THE LAWYER'S LENS
CASE LAW AND LEGISLATIVE UPDATES

June 1, 2017 to October 21, 2018
(*Warning:* Includes some favorites that predate June 1, 2017)

Submitted by: Kathleen A. McCarthy, J.D.
THE McCARTHY LAW FIRM
kathleen@kathleenmccarthylaw.com

CHILDREN'S ISSUES

DIVISION 1: DEVIATION FROM STANDARD OF EQUAL PARENTING TIME 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, Wife 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 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.

The trial court erred by applying a presumption *against* equal parenting time; and basing its change from the temporary orders on:

a. Its finding that the parties' three girls "naturally will gravitate more to [Mother] as they mature;
b. Mother had been the children's primary caregiver;
c. The presumption that "changing equal parenting time now would be less disruptive than in the future";

d. Father's military duties "often made him unavailable during his parenting time"; and,
e. 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 A.R.S. § 25-403(A). ***Barron v. Barron,*** No. 1 CA-CV 17-0413 FC (App. 7/31/2018).

DIVISION 1: ADOPTION BY ONE PARENT IN A SAME-SEX COUPLE 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 Arizona law 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. 16– 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. A.R.S. §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),*** No. 1 CA-CV 16-0734 FC (App. 7/31/18***).***

DIVISION 1: FAILURE TO SHOW A SUBSTANTIAL AND CONTINUING CHANGE OF CIRCUMSTANCES PRECLUDES A CHANGE IN CHILDREN'S PRIMARY PHYSICAL RESIDENCE; COURT CAN EXCLUDE UNTIMELY DISCLOSURE OF EVIDENCE WHICH DID NOT HAVE A SIGNIFICANT EFFECT ON COURT'S ABILITY TO DETERMINE BEST INTERESTS

Mother and Father were married and had two children in Rhode Island. In 2012, Mother moved to Arizona with the children and learned that she was pregnant with a third child. In June of 2013, she filed for dissolution in Arizona. Mother and Father each sought appointment as the primary residential parent. The trial court found that it was in children's best interests for Father to be the primary residential parent.

In April 2016, Mother filed a petition to modify the children's primary physical residence. The court issued a scheduling order, but Mother missed multiple deadlines including disclosure of her expert report and untimely disclosure of witnesses and voluminous documents. Mother again violated the scheduling order in late disclosure of a supplemental expert report, which was ultimately excluded because she did not establish good cause for her late disclosure. The court allowed the original report and allowed testimony from the expert even though it excluded the supplemental report.

The Court held that Mother had failed to demonstrate a substantial and continuing change of circumstance. The Court further held that it did not exclude any evidence that had an "especially significant effect" on its ability to determine the children's best interest; and that it did admit other relevant evidence supporting mother's claims. Division 1 affirmed. ***Johnson v. Provoyeur,*** No. 1 CA-CV 17-0276 FC (App. 07/26/18).

DIVISION 1: TRIAL COURT CANNOT CHOOSE ITS OWN THERAPIST TO TREAT A CHILD, OR ORDER THAT PARENTS NOT DISCUSS GENDER IDENTITY ISSUES WITH A CHILD

Child was born male. 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 by then, apparently) 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 trial 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."

The Court of Appeals 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."

The sole exception, a narrow one, 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. The Court of Appeals 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 under A.R.S. § 25-410(A), a trial court cannot appoint a treating professional for a child. The court may only impose a "specific limitation" on a parent. ARFLP 95(A) does not amend, override, or otherwise affect a court's powers to make unilateral decisions about a child's professional care.

The Court of Appeals also held that 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).]

Finally, the trial court had 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 rights of free speech. The decision has been appealed and the petition to review has been accepted. ***Paul E. v. Courtney F.***, 244 Ariz. 46, 418 P.3d 413 (Ct. App. Div. 1, 4/3/18).

DIVISION 1: JOINT LEGAL DECISION-MAKING WITH FINAL SAY FOR ONE PARENT MUST BE CONSIDERED SOLE LEGAL DECISION-MAKING FOR THE PARENT WITH FINAL SAY; DUE PROCESS NOT VIOLATED BY TRIAL COURT'S TIME CONSTRAINTS WHEN COUNSEL MADE STRATEGIC DECISIONS REGARDING USE OF TIME; AND FEES AWARDABLE BASED ON DISPARITY OF RESOURCES ALONE, EVEN THOUGH BOTH PARTIES WERE UNREASONABLE

Following an evidentiary hearing, the trial court awarded joint legal decision-making, and awarded father 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. The Court of Appeals 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 enough to make an award:

a. **FINAL SAY/MEDIATION.** The Court of Appeals held that [a]n award of joint legal decision-making that gives final authority to one parent is, in reality, an award of sole legal-decision making on those issues. 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. (A trial court can award sole decision-making on some, but not all, issues.)

b. **COURT-ORDERED TREATMENT.** 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, the Court of Appeals 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 Court of Appeals does not explain how ruling for one parent is different than the court making substantive legal decisions directly.]

c. **TIME LIMITS**. Mother also contended that 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.

d. **FEES– DISPARITY OF RESOURCES ALONE IS SUFFICIENT EVEN IF BOTH PARTIES ARE UNREASONABLE.** The Court affirmed the trial court's award of fees to father **even though the trial court found that 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. ***Nicaise v. Sundaram***, 244 Ariz. 272, 418 P.3d 1045 (Ariz. App. Div. 1, 3/1/18), review granted (Aug. 29, 2018).

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

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 A.R.S. § 25-409(E). After divorce, trial court granted paternal grandparents' petition for visitation under A.R.S. § 25-409(C). In a split decision, the Court of Appeals affirmed.

The Arizona Supreme Court reversed, holding that if both legal parents have competing views on visitation, then ***both*** received special weight and "the respective presumptions effectively and necessarily cancel each other out." To break the stalemate, the court then has discretion under A.R.S. § 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 take away points were:

a. By statute, grandparents (and great-grandparents) have different visitation rights than other third parties thanks to A.R.S. § 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.

b. 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 contest."

c. ***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.

d. 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;

e. 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".

f. ***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 (6/8/18).

LEGAL DECISION-MAKING AND PARENTING TIME ORDERS SET ASIDE DUE TO MOTHER'S FRAUD UPON THE COURT REGARDING THE CHILD'S PATERNITY

At or around conception, Mother had had sexual relationships with two men, Ramirez and Chao. Chao asked Mother if he was the father of the child and wanted Mother to update him when the child was born. Mother denied that Chao was the father, both before and after she gave birth. In fact, she told Chaos that the child did not look like him. Two years after the child was born, Mother married Ramirez, but they divorced five years later. Mother and Ramirez acknowledged paternity in the divorce pleadings and the Court entered decision making and parenting time orders as part of the Decree. Chao later noted on social media that the child looked quite like him, having characteristics of his racial background. Mother eventually admitted to Chao that he was the father but equivocated on allowing him access to the child. Chao moved to establish paternity, legal decision making and child support. The trial court found by clear and convincing evidence that Mother committed fraud upon the divorce court and set aside the custody provisions under A.R.S. § 25-812 and Rule 85(C)(1), relief from a judgment upon mistake. The decision did not discuss the 6-month time limitation for setting aside a judgment pursuant to Rule 85, but case law establishes that fraud upon the court can be raised at any time. The trial court did not believe that Mother made an innocent mistake; however, it found Ramirez was an innocent party. Ramirez never adopted the child, nor was he on the birth certificate. He never was a legal parent, but he could assert rights *in loco parentis*. ***Ramirez Clark v. Kreamer***, 243 Ariz. 272, 405 P.3d 1123 (Ct. App. Div. 1 11/14/17).

A.R.S. § 25-812.E AUTHORIZES POST-JUDGMENT CHALLENGE TO VOLUNTARY ACKNOWLEDGMENT OF PATERNITY EVEN AFTER RULE 85.C CHALLENGE IS TIME-BARRED

A mother, father or child can bring a statutory, post-judgment challenge to a voluntary acknowledgment of paternity outside the six-month time limit of Rule 85.C. The case involved a biological father seeking parental rights after someone, who was not the biological father, made a voluntary acknowledgment of paternity. The Court of Appeals held that A.R.S. § 25-812.E allowed the biological father to bring a petition even after a Rule 85.C challenge is time-barred. ***Brummond v. Lucio***, 243 Ariz. 360, 407 P.3d 553(Ct. App. Div. 2, 11/30/17).

ARIZONA SUPREME COURT RULES IN *MOTHER GOOSE*: STRICT COMPLIANCE WITH PUTATIVE FATHER'S REGISTRY REQUIRED EVEN WHERE A CALIFORNIA FATHER HAS FILED A TIMELY PATERNITY ACTION AGAINST A CALIFORNIA MOTHER; TIMELY OBJECTED TO AN ARIZONA SEVERANCE; AND THE MOTHER AND THE ADOPTION AGENCY LIED EXTENSIVELY REGARDING THE IDENTITY OF THE FATHER AND HER RESIDENCY

In a unanimous and relatively succinct opinion, the Arizona Supreme Court upheld the trial court's decision in ***Mother Goose***. The Court discussed the strong policy objectives of the Putative Father's Registry and the strict statutory scheme that is set up: Failure to file with the Registry is separate grounds for severance. The trial court must also consider the child's best interests, but the Court declined review of that issue. The misconduct by Mother and the adoption agency did not excuse Father's non-compliance. Similarly, the fact that Father asserted his rights did excuse his non-compliance. An inquiry into whether the intent of the statute is satisfied by specific factual circumstances would undermine the legislative intent and be contrary to its strict wording.

The Court cited similar holdings by the high courts of Utah and Minnesota. In 1983, the U.S. Supreme Court approved New York's registry as constitutional. ***Lehr v. Robertson***, 463 U.S. 248. The opinion distinguishes ***Mother Goose*** from ***David C.***, 240 Ariz. at 57, because that case involved the adoption statutes. Finally, there was no procedural due process violation because Father had actual notice of the severance proceeding with time to register, and he failed to do so. The Court felt that the result was unsettling but required, and had deep concerns about the conduct of Mother Goose's counsel at the trial level. The Court stated, "We deplore the conduct of Rachel [Mother] and Mother Goose." Parts of Division Two's opinion stand, including the sanctions against Mother and the agency. ***Frank R. v. Mother Goose* Adoptions**, 402 P.3d 996 (Ariz. 10/2/17).

ARIZONA SUPREME COURT: *McLAUGHLIN*. 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

The ***McLaughlin*** case went up to the Arizona Supreme Court after a split between Division I in ***Turner v. Steiner*** and Division II with ***McLaughlin v. Jones*** (See ***Turner v. Steiner*** below). Under A.R.S. § 25–814(A)(1), a man is presumed to be a legal parent if his wife gives birth to a child during the marriage. The Arizona Supreme Court in ***McLaughlin*** considered whether this presumption applies to similarly situated women in same-sex marriages and decided it does.

The Supreme Court looked to ***Obergefell v. Hodges***,135 S.Ct. 2584, as interpreted further in ***Pavan v. Smith***, 137 S.Ct. 2075. ***Paven*** reinforced that ***Obergefell*** was not merely about the right to marry; it was about the protection of that right and all legal benefits that are attached to marriage referring to "***Obergefell's*** commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'" ***Pavan***, 137 S.Ct. at 2077 (quoting ***Obergefell***, 135 S.Ct. at 2601).

