THE LAWYER'S LENS
IT'S MORE THAN JUST A HEADLINE!

June 1, 2018 to October 31, 2019
(*Warning:* Includes some favorites that predate June 1, 2018)

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CHILDREN'S ISSUES

Children's Issues: Standards for Decision Making

***PAUL E*: ARIZONA SUPREME COURT:**

A SOLE LEGAL DECISION-MAKING PARENT HAS THE LEGAL RIGHT TO MAKE DECISIONS UNDER A.R.S. §25-403.02(D) AND THE COURT MAY NOT INTERVENE WITH THESE DECISIONS WHEN THE PARTIES DISAGREE, UNLESS IT FINDS AN EXCEPTION UNDER 25-410(A)

THE COURT MAY INTERVENE IF THE PARTIES HAVE JOINT LEGAL DECISION- MAKING AUTHORITY; *NICAISE I* IS OVERRULED TO THE EXTENT THAT IT LIMITS THE COURT'S AUTHORITY IN A JOINT LEGAL DECISION-MAKING CASE TO MERELY VESTING ONE PARENT WITH SOLE LEGAL DECISION MAKING ON THE DISPUTED ISSUE

ANY FINDING OF ENDANGERMENT OR SIGNIFICANT EMOTIONAL IMPAIRMENT UNDER A.R.S. §25-410(A) MUST SPRING FROM "THE ABSENCE OF A SPECIFIC LIMITATION" ON THE SOLE DECISION-MAKING PARENT. A PERMISSIBLE "SPECIFIC LIMITATION" MUST HAVE A NEXUS WITH THE REQUIRED ENDANGERMENT OR HARM FINDINGS AND MUST AVERT SUCH HARM WITHOUT UNNECESSARILY INFRINGING ON THE SOLE LEGAL DECISION-MAKER'S AUTHORITY, WHICH IS BROAD AND UNSHARED

NEITHER A.R.S. §25-405(B) NOR FORMER ARFLP RULE 95(A) AUTHORIZES THE FAMILY COURT TO APPOINT A THERAPIST WHERE ONE PARENT HAS SOLE LEGAL DECISION-MAKING AUTHORITY

STATUTE TAKES PRECEDENT OVER A RULE OF PROCEDURE

Some history is in order to understand the nuances of this Supreme Court decision, starting with the trial court history:

1. Trial Court Decision.

In the Decree of Dissolution in 2010, Mother and Father were awarded joint legal decision-making authority with equal parenting time of their three children; and Father was designated as final decision-maker for the child at issue ("Child") as to education and medical issues.

Post-divorce, the parties continued to clash, making their relationship "volatile and dysfunctional." In particular, the parties disagreed over the handling of the gender identification of the Child, who was born male. In 2013, Father requested sole legal decision-making authority for all three children. Multiple evaluations ensued, and a parenting coordinator was appointed. Multiple medical professionals diagnosed the Child with gender dysphoria, but disagreed on the best approach.

Mother contended that Child (elementary school age) identified as female. In 2013, the trial court entered temporary orders that Mother not purchase or supply girls clothing for Child, refer to Child as "she" or a "girl" or encourage third parties to do so, or use terms such as "gender variant" in the presence of the Child or Child's siblings. In 2015, the trial court (a different judge) appointed its own "gender expert" for an indefinite term to serve as a "treating professional" for the Child and to provide input to the Court and the parties. The court further ruled that "neither parent shall discuss gender identification issue with [child]" but shall use a standardized response suggested by a therapist or refer questions to a therapist." ("Gag Order").

After a hearing, the Court appointed Father sole legal decision-maker of all three children. The Court also implemented many of the child custody evaluator's ("Evaluator") recommendations as mandatory "guidelines", including: (1) Court appointment of a "gender expert" to provide input to the Court and parties regarding these issues; (2) appointment of a Therapist for the Child who was to consult with the gender expert; (3) specific restrictions regarding gender exploration in each parent's home, but permitting it in the Therapist's office; and (4) continuance of the Gag Order. The Court entered orders appointing the Therapist as court-appointed expert, precluding any other therapist from treating the Child; ordering that neither parent would have access to the Therapist's records; and giving the Therapist discretion as to what information to share with the parents. The gender expert and the Therapist would be cloaked with applicable judicial immunity.

2. Division One Vacates the Trial Court Decision.

On appeal, Division One [***Paul E. v. Courtney F.***, 244 Ariz. 46, 418 P.3d 413 (Ct. App. Div. 1, 4/3/18) vacated the trial court's orders to the extent they infringed on Father's exercise of his sole legal decision-making authority. It held that the trial court had no right to dictate a child's therapy. It cited the Fourteenth Amendment's guarantee of parents' fundamental right to make decisions about children in their custody, as well as ***Nicaise v. Sundaram***, 244 Ariz. 272, 418 P.3d 1045 (Ariz. App. Div. 1, 3/1/18) (review granted Aug. 29, 2018). Once the Court awards legal decision-making, "the court generally has no say in the actual decisions of the chosen parent or parents." Additionally, the trial court could not appoint a therapist to treat a child under A.R.S. §

25-405(B). That statute allows the Court to appoint a therapist as judicial advisor only. [Also, there was no motion brought under A.R.S. § 25-405(B).] Additionally, the trial court had no power to confer judicial immunity on the appointed therapists.

The sole narrow exception to the above rules arises under A.R.S. § 25-410(A) if a sole legal decision-maker would endanger a child's physical health or significantly impair emotional development. Division 1 warned that only "the most extreme of circumstances" will meet this standard and "does not provide free license for the court to substitute its judgment for that of the decision-maker parent". Even then, a court cannot appoint a treating professional for a child. The court may only impose a "specific limitation" on a parent. Nor does ARFLP 95(A) amend, override, or otherwise affect a court's powers to make unilateral decisions about a child's professional care.

Finally, it vacated the Gag Order. The court has no authority to order that a parent not provide a child with certain clothing or speak to the child about gender identification. These are matters of "parenting time", not "legal decision-making", and the trial court infringed on the parents' rights of free speech.

3. Arizona Supreme Court Vacates the Court of Appeals Decision in Part and Vacates the Trial Court Decision; Discussion of Nicaise I

Citing matters of statewide importance, the Arizona Supreme Court vacated Division One's opinion except for Paragraphs 34-35 and 39. It remanded for the purpose of determining attorneys' fees and for further proceedings.

It vacated the family court orders to the extent those orders appointed and granted authority to the gender expert and the Therapist and limited Father's sole legal decision-making authority, holding that the family court exceeded its authority. Once appointed as sole legal decision-maker, Father alone possessed the "legal right and responsibility to make major decisions" for the child. 25-401(3) (6); ***Nicaise v. Sundaram*** (***Nicaise II***), 245 Ariz. 566, 569 (2019) ("an award of sole legal decision-making....creates unshared authority").

Rationale and Disagreement with the Court of Appeals Decision Regarding Application of A.R.S. § 25-410(A)– Specific Limitations of Sole Legal Decision-Maker

A.R.S. §25-410(A) provides that the person appointed as sole legal decision-maker may determine the child's upbringing unless, after a hearing, the Court finds that "in the absence of a *'specific limitation*' of the parent designated as the sole legal decision-maker's authority, the child's physical health would be endangered or the child's emotional development would be significantly impaired". The Court of Appeals had concluded that a "specific limitation" allows a family court to prohibit the sole legal decision-maker from making decisions like *withholding* therapeutic care for a child, but does not authorize the court to issue *directives* like requiring care by a specific provider. The term "specific limitation" is not statutorily defined.

The Supreme Court agreed with Division One that A.R.S. 25-410(A) has a narrow application; **but it disagreed with its analysis that a "specific limitation" must be a *prohibition*, rather than a *directive*.** The Supreme Court reasoned that a "limitation" is the act of *restricting* or *restraining*. A prohibition and directive both restricts and restrains. Rather, the key to complying with 25-410(A) is that the "limitation", in either form, must be necessary to prevent the child's physical endangerment or significant emotional impairment. The Supreme Court observed that the Court of Appeals was persuaded that a directive is impermissible because the court "has no say in the actual decision of the chosen parent" and "typically may do no more than reallocate the authority between the parents" when they disagree. However, the family court is authorized to make child rearing decisions in limited, statutorily prescribed circumstances, e.g. third party-visitation rights over a parent's objection; or when parents cannot agree on decisions to be included in a parenting plan. The court may also make parental decisions when the parties disagree under 25-403.02(D) when parents have joint legal decision-making. **The Supreme Court specifically reversed *Nicaise I* to the extent that it limits the Court's authority in a joint legal decision-making authority to merely vesting one parent with sole legal decision-making on the disputed issue.**

The Supreme Court also disagreed with the Court of Appeals that endangerment and significant emotional impairment as used in 25-410(A) means abuse or neglect, which implies wrongdoing. Nothing in the statute suggests any intent to import these terms. Rather, States may regulate the well being of children and restrict the control of parents in a number of areas, including.....prevention of abuse or neglect.

The Supreme Court further held that any finding of endangerment or significant emotional impairment must spring from "the absence of a specific limitation". A permissible "specific limitation" must have a nexus with the required finding, and any limitation must avert the endangerment without unnecessarily infringing on the sole legal decision-maker's authority, which is broad and unshared *(Nicaise II*).

The Supreme Court concluded that there was nothing in the record to suggest that Father's decision-making was harmful to the Child or met the standard required by 25-410(A). The complexity of the Child's situation alone is not a basis for invoking 25-410(A). Even if the evidence showed that, absent a specific limitation on Father's authority, the Child would be physically endangered or his emotional development would be significantly impaired, the family court failed to tailor each directive to prevent such harm. The Supreme Court did allow for such a possibility if the trial court found that Father had chosen not to maintain therapy or consult with a gender expert or hired an unqualified or ineffective therapist. On remand, if the trial court were to make these findings, it could order Father to continue the Child's therapy, retain a gender expert, and/or permit the Child to gender explore.

Rationale Regarding A.R.S. § 25-405(B); Agreement with Division One on the Impropriety of Appointment of Therapist or Gender Expert

A.R.S. § 25-405(B) provides that the court may seek the advice of professional personnel to determine legal decision-making authority and parenting time. The Supreme Court agreed with the Court of Appeals that this statute did not authorize the family court

to appoint the Therapist or the gender expert.

First, A.R.S. §25-405(B) applies only when an issue regarding legal decision-making authority or parenting time is pending before the court. No such issues were pending here as the court had already awarded Father sole legal decision-making authority and parenting time was not in dispute. The court did not need professional advice to make these decisions as they had already been made.

Second, even if such issues had been pending, the appointments exceeded the authority granted by § 25-405(B) which only authorizes the court to seek advice from a professional to aid it in making certain decisions. It does not authorize the court to order treatment for a child, as occurred here.

Rationale Regarding ARFLP 95(A); Agreement with Division One as to Improper Reliance on ARFLP Rule 95(A) for Appointment of Therapist

The version of ARFLP 95(A) in effect at the time, provided that the court may order parties to engage in private mental health services including, counseling, legal decision-making or parenting time evaluations, mental health evaluations, Parenting Coordinator services, therapeutic supervision and other therapeutic interventions. This rule did not authorize the appointment orders here. It is a procedural rule and cannot enlarge the court's authority beyond that granted by statute. The Court's appointment orders were impermissible specific limitations on Father's authority. ***Paul E. v. Courtney F.,*** 246 Ariz. 388, 439 P.3d 1169 (Sup. 4/25/19) (Justice: Ann Timmer)

***NICAISE*: ARIZONA SUPREME COURT: FINAL SAY DOES NOT CONVERT JOINT LEGAL DECISION-MAKING INTO SOLE LEGAL DECISION- MAKING; FINAL AND SOLE HAVE DIFFERENT MEANINGS**

Again, some history is in order:

1. Trial Court:

Following an evidentiary hearing, the trial court awarded joint legal decision-making, with Father to have the final say on medical, mental health, dental and therapy. The trial court also ordered that the parties attend mediation if they could not agree on education decisions (neither parent received final say on education issues). The trial court ordered the parties' child to receive specific medical, dental, and mental-health treatment.

2. Division One Opinion:

Nicaise v. Sundaram, 244 Ariz. 272, 418 P.3d 1045 (Ariz. App. Div. 1, 3/1/18). Division One affirmed the grant of final say, reversed the Court-ordered treatment plans, denied Mother's challenge based on lack of due process due to trial time limit constraints; and affirmed fees to Father even though both parties had been unreasonable, holding that the disparity in resources was enough to make an award. Its rationale was as follows:

a. A.R.S.§ 25-401(2) provides that joint legal decision-making "means both parents share decision-making and neither parent's rights or responsibilities are superior except with respect to specified decisions as set forth... in the final judgment or order." Construing § 25-401(2), Division One determined that an award of joint legal decision-making that gives final authority to one parent, however, is in reality, an award of sole legal-decision-making on those issues. The label does not matter. Where one parent has the final say, that parent's rights are superior and decision-making authority, therefore, is not joint as a matter of law. A trial court can also order mediation if parents cannot agree, but only on issues where the parents have joint decision-making -- a court cannot order mediation when one party has sole decision-making. Further, a court can award sole decision-making on some, but not all, issues. **[EDITOR'S NOTE:** The Court of Appeals decided this issue even though it was not raised nor briefed by the parties.]

b. The trial court exceeded its authority under A.R.S. § 25-403 when the court exercised legal-decision-making powers in place of the parents: "The court's … role is not to make decisions in place of parents, but to decide which fit parent or parents shall make the decisions." In deciding this, Division One overruled ***Jordan v. Rea***, 221 Ariz. 581 (App. 2009) to the extent it held that the court may make substantive legal decisions for parents who are unable to agree. If the parents cannot agree, the court must choose one parent to make the decision. **[EDITOR'S NOTE:** the choice of school issue was not appealed to the Arizona Supreme Court; however the Supreme Court in ***Paul E***. did address that issue (after the Nicaise Supreme Court decision) holding when parents have joint legal decision-making, the Court could make such decisions.]

Mother also contended she was denied due process because the trial court enforced time limits and did not give her enough time to testify. The Court of Appeals rejected this argument, finding that the brevity of her testimony was the product of her counsel's "strategic decisions" at trial, and that her counsel did not move for additional time at the end of trial.

Even though both parties had acted unreasonably – and even though father had been declared a vexatious litigant by the trial court, the disparity of resources between the parties was sufficient to justify an award of fees.

3. Arizona Supreme Court Opinion: Final Say Does Not Convert Joint Legal Decision-Making to Sole Legal Decision-Making

Mother sought review only of the holding that even where there is joint legal-decision-making, if one party has the final say, effectively that parent is the sole legal decision-maker with respect to that issue. Finding this to be a matter of first impression with statewide significance, the Court accepted review. The Supreme Court concluded that Division One erred as a matter of law in equating final legal decision-making over certain matters as an award of sole legal decision-making.

Rationale:

A.R.S. § 25-401(3) defines legal decision-making as "the legal right and responsibility to make all nonemergency legal decisions for a child including those regarding education, health care, religious training and personal care decisions."

Section 25-401(2) provides that joint legal decision-making "means both parents share decision-making and neither parent's rights or responsibilities are superior to the other except *with respect to specific decisions as set forth by the court in the final order.*

Finally, § 25-401(6) provides that sole legal decision-making "means one parent has the legal right and responsibility to make major decisions for a child."

Division One had concluded that any order based on the exception in § 25-402(2) regarding one parent having "superior" decision-making authority over certain matters means that "one parent has the sole legal right to decide" which "is the essence of sole legal decision-making" under § 25-401(6). Accordingly, any order vesting superior decision-making authority in one parent necessarily establishes sole legal decision-making.

However, that interpretation conflicts with statutory scheme as well as precedent and practice. Section 25-401(2) provides that joint legal decision-making "means *both* parents share decision-making and neither parent's rights are superior *except with respect to specified decisions*". Division One had effectively carved out a sole legal decision-making order from a general order for joint legal decision-making. The net result would be that the court is only authorized to order joint or sole legal decision-making – and the court could not order joint legal decision-making with one parent having final authority if they cannot agree to a decision. This is incorrect.

Rather, § 25-401(2) should be interpreted as meaning one parent's joint legal decision-making authority is made superior in some circumstances, but the parents retain joint legal decision-making authority; the "tie-breaking" parent is not granted sole legal decision-making authority under subsection (6). In setting forth an option for joint legal decision-making, including an option for final decision-making authority on certain issues, subsection 2 does not reference subsection 6. That the legislature placed this exception to joint legal decision-making in a different subsection than sole legal decision-making suggests they were meant to be distinct. Further, transforming the subsection 2 exception into an award of sole legal decision-making would render the exception surplusage as subsection 6 already authorizes such awards.

