OUT WITH THE OLD, IN WITH THE NEW

The Fourth Annual Family Law Immersion Course
January 1, 2021 to August 18, 2022

Submitted by: Kathleen A. McCarthy, J.D.
McCARTHY FAMILY LAW
Turning Stress Into Solutions!®

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CHILDREN'S ISSUES

1. ***GISH:*** **SOLE LEGAL DECISION MAKING MAY BE AWARDED TO A PARTY EVEN IF THAT PERSON WAS NOT AWARDED ANY PARENTING TIME; OR WAS AWARDED SUPERVISED PARENTING TIME; COURT MAY NOT ABDICATE PARENTING TIME DECISIONS TO A THIRD PARTY; THE COURT MUST MAKE FINDINGS AS TO A PARTY'S ABILITY TO PAY FEES**

   The court awarded Mother the majority of parenting time, but awarded Father sole legal decision-making with parenting time as directed by a therapeutic interventionist. The court equally divided the fees for the behavioral health services without making findings on the record as to the parties' abilities to pay. Mother appealed. Division One held:

   a. A court may award sole legal decision-making to a party, even though that party was not awarded any parenting time or supervised parenting time. Doing so does not violate A.R.S. § 25-403.01(D).

   b. The court reiterated that a court may not abdicate its authority to make parenting time or legal decision-making orders to a behavioral health professional. In doing so, the parties are deprived of due process rights. The Court may consider any recommendations, but the therapist cannot make the recommendation. Additionally, while a court may establish self-effectuating milestone to change parenting time, the achievement of these milestones cannot be determined by a behavioral health professional.

   c. The court must make findings on the record as to a party's ability to pay for behavioral health services.

   Gish v. Greyson, No. 1 CA-CV 21-0472 FC, Filed 6/28/22.

(**Practice Tip:** When crafting an order appointing a behavioral health professional, avoid language that requires parties to "follow the recommendation" of the behavioral health professional or language that parenting time will change based upon a behavioral health professional's recommendation or determination).

2. ***HULSTRID:* PARENT WHOSE RIGHTS HAVE BEEN TERMINATED MAY NOT BE AWARDED THIRD PARTY PLACEMENT AND DECISION MAKING RIGHTS; COURT MAY SUA SPONTE DENY A THIRD PARTY CLAIM THAT FAILS TO ESTABLISH THE REQUIRED ELEMENTS UNDER A.R.S. 25-409A, WITHOUT PERMITTING AN OPPORTUNITY T TO AMEND OR TO RESPOND**

Father sought third-party rights to joint legal decision-making and placement pursuant to A.R.S. § 25-409(A) for his minor children, although his parental rights had already been terminated and the children had been adopted by his sister (Mother). The trial court rejected his request. Father appealed. Division One held as follows:

a. Awarding a parent, whose rights have been terminated, third-party rights is contrary to A.R.S. §§ 8-117 and 8-539 (the termination of parental rights completely severs and divests the parent and child of all legal rights, privileges, duties, obligations, and other legal consequences). Additionally, an award of third-party rights to a parent, whose rights have been terminated, would discourage adoptive parents from allowing any relationship between that individual and the child.

b. Additionally, the superior court could not award joint legal decision-making and placement to a third party pursuant to A.R.S. § 25-409(A). "It is inconsistent for a third party to allege a significant detriment if the child remains with the parent while also seeking joint legal decision-making that would leave the child in the parent's care."

c. A court may “sua sponte deny a petition brought under § 25-409 that fails to sufficiently establish the required elements without allowing amendment of the petition or requiring the legal parent to respond."

Hustrulid v. Stakebake, No. 1 CA-CV 21-0073 FC, 2022 WL 3097906 (Div. 1, 8/4/22).

3. MUNGUIA V. ORNELAS. COURT MAY GRANT PETITION FOR CHILD'S FIRST NAME CHANGE BASED ON THE SAME FACTORS THAT GOVERN REQUEST FOR CHANGE OF CHILD'S SURNAME

The trial court granted Father's petition for a name change of the parties' infant child. Father's basis for his petition was that adding his (Father's) name would continue his family's tradition of giving a father's first name to his first-born son. Mother did not contest giving the child Father's last name, but claimed that the child's independent identity would best be served if the child was not given Father's first name. The parents were never married and by the time of the infant's birth were no longer in a relationship. Father had initially disputed paternity. Mother named the child Legend Messiah Ornelas. After petitioning for paternity, Father requested a name change to "Angel Legend Messiah Munguia Ornelas". The Court granted Father's Petition. Mother appealed challenging the addition of "Angel" to the child's first name, claiming that the child should have his own unique first name and having five first names was a bit much.

Division One court applied the factors in A.R.S. §12-601 and *Pizzicone v. Yarbrough,* 177 Ariz. 422 (App. 1993). The best interests factors include: the child's preference; the effect of the change on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; the motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity.

Although Pizziconi addressed the change of the surname, which historically has implicated issues that differ from the change of a child's first name (the court noted "the tradition of children bearing the father's name has eroded as women have, with increasing frequency, opted to retain their birth names after marriage or to select a surname other than their husband's"). But Pizziconi should also apply to first names.

Munguia v. Ornelas, No. 1 CA-CV 21-0620 FC (Filed 7/26/22).

4. ***COMO.* IN A CUSTODY CASE, WHERE BEST INTERESTS OF THE CHILDREN COLLIDE WITH THE PSYCHOLOGIST-CLIENT PRIVILEGE, THE CHILD WINS; HOWEVER, EVEN THEN, THE COURT MUST INSPECT THE CONTESTED RECORDS IN CAMERA TO DETERMINE THAT THE RECORDS PRODUCE PERTAIN ONLY TO THE DISCRETE ISSUE THAT HAS BEEN RAISED BY THE PRIVILEGE HOLDER IN THE LITIGATION**

Father moved for a temporary order for unsupervised parenting time. Mother objected, arguing that allowing this would jeopardize the children's safety because Father was an alcoholic who went on binges and disappeared for days at a time. Father agreed he was diagnosed with moderate to severe alcohol use disorder and that he should not drink alcohol. Additionally Father admitted to four DUI charges before the marriage. Father argued he had rebutted any adverse presumption because his disorder was in early remission, he had tested sober for nearly four months and continued to participate in therapy. The trial court ordered Father to release five years of his mental health records for in-camera review from a provider who had treated him for alcohol abuse. Father filed a special action invoking the psychologist-patient privilege under A.R.S. 32-2085(A), which he never waived. Given that the best interests of the children are paramount, Division One held that Father impliedly waived the privilege on the discrete topic of his alcohol abuse, but remanded for the court to reduce the responsive period of records from five years to one year. Other highlights of the decision are:

a. Arizona courts have construed the privilege narrowly because it excludes relevant evidence and impedes the fact-finder's search for the truth.

b. The privilege is not absolute. There are two forms of waiver: in writing or court testimony. A patient may impliedly wive the privilege by pursuing a course of conduct inconsistent with observance of the privilege, i.e. placing one's medical condition at issue. Any implied waiver is limited to the privileged communications regarding the specific condition which has been voluntarily placed at issue by the privilege holder. Even then, there must be an in camera inspection. A lesser evidentiary showing is needed to trigger an in camera inspection.

c. Arizona courts have not directly decided whether or how a parent might waive the privilege in a child custody action, but see In re Marriage of Gove, 117 Ariz. 324 (App. 1977) (Arizona does not recognize the privilege once a parent seeks custody in a divorce proceeding). Parents do not forfeit their privilege by requesting parenting time in a divorce action. Otherwise the privilege would be seriously compromised if a treating psychiatrist

would have to testify against his own patient. So the court must address the tension between custody laws and a parent's privacy interests.

d. The bottom line; When a parent's privacy interest squarely conflicts with the child's best interests, the child wins.

Here Father put his alcohol abuse counseling records to the fore, not merely by seeking custody, but by affirmatively seeking unsupervised parenting time and then a reduced alcohol testing requirement based on his four months of sobriety and touting his participation in therapy. Father did more than parenthetically acknowledge his path to treatment; h e wielded that path as affirmative evidence to prove that he presents no danger to the children. However, "like mining for iron, but dreaming of gold, Mother should not mistake the narrow, pointed inquiry described above as her chance to unearth new and persuasive evidence on Father's mental health". For that reason, the trial court must first inspect the records to ensure a limited production. Note there was a *vigorous* dissent by Judge Swann.

J.F. v. Como, No. 1 CA-SA 21-0123 (Filed 7/12/22).