The Court held that in the wake of ***Obergefell***, excluding Suzan McLaughlin from the marital paternity presumption violates the Fourteenth Amendment. ***Obergefell*** held that "marriage is a fundamental right, long-protected by the Due Process Clause. 135 S.Ct. at 2598. Describing marriage as "a keystone of our social order," the Court noted that states have "made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities," such as "child custody, support, and visitation rules," further contributing to its fundamental character. ***Id***. at 2601. Denying same-sex couples "the same legal treatment" in marriage, ***Id.*** at 2602, and "all the benefits" afforded opposite-sex couples, "works a grave and continuing harm" on gays and lesbians in various ways—demeaning them, humiliating and stigmatizing their children and family units, and teaching society that they are inferior in important respects." ***Obergefell*** at 2600–02, 2604.

Kimberly McLaughlin urged the Court to interpret ***Obergefell*** narrowly - relying on the Division I decision in ***Turner*** seeking to limit ***Obergefell*** to declaring that marriage is a fundamental right and that all states must give full faith and credit to same-sex marriages performed in other states. These arguments were rejected as being too narrow and as such contrary to ***Obergefell*** and ***Pavan***.

The Court focused on whether "§ 25–814(A)(1) affords a benefit linked to marriage and authorizes disparate treatment of same-sex and opposite-sex marriages." The Court found that at minimum the presumption creates an evidentiary benefit flowing from marriage. ***McLaughlin*** at ¶ 19. The Court held, "in sum, the presumption of paternity under § 25–814(A)(1) cannot, consistent with the Fourteenth Amendment's Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following ***Pavan*** and

Obergefell, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses." ***McLaughlin*** at ¶ 23.

McLaughlin also sought to challenge whether the Courts are even permitted to interpret A. R. S. § 25–814(A)(1) gender neutrality without impermissibly invading the legislature's domain by re-writing the statute. The majority of the Court rejected this argument, stating, "this argument misperceives this Court's constitutional role and responsibility when faced with a statute that violates the equal protection of the laws guaranteed by the Fourteenth Amendment." ***McLaughlin*** at ¶ 24.

The Court viewed its choices when faced with an unconstitutional statute as either striking down the statute or expanding its coverage to include those parties otherwise wrongly excluded. In ***McLaughlin***, not only was nobody asking to strike down A.R.S. § 25–814(A)(1) in its entirety, but the Court reasoned that to do so would undermine the legislative purpose of A.R.S. § 25–814(A)(1), which was in part to ensure all children have financial support from two parents. The Court notes that the legislature originally enacted § 25–814(A)(1) in 1994 as part of sweeping changes to Arizona's child support statutes. ***McLaughlin*** at ¶ 29. The Court reasoned that extending the protections of A.R.S. § 25–814(A)(1) to same-sex couples would further promote strong families by ensuring the support of the children, and also removing any stigma that somehow certain families are to be treated differently.

The Court also held that not only does the marital presumption of A.R.S. § 25–814(A)(1) apply to same-sex couples, but that in the ***McLaughlin*** case, Kimberly McLaughlin was estopped from attempting to rebut the presumption. This estoppel ruling was based on the specific facts of this case wherein the factual history was overwhelming that Kimberly and Suzan McLaughlin agreed and intended for Suzan to be a legal parent along with Kimberly - even if the marriage did not last.

The Court acknowledged that in light of ***Obergefell*** and ***Pavan***, a number of State statutes, rules and regulations will need to be re-evaluated to ensure same sex spouses are afforded the same rights as opposite-sex spouses. ***McLaughlin v. Jones*** (Arizona Supreme Court, 243 Ariz. 29, 9/19/17).

DIVISION 1: *TURNER v. STEINER*. A.R.S. § 25-814 APPLIES ONLY TO MEN SO A BIRTH MOTHER'S SAME-SEX SPOUSE CAN NEVER HAVE A RIGHT TO A PRESUMPTION OF PATERNITY

Division 1 held that A.R.S. § 25-814's language "is clearly and unambiguously gender-specific to apply to men", so a birth mother's same-sex spouse can never have a right to a presumption of paternity. The Court's interpretation leans heavily on the Webster's Dictionary definition of "paternity." "Paternity" means being a father, and "father" means being a "male parent", ergo "paternity" can never apply to a woman.

Turner directly criticizes ***McLaughlin*** on three points. First, ***Turner*** posits **that *Obergefell v. Hodges***, 135 S.Ct. 2584 (2015), does **not** require states to change laws that deal with maternity and paternity. This leads to split of authority No. 1 – Does ***Obergefell*** require a gender-neutral application of A.R.S. § 25-814?

Second, ***Turner*** says that paternity presumptions in A.R.S. § 25-814 – and "parentage in Arizona" in general – are "determined by biology." Thus, the ***Turner*** court reasons, it is impossible to make a gender-neutral interpretation of the paternity presumptions in A.R.S. § 25-814. This leads to split of authority No. 2 – Are the paternity presumptions in A.R.S. § 25-814 "biologically based", or can the statute be interpreted in a gender-neutral fashion?

Third, ***Turner*** holds that even if a gender-neutral interpretation were possible, that interpretation is ultimately futile because a non-biological mother's presumption of paternity can always be defeated by proving she is not the biological father or mother. (***McLaughlin*** did not reach this issue, finding that equitable estoppel prevented the biological parent from raising that issue.)

Turner includes a dissent, which raises two issues. First, both ***Obergefell*** and other state courts hold that an overly restrictive definition of who is a legal "parent" may not be in the best interests of children of same-sex couples. Second, Arizona already allows a biological mother of a child born outside wedlock to confer "paternity" on any male through a voluntary acknowledgment of paternity. *See* A.R.S. § 25-812. Thus, a man without biological or adoptive connection to a child may obtain statutory parentage rights in Arizona – an outcome that the majority in ***Turner*** does not address.

The majority in ***Turner*** bypasses the question of whether its interpretation of A.R.S. § 25-814 makes the statute vulnerable to a constitutional challenge on equal protection grounds. *See, e.g.*, ***Lehr v. Robertson***, 463 U.S. 248 (1983) (holding that laws treating fathers and mothers differently "may not constitutionally be applied ... where the mother and father are in fact similarly situated with regard to their relationship with the child."). ***Turner v. Steiner***, 242 Ariz. 494, 398 P.3d 110 (6/22/2017).

SIGNIFICANT DETRIMENT STANDARD OPERATES ONLY TO DETERMINE IF THIRD PARTY PETITION SHOULD BE DISMISSED; ONCE THAT SHOWING IS MADE, PETITIONING PARTY BEARS BURDEN OF REBUTTING BY CLEAR AND CONVINCING EVIDENCE THE PRESUMPTION THAT LEGAL DECISION MAKING SHOULD REST WITH THE LEGAL PARENT; SIGNIFICANT DETRIMENT DETERMINATION IS NO LONGER A FACTOR

This decision upholds ex-parte temporary orders giving widowed mother's parents sole legal decision-making authority and sole parenting time for Mother's minor children. The Court of Appeals rejected Mother's argument that the trial court did not have subject matter jurisdiction. A.R.S.§25-409 sets forth substantive criteria for governing 3rd party petitions, but is not jurisdictional. The court further found that the petition established *in loco parentis* and a significant detriment to the children if they remained in Mother's care.

The Court rejected Mother's argument that it should have made its determination under the significant detriment standard rather than the best interests factors. The Court held that the significant detriment determination only relates to the initial determination of whether the 3rd party petition should be summarily dismissed. Once that showing has been made, the petitioning party bears the burden of rebutting by clear and convincing evidence the presumption that legal-decision making should rest with the legal part. The significant detriment determination is no longer a factor. The determination does not allow the family court to enter orders it considers in the child's best interests, but rather to use the child's best interests to determine who should make decisions for the child. Specific findings are not required when the family court makes a temporary order. ***Chapman v. Hon. Hopkins***, 243 Ariz. 236 404 P.3d 638 (10/16/17).

U.S. SUPREME COURT OVERRULES ARKANSAS BIRTH CERTIFICATE RULE EXCLUDING SAME-SEX SPOUSES

In Arkansas, birth certificates only list the name of the mother's spouse if the spouse is a male. The U.S. Supreme Court, in a 6-3 ruling, reversed the judgment of the Arkansas Supreme Court and held that Arkansas's disparate treatment of same-sex and opposite-sex married couples was unconstitutional.

By listing the mother's spouse (regardless of biological relationship to the child), "Arkansas has thus chosen to make its birth certificates more than a marker of biological relationships: The State ... give[s] married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not ... deny married same-sex couples that recognition." ***Pavan v. Smith***, 137 S.Ct. 2075, (6/26/17).

SUPREME COURT STRIKES DOWN PHYSICAL PRESENCE STATUTE DETERMINING CITIZENSHIP OF CHILD BORN OUTSIDE U.S. TO UNWED U.S. CITIZEN MOTHER AND NON-CITIZEN FATHER

Under the federal Immigration and Nationality Act, a child born outside the United States to an unwed U.S. citizen mother and non-citizen father could receive U.S. citizenship if the mother was physically present in the United States for at least one year before birth. However, if the child were born outside U.S. soil to an unwed U.S. citizen father and non-citizen mother, the child could receive citizenship if the father lived in the United States for at least 10 years, at least 5 of which were after age 13. *Compare* 8 U.S.C. §1401(a)(7) (10-year requirement) *with* 8 U.S.C. § 1409c (one-year exception).

This case was a Fifth Amendment challenge by a boy born in the Dominican Republic to a father who was 20 days short of the 10/5 requirement when the boy was ordered removed to the Dominican Republic.

In an 8-0 decision (Gorsuch took no part in the case), the Supreme Court found the gender-specific exception in 8 U.S.C. § 1409c unconstitutional on equal protection grounds. The Supreme Court also found that the Court was "not equipped" to enact a gender-neutral, one-year physical presence requirement for both genders, meaning that the 10/5 requirement will govern until Congress acts. ***Sessions v. Morales-Santana***, 137 S.Ct. 1678 (6/12/2017).

MEMORANDUM DECISION: COURT MAY GRANT SOLE LEGAL DECISION MAKING TO PARENT RESPONDING TO OTHER PARENT'S PETITION FOR SOLE LEGAL DECISION MAKING EVEN THOUGH THE RESPONDING PARTY HAD NOT FILED AN INDEPENDENT REQUEST

Mother filed petition to modify which included a request for sole legal decision making. During the litigation, Father moved for temporary orders for sole legal decision making, and ultimately requested that the Court grant him sole legal decision making. Mother objected because Father had not filed a separate petition. The Court overruled the objection. Mother tried to withdraw her petition, which was also denied. The family court awarded sole legal decision making to Father. The court of appeals upheld the ruling, holding that the statutory requirements for modification were met by Mother's petition, and it was not necessary for Father to file separately. ***Sundstrom v. Flatt***, 2017 WL 4657571 (Division 1, 10/17/17) (Memorandum Decision).

[**EDITOR'S NOTE:** Does the word "backfire" comes to mind?]

UTAH: PARENT HAS A CAUSE OF ACTION AGAINST A THERAPIST WHOSE RECKLESS THERAPEUTIC TECHNIQUE GIVES RISE TO FALSE MEMORIES OF SEXUAL ABUSE IN A CHILD.

From 2011 to 2012, Mother had taken the parties' 4 year old daughter to a children's center to meet with a therapist, alleging that Father had sexually abused her. During the summer of 2012, Mother attempted to use the therapist's findings of abuse during divorce proceedings. When Father discovered the findings issued by the Division of Children and Family Services ("DCFS"), he challenged them in juvenile court, which determined that the findings were "unsubstantiated." He then brought a medical malpractice action against the therapist alleging that the therapist's use of unreliable treatment methods resulted in Child's false allegations of sexual abuse. The therapist, who was also the DCFS investigator, allegedly "received little to no training, supervision or oversight from the children's center" and questioned Child repeatedly about the same events while disregarding standardized test results in reaching the conclusion that Child had been sexually abused.

