

## *Vincent v. Shanovich*

**Citation:** 405 P.3d 1120 (Ariz. 2017).

**Date Filed:** Dec. 6, 2017

**Author:** Justice Timmer

**Joined by:** Chief Justice Bales, Vice Chief Justice Pelander, Justices Brutinel, Bolick, Gould, and Lopez.

**Facts:** Vincent and Shanovich divorced in 2002. The dissolution decree awarded Vincent “a one-half (1/2) portion of [Shanovich’s] retirement including employer contribution and accrued interest as of the date of filing the Petition for Dissolution,” of August 25, 2000.<sup>1</sup> The parties stipulated to entry of a Qualified Domestic Relations Order (“QDRO”) in 2004, but the order did not tie the retirement benefits to the petition filing date. Instead the QDRO stated Vincent was entitled to “50% of [Shanovich’s] annuity, payable at the time and in the manner payments are made to the member pursuant to the retirement benefit elected;” or if Shanovich died or withdrew from the plan, Vincent would receive 50% of the account balance or death benefit “as of August 25, 2000” plus interest.<sup>2</sup> Neither party appealed.

In 2015, Shanovich retired. After learning that the QDRO had awarded Vincent half of his total pension, rather than calculating benefits up to August 5, 2000, Shanovich initiated proceedings in the family court to alter the QDRO to comply with the dissolution decree.

**Procedural history:** The case is currently before the Arizona Supreme Court. Shanovich moved the family court to replace the QDRO with one complying with the decree under Rule of Family Law Procedure 85(A), which empowers a family court to correct clerical errors “at any time” after judgment is entered.<sup>3</sup> The court denied the motion, reasoning that the decree and QDRO were “clear and unambiguous” and because no appeal had been taken, the court could not “consider extrinsic evidence regarding claims of clerical error.”<sup>4</sup> Shanovich timely appealed.

The court of appeals dismissed Shanovich’s appeal for lack of jurisdiction, reasoning that Shanovich’s motion had “attacked the merits of the QDRO and thus failed to assert any issues that could not have been raised in a timely appeal.”<sup>5</sup> The Arizona Supreme Court noted it had jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. §12-120.24.<sup>6</sup> It granted review to clarify the court of appeals’ jurisdiction over Rule 85(A) rulings.<sup>7</sup>

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<sup>1</sup> Vincent v. Shanovich, 405 P.3d 1120, 1121 (Ariz. 2017).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (citing ARIZ. R. FAM. LAW P. 85(A)).

<sup>4</sup> *Id.*

<sup>5</sup> Vincent v. Shanovich, 1 CA-CV-16-0431, 2017 WL 1174317, at \*1 (Ariz. Ct. App. Mar. 30, 2017), *vacated*, 405 P.3d 1120 (Ariz. 2017).

<sup>6</sup> *Vincent*, 405 P.3d at 1121.

<sup>7</sup> *Id.*

**Issue:** Under Rule 85(a) a family court may correct a clerical error in a family court judgment at any time. When a family court denies a Rule 85(a) motion to correct an error based on a finding that the error was non-clerical and the moving party timely appeals, does the court of appeals have jurisdiction to decide whether the family court correctly denied the motion?

**Holding:** Yes, the court of appeals has jurisdiction.

**Disposition:** The issue is remanded to the court of appeals to determine if the error on the QDRO is clerical. If the error is clerical, the case should be reversed and remanded to the family court for correction; if the error is non-clerical, the court of appeals should affirm the family court's ruling.

**Rule:** Because rulings on Rule 85(A) motions are special orders after judgment under A.R.S. § 12-2101(A)(2), the court of appeals has jurisdiction to decide a timely appeal from the family court's denial of a Rule 85(A) motion to correct an error.

**Reasoning:**

- **Statutory Interpretation:** The court began its discussion noting that absent a pertinent provision in the Arizona Constitution, appellate jurisdiction is governed entirely by statute.<sup>8</sup> The court also noted that whether the court of appeals correctly dismissed Shanovich's appeal for lack of jurisdiction is a legal issue subject to de novo review.<sup>9</sup>
- **Distinguishing Clerical and Judgmental Errors:** The court distinguished between clerical and judgment errors: Clerical errors occur when a written judgment fails to accurately set forth the court's decision;<sup>10</sup> they are inadvertent and may be a misstatement or an omission.<sup>11</sup> A judgment error occurs when the court's decision is accurately set forth but is legally incorrect.<sup>12</sup> The family court can correct clerical errors at any time under Rules 85(A), in contrast to other rules.<sup>13</sup> When a clerical error is asserted, the family court should examine the record to determine whether the judgment accurately recorded the court's intent and if not, the judgment should be corrected.<sup>14</sup>
- **Special Order Made After a Judgment:** The court noted that under A.R.S. § 12-2101(A)(2), the court of appeals has jurisdiction if the family court's order denying a

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<sup>8</sup> *Id.* (citing *Musa v. Adrian*, 636 P.2d 89, 90 (Ariz. 1981)).