5. ***SMITH*: NO PRESUMPTION OF EQUAL PARENTING TIME; A COURT MAY CHANGE THE TEMPORARY PARENTING ORDERS AT A FINAL TRIAL WITHOUT HAVING TO COMPLY WITH 25-411 MODIFICATION STANDARDS; AS LONG AS THE COURT MAKES APPROPRIATE BEST INTERESTS FINDINGS UNDER 25-403, IT DOES NOT HAVE TO SPELL OUT ADDITIONAL FINDINGS SUPPORTING A LESS THAN EQUAL TIME SHARING; ENDANGERMENT FINDINGS ARE NOT REQUIRED UNLESS THE ORDER MODIFIES A PRIOR PERMANENT ORDER**

The parents were married and living in Arizona for just under one year before Mom unilaterally took the child to Idaho without notice to Father. At the time of the temporary orders hearing, Mother resided in Idaho where her family resides and Father resided in Arizona. The Court entered an order for equal parenting time. Before trial, the Court ordered (at Father's request) Mother to undergo a psychological exam. Mom was diagnosed with several mental health disorders which the evaluator believed could impede Mother's ability to parent. At trial, Father sought sole legal decision-making authority and to limit Mother's parenting time to one weekend a month. Mother sought joint legal decision-making and equal parenting time. The trial court ordered joint legal decision-making but gave Father final decision-making authority. As for parenting time, the Court found that Mother's mental health issues, taken together with the child's special needs, would endanger the physical, emotional or mental well-being of the child if Mother had unsupervised parenting time. The court awarded Mother one week of supervised

parenting time per month. If Mother complied with the therapeutic recommendations, the Court indicated it would consider lifting the restrictions. Mother appealed. Division One affirmed reasoning as follows:

a. **The trial court did not modify Mother's parenting time and did not have to comply with 25-411 standards.** A trial court may enter a final order that modifies a temporary order without complying with the parenting-time-modification statute under §25-411. Temporary orders are cut from an entirely different cloth than permanent orders, especially in the parenting time context. Further temporary orders do not require detailed findings because of their transitory nature; and they do not prejudice the rights of a party or child because they become ineffective and unenforceable after dismissal of an action and are replaced entirely by the entry of a final decree. Further A.R.S. §25-411.J. does not apply to A.R.S. §25-403's best interests findings or parenting time orders.

b. **Arizona law does not have a presumption for equal parenting time**. Although Division One has said "equal or near-equal parenting time is presumed to be in a child's best interests" (***Woyton v. Ward***, 247 Ariz. 529 (App 2019), that statement was a short-hand explanation of a more comprehensive constitutional and statutory analysis. Without a court order every parent has the right to co-equal custody of their child. Arizona's public policy (A.R.S. §25-103.B.) is that absent evidence to the contrary, it is in the best interests of a child to have both parents participate in decision-making of their child. Although this statute expressly sets the "declared public policy" of Arizona, it does not create a presumption a parent must overcome.

c. **Legal presumptions come in all shapes and sizes.** They are generally tied to a burden of proof, are identified as rebuttable or not; and what is needed to rebut that presumption. Notwithstanding the Woyton court's shorthand use of this term, the court did not establish a legal presumption for equal parenting time. In ***Woyton*** and other cases using the presumption language, the parents did not bear a specific burden of proof to overcome presumed equal parenting time. Instead, this court recognized equal parenting time as a starting point for the court's best interests analysis. It is evidence, not a presumption linked to a burden of proof that guides the court in deciding parenting time. Similarly, the presumption that each parent have substantial, frequent, meaningful and continuing parenting time is just a starting point.

d. **Mother's reliance on A.R.S. §25-403.02.B. that requires a superior court to "maximize" each parent's respective parenting time" is**

misplaced. The caveat is that it has to be consistent with the children's best interests. The statute at issue here, A.R.S. §25-403, does not reference any presumption, let alone a presumption for equal parenting time. Besides, the parents' long distance parenting plan makes equal or near equal parenting time untenable.

e. **The court made required best-interests findings. It did not have to spell out additional findings supporting less than equal time sharing**. Nold requires only that the superior court explain the reasons why its decision is in the children's best interest.

f. **Endangerment findings are not required.** An award of less than equal parenting time need not be supported by an endangerment finding. The endangerment finding requirement applies only if the superior court modifies a permanent parenting-time schedule. Though other statutes require certain findings for supervision (e.g. domestic violence, those statutes do not apply here.

Smith v. Smith, No. 1 CA-CV 21-0317 FC, 2022 WL 1012948, at *2 (Filed 4/5/22).

6. *KELLY*: COURT MAY NOT IMPOSE EVIDENTIARY SANCTIONS AGAINST A PARENT WHO OBSTRUCTS CHILD CUSTODY EVALUATOR EFFORTS AND REFUSES TO PAY HIS SHARE; IT MAY IMPOSE OTHER SANCTIONS, BUT BEST INTERESTS IS THE OVERARCHING GUIDE

In a child custody proceeding, Mother alleged domestic violence against Father. The court appointed a custody evaluator and required the parties to promptly provide all records, reports and documents requested. Long story short: Father hinders and then ultimately foils the evaluator's efforts; and then refuses to pay his share. The Court admonished the Father to participate, warning if either party failed to do so, any evidence they could have presented to the evaluator at trial would be excluded. Father still refused and the Court ordered that Father be precluded from presenting any evidence at the trial that he could have presented to the evaluator. Father appealed. Division One reversed reasoning as follows:

a. **Contempt must be limited to the least possible power adequate to the end proposed.** As in ***Hays***, the superior court used its inherent contempt powers to sanction Father. Contempt should be limited to the least possible power adequate to the end proposed. This presumption is most significant when a "contempt sanction impacts an innocent third party," like the children of parents locked in custody battles.

b. **Best interests reigns supreme and this limits the Court's ability to impose evidentiary sanctions.** A child's best interests reign supreme in custody disputes. Arizona law directs the superior court to resolve issues of legal decision-making and parenting time "in accordance with the best interests of the child" and instructs the court to "consider all factors that are relevant to the child's physical and emotional well-being." This bedrock requirement necessarily limits the superior court's otherwise broad authority to impose evidentiary sanctions. The superior court cannot sanction a parent in a way that prevents the court from considering admissible, "potentially significant information" about the child's best interests.

c. **Other sanctions are permissible.** We do not question or discount the superior court's broad authority to sanction contemptuous parents in custody litigation. Tough sanctions are still available and appropriate. The superior court may, for instance, impose a progression of monetary sanctions on contemptuous parents, even incarcerating them after a finding of civil contempt. However, here the court excluded almost all of Father's evidence without first examining it or assessing its impact on the daughter's best interests.

Kelly v. Kelly, 252 Ariz. 371 Div. 1, 11/16/21).

7. ***JORGENSON*: COURT MAY NOT CONDITION PARENTING TIME ON A PARENT PARTICIPATING IN LONG-TERM PSYCHOTHERAPY**

In a legal decision-making and parenting time modification hearing, the court took testimony from Mother, Father, a court-appointed advisor, and a psychologist who had evaluated Mother and concluded she demonstrated patterns of Antisocial Personality Disorder and Narcissistic Personality Disorder. The court denied Father's request for sole legal decision-making, but extended his weekend parenting time. It also ruled that Mother could continue to be the primary residential parent, but only for so long as she participates in psychotherapy that includes Dialectical Behavioral Therapy ("DBT"). Based on these findings, the Court found that, contingent on Mother participating in long-term psychotherapy, it is in the child's best interest to exercise substantial frequent, meaningful and continuing parenting time with both parents. Mother appealed. Division One reversed, holding that the court exceeded its statutory authority when it ordered Mother to participate in long-term psychotherapy as a condition of exercising parenting time.

It reasoned that under A.R.S. § 25-405(B), the court "may seek the advice of professional personnel" in determining legal decision-making authority and parenting time. The court did so in this case, and both a court-appointed advisor and the psychologist who evaluated Mother testified not only that long-term therapy could benefit her but that she may need supervision to ensure she progresses in such treatment. However, A.R.S. § 25-405(B) does not authorize the court to order a parent to undergo treatment, including treatment with a specific provider, as a condition of parenting time. Cf. Paul E., 246 Ariz. at 397, ¶ 38 (stating that A.R.S. § 25-405(B) "nowhere authorizes the court to order treatment for a child"); *id*. at 397, ¶ 37 ("[Section] 25-405(B) applies only when an issue regarding legal decision-making authority or parenting time is pending before the court.").

Jorgenson v. Giannecchini, No. 1 CA-CV 20-0009 FC; 1 CA-CV 20-0208 FC (Consolidated) (Filed 5/6/21)

8. ***HUBERT/CARMONY*: ARIZONA MAY NOT DECLINE JURISDICTION BASED ON *FORUM NON CONVENIENS* IN A UCCJEA MATTER WITHOUT: (1) EXPRESSLY CONSIDERING AND MAKING FINDINGS ON ALL RELEVANT FACTORS INCLUDING THOSE LISTED IN A.R.S. § 25-1037(B); and (2) CONDUCTING AN EVIDENTIARY HEARING. COURT MUST MAKE A RECORD OF ALL NON-ADMINISTRATIVE INTER-STATE JUDICIAL CONFERENCES AND PROVIDE THE RECORD TO THE PARTIES; and MAY ONLY STAY AN ACTION, NOT DISMISS IT**

Father filed a paternity action in Arizona (the child's home state) after Mother fled to El Paso. Father subsequently requested sole legal decision-making with parenting time in Mother. Prior to the Arizona hearing, Mother filed: (1) a custody petition in Texas; (2) an application for temporary restraining order; and (3) an Arizona motion to dismiss Father's petition.

At the Arizona hearing, the Arizona court determined it had jurisdiction, set a trial date, appointed an attorney for the child and entered parenting time orders. In April 2020, Father requested that the Arizona court hold Mother in contempt for her refusal to allow him to see the child. Before trial, Mother requested the Arizona court to transfer the case, alleging Texas was the more convenient forum. The Arizona and Texas judges then conferred, after which Arizona declined and relinquished jurisdiction based on *forum non conveniens*.
Division One granted Father's appeal, holding as follows:

1. **Before Arizona declines jurisdiction, it must allow the parties to submit information and it shall consider all relevant factors including those**

listed in A.R.S. § 25-1037(B). It shall also make findings on all of the factors. A.R.S. § 25-1037. A failure to address any finding is an abuse of discretion. The best evidence that a court has considered all the factors is the findings, which also facilitate appellate review.

2. **Although Arizona may communicate with a court in a foreign state concerning a proceeding under A.R.S. § 25-1010(A) without permitting party participation, the court must give the parties an opportunity to present facts and arguments before a jurisdictional decision is made.** Although courts may communicate on administrative matters without making a record, on all substantive matters the court must make a record of the communication, promptly inform the parties of the communication and grant them access to that record. 25-1010[c].

3. **Children's best interests are paramount.** Where children's best interests are at stake, waiver of procedural objections is inapplicable.

4. **Due process requires the opportunity for witness participation.** Due process requires that a court provide a forum for witness testimony and that it must refrain from resolving matters of credibility on documents alone.