Additionally, joint legal decision-making authority and sole legal decision-making authority, are different as a practical matter. Final say creates shared legal decision-making with the possibility that one parent will exercise a superior right if there is no agreement. By contrast, sole legal decision-making creates unshared authority. The distinction is further illustrated by the court's order conditioning the exercise of Father's final say-so upon good-faith efforts to reach a consensus. Such orders are common and commendable and do not convert joint into sole legal decision-making.

Finally subsection 2 also preserves some legal authority for the parent who does not have final say. The definition of legal decision-making under subection 3 includes the legal right to make non-emergency decisions for the child. Thus, a parent with joint legal-decision-making authority who does not have final say on an issue would maintain the legal right, subject to consultation and the other parent's approval , to establish a bank account for the child, take the child to a doctor, and exercise other nonemergency legal authority.

In short, the "final say" practice is common. Division One's opinion unnecessarily injected uncertainty into a well-established practice and is inconsistent with the overall structure of § 25-401. ***Nicaise v. Sundaram***, 245 Ariz. 566, 432 P.3d 925 (1/17/19).

BEJARANO: **MEMORANDUM DECISION: POST *PAUL E* AND *NICAISE*: WHERE BOTH PARTIES SHARE JOINT LEGAL DECISION-MAKING, SIMPLY AWARDING ONE PARENT PRIMARY PARENTING TIME, DOES NOT CONFER SUPERIOR LEGAL DECISION MAKING ON THE PRIMARY PARENT WITH RESPECT TO SCHOOL CHOICE. THE FACT THAT THE CHILD WILL PRESUMABLY ATTEND THE SCHOOL WITHIN THE PARENT'S DISTRICT DOES NOT CHANGE THIS PRINCIPLE, EVEN THOUGH THE SCHOOL IS CONSISTENT WITH THE PRIMARY PARENT'S WISHES.**

In a paternity action, the parties stipulated to joint legal decision making with an alternating week on, week off parenting time schedule. Mother then moved to Buckeye and filed a motion to allow the child to attend kindergarten there. Father opposed her motion arguing that there would first need to be a modification of parenting time filed and granted before the trial court could grant Mother's request. Father then petitioned for a modification of legal decision-making and parenting time. The court denied Father's request to modify legal decision-making, but granted Father's request to be awarded primary parenting time. Mother appealed. Mother argued that awarding Father primary residential parenting time effectively awarded him sole legal decision making regarding school choice/education. The Court of Appeals took note of the fact that the trial court had denied Father's motion to modify legal decision making; that the court's ruling was limited to parenting time; and did not award Father sole legal decision-making authority over the child's education.

On appeal, Mother cited ***Nicaise v. Sundaram***, 244 Ariz. 272 (App.2018), vacated in part on other grounds, 245 Ariz. 566 (2019), but Division 2 found that argument to be unavailing. It distinguished ***Nicaise*** on the basis that the parents' relationship was volatile and highly contentious there. This resulted in the trial court finding that the parents could not agree on school choice and it was not in the child's best interests for either parent to be given final-decision making on that issue. Accordingly, the ***Nicaise*** trial court decided the school in which the child should be enrolled. On Appeal in the ***Nicaise*** matter, Division 2 remanded the matter for the trial court "to decide which parent (or whether the parents jointly) shall decide which school the child will attend"; "the trial court does not have plenary authority to make decisions in place of the parents when it deems them to be in a child's best interests."; Instead, "If the court determines that the parents cannot agree, the court must choose which parent shall decide. But the court

cannot make the decision itself". Division 2 then appended footnote 4, which acknowledged that the ***Paul E*** Supreme Court decision disapproved ***Nicaise*** to the extent it suggested that the trial court is limited to merely vesting one parent with sole legal decision-making authority on the disputed issue. Instead, the trial court "is authorized to resolve any conflict" if the parties share joint legal decision making authority".

Given the above factual and legal background, Division 2 reasoned that nothing prevented Mother and Father from agreeing to send the child to another school. It recognized that as a result of the trial court's decision regarding parenting time that the child would presumably attend the Ajo Unified School District, which was consistent with the Father's wishes. Nevertheless, unlike in *Nicaise,* the court did not specifically order that the child attend a particular school in Ajo. Mother argued on appeal that the trial court should have addressed the school choice issue by awarding one parent sole or final decision making in the area of education, but she never made that request and the court had previously denied the petition for modification of legal decision-making. Accordingly that issue was not before the court. ***Bejarano v. Castro,*** No. 2 CA-CV 2018-0148 FC, 2019 WL 2024273 (Div. 2 May 8, 2019) (memorandum decision).

FRIEDMAN V. ROELS: **ARIZONA SUPREME COURT: WHEN TWO LEGAL PARENTS DISAGREE ABOUT THIRD-PARTY VISITATION, THEN BOTH PARENTS' OPINIONS RECEIVE "SPECIAL WEIGHT"; IF THEIR OPINIONS CANCEL OUT, THEN THE COURT CAN DECIDE THE ISSUE BASED ON THE BEST INTERESTS OF THE CHILD; GRANDPARENTS DISTINGUISHED FROM OTHER THIRD PARTIES; GOODMAN PARTIALLY OVERRULED; *NICAISE* DISTINGUISHED**

After a hearing, the trial court granted paternal grandparental visitation over Mother's objection. The parents had joint legal decision making authority with Mother to have the final say. Father's visitation time was supervised. Mother argued that her wishes should prevail and that her wishes, not Father's, should be given deference. After a hearing, the Court granted the grandparents' petition pursuant to § 25-409(c). The trial court gave deference to Mother's opinion and applied the rebuttable presumption that Mother would continue to make decisions in the best interests of the children. The Court nevertheless found that it was in the children's best interests that the grandparents have visitation. The Court of Appeals affirmed, reasoning, however, that when both legal parents disagree about whether third-party visitation is in a child's best interest, then both parents' opinions must receive special weight under § 25-409(E).

The Arizona Supreme Court affirmed the trial court's decision, but vacated Division Two's opinion. It held that if both legal parents (regardless of who has decision-making authority) have competing views on visitation, then ***both*** opinions must receive special weight and "the respective presumptions effectively and necessarily cancel each other out." To break the stalemate, the court then has discretion under § 25-409(c) to grant visitation rights if they are in the child's best interests. This leaves the best interests of the child as the *sole standard* to apply. The additional takeaway points were:

(1) By statute, grandparents (and great-grandparents) have different visitation rights than other third parties thanks to § 25-409(F) (stating that the court "shall" order visitation if the parent through which the grandparent claims

access has parenting time). This is in contrast to § 25-409(c), which is framed in permissive terms as to third-party visitation.

(2) The term "special weight" for § 25-409 purposes is no different than the standard in ***Troxel (Troxel v. Granville***, 530 U.S. 57 (2000) or ***McGovern and McGovern***, 201 Ariz. 172 (App. 2001) (the term "special weight" describes the deference courts must afford a parent's visitation opinion, which prevents state interference with a parent's fundamental right to make decisions concerning the rearing of their children). This deference is consistent with the traditional presumption that a fit parent will act in the best interest of his or her child. ***Troxel***, however, did not articulate "the precise scope of the parental due process right in the visitation context."

(3) ***Goodman v. Forsen,*** 239 Ariz. 110 (App. 2016) is disavowed to the extent of its broader interpretation of "special weight". The ***Goodman*** Court applied a "robust standard" in making a "broad pronouncement" that any "nonparent who seeks visitation carries a substantial burden to prove the parent's decision (to bar visitation) is harmful" and that the "nonparent must prove that the child's best interests will be substantially harmed absent judicial intervention.

(4) Both parents are legal parents even if one parent has final decision-making authority under a Parenting Plan and the other has been adjudicated to be unfit. The statutes related to legal decision-making and parenting plans do not override § 25-409, which specifically address third-party rights and grandparent visitation; whether a parent's opinion is entitled to "special weight" under § 25-409 turns on whether he or she is a "legal parent" as defined in § 25-401(4), not whether that parent has legal decision-making authority under a parenting plan; it is abundantly clear from the statutes that a parent can be a legal parent without any grant of legal decision-making authority; ***Nicaise*** is inapposite because it did not address visitation issues;

(5) Even assuming a parenting plan could control visitation disputes, the Parenting Plan in this case did not include an agreement on the grandparental visitation rights. This brings the Parenting Plan squarely within §25-403.02(D), which directs the court to determine "any element to be included in a parenting plan" about which the "parents are unable to agree".

(6) ***Troxel***'s "special weight" requirement is not confined only to a fit parent. To the contrary, it is well established that a parent's rights "do not evaporate simply because they have not been model parents." ***Friedman v. Roels***, 244 Ariz. 111, 418 P.3d 884 (Sup. 6/8/18).

CHILDREN'S ISSUES: RELOCATION CASES

WOYTON: RELOCATION CASES REQUIRE ANALYSIS OF A.R.S. § 25-408(I) BEST INTEREST FACTORS – NOT JUST A.R.S. §25-403 FACTORS, EVEN WHERE ONE PARENT HAS MOVED OUT OF STATE AND THERE IS NO PRIOR CUSTODY ORDER OR PARENTING PLAN.

In early June 2017, Mother left Arizona for Massachusetts with the child without Father's consent. Two days later, Father filed a petition for legal separation and motion for emergency temporary orders without notice. Based on the filing, the Court awarded Father sole legal decision-making and primary parenting time with supervised visitation in Mother on a temporary basis. Armed with a custody warrant, Father traveled to Massachusetts, where law enforcement took custody of the child and the court later released her to Father's care. Mother than filed a Petition for Dissolution in Arizona and challenged temporary orders. After a hearing, the Court granted the parties joint legal decision-making with Father as temporary primary residential parent in Arizona and Mother was awarded additional parenting time. After a divorce trial, the court awarded the parties joint legal decision making and Mother (still living in Boston) was to be the child's primary residential parent. Father appealed and argued that because this was a relocation case, the Court had a duty to consider the best interest and other factors contained in ARS 25-4089(I) (the relocation statute) even where one party has already moved and there are no prior parenting or decision making orders. Division 1 agreed and reversed, reasoning as follows:

a. It first recited the law with respect to an equal parenting time presumption. The Court is to determine parenting time in accordance with the best interests of the child. A.R.S. § 25-403(A). The Court must also adopt a parenting plan that maximizes the parents' respective parenting time. A.R.S. § 25-403.02(B). As a general rule equal or near-equal parenting time is presumed to be in the child's best interests (***Matter of Appeal in Maricopa Cty. Juvenile Action No. JD-4974***, 163 Ariz. 60, 62, 785 P.2d 1248, 1250 (App. 1990) ("A father has a right to co-equal custody of his child, but not exclusive custody absent a court order to that effect). The Court may not apply a presumption against equal parenting time. ***Barron v. Barron***, ***infra.*** Equal parenting time, however, may not always be possible, particularly when the parties live in different states or are separated by a considerable distance.

b. In ***Buencamino v. Noftsinger***, 221 P.3d 41, 42 (App. 2009), the court held that compliance with A.R.S. § 25-408(I) is not required unless 25-408(A)'s conditions are met that: (1) the parents have a written agreement or pre-existing order about legal decision-making or parenting time; *and* (2) both parties reside in the state. If these conditions are not met, the Court does have a duty to consider the best interest factors of A.R.S. § 25-408(I), but it may choose to do so where appropriate.

c. Division 1, here, however, found that ***Buencamino*** limited A.R.S. § 25-408's application based on the language in A.R.S. § 25-408(A) which

requires notice prior to relocation if there is a court order or written agreement entitling the parents to joint legal decision making or parenting time; and both parties reside in the state. However, by its terms, this subsection does not limit the court's authority to determine relocation issues or define what constitutes a relocation under A.R.S. § 25-408, citing ***Berrier v. Rountree, infra.*** Rather A.R.S. § 25-408(A)'s condition that both parties reside in the same state only describes the circumstances under which a party must give *notice* before effecting certain types of relocations. Thus the court may resolve relocation issues regardless of whether both parents reside in the state or have pre-existing orders or agreement.

d. A.R.S. § 25-408 puts the burden of proof on the relocating parent to prove that relocation is in the child's best interests. Here the trial court considered best interest factors under A.R.S. § 25-403, but did not apply all of the factors in A.R.S. § 25-408(I) nor did it require Mother to prove relocation was in the child's best interests.

e. The court erred to the extent it relied on Mother's role as the child's primary caregiver during the marriage to determine that she should be the primary residential parent after the entry of the divorce decree. See ***Barron I,*** 443 P.3d at 983).

f. Rule 48 governs the procedure for hearings on temporary orders entered without notice. There are no disclosure requirements.

g. Letter from Mother's physician was not inadmissible hearsay because Father had not requested strict compliance with the Rules of Evidence.

h. Child care costs must be supported by evidence to be considered in a child support calculation.

Woyton v. Ward, No. 1 CA-CV 18-0677 FC, 2019 WL 5445823 (Div. 1, 10/24/2019).

[EDITOR'S NOTE: Those who forego strict compliance with the Rules of Evidence do so at their own risk! The Court of Appeals found that a letter from Mother's physician was not inadmissible hearsay "because hearsay is not barred in family court proceedings unless a party requests strict compliance with the Rules of Evidence", citing ARFLP 2(b)(1). Also, note that the Court's reliance upon ***Maricopa County Juvenile Action,*** 163 Ariz 60 (Div. 1, 1990) for it's finding that there is a presumption of equal parenting time is wholly misplaced. ***Maricopa*** involved a paternity action where parentage had been established, but there was **no custody order in place.** ***Maricopa*** stands only for the principle that *until* a custody order is in place, then neither parent's rights are superior to the other. "A father has a "right to co-equal custody of his child, but not exclusive custody **absent a court order** to that effect (***State v. Donahue,*** 140, Ariz. 55, App. 1984. In domestic relations cases the parents, post dissolution and **absent an order awarding custody,** have co-equal custody. ***Campbell v. Campbell,*** 126 Ariz. 558 (App. 1980).

BERRIER: A "PARENTING TIME DECISION" MUST BE DECIDED AS A RELOCATION MATTER UNDER A.R.S. §25-408 (NOT JUST A.R.S.§25-403) WHEN THE COURT IS FORCED TO DETERMINE THE STATE OF RESIDENCE FOR EDUCATION AND CHOOSE A HOME STATE FOR THE MINOR

Where parents are requesting the court make a determination of which state the minor will attend school, the case must be analyzed as a relocation case under the relocation statutes, rather than as a simple parenting dispute regarding school selection and change of parenting time. ***Berrier Jr. v. Rountree,*** 245 Ariz. 604, 433 P.3d 8 (Div.1, 11/27/18).

CHILDREN'S ISSUES: ESTABLISHMENT OR MODIFICATION OF PARENTING TIME

DELUNA: ANY ACT OF DOMESTIC VIOLENCE CREATES REBUTTABLE PRESUMPTION AGAINST PARENTING TIME, WHICH MUST BE REBUTTED BY SPECIFIC EVIDENCE AND § 25-403.03(E) FACTORS

Trial court awarded joint legal decision making, and unsupervised parenting time to Father. The court found that Father had committed domestic violence, but not "significant domestic violence". Mother appealed, contending that the trial court did not correctly apply A.R.S. § 25-403.03. Division One reversed. It held that a finding that domestic violence occurred, but was not "significant", requires additional analysis. Under A.R.S. § 25-403.03(D), any act of domestic violence requires the court to apply a rebuttable presumption that it is contrary to the children's best interests to award sole or joint legal decision-making authority to the offending parent. To rebut that presumption, the trial court must then make specific findings based on evidence in the record, and considering the factors in § 25-403.03(E). ***DeLuna v. Petito***, No. 1 CA-CV 18-0631 FC, 2019 WL 4197236 (Div. 1, 9/5/19).

BARRON. DIV. 1*:* DEVIATION FROM PARENTING TIME STANDARDS MUST BE BASED ON PERMISSIBLE STATUTORY PRESUMPTIONS

The parties entered into pre-decree orders allowing Father more parenting time than Mother because Mother was in training to become an emergency medical technician. However, Mother did not petition the Court for more time after she completed her training. 14 months later, after an evidentiary hearing, the trial court entered a decree containing joint legal decision-making provisions, but significantly reduced Father's parenting time to 130 days a year plus specified holidays and summer vacation. Father appealed, arguing that the Decree's parenting time provisions were the product of impermissible presumptions about equal parenting time and gender; and that the trial court should have ordered equal parenting time. Division 1 reversed and remanded for a new hearing on parenting time. In making its ruling, it relied on A.R.S. § 25-403.02(B)

which requires the superior court to adopt a parenting plan that is consistent with the child's best interests set forth in A.R.S. § 25-403; and A.R.S. § 403(A) which states that the Court consider all factors relevant to the child's physical and emotional well-being including:

> (1) The past, present and potential future relationship between the parent and child;
> (2) The interaction and interrelationship of the child with the child's parent or parents;
> (3) The child's adjustment to home, school and community;
> (4.) If the child is of a suitable age and maturing the wishes of the child as to legal decision-making and parenting time; and
> (5) The mental and physical health of all individuals involved.