<sup>9</sup> *Id.* at 1121–22 (citing *Bilke v. State*, 80 P.3d 269, 271 (Ariz. 2003)).

<sup>10</sup> *Id.* at 1122 (citing *Ace Auto. Prods., Inc. v. Van Duyne*, 750 P.2d 898, 900–01 (Ariz. Ct. App. 1987) discussing “ARIZ. R. CIV. P. 60(a), the civil counterpart to Rule 85(A)”).

<sup>11</sup> *Id.* (“Clerical mistakes [are] those ‘arising from oversight or omission.’” (quoting ARIZ. R. FAM. LAW P. 85(A))).

<sup>12</sup> *Id.* (citing *Egan-Ryan Mech. Co. v. Cardon Meadows Dev. Corp.*, 818 P.2d 146, 151 (Ariz. Ct. App. 1990); *Ace Auto. Prods.*, 750 P.2d at 900–01).

<sup>13</sup> *Id.* (comparing ARIZ. R. FAM. LAW P. 85(A), with ARIZ. R. FAM. LAW P. 83 (new trial/amended judgment), ARIZ. R. FAM. LAW P. 84 (reconsideration or clarification), and ARIZ. R. FAM. LAW P. 85(C) (mistake, etc.)).

<sup>14</sup> *Id.* (citing ARIZ. R. FAM. LAW P. 85(A)).

Rule 85(A) motion is a “special order made after final judgment,” which must meet two conditions<sup>15</sup>:

1. The issues raised on appeal from the order must be different from those that could have been raised on appeal from the underlying judgment.<sup>16</sup> “This requirement prevents a delayed appeal from the judgment, and also prevents multiple appeals raising the same issues.”<sup>17</sup>
  2. The order must either affect the judgment or relate to its enforcement to avoid “innumerable appeals of anything denominated an ‘order.’”<sup>18</sup>
- **The Court of Appeals Erred in Its Jurisdictional Analysis:** The Supreme Court held that the family court’s order satisfied both requirements and thus, the court of appeals has jurisdiction.<sup>19</sup> The order satisfied the first requirement because Shanovich could not have raised the issue of whether the QDRO contained a clerical error in a prior appeal; he could only appeal after the issue was first decided by the family court, which was triggered by a Rule 85(A) motion.<sup>20</sup> The court differentiated this from cases seeking a delayed or successive appeal.<sup>21</sup> The order met the second requirement because the motion related to enforcement of a judgment, and the correction is necessary to enforce the family court’s intent as expressed in the dissolution decree.<sup>22</sup> Because Shanovich filed a timely appeal from a “special order made after final judgment,” the court of appeals properly has jurisdiction.<sup>23</sup>

The court noted that the court of appeals incorrectly framed its jurisdictional inquiry as a question of whether the Rule 85(A) motion sought to correct a clerical or judgment error, and dismissed for lack of jurisdiction upon determining it was a judgment error.<sup>24</sup> This holding went to the merits of the 85(A) claim by addressing whether the family court’s error was a clerical or judgment error, but then confusingly dismissed for lack of jurisdiction after deciding the issue over which it claimed to lack jurisdiction.<sup>25</sup> The Supreme Court held that on remand, if the court of

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing *Reidy v. O’Malley Lumber Co.*, 374 P.2d 882, 886 (Ariz. 1962); *Arvizu v. Fernandez*, 902 P.2d 830, 832–33 (Ariz. Ct. App. 1995)).

<sup>17</sup> *Id.* (quoting *Arvizu*, 902 P.2d at 833).

<sup>18</sup> *Id.* (quoting *Arvizu*, 902 P.2d at 833). “[A]n order that is merely ‘preparatory’ to a later proceeding that might affect the judgment or its enforcement is not appealable.” *Id.* (quoting *Arvizu*, 902 P.2d at 833).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing ARIZ. R. CIV. APP. P. 13(a)(7)(B) (“requiring appellant’s opening brief to specify where in the record the particular issue was raised and ruled on.” (internal quotation omitted)) and *Crowe v. Hickman’s Egg Ranch, Inc.*, 41 P.3d 651, 654 (Ariz. Ct. App. 2002) (“stating that the failure to raise an issue to the superior court waives the argument on appeal”).

<sup>21</sup> *Id.* (citing *Reidy*, 374 P.2d at 886; *Arvizu*, 902 P.2d at 833).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1123 (citing *Vincent v. Shanovich*, 1 CA-CV-16-0431, 2017 WL 1174317, at \*2 (Ariz. Ct. App. Mar. 30, 2017), *vacated*, 405 P.3d 1120 (Ariz. 2017)).

<sup>25</sup> *Id.* (citing *Vincent*, 2017 WL 1174317, at \*2) “[A]lthough [Shanovich’s] motion to set aside was couched in terms of ‘clerical mistake’ . . . the motion essentially challenged the merits of the QDRO . . . [and so] we lack jurisdiction to consider his appeal . . .” *Id.* (quoting *Vincent*, 2017 WL 1174317, at \*2).

appeals found the error to be of judgment it should affirm the family court's decision, and if it found the error to be clerical it should reverse for correction by the family court.