5. **Stay, but not dismissal.** An Arizona court may stay, but shall not dismiss, a case when it declines jurisdiction under the UCCJEA's inconvenient forum statute.

In re the Matter of Hubert and Carmony, No. 1 CA-CV 20-0362 FC, 2021 WL 2549006, Ariz.Ct.App (Filed4/29/21).

9. ***EMILIE DLM*: CALIFORNIA: HAGUE CONVENTION: FAILURE BY PARENT TO MITIGATE THE GRAVE RISKS OF HARM TO CHILDREN DUE TO PARENT'S ACTS OF DOMESTIC VIOLENCE AND EMOTIONAL ABUSE AND ALCOHOL MISUSE IS SUFFICIENT TO DENY PETITION FOR RETURN OF CHILD**

In this appeal concerning an international custody dispute involving the two minor children of an American mother and a Chilean father, mother was subjected to acts of domestic violence and emotional abuse by father, which were sometimes committed in the presence of the children. The court concluded that it is a reasonable inference from the evidence that father will continue to drink to excess and drive while intoxicated, thus exposing his children to a grave risk of harm. Given father's failure to acknowledge his excessive drinking and acts of domestic violence, as well as his repeated acts of driving while intoxicated, the court

explained that there are no ameliorative measures that will mitigate the grave risk of harm to his children.

In re Marriage of Emilie D.L.M. & Carlos C., 64 Cal. App. 5th 876, 279 Cal. Rptr. 3d 330 (2021), as modified on 5/28/21).

10. ***MARGAIN*: MEXICO'S DECLINATION OF HOME STATE JURISDICTION BASED ONLY ON THE FINDING IN A HAGUE CONVENTION MATTER, BUT NOT THE UCCJEA, WAS SUFFICIENT FOR ARIZONA TO EXERCISE JURISDICTION BECAUSE: (1) MEXICO HAS NOT ADOPTED THE UCCJEA; and (2) ITS FINDINGS CLEARLY INDICATED IT HAD DECLINED JURISDICTION, LEAVING NO OTHER HOME STATE; THE LACK OF SIGNIFICANT CONNECTIONS TO THE CHILD IN ARIZONA ARE IRRELEVANT WHERE THE CHILD'S HOME STATE DENIES JURISDICTION**

After a long and winding tale of international child custody jurisdiction intrigue, this is – one hopes – the final chapter.

Chapter 1: Arizona Trial Court Declines to Recognize Mexico Custody Order, and orders that Arizona has Jurisdiction

It all started with a dissolution action filed by Father in Mexico in 2011 when the child (born in California) was 3 years old. The child is now almost 13. Along the way, each parent took their turn at absconding with the child. At the time the divorce was filed, the child had lived in Mexico for at least six months. In 2013, Father sought return of the child to Mexico by filing a Hague Convention action, which was denied. In 2014, the Supreme Court of Mexico affirmed jurisdiction was properly in Mexico and granted Father definitive legal custody ("Initial Mexico Order"). Father then filed a petition in the Pima County Superior Court seeking to enforce this Order. The trial court denied it, finding that the Initial Mexico Order had not been made in substantial conformity with the UCCJEA.

Chapter 2: In 2016, Division Two Requires Recognition of The Initial Mexico Order Leaving Jurisdiction in Mexico

In 2016, Father appealed the Arizona trial court ruling. Pending that appeal, Father absconded with the child back to Mexico in violation of an Arizona Order. Division Two, however, reversed the trial court and, instead, held that Mexico had exclusive jurisdiction to issue the Initial Mexico Order because it was the home state of the child. When determining if a foreign order is in substantial conformity with the UCCJEA, an Arizona court must examine the *factual* circumstances under which the foreign court exercised jurisdiction, not the *legal* circumstances. The

factual circumstances complied with the UCCJEA jurisdictional requirement that is based on where the child is living (see history in the 2016 case analysis).

Chapter 3: In 2018, the Mexico Supreme Court Vacates the Initial Mexico Order Putting Jurisdiction Back in Arizona. The Mexico Trial Court then Ordered the Child to be Returned to Arizona; However, in 2019, Another Mexico Court Enjoined the Child's Removal from Mexico

In 2018 the Supreme Court of Mexico decided that Mexico had no authority to issue the Initial Mexico Order granting custody in Father because it was contrary to the court's finding in the Hague Convention action that the child was a habitual resident of the U.S. ("Second Mexico Order"). It observed that the child should be returned to Mother in Tucson during the pendency of the custody case in Tucson. In March of 2019, the Mexico trial court ordered the child to be returned to the United States. Then in November 2019, Father notified the Pima County Superior Court that another court in Mexico enjoined the child's removal from Mexico.

Chapter 4: In 2019, the Arizona Trial Court Refuses to Recognize the Second Mexico Order Claiming that It was Not in Compliance with the UCCJEA, Thereby Tossing Jurisdiction Back to Mexico. Division Two Reverses and Finds that the Second Mexico Order Abdicating Jurisdiction was Valid–Jurisdiction is Back in Arizona

In 2019, the Pima County Superior Court determined that the Second Mexico Order was not entitled to full faith and credit because it was not in compliance with the UCCJEA; instead its decision was rooted in the findings made in the Hague Convention case. If upheld, that decision would have put jurisdiction back in the Mexico Court with custody in Father. On appeal, Division Two reversed, effectively giving full faith and recognition to the Mexico Supreme Court's decision **not** to exercise home state jurisdiction and deferring to Arizona. Division Two reasoned that Mexico **effectively** declined jurisdiction, even though it relied on Hague Convention grounds. The fact that its order did not comply with the findings and language of the UCCJEA was irrelevant. Mexico is not required to follow a law that it has not adopted.

It was undisputed that the child had not lived in Arizona during the last five years, and that the child did not have significant connections with Arizona. However, that fact is irrelevant where it is clear from the facts that the home state declined jurisdiction; and there is no other home state. Arizona properly exercised jurisdiction because no court would be able to exercise jurisdiction under these circumstances.

So stay tuned. This was remanded back to Pima County to make a custody determination.

In re the Marriage of Margain and Ruiz-Bours, 251 Ariz. 122, 485 P.3d 1079 (Div. 2, March 30, 2021); Continuation of ***In re Marriage of Margain & Ruiz-Bours***, 239 Ariz. 369 (Div. 2, 4/22/16).

[**EDITOR'S NOTE:** the Mexico Court did not appear to rely on *forum non conveniens*; Arizona courts can refuse to enforce a foreign custody order if the law of that country violates fundamental principles of human rights; however, neither party raised the comity issue.]

For the history buffs among you:

11. **2016 *MARGAIN* DIVISION TWO APPEAL: MEXICO CUSTODY ORDER WAS ENTITLED TO FULL FAITH AND CREDIT IN ARIZONA WHERE THE FACTUAL, NOT NECESSARILY LEGAL, CIRCUMSTANCES WERE IN SUBSTANTIAL CONFORMITY WITH THE JURISDICTIONAL STANDARDS OF THE UCCJEA**

Mother and Father married in Mexico, then moved to the U.S., where their daughter was born. Mother and child left California for Hermosillo, Mexico, when the child was two years old and stayed for two years. Father brought a dissolution action in Tijuana, Mexico, asserting abandonment. Mother challenged jurisdiction in the Mexico Court, claiming Hermosillo was the proper venue. However, the Supreme Court of Mexico confirmed jurisdiction in Tijuana. Mother absconded with the child to Tucson. The Tijuana court later issued a final judgment awarding Father custody ("Initial Mexico Order"). Mother did not appeal the Initial Mexico Order.

In Arizona, Mother filed a petition for physical custody. The Arizona Court ordered that neither parent remove the child from Arizona until it resolved jurisdiction. Jurisdiction in Arizona pivoted on whether Mexico exercised jurisdiction in substantial conformity with the UCCJEA. Arizona answered "no" – because jurisdiction in Mexico was not based on where the child was living. Mother was eventually awarded attorneys fees. Father appealed both the decision and the award of fees in Arizona. Pending appeal and against the order of the Arizona court, Father failed to return the child from Mexico after a scheduled visit. Mother moved to dismiss Father's appeal for contempt.

Division Two considered dismissal of Father's appeal based on his contempt, but found Mother had unclean hands (for absconding with the child to Arizona).

Division Two, however, reversed the trial court by finding that Mexico had exclusive jurisdiction and the Initial Mexico Order was valid and binding.

When determining if a foreign order is in substantial conformity with the UCCJEA, an Arizona court must examine the *factual* circumstances under which the foreign court exercised jurisdiction, not the *legal* circumstances. While the Mexico court based jurisdiction on the location of the child's abandonment, this was also the location of the child; therefore, the factual circumstances complied with the UCCJEA requirement of the jurisdiction being based on where the child was living. Because the Court reversed the trial court ruling, it also reversed the fees order. ***In re the Marriage of Margain and Ruiz-Bours***, 239 Ariz. 369 (Div. 2, 4/22/16).

12. ***GREENBANK*: § 25-1032(A)(2) THE UCCJEA REQUIRES ARIZONA TO DIVEST ITSELF OF JURISDICTION ONCE A FOREIGN COURT ASSUMES JURISDICTION AND NEITHER THE CHILD NOR A PARENT OR PERSON ACTING AS A PARENT LIVES IN ARIZONA; STATUTE CREATES NO EXCEPTION FOR A GRANDPARENT WITH AN ARIZONA VISITATION ORDER WHO CONTINUES TO RESIDE IN ARIZONA**

At the time the divorce was filed, Arizona was the child's home state under the UCCJEA. In 2012, the Arizona court entered the Visitation Agreement granting the paternal Grandmother visitation privileges with Child. Mother moved with the child to Canada, then repeatedly and blatantly violated the Agreement. In 2019, Mother obtained a Canadian Court order modifying the Agreement. The Canadian court did not consult with the Arizona court.