While there may not be a presumption in favor of equal parenting time, the trial court erred by applying a presumption *against* equal parenting time; and basing its change from the temporary orders on:

(1) Its finding that the parties' three girls "naturally will gravitate more to [Mother] as they mature";
(2) Mother had been the children's primary caregiver;
(3) The presumption that "changing equal parenting time now would be less disruptive than in the future";
(4) Father's military duties "often made him unavailable during his parenting time"; and,
(5) The "girls have not fully adjusted to equal parenting time during the pendency of the temporary orders."

The court acknowledged that not every error in a parenting-time decision warrants a new hearing, but given the multiple errors noted, reversed and remanded for a new hearing consistent with the provisions of § 25-403(A). ***Barron v. Barron***, 246 Ariz. 580, 443 P.3d 977 (Ct. App. 2018), review granted in part (Feb. 5, 2019), vacated in part, 246 Ariz. 449, 440 P.3d 1136 (2019).

CHILDREN'S ISSUES: SAME SEX/THIRD PARTY VISITATION RIGHTS

ULLC CHANGES AFFECTING THIRD PARTY VISITATION RIGHTS

The Uniform Law Commission has developed new acts affecting nonparent custody and visitation, and the disclosure of intimate images.

DOTY 2: ADOPTION BY ONE PARENT PRECLUDES THIRD-PARTY VISITATION FOR NON-ADOPTING PARENT EVEN THOUGH SOLO ADOPTION RESULTED FROM ARIZONA LAW'S FAILURE TO ALLOW JOINT ADOPTION BY A SAME-SEX COUPLE

Tonya (Tonya) and Susan Doty-Perez (Susan) were married in Iowa in 2011, at a time that Iowa recognized same-sex marriages and Arizona did not. At that time, Arizona law did not allow joint adoption by a same-sex couple. Thus, Tonya alone adopted four

children after parental rights of the biological parents had been terminated. Even though both Tonya and Susan parented the children together, Tonya was and is the only legal parent of the children under A.R.S § 25-401(4) [Legal parent means a biological or adoptive parent whose parental rights have not been terminated]. The marriage ended in 2015. After ***Obergefell v. Hodges***, 135 S.Ct. 2584, 192 L.Ed 609 (2015), Susan sought rights "as a parent" to the children or in the alternative third-party visitation rights. The superior court denied Susan's request to be declared a legal parent (affirmed by Division 1, ***Doty-Perez v. Doty-Perez,*** 241 Ariz. 372, 388 P.3d 9 (App. 2016) – ***Doty-Perez I***, Petition for review denied).

Susan sought third-party visitation under §25-409(C)(2) which allows "'a person other than a legal parent' to seek 'visitation with a child' and the court 'may grant visitation rights during the child's minority on a finding that the visitation is in the best interest and that the child was born out of wedlock and the child's legal parents are not married to each other at the time the petition is filed". Tonya argued that because the children were adopted, they were not born out of wedlock. [***Sheets v. Mead***, 356 P.3d 341 (App. 2015)] [holding adoption changes a child's legal status to being born in wedlock under 8-117(A)]. Accordingly, Susan could not make the showing required for third-party visitation. The trial court tacitly agreed that Susan could not make the required showing and, instead, found that the statute was unconstitutional as applied. Using the rational basis test, the court found the statute treats "adopted children differently than natural born children for third party visitation". Tonya appealed.

Division 1 reversed, finding: (1) Susan had standing to assert the constitutional rights of the children; (2) the children were not born out of wedlock (***Sheets***); (2) the rational basis test (not strict scrutiny) applies– which means that a statute will be upheld as long as the court can find some legitimate state interest to be served; and the facts permit the court to conclude that the legislative classification rationally furthers the state's legitimate interest. There is a strong presumption supporting the constitutionality of a legislative enactment. The constitutional requirement of equal protection is violated only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. Here, Susan failed to meet her burden. § 25-409(C)(2) as applied satisfies the rational basis test. See ***Dodge v. Graville,*** 195 Ariz. 126; 985 P.2d 611. It also acknowledged that although the application of the statute may yield harsh results, changing it is the responsibility of the legislature and not the court. ***Doty-Perez v. Doty-Perez (II),*** 245 Ariz. 229, 426 P.3d 1208 (Ct. App. 2018), review denied (Apr. 3, 2019).

> **[EDITOR'S NOTE:** Doty 1 was pre-McLaughlin (***McLaughlin v. Jones*** (Arizona Supreme Court, 243 Ariz. 29, 9/19/17) [the female spouse of a birth mother is a presumptive parent and a legal parent; same-sex spouse of a birth mother is entitled to a presumption of paternity; presumption of paternity is rebuttable].

CHILDREN'S ISSUES: PROCEDURE

BRITTNER: THERAPEUTIC INTERVENTIONIST (TI) IS ENTITLED TO IMMUNITY IF APPOINTED BY THE COURT AS AN EXPERT TO ASSIST THE COURT; IMMUNITY HINGES ON THE NATURE OF THE FUNCTION PERFORMED, NOT THE IDENTITY OF THE ACTOR

Father filed a civil action against therapeutic interventionist (TI) for intentional infliction of emotional distress, abuse of power, breach of fiduciary duty and breach of contract after she resigned from her role as a court-appointed TI in his dissolution matter. The family court appointed a psychologist as a custody evaluator (Psychologist). The Psychologist recommended the family see a TI and the TI was appointed by Court order. The TI was appointed to rehabilitate relationships between Father and the children and establish rules for the exchange of the children, make therapy referrals as necessary, and facilitate conflict resolution. The Court relied on the TI's recommendations in making its orders. TI's motion to dismiss the civil action was granted. Father appealed, arguing that TI was not entitled to judicial immunity because she was hired to provide therapeutic services to the parties, and not as an expert to assist the court [relying in part on ***Paul E. V. Courtney*** F, 244 Ariz. 46 (App. 2018).] Division One affirmed.

Judicial immunity protects a non-judicial officer performing a function pursuant to a court directive related to the judicial process [***Lavit v. Superior Court***, 173 Ariz. 96, 99 (App. 1992).] Absolute judicial immunity has been extended to certain other court officials who perform functions integral to the judicial process, including court-appointed psychologists [***Acevedo ex. Rel. Acevedo v Pima County***, 142 Ariz. 319 (1984).] Whether absolute immunity protects a non-judicial officer hinges on the nature of the function performed, not on the identify of the actor. The trial court appointed TI to provide both therapeutic services and to give recommendations to the family court which the court ultimately relied on in issuing its final order. The therapeutic services were, therefore, incidental to the court's purpose. To formulate her expert opinion, the TI conducted therapeutic sessions in order to evaluate the family dynamics. Accordingly, TI was a court appointed therapist who performed functions integral to the judicial process.

The Court distinguished ***Paul E.*** stating that judicial immunity was not accorded to the court appointed therapist there because that person was not ordered to report to the court; and the trial court had expressly ordered that the therapist continue in the role of privately retained therapist, rather than an advisor to the court. Further, to invoke §25-405(B), there must be a pending motion, scheduled review hearing, or some other unresolved proceeding before the Court.

The Court rejected Father's argument that the **therapeutic services portion** should not be cloaked in immunity. Therapeutic service is not parceled out from evaluation and reporting to the court nor will the court limit immunity only to services related to the judicial process as doing so is neither practical not possible. The therapy sessions were not separate from the evaluation leading to an expert opinion. ***Brittner v. Lanzilotta,*** 438 P.3d 663 (Div. 1, 3/12/19).

***GIBSON:* IF A GAL OR APPOINTED ATTORNEY ACTS IN A REPRESENTATIVE, NOT JUDICIAL, CAPACITY, JUDICIAL IMMUNITY DOES NOT ATTACH; MINORS HAVE STANDING TO SUE A GAL FOR LEGAL MALPRACTICE; GOVERNMENT ENTITIES CAN BE SUED FOR NEGLIGENT HIRING WHEN THEY APPOINT LEGAL COUNSEL THAT LACKS COMPETENCE TO HANDLE A MATTER**

This was a wrongful death case where the person sued was a minor and the Court appointed a GAL and attorney who were on the GAL/children's attorney list, but had no competence in the area. ***Gibson v. Theut, et al.*,** 438 P.3d 666 (Div.1, 3/12/19).

IDAHO. *KELLY:* BECAUSE CUSTODY EVALUATORS ARE GRANTED QUASI-JUDICIAL IMMUNITY, THE IMPORTANCE OF THEIR NEUTRALITY CANNOT BE OVEREMPHASIZED

This Idaho dissolution matter involved a custody evaluation, where the Mother claimed the evaluator was biased. The Idaho Supreme Court vacated the child custody judgment, finding the magistrate court abused its discretion in allowing father's hired expert's opinion on parenting time. "The use of parenting time evaluations is unique to custody disputes;" the authority for and parameters guiding the use of such evaluations were governed by court rule ARFLP 719. "These evaluators are performing a 'judicial function,' entitling them to quasi-judicial immunity, because of the important, impartial work they perform as an extension of the court ... The importance of an evaluator's neutrality cannot be overemphasized." The Court affirmed certain evidentiary rulings and remanded for further proceedings. ***Kelly v. Kelly***, No. 46748, 2019 WL 5485180 (Idaho Oct. 25, 2019).

***DAVIS:* UNLIKE ARFLP RULE 12, UNDER ARFLP RULE 10 A COURT APPOINTED ADVISOR DOES NOT NEED TO RECORD INTERVIEWS WITH MINORS**

ARFLP Rule 10 does not require a Court Appointed Advisor (CAA) to record interviews with minors, unlike Rule 12, which does require recording. Therefore, the Court did not err in allowing the report of a CAA where said CAA was appointed under Rule 10 and did not record her interviews conducted for the purposes of her report and recommendations on parenting time. ***Davis v. Davis*,** 246 Ariz. 63, 434 P.3d 152 (Div.1, 12/11/18).

***LEHN:* COURT'S REQUIREMENT FOR FATHER TO POST $2.5 MILLION BOND FOR EACH CHILD TO SECURE THEIR SAFE RETURN FROM KUWAIT IS PROPER; COURT HAS DISCRETION TO PERMIT INTERNATIONAL TRAVEL**

Father was a Kuwaiti citizen who had US lawful permanent resident status, and Mother was a US citizen. The parties were married in the US and then moved to Kuwait and lived there for five years before returning to the US. The older child was born in Kuwait. The children were dual citizens. Prior to the divorce, the children and the parties traveled between Kuwait and the US. Mother requested that Father's parenting time occur only in Arizona because of her fear that Father would take the children to Kuwait

and never return them. She asked that Father be ordered to surrender his passport and US permanent resident card to his attorney before he exercised parenting time in the US because: (1) Kuwait is not a signatory to the Hague Convention; (2) under Kuwait law, Mother would need Father's permission to leave Kuwait with the children; (3) there were conflicting expert opinions about Mother's legal recourse in Kuwait if Father failed to return the children; and (4) Father conceded that any agreement for return would be revocable. The trial Court ordered Father to exercise parenting time in Arizona unless Mother agreed and was given the children's passports. Father's parenting time in Kuwait could be exercised only if he posted a $2.5 million bond per child, citing the following reasons: (1) Kuwait is not a signatory of the Hague Convention and does not have an extradition treaty with the US; (2) the risky legal structures in Kuwait for Mother to utilize; (3) Father's insufficient ties to the US; and (4) Father is at risk for not returning the Children if they visit in Kuwait, all of which are factors under the Uniform Child Abduction Prevention Act (UCAPA). Father appealed.

The Court of Appeals affirmed. Although Arizona has not adopted UCAPA, the Court has the discretion to rely on these standards as long as it also considered the children's best interests.

It upheld the bond, reasoning that a parent's right to custody and control of his or her children is not absolute. The Court may regulate international travel within the bounds of due process. The bond requirement does not preclude Father from traveling with the children altogether; it merely conditions his ability to take the children to Kuwait. The amount of the bond need not relate to the costs of Mother repatriating the children, but rather to deter abduction in the first instance; accordingly the case law relating to establishing a supersedeas or other bonds is not persuasive. Finally, the Court may prohibit international travel altogether. ***Lehn v. Al-Thanayan,*** 438 P.3d 646 (Ariz. Ct. App. 2019).

VERA: ALTHOUGH THE COURT MAY ACT TO HARMONIZE PARENTING-TIME AND PROTECTIVE ORDERS AFTER A JOINT HEARING, ITS AUTHORITY TO DO SO IS LIMITED ONCE A COORDINATE MEMBER OF THAT SAME COURT AFFIRMS THE PROTECTIVE ORDER FOLLOWING AN EVIDENTIARY HEARING

Between the filing of Father's petition for temporary parenting orders and the hearing, Father was served with an Order of Protection (OOP). The OOP was transferred to the superior court for consolidation with the family court case for all further proceedings. Once the transfer was effectuated, however, the superior court, pursuant to its obligations under Arizona Supreme Court Rule 123 and the Federal Violence Against Women Act, assigned the OOP a new cause number. In the family case, the Court held the temporary orders hearing. Before the hearing, Father notified the family court that the OOP had been transferred to the superior court. At the temporary orders hearing, the Court heard testimony and took evidence regarding parenting issues, allegations of domestic violence by Father and the OOP. The Court then issued temporary parenting orders, but made no mention of the still active OOP prohibiting Father from any contact with Mother or the children. Both parties challenged the temporary orders as conflicting with the OOP. Notably, neither party asked the family court to conduct a joint hearing on temporary orders and modification of the OOP.

Father then requested a hearing on the OOP, which was held before a different judicial officer. The OOP court determined that the family court temporary order would become effective only if the OOP Court modified the order of protection or removed the children from that Order. Neither party objected. The OOP Court took testimony and upheld the OOP in its entirety. Father filed a Special Action seeking an order directing the family court to amend the OOP to effectuate its temporary parenting-time order. Notably, Father did not file an appeal from the OOP decision. The SA was denied.

The Court of Appeals distinguished this case from ***Courtney v. Foster,*** 235 Ariz 613 (2014), (family court has authority to "modify the OOP if the court is satisfied that parenting time would not endanger the child or significantly impair the child's emotional development") because the Father here did not request a joint hearing. Rather, Father requested a hearing on the OOP and the Court affirmed it in its entirety.

The Order of Protection statutory and procedural scheme does not authorize the superior court to amend an OOP that has been affirmed by a coordinate member of the same Court (a judicial officer may not engage in horizontal appellate review of another judicial officer's decision to affirm the OOP). A party restrained by an OOP is only entitled to one hearing to contest the Order. A.R.S. § 13-3602 sets forth the proper procedure to contest an OOP– one hearing and an appeal). Once that hearing has been held, an affirmed OOP may be amended or dismissed only in two ways: (1) by a request of the party protected by the Order (note that a defendant may NOT request modification); or (2) appeal. These are the takeaway points:

(1) The Superior Court has the authority to hold a joint hearing regarding temporary parenting time and protective orders. The family court has the power to issue temporary parenting time orders under § 25-404(A) and ARFLP 47 after it considers all factors relative to the child's best interests, including whether conditions should be placed on parenting time if a parent has committed an act of domestic violence under § 25-403(A).

(2) The Superior Court also has exclusive jurisdiction to issue an OOP when a family law action is pending. A.R.S. 13-3602(P); Ariz. R. Protect.Ord. P 34.(a). An OOP issued by a municipal or justice court must be promptly transferred to the Superior Court when a family law action is pending. Ariz. R. Protect. Ord. P 34(c).

(3) When a parent's request for temporary parenting time conflicts with an OOP transferred to the Superior Court, ARFLP recognizes the court's concurrent authority over both actions by permitting consideration together in a joint hearing. ARFLP 5(A). But the superior court is not obligated to hold a joint hearing to harmonize the orders. Its authority to modify the OOP only exists pursuant to the statutes and rules controlling protective orders Ariz. R. Protect. Ord P. 2 (to the extent not inconsistent with these rules, ARFLP applies to protective order matters heard in conjunction with pending family law cases.)