The Utah Supreme Court reversed and remanded upon determining that the therapist did, in fact, owe a duty of care to Father. The Court adopted a middle-of-the-road approach and chose to apply a recklessness standard for the duty of care. This standard limits the therapists's duty to refraining from the affirmative act of recklessly using negligent therapeutic techniques which cause the minor child to develop false memories of sexual abuse by a parent. The Court also placed other limitations on the application of its holding, limiting the application to minor children and limiting standing to the parent of the minor child, excluding adult children and non-parent alleged abusers, respectively. In reaching its decision, the Court relied on the factors as set forth in ***B.R. ex rel. Jeffs v. West,*** 2012 UT 11, 275 P.3d 228 (2012):

> "1.) Whether the defendant's allegedly tortious conduct consists of an affirmative act or merely an omission; 2.) The legal relationship of the parties; 3.) The

foreseeability or likelihood of injury; 4.) 'Public policy as to which party can best bear the loss occasioned by the injury'; and, 5.) 'Other policy considerations.'"

In applying the ***Jeffs*** factors cited above, the Court determined that: 1.) the act of the therapist was an overt act and not merely an omission; 2.) the existence of an overt act negates the need for there to exist a special relationship between the parties; 3.) the act would result in harm to Father was foreseeable; 4.) the therapist is the party best suited to "bear the loss" by acting with care; and, 5.) just as there is a policy consideration favoring therapists providing appropriate diagnosis and treatment, there is also a limited policy consideration requiring that they do not do so recklessly. ***Mower v. Baird,*** No. 20160149 (App. 7/5/18), 2018 UT 29, 422 P. 3d 837 (2018).

HAGUE CONVENTION

MOTHER DID NOT ESTABLISH DEFENSE TO ABDUCTION AS UNPROVEN ALLEGATION THAT FATHER THREATENED TO KILL HER AND THEIR SONS DID NOT AMOUNT TO GRAVE RISK

A parent who has failed to return the minor child(ren) under the Hague child abduction convention must show grave risk to the children to establish the defense. Father denied the threat and the court was clearly not convinced of the risk. ***Barone v. Barone***, Case No. 17cv1209-LAB (KSC) (S.D. Cal, 6/26/17).

STANDARD FOR WRONGFUL RETENTION UNDER LAW OF MEXICO APPLIED WHERE MEXICO WAS CHILD'S HABITUAL RESIDENCE

The parties' daughter visited Father in Arizona for several summers running, but when he claimed the parties agreed she would stay with him for two years, Mother filed for wrongful retention on the Hague Convention on abduction. The trial court found Mexico to be the child's habitual residence based on the "settled intent" test in the 9th Circuit. Intent of the parties for the child to take up residence in the U.S. was certainly unclear. Finding Mexico to be the habitual residence, the trial court had to look to the law of Mexico as to whether the abduction was wrongful. Mother prevailed. ***Zaragoza Gutierrez v. Juarez***, 2017 WL 3215659 (D. Ariz. 7/28/17).

HABITUAL RESIDENCE ESTABLISHED IN 21 MONTHS AND WITHOUT INTENT FOR PERMANENT RESIDENCE

A 5-year-old who lived three years in Israel, followed by 21 months in the United States, had "habitual residence" in the United States for purposes of the Hague Convention and International Child Abduction Remedies Act (22 U.S.C. §§ 9001-9011), even if his parents did not intend to remain in the United States permanently. ***Cohen v. Cohen***, 858 F.3d 1150 (8th Cir. 2017) (affirming dismissal of Israeli father's application to return child to Israel).

U.S. WAS CHILD'S HABITUAL RESIDENCE DESPITE ARGUMENT THAT PARENTS INTENDED ALTERNATING RESIDENCE

The Third Circuit has previously held that a child's habitual residence may alternate, so long as it is only one place at a time. After a factual-heavy analysis, the Court here determined that the habitual residence was in the U.S. and Mother's retention was not wrongful. ***Blackledge v. Blackledge***, 866 F.3d 169 (3d. Cir. 8/3/17).

FILING FOR CUSTODY DETERMINATION AND HAGUE CLAIM IN TEXAS DID NOT WAIVE HAGUE ARGUMENT FOR CHILD'S RETURN TO ITALY

Father filed in Texas and lost at the UCCJEA level, where jurisdiction was found to be in Michigan. He later filed for divorce and custody in Italy. His filing in Texas did not waive his right to claim relief under the Hague Convention. ***Willard v. Willard***, 2017 WL 3278745, (E.D. Mich. 8/2/17).

GRAVE RISK OF HARM DEFENSE APPLIES WHERE CHILD WITNESSED ABUSE OF MOTHER

Finding that the child was exposed to Father and his family's physical, verbal, and sexual abuse of Mother, the court did not require Mother to return the child she removed from Guatemala. ***Ischiu v. Gomez Garcia***, 274 F.Supp.3d 339 (D. Md. 8/14/17).

SIXTH CIRCUIT ADOPTS SHARED INTENT STANDARD FOR CHILD TOO YOUNG TO ACCLIMATE TO SURROUNDINGS

The Sixth circuit had previously declined to adopt the standard of the parents' shared settled intent to determine a child's home country. Here it did so because of a distinguishing factor—the child was 9 months old. The acclimatization standard looking at settled purpose from child's perspective could not apply. ***Ahmed v. Ahmed***, 867 F.3d 682 (6th Cir. 8/16/17).

NEW ZEALAND IS HOME COUNTRY UNDER HAGUE WHERE PARTIES ENTERED A CUSTODY AGREEMENT THERE TO ALTERNATING RESIDENCE DOWN THE ROAD

The parents were in a domestic partnership in New Zealand and settled their property rights and parenting agreement. They agreed Mother would have the children initially in Oklahoma, but when they each turned 6, an equal residential split between the two locales would apply. The agreement barred attempts to overturn it in the U.S., but Mother filed for sole custody. New Zealand was determined to be the home state. ***Crane v. Merriman***, 2017 WL 4079406 (W.D. Okla. 9/14/17).

ICWA

ICWA NOTICE REQUIRED EVEN THOUGH MOTHER OBJECTED FOR THE FIRST TIME AFTER TERMINATION OF HER RIGHTS

Mother appealed termination of her parental rights. ICWA notice was made to tribe of which Father was a member. Father failed to appear. Mother testified that she was a member of the Souix tribe, which did not receive the ICWA notice. Mother's testimony was not rebutted. Although the ICWA challenge was made after termination Division One reasoned that '"[n]otice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered" and that the notice requirement in ICWA cannot be waived by a parent.'" (citing ***In re Suzanna L***. , 127 Cal. Rptr. 2d 860, 866 (App. 2002) (internal citations omitted). The findings regarding the children's best interests were upheld, but the appeal was stayed 90 days to revest jurisdiction in the trial court to provide ICWA notice and for further proceedings dependent upon the tribe's response. ***Michelle M. v. Dept. of Child Safety***, 243 Ariz. 64, 401, P.3d 1013 (Div. 1 8/31/17).

JUVENILE CASES

DIVISION 1: SEXUAL ABUSE OF STEP-CHILD SUPPORTS A STATUTORY GROUND FOR TERMINATION OF PARENTAL RIGHTS TO BIOLOGICAL CHILDREN BASED ON THE PLAIN LANGUAGE OF A.R.S. § 8-533(B)(2) ; FINDING OF ABUSE DOES NOT REQUIRE EVIDENCE OF SERIOUS EMOTIONAL INJURY

The Juvenile court terminated Father's rights on two grounds: first, "Father had neglected or willfully abused a child and this abuse has caused serious emotional injury to the child"; second, "Father has been deprived of civil liberties due to the conviction of a felony which is of such nature as to prove the unfitness of Father to have future custody and control of the Children. According to A.R.S. § 8-533(B)(2) "A court may terminate parental rights if it finds by clear and convincing evidence 'that the parent has neglected or willfully abused a child. This abuse includes serious physical or emotional injury..."

On appeal, Division 1 held that a finding of abuse does not require evidence of serious emotional injury. It also found, in a case of first impression, that the court could terminate parental rights even though the abused child was not of familial relation because the use of the term "a child" was unambiguous and thus whether or not "a child" has a familial relationship, abuse of "a child" is sufficient to support termination of Father's rights to other biological Children. ***Seth M. v. Arienne M***, No. 1 CA-JV 18-0007 (App. 9/6/18).

WITHOUT AN ORDER GRANTING THIRD PARTY RIGHTS PURSUANT TO A.R.S.§25-409, A CHILD'S RELATIVE HAS NO RIGHT TO APPEAL CHANGE OF PLACEMENT IN A DEPENDENCY ACTION AND, FOR A PERSON OTHER THAN A PARENT OR PERSON WITH THIRD-PARTY RIGHTS, AN ORDER TO CHANGE PLACEMENT OF CHILDREN IS NOT A FINAL ORDER

A great-grandmother appealed the juvenile court's order changing placement of her great-grandchildren during a dependency action. She appealed. Division Two held that they lacked jurisdiction and dismissed the appeal. A.R.S.§8-235 (the statute regarding appellate jurisdiction in juvenile court proceedings) allows for jurisdiction only of an aggrieved party from a final order. The Court found a great-grandparent has no right to placement of a child absent an order granting third-party rights under A.R.S. §25-409. Accordingly, the great-grandmother was not an aggrieved party with a right to appeal. Further, Division Two held that the order changing placement, for a person other than a parent or a person with third-party rights, was not a final and appealable order because they do not constitute a reaffirmation of dependency status *vis-a-vis* the parent. ***Jewel C. v. Dep't of Child Safety***, 244 Ariz. 347 (App. Feb. 5, 2018), review denied (May 8, 2018).

[**EDITOR'S NOTE**: The Court made a clear distinction that where an order changing placement impacts a parent's ability to have contact with their child that is an appealable matter.]

WHEN CHILDREN ARE CLEAR IN THEIR REFUSAL TO CONSENT TO ADOPTION, IT IS POSSIBLE THAT THERE WILL BE INSUFFICIENT EVIDENCE OF PRESENT BENEFIT TO MEET THE BEST INTERESTS REQUIREMENT FOR SEVERANCE

Fourteen-year-old daughter and thirteen-year-old son were removed from Mother and Step-father's care based on accusations of domestic violence and drug abuse. Father lived out of state and had limited contact with the children in the preceding year based on a work-related injury. The children were adjudicated dependent as to Father after he admitted the allegations in the dependency petition.

After reunification efforts, DSC eventually changed the case plan to "severance and adoption and permanent guardianship", however both children made clear they were unwilling to consent to adoption and neither wished to be in Father's custody. DCS sought to terminate Father's parental rights claiming he failed to protect the children from Mother's drug abuse and because he was unable to remedy the circumstances causing the children to be in out-of-home placement, that he was unlikely to be able to parent in the near future. The juvenile Court terminated Father's rights for the purpose of providing the children with permanency. Father appealed.

To sever parental rights the court must find by clear and convincing evidence one of the statutory grounds in A.R.S.§8-533(B) and, by a preponderance of evidence that termination will serve a child's best interests. Because the consent of the child is required

for adoption to take place, and the children's refusal to consent to adoption, there was insufficient evidence to find the children's adoption was "legally possible and likely", and thus, insufficient to establish the "present benefit" required to support a determination of best interests. Division Two held that the juvenile court's best-interests finding was an abuse of discretion and reversed the termination order. ***Titus S. v. Dep't of Child Safety***, 244 Ariz. 365, 418 P.3d 1138 (App. 4/9/18).