Arizona concluded that under the UCCJEA, A.R.S. § 25-1031, the Canadian court's order automatically divested Arizona of exclusive, continuing jurisdiction. It quashed the outstanding civil arrest warrant against Mother and dismissed the Arizona proceeding with prejudice. Grandmother appealed.

Division One affirmed, reasoning that A.R.S. §25-1032(A)(2) divested Arizona of jurisdiction. No one disputed that neither the child nor the parents had lived in Arizona for more than seven years. While the Grandmother continued to live in Arizona, she did not qualify as a parent or a person acting as a parent. Consequently, Grandmother's residence does not change the result under A.R.S. §25-1032(A)(2). While this interpretation may contradict the UCCJEA's spirit and purpose, it reflects a plain reading. While a substantial connection to Arizona might have been relevant for a parent, the statute grants no such jurisdictional protections for grandparents.

Division One acknowledged that the UCCJEA contemplates, encourages, and – in some instances, requires – communication and consultation between courts, it appeared that neither party requested such communication. Although under A.R.S. §25-1057 an Arizona court must communicate with a foreign court before dismissing an Arizona proceeding, it must do so only if the Arizona court knew of the Canadian court proceedings. Both parties had a duty to notify the Arizona court of such proceedings.

Although the Court of Appeals acknowledged the unfairness of Mother's blatant evasion of court orders, its hands were tied because the UCCJEA excludes grandparents. Arizona did, however, award fees to Grandmother based on a variety of grounds.

Greenbank v. VanZant; 250 Ariz. 644, 483 P.3d 266 (Div. 1, 3/9/21).

13. ***OLESEN*: COURT MUST MAKE SPECIFIC FINDINGS AS TO WHETHER A PARENT WHO COMMITTED AN ACT OF DOMESTIC VIOLENCE FAILED TO REBUT THE PRESUMPTION AGAINST GRANTING THAT PARENT LEGAL DECISION-MAKING AUTHORITY; UNLIKE SUBJECT MATTER JURISDICTION, VENUE IS WAIVEABLE; ALTHOUGH ISSUE PRECLUSION PREVENTS A PARTY FROM RE-LITIGATING A PRIOR COURT ORDER FINDING DOMESTIC VIOLENCE, PARTY CAN OFFER EVIDENCE THAT THERE HAS BEEN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES**

The trial court awarded sole legal decision-making authority and parenting time to maternal grandparents. The Court granted Father only four hours of supervised parenting time each month at the child's counselor's discretion. Father appealed arguing: (1) lack of subject-matter jurisdiction under A.R.S. §25-402(B)(2) because the action was filed in Yavapai County even though the child was a permanent resident of Mohave County; and (2) that the Court did not make specific findings as to whether Father rebutted the presumption under A.R.S. §25-403.03(E) that due to Father's domestic violence, it was contrary to the child's best interests that Father exercise decision-making. Division One held:

- **Subject Matter Jurisdiction.** Subject matter jurisdiction refers to its "statutory or constitutional authority to hear a certain type of case." It cannot be waived and it can be raised at any stage of the proceedings. A.R.S. §25-311(A) grants the superior court jurisdiction to hear all matters relating to legal decision-making and parenting time, which is precisely what the trial court did here. The superior court is a unified trial court of general jurisdiction. Accordingly, the trial court had subject matter jurisdiction.

- **Venue.** A.R.S. §25-402(B)(2) creates a venue requirement. A petition for third party rights under A.R.S. §25-409 must be filed in the county in which the child permanently resides. It does not restrict the superior court's **jurisdiction**. Venue can be waived. Father failed to raise this issue in the superior court; and, therefore, waived it.

- **Specific Findings Required for Domestic Violence.** The superior court must **make specific findings** as to whether a parent who has committed an act of domestic violence failed to rebut the presumption against granting that parent legal decision-making authority. A.R.S. §25-403(B). These findings cannot be inferred just because the court rejected Father's request for legal decision-making. (***DeLuna v. Petitto***, 247 Ariz. 420, 423 (App. 2019)) [the Court imposed the specific finding requirement where the court **awarded legal decision-making to the parent** who committed domestic violence]. The court must also make specific findings to deny legal decision-making to the parent who committed domestic violence.

- **Issue Preclusion.** Father's due process rights were not violated when the Court refused to let him challenge the factual bases underpinning prior court orders finding domestic violence. Issue preclusion (collateral estoppel) bars litigation over the prior court findings because: (1) the matter was actually litigated; (2) a final judgment was entered; and (3) the party against whom the doctrine was to be invoked had a full opportunity to be heard.

- **Change of Circumstances.** An offending parent can present evidence of a change in circumstances. The Arizona supreme court has established such a rule to apply *res judicata* for parenting issues ***Ward v. Ward,*** 88 Ariz. 130 (1960). If it finds a change, the court must then make specific findings regarding whether the parent's new evidence rebuts the presumption.

- **Burden of Proof.** If Father can rebut the presumption, the burden shifts to the Grandparents to show by clear and convincing evidence that it is not in the Child's best interests for Father to be awarded legal decision-making authority.

  [**EDITOR'S NOTE:** As to the court's order awarding Father only four hours of supervised parenting time each month at the Child's counselor's discretion, the Court wrote this footnote: citing ***Nold v. Nold,*** 232 Ariz. 270 (App. 2013) and other cases, the court "can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. The best interests of the child...are for the superior court alone to decide." Although worthy of a footnote, it did not appear to factor into Division One's decision to reverse and remand.]

Olesen v. Daniel/Burge et al., 251 Ariz. 25, 484 P.3d 139 (Div.1, 3/11/21), as amended (Mar. 12, 2021)

14. ***BRACKEEN/HAALAND*: FIFTH CIRCUIT: STRIKES DOWN PARTS OF THE ICWA**

The Fifth Circuit has struck down parts of the Indian Child Welfare Act. The 325-page opinion (which will **not** be summarized here) showed the court to be sharply divided on the constitutionality of requiring Native American children to be adopted by Native families or placed in homes approved by an Indian tribe. Pre-ICWA, evidence showed that state adoption standards resulted in the breakup of Native American families. With multiple partial dissents and partial concurrences, the opinion is not precedential on all issues - but the holding that Native placements are unlawfully discriminatory earned a sharp rebuke from advocates for indigenous communities. Critics say that will undermine the preservation of Native families and culture.

Brackeen v. Haaland (formerly ***Brackeen v. Bernhardt***), 937 F.3d 406 (5th Cir. April 6, 2021); No. 18-11479 (5th Cir. 4/6/21).

15. ***BACKSTRAND:*** **COURT MAY MODIFY A PARENTING PLAN ONLY IF IT FIRST FINDS A MATERIAL CHANGE OF CIRCUMSTANCES *AFFECTING THE CHILD'S WELFARE* SINCE THE LAST COURT ORDER; IF IT MAKES THIS FINDING, THEN THE COURT MAY DETERMINE WHETHER A CHANGE IN THE PARENTING PLAN WILL BE IN THE CHILD'S BEST INTERESTS; THE MATERIAL CHANGE DOES NOT HAVE TO BE *DETRIMENTAL* TO THE CHILD'S WELFARE; THE TRIAL COURT DID NOT DENY DUE PROCESS TO A PARTY BY IMPOSING REASONABLE TIME LIMITS**

Decree and parenting plan were entered in 2017. While the dissolution was pending, Father moved to Minnesota. The Plan provided two alternatives for parenting time depending on whether or not Father stayed in Minnesota (Mother would have primary parenting time) or moved back to Arizona (equal parenting time). Either way, the child would reside in and attend school in Arizona. After the Decree was entered, Mother notified Father that she was moving to Las Vegas with the child. Father filed for emergency relief to enjoin relocation. The Court denied Father's request. Mother moved, and Father requested a modification of legal decision-making and parenting time. After a hearing, the court concluded that Mother created a substantial and continuing change that *affected the child's best interests*. Therefore, it needed to analyze best interests under A.R.S. §25-403.

The court concluded it was in the child's best interests for Father to be her primary residential parent in Minnesota and granted Mother liberal parenting time.

Mother appealed, arguing that the Court could not modify parenting time unless it first found a material change <u>detrimental</u> to the child's welfare. Division One rejected this argument, citing ***Black v. Black***, 114 Ariz. 282, 283 (1977). These are the rules:

- **Two-Step Inquiry Required.** Before modifying a decree's decision-making and parenting-time provisions, the court must engage in a two-stage inquiry: First, it must decide if there has been a *material change of circumstances* since the last court order that *affects the welfare of the child.* Second – and only then – may the court determine whether a change in custody will be *in the best interests of the child*. The burden is on the moving party to satisfy the court that the circumstances have materially changed (i.e. whether the change justifies departing from the principles of *res judicata* underlying the order currently in place). In other words, the change of circumstances acts to limit the circumstances under which a decree can be modified and is one aspect of *res judicata*.

- ***Davis*** **distinguished.** Mother argued that ***Davis v. Davis****,* 78 Ariz. 174, 176 (1954) requires the court to find that the alleged change of circumstances are both **substantial and detrimental** before it may consider changing the parenting plan. Because she could show that the move was beneficial, the Court could not modify the parenting plan. Division One acknowledged that ***Davis*** did not specifically reference the two distinct stages of the modification inquiry, but as a practical matter, it did follow this principle. Division One concluded that the change of circumstances need only be substantial and that it *affects* the child's welfare before it can modify custody, at which time the modification must be based on the *child's best interests*.