(4) If the Court finds at the end of a joint hearing that the requesting parent is entitled to temporary parenting time and the OOP should not remain in

effect as originally issued, it may harmonize the orders using a wide range of statutory and procedural options. But given the priority placed on OOPs and the criminal penalties associated with them, the court must ensure that any decision affecting the OOP will not hinder the understanding and compliance by the parties and ease of enforcement by law enforcement officers. Ariz. R. Prot. Ord. P 35(d). And Ariz. R. Prot. Ord. P. 21(c) (protective orders control over conflicting legal decision-making orders; A.R.S. § 13-2810 (criminal penalties for violations of protective orders) ***Vera v. Rogers,*** 246 Ariz. 30, 433 P.3d 1190 (Ct. App. December 14, 2018).

PROUTY: **JURISDICTION TO MODIFY A FOREIGN CHILD CUSTODY ORDER WHERE THE FACTORS OF A.R.S. §25-1033 ARE MET, EVEN IF A FOREIGN CHILD CUSTODY ORDER HAS NOT BEEN REGISTERED**

There is jurisdiction to modify a foreign child custody order that was not registered in Arizona in accordance with A.R.S.§25-1055 where there was an initial order from Illinois regarding the child, but mother and child moved to Arizona (even though mother later attempted to return to Illinois during the Arizona proceedings). The UCCJEA does not require a foreign custody order to be registered before it may be modified (unlike UIFSA, which requires support orders to be registered). Under UCCJEA, the jurisdictional requirement for modification of custody is that the state has jurisdiction to make an initial determination and that either of the following is true:

1. The Court of the other state determines it no longer has exclusive, continuing jurisdiction under § 25-1032 or that a court of this state would be a more convenient forum under § 25-1037; or,

2. A Court of this state or a Court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state. A.R.S.§22-1033. ***Prouty v. Hughes*****,** 246 Ariz. 36 433, P.3d 1196 (Div.1, 12/11/18).

CHILDREN'S ISSUES: FROZEN EMBRYOS

TERRELL: **PRE-FROZEN EMBRYO STATUTE: COURT EXAMINES THREE APPROACHES TO DISPOSITION OF FROZEN EMBRYOS WHEN THERE IS A DISPUTE, INCLUDING CONTRACT APPROACH, BALANCING APPROACH AND CONTEMPORANEOUS MUTUAL CONSENT, BUT ADOPTS THE CONTRACT APPROACH-THE MAJORITY VIEW- UNLESS THE CONTRACT LEAVES THE DECISION TO THE COURT. THEN THE BALANCING APPROACH APPLIES**

The parties entered into an in vitro fertilization agreement ("IVF Agreement") concerning the disposition of cryogenically preserved embryos creating using Mother's eggs and Father's sperm. Under the IVF terms, any dispute regarding disposition of the embryos would be decided by the Court. Prior to the IVF Agreement, Mother had been diagnosed with aggressive breast cancer. This diagnosis prompted creating and freezing

of the embryos. Father (Mother's boyfriend) originally declined to serve as sperm donor. It was only after Mother began the process of finding another sperm donor that Father changed his mind as a favor to Mother. Subsequently the parties married, and this issue arose in their divorce proceeding. The parties did not challenge the jurisdiction of the family court (it could have been brought in either family court or as a contract action); rather, it treated the embryos as joint property pursuant to A.R.S. § 25-318(A). After applying a balancing analysis, the trial court ordered the embryos to be donated to a third party.

The Court of Appeals vacated the trial court's ruling and held that Mother could use the embryos to become pregnant. In coming to this conclusion, the Court examined the various approaches to resolution of this issue including: (1) a contract approach; (2) the balancing approach; or (3), contemporaneous mutual consent. It adopted the contract approach, which has been adopted by the majority of jurisdictions. However, if the agreement leaves the decision to the court (which it does here), the balancing approach provides the proper framework. Under that approach, each spouse has an equally valid, constitutionally based interest in procreational autonomy and a party who does not wish to be a parent should prevail if the other party has a reasonable possibility of becoming a parent without the use of the embryos. The Court articulated the following principles:

(1) The Court may consider parol evidence in applying the balancing approach. The Court concluded from the record that the sole purpose of the IV process was to allow Mother to preserve her ability to have biological offspring; that it was highly improbable that she could become pregnant; that there was no expectation of co-parenting; that the parties did not contemplate marriage; and that Mother would likely have been able to preserve the embryos ready for implantation, but for Father's last minute decision to donate his sperm. She had already enlisted another donor.

(2) That Father may be financially responsible for the child is irrelevant as that was the reality regardless of whether or not the IVF Agreement had been signed.

(3) The trial court also erred as a matter of law to the extent it considered and relied on a constitutional right to procreational autonomy to resolve the dispute. The trial court appeared to balance what it construed as Mother's constitutionally established right to procreate against Father's right not to procreate. But this framework is not useful or applicable when two individuals cannot agree on the disposition of embryos; rather such constitutional rights are directed at protecting an individual against government intrusion into such decisions. Here the parties specifically empowered the court to decide such disputes.

(4) Awarding Mother the embryos to achieve pregnancy is not against public policy under A.R.S. § 25-103 (declaring the public policy of this state to promote strong family values). To apply it here would always necessarily tip the balance in favor of the objecting party and would be a *de facto* adoption of the contemporaneous mutual consent approach (which the

Court rejected). Further, any conclusion as to whether implantation of the embryos would result in strong families and family values is speculative.

Terrell v. Torres**,** 246 Ariz. 312, 438 P.3d 681 (Div. 1, 6/6/19), as amended (June 6, 2019), review granted in part (Aug. 27, 2019).

ARIZONA'S NEW FROZEN EMBRYO STATUTE REQUIRES THE AWARD OF IN VITRO HUMAN EMBRYOS TO THE SPOUSE WHO INTENDS TO ALLOW THEM TO DEVELOP TO BIRTH; HOWEVER, IT ONLY APPLIES TO MARRIED COUPLES IN PROCEEDING FOR DISSOLUTION OF MARRIAGE OR LEGAL SEPARATION

A.R.S. §25-318.03 requires that the Court in a dissolution or separation proceeding award any such embryos to the spouse who intends to allow them to develop to birth. The non-consenting party shall not have any financial responsibility for the embryos. Note that this statute was not enacted prior to ***Terrell, supra.***

CHILDREN'S ISSUES: JUVENILE COURT

***TRISHA*- AZ. SUPREME COURT: MOTION TO SET ASIDE JUVENILE COURT JUDGMENT AFTER ACCELERATED SEVERANCE HEARING AND FAILURE TO APPEAR REQUIRES GOOD CAUSE FOR NONAPPEARANCE AND MERITORIOUS DEFENSE.**

Ariz. R. P. Juv. Ct. 46(E) Motions to set aside juvenile court judgments in actions involving dependency, guardianship, and termination of parental rights must conform to Ariz. R. Civ. P. 60(b)-(d). Because precedent requires the movant under civil Rule 60(b) to prove a meritorious defense, the moving party under juvenile Rule 46(E) also must prove a meritorious defense.

Under ***Christy A. v. Arizona Department of Economic Security***, 217 Ariz. 299 (App. 2007), a parent who fails to appear at a final severance hearing must show "good cause" for the nonappearance *and* must show a meritorious defense. In ***Trisha A. v. Dep't of Child Safety*****,** 245 Ariz. 24, 29 ¶ 10 (App. 2018), Division One *declined* to apply ***Christy A.*** to judgments after an *accelerated hearing* under juvenile Rule 64.C. However, the Arizona Supreme Court vacated the Court of Appeals decision and held that a motion to set aside a judgment resulting from an accelerated hearing must show "good cause" for the nonappearance *and* a "meritorious defense".

Justice Bolick, in an 11-page opinion, wrote that the majority fails to safeguard the due process rights of the parent whose legal rights are being severed. Only good cause should be required. The statute requires a parent to attend *every* proceeding or else the parent may be deemed to have waived his or her rights. This is a "catastrophic" consequence, especially for parents who may have jobs or who may lack access to transportation. Non-appearance can lead to an immediate "accelerated hearing" to terminate rights. Justice Bolick wrote that this process fails to guarantee due process rights. ***Trisha A. v. Dep't of Child Safety***, 247 Ariz. 84, 446 P.3d 380 (Sup. 8/5/19).

CHILD SUPPORT

DES v. TORRES: GIFT OF FUNDS TO INMATE'S TRUST ACCOUNT MAY BE SEIZED FOR CHILD SUPPORT ARREARAGES UNDER A WITHHOLDING ORDER

A.R.S.§ 31-254 does not bar ADES from issuing a withholding order to seize an inmate's non-wage monies (including gifts to their inmate trust accounts) for child support. This is true even where child support has been terminated, a parent does not have parenting time with the child due to their incarceration, and where the child support owed is for arrearages. Such funds can be removed by income withholding order pursuant to § 25-504 as a periodic or non lump sum payment. Additionally, the Court notes that ADES is not limited by the types of lump sum payments addressed under § 25-505(E), which are a partial, but not exhaustive, list of types of payments considered by statute to be lump sums. ***State of Arizona ex rel. Dept. of Economic Security v. Torres, State/DES v. Torres***, 245 Ariz. 554, 431 P.3d 1207 (Div.1, 10/30/18).

AMADORE v. LIFGREN: MODIFICATION OF CHILD SUPPORT AND TERMINATION OF SPOUSAL MAINTENANCE ARE APPROPRIATE UPON PROOF OF A SUBSTANTIAL AND CONTINUING CHANGE OF CIRCUMSTANCES; REIMBURSEMENT FOR OVERPAYMENT IS NOT RIPE FOR CONSIDERATION WHILE A CHILD SUPPORT OBLIGATION REMAINS ONGOING

Mother, who was not employed at the time of the divorce, was awarded $2,000 per month indefinite spousal maintenance and $3,000 per month in child support--an upward deviation from the Guidelines. Mother obtained a real estate license in May 2014. Father then filed a petition to modify spousal maintenance, alleging that Mother had achieved the ability to be financially independent through acquisition of her real estate license. After a hearing, the trial Court reduced child support to an amount within the guidelines and terminated spousal maintenance. To account for the overpayments created by the changes, the court reduced monthly child support payments to $500 per month until the child support overpayment was equalized and offset.

Division One affirmed the termination of spousal maintenance and modification of child support; however, it vacated the effective dates of both orders and remanded for redetermination based on when the changed circumstances were proven to be substantial and continuing. They also vacated the order reducing Father's child support obligations to $500 per month to account for the overpayments. While A.R.S. § 25-527 allowed Father to request reimbursement, that request could not be made until the child support obligation terminated, which it had not. ***Amadore v. Lifgren,*** 245 Ariz. 509, 431 P.3d 579 (Div. 1, 10/16/18).

MARRIAGE/SAME-SEX ISSUES

A.R.S. § 25-102: LEGISLATURE ESTABLISHES 16 AS MINIMUM AGE TO MARRY, BUT EVEN THEN THE MINOR MUST PROVE THAT HE OR SHE HAS AN EMANCIPATION ORDER; OR THE PARENT OR GUARDIAN CONSENTS, AND THE PROPOSED SPOUSE IS NOT MORE THAN THREE YEARS OLDER THAN THE MINOR

SPOUSAL MAINTENANCE

A.R.S. § 25-319: LEGISLATURE EXPANDS ELIGIBILITY FOR SPOUSAL MAINTENANCE

Instead of three grounds for eligibility for spousal maintenance, there will now be **five**. The text of revised A.R.S. § 25-319(A) is below. A spouse may now qualify for maintenance even if the spouse has sufficient property or can be self-sufficient through appropriate employment if the spouse: "Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse" or "has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse." *See Legislative analysis at the end of these materials.*

COTTER: SUFFICIENT PROPERTY UNDER A.R.S. 25-319(A)(1) IS PROPERTY THAT, STANDING ALONE, WOULD BE ENOUGH TO MEET THE RECIPIENT'S LIFETIME NEEDS

The parties were married over 20 years. Both had worked, but Wife was determined disabled in 2013 and obtained Social Security disability benefits. Husband had an "acute mental health problem" that he was still dealing with at the time of trial and was receiving short term disability benefits. Each party filed separate bankruptcy cases immediately prior to the divorce. Wife sought spousal maintenance, but the trial court found she was not eligible. Division Two found that the trial Court failed to make specific findings about the value of Wife's property. Accordingly, it reversed and remanded for a determination of whether Wife's property could provide for her reasonable needs without being exhausted. Division Two refused to take a position on the secondary question of whether Wife was eligible for an award under A.R.S. § 25-319(A) (income from employment sufficiency). In making its ruling, the Court elaborated quite extensively on its interpretation of § 25-319(A), including the following:

a. In determining eligibility, the Court must consider only the circumstances of the requesting spouse; and,

b. Sufficient property (to provide for a recipient's reasonable needs) has not been defined by the legislature. However, legislative history and prior case law – ***Deatherage v. Deatherage****,* 140 Ariz. 317, 320, 681 P.2d 469 (App. 1984; and ***Wineinger v. Wineinger****,* 137 Ariz. 194, 197-198, 669 P.2d. 971 (App. 1983) – suggest that for the *limited purpose of an eligibility determination,* sufficient property is of such value that the spouse would be unlikely to exhaust it in his or her lifetime. "Adequate or necessary for the

purposes of § 25-319(A)(1) means capable of independently providing for a spouse's reasonable needs during his or her life". ***Cotter v. Podhorez***, 245 Ariz. 82, 425 P.3d 258 (Ct. App. 2018)

[**EDITOR'S NOTE:** Does this throw the eligibility door wide open? For example, in the case of two neurosurgeons with substantial earnings, but who were profligate spenders during the marriage leaving no property, both spouses could be eligible for maintenance under A.R.S. §25-319(A). In an emphatic dissent, Judge Brearcliffe worries that the reasoning risks misapplication. For him, sufficient property is evaluated at the time of the dissolution and in the context of other factors at that time. The majority directs the trial court to evaluate whether the spouse seeking maintenance has property sufficient to meet his or her needs "without supplement." Yet it does not expect the trier of fact to operate in a vacuum. It remanded the case for the trial court to "evaluate" Wife's property, such as to understand the "term for which that property could be expected to provide for [her] needs before she exhausted it." If needs must be understood by any measure of context, then the dissent has a point. The dissent reads reasonable needs to be unmet needs, not standalone needs: as long as reasonable needs are being met from some source or combination of sources, including property, then no eligibility is established by this factor alone.]

GUIDELINES RE DEDUCTIBILITY OF SPOUSAL MAINTENANCE AFTER JANUARY 1, 2019

a. A divorce decree by 12-31-18 is not required. An agreement will do. That is because IRC Section 71 continues to apply, which makes deductible, anything paid pursuant to written agreement incident to divorce.

b. However, technically, not even a written agreement is required. You just need a meeting of the minds. Consent by letter may be acceptable as are other broad ranging oral agreements supported by email, etc. See ***Tax Court Memorandum Opinion, Leventhal. T.C. Memo 2000-92. A Tax Court Summary Opinion***, ***Micek , T.C. Summ. Op 2011-45*** (2011).

c. Prenuptial Agreements pose a different problem. They are not incident to divorce. Do not assume that spousal maintenance paid pursuant to a Prenuptial Agreement will be deductible. You should cover this in correspondence to your client.

d. Temporary orders pose challenges when dealing with the TCJA and retroactivity. If there is a 2018 temporary order of alimony followed by a 2019 Divorce judgment, the temporary order is extinguished and with that any retroactivity. However, the result is not clear.

[**PRACTICE TIP:** Incorporate the temporary order in your final Agreement by reference. The rationale is that this is generally consistent with the Tax Reform Act of 1984, which deals with the issue of

retroactivity; but the real practice tip is to **REFER ALL TAX ISSUES** to your client's accountant.]

REITH: **MEMORANDUM DECISION: COURT MUST NOT AWARD MAINTENANCE FOR "SPECULATIVE" ANTICIPATED DISABILITY CLAIM.**

Husband worked throughout marriage. At time of trial, he was still working full-time but testified he was disabled and would be unable to work full-time in the future. At time of trial, Husband had not applied or qualified for disability status. The trial court ordered spousal maintenance. Division One reversed, finding spousal maintenance cannot be based on "speculative predictions about the future." The correct procedure was for husband to seek modification if and when he obtained disability status. ***Reith v. Reith***, No. 1 CA-CV 18-0283 FC, 2019 WL 5577350 (Div. 1, 10/29/19) (Memorandum Decision).

HEALTH INSURANCE– SO OLD, YET STILL SO RELEVANT!