A PARENT WHO ARRIVES LATE, BUT NEVERTHELESS APPEARS, TO A HEARING TO TERMINATE PARENTAL RIGHTS MAY WAIVE RIGHTS FOR THE PORTION OF THE HEARING THAT SHE MISSED; HER ATTORNEY CAN PARTICIPATE FULLY IN HER ABSENCE

DCS moved to terminate a mother's parental rights. The mother did not attend the first day of the two-day hearing (she called and told the court she was experiencing severe back pain but produced no medical documentation). She appeared 25 minutes late on day two. The court told mother's counsel to refrain from making evidentiary objections in mother's absence (counsel did not object). The Supreme Court held that a parent who arrives late to a termination hearing after proper notice has "failed to appear" under A.R.S. § 8-863 and Rule 66(D)(2). Following a failure to appear, the trial court has discretion at the beginning of the hearing to find that the absent parent has waived his or her rights. If, however, the parent appears late and before the end of the hearing, then the waiver only applies to the section of the hearing that the parent missed, and the parent can participate fully in the rest of the hearing. A waiver does not a limit a parent's right to counsel in a termination proceeding, and even in a parent's absence, the absent parent's counsel has a right to fully participate in the hearing on the parent's behalf, including cross-examination of witnesses and objections to evidence.

Dissenting, Justice Timmer (joined by Justice Bolick), criticized the majority's decision as harsh. According to the dissent, a parent should not waive any rights unless she or he misses the entire hearing. A.R.S. § 8-863 applies to a parent who "does not appear" -- and a parent who shows up later has appeared, in the dissent's view. Justice Timmer also criticized the majority's decision as allowing a trial court to fail to safeguard due process rights. ***Brenda D. v. Dep't of Child Safety***, 243 Ariz. 437, 410 P.3d 419 (2/9/18).

TRIAL COURT ABUSED ITS DISCRETION IN SEVERING MOTHER'S RIGHTS WHERE CASE MANAGER AND PSYCHOLOGIST'S OPINIONS AMOUNTED TO UNSUBSTANTIATED PREDICTIONS ABOUT FUTURE CONDUCT

Mother appealed the finding that severance of her rights was in the child's best interests. Statutory grounds for severance were present, and the trial court found severance to be in the child's best interests by a preponderance of the evidence. The evidence established an incident where Father physically abused the child and his half brother, that Mother knew that Father did it, and that she failed to report or take the child to the hospital. Mother's rights were severed. The trial court justified severance based on Mother's exposing the child to the abusive Father and apparent continued relationship with him. On review, Division One found that the only competent evidence that Mother

risked continued exposure of the children to Father or another abuser could have come from her case manager or a psychological report. The reassigned case manager never met with Mother independently, never visited her home, nor observed her with the children. "Such a casual inquiry into the facts is not sufficient to meet even minimal professional standards, and such testimony is not sufficient to defeat fundamental constitutional rights." Similarly, the psychologist's opinions were based only on the initial child safety plan and progress report, an interview of Mother, and personality tests. There were numerous inconsistencies in his report and testimony, and he never reviewed Mother's successful compliance with DCS's services over 14 months. There was insubstantial evidence of a pattern of risk-exposure on the part of Mother or what would "likely" happen in the future. Division One found Mother demonstrated an ability to protect the child. The severance finding was vacated and the case remanded. ***Alma S. v. Dep't of Child Safety***, 244 Ariz. 152, 418 P.3d 925 (Div. 1 11/14/17) review granted (May 8, 2018), vacated, CV-17-0363-PR, 2018 WL 4374432 (Ariz. 9/14/18).

JUVENILE RULE 64(C) ALLOWING DEFAULT TERMINATION OF PARENTAL RIGHTS FOR FAILURE TO APPEAR IS NOT UNCONSTITUTIONAL ON SEPARATION OF POWERS GROUNDS BECAUSE IT DOES NOT CONFLICT WITH STATUTORY PROVISIONS FOR DEFAULT

DCS sought termination of Mother's parental rights on the grounds of neglect and her poor compliance with the orders of the juvenile court. While Mother attended an initial termination hearing, she failed to attend a later hearing set for mediation and pretrial conference. Mother phoned in 30 minutes after the hearing and claimed that her hearing notice had the wrong time. The trial court provided Mother notice pursuant to Juvenile Rule 64(C) that failure to appear at the initial hearing, pretrial conference, status conference or termination adjudication hearing, without good cause, could result in waiver and termination of her rights. Mother argued the Rule was an impermissible expansion of A.R.S. § 8-863(C), which provided that failure to appear at "the hearing" could be grounds for waiver and termination of her parental rights. Another subsection of § 8-863 mentions the initial termination hearing. Mother argued that the hearing in the statute is the final hearing. The Arizona Supreme Court reasoned that it need not resolve the ambiguity or decide whether the procedural rule was substantive because the statute did not limit which hearing was relevant. It viewed the procedural rule to be in harmony with the statute, reasoning that the legislature left it to the Court to determine the procedural framework. Thus, the rule did not contravene separation of powers. Three justices Dissented in an opinion authored by Judge Eckerstrom, sitting in. They viewed the Rule as a procedural one to provide notice and the statute to not allow termination for failure to appear at a pretrial conference. ***Marianne N. v. Dep't of Child Safety***, 243 Ariz. 53, 401 P.3d 1002 (9/25/17).

CHILD SUPPORT

DIVISION 1: 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 Father 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,*** No. 1 CA-CV 17-0024 FC, 2018 WL 5019535 (App. 10/16/2018).

IF REQUEST TO MODIFY CHILD SUPPORT USES SIMPLIFIED PROCEDURE AND WOULD CHANGE AMOUNT BY AT LEAST 15 PERCENT, COURT CAN CONSIDER WHETHER IT USED INCORRECT INFORMATION IN EARLIER AWARD

If a parent uses the simplified procedure to modify child support because application of the Guidelines will result in at least a 15 percent change from the existing child support order (A.R.S. § 25-503(E) and Guidelines § 24), then claim preclusion does not prevent a court from considering the argument that a modification should be made because the court used incorrect information in a previous calculation. ***Birnstihl v. Birnstihl***, 243 Ariz. 588, 416 P.3d 852 (Ct. App. Div. 1, 3/6/18).

AZ SUPREME COURT: PARENTS HAVE MORE THAN 20 DAYS TO CHALLENGE AMOUNT OF UNPAID ARREARAGES ON OUT-OF-STATE CHILD SUPPORT ORDERS REGISTERED IN ARIZONA

Father registered a child support order from Illinois, and said he did not know of any arrearages. Mother contested Father's allegation as to the arrearages, but the court denied her challenge as untimely because she filed more than 20 days after receiving notice of registration. The Arizona Supreme Court held that the Arizona Uniform

Interstate Family Support Act, A.R.S. §§ 25-1301 to 1308 (AUIFSA) does not bar all objections after 20 days. Instead, it only bars objections that could have been made at the time of registration – listed in A.R.S. § 25-1307(A)(1)-(8).

By statute, mother had the right to object to unpaid arrearages because A.R.S. § 25-1307 does not require those objections to be raised within 20 days. In addition, precluding the arrearage would fail to accord the out-of-state judgment full faith and credit. ***State ex rel. DES v. Pandola***, 243 Ariz. 418, 408 P.3d 1254 (1/26/18).

A.R.S. § 46-441(H) REGARDING NO CREDIT FOR DIRECT CHILD SUPPORT PAYMENTS DOES NOT GREEN-LIGHT UNJUST ENRICHMENT

The statute states that direct payments to an obligee, rather than through the support payment clearinghouse, shall not be credited against the support obligation unless the direct payments were ordered by the court, or made pursuant to a written support agreement by the parties. But A.R.S. § 25-510(B) permits a party to rebut the presumption that clearinghouse records are a complete record of payment, and A.R.S. § 25-510(G) also allows the Court to give credit for direct payments or equitable credits. Mother received direct payments in full yet sought double-payment. By admittedly accepting payments, she waived any claim under A.R.S. § 46-441(H). The other statutes also doomed her claim, and the attorney's fees award against her stood. ***Schultz v. Schultz***, 243 Ariz. 16, 400 P.3d 172 (Div. 1, 7/20/2017).

WHERE THERE HAS BEEN A SUBSTANTIAL AND CONTINUING CHANGE OF CIRCUMSTANCES WARRANTING A MODIFICATION OF CHILD SUPPORT, A PRIOR DEVIATION ANALYSIS DOES NOT GOVERN

Where an upward deviation from the Guidelines child support amount had previously been entered and a subsequent change in circumstances occurred, the trial court did not err in applying the Guidelines and then deciding anew whether a deviation was appropriate. "There is not a presumption for deviation based on a previously deviated order." The trial court did not order a deviation in the modification proceeding, and child support was substantially reduced. Father met his burden, which was simply to show a substantial and continuing change in circumstances. It remained Mother's burden to prove that a deviation was warranted. The Court did not have to follow its prior findings. ***Nia v. Nia***, 242 Ariz. 419, 396 P.3d 1099 (Ariz. App. Div. 1, 6/15/17)

MARRIAGE/SAME SEX ISSUES

NEW STATUTE REGARDING ABILITY OF MINORS TO MARRY

See the Legislative materials for amended statute regarding ability of Minors to Marry.

9TH CIRCUIT MEMORANDUM DECISION: CHOICE OF LAW PROVISION IN PREMARITAL AGREEMENT INVOKING LAW OF ANOTHER JURISDICTION DOES NOT DEFEAT CREDITOR PROTECTIONS UNDER A.R.S. § 33-413 REQUIRING SUCH AGREEMENTS TO BE RECORDED

Husband and Wife entered into a Premarital Agreement in Kansas, and the agreement provided Kansas law would govern. The parties later moved to Texas and executed a waiver of community property rights. Husband and each of the parties' two energy companies later filed for Chapter 11 bankruptcy in Arizona. Wife signed the bankruptcy petition as member for one company and husband signed for the other. Husband was actually listed as the sole member for the former entity (alleged to be Wife's property) in several tax returns and corporate filings. Wife sought to shield the company and many other assets from creditors by claiming them as her separate property. The bankruptcy trustee argued that the bankruptcy estate included any of Wife's property that would have only been separate by virtue of the premarital agreement. The question became whether the agreement was binding on creditors in the consolidated, Arizona bankruptcy cases.

> A.R.S. § 33-413 provides, "No covenant or agreement made in consideration of marriage shall be valid against a purchaser for valuable consideration, or a creditor not having notice thereof, unless the covenant or agreement is duly acknowledged and recorded in the manner and form required for deeds and other conveyances."

The decision first upholds what might seem rather obvious in regard to the applicability of the statute: it applies to premarital agreements and more broadly than to just real property. While the trial court did not address the choice of law issue, it was raised on appeal. The decision found no Arizona state cases on point. The appellate court reasoned that the creditor-protection purpose of A.R.S. § 33-413 cannot be simply defeated with a choice of law provision that really just binds the spouses. ***Osborn v. Reaves***, 2:14-BK-03079-BKM, 2017 WL 5472554, (B.A.P. 9th Cir. 11/9/17) (Memorandum Decision).

> [**EDITOR'S NOTE:** It is worth revisiting your protocols and advice to clients on recording premarital agreements]

PENSION PLAN DOES NOT OWE SURVIVOR PENSION BENEFITS TO GAY WIDOWER

Pension plan administrator did not violate federal law by denying survivor benefits to the gay widower of a former employee who retired in 2009 (and would have had to elect the benefits at that time) at a time when federal law limited the term "spouse" to members of the opposite sex. Although the Court ruled against the gay widower because of the timing, the Judge ruled that registered domestic partners share the same rights and obligations as married couples and that ERISA did not preempt California law with respect to the definition of "spouse". Allowing registered domestic partners access to surviving spouse benefits is consistent with the core aims of ERISA. The Judge reasoned that while the administrator may have been incorrect in light of ***Obergefell***, in this case

the gay widower could not reasonably allege that the administrator abused it discretion since its determination came four years before that. ***Reed v. KRON/IBEW Local 45 Pension Plan***, N.D. Cal. No. 4:16-cv-04471-JSW, 9/25/17. Family Law Reporter, 43 at 1404, 10/10/17.