- **Change in Circumstances that Reduces the Effect of a Parenting Plan Provision is Material.** A Parenting Plan represents a snapshot of the child's best interests. The Plan forms the baseline for future assessment of whether a substantial change has occurred. That is one reason that A.R.S. §25-403 requires specific findings on the record. A change that materially reduces or eliminates the effect of a parenting-plan provision constitutes a substantial change of circumstances because that provision no longer advances the child's best interests.

- **Change of Circumstances Factors Relevant to, but not Dispositive of Best Interests Analysis.** While the factors that establish a change of circumstances are not always completely dispositive of what will be in the child's best interests, they are highly relevant.

- **Circumstances Existing Prior to the Last Court Order Cannot Establish Material Change, but Are Relevant to Best Interests.** Mother contended that the court could not consider the presence of the child's extended family in Minnesota because that fact already existed when the original decree was entered. While Mother was correct that the allegation of a material change must occur after the last court order, once the court found that the relocation caused a material change of circumstances affecting her welfare, it was statutorily required to consider **all** factors, including presence of significant persons in the child's life.

- **Moral of the Story: Affirmatively Seek Court Authorization to Relocate Before Relocating.** Had Mother sought the court's authorization to relocate *before* she moved to Las Vegas, the outcome may have been entirely different. A proposed relocation, by itself, does not constitute a material change of circumstances affecting the child. If the residential parent is willing to remain in the state if relocation is not granted, there is no basis to modify any provision of the Decree.

- **Court Time and Due Process.** Mother argued that she was denied due process because the court allowed Father 2.5 days to present his case, but limited her case to only 50 minutes. The court acknowledged that the touchstone of due process is fundamental fairness. At a minimum, due process requires that litigants be heard at a meaningful time and in a meaningful matter. But it has to be balanced against the superior court's broad discretion to impose reasonable time limits and control the management of its docket. Here, due process was served. Mother's counsel was allowed extensive cross-examination of Father's witnesses. The court then extended the trial by nearly a full day without objection. Mother's counsel again used this time to conduct extensive cross-examination and granted Mother an additional 50 minutes for her case. Additionally, the court noted that Mother's counsel did not renew the time objection or specify what other evidence was needed to present Mother's case adequately, nor does Mother identify any evidence that she was not able to present due to lack of time.

Backstrand v. Backstrand, 250 Ariz. 339, 479 P.3d 846 (Div.1, 12/24/20).

[**EDITOR'S NOTE:** In a footnote, Division Two essentially directed the trial court on how to rule.]

16. ***IN RE M.G.*: WHEN CHILD'S ONLY LIVING PARENT DIES, PARENTAL RIGHTS ARE TERMINATED FOR PURPOSES OF A.R.S. § 14-5204, ALLOWING APPOINTMENT OF GUARDIAN**

When a child's only living parent dies, parental rights are terminated for purposes of A.R.S. § 14-5204, which provides a basis for an assertion of authority under that statute to appoint a guardian for the child. The trial court had denied the guardianship petition, concluding that, because a guardianship proceeding requires parental notice, such proceedings are not an option for a child whose only living parent has died. But the Court of Appeals noted that Mother's parental rights terminated when she died, thereby satisfying A.R.S. § 14-5204's condition that "all parental rights of custody have been terminated." Therefore, the court could appoint a guardian upon determining that the requirements of A.R.S. §14-5207(B) were met.

In Re M.G. and R.G. 481 P.3d 1176 (Div. 1, 2/9/21).

PATERNITY

17. ***JOHNSON*: A VOLUNTARY ACKNOWLEDGMENT OF PATERNITY CAN BE CHALLENGED ONLY ON THE BASIS OF FRAUD, DURESS OR MATERIAL MISTAKE OF FACT AND ONLY FOR SIX MONTHS; AFTER THAT TIME, THE ONLY REMEDY AVAILABLE TO A BIOLOGICAL FATHER IS TO PROVE FRAUD ON THE COURT; *BRUMMOND* REJECTED**

In 2017, Johnson signed and filed a voluntary acknowledgment of paternity ("Acknowledgment Father"). Two years later Daniels filed a paternity action to child when DNA showed he was the biological father. The superior court entered a paternity order for Daniels. Johnson intervened and moved to set aside the judgment. The trial court denied Johnson's request. Johnson appealed. Division One reversed, reasoning as follows:

a. **Voluntary Acknowledgments. A.R.S. § 25-812(E)** This statute requires that a paternity judgment based on a voluntary acknowledgment can be challenged "only on the basis of fraud, duress or material mistake of fact," and only for a period of six months; after that time, it can be attacked only in exceptional circumstances, such as fraud on the court. A.R.S. § 25-812(E).

b. **A.R.S. § 25-812(H)**. Under this statute, individuals signing a voluntary acknowledgment of paternity can rescind the acknowledgment for any reason until the earlier of "[t]he date of a proceeding relating to the child" or 60 days after the date of the last signature to the acknowledgment. After that, a determination of paternity based on a voluntary acknowledgment can be challenged only on **limited grounds and for a limited time.**

c. ***Brummond*'s removal of the above statutes' time limits is rejected.** ***Brummond*** held that "the time limits of A.R.S. § 25-812(E) and Rule 85(C) do not apply" when a biological father effectively challenges a judgment resulting from a voluntary acknowledgment by filing an independent paternity action. 243 Ariz. at 364–65, ¶¶ 18, 21, 407 P.3d at 557–58. It is true that a separate paternity action can function as a challenge to a paternity judgment based on voluntary acknowledgment. *See* Ariz. R. Fam. Law P. 24(d) ("Pleadings must be construed so as to do substantial justice."); see also ***Roger S. v. James S***., 495 P.3d 327, 251 Ariz. 555 (Ariz. Ct. App. 2021), ¶¶ 20–22, 495. **But such a challenge (whatever its technical form) is not exempt from the requirements imposed by the Legislature through A.R.S.§ 25-812(E).** In that respect, we reject ***Brummond*'s** analysis.

d. **The paternity action by Biological Father would have to be filed within six months; otherwise Biological Father must prove fraud.** Within this framework, Johnson's paternity judgment could be set aside for fraud, duress, or material mistake of fact only within six months, and thereafter, only for fraud upon the court. See A.R.S. § 25-812(E); ***Alvarado v. Thomson***, 240 Ariz. at 15, ¶¶ 14–16, 375 P.3d at 80. Daniels did not file his paternity action within six months, leaving fraud upon the court as his only avenue for relief.

Johnson v. Edelstein, 1 CA-SA 21-0072 (Filed 10/26/21).

18. ***COX/PONCE*: THE REQUIREMENT THAT FATHER FILE PATERNITY ACTION WITHIN THIRTY DAYS OF RECEIVING MOTHER'S NOTICE OF ADOPTION PROCEEDINGS OR TERMINATION OF PARENTAL RIGHTS CANNOT BE WAIVED EVEN BASED ON EQUITABLE DEFENSES BECAUSE A.R.S. 8-106(G)(J) IS A STATUTE OF REPOSE, NOT A STATUTE OF LIMITATIONS**

The baby was conceived in 2018, when the parties lived together. In 2019, Mother moved out. Father retained an attorney and filed a claim of paternity with the putative father's registry pursuant to A.R.S. § 8-106.01

On August 27, Mother served Father with an adoption notice, and Father's attorney accepted service. The notice contained a warning that Father would have to initiate paternity proceedings and serve Mother within 30 days. The baby was born on September 14.

Father's attorney's paralegal sent a letter to the Adoptive Couple's attorney stating that Father would be asserting parental rights. In one huge and irredeemable "oops", the paralegal failed to calendar the deadline to file the paternity action.

On October 11, Father filed his paternity action. Mother and Adoptive Couple filed a Motion to Dismiss, which was granted. Division One declined special action jurisdiction. In this matter of first impression, the Supreme Court granted review and affirmed the dismissal holding as follows:

1. A.R.S. § 25-804 requires the trial court to dismiss any proceeding that is barred by A.R.S. § 8-106(J). In addition ARFLP Rule 40(j) requires dismissal of any proceeding barred under A.R.S. § 8-106(J). Whether principles of equity (*e.g.*, excusable neglect and equitable tolling) apply to provide relief depends on the nature of the statute as a statute of limitations versus a statute of repose.

2. A statute of limitations identifies the outer limits of the period of time within which an action may be brought to enforce legal rights. A statute of repose (non-claim statute) acts to extinguish an action if rights are not enforced within a specific deadline. While both statutes act as deadlines, equitable principle may provide relief only from deadlines imposed by a statute of limitations. A statute of repose may not be tolled, even in cases of extraordinary circumstances beyond a person's control.

3. Statutes of limitation are procedural and constitute a personal privilege, which a party may waive; and are subject to equitable tolling; a statute of repose may not be waived and is not subject to tolling because it defines a substantive right. It establishes a condition precedent to enforcement of a right.

4. This interpretation is consistent with Arizona's strong public policy favoring finality in adoptions.

5. Although the Supreme Court acknowledged sympathy for the Father, its hands were tied. The Court will not recast a statute under the guise of interpreting it to avoid an unpleasant result because such action would do violence to the law itself. The remedy lies with the legislature.

Cox and ***Richard M (5)*** and ***Mother Goose*** look-alikes.

Cox v. Ponce in & for Cty. of Maricopa, 491 P.3d 1109, 49 Arizona Cases Digest 18 (Ariz. 2021).

19. *McQUILLEN:* VOLUNTARY ACKNOWLEDGMENT OF PATERNITY HAS SAME FORCE AS A COURT JUDGMENT; IT TRUMPS ALL OTHER PATERNITY PRESUMPTIONS IDENTIFIED IN A.R.S. §25-812(A)

In January 2016, Father voluntarily acknowledged paternity of Child. Both parents signed a form issued by ADES entitled "Acknowledgment of Paternity" ("Acknowledgment") that identified the Voluntary Father as Child's Father, which was submitted to ADES. ADES then amended the Child's birth certificate to reflect Voluntary Father as the Child's father and to change of Child's last name.