THIRD CIRCUIT: FAILURE TO NOTIFY HEALTH PLAN ADMINISTRATOR OF DIVORCE WITHIN 60 DAYS OF FINALIZATION PRECLUDES EX-SPOUSE FROM RECEIVING COBRA BENEFITS

Third Circuit. ***Ludwig v. Carpenters Health & Welfare Fund of Philadelphia & Vicinity, et al.***, 383 Fed.Appx. 224, 36 FLR 1355 (3d Cir., 06/04/10). (*Unpublished*). **[EDITOR'S NOTE:** Although ancient and unpublished, this remains a valuable reminder to make sure that you advise your clients in your closeout letter of the requirement to give the Plan Administrator notice of divorce within 60 days of the filing of the Decree if that person wants COBRA rights.]

PROPERTY/DEBTS

HAMMETT. **ANNULMENT DOES NOT ALTER THE COMMUNITY PROPERTY STATUS OF PROPERTY AND DEBT; RATHER, IT REQUIRES THE COURT TO ALLOCATE PROPERTY AND DEBT ACQUIRED DURING MARRIAGE; ALTHOUGH NOT AT ISSUE IN THIS CASE, BIGAMY DOES NOT RENDER THE MARRIAGE VOID AND IS NOT A GROUND FOR ANNULMENT; LOAN SIGNED FOR BY ONE SPOUSE THAT ENCUMBERS THAT SPOUSE'S SEPARATE REAL PROPERTY IS A COMMUNITY DEBT, IF THE LOAN WAS NOT USED TO PURCHASE THE PROPERTY**

In a dissolution action after a six-year marriage, husband alleged he was entitled to an annulment because wife was already legally married in the Philippines and the parties had faked the first husband's death certificate so that they could marry. In all fairness, the first husband had disappeared off the radar screen for the 19 years prior to her marriage to Husband here. The trial court then granted Husband's motion to dismiss the dissolution action because of the "mutual fraud committed by both parties". Husband then filed an

annulment action. Before the annulment trial, the parties reached a partial agreement on the disposition of some assets and obligations, which the Court found constituted a valid Rule 69 Agreement. The remaining issues were tried after which the trial court held that all community property rights and obligations were void *ab initio* from the date of marriage; and it entered orders for disposition of property and debts in reliance on this assumption. It further ordered that the parties condo was owned by them as tenants in common and that a Loan (which had been secured by Husband's separate property house), but was used for community purposes, would be paid from the proceeds of sale. Wife appealed.

Division One ruled as follows:

(1) **An annulment does not extinguish community property.** Property acquired by either spouse during a marriage is community property and an annulment does not change its status. The court must allocate community property and debt as it would in a dissolution proceeding. If grounds for annulment exist, the court to the extent that it has jurisdiction to do so, shall divide the property of the parties. A.R.S. §25-301(B). A.R.S. § 25-211(A)(2) does not distinguish between a dissolution and annulment action as to community property acquired during a marriage. A Petition for Annulment does not alter the status of preexisting community property. A.R.S. §25-211 (B) (1). §25-213(B) mirrors the same principles as to separate property. Although all of these statutes are in the context of service of a petition, the Court reasoned that "if community property principles do not apply to property acquired during a marriage that is annulled, the distinction the statute draws between property obtained before and after service of an annulment petition would be immaterial". There is a presumption that the legislature did not intend to do a futile thing by including language that is not operative. ***City of Mesa v. Killingsworth***, 96 Ariz. 290, 294-295 (1964).

(2) **An annulment does not extinguish community debt.** A.R.S. §25-213(C) presupposed that debt acquired by one spouse after marriage binds both parties even after the marriage is annulled. Otherwise it would be unnecessary to discontinue the accrual of community debt after service of the petition if the annulment itself resulted in the nullification of the community.

(3) **Prior case law is overturned.** ***Cross v. Cross***, 94 Ariz. 28, 31 (1963) ("where there was no valid marriage of appellant to appellee, there can be no acquisition of property rights based on their marital status") has been superseded by the current A.R.S. §§ 25-211 to -215, which were enacted or amended after ***Cross***.

(4) **The court in both a dissolution and annulment action must consider community debt when it makes an equitable allocation of community property**. Although the dissolution statutes do not expressly grant authority to allocate debts between the parties, assets and obligations are reciprocally related and there cannot be a complete and equitable disposition of property without a corresponding consideration and disposition of obligations. See also ***Cadwell v. Cadwell***, 126 Ariz. 460, 462 (App. 1980).

(5) **The Rule 69 Agreement is vacated.** The Court's acceptance of the Rule 69 Agreement was predicated on an incorrect legal principle; and therefore, the parties did not act with full knowledge of their property rights; nor could the court determine

whether the agreement was fair and equitable. See ***Buckholtz v. Buckholtz,*** 246 Ariz. 126, 132-33 (Div. 1, 2019).

(6) **The Loan was not Husband's separate debt even though it was secured his separate property.** Wife argued that A.R.S. §25-214(C)(1) requires joinder of both spouses to bind the community in any transaction for an encumbrance on real property. However, all liability incurred by either spouse during a marriage is presumed to be a separate obligation, and that presumption applies to debt secured by separate property. A.R.S. §25-214(C)(1) would only apply if the Loan encumbered a community asset or if the Loan was a purchase money loan on for acquisition of the property in question.

(7) **Polygamous marriage is not void *ab initio*.** Neither party raised the issue of whether the dissolution action should have been dismissed or whether annulment was appropriate. However, in a footnote, the court noted that (unlike marriage to a person under the age of 16), polygamous or plural marriages are not void under A.R.S. §25-102; although it is punishable as a criminal offense under A.R.S. §13-3606.

***Hammett Sr. v. Hammett*,** No. 1 CA-CV 18-0632 FC, 2019 WL 5556953, ___ P.3d ____ (Div. 1. 10/29/2019).

***LEHN:* A PARTY'S WASTE OR HIDING OF ASSETS MAY BE CONSIDERED IN THE DIVISION OF PROPERTY; THE COURT CAN AWARD A MONETARY JUDGMENT FOR SUCH WASTE; WHERE A PARTY'S OWN "OBSTRUCTIONIST BEHAVIOR" PREVENTS AN ACCURATE DETERMINATION OF THE COMMUNITY'S INTEREST IN AN ASSET, THE COURT MAY AWARD ONE PARTY A GREATER SHARE OF COMMUNITY ASSETS**

During the marriage, Father worked for the Kuwait Municipal Ministry and a Kuwaiti business. In the divorce, Mother claimed Father also owned other Kuwaiti businesses and sought disclosure from Father of financial documents. Father refused, claiming he could not obtain them because the businesses were family owned and he had no interest in them.

At trial, Mother produced evidence that Father had been listed on the website of the Businesses as an owner and identified himself as its CEO. There was other corroborating evidence of Father's ownership of the Businesses, including the fact that his known income was in excess of the income that he claimed from other sources. The court found that Father likely had an ownership interest in the businesses; and that Father had provided insufficient disclosure of these interests or had otherwise hidden assets. To compensate Mother for her share in the Businesses, the Court ordered Father to pay $241,000 in community debt, awarded Mother an interest in an account, and ordered Father to pay Mother's fees. Father appealed. Division One affirmed.

The Court has broad discretion to allocate community property. ***Boncoskey v. Boncoskey,*** 216 Ariz. 448 (App. 2007). The court is allowed to consider excessive or abnormal expenditures, concealment and the like in dividing property. "Equitable" is a concept of fairness dependent upon the facts of a particular case. ***Toth v. Toth,*** 190 Ariz. At 221. Accordingly, the Court's division of assets was supported by the evidence of

Father's attempt to hide the community interest in or income from the Businesses. A.R.S. § 25-318(c). The court is also authorized to make a monetary award instead of merely dividing property. ***Martin v. Martin***, 156 Ariz. 452 (1988).

Father also objected based on the lack of a valuation of his business interests. However, the inability to value the businesses were due to Father's attempt to hide the interests and failure to disclose information. Where a party's own "obstructionist behavior" prevents an accurate determination of the community's interest in an asset, the Court may award one party a greater share of community assets. ***Lehn v. Al-Thanayan,*** 438 P.3d 646 (Ariz. Ct. App. 3/7/19).

VAN HAIL: **MEMORANDUM DECISION: SPOUSE WHO CONTROLS COMMUNITY BUSINESSES CAN BE ALLOCATED ALL TAX DEBT FROM THE BUSINESSES; DECISION ACCOMPANIED BY FINDING OF WASTE.**

The businesses, which had been controlled by husband during the marriage had tax debt at the time of the dissolution action arising out of a failure by husband to pay the taxes since 2011. This unequal division of property was accompanied by a finding of community waste. Division One affirmed. ***Van Hail v. Evans*****,** No. 1 CA CV 18-0758 FC (Div. 1, 10/29/19) (Memorandum Decision).

CARTER: **MEMORANDUM DECISION: SPOUSE WITH SUPERIOR EARNING CAPACITY ALLOCATED ALL OF BACK TAX DEBT; NO FINDING OF WASTE.**

The trial court ruled that the spouse who earned more (about 60%) of the community's monthly gross income should be allocated 100% of the parties' tax debt. The trial court did not make a finding of waste. Rather, it made an equitable, but unequal division of the debt. ***Carter v. Carter***, No. 1 CA CV 18-0718 FC, 2019 WL 4667526 (Div. 1, 09/24/19) (Memorandum Decision).

PERRY: **ALASKA. STUDENT LOANS ARE PRESUMPTIVELY COMMUNITY; AGREEMENT OF THE PARTIES IS IRRELEVANT**

Weighing in on the student loan contracted during marriage issue, Alaska (a community property state) holds that the student loans are presumptively community and that agreement of both parties is irrelevant. ***Perry v. Perry,*** 449 P.3d 700 (Alaska 2019).

LEW: **WYOMING SUPREME COURT WEIGHS IN ON PRE AND POST JUDGMENT INTEREST WHEN THE COURT ORDERS REIMBURSEMENT; TIPS FOR PRESENTING A CASE**

The trial court ordered Mother to reimburse funds she removed from the college account that she was managing for a child and awarded post-judgment interest. After first determining that an award of post-judgment interest from date of decree was inapplicable because there was no judgment against Mother at this time, the Court turned its attention to pre-judgment interest. Prejudgment interest is available when (1) the claim is liquidated, meaning it is readily computable via simple mathematics; and (2) the debtor

receives notice of the amount due before interest begins to accumulate. Here, there was no evidence in the record regarding the level of interest the education account could have earned; the amounts in the account at different times, or the amounts withdrawn by Mother at any particular time. It also noted that Mother waived her right to argue that the Father was not the Real Party in Interest because she had not previously raised it. ***Lew v. Lew,*** 2019 WY 99, 449 P.3d 683 (Wyo. 2019).

EMERGING ISSUE: HOW TO EQUITABLY DIVIDE BITCOIN OR OTHER CRYPTOCURRENCIES IN A DIVORCE

Virtual currencies (such as Bitcoin) pose a host of issues for divorce practitioners, who must learn how to find them if a spouse tries to hide them, how to value a notoriously volatile asset, how to craft relief for violation of a preliminary injunction or discovery order, and what fiduciary duties a spouse owes with respect to trading in virtual currency. For more, see "Bitcoin: The New Mattress Full of Cash for Divorce Cheats", http://aaml.org/sites/default/files/Bloomberg%20Legal%20-%2012-28-17.pdf, and "Bitcoin Bitterness Starts to Make Messy Divorces Even Worse" (https://www.bloomberg.com/news/articles/2018-02-26/bitcoin-bitterness-starts-to-make-messy-divorces-even-worse) and the Appendix to these materials.

CALIFORNIA: DISSOLUTION COURT CAN AWARD SOLE OR JOINT OWNERSHIP OF COMMUNITY PETS

California in 2018 enacted AB2274, which allows a court in a dissolution or separation action "to assign sole or joint ownership of a community property pet animal taking into consideration the care of the pet animal", both post-decree and on a temporary basis. AB2274, implemented as Section 2605 of the California Family Code, is found at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2274

[**EDITOR'S NOTE:** California is the latest state to acknowledge that pets of divorcing couples are not merely property to be divided, but sentient creatures who deserve more consideration than a rug (quoting Tim Eigo). The new law allows judges to gnaw on what is in the best interest of the companion animal, not just what is equitable in a community property state. Illinois and Alaska have similar laws. It may be a sign of things to come in a country where 85M households have animal family members.]

PROCEDURE

A.R.S. §§ 12-1551, 12-1611, 12-1612, 12-1613 and 33-964: TIME FOR RENEWAL OF JUDGMENTS EXTENDED FROM FIVE YEARS TO 10.

McCARTHY: RULING ON CHALLENGE TO OOP TRANSFERRED TO FAMILY LAW COURT DOES NOT BECOME APPEALABLE UNTIL RULE 78 LANGUAGE IS ENTERED

After a Justice Court order of protection is transferred to Superior Court for a pending family law case, a family law court order maintaining, modifying or dismissing

the order of protection is not appealable unless it contains Rule 78(b) language. Without Rule 78(b) language, that order remains subject to modification by the family law court and is not appealable. ***McCarthy v. McCarthy***, No. 2 CA-CV 2018-0184, 2019 WL 3928643 (Div. 2, 8/20/19).

CROSBY: ISSUE PRECLUSION DEFINED

This was a juvenile court case that as an excellent primer on the meaning and application of claim preclusion. It means a final judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same claim. Specifically, a party seeking to invoke the doctrine must establish: (1) an identity of claims in the suits; (2) a final judgment on the merits in the prior litigation, and (3) identity or privity between parties in the two suits. ***Lawrence T. v. DCS, MT***, No. 1 CA-JV 18-0214 (February 28, 2019). ***In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. And Source***, 212 Ariz. 64 (2006). However, as a judicially-created doctrine, it is not strictly applied in all instances. ***In re Marriage of Gibbs,*** 227 Ariz. 403 (App. 2011) – the doctrine must give way when mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.] ***Crosby-Garbotz v. Fell in & for Cty. of Pima***, 246 Ariz. 54, 434 P.3d 143 (Div. 2, 2/5/19) (Chief Justice Bales).

PACIFIC WESTERN: A JUDGMENT CREDITOR MAY NOT ATTACH A JUDGMENT LIEN TO HOMESTEAD PROPERTY; INSTEAD, IT MUST EXECUTE ON ITS JUDGMENT BY WAY OF A FORCED SALE OF THE PROPERTY UNDER A.R.S. § 33-1105

Although this is a civil case, its holding is equally applicable to a party who has a non-support judgment against his or her former spouse. It analyzes the intersection of Arizona's judgment lien and homestead statutes. Pursuant to judgment lien statutes, a recorded judgment becomes a lien on all real property owned by the judgment debtor, A.R.S. § 33-961(A) unless the property is exempt from execution, including homestead property. A.R.S. § 33-964(A). The homestead exemption for a married couple in a personal residence is up to $150,000 in equity. Any person entitled to a homestead exemption holds the property free and clear of the judgment lien. A.R.S. § 33-964(B). A judgment creditor may reach excess equity in a homestead property only by invoking A.R.S. § 33-1105, which allows a forced sale of property to a bidder whose offer exceeds the sum of the exemption plus the value of any consensual liens on the property having priority to the judgment. Further, a recorded judgment does not create a lien on property subject to homestead even when the value of the property exceeds the amount of the homestead. ***In re Rand***, 400 B.R. 749 (Bankr. D. Ariz. 2008); ***In re Glaze,*** 169 B.R. 956, 966 (Bankr. D. Ariz) (explaining that 33-1105 sets forth the procedure for ensuring that excess equity is distributed to judgment lien creditors). Here, Lender's judgment lien did not attach to the Home. The lien does not run with the land because homeowners hold their homestead property free and clear of judgment liens. ***Pacific Western Bank v Castleton***, 246 Ariz. 108, 434 P.3d 1187 (Div. 1, 12/27/18).

[**EDITOR'S NOTES:**

***** Do not assume that a recorded judgment is effective to create a lien on any homesteaded property. You must actually force a sale under A.R.S. § 33-1105. Advise your clients of this in a close out letter, if applicable).

* A minority of jurisdictions take the position that a judgment lien attaches to homestead property but remains "dormant or in abeyance as long as the homestead continues. However, Arizona follows the majority approach that a judgment is not a lien against the premises.

*The takeaway is **DEFER TO THE EXPERTISE OF A CREDITOR'S RIGHTS ATTORNEY WHENEVER YOU ARE TRYING TO PROTECT A JUDGMENT.** The rules of the road are tricky.

* Homestead exemptions do not apply to a lien for child support or spousal maintenance arrearages. However, an award of court ordered support is not a lien for the purposes of the homestead exemption statute unless one of the following applies: (1) **the arrearage has been reduced to judgment**; (2) a lien exists pursuant to A.R.S. § 25-516 (see note); or (3) the Court orders a specific security interest of the property for support.