[**EDITOR'S NOTE**: This case is one of a few challenging benefit determinations related to same-sex spouses or domestic partners. Some other cases have been resolved in the beneficiaries' favor.]

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.*

DIVISION 2: SUFFICIENT PROPERTY UNDER A.R.S. 25-319(A)(1) IS PROPERTY THAT, STANDING ALONE, WOULD BE ENOUGH TO MEET THE RECIPIENT'S NEEDS FOR THE REST OF HIS OR HER LIFE

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. The appellate Court refused to take a position on the secondary question of whether Wife was eligible for an award under A.R.S. §25-319(A). In making its ruling, the Court elaborated quite extensively on its interpretation of A.R.S. §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***, No. 2 CA-CV 2017-0159 (App. 6/21/18).

[**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 IRCS 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.]

POST-DECREE, A SUBSTANTIAL AND CONTINUING CHANGE IN CIRCUMSTANCES MUST OCCUR AFTER THE DATE OF THE MOST RECENT COURT ORDER ON MAINTENANCE, NOT AFTER THE DATE OF DECREE

Husband agreed to pay indefinite spousal maintenance in a 2007 consent decree. In 2014, the parties entered into a Rule 69 agreement (which was reduced to an Order) that reduced the amount of maintenance. In 2016, Husband petitioned to reduce maintenance. The Court reduced maintenance upon a finding that a substantial and continuing change in circumstances had occurred between the 2007 decree and the 2016 petition. The Court of Appeals reversed, holding that, when there is a petition on spousal maintenance after a post-decree order on maintenance, that petitioner must show a substantial and continuing change of circumstance occurred *after the most recent post-decree order on maintenance*. In this case, Husband could not show a substantial and continuing change between 2014 and 2016. The fact that the 2014 order arose from a Rule 69 agreement did not affect this analysis. ***McClendon v. McClendon***, No. 1 CA-CV 17-0049 FC, 243 Ariz. 399, 408 P.3d 440 (Ct. App. Div 1, 12/7/17).

NON-MODIFIABLE SPOUSAL MAINTENANCE IS SUBJECT TO EQUITABLE DEFENSES, SUCH AS WAIVER AND ESTOPPEL, AND THE TRIAL COURT HAS JURISDICTION TO CONSIDER THOSE AS LONG AS IT DOES NOT CHANGE THE TERMS OF THE DECREE

The parties signed a post-decree agreement whereby wife agreed to receive about one tenth of the non-modifiable maintenance award in the decree ($180,000 over the term) to settle Husband's arrears and claim of hardship. Husband performed on that agreement. Wife sought enforcement of the decree claiming she signed the later agreement under duress and that the court lacked jurisdiction to modify. The parties asked the court to decide the jurisdictional issue as a matter of law, and the court found it had no jurisdiction under A.R.S. § 25-317(G). On review, Division One found equitable defenses may apply. It distinguished ***Waldren*** (set-aside under Civil Rule 60(c) can't trump non-modifiability) because equitable defenses were not raised there. In ***Waldren***, the disabled husband asked the court to modify or terminate the maintenance award. Here, Husband asserted equitable defenses to enforcement. The case was remanded for consideration of the enforceability of the agreement and whether the equitable defenses applied. ***Coburn v. Rhodig***, 243 Ariz. 24, 400 P.3d 448 (Div. 1 8/3/17).

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

PARTIES DIVORCED BETWEEN 2011 AND THE PARKER/HALL CASES WHERE AN EEORP OR PSPRS PLAN WAS DIVIDED MAY HAVE A CLAIM TO UNDIVIDED PROPERTY

In 2011, the Arizona State Legislators proposed Senate Bill 1609. The bill's purpose was to bolster the plans administered by the Public Safety Personnel Retirement System (PSPRS). One of the provisions of the bill was to gradually increase the member contributions from 7% to 11% in the Elected Officials Retirement Plan (EORP) from 7.65% to 11.65% in the PSPRS. In August of 2011, the provisions were challenged. There were two separate lawsuits filed ***Hall*** for EORP and ***Parker*** for PSPRS**.**

In November of 2016, the Supreme Court upheld the Lower Court ***Hall*** decision that ruled the increases in member contributions were unconstitutional. The end result was that member's contributions to EORP and PSPRS were to revert back to pre-Bill 1609 levels. Therefore, members who were hired prior to July 20, 2011 were entitled to receive a return of those excess contributions with interest. The excess contributions were considered to be wages and a W-2 was issued. The court subsequently ruled that the interest rate to be paid to members for the overwitholding was 4.25% through June 28, 2017 for EORP and 5.25% through June 28, 2017 for PSPRS or until the date the excess contributions were returned if after June 28, 2017.

In a number of cases that involved a dissolution of marriage prior to the court's ruling, this resulted in a community asset which could not have been resolved at the time of entry of the decree of dissolution of marriage. Anyone divorced between July 20, 2011 and the date of the Court's decision may be impacted. In order to determine the exact amount to which an ex-spouse may be entitled to receive it, it is necessary to obtain from PSPRS the paychecks for the relevant period of time. Since the retirement withholdings vary from paycheck to paycheck, the information is necessary to correctly calculate this amount. The over-withholding is 4% per paycheck, the interest thereon. The taxable consequences need to be taken into consideration as the Court ruled that the return to the participant of this sum would be considered W-2 income and therefore, taxable.

Pursuant to 25-318(D) "The community, joint tenancy and other property held in common for which no provision is made in the Decree, shall be from the date of the decree held by the parties as tenants in common, each possessed of an undivided one-half interest." Property that is not disposed of by a judgment or a Decree, may be accomplished either by a separately filed Civil action or by a Motion to reopen the Dissolution Action, ***Rinegar v. Rinegar***, 231 Ariz. 85 (2012) 290 P.3d 1208, 646 Ariz. One suggested mechanism is to file a Rule 85 Motion pursuant to the Arizona Rules of Family Law Procedure wherein Rule 85(A) specifically addresses "parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time."

[EDITOR'S NOTE: Many thanks to Gloria Cales for this analysis.]

CAPTIVE INSURANCE - THE BASICS ON A NEW FORM OF ASSET PROTECTION AND HOW IT IMPACTS FAMILY LAW

A Captive is an insurance company created and wholly owned by one or more non-insurance companies to insure the risks of its owner (or owners). Captives are essentially a form of self-insurance whereby the insurer is wholly owned by the insured. Using Captive insurance, funds can be transferred as a business expense into an independent, fully licensed Captive insurance company. As such, any lawsuit, claim, divorce, tax or other action against the business owner is completely separate from the Captive and any investments held and owned by the Captive are protected against litigation.

A Captive insurance company is generally formed by a business owner to insure the risks of regulated or affiliated business. It is a form of principle risk transfer and average Captives are generally regulated by the state of its domicile. Having a Captive permits insurable risks to be covered. There are different types of Captives that are structured to meet the needs of those covered by the Captive. The reason for a Captive is to provide coverage for uninsured or those that are hard to insure.

Types of Captive include: Group, Agency, Protected Cell, Pure and Association owned. **Group Captive** is a like kind number of owners that are unrelated business owners in one Captive cell. **Agency Captive Design** is a reinsurance company owned by an agent or a group of agents. **Protected Cell Captive Design** is a type that allows renters to shield their Captive and surplus from other renters in the Captive as long as the owner remains silent. A **Pure Captive** insures the risk of related entities. **Association Owned Captive Design** is a type formed by a pre-existing association to provide insurance coverage for members.

In the context of divorce, using Captive insurance, funds can be transferred as a business expense into an independent, fully licensed Captive insurance company. As such, any lawsuit, claim, divorce, tax or other action against the business owner is completely separate from the captive – and any investments held and owned by the Captive are protected against litigation.

Most Captives have various investments. The non-participant spouse cannot remain as an owner of a portion of the Captive as the out spouse is not an insured. At

onset of case, ask for the tax returns of the Captive and the statements verify the assets of the Captive. The cash accounts, if sufficient, are possibly the easiest use to use for an offset. Tax returns need to be considered as the money paid into the Captive are generally pre-tax dollars written off of the corporate structure paying into the Captive.

[EDITOR'S NOTE: Many thanks to Gloria Cales for this analysis].

DIVISION 1: 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

The parties divorced in 1987. Their settlement 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,*** No. 1 CA-CV 17-0045 (App. 8/23/18).

[**EDITOR'S NOTE:** This underscores the compelling rationale behind identifying a specific life insurance policy to insure the obligor's life and obtain a collateral assignment so that the creditor spouse effectively owns the policy. It also underscores the necessity of securing money obligations due after the decree is entered].

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.

U.S. SUPREME COURT OVERRULES ARIZONA SUPREME COURT ON POST-DECREE, DISABILITY WAIVER OF RETIRED PAY

On May 15, 2017, the Supreme Court of the United States overruled ***Howell v. Howell***, 361 P.3d 936 (Div. 1, 12/2/15).

Case background: Federal law prohibits courts in marital dissolution proceedings from dividing any portion of military retirement pay ("MRP") waived by a retired veteran to receive service-related disability benefits. In 2010, the Arizona Legislature enacted A.R.S. § 25-318.01 to prohibit the family court from making up the difference for the resulting reduction by awarding additional assets to the former spouse. The issue here was whether A.R.S. § 25-318.01 prohibits courts from fashioning such relief when the veteran elects to waive retirement pay **after** the court has awarded the former spouse a share of MRP in a decree entered before 2010. Wife in this case asked the Court for an arrearage indemnification judgment against the military spouse for the reduction in her share of the MRP as a result of the disability waiver and the trial court granted it.

The Arizona Supreme Court held that such an indemnification order was not prohibited by federal law nor A.R.S. § 25-318.01. Husband argued that—regardless of the applicability of A.R.S. § 25-318.01—the USFSPA (10 U.S.C. §1408) and ***Mansell v. Mansell***, 490 U.S. at 583, preempted the family court's authority to order Husband to indemnify Wife for the reduction of her benefits. The United States Supreme Court agreed with Husband. Federal law still preempts and *Mansell* is not distinguished just because it dealt with a pre-retirement order.

It is difficult to tell how far federal preemption extends on this issue. The U.S. Supreme Court ruled that a trial court cannot make up the non-member's lost retirement dollars with other retirement dollars from the military retired pay by increasing the non-member's share pro rata. It further ruled that the trial court cannot order the member to indemnify or reimburse their spouse. A contradiction appears when the Court recognized the hardship of the result and explained that what non-member Wife had all along was a lesser interest than Husband's—she had an award subject to a contingency. The Court then said trial courts have flexibility to consider this when "valuing" marital property or determining spousal maintenance. Wouldn't the purpose of valuing property be to equalize property? How does one of those remedies not constitute reimbursement or indemnification? Would it satisfy ***Howell*** if those orders preceded the member's claim for disability? Or is ***Howell*** satisfied as long as the trial court does not reimburse the non-member from the very same military pension? ***Howell v. Howell***, 137 S.Ct. 1400 (2017).