In October 2017, Mother filed a paternity petition to establish another man, "Hufford", as the child's biological father and she asked for child support and parenting orders. Genetic testing confirmed that Hufford was the Child's biological father. Hufford moved for summary judgment arguing that Mother was precluded from filing a paternity claim against him because Child already had a legal father. Mother asked the court to set aside the Acknowledgment on the grounds of fraud and apply a presumption of paternity in favor of Hufford based on the genetic test results. The trial Court granted Hufford's motion. On Appeal, Division One affirmed the trial court. In doing so the Court reconciled A.R.S. §25-812 (the statute that provides for an Acknowledgment of Paternity) and A.R.S. §25-814 (the statute that sets out the presumptions of paternity) as follows:

- **Statutes Must be Read Together.** The goal of statutory interpretation is to effectuate the legislature's intent. The best indicator of that is the statute's plain language. When statutes related to the same subject or have the same general purpose, they should be read together as one law.

- **Paternity Acknowledgment Equal to Other Statutory Proof of Paternity.** A.R.S. §25-812 (D) provides that an Acknowledgment has the same force and effect as a superior court judgment. Any uncertainty about the effect of an Acknowledgment is resolved by the legislature's directive that "a court decree establishing paternity of the child by another man rebuts the presumption." A.R.S. §25-814.c. Because an Acknowledgment has the same force and effect as a superior court judgment, it qualifies as a court decree establishing paternity for the purposes of A.R.S.§25-814.C. Accordingly, the legislature unambiguously expressed a preference for finality in paternity determinations that trumps any weighty considerations of policy and logic.

- **Other A.R.S. §25-814 Presumptions of Paternity are Subordinate to an Acknowledgment.** Other presumptions of paternity contained in A.R.S. §25-814 are subordinate to the voluntary establishment of paternity governed by A.R.S.§25-812.

- **Acknowledgment Must Be Filed.** The above interpretation does not make A.R.S.§25-814(A) meaningless. The mere execution of an Acknowledgment does not create a judgment; the Acknowledgment must be

filed with the state- through the clerk of the superior court, ADES or ADHS - before it establishes paternity with the same force and effect as a court order.

- **An Acknowledgment is presumed valid and binding unless proved otherwise.** Once the 60 day period to rescind an Acknowledgment has expired under A.R.S.§25-812(H)(1), it may be challenged only for fraud, duress or material mistake of fact. ARFLP Rule 85(b). The challenger bears the burden of proof. Such relief is never available to someone who has knowingly participated in the fraud, which Mother perpetrated here.

- **Mutual Rescission of Acknowledgment After Deadline is Prohibited.** The Mother and Voluntary Father cannot simply stipulate to rescind the Acknowledgment. A.R.S.§25-812(H) specifically limits the time for rescission.

- **Every Paternity Presumption is Rebuttable. If Presumptions Conflict, the Court Weighs Policy and Logic.** One of the presumptions for paternity under A.R.S.§25-814(A)(2) is genetic testing establishing 95% or more probability of paternity. Another presumption for paternity under A.R.S. §25-814(4) is an Acknowledgment. Any presumption shall be rebutted by clear and convincing evidence. If two or more contradictory presumptions apply, weightier considerations of policy and logic determine which presumption controls.

- **BUT and here is the Kicker: Although A.R.S. §25-812(E) directs genetic testing and requires an Acknowledgment be vacated if the court finds by clear and convincing evidence that the genetic tests demonstrate that the Voluntary Father is not the biological parent, the statute's provisions must be read together.** By its plain language, A.R.S.§25-812(E) requires genetic testing only **after** the court finds that a party has shown fraud, duress or material mistake of fact sufficient to upset the Acknowledgment.

In re McQuillen v. Hufford, 249 Ariz. 69, 466 P.3d 380 (Div One, 4/30/20), review denied (Jan. 5, 2021).

[**EDITORS' NOTE:** Under this same logic, Voluntary Father would not be precluded from challenging an Acknowledgment for fraud as he did not participate in the fraud. One would think that he would be an indispensable or necessary party. However, there is no explanation of Voluntary Father's role in this proceeding. Presumably, he was not challenging his status.]

[**SECOND EDITOR'S NOTE:** Had the court found fraud, then presumably genetic testing would be a viable presumption that must be weighed against the Acknowledgment presumption. A.R.S. §25-814.c states that if two or more presumptions apply, the presumption that the court uses, on the facts, is based on weightier considerations of policy and logic will control.]

MARRIAGE

20. *WISNIEWSKI*: FRAUD AS A JUSTIFICATION FOR ANNULMENT MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE

Court annulled marriage based on Husband's allegations of fraud. Husband claimed Wife married him only to receive legal residency in the U.S., which defrauded him. The trial court, by a preponderance of the evidence, determined that Husband was defrauded. Wife appealed. Division One reversed and remanded, holding that the correct standard of proof was clear and convincing evidence, citing ***State v. Renforth***, 155 Ariz. 385, 387 (App. 1987) ("The clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the fact finders in the correctness of their judgment..."). To void a marriage for fraud, the clear and convincing standard should apply.

Wisniewski v. Dolecka, 251 Ariz. 240, 489 P.3d 724 (Div. 1, 5/4/21).

CHILD SUPPORT

CHILD SUPPORT GUIDELINES

21. *ALI*: WHERE NO FOREIGN CHILD SUPPORT ORDER WAS SHOWN TO HAVE EXISTED, ARIZONA HAS SUBJECT MATTER JURISDICTION TO ENTER ONE; REGISTRATION OF A NON-EXISTENT FOREIGN ORDER IN ARIZONA IS NOT REQUIRED BY UIFSA

A California court entered a custody order in a dissolution decree ("Custody Order") and relinquished future jurisdiction to Arizona to make any further parenting orders. Father registered the Custody Order in Arizona, pursuant to the UCCJEA, A.R.S. § 25-1055. Father later petitioned the Arizona court to modify the Custody Order and also requested Arizona to enter a child support order. Father alleged in both his Petition and Resolution Management Statement that California had not entered a child support order.

It was not until after the Arizona court entered a child support order that Father argued for the first time (but did not produce any evidence) that, in fact, there was a California order, which ordered that he pay zero in child support ("Alleged California Child Support Order"). Further, because the Alleged California Child Support Order had not been registered as a foreign judgment under UIFSA, Arizona lacked subject matter jurisdiction to enter a child support order. The Arizona Court entered a modified custody order and ordered Father to pay child support. Father appealed as to the child support order.

Division One affirmed the judgment for child support. Although an order for zero support qualifies as an order that would have required registration in Arizona as a foreign judgment under UIFSA, Father never produced any evidence of such an order. Accordingly, UIFSA does not apply. However, because subject matter jurisdiction cannot be waived, it held that the Father could request Relief from Judgment under ARFLP Rule 85(b) if he could produce the Alleged California Child Support Order.

[***EDITOR'S NOTE**: See ***Glover v. Glover***: 231 Ariz. 1, 5 (App. 2012): Arizona's UIFSA requires a party to register a foreign child support order to confer subject matter jurisdiction on Arizona courts to modify that Order.]

Ali v. Ali, 1 CA-CV 21-0434 FC, 2022 WL 1218185 (Filed 4/26/22).

22. CHILD SUPPORT GUIDELINES

The new Child Support Guidelines have been the topic of endless discussion. This is not intended as a comprehensive guide. It only highlights some of the more interesting information.

a. **Organization.** Note the scarily careful organization of the factors in the guidelines – the worksheet and guidelines go in order with each other. It is being beta-tested to have hyperlinks to specific findings. There's also a correlation table that compares the prior guidelines (following the CS tables).

b. **Effective Date**. Guidelines will be in effect as of 1/1/2022 – the new guidelines will be employed for cases that haven't been decided yet on those issues – you'll have to use the new calculators.

c. **The Formula**. Basic child support obligation charts calculates the combined gross income of the parties for average normal people with average normal children; then the next factors implement certain expenses for the particular family and the particular children; then divides the percentage of responsibility to each individual parent.

d. **Don't try it by hand.** The ability to calculate things by hand has been reduced or eliminated – you are forced to rely on the child support calculator algorithm. So all Luddites out there, you need to get with it!

e. **Gross Income is not what it used to be.** It's not called "gross" income anymore, it's called "child support income" – any source before any deductions or withholding.

f. **Attribution.** Look at Section 4 of income for "attributing" income – gives explicit explanations of when income should or should not be attributed. When you are attributing income, and it's higher than minimum wage – you don't have to attribute 40 hours at that rate if it's higher than minimum wage.

g. **Tax affecting spousal maintenance.** This was long included as an automatic deduction to the gross income in the worksheet; however, because of the Tax Cut and Jobs Act of 2017 eliminating the tax deduction for paying spousal maintenance, there is now specific language that the Court has the discretion to account for the tax impact – that parent would have had to gross more money to pay that SM (isn't deductible any more).

h. **New Economic Data.** The basic child support amount is now really driven by economic data / how spending occurs / and that the numbers support going to $30,000/month cap for the combined income – now there is more instruction on making requests to deviate higher than the basic child support tables provide for – See Section IX.

i. **Adjustments other children.** When making adjustments for other children in the household, there are more specifics for this.

j. **Self Support Reserve.** Simplified, but also made flexible – as minimum wage changes, it's flexible – 80% of MW at 40 hrs/wk. If a court is going to apply SSR test and either diminish or reduce CSO to zero, Court must look at impact on the receiving parent's household.

k. **Deviation.** The burden is on the person arguing for a higher amount than the obligation showing when combined income surpasses $30K/month – have to look at best interests factors and any needs the child may have in excess of the guidelines. Look at Section IX – deviation based on the circumstances of each case. It now says that if a parent comes to a compromise on any specific factor in the worksheet, that is not considered a "deviation".

l. **Medical Insurance.** Medical insurance to be credited – if available to both parents, the court will assign that responsibility to the parent that has a greater amount of parenting time absent an agreement otherwise – if insurance is provided by a stepparent, the parent will get credit for that in the worksheet.

m. **Childcare expenses** – there is a clarification for third-party caregivers that are family members who can be claimed as a dependent.

n. **Parenting time adjustments.** Parenting time credit table has been significantly adjusted – there's only one now – the maximum number of days that has been accounted for is 164 days – once you hit that 164 days, that will be treated as an equal time parenting time schedule – entire table has been simplified - the most common PT plans are going to fall within a specific range. Look at the examples for families with multiple children with different parenting plans.

o. **Denial of tax benefit**. If you want to deny the other parent a tax benefit due to non-payment, the burden is on the parent who wants to deny it.