* In a contempt proceeding brought to enforce payment of any form of child support or spousal maintenance, the court may consider the portion of property claimed as exempt pursuant to § 33-1101(A) as a resource from which an obligor has the ability to pay.

* § 25-514 gives child support priority over all other judgments except for prior recorded judgments or liens, but priority shall not arise until a certified copy of the child support judgment is recorded with the county recorder. § 25-516, however, states that notwithstanding § 25-514, in a title IV-D case, if an obligor owes two months or more of child support, the unpaid amounts constitute a lien by operation of law on all property owned or later acquired by the obligor. The department files a notice of lien with the county recorder. A liquidated judgment is not required to establish a lien.

* Under § 25-503(I). Each child support payment is enforceable as a final judgment by operation of law as it is due.

* Under § 25-503(K), if an obligee makes efforts to collect a child support debt more than 10 years after the emancipation of the youngest child subject to the order, the obligor may assert as a defense, and has the burden to prove that the obligee unreasonably delayed in collection efforts.

* Under § 25-403(M). Any judgment for support and for associated costs and attorneys fees is exempt from renewal and is enforceable until paid in full.]

RUFFINO V. LOCOSKY: COMMUNICATION BY A PLAINTIFF WITH A DEFENDANT'S EMAIL ADDRESS, PHONE NUMBER AND SOCIAL MEDIA ACCOUNTS MUST BE ATTEMPTED PRIOR TO PUBLICATION

Under ARCP Rule 41(m) (formerly 4.1(1)), a plaintiff seeking to serve a defendant by publication must show that he was unable to determine the defendant's current address or that the defendant was intentionally avoiding service. To make that showing the plaintiff must demonstrate that he took reasonably diligent efforts to ascertain the address. In addition, Rule 41(m) and due process require that publication be by the best means practicable to provide notice to the defendant and the rules permit a plaintiff to seek permission to serve by other means. A plaintiff who knows the defendant's email address and social media accounts but does not attempt to communicate with the defendant through those means to determine the correct address or seek permission to serve via those alternative means has not used reasonably diligent efforts or shown that publication is the best means practicable. ***Ruffino v. Lokosky,*** 245 Ariz. 165, 425 P.3d 1108 (Ct. App. 2018), review denied (Dec. 13, 2018).

BUCKHOLZ: THE COURT MUST DETERMINE WHETHER A SEPARATION AGREEMENT IS ENFORCEABLE, AND IF SO, WHETHER IT IS UNFAIR; INEQUITABLE IS NOT THE STANDARD; THE COURT MAY CONSIDER THE SEPARATE PROPERTY OF A PARTY AS PART OF THE UNFAIRNESS CALCULUS, IF THE PARTIES CONSIDERED THAT IN THE AGREEMENT; HOWEVER, THE PARTIES MUST ACT WITH FULL KNOWLEDGE OF THE CHARACTER OF THE SEPARATE ASSETS

In 2013, after individually consulting with attorneys, the parties signed a Marital Separation Agreement (MSA). The MSA covered assets and debts generally, but did not specifically address disposition of the parties' home, Wife's community retirement account or Husband's separate retirement plan. However, at the same time the MSA was signed, Wife quit-claimed the residence to Husband, who refinanced it and paid half the equity to Wife; and Husband quit-claimed his interest in Wife's retirement to her. The parties agreed that Husband's retirement was his separate property. A divorce was filed in 2016. The trial court found that the parties voluntarily entered into the Agreement; it was valid and binding and fairly and equitably divided the community property and debts as of 2013. Although the MSA did not address the marital home, Wife's retirement and home equity payment to the Wife, the Court awarded the home to Husband; the Court awarded to Wife the equity payment and Wife's retirement. It affirmed Husband's retirement to him as his separate property. Husband appealed. Division One reversed and remanded, holding that enforcing a Separation Agreement under A.R.S. §25-317(A) requires the following:

(1) First, the Court must find that the Agreement is binding. A Separation Agreement is a contract requiring an offer, acceptance, consideration and sufficient specificity. The parties must mutually consent to all material terms. Division One found that the Agreement was binding as to the items set forth in the MSA; but not as to the payment of the home equity to Wife. Husband contended the equity payment to Wife was not in consideration of half of her equity, but because the refinancing people told him he had to do

it. Wife objected to this and also argued that Husband gifted her the equity (although she failed to raise this at the trial court level). Additionally, she argued part performance. There was no meeting of the minds on these issues.

AND

(2) Second, The Court must determine if the Agreement is unfair. This does not mean unequal or inequitable. § 25-317 does not use either term, even though the legislature used this terms in other statutory sections. An Agreement can be inequitable, but also not unfair.

(3) In determining what is "unfair", the Court may consider a party's separate property (Husband's separate retirement was worth substantially more than Wife's community retirement), but only if the parties considered this as a basis for making this agreement (they did), but the party with the separate property has to act with full knowledge of its character. Husband claimed he was unaware of the separate property character of his retirement.

(4) The Court erred by finding that Wife had equitable defenses of laches, ratification, and detrimental reliance based on her use of funds during the prior three years. Wife had failed to plead all the elements of these defenses in her Pretrial Statement. Affirmative defenses must be both pled and proven.

(5) Unfairness is based on when the Agreement is entered into, not the date the Court decides the matter.

Buckholtz v. Buckholtz, 435 P.3d 1032 (Div. 1, 1/15/19).

[**EDITOR'S NOTE**: *See* ***Hutki v. Hutki***, 417 P.3d 804 (Ct. App. Div.1 , 4/24/18) When a property settlement agreement is challenged for lack of fairness under A.R.S. § 25-317(B), the Court is not required to hold a hearing to determine if the agreement is fair. The Court may make that determination from other documents and communications in the record.]

AUSTIN/ ROE: PAROL EVIDENCE RULE EXPLAINED IN CONNECTION WITH MARITAL SETTLEMENT AGREEMENTS

The Facts. The parties divorced in 2015 after entering into a Marital Settlement Agreement (Settlement). The divorce occurred several years after the Roes had moved into a house located on a jointly owned ranch (Ranch) that Wife was awarded in the divorce. After the divorce, Wife demanded that the Roes vacate the premises. The Roes filed a declaratory judgment claiming a life estate in the house and some surrounding property on the Ranch. Wife asserted the statute of frauds and a third-party complaint against Husband, alleging the Settlement required him to defend and indemnify her against the Roes' life estate claim. Wife moved for summary judgment on both the life estate claim and her indemnification claim against Husband. The court denied summary judgment on both counts. The denial of summary judgment on indemnification was based

on the trial court's consideration of extrinsic evidence. The trial court reasoned that the Settlement's indemnification provisions were "not so clearly written that they can only be supported by one party's interpretation and that the intent of the parties raised questions requiring resolution at trial." That left the jury to review and interpret an extensive and detailed Settlement Agreement. The jury ruled in Roes' favor on the life estate and in favor of Husband on the indemnification claim. **Holding and Rationale**. Division 2 reversed the jury award in its entirety. It found that:

A. **Statute of Frauds.** Only in rare circumstances will the Court exempt oral agreements from the plain terms of the contract. A party's explanations regarding the part performance conduct BY are inadmissible. The acts themselves must suffice to establish part performance and the acts must be unequivocally referable to an oral contract for life and not explainable in another way.

B. **Indemnification Claim.** The interpretation of a contract including whether it is reasonably susceptible to more than one interpretation is a question of law, must be reviewed *de novo* as it is a question of law for the Court. In determining the parties' intent, courts must decide what evidence is admissible in the interpretation process, bearing in mind that the parol evidence rule **allows extrinsic evidence to interpret, but not to vary or contradict, the terms of the contract**. It is a general principle of contract law that when parties bind themselves by a lawful contract the terms of which are clear and unambiguous, a court must give effect to the contract as written. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto. In addition, Courts must avoid an interpretation of a contract that leads to an absurd result.

While Arizona has adopted a permissive approach to the parol evidence rule, allowing extrinsic evidence to aid in contract interpretation, there are limits. When faced with the question of whether to admit extrinsic evidence, the judge should first consider the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties. However, if the offered evidence varies or contradicts the terms of the contract, the parol evidence rule precludes it. So even under Arizona's more permissive approach to the parol evidence rule, a proponents of parol evidence cannot completely escape the confines of the actual writing.

Here the Court found that as a matter of law the Settlement was susceptible to only one interpretation. The Settlement clearly and unambiguously required Husband to defend and indemnify Wife in the event he caused a lien or encumbrance to be placed on property awarded to Wife in the settlement. Further, Husband clearly represented in the Settlement that there were no life estates, leasehold interests, or leases of any kind or nature that burden any of the real property awarded to her. And Husband specifically disclaimed any knowledge of a life estate in favor of the Roes. The extrinsic evidence from Husband varied and contradicted the plain terms of the Settlement.

The Court also recited other rules of contract interpretation, including the cardinal rule that Courts do not construe one term of a contract to essentially render meaningfulness another term. It is the Court's duty to adopt a construction of a contract which will harmonize all of its partes, and apparently conflicting parts must be reconciled,

if possible, by any reasonable interpretation. The only reasonable interpretation of the Settlement was that Husband must defend and indemnify Wife against all claims in relationship to the Ranch that were not specifically disclosed in the Settlement, including the Roes' life estate claim.

The Court also awarded Wife her attorney's fees in part based on the Settlement Agreement terms that in the event of litigation, the prevailing party is to pay the other party's fees. ***Roe v. Austin***, 246 Ariz. 21, 433 P.3d 569 (Ct. App., 11/29/18), review denied (5/28/19).

> **[EDITOR'S NOTE**: Arizona dissolution cases have consistently held that the normal rules of contract interpretation apply to Settlement Agreements in divorce. However, in ***Zale and Zale***, the Court held that rules of contract interpretation do not apply to Decrees, because Decrees are not contracts. This raises interesting issues with respect to merger and non merger of a Settlement Agreement. If an Agreement is merged, then the Agreement is of historical value only. It is as if the terms of the Agreement appeared in the Decree. Under these circumstances, it would seem that the parol evidence rule could never be invoked. This decision also implicates the standard provision for an award of attorneys' fees to the prevailing party. Ordinarily, such a provision would not bind the Court because of the multiple factors it must consider under § 25-324; but if the Agreement does not merge, then § 25-324 would not apply to an award of fees, as seems to be the case in ***Austin***].

> ***EVITT:*** **DIVORCE SETTLEMENT AGREEMENT EXECUTED YEARS BEFORE THE DECEDENT'S DEATH, BUT NOT ENFORCEABLE UNTIL AFTER DEATH, SHOULD BE DEEMED TO HAVE ARISEN BEFORE THE DECEDENT'S DEATH FOR PURPOSES OF FILING A CREDITOR'S CLAIM UNDER A.R.S. § 14-3803 AGAINST DECEDENT'S ESTATE FOR BREACH OF THE AGREEMENT**

Parties' divorce agreement provided that if Wife survived Husband, Husband would provide to Wife $150,000 upon Husband's death. This obligation could be satisfied with life insurance. Husband remarried. He predeceased his former Wife, thereby potentially triggering the $150,000 provision. Husband's widow was unaware of the settlement agreement; notice to creditors was published; without objection, the probate court entered a final decree of distribution in 2014. Thereafter, the Wife initiated probate proceedings in Arizona to allow her claim. Wife argued her claim was not barred because it arose *after* the decedent's death (because it could not be enforced until then). This would give her *two years after* decedent's death to file a claim. The Estate argued that it arose when the settlement agreement was signed – 26 years prior. Division One sided with the Estate, reasoning that although Wife's claim was not enforceable until decedent's death, the claim itself was based on the settlement agreement. That it was not yet due and contingent is inapposite. Both §14-3803(A) and (C) apply to claims "whether due or to become due, absolute or contingent." Thus the Wife's claim was a contingent claim. The court also noted the same rule would apply if there was an agreement to pay a sum certain years *after* the decedent's death. ***In re Estate of Evitt,*** 245 Ariz. 352, 429 P.3d 1146 (Div. 1, 2018), review denied (3/5/19).

UTHE: MEMORANDUM DECISION: **COURT CAN DEDUCT A PARTY'S SHARE OF A COMMUNITY OBLIGATION AGAINST HIS OR HER SHARE OF THE COMMUNITY PROPERTY AWARD; CONTEMPT WAS NOT APPROPRIATE ON A PARTICULAR GROUND IF THAT GROUND WAS NOT SPECIFICALLY PLED AS A BASIS FOR THE CONTEMPT REQUEST**

The Facts: Decree ordered that each party pay 50% of the community debt, including a tax debt, credit card debt and HELOC. In addition, Father was to pay child support. Father failed to pay child support and his share of the debt. The Court ordered that the past due child support be deducted from Father's half of the 401(k). In a subsequent action, Father asked the court to find Mother in contempt for failing to divide the 401(k) and for failing to sell his guns and give him his share of the proceeds. The Court agreed with Father's contempt requests and found Mother in contempt on all these counts. The Court found Father in contempt for failing to make the tax debt payments. The Court further ordered that as a contempt sanction against Father, that his portion of the 401(k) and his share of the gun proceeds be applied as a "credit" to the outstanding tax debt. Father timely appealed arguing among other things, that the trial Court erred by applying his portion of the 401(k) and the gun proceeds to the tax debt as a sanction for contempt. The Court accepted jurisdiction even though an appeal challenging a civil contempt order is only appealable by special action.

Relevant statutes: A.R.S. § 25-318(P). If a party fails to comply with an order to pay (community) debts, the Court may enter orders transferring property of that spouse to compensate the other party, and the Court may order contempt.

Holding and Rationale. Division One held that the trial court erred by finding Father in contempt for failing to pay the tax debt because Mother failed to specifically request the Court to hold Father in contempt; she only asked the Court to enforce Father's payment of the tax debt. The only request for contempt was the failure to pay child support. However, under § 25-318(P) the Court had discretion to apply Father's share of the 401(k) to reduce his outstanding ability for the tax debt. ***Uthe v. Uthe***, No. 1 CA-CV 18-0021 FC, 2018 WL 5306672 (Div. 1, 10-25-18) (Memorandum Decision).

[EDITOR'S NOTE: Although the Court held that the Contempt Order against Father was improper, it did so based on the fact that Mother had failed to properly petition the Court for contempt on this issue. The Court did not even mention the longstanding case law that a party cannot be held in contempt for failure to pay a debt; otherwise we are risking "debtor's prison" for divorced persons only. The statute itself is problematical because it effectively allows the trial court to allocate debt without the creditor having to lift a finger. What if the Father had defenses to the debt– effectively just because the parties were in a divorce, it eviscerated Father's defenses to the debt. It also was effectively an end run around ERISA which prohibits garnishment of a person's retirement to pay debt.]

WILLIS: MEMORANDUM DECISION: RULE 69 DOES NOT APPLY TO AGREEMENTS WITH THIRD PARTIES

During the case, Wife entered a brokerage contract for the marital residence. The contract was canceled, and there was a dispute about who was responsible (a special real estate commissioner was appointed to handle the sale). Husband sought to enforce the contract as a Rule 69 Agreement. Although not dispositive, the Court of Appeals said that Rule 69 "says nothing about the validity and enforceability of an agreement that parties to such [a dissolution] action might enter with a third party." The Court of Appeals affirmed the denial of the Rule 69 motion, primarily for a different reason – Wife did not cancel the contract, so there was no agreement to enforce. ***Willis v. Willis***, No. 1 CA-CV 18-0329 FC, 2019 WL 2395094 (Ariz. Ct. App. Div. 1, June 6, 2019) (Memorandum Decision).

STIMMEL: NINTH CIRCUIT, SIXTH CIRCUIT: STATUTE CAN PROHIBIT FIREARMS OWNERSHIP FOR MISDEMEANOR DOMESTIC VIOLENCE CONVICTION

A husband and father was convicted of misdemeanor domestic violence and ordered to surrender his firearms. He completed his sentence. Ten years later, Hawaii (his state of residence) prevented him from buying or owning any firearms based on his conviction. The Ninth Circuit upheld Hawaii law and related federal law that barred him from owning firearms based on his domestic violence conviction. ***Fisher v. Kealoha***, 855 F.3d 1067 (9th Cir. 2017). The Sixth Circuit joined the First, Fourth, Seventh, Ninth and 10th Circuits in holding that a parallel federal statute, 18 U.S.C. § 922(g)(9), does not violate the Second Amendment by barring a person with a misdemeanor domestic violence conviction from owning a firearm. The Sixth Circuit also held that the U.S. Supreme Court's decision in ***District of Columbia v. Heller,*** 554 U.S. 570 (2008) does not prevent a person from being "disqualified" from firearms ownership after a domestic violence conviction. ***Stimmel v. Sessions,*** 879 F.3d 198 (6th Cir. 1/4/18).