One week after ***Howell***, the U.S. Supreme Court accepted certiorari and vacated the Arizona Supreme Court's judgment in ***Merrill v. Merrill***, 238 Ariz. 467 (2015). In ***Merrill*** the Arizona court required husband to indemnify wife for the effect of his post-decree waiver of retired pay for disability, where husband's disability rating increased by over 80% after divorce. Wife's portion of his Military retired pay was effectively wiped out. In light of its decision in ***Howell***, the Arizona ruling has been vacated with the case remanded for further proceedings. ***Merrill v. Merrill,*** 137 S. Ct. 2156, 198 L. Ed. 2d 228, reh'g denied, 138 S. Ct. 30, 198 L. Ed. 2d 756 (2017)

MEMORANDUM DECISION: BUSINESS VALUATION DID NOT REQUIRE LACK OF CONTROL OR LACK OF MARKETABILITY DISCOUNTS WHEN 50 PERCENT OWNER HAD NO PLAN TO SELL AND SUBSTANTIAL INFLUENCE

In a dissolution action, a business valuation expert applied discounts for lack of marketability and lack of control to community's 50 percent ownership interest in an LLC. Husband testified that he did not intend to sell the business. The trial court declined to apply either a lack of marketability discount or a lack of control discount in making findings on business valuation. The Court of Appeals affirmed, finding (1) husband's intention not to sell was not "demonstrably linked" to a lack of marketability; and (2) the trial court properly declined to apply a lack of control discount to a 50 percent ownership interest when husband oversaw day-to-day management and had "substantial influence" over the business. ***Bryson v. Bryson***, 2017 WL 2483722 (Ariz. App. Div. 1, 6/8/17) (Memorandum Decision).

ALASKA SUPREME COURT: MILITARY MEDICAL BENEFITS SHOULD BE VALUED AND OFFSET

A veteran's lifetime military medical benefits should have been valued and equalized in the property division. ***Grove v. Grove***, 400 P.3d 109 (Alaska 8/11/17).

ALASKA: COMMINGLING OF PRE- AND POST-MARITAL STUDENT LOANS JUSTIFIED TREATING ALL LOANS AS COMMUNITY DEBT

Wife had a premarital student loan and several post-marital student loans. She later consolidated all of her loans. Husband contended that premarital student loan was wife's separate debt. However, the commingling of the loans, and lack of tracing of the separate debt, allowed the trial court to conclude that all student loan debt should be divided 50-50 between the parties. ***Wagner v. Wagner***, 386 P.3d 1249 (Alaska 2017).

PROCEDURE/APPEALS/EVIDENCE

DIVISION 1: IF A DEFENDANT'S EMAIL ADDRESS, PHONE NUMBER AND SOCIAL MEDIA ACCOUNTS ARE ACCESSIBLE TO PLAINTIFF, THEN PLAINTIFF SHOULD ATTEMPT TO COMMUNICATE WITH DEFENDANT THROUGH THOSE MEANS TO DETERMINE DEFENDANT'S ADDRESS PRIOR TO BEING PERMITTED TO SERVE BY PUBLICATION

Under ARCP Rule 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 4.1 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,*** 1 CA-CV 17-0353, (App. 7/12/2018)

ORDER GRANTING OR DISSOLVING INJUNCTION AGAINST HARASSMENT IS APPEALABLE BY STATUTE AND DOES NOT REQUIRE FINAL JUDGMENT LANGUAGE

An order granting, dissolving or appealing an injunction against harassment is appealable by statute and does not require Rule 54(c) language. ***Wood v. Abril***, 244 Ariz. 436, 420 P.3d 220 (Ariz. App. Div. 2, 4/20/18).

RELIEF FROM DEFAULT JUDGMENT FOR MERITORIOUS DEFENSE DOES NOT REQUIRE EVIDENCE OUTSIDE THE RECORD

In a motion for relief from default judgment under Ariz. R. Civ. P. 60(b)(6), a party does not need to produce evidence outside the record in order to establish a "meritorious defense" to a claim. A meritorious defense does not require a showing of excusable neglect. ***Gonzalez v. Nguyen***, 243 Ariz. 531, 414 P.3d 1163 (4/12/18).

FAIRNESS CHALLENGE UNDER A.R.S. § 25-317(B) DOES NOT REQUIRE A HEARING

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. ***Hutki v. Hutki***, 417 P.3d 804 (Ct. App. Div.1 , 4/24/18).

MISSING FIVE DAY RESPONSE DEADLINE AFTER A DECREE IS LODGED IS NOT FATAL: RELIEF STILL AVAILABLE UNDER ARFLP 83(D) or ARFLP 85

Wife filed proposed consent decree and Husband did not file an objection until seventeen days later. The court denied Husband's objection as untimely under ARFLP 81, which requires objections be filed within five days, and the court signed the decree. Fifteen days thereafter Husband filed a motion to set aside and/or amend the decree, which the court denied as untimely. Division One held under ARFLP 83 and 85 Husband's motions were timely and thus the court abused its discretion in denying his motions based on timeliness. ***Logan v. Logan***, 1 CA-CV 16-0764 FC, 2018 WL 358026 (App. Jan. 11, 2018).

THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION TO ENFORCE ITS OWN ORDER OF PROTECTION REGARDLESS OF WHERE AN ALLEGED VIOLATION TAKES PLACE; REQUEST OF HEARING AND ENTERING AN APPEARANCE WITHOUT RAISING JURISDICTION ISSUE RESULTED IN WAIVER

Mother moved to Arizona shortly after the parties' divorce in Georgia and obtained an Order of Protection in Arizona. She filed for another Order of Protection shortly before the expiration of the first. The trial court continued the first Order of Protection in effect after finding Father violated the first one. The court found that violating it constituted domestic violence. A.R.S. § 13-2810(A)(2). Specifically, the trial court found that at least one of the grounds alleged, a video chat initiated by Father out of state, was a violation. Father appealed, claiming the trial court lacked both personal and subject matter jurisdiction. The Court of Appeals denied Father's appeal: (1) Father waived personal jurisdiction by requesting a hearing, entering an appearance and not raising that objection in doing so; (2) the only condition precedent to subject matter jurisdiction over a court's own order is that it still be in place. It did not matter where the act occurred. ***Shah v. Vakharwala*,** 244 Ariz. 201, 418 P.3d 974 (Ct. App. Div 1, 1/11/18).

AN ORDER ON A RULE 85(A) MOTION IS INDEPENDENTLY APPEALABLE

The Court of Appeals has jurisdiction to review an order upon a Rule 85(A) Motion, which is a motion to correct a clerical mistake. Rule 85(A) allows the trial court to correct a clerical error in a judgment "at any time." The Arizona Supreme Court explained that clerical error occurs when "the written judgment fails to accurately set forth the court's decision." By comparison, a judgmental error occurs when the judgment accurately sets forth the court's decision, but the decision contains a legal error. Because a Rule 85(A) motion is a "special order made after a final judgment", it is appealable under A.R.S. § 12-201(A)(2). ***Vincent v. Shanovich***, 243 Ariz. 269, 405 P.3d 1120 (12/6/17).

CIVIL RULE 9(c) ALLOWING SOME PREMATURE NOTICES OF APPEAL TO BE TREATED AS APPEAL FROM FINAL JUDGMENT MAY APPLY EVEN WHERE AN INTERVENING MOTION FOR RECONSIDERATION IS FILED

In a quiet title action, appellant filed a notice of appeal from an order that was not yet a final judgment but which became a final judgment. The order disposed of all issues as to all parties, but appellant filed motions to reconsider and a notice of appeal before the trial court ruled on those motions. Both the motions and notice of appeal predated the final judgment. Rule 9(c), Ariz. R. Civ. App. P., states, "A notice of appeal . . . filed after the superior court announces an order . . . but before entry of the resulting judgment that will be appealable is treated as filed on the date of, and after the entry of, the judgment." Appellant's motions for reconsideration did not raise new issues and the trial court summarily denied them. On review, Division Two found the order to form the basis for a final judgment, so Rule 9(c) rescued them despite the intervening motions. ***McLeary v. Tripodi***, 243 Ariz. 197, 403 P.3d 1191(Div. 2 8/29/17).

ARIZONA SUPREME COURT: INVOKING WITNESS EXCLUSION PRESUMPTIVELY BARS WITNESSES FROM VIEWING TRANSCRIPTS OF PRIOR TESTIMONY

Arizona Rule of Evidence 615 ("the Rule") generally provides that a trial court, at a party's request, "must order witnesses excluded so that they cannot hear other witnesses' testimony." The Supreme Court held that the Rule, when invoked, prohibits a party from providing prospective trial witnesses with transcripts of prior witnesses' trial testimony. However, a violation of this prohibition is not presumptively prejudicial in a civil action; but even when no prejudice is shown, the trial court must take some corrective action by tailoring an appropriate remedy under the circumstances. Finally, that although expert witnesses are not automatically exempt from the Rule, under Rule 615(c), a trial court must permit a witness to hear (or read) a prior witness's testimony if a party shows that such an exception is essential to that party's claim or defense." ***Spring v. Bradford***, 243 Ariz. 167, 403 P.3d 579 (Ariz. 10/23/17).

THE TRIAL COURT CANNOT DENY JOINDER OF A 3RD PARTY ON THE BASIS THAT THE CLAIM INVOLVING THAT PARTY IS NOT ONE FOR "FAMILY COURT"

Wife sought enforcement of property settlement provisions of the decree and a stipulated, post-decree judgment. She also sought joinder of Husband's new wife under Rule 33 and a determination of the amount of the community estate in Husband's new marriage that was collectable as "his" share under A.R.S. § 25-215(B). The trial court granted the enforcement relief but denied joinder, appearing to reason that the issue was not ripe and should be pursued in a civil action against specific assets. Relying on prior authority that the divisions in the superior court are a matter of convenience, Division One vacated and remanded. While the trial court had discretion to allow joinder, its

reasoning was flawed. Wife was entitled to a determination of the collectable estate, and Husband and New Wife were required and entitled to play part on due process grounds. The reasoning of the opinion strongly suggested the trial court should allow joinder on remand. ***DiPasquale v. DiPasquale***, 243 Ariz. 156, 403 P.3d 156, (Div. 1 9/7/17).

FAMILY LAW COURT'S CERTIFICATION OF A JUDGMENT AS BEING FINAL ON LESS THAN ALL CLAIMS UNDER RULE 78(B) IS NOT DISPOSITIVE

The order awarding and affirming spousal maintenance and attorney fees did not ultimately dispose of those claims because they directed the parties to prepare and submit dissolution decrees incorporating those rulings. Court of appeals dismissed the appeal because final judgment had not been entered. ***In re Marriage of Curto***, 243 Ariz. 142, 402 P.3d 1027 (Div 2, 9/19/17).

9th CIRCUIT: SPOUSAL PRIVILEGE NOT ABSOLUTE FOR DOMESTIC VIOLENCE CASES

Victims of domestic violence can be forced to testify against their spouses. Spousal privilege typically protects spouses from testifying against each other in Court, but spousal privilege contains an exception for when the spouse is a victim. Here, the wife insisted she did not want to testify and attempted to invoke the privilege. When forced to take the stand, she testified that she instigated the attack and her husband tried to calm her down with a hug. The prosecution discredited her testimony with her written statement. ***United States v. Seminole***, 865 F.3d 1150 (7/31/17).

MEMORANDUM DECISION: DIVISION TWO ACKNOWLEDGES PITFALLS OF APPELLATE JURISDICTION IN FAMILY LAW CASES

Father, *pro se*, appealed the trial Court's orders regarding legal decision-making, parenting time, child support and attorney's fees following an evidentiary hearing. At the time of the hearing, Father filed a motion to enforce regarding child support. The trial court set that matter for a hearing in another division. On review, Division Two viewed the enforcement proceeding as part of the same proceeding because Father did not follow the usual course of filing a post decree petition. Additionally, there may be several Rule 91 issues in the same proceeding pursuant to ***In re Marriage of Kassa***, 231 Ariz. 592, ¶¶ 4-5, 299 P.3d 1290, 1291-92 (App. 2013). Without Rule 78(B) language (non-final but no just reason for delay) in the orders, there was no jurisdiction for the appeal. ***Cespedes v. Reis,*** No. 2 CA-CV 2016-0105, No. 2 CA-CV 2017-0017 FC (consolidated) (Div. 2 10/10/17) (Memorandum Decision).

