opinion was of "general precedential value" and a majority of the panel rendering the decision ordered it.[2] Following suit, in 1973, the Supreme Court Rules and relevant statutory provisions in Arizona were changed to distinguish between "opinions," which are written dispositions intended for publication, and "memoranda decisions," which are not.[3]

The use of memoranda decisions purportedly decreased the burden on Arizona's appellate judges because memoranda decisions need not meet strict publication standards and, in contrast to opinions, they are not reviewed by all of the judges on the court prior to distribution. Since, according to Judge Donn Kessler, each judge issues an average of 76 case dispositive rulings per year, this is not an inconsequential savings in judicial resources.[4] Of course, it also saved trees by dramatically reducing the percentage of cases that were printed in the official bound case reporters.

The main problem with the memoranda decisions was that they were only distributed to the parties. They kept hidden from the public – through practical obscurity – the thought processes and legal rationale the court applied in the vast majority of its cases.

The court opened up a window into this body of law in July 2007, when both divisions of the Court of Appeals began making memoranda decisions available to the public on their websites.[5] Memoranda decisions also became available on the Westlaw database. Many issues of interest to family law practitioners appear only in these memoranda decisions. Although they do not constitute binding precedent, these unpublished decisions provide a source of cogent legal analysis and insight into how at least one panel of the appellate judges sees these issues.

Fouch v. Fouch, No. 1 CA-CV 09-0480 (June 10, 2010) is an example of such a case. In *Fouch*, the Court of Appeals upheld the use of a QDRO to enforce an unpaid property equalization, despite the fact that it was in a separate post-decree proceeding. This issue has never been addressed in a published opinion. The Court of Appeals interpreted ERISA to allow this type of QDRO, even though the parties were already divorced and the unpaid equalization was not support related.

Another example is *Stathakis v. Stathakis*, No. 1 CA-CV 05-0094 (March 30, 2006), which contains a prolific dissertation on the differences between enterprise and personal goodwill in the valuation of a business. These cases present issues of first impression in Arizona and, as far as citable precedent is concerned, the issues still are of first impression. But a practitioner who reads these memoranda decisions need not be as ingenious and resourceful as the lawyers who originally made the arguments. The memoranda decisions provide a roadmap for successfully arguing these issues to the trial court or for framing the issue appropriately on appeal.

Finding the Trends in the Family Law Decisions

In reviewing the available cases, the data showed trends that were expected in some regards and surprising in others. First, as noted above, a vast majority of the Court's family law work is done by unpublished decision.

	Published	Memo	% Memo
Division 1	36	294	89%
Division 2	2	49	96%

In determining the "success" rate of family law appeals, it became quickly evident that the standard of review was the key factor in overturning the trial court and was somewhat predictive of whether a case would be published or not.

ANALYSIS BY STANDARD OF REVIEW[6]

	% 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%

And what we expected was happening *is* happening. The vast majority of cases are affirmed on all issues, under an abuse of discretion standard. But this limited analysis does not show what is actually important, and useful to the family law attorney. That comes from examining the most common issues that were raised and tracking their disposition.

MOST COMMON ISSUE BY PERCENTAGE OF TOTAL ISSUES RAISED

	Division 1 Published	Division 1 Memorandum	Division 2 Memorandum
Custody/Modification	5.5%	19.75%	24.5%
Spousal Maintenance	8.3%	16.0%	26.5%
Child Support	25.0%	23.1%	28.5%
Property Distribution	16.7%	20.75%	26.5%
Attorney's Fees		26.9%	6.0%

Breaking down the data into the most and least commonly reversed issues, revealed these findings regarding success on appeal.

MOST COMMONLY REVERSED ISSUES BY PERCENTAGE[7]

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

LEAST COMMONLY REVERSED ISSUES BY PERCENTAGE[8]

Division 1 Published		Division 1 Memorandum		Division 2 Memorandum	
Relocation	33%	Spousal Maintenance	12%	Parenting Time/ Modification	0%
Property Dist.	33%	Valuation	12%	Child Support	0%
		Attorney's Fees	15%	Attorney's Fees	0%

We then reviewed the most common de novo issues, to determine if there was a correlation between de novo review, and the success rate on appeal.

MOST COMMON DE NOVO ISSUES BY PERCENTAGE[9]

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%

From this analysis, we draw our first lesson.

Lesson One: The Standard of Review is the Great Equalizer

It is common wisdom that the best thing a lawyer can do to improve their chances in the Court of Appeals is to win in the trial court. This is true as far as it goes. When the trial court has the discretion to rule, the Court of Appeals is loath to overturn. But there is a great equalizer – the standard of review.

When the Court of Appeals conducts review *de novo,* all bets are off. Just because the trial judge was convinced by the argument, does not mean that three appellate judges, their law clerks, and the assigned staff attorney will be. The resources and amount of scrutiny applied to arguments presented in the appellate courts are much greater than at the trial court level. When the Court of Appeals need not give deference to the trial court's decision or its reasoning, the result is truly a decision made anew.

This is borne out by our analysis. For example, the Court of Appeals applied abuse of discretion review to spousal maintenance issues in 93% of the cases we reviewed. They upheld the trial court on that issue 71% of the time. By contrast, in those cases where the Court of Appeals applied *de novo* review to the issue, the trial court was affirmed only 25% of the time.

What does this mean for the practitioner? If the memoranda decisions teach us nothing else it is this: smart advocacy at the appellate level really matters. As will be explored in our later installments, knowing what issues to advance, how to frame them in the trial court and beyond, and how to meet the heightened expectations of appellate judges and their staff will improve your chances at the in the Court of Appeals. Memoranda decisions are a terrific tool for helping you get there.

In future newsletters we will delve into other lessons, including how to shape the standard of review into the prized *de novo* standard and which issues are more and less likely to succeed on appeal and why. FL

endnotes

1 For an excellent discussion of the history behind memoranda decisions, see Hon. Donn G. Kessler & Thomas L. Husdon, *The "Secret" History of Memoranda Decisions: A Rule's Evolution*, Arizona Attorney, June 2006, at 10-12.

2 *Id.* at 10.

3 See Historical Notes to Arizona Supreme Court rule 111; Historical Notes to A.R.S. § 12-107 (noting that in 1973 all references in the publication statute were changed from "decision" to "opinion").

4 Hon. Donn Kessler, *Memo Decisions: Online and Citable? CON*, Arizona Attorney, June 2006, at 15, 22-30.

5 Both courts' websites are available through **www.azcourts.gov**.

6 We did not include Division 2 published opinions because there were only 2 cases, which did not supply sufficient data to analyze.

7 This was only examined for issues that presented themselves in at least three separate appeals.

8 This was only examined for issues that presented themselves in at least three separate appeals.

9 This was only examined for issues that presented themselves in at least three separate appeals.

about the authors

TAYLOR YOUNG is an appellate attorney and member at The Cavanagh Law Firm. **KEITH BERKSHIRE** is a family law attorney and associate at The Cavanagh Law Firm. They both have significant appellate experience. In addition to handling appeals for clients of the firm, the authors are often called upon by outside lawyers to consult on appellate matters for their clients. More information about Taylor and Keith is available at **www.cavanaghlaw.com**.