APPEALS

OCHOA: A JUDGMENT IN ONE PART OF A BIFURCATED PROCEEDING (CHILD SUPPORT UNDER TITLE IV (D) AND MODIFICATION OF PARENTING TIME) CANNOT BE APPEALED UNLESS BOTH PROCEEDINGS HAVE BEEN FINALLY ADJUDICATED OR THERE IS FINAL JUDGMENT LANGUAGE

In 2017, Father filed a motion to modify child support and the hearing was held on February 28, 2018. On February 22, Mother filed a petition to modify parenting time. On February 28, the court entered an order modifying Father's child support obligation, but increased it, instead of decreasing it. That order did not address Mother's petition on parenting time. It did not contain language pursuant to Rule 78(B) ARFLP, directing the entry of final judgment as to one or more but fewer than all claims. Father's appeal was dismissed for lack of jurisdiction. The Court recognized that the case was carried out under a bifurcated procedure in which child support was before one judicial officer under Title IV(D) and the other was before a different judicial officer. While the issues may be

bifurcated, they are not treated as separate actions, but rather all claims are under the same case number. Because Mother's petition remained outstanding when the child support judgment was entered, and the judgment did not contain language pursuant to Rule 78(B), the judgment was not final and could not be appealed. ***Ochoa v. Bojorquez,*** 245 Ariz. 535, 431 P.3d 605 (Div. 2, 10/25/18).

ERISA AND RETIREMENT ISSUES

BARRON: COURT CANNOT MAKE AN ORDER AFFECTING MILITARY RETIREMENT WHICH WOULD OTHERWISE BE PROHIBITED BY 10 U.S.C. § 1408; SPECIFICALLY A STATE COURT MAY NOT ORDER KOELSCH RELIEF AGAINST A MILITARY MEMBER TO INDEMNIFY HIS FORMER SPOUSE AGAINST THE CONSEQUENCES OF HIS DECISION TO POSTPONE RETIREMENT BEYOND 20 YEARS

Barron is yet another family law case where the Arizona Supreme Court has weighed in during this case cycle.

Trial Court:

Husband was an active duty member of the US Marine Corps when the parties divorced. The divorce court found that Husband could retire in 2023 after 20 years of service and divided his military retirement pay (MRP) on that assumption. The divorce court also provided that Husband would make payments of Wife's share of his MRP if he chose to work past his normal retirement date. Husband had argued that when a military spouse chooses not to retire after 20 years, a state court may not order him to indemnify his former spouse against the financial consequences of his decision to postpone retirement. Wife argued that indemnification would be proper under ***Koelsch v. Koelsch***, 148 Ariz. 176 (1986) [where a spouse entitled to public retirement benefits chooses to keep working past normal retirement date, court may order the employee spouse to pay the former spouse would have received from the community's share of the MRP].

The trial court also ordered that if Husband elected a survivor annuity in favor of any other person, such election would not reduce Wife's share of the MRP.

Finally, the trial court ordered that Wife would receive a proportionate share of "any cost of living or other post-retirement" increases in Husband's MRP. Husband agreed that the Court could order division of certain specified cost-of-living increases, but the court's order exceeded this when it ordered a division of other post-retirement increases.

Division One:

Indemnification for Voluntarily not Retiring. Division One looked to the U.S. Supreme Court case of ***Howell v. Howell,*** 137 S. Ct. at 1405-06 (2017), holding that state courts may not employ equitable principles to reach results that are inconsistent with federal statutes governing MRP. ***Howell*** involved a trial court order requiring the

military member to indemnify his spouse for her loss in benefits due to the military member's election of disability benefits in lieu of a portion of his MRP. Although 10 U.S.C. §1408(c)(3) permits a state court to treat MRP as community property, it specifically states that it *"does not authorize any court to order a military member to apply for retirement or retire at a particular time in order to effectuate any payment under this section*". It rejected Wife's ***Koelsch*** argument pointing out that ***Koelsch*** did not address division of MRP (this is exclusively a federal matter); and regardless, ***Howell*** is dispositive. A state court may not order the military member to indemnify his former spouse against the financial consequences of his decision to postpone retirement. A state court may not do indirectly what 10 U.S.C. § 1408 directly forbids.

Survivor's Benefits. Division One reversed the trial court's decision that Wife's share of the community's interest in Husband's MRP cannot be reduced by payments he might make to buy a survivor benefit for a future spouse. Pursuant to 10 U.S.C.§ 1408(a)(4), the amount of MRP that may be divided as community property does not include amounts deducted because of an election to provide an annuity (Survivor Benefit Plan) to a spouse or former spouse.

Other Retirement Increases. Division One reversed the trial court and held that it exceeded the breadth of 1408(a)(4)(B), which only permits division of expressly defined cost of living increases– not other post-retirement increases.
Barron v. Barron, 96 Ariz. Adv. Rep. 31 (Div 1, 7/31/2018).

Arizona Supreme Court:

The Arizona Supreme Court agreed with the result, but not with the reasoning of the Court of Appeals. It agreed to reverse the indemnification requirement, but left intact Division One's holdings and reasoning on the Survivor's benefits and other retirement increases issue.

Indemnification. It agreed with Division One's observation that 1408(c)(3) would have little effect if a court, instead of ordering a service member to retire, could simply order indemnification. However, the Arizona Supreme Court focused attention on the definition of "disposable retired pay" which is the relevant benefit that can be divided. Federal law does not permit states to divide Military Retirement Pay, but rather "disposable retired pay", which in turn is defined as the total monthly retired pay to which a member is *entitled*. Entitled means a member has applied and been approved for military retirement benefits. That means actual retirement must have occurred. The statute also applies only to "disposable retired pay payable to a member." The member's interest in MRP is neither vested nor mature until the member retires and benefits are approved. Finally, the statute would be meaningless if "entitled" meant "eligible" as Wife argued. Although a divorce court can enter an order awarding a former spouse a share of MRP, such orders cannot require payment until the military spouse retires.

Where the Supreme Court opened the door is in the second-to-last paragraph of the opinion where it states that the trial court cannot order the military spouse to indemnify the non-military spouse if the military spouse does not retire, **but (quoting *Howell*) a state "remains free to take account of the contingency that some military retirement pay might be waived, or....take account of reductions in value when it calculates or**

recalculates the need for spousal support."

Before a military spouse retires, a court remains free to enter orders awarding a former spouse his or her share of MRP, but such orders cannot require payment until the military spouse retires. See, e.g., § 1408(a)(4)(B) (freezing benefits for decrees finalized before retirement); § 1408(d)(1) (contemplating orders served on the Secretary before entitled to payment). Notably, in ***Howell***, the United States Supreme Court observed that a state "remains free to take account of the contingency that some military retirement pay might be waived, or ... **take account of reductions in value when it calculates or recalculates the need for spousal support**." ***Howell***, 137 S. Ct. at 1406. We express no view, however, on whether or how the court on remand should make any adjustments based on MRP-related contingencies. ***Barron v. Barron***, 440 P.3d 1136 (Ariz Supreme Court, 5/21/19) (emphasis added).

QUIJADA: A COMPENSATION REMEDY FOR A NON-EMPLOYEE SPOUSE FOR HIS OR HER SHARE OF THE RETIREMENT BENEFITS IF THE EMPLOYEE SPOUSE CHOOSES TO WORK PAST NORMAL RETIREMENT MUST BE INCLUDED IN THE DIVORCE AGREEMENT

In the divorce Decree, the parties agreed to divide the community portion of Husband's pension with The Arizona Public Safety Retirement System (APSRS) pursuant to a separate DRO, which was entered on the same day as the Decree. The DRO awarded Wife as her separate property a pro-rata portion of Husband's pension payable directly by the system at the same time and in the same manner payments are made to Husband. By its terms, the DRO could be amended only for the purpose of establishing or maintaining its acceptance to ASPRS and supervise the payment of retirement benefits as provided in the Order. Neither party appealed. Husband became eligible to retire in late 2014, but continued to work and intended to do so through at least 2024. In 2016, Wife petitioned to enforce the division of retirement benefits, arguing Husband's decision to delay his retirement impermissibly blocked her from accessing her separate property. The trial court denied Wife's request. Division One affirmed.

Division One's rationale was that Wife's contention effectively called for a *de facto* modification of the otherwise unambiguous decree and DRO. When division of assets is based on agreement of the parties, entry of the decree thereafter precludes the modification of the terms of the Decree and property settlement agreement. A.R.S. § 25-317(F). Unless a party can show grounds justifying the reopening of a judgment, the Decree stands [A.R.S. § 25-327(A)]. ARFLP Rule 85(b)(6) permits relief from a final judgment if the moving party shows special circumstances justifying relief. Although the Arizona Supreme Court in ***Koelsch*** largely disapproved of an arrangement that would grant the employee-spouse sole discretion to determine when the non employee spouse received his or her share of the retirement benefits, the issue there arose on direct appeal from a decree of dissolution entered following a contested hearing. ***Koelsch*** does not apply to a post judgment modification. Here, Wife could have insisted on a different distribution method at the time of the dissolution, or a ***Koelsch*** arrangement, or reservation of future jurisdiction in the Court, but she did not.

As an aside, Division One noted that appeals lie from findings of fact, conclusions of law and judgments, not *"ruminations of the trial court judge"*. ***Quijada and Quijada***, 246 Ariz. 217, 437 P.3d 876 (2/19/19).

[**EDITOR'S NOTE:** Deal with the ***Koelsch*** issue in every retirement case as part of the divorce settlement discussions.]

VINCENT: **MEMORANDUM DECISION: WHEN A QDRO CONTAINS A MISTAKE SUCH THAT IT DOES NOT ACCURATELY REFLECT THE TERMS AND CONDITIONS OF THE DECREE, IT MAY BE AMENDED TO REFLECT THE DECREE**

'Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party after such notice, if any, as the court orders.' Ariz. R. Fam. L.P. 85(A).

"A clerical mistake 'occurs when the written judgment fails to accurately set forth the court's decision,' while '[a] judgmental error occurs when the court's decision is accurately set forth but is legally incorrect.'" ***Vincent v. Shanovich***, 243 Ariz. 269 citing ***Ace Auto Prods., Inc. v. Vand Duyne***, 156 Ariz. 140, 142043 (App. 1987). ***Vincent v. Shanovich,*** No. 1 CA-CV 16-0431 FC, 2018 WL 4585984 (Div. 1, 9/25/18).

ATTORNEYS' FEES

LEHN: **THE COURT MAY IMPUTE INCOME TO A PARTY IN MAKING A FEE DETERMINATION; A SHOWING OF INABILITY TO PAY FEES IS NOT A PREDICATE TO AN AWARD OF FEES IF THERE IS OTHERWISE A FINANCIAL DISPARITY IN RESOURCES**

Father objected to the fee award because the court failed to properly consider the parties' financial resources and Mother's ability to pay her own fees. However, Mother's ability to pay is not dispositive. § 25-324 does not require a showing of actual inability to pay as a predicate for an award; all a party need show is that a relative financial disparity in income and/or assets exists between the parties, quoting ***Magee v. Magee,*** 206 Ariz. 589 (App. 2004). Although the family court was unable to attribute a specific amount of income to Father form the businesses, Mother's evidence suggested that Father's income was much higher than he claimed on tax returns. ***Lehn v. Al-Thanayan,*** 438 P.3d 646 (Div. 1, 3/7/19).

ATTORNEY/MEDIATOR/ ETHICS

Q: I use my personal Twitter account to post about political issues. Can I tweet about candidates running for Attorney General?

A: Yes, with some constraints. For instance, 1. ER 8.2 states that lawyers cannot make statements that are false or with reckless disregard as to truth or falsity about a candidate

for judicial or legal office. Also, in sharing your opinion you must not disclose confidential client information. Contact the Ethics Hotline for further guidance.

RESOURCES

1. **RANDOM TIPS– NEW LLC ACT**: New LLC act applies to those LLCS formed after 9/1/19 and after 9/1/20, it applies to ALL LLCS.

   a. Membership interests may be held jtwrs or cpwros A.R.S. § 29-3401;
   b. Changes fiduciary duty standards for members and managers. Operating agreement may limit those duties, but not eliminate the implied contractual duty of good faith and fair dealing;
   c. There are more, and different, default statutory provisions for operation of an LLC.
   d. Unless the operating agreement specifies otherwise, "Any distribution made by a limited liability company before its dissolution and winding up must be in equal shares among members and persons dissociated as members" A.R.S § 29-3404(a).
   e. Suffice it to say, if you have a matter involving business interests, always get a copy of the current Operating Agreement and analyze it for titling of the membership interest, buy-out provision and other provisions that may be applicable to a dissolution matter. It may require a spouse of a member to get approval for a transfer of interest.

2. **Tips for Taxes on early distributions:**

   http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Tax-on-Early-Distributions

3. **Advising Seniors.** ***New Times, New Challenges: Law and Advice for Savvy Seniors and their Families*** by Kenney F. Hegland and Robert B. Fleming (Carolina Academic Press, $27.00).

4. **Marriage.** ***New Social Security Rules involving same-sex married couples*****:** Social Security has published new instructions that allow the agency to process some Supplemental Security Income (SSI) claims by individuals who are in a same-sex marriage. To learn more, please go to: www.socialsecurity.gov/same-sexcouples.

5. **International Travel Child Consent Forms**: The I CARE Foundation offers travel forms for minors and supporting legal documents online and in over twenty languages. These forms are intended to prevent international parental child abductions associated with wrongful retention. For the forms, please go to: http://theicarefoundation.org/international-travel-child-consent-form.

6. **DES Subpoenas.** This tip is thanks to attorney Reagan Kulseth. She worked overtime to find the name of a person who handles subpoenas for the Department of Economic Security: Todd Stone; 602-542-0821. A subpoena won't work

unless you have the relevant party's written consent. In the absence of that, it requires a court order.

7. **FOIA Request.** If you represent anyone who has pledged to keep government information confidential (think business who contracts with the federal government) then you must object to a FOIA request and the person themself cannot free the material from the non-disclosure provision by making a request on his or her own.

8. **Disability and life insurance** specifically to insure child support or spousal maintenance obligations (generally cheaper than regular insurance). Here is one person who handles this:

   William L. Pollock, President, Disability Specialists, Inc. - FSI Covered Advisor enrollment center, Direct Line: 503-925-2003
   Toll Free: 888-279-8304 ext 2003, wpollock@gotodsi.com

9. **Service of process on a civilian foreign service employee of the Department of State.** Attorney Merle Stolar did an enormous amount of research on this issue. If this question comes up, she has generously offered to give you the results of her research. Http://theicarefoundation.org/international-travel-child-consent-form.

STINKY EGG

A former top exec at Juul says the e-cigarette company knowingly shipped out a million contaminated pods this year. In a new lawsuit, the ex-senior VP claims he was sent packing for piping up about polluted pods. He adds that the CEO dismissed the concerns because "Juul's drunk and vaping customers wouldn't notice." Harsh. Juul, which just announced it's laying off 500 employees, denies the accusations. This lawsuit is one of about 50 the company is now fighting. Most deal with vaping-related illnesses or false marketing.

AROMATIC EGG

CommonSense American (CSA) is a community-engaged project designed to motivate Congress to pass common-sense legislation. This is accomplished through research and selection of topics that show promise in terms of bipartisan appeal and impact, but that are otherwise mired in a political rut. From there, the project team develops briefs on promising topics and submits briefs to its membership. Members are individuals from all over the country and represent broad ideological diversity, with new people signing up all the time. The CSA participants then vote on which briefs they believe are most promising. If any brief receives support of at least two-thirds of the members, then the CSA organization will adopt that proposal, and approach Congressional leaders about it. **https://www.commonsenseamerican.org/**

ESPECIALLY AROMATIC EGG

MEDICAL LEGAL PARTNERSHIPS FOR THE GREATER GOOD

"I was homeless," Lawler Stichter said. She was speaking in the office at the Salud Family Health Center's Commerce City clinic where she met with the specialist who helps at no cost: attorney Marc Scanlon. Scanlon represented Lawler Stichter at a Social Security Administration hearing earlier this year. He explained how lingering pain following a series of surgeries and other ailments left her unable to continue working as a dog groomer. Lawler Stichter was granted disability payments that allowed her to stop couch surfing and get her own housing.

Across the country, hospitals and clinics are integrating lawyers into their medical practices– See Appendix for more information

LEGISLATION, RULES, ORDERS AND MORE
LEGISLATIVE SUMMARY

FIFTY-FOURTH LEGISLATION SESSION

1. **Section 25-318.02, Arizona Revised Statutes, is amended to read (SPOUSE ORDERED TO MAKE INSTALLMENT PAYMENTS FROM "CONVICTED SPOUSE" RECEIVES EXPANDED RIGHT TO PETITION FOR MODIFICATION)**

25-318.02. Convicted spouse; award of community property; definition

A. In an action described in section 25-318, subsection A, the court shall not award any community property to a convicted spouse.