MEMORANDUM DECISION: FAMILY COURT MUST MAKE FINDING THAT A SPECIAL MASTER'S FINDINGS WERE CLEARLY ERRONEOUS BEFORE REJECTING THEM; *ZALE* DOES NOT PERMIT CONSIDERATION OF PAROL EVIDENCE WHEN INTERPRETING A DECREE

Without finding that the Special Master's findings were clearly erroneous, the family court rejected them (reduced spousal maintenance and increased attorney's fees by $10,000, even though husband had not objected to the amount awarded by the special master-- based upon lies told by mother and increase in costs of litigation). Mother appeals. Because the appointment of the special master pre-dated 2017, the Appeals Court found that the Court's *sua sponte* appointment of the Special Master (done under pre-2017 rules that require party consent) was not a violation of Mother's due process rights because Mother failed to raise the arguments in the trial court. However, it found that the family court could only reverse or modify the special master's findings if the family court found they were clearly erroneous, which it did not. Also, invoking ***Zale***, the Court found that extrinsic evidence is not admissible in interpreting whether "income from inheritance" in the decree included a lump sum inheritance. ***Weiss v. Weiss***, 2017 WL 4682100 (Ariz. App, Div 1, 10/19/17) (Memorandum Decision).

MEMORANDUM DECISION: COURT MUST ALLOW PARTY CHALLENGING RULE 69 AGREEMENT TO PRESENT EVIDENCE AS TO WHETHER THE AGREEMENT WAS FAIR AND EQUITABLE; COURT HAS INDEPENDENT OBLIGATION TO FIND FAIRNESS

Rule 69 agreement entered in mediation but then challenged by Wife prior to entry of decree. Court set status conference to hear argument and take evidence but refused evidence presented by Wife's counsel and allowed Husband to offer unsworn "testimony" but did not give Wife same opportunity. Court then made findings stating wife had failed to present admissible evidence that the Rule 69 agreement was not equitable, and based upon counsel's avowals of what the evidence would show, found the Agreement fair and equitable. Court of Appeals vacated and remanded. Court had independent obligation to determine if the agreement was fair and equitable. The record did not include sufficient evidence to support the finding that the agreement was fair and equitable. Wife bore burden of proving a defect in the agreement, but the family court deprived Wife of the opportunity to satisfy her burden. Avowal by counsel was not sufficient. ***Marriage of Stone v. Stone*** (Div 1) 2017 WL 4288033 (Memorandum Decision).

MEMORANDUM DECISION: DUE PROCESS REQUIRES THAT A PARTY RECEIVE ACTUAL NOTICE OF A STATUS CONFERENCE WHERE OTHER PARTY MAKES ARGUMENTS; HOWEVER, THE REQUIREMENT THAT EACH PARTY BE GIVEN SUFFICIENT TIME TO PRESENT ITS CASE HAS ITS LIMITS

Father was not denied due process where, in a two day trial, on the second day he was told how much time he had left to call himself as a witness, but continued cross examining Mother until his time ran out, failed to object, ask for more time, or otherwise

comment when the court took the matter under advisement. No due process violation was found here. However, the Court of Appeals did find that the family court denied Father due process where the record did not show that Father received actual notice of a status conference where Mother's counsel made arguments regarding financial issues, legal decision making, and parenting time based on trial evidence and newly discovered evidence--decree was vacated and remanded for re-argument on those issues. The family court also erred in accepting portions of a Rule 69 agreement put on the record which Father disputed and never signed. ***Camargo v. Camargo***, 2017 WL 4247767 (Ariz. App., Div 1 9/26/17) (Memorandum Decision).

MEMORANDUM DECISION: OFFER OF PROOF REQUIRED IN ORDER TO ARGUE THAT EVIDENCE IMPROPERLY EXCLUDED

This is a pre-marriage agreement case involving valuation of a residence and purported conversion of an engagement ring. Plaintiff appealed exclusion of her testimony, which was excluded because she was neither the owner or an expert. Court of appeals held that regardless of whether exclusion was improper, they could not tell whether she had been prejudiced because she failed to make an offer of proof as to what her testimony would have been (something to definitely keep in mind!), and denied her appeal on that basis. ***Schledorn v. Weiherer***, 2017 WL 4247968 (Ariz. App., Div 1, 9/26/17) (Memorandum Decision).

MEMORANDUM DECISION: FAILURE TO FILE A NOTICE OF APPEAL AFTER ORIGINAL NOTICE WAS DEEMED TO BE PREMATURE IS FATAL TO APPEAL

Appellant filed premature notice of appeal which court of appeals found to be a nullity. Because another notice of appeal was not timely filed after the final decree was entered, appellant waived any right to appeal. Period. ***In re Marriage of Sanders and Parks***, 2017 WL 4251661 (Ariz. App., Div 2, 9/25/17).

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. 2018).

NEW YORK: SPOUSE'S SPYWARE USE JUSTIFIES STRIKING PLEADINGS FOR SPOUSAL MAINTENANCE, EQUITABLE DIVISION OF PROPERTY

During divorce case, Husband installed spyware on Wife's iPhone to intercept her e-mail and text messages, and record her phone calls and voice mail. Husband also used spyware to activate the microphone on Wife's phone and record conversations (because he also hacked Wife's calendar, Husband knew when Wife was meeting with her attorney and recorded these meetings). When the court ordered Husband to produce all computing devices to search for evidence of spyware use, Husband attempted to wipe these devices to hide evidence. When questioned, Husband invoked his Fifth Amendment rights. After finding that Husband caused spoliation of evidence, and that he violated attorney-client privilege, the Supreme Court of New York struck all of Husband's pleadings for spousal maintenance, equitable distribution of property and attorneys' fees. The court wrote: "Litigants in matrimonial actions must abide by the same standards of conduct as those in other forms of civil litigation and intentional, bad-faith spoliation must be held to the same standards as in any other civil action." ***Crocker C. v. Anne R.***, Index No. Redacted, 2018 N.Y. Slip Op. 50182(U) (N.Y. S.Ct., Kings County, 2/5/18).

NORTH DAKOTA: HUSBAND IS "SURVIVING SPOUSE" AFTER WIFE DIED AFTER DIVISION OF PROPERTY BUT BEFORE ENTRY OF JUDGMENT

Wife died before divorce action concluded (division of property had been ordered, but no decree had been entered). Under North Dakota law, death of the spouse abated the divorce action. ***Matter of Estate of Albrecht***, 256 N.W.2d 755 (ND 2013). A probate action followed, and husband was found to be the "surviving spouse" under applicable law. ***Matter of Estate of Albrecht***, 2018 ND 67, 908 N.W.2d 135 (ND 3/8/18).

VERMONT: NON-RESIDENT ALIEN HAS RIGHT TO OBTAIN DIVORCE IN STATE IF HE MEETS RESIDENCY REQUIREMENT OF STATUTE

Maghu v. Singh, 181 A.3d 518 (Vt. 1/1218). Husband was born in India and is a citizen of India. He moved to Vermont in 2011 on a temporary H-1B employment Visa and has resided there since. Husband married wife (also from India) in India in 2012, and wife moved to Vermont. Husband filed for divorce in Vermont in 2015. Wife moved to dismiss for lack of jurisdiction: His non-resident status "does not prevent him from subsequently forming a bona fide intent to remain in Vermont indefinitely", and he met the residency requirement of Vermont's divorce statutes. ***Maghu v. Singh,*** 2018 VT 2, 181 A.3d 518 (Vt. 2018).

ERISA AND RETIREMENT ISSUES

DIVISION 1: 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 A MEMBER OF THE MILITARY TO INDEMNIFY HIS FORMER SPOUSE AGAINST THE CONSEQUENCES OF HIS DECISION TO POSTPONE RETIREMENT BEYOND 20 YEARS

Husband 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 the superior court order doing just that is proper under ***Koelsch v. Koelsch***, 148 Ariz. 176 (1986). In that case, the Arizona Supreme Court addressed the division of a community property interest in public retirement benefits when the employee is vested but wants to continue working, thereby delaying the former spouse's receipt of retirement pay. The court held that in such a situation, the superior court may order the employee to indemnify the former spouse for what the former spouse would have received from the community's share of the retirement.

The Court of Appeals, however, reasoned that in ***Howell***, issued just a week before the decree in ***Barron***, the Supreme Court held that state courts may not employ equitable principles to reach results that are inconsistent with federal statutes governing military retirement. ***Howell v. Howell,*** 137 S. Ct. at 1405-06 (2017).

The Court of Appeals concluded that the question has been resolved by ***Howell***, which holds that a state court may not do indirectly what 10 U.S.C. § 1408 directly forbids. The superior court here had no authority to order Husband to indemnify Wife in the event he does not decide to retire when eligible at 20 years. Although federal law allows a state court to award a former spouse a share of a military member's retirement benefits, it does not allow the court to order the military member to indemnify his former spouse if he decides to continue working past the date on which he could retire. This decision also raises the issue of applying the time rule in a frozen benefits situation. This issue will be further addressed in an upcoming pocket part. ***Barron v. Barron,*** No. 1 CA-CV 17-0413 FC (App. 7/31/2018).

DIVISION 1: 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

The dissolution decree contained the relevant valuation date for the award, however, the QDRO did not. Even though the QDRO referenced the decree, the plan administrator interpreted the QDRO as awarding to Petitioner one-half of the entire retirement benefit, including the portion of the benefit Respondent had accrued since the parties' divorce. Respondent filed a motion to set aside the QDRO pursuant to Rule 85, asserting that it contained a clerical mistake under Rule 85(A) because it did not include

the valuation date specified in the decree. The superior court denied Respondent's motion and Respondent appealed. Division 1 vacated and remanded to the trial court for entry of an Amended QDRO. It reasoned as follows:

> '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).
>
> Because the QDRO does not accurately reflect the Decree, the QDRO "contains a clerical mistake," and "it was error not to correct that clerical mistake." Thus the order denying the motion to set aside the QDRO was vacated and was remanded for entry of an amended QDRO.
>
> ***Vincent v. Shanovich,*** No. 1 CA-CV 16-0431 FC (App. 9/25/18).

CIVIL CASE: ERISA BARS RECOVERY FROM A QUALIFIED PLAN PARTICIPANT EVEN IF A FRAUDULENT TRANSFER COULD BE SHOWN

Shah is a non-discharged creditor of Baloch with a large judgment for fraud. Wells Fargo, as trustee of Baloch's 401(k) plan successfully quashed Shah's attempt to garnish against Baloch as participant, and Shah appealed. ERISA's anti-alienation provisions generally prohibit garnishment from qualified plans. ***Guidry v. Sheet Metal Workers Nat'l Pension Fund***, 493 U.S. 365, 367 (1990). The treasury regulation that interprets and applies the anti-alienation provisions have no exceptions to garnishment from a participant. In other cases, which were distinguished, fraudulent transfers to plan trustees were set aside. That did not allow for a broader exception for fraudulent transfers. ***Shah v. Baloch***, 244 Ariz. 129, 418 P.3d 902 (Div. 1 10/12/17).

9th CIRCUIT: ARIZONA EX-WIFE CANNOT COLLECT ON IRA EVEN THOUGH NAMED AS BENEFICIARY– REVOCATION LAW IS RETROACTIVE

Arizona's law automatically revoking spousal beneficiary designations upon divorce applies to an IRA that was set up three years before the law went into effect. The issue implicates the U.S. Constitution's Contracts Clause, which bans states from passing laws that interfere with contractual rights. The Eight Circuit has held that retrospective

application does violate this Clause and the Tenth Circuit has held that such treatment would result in "no significant contractual impairment". The 9th Circuit reasoned that the ex-wife's expectance interest in the IRA proceeds could not have vested until her former spouse's death, which was extinguished upon their divorce. ***Lazar v. Kroncke***, 862 F.3d 1186 (7/25/17).