23. ***GELIN/MURRAY*: IN A PATERNITY ACTION UNDER A.R.S. § 25-809(A)-(B), THE SUPERIOR COURT MUST AWARD RETROACTIVE CHILD SUPPORT DATING BACK TO THE PETITION FILING DATE; AN AWARD OF SUPPORT PRIOR TO THE PETITION FILING DATE LIES WITHIN THE COURT'S DISCRETION–PAYEE NEED NOT PROVE EQUITABLE DEFENSES; THE COURT IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS UNLESS THE COURT ORDERS SUPPORT DATING BACK MORE THAN THREE YEARS**

In this paternity action, the Court granted retroactive child support under A.R.S § 25-809(A)-(B) to the date the petition was filed. It did not grant Mother's request to order support for the three years prior, finding that Mother deliberately kept Father out of the Child's life. Mother appealed, alleging that an award going back three years was mandatory absent a valid equitable defense by Father. After reciting a somewhat checkered history of decisions, including memorandum decisions and the date the statute was amended (1997), Division One denied Mother's appeal and used the occasion to clarify the extent of the court's discretion on this issue:

a. The analogue to A.R.S. § 25-809(A) for divorcing parents is A.R.S § 25-320(C), and both statutes should be interpreted the same way.

b. The court ***must*** grant retroactive child support to the date of the filing of the Petition.

c. The Court ***may*** in its discretion grant child support going back three years without making findings on equitable defenses.

d. The Court ***must*** make explicit findings if it orders child support retroactive to a date earlier than three years.

e. Case law to the contrary, including ***DES v. Valentine,*** 190 Ariz. 107 (app. 1997) was superseded by the amendment to A.R.S. § 25-809(A).

f. Even though the Court's findings about Mother's misconduct (that Mother acknowledged paternity, while at the same time listing another person as the father on the child's birth certificate; that she had moved multiple times without informing Father; and that she excluded Father from the child's life) may not necessarily establish an equitable defense, they do support the exercise of the court's discretion.
Gelin v. Murray, 251 Ariz. 544, 494 P.3d 1112 (Div. 1, 6/22/21).

24. **TIPS ON SPECIAL NEEDS TRUSTS.**

If you have a post-majority child support case or your client or the adult child is receiving some sort of public disability benefit and is eligible for spousal maintenance, attorneys should not be entering a child support order or spousal maintenance order before consulting an attorney who handles public benefits and special needs trusts.

There is some possibility that the benefit can be assigned to a special needs trust and then the child's public benefit will not be affected. In NO way should attorneys ever have language in a decree that discusses child support being waived so as not to affect the recipient's public benefits. That said, this plan should be developed long before a settlement conference occurs and attorneys should discover the paperwork regarding the disabled child's public benefits before negotiations begin.

If a client is receiving AHCCCS or any other public benefit, child support maintenance, and lump-sum property settlement payments may affect those benefits and we should consult estate planning counsel before settling those cases. If the client is on AHCCCS and truly cannot afford the cost of his or her care on private insurance, attorneys can do more harm than good with a spousal maintenance or child support award.

> [**EDITOR'S NOTE:** This tip is courtesy of Megan Hill who really likes to attend these kinds of CLE's]

SPOUSAL MAINTENANCE

25. ***HUEY:*** **A DISABLING MENTAL HEALTH CONDITION THAT PREVENTS THE SPOUSE SEEKING MAINTENANCE FROM OBTAINING ADEQUATE EMPLOYMENT TO BE SELF-SUFFICIENT MUST BE PERMANENT BEFORE A COURT MAY AWARD INDEFINITE SPOUSAL MAINTENANCE BASED UPON THAT DISABILITY**

Trial court found that Wife was eligible for $2,500 per month in indefinite spousal maintenance. Wife's expert specifically testified that the mental health condition that prevented her from working was not permanent. Division One vacated the trial court's indefinite award and held:

> ...in this context, absent evidence of a permanently disabling mental health condition, an award of indefinite spousal maintenance is not an available option. (Emphasis added).

Division One also, however, considered in the record Wife's $90,000 annual income prior to the onset of the mental health disability (which she attributed to Husband's behavior during the marriage). The appellate court not only considered

the expert's explicit testimony that Wife's condition was not permanent, but also considered Wife's prior earning capacity. This suggests that all factors in 25-319(B) can still be considered when there is a non-permanent disability to arrive at the conclusion that an indefinite award is nonetheless appropriate.

The Court also cited heavily to *Rainwater v. Rainwater* in discussing the burden an indefinite award placed on the payor to modify if the payee's disability were to improve when it was highly unlikely the payor would have access to the recipient's mental health records. Because the disability was not considered permanent, a defined term was more appropriate because then Wife could request modification herself if her condition did not improve after the initial term.

Huey v. Huey, 1 CA-CV 21-0547 FC, 2022 WL 2951559 (Filed 7/26/22).

CHANGES TO A.R.S. §25-319(A)

25. See the statutory updates provided by Judges Sakall and Cohen for the latest changes to A.R.S. 25-319(A)- including a mandate for mandatory spousal maintenance guidelines. A committee is already well underway to develop these guidelines. Public input is welcome.

PROPERTY AND DEBTS

26. **FERRILL. POST-SERVICE PAYMENT OF COMMUNITY DEBT WITH SEPARATE FUNDS MUST BE ACCOUNTED FOR IN FINAL PROPERTY DISTRIBUTION; MORTGAGE REIMBURSEMENT IS SUBJECT TO OFFSET FOR FAIR RENTAL VALUE, BUT ONLY IF EXCLUDED SPOUSE SHOWS "OUSTER"**

Husband moved out of the marital residence, which was community property. About three months later, Wife petitioned for dissolution of marriage. Wife then paid the mortgage (also community) with separate funds. At trial, Wife's request for reimbursement was denied. Division One vacated and held:

a. If a party pays a community mortgage – or other community debt – with separate funds after date of service, those payments **must** be "accounted for" in an equitable division of property and debt. Further, even if the paying spouse continues to live at the residence, *the paying spouse still is entitled to reimbursement*.

b. A spouse who is "ousted" from the residence is entitled to an offset for up to one-half of fair market rental value of the home. If there is no ouster, then there is no reimbursement claim. The trial court should determine if ouster occurred by considering:

i. if the excluded party tried to continue to occupy the home;
ii. if the occupying party excluded, or denied access to, the excluded spouse; and
iii. "the various factors often present in dissolution cases".

c. The party who seeks an offset for fair market rental value of the home bears the burden of showing both ouster and fair market value.

d. If the parties seek temporary orders for exclusive use, they can also seek orders for financial responsibility for payments on the marital residence.

Ferrill v. Ferrill, 1 CA-CV 21-0553 FC, 2022 WL 2349930 (Filed 6/30/22).

27. ***ANDREWS:*** **ACCRUED VACATION PAY IS COMMUNITY PROPERTY IF REIMBURSEABLE; POST DATE OF SERVICE PAYMENT OF COMMUNITY OBLIGATIONS MAY BE REIMBURSEABLE - RATHER THAN CONSIDERED AS GIFTS**

Husband appealed the trial court's characterization of Husband's accumulated vacation pay as community property to be divided equally; its denial of his claim for reimbursement for home loan and other expenses he paid after date of service; and the spousal maintenance award of $5,000 a month to Wife. During the proceeding, Husband wilfully failed to disclose the documents related to his vacation pay. The trial court had also entered a pre-decree Order requiring Husband to pay $2,200 a month to Wife as spousal maintenance and to pay certain home loan and other expenses. However, the Court noted that the payment of expenses might be subject to an equalization later on. Division One reversed and remanded in part, holding as follows:

a. In a case of first impression in Arizona, Division One followed California and Colorado and held that the characterization of accrued vacation pay hinges on whether or not it is reimbursable or otherwise constitutes deferred compensation. If it is, then it is community. Property earned through a spouse's labor is community property even if not received until later (similar to retirement plans). If the reimbursement is conditional (it constitutes an alternative form of wages, then it would be separate property because it would be speculative).

b. The court distinguished the ***Helland*** case which classified disability payments received post date of service as separate property even though the community had maintained the policy prior to date of service. A disability policy is not an annuity or other investment with an expected rate of return as disability benefits are paid only under certain conditions and are

contingent upon the insured's ongoing disability– and so the community did not acquire a right to future disability benefit payments when it purchased the policy.