B. If one spouse is required to make ongoing installment payments to a convicted spouse pursuant to a division of property as described in section 25-318 ~~and the convicted spouse's conviction occurs after the order to make the installment payments~~, the spouse making the installment payments may petition the court for a modification of that ongoing payment.

C. For the purposes of this section, "convicted spouse" means a person who is convicted of an offense and who is sentenced to at least eighty years in prison or to life in prison, with or without the possibility of parole.

APPROVED BY THE GOVERNOR MARCH 22, 2019.

FIFTY-THIRD LEGISLATURE SECOND REGULAR SESSION SUMMARY

General Effective Date Unless Otherwise Noted is August 3, 2018

1. **A.R.S. § 25-319: LEGISLATURE EXPANDS ELIGIBILITY FOR SPOUSAL MAINTENANCE**.

   Instead of three grounds for eligibility for spousal maintenance, there are now five. A spouse may now qualify for maintenance even if the spouse has sufficient property or can be self-sufficient through appropriate employment if the spouse: "Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse" or "has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse."

2. **A.R.S. § 25-102: LEGISLATURE ESTABLISHES 16 AS MINIMUM AGE TO MARRY, BUT EVEN THEN THE MINOR MUST PROVE THAT HE OR SHE HAS AN EMANCIPATION ORDER; OR THE PARENT OR GUARDIAN CONSENTS, AND THE PROPOSED SPOUSE IS NOT MORE THAN THREE YEARS OLDER THAN THE MINOR**

3. **A.R.S. § 25-417: LIMITS COURT'S AUTHORITY TO CONSIDER BLINDNESS IN DECIDING PARENTING TIME AND LEGAL DECISION-MAKING UNLESS THE COURT FINDS BOTH THAT THE BLINDNESS SIGNIFICANTLY IMPACTS THAT PARENT'S ABILITY TO PROVIDE FOR A CHILD'S PHYSICAL AND EMOTION NEEDS; AND THE PARENT LACKS SUFFICIENT HUMAN, MONETARY OR OTHER RESOURCES TO PROVIDE FOR THESE NEEDS**

4. **A.R.S. § 25-318.03: STATUTE GOVERNS ALLOCATION OF HUMAN EMBRYOS IN ACTIONS FOR DISSOLUTION OR LEGAL SEPARATION; COURT MUST AWARD THE IN VITRO EMBRYOS TO THE SPOUSE WHO INTENDS TO ALLOW THEM TO DEVELOP TO BIRTH; IF BOTH WANT TO DO THIS AND THEY BOTH CONTRIBUTED GENETIC MATERIAL, THEN THE COURT RESOLVES THE ISSUE IN A MANNER THAT PROVIDES THE BEST CHANCE FOR THE EMBRYO TO DEVELOP TO BIRTH; OTHERWISE THE PARENT WHO CONTRIBUTED RECEIVES THE EMBRYO; SPOUSE NOT AWARDED THE EMBRYO HAS NO PARENTAL RIGHTS OR OBLIGATIONS**

5. **A.R.S. §§ 12-1551, 12-1611, 12-1612, 12-1613 and 33-964: TIME FOR RENEWAL OF JUDGMENTS EXTENDED FROM FIVE YEARS TO 10.**

The Legislature amended A.R.S. §§ 12-1551, 12-1611, 12-1612, 12-1613 and 33-964 to extended the deadline for renewal of judgment from five years to ten years. For redlined text, *see* https://www.azleg.gov/legtext/53leg/2R/laws/0036.htm

ARIZONA RULES- AMENDED
EFFECTIVE 1/1/2019

6. **RULES OF FAMILY LAW PROCEDURE.** Effective January 1, 2020.

Rule 47.2: Clarifies that post-decree motions for child support require a verified petition and compliance with Rule 91.1.

Rule 79: Corrects cross-reference to clarify that a motion fo summary judgment can be filed after a Rule 29(a)(6) motion to dismiss.

7. RULES OF FAMILY LAW PROCEDURE. Effective January 1, 2019.

The following Rules of Family Law Procedure have been amended. A full version of the amended rules can be found at: https://www.azcourts.gov/rules/RecentAmendments/MoreRules/ArizonaRulesofFamilyLawProcedure.aspx. Or just call the Honorable Greg Sakall. He has all the answers. Better yet, come to one of his many comprehensive presentations on this subject.

8. **RULES OF EVIDENCE**. Effective January 1, 2019.

The following Rules of Evidence have been amended. The amendments can be found at: https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Evidence

a. **Rules 1001, 1002, 1004, 1006-1008.** Order amending Rules 1001, 1002, 1004, 1006, 1007, 1008, Arizona Rules of Evidence; Rules 15.1, 15.2, 15.3, Arizona Rules of Criminal Procedure; Rules 16, 44, 73, Arizona Rules of Procedure for the Juvenile Court; and Rule 10, Arizona Rule of Procedure for Eviction Actions (would amend rules of evidence to expressly reference digital evidence and various rules of procedure to specifically address disclosure of electronically stored information)

b. **Rule 807.** Order amending Rule 807, Arizona Rules of Evidence (would amend Rule 807, Arizona Rule of Evidence to conform to pending amendment of Rule 807, Federal Rule of Evidence)

9. **RULES OF CIVIL APPELLATE PROCEDURE**. Effective January 1, 2019.

The following Rules of Civil Appellate Procedure have been amended. The amendments can be found at:

https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Civil-Appellate-Procedure

a. **Rule 7, 62, and 69.** Order amending Rule 7, Arizona Rules of Civil Appellate Procedure and, Rules 62 and 69, Arizona Rules of Civil Procedure (would clarify the appeal bond scheme and computation of bond amounts, adopt aspects of Rule 62, Federal Rules of Civil Procedure, and create an automatic discovery stay).

10. **RULES OF THE SUPREME COURT**.

a. **Effective as of January 1, 2019.**

The following Rules of the Supreme Court have been amended. A full version of the amended rules can be found at:

https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-the-Supreme-Court

i. **Rule 45.** Order amending Rule 45, Rules of the Supreme Court of Arizona (would amend Rule 45, Rules of the Supreme Court of Arizona, to eliminate outdated provisions and to allow future changes in delinquency fees without further rule amendment).

ii. **Rule 32(c)(7)**. Order amending Rule 32(c)(7), Rules of the Supreme Court of Arizona (would authorize the executive director of the State Bar to waive the dues of a member for personal hardship, subject to board of governors review of denial).

iii. **Rules 32, 46-49, 53, 55-58.** Order amending Rules 32, 46-49, 53, 55-58, and 60-63, Rules of the Supreme Court of Arizona (would clarify the process for appointing and overseeing the functions of Chief Bar Counsel).

iv. **Rule 42.1.** Order adopting new Rule 42.1, Rules of the Supreme Court of Arizona (would add Rule 42.1, Rules of the Supreme Court of Arizona, creating an Attorney Ethics Advisory Committee that can issue lawyer ethics, professionalism, and unauthorized practice of law opinions).

v. **Rule 28.** Order amending Rule 28, Rules of the Supreme Court of Arizona (would update, restyle, and reorganize Rule 28, Rules of the Supreme Court of Arizona, the "rulemaking rule").

vi. **Rule 37(d)(1).** Order amending Rule 37(d)(1), Rules of the Supreme Court of Arizona (would amend Rule 37, Rules of the Supreme Court of Arizona to allow for partial refund of bar exam fees to applicants who must first obtain approval from the Committee on Examinations to sit for the exam, whose approval occurs after the registration deadline, and who withdraw from taking the exam).

vii. **Rule 47, 48, 58.** Order amending Rules 47, 48 and 58, Rules of the Supreme Court of Arizona (would amend Rules 47, 48, and 58 of the Rules of the Supreme Court of Arizona to correct capitalization and cross-references, to add a notice requirement for production of documents, and to change the time for initial discovery requests in attorney discipline matters).

viii. **Rule 34(f)(4).** Order denying petition for Rule 34 (f)(4), Rules of

the Supreme Court of Arizona. The Court notes that the Attorney Regulation Advisory Committee is currently reviewing the rule provisions relating to admission on motion (would delete Rule 34(f)(4), Rules of the Supreme Court of Arizona, which makes a person ineligible for bar admission on motion if the person failed to achieve an Arizona scaled score on the uniform bar examination within five years of the date of filing an application.)

ix. **Rule 123(g)(1).** Order amending Rule 123(g)(1), Rules of the Supreme Court of Arizona (would require under Rule 123(g), Rules of the Supreme Court of Arizona that court clerks afford equal remote electronic access to court records to both counsel and self-representing litigants, including in Family Law cases)

x. **Rule 49.** Order amending and renumbering Rule 49(c)(2)(C)(ii), Rules of the Supreme Court of Arizona (proposed rule is intended to remove the unintended punitive effect on respondents of the current rule which requires posting of probation on the State Bar website for five years)

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APPENDIX

MEDICAL LEGAL PARTNERSHIPS FOR THE GREATER GOOD

Across the country, hospitals and clinics are integrating lawyers into their medical practices. They've begun seeing, for example, that a doctor's prescription could only do so much for patients with no homes where they can refrigerate medications that need to be kept cool. In that vein, Lawler Stichter's doctor had referred her to Scanlon, one of two full-time lawyers who have established Medical Legal Partnership Colorado as part of Salud, a group of clinics serving low-income patients. Lawyers on clinic staffs have taken landlords to court to force them to address lead or other environmental problems that were making children sick, and helped families navigate benefit-bureaucracies to get food stamps for nutritious meals.

Pia Dean founded Medical Legal Partnership Colorado in 2015 after a 30-year career with a top Denver firm, Holland & Hart. Dean calls her office at Salud a "legal clinic in the middle of a medical clinic."

"We consider ourselves a full partner to the (medical) providers here," Dean said. "I think it's just one more arrow in the quiver of an integrated medical team."

Scanlon was a University of Colorado law student interning at the Medical Legal Partnership at its founding and has been there since. When at home discussing work with his girlfriend he refers to patients, not clients. He said his girlfriend, who is also a lawyer, gently corrects him: "Marc, you're a lawyer, not a doctor."

According to the National Center for Medical-Legal Partnership at The George Washington University, more than 300 hospitals and clinics have developed a legal element to their programs. They operate in 46 states. In a report this summer, the Colorado Health Institute said medical-legal partnerships were among the "practical options" to address the impacts that housing access — or lack thereof — have on health. Stephanie Perez-Carrillo, a policy analyst at the Colorado Children's Campaign, hopes the Colorado Health Institute report can be used outside the "typical policy research world" to inform new ways of talking about health.

Perez-Carrillo's nonprofit is one of 18 organizations in the Health Equity Advocacy Cohort, which works to develop policies that address barriers to health like racism and lack of economic opportunity and immigration status. The cohort, which is funded by the Colorado Trust, hired the Colorado Health Institute to work with its members and others to write the report on health and housing.
"It's an exciting time to be working in this space," Perez-Carrillo said. "We know that there are challenges. But there are solutions."

Ashlie Brown, a director who specializes in health and data systems at the Colorado Health Institute, said health care providers have been seeing the impact of the housing crisis but weren't always aware of what steps were being taken to address problems. "What folks need on the health side is better connections to all of the great work that's happening," Brown said. Brown pointed not only to medical-legal partnerships but to initiatives to ensure housing stability for low-income families by

promoting residents' communal ownership of mobile home parks, for example.

Tillman Farley, the chief medical officer for Salud Family Health Centers, is the son of two doctors who impressed upon him that health was about more than medicine. "All my life, since I was a little kid, I've been hearing about housing, about clean living situations, about all the things outside the clinic walls," he said. So he was ready to listen several years ago when he first heard about medical-legal partnerships from a medical student who was interning at Salud. "When we first started this, I thought it would be the easiest thing in the world," Farley said. "That was my naivete."

Dede de Percin, executive director of the Mile High Health Alliance and a proponent of medical-legal partnerships, said funding is often a stumbling block. De Percin, whose alliance brings together health, human and social services leaders in the Denver area to improve community health, led a symposium in October to share ideas on establishing medical-legal partnerships.

De Percin said medical-legal partnerships need champions to prosper. Salud's has two, in Farley, who has a tight budget but nonetheless makes funding Medical Legal Partnership Colorado a priority, and in Dean, who works full time and has never taken a salary, though other staff are paid. The program is funded by Salud and by grants and private donors.

Dean since 2010 had participated in a University of Colorado program in which law students advised clinic patients. She saw how students rotated in and out, that volunteer lawyers weren't always well-versed in the issues, and that it was a struggle for lawyers who were not on-site at clinics to connect with patients. When that program ended in 2015, Dean moved to Salud.

"Funding is our ongoing challenge," Dean said, saying the partnership has survived because of "Salud's failure to let it die and our ongoing efforts to find ways to keep it going."

Children's Hospital offers an example of how difficult it can be to keep a medical-legal partnership going. Annie Lee, executive director for community health and Medicaid strategies at Children's Child Health Advocacy Institute, said the hospital had a medical-legal partnership from 2013 to 2016. Its legal resources included pro bono attorneys and lawyers from Colorado Legal Services, a nonprofit that helps low-income Coloradans who have civil legal issues — people with criminal issues can turn to public defenders. "The need was so great that we were tapping out the resources that we had available regularly," said Lee, who is a lawyer. Lee and her colleagues had to phase out the program.

But one critical facet was maintained: Clinics held three times a year, serving six families each session to supports parents or guardians who need to continue making medical decisions for adults and children with serious medical conditions.

Now Children's is resurrecting its medical-legal partnership, this time with a dedicated half-time attorney and a half-time paralegal instead of volunteers, a model closer to Salud's that Lee believes will be easier to sustain.

Interest in medical-legal partnerships persists because doctors and lawyers have seen them make a difference. Salud patient Veronica Ortiz is an example. Ortiz and her family had been coming to Salud for health care. They also had been trying to resolve legal immigration questions for Ortiz's husband Jose Prieto Torres, who had come to the United States from Mexico in 2003. Ortiz is a U.S. citizen, as are the couple's three children. In 2016, Prieto Torres was refused a waiver, which meant he could be barred from the United States for years because he had entered illegally. The family wasn't sure why, but Ortiz thought a letter from her doctor explaining that her poor health made his presence in the country crucial would help with an appeal. When she asked for the letter at Salud, she was referred to the clinic's medical-legal partnership. Scanlon was able to help him secure a waiver on appeal and Prieto Torres went to Mexico for an interview with a U.S. consul who granted him lawful permanent residency last year. He can now work legally and will be eligible to apply for citizenship in 2021. Ortiz said she has seen the impact on her family's mental health.

"We were always worried," she said. "It's been a lot of relief since he's gotten his residency." "We've been coming to the clinic maybe six or seven years, and I didn't know about this program," she said. "Who's going to think that they have that?" Ortiz has seen the difference having a lawyer can make. Many do not have representation in immigration matters. "A lot of people don't have the money to get a lawyer," Ortiz said, calling the free legal help from Salud "really helpful."

Lawler Stichter, the woman who got help from Salud with her disability claim, had just lost her husband when she went with Scanlon to her Social Security Administration hearing. Terry Stichter had worked in construction and car repair, but stopped as cancer weakened him. Lawler Stichter at first tried to keep working despite her poor health, then became her husband's full-time caregiver. The couple lost their home, moved in with friends and sent their teenage daughter to live with other friends.

Lawler Stichter had started applying for disability on her own before her husband's illness. She had found the process confusing and intimidating, and lost track of it as her husband's health worsened. When she came to Salud's lawyers, she had forgotten that she had appealed an initial refusal of her claim. Scanlon discovered she had a hearing in her appeal that was coming up. "I thought, 'Boy, you're quick,'" she said, and smiled wryly. The hearing "was right when I was in mourning," she said. "I cried a lot when I was sitting there."

Lawler Stichter needs more surgery. Now she can go to her own home to recover. Attorney Dean said it's not just anecdotes like Ortiz's and Lawler Stichter's that give her confidence in medical-legal partnerships. Dr. Angela Sauaia. a professor of public health at the University of Colorado Anschutz Medical Campus, conducted a study of Medical Legal Partnership Colorado between 2015 and last year, a period over which the project screened more than 1,100 Salud patients and completed cases for 169. Sauaia found slight reductions in visits to emergency rooms and missed work days among people whose cases were completed. And two-thirds attributed improvement in their health to their relationship with the Salud lawyers.