BANKRUPTCY

CHILD SUPPORT REPAYMENT CAN BE WIPED OUT IN BANKRUPTCY

A debtor who owes child support overpayment to the father of her child can wipe out that debt in bankruptcy. ***Martin v. Pelley (In re Pelley)*** 2017 WL 4286134 (Memorandum Opinion) (9/26/17).

ATTORNEYS' FEES

MEMORANDUM DECISION: A LEGAL POSITION MAY BE UNREASONABLE EVEN IF NOT CONTRARY TO COURT ORDER OR STATUTE

For purposes of determining attorneys' fees, a legal position may be unreasonable even if it is not contrary to court order or statute. The reasonableness of the position is measured in the context of what was occurring in the litigation. ***Viands v. Viands***, 2017 WL 4248071 (Ariz. Ct. App., Div 1, 9/26/17).

ATTORNEY/MEDIATOR/ ETHICS

OHIO: LAWYER SUSPENDED FOR TWO YEARS DUE TO INAPPROPRIATE CONTACT WITH CLIENT IN CHILD CUSTODY CASE AND SUBSEQUENT ACTS OF DISHONESTY

An Ohio attorney representing a female client in a child-custody case developed a sexual relationship with her after she had retained him to represent her. The unethical relationship was brought to light by a live-feed closed circuit camera placed in a courthouse conference room. While in the conference room waiting on a magistrate to complete final orders, the attorney moved to sit next to his client, covered his lap with a file and coat and collaboratively placed his client's hand in his lap. For the next 8 minutes, courtroom deputies witnessed the client fondling the attorney until the attorney received a phone call, at which point the final orders were delivered. His client was then interviewed by the Sheriff's office and informed him of the interview which led him to seek counsel and self-report (a month later). However, in so doing, he omitted relevant information and misrepresented facts, which he again repeated when deposed by disciplinary counsel.

The attorney was suspended for two years with one year stayed provided the attorney comply with terms set forth by the disciplinary committee. The board considered as aggravating factors his selfish motive, lack of cooperation, making false statements, submitting false evidence and engaging in deceptive practices during the disciplinary process. The court also considered that he had harmed a vulnerable client who was "embroiled in a contentious custody dispute" with a "dangerous individual." The sanction was mitigated by the attorney's submission of approximately 40 letters attesting to his good character and the fact that he had no prior disciplinary record. ***Disciplinary Counsel v. Benbow***, No. 2017–1734 (App. 7/12/18), 2018 WL 3387574, --N.E.3d– (2018).

RESOURCES

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

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

2. **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).

3. **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.

4. **Child Jurisdiction Resources**

   Handling Child Custody, Abuse and Adoption Cases, 3rd Edition **(2009, annually supplemented)** by Ann Haralambie (West Publishing).

   Child Welfare Law and Practice (2010), Editors Duquette & Haralambie (Bradford Press, 2010).

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 CoveredAdvisor enrollment center
    Direct Line: 503-925-2003
    Toll Free: 888-279-8304 ext 2003
    Cell: 503-250-1449
    Fax: 503-217-5282
    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.

STINKY EGG

NO DUTY TO REPORT ERRORS TO EX-CLIENTS

Lawyers who discover malpractice-worthy errors on matters they handled for former clients have no ethical obligation to disclose those mistakes, the ABA's ethics committee said in an April 17, 2018 opinion.

It is well settled that lawyers must disclose material errors to current clients (ABA Model Rule 1.4– lawyers must keep clients reasonably informed about the status of a matter). But the duty to communicate does not extend to former clients- the rule refers to "clients" and if the drafters meant it to apply to former clients "they presumably would have referred to the term "former clients". 44 FLR 24 at 1191-1192, 4/24/18.

AROMATIC EGG WITH UNDERTONES OF STINK

This started out as a top candidate for a Stinky Egg Award, but the outcome has made it aromatic. Nevertheless, the excruciating process the Mother endured remains a

stink on the system. In 2014 Mother signed a notarized document eight days after the adoption action was filed revoking her consent to it on the basis of emotional duress. She and her husband were experiencing financial and marital stressors when they decided to place their two children, ages 5 and 3 for adoption, which they believed was preferable to foster care. Mother appeared at seven separate hearings before six different family court judges, each of whom refused to address the merits of her claim due to "perceived procedural abnormalities". These judges gave her "inconsistent (and at times incorrect) instructions" on the proper procedure to contest the validity of her consent. Meanwhile the couple, "well aware" of the mother's claim, proceeded with the adoption in front of a seventh judge who apparently did not know of her pending challenge. Armed with the adoption decree, they obtained dismissal of her separate action under a state law providing that "entry of the final decree of adoption renders any consent....irrevocable.".

The Mother never gave up. It finally made its way to the South Carolina Supreme Court where the Court held that "Once a final decree is entered, only a "*validly"* executed consent to adoption is irrevocable and a judge can grant collateral relief from the decree on the ground of extrinsic fraud."

The Supreme Court found that "at the heart of the extrinsic fraud claim is the adoptive couple's effort...to push through the final adoption knowing full well" the Mother's repeated requests to be heard. "Most troubling" their attorney "stunningly responded 'I think we're good'" when the adoption judge asked what else needed to be placed on the record. These facts manifestly state a claim for extrinsic fraud– and sent the case back for a hearing on the Mother's claims. ***Roe v. L.C.*** 2018 BL 95948, S.C., no. 27786, 3/21/18. 44 FLR 22 at 1175, 4/10/18.

OTHER 2017 STINKY EGGS

FBI NOT LIABLE FOR AGENT'S SPYING ON WIFE

An FBI agent used FBI work equipment to spy on his wife to monitor her whereabouts. After the divorce Wife sued the FBI. Applying the "discretionary" function exception, the appeals court refused to grant relief. Its reasoning was that "while there is a general duty to refrain from using or letting others use government property for unauthorized purposes, the regulation does not direct the manner of supervision required". ***Gordo-Gonzalez v US***, 873 F.3d 32, 2017 WL 4366862 (10/3/17).

IOWA SUPREME COURT: UNETHICAL SEXUAL RELATIONSHIP WITH DIVORCE CLIENT IS NOT MALPRACTICE

A lawyer was suspended from the practice of law for becoming romantically involved with a client and badly beating her. The lawyer's actions occurred during the time the lawyer was representing the woman in a divorce. The woman sued for damages and malpractice, breach of fiduciary duty, assault and battery and punitive damages.

Although she was awarded $500,000 on other claims, the Court (over three dissents) refused to allow her claim for malpractice or breach of fiduciary duty reasoning that a violation of an ethical rule is not *per se* malpractice. ***Stender v. Blessum***, 897 N.W.2d 491 2017 WL 2610632 (Iowa 6/16/17).

> [**EDITOR'S NOTE**: The Court's decision is consistent with Arizona, Georgia, Illinois, New York, Rhode Island and Wyoming]

LEGISLATION, RULES, ORDERS AND MORE

LEGISLATIVE SUMMARY
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 will now be 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: NEW STATUTE 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: NEW 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

6. **A.R.S. §§ 11-475, 11-475.01, 11-1132 AND 27-208: CHANGES TO**

RECORDER'S OFFICE FEES. This act is effective from and after June 30, 2019:

Fees have generally been simplified and will be generally $30 per instrument. For redlined text, *see* https://www.azleg.gov/legtext/53leg/2R/laws/0143.htm

LEGISLATIVE SUMMARY
FIFTY-THIRD LEGISLATURE FIRST REGULAR SESSION SUMMARY

General Effective Date Unless Otherwise Noted is August 9, 2017

7. **A.R.S. §§ 25-517 and 25-518 (HB 2192):** Under amended A.R.S. §§ 25-517 and 25-518, willful failure to pay child support that is at least six months in arrears can be punished by ordering suspension or denial of a driver's license, or by ordering suspension with restrictions so that the obligor can use the license only to travel to a place of employment, school, a treatment facility, health care professional, or site of parenting time. The amended statute also places the burden on the obligor to show that a failure to pay child support is "not willful."

8. **A.R.S. §§ 8-463 and 8-514.02 (SB 1109): BACKGROUND CHECKS BEFORE CHILD PLACEMENT.** Under amended A.R.S. §§ 8-463 and 8-514.02 The Department of Child Safety (DCS) is prohibited from placing a child with a relative or a person with a significant relationship until each adult in the household where the child would be placed agrees to a state and federal name-based background check, and submits fingerprints for a criminal records check.

9. **A.R.S. § 25-505.02 (HB 2139): ESTABLISHING SYSTEM TO TRACK PERSONS WHO ARE OVERDUE ON CHILD SUPPORT PAYMENTS**. New A.R.S. § 25-505.02 requires the Department of Economic Security to establish a database with the insurance industry to find people overdue on child support payments. DES must post online information on persons who have not made child support payments in at least 12 months.

10. **A.R.S. § 25-526. CHILD SUPPORT ENFORCEMENT INFORMATION; INTERNET POSTING.(**June 15, 2017 **)** The Department of Economic Security division of child support enforcement shall post information on the internet on a quarterly basis that identifies no fewer than ten non-payors of child support on whom arrest warrants have been issued pursuant to section 25-681 who have an arrearage in an amount equal to or greater than twelve months of support. The information shall include a photograph of each of these persons.

11. CHANGES TO USFSPA (MILITARY PENSION). The Uniformed Services Former Spouses Protection Act (USFSPA) expressly authorizes states to treat military retired pay—specifically disposable retired pay—as separate or community property. In late 2016, as part of the nearly 1000-page National Defense Authorization Act for Fiscal Year 2017, the USFSPA was amended to limit—essentially cap—the definition of disposable retired pay. Disposable retired pay is now defined with reference to:

   i. the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased

by each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

10 U.S.C. 1408(a)(4)(A). The revision is sloppy in that it defines total retired pay in terms of basic pay—not what the retired pay would be based on certain basic pay—just basic pay. This appears to be an error. Charged with administering the law, DFAS appears to think that the disposable retired pay is supposed to be what the pay would have been if the service member was eligible to retire on the date of the division order, if not already retired. This would seem to mean that the division order should assume the member had 20 years of service. Except possibly in the case of disability, it's not clear any member can retire without 20 years of service. DFAS has revised its guidance for division orders, and it raises more questions than answers. It does not assume 20 years of service for pre-retirement orders. The guidance also reveals that, for a number of members, their retired pay is not determined by pay grade and years of service but their last three years of pay.

ARIZONA RULES- AMENDED
EFFECTIVE 1/1/2019

12. **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)

13. **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).

14. **RULES OF THE SUPREME COURT**.

a. **Effective as of July 1, 2018.**

The Rules and Regulations of the Board of Legal Specialization have been updated and approved through the Supreme Court and can be found at:
https://www.azcourts.gov/Portals/20/2018%20Rules/Final%20Order%20for%20R-18-0025%20filed%204-25-18.pdf

b. **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)

15. **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.

Order amending Rule 9, Arizona Rules of Civil Appellate Procedure, current Arizona Rules of Family Law Procedure, except Forms 1 through 5 and 7 through 16 of Rule 97, be abrogated and replaced with the rules and Form 6. Current Forms 1 through 5 and 7

through 16 of Rule 97 will remain in effect until further order of the Court. (would comprehensively restyle and revise the Rules of Family Law Procedure), new and amended rules will apply to all actions filed on or after January 1, 2019.

Submitted by:

Kathleen A. McCarthy, J.D.
THE McCARTHY LAW FIRM
300 N. Main Ave., Ste. 203
Tucson, AZ 85701
520-623-0341
520-628-9495 (fax)
kathleen@kathleenmccarthylaw.com