[**EDITOR'S NOTE 1:** Of interest is that even though Husband had wilfully failed to disclose the documents related to his vacation pay, Division One nevertheless remanded to the trial court to determine if it was reimbursable or not.]

c. The court upheld the spousal maintenance award holding it has wide discretion in this area. Husband had argued that Wife's conduct contributed to her health problems and inability to work full-time. Wife had admitted to having dogs, vaping and occasionally smoking; but Wife's medical expert testified that eliminating these issues does not always alleviate significant asthma.

d. The trial court abused its discretion by denying Husband's reimbursement claim as to loan payments he made on the marital residence. When a divorcing spouse pays community obligations after a petition for dissolution is filed, the matrimonial presumption of a gift does not apply. ***Bobrow v. Bobrow,*** 241 Ariz 592 (2017). The payor has the burden of proof to show the amount of his claim. The trial court concluded husband had failed to disclose credible evidence to support his claim; but Husband contended that Wife had admitted his claim. In fact, Wife had testified that Husband had made various payments on the debt after date of service. Based on the record, Division One concluded that Husband failed to meet his burden of proof to show the exact amounts. But in view of Wife's testimony regarding the mortgages, Division One fond that a preponderance of the evidence established that Husband made payments somewhere within the range of the amounts identified by Wife. The trial court abused its discretion by disregarding that evidence. Division remanded so the trial court could consider Husband's reimbursement claim regarding the mortgage residence payments only.

[**EDITOR'S NOTE 2**: The trial court held that Husband's sick pay was his separate property, but this issue was not appealed, so the issue of sick pay has not been decided.]

[**EDITOR'S NOTE 3**: The trial court reduced Husband's spousal maintenance obligation *pendente lite* after the parties entered into a Rule 69 Agreement which allowed each party access to $1.3 million in retirement without penalty.]

[**EDITOR'S NOTE 4:** When making a reimbursement claim, make sure you submit documentation of the types and amounts of all expenses paid.]

Andrews v. Andrews, 252 Ariz. 415; 504 P.3d 924 (Div. 1, 12/14/21).

28. ***MEISTER*: COURT MUST TAKE INTO ACCOUNT ALL FACTORS WHEN DETERMINING VALUATION DATE OF COMMUNITY ASSET; THERE IS NO PARTICULAR STANDARD; AN ACCOUNTING STANDARD REQUIRING KNOW-ABILITY OF A FUTURE EVENT AS OF THE DATE OF VALUATION MUST YIELD TO THE OVERARCHING PRINCIPLES OF EQUITY AND SHOULD NOT CONTROL A DIVORCE COURT'S CHOICE OF VALUATION DATE; COURT MUST MAKE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW IF REQUESTED; EVEN IF NOT REQUESTED, THE COURT MUST MAKE SUFFICIENT FINDINGS**

There were significant changes to the income flow to the community property business that occurred due to pre date of service conduct by Husband as well as lawsuits. Both parties had been involved with the business prior to date of service (1/31/17). Wife terminated (or was fired by Husband) after date of service, after which, Husband managed the business. It was presumed that Husband would buy out Wife. Along the way, to keep the business operational, Husband sold business assets for $1.4 million which violated a court order prohibiting this. By the time of trial, the business was entangled in lawsuits and had lost its main customer, decimating the business income. Wife's expert testified that the business should be valued as of 3/31/17 due to its proximity to the date of service; and that because the post date of service events leading to the demise of the business were neither known or knowable at that time, they should be disregarded. Husband's expert testified that the valuation date should be December 31, 2017 and, among other things, should take into account these events.

The trial court relied on Wife's valuation expert's opinion (in part because of the lack of known or knowable changes); and that Husband had managed the business after Date of Service; ordered Husband to buy out Wife's interest at this value; ordered Husband to pay a business obligation owed to Wife's brother which was also incurred prior to date of service; and that Wife had made a *prima facie* showing to support her waste claim and that claim was "granted and embedded in the distribution of property". Husband appealed on all these issues. Division One held as follows:

a. **Valuation date issue.**

i. Community property must be divided equitably, though not necessarily in kind, without regard to marital misconduct. The court

also has wide discretion in apportioning community property. The court's discretion includes the ability to choose a valuation date for community assets. Invoking ***Sample***, the court recognized that the equitableness of property distribution is the very touchstone of a property apportionment. Accordingly, the trial court must be allowed to utilize alternative valuation dates. On appeal the court must assess whether the superior court's choice of a valuation date reached an equitable result that "stands the test of fairness on review."

ii. There is no Arizona authority mandating or even suggesting a community asset must be valued at or near the date of service. Rather, the trial court is to choose a date that is just and equitable.

iii. The choice of a valuation date should be dictated by pragmatic considerations and must comport with principles of fairness and equity. This is the touchstone of A.R.S. §25-318(A).

iv. The trial court erred by not considering that the conduct resulting in the loss of the primary contract was attributable to Husband's conduct *before* the date of service. Additionally, Wife benefitted from the fruits of Husband's over-billing (that led to the loss of the customer) and was working for the business when the over-billing occurred.

v. The court expressed no opinion on whether the valuation of a business for any other purpose should turn on whether a specific event is foreseeable as of the date of valuation. *But when a court is valuing a community asset in a dissolution proceeding, it triggers different considerations, and otherwise "standard" valuation approaches must yield to the overarching principles of equity. There is no authority suggesting that foreseeability should control the court's choice of a valuation date*.

vi. Because the trial court did not make specific findings about the equitableness of the valuation date, the court abused its discretion to the extent it selected the valuation date based on Wife's expert's opinion that the loss of the contract was not foreseeable.

b. **Waste.**

i. If a court finds a party committed waste that reduced the value of a community business, it may consider such waste in selecting a valuation date for the business. On the other hand, if a court finds

that waste did not affect the value of the business, but did impact other marital assets, the court may when apportioning that property take that into account. However, the trial court conflated Wife's claims of Husband's post date of service financial mismanagement with the selection of Wife's expert's proposed valuation date based on whether the subsequent events were knowable. As such, neither the record nor the court's ruling showed how Husband's poor management or wasteful spending impacted the value of the business such that it was decimated by 95%.

c. **Sufficient findings of fact are required.** Absent a proper request from a party that triggers *mandatory* separate findings of fact and conclusions of law, no bright-line rule exists as to what a court must include in addressing whether a selected valuation date is equitable. However, the court must provide enough analysis, however labeled, to allow the appellate court to decide whether the ruling withstands the test of equity and fairness. When the court's ruling lacks such analysis, the appellate court cannot merely presume that the valuation date complies with ***Sample***.

Meister v. Meister, 252 Ariz. 391; 503 P.3d 842 (Div. 1, 12/2/21).

29. ***LARCHIK:*** **A CALCULATION OF VALUE OF A BUSINESS IS ADMISSIBLE; COMMUNITY GUARANTEE OF SPOUSE'S SEPARATE OBLIGATION DOES NOT CONVERT THE ASSET SECURING THE OBLIGATION TO A COMMUNITY ASSET; BROWN DECREES MAY BE WRONG, BUT WILL BE TOLERATED**

Wife owned a pre-marital business. After marriage, Wife formed a new LLC to purchase a building for the use of her pre-marital business. Wife claimed (but did not produce evidence) that all of the funds used to acquire the office were her separate property. The community signed a guarantee for the mortgage payment. The trial court decided some issues and entered a decree (known as a Brown Decree), deferring to a later date the business valuation and lien issues.

At the valuation trial, Husband disclosed a Calculation of Value report created by his expert. Husband's expert noted in his engagement letter that he would not testify as to a Calculation of Value at trial; and that if it went to trial he required that the calculation schedules be upgraded to a formal summary valuation report. Wife's expert produced a full appraisal. Both experts were present during trial. The Court sustained Wife's objection to the Calculation of Value. Husband then attempted to call Wife's expert who was present in the courtroom. The Court sustained Wife's objection to this based on the fact that Husband had not subpoenaed Wife's expert. Without producing further evidence, Wife moved for a

directed verdict on the issue of a community interest in an increase in value of her pre-marital business, which the Court sustained.

The Court also held that the building was Wife's separate property based on Wife's assertion that she had paid the remainder of the price with her separate funds; that no default on the mortgage had occurred; and that the building had been sold.

Husband appealed. Division One vacated and remanded in part holding as follows:

a. **Brown Decrees are wrong, but will be tolerated here**. Under A.R.S.§ 25-312(4), the court can enter a decree of dissolution only if it has made provision for the disposition of property. The Court erred by bifurcating its ruling, but this did not void the dissolution, which neither party appealed. Nor does the error deprive the appellate court of jurisdiction.

b. **Rule 702 and Admissibility of Expert Testimony.** The court serves as a gatekeeper to ensure expert evidence is reliable and helpful to the finder of fact. However, it is not intended to replace the adversary system. Nothing in Rule 702 requires an expert to account for all possible methods of assessment. In excluding Husband's expert's report, the court erred because it deferred to the expert's understanding of what evidence would be admissible. This is the expert's personal view; the expert is not qualified to offer a legal opinion. Even though a "calculation of value" opinion may be short of the gold standard, it is not *per se* unacceptable or inadmissible. The court is free to give the opinion little or no weight, but not to exclude it altogether. All that is necessary is for the court to make sure the evidence clears the reliability threshold.

c. **Granting a Directed Verdict was error because even Wife admitted it had increased some in her Pretrial Statement**. Wife was bound by this admission that she included in her Pre-Trial Statement. A party is bound by an admission against interest.

d. **Wife failed to prove her separate property claim to the building by clear and convincing evidence.** The trial court erred by dismissing Husband's community claim to the property. The trial court relied solely on Wife's word. But the spouse contending property acquired after marriage is separate property must prove this by clear and convincing evidence.

Larchik v. Pollock, 252 Ariz. 364; 503 P.3d 128 (Div. 1, 12/9/21).

30. ***FEMIANO* AND *SABA- DIVISION ONE CONFLICTING OPINIONS*: IF POST-MARITAL PROPERTY IS PURCHASED WITH COMMUNITY FUNDS, AND THE COMMUNITY MAKES ALL THE PAYMENTS, BUT ONE SPOUSE SIGNED A DISCLAIMER DEED, IT HAS A LIEN FOR CONTRIBUTIONS TO PRINCIPAL AND EITHER: (1) 100% of THE INCREASE IN VALUE; OR (2) ONLY A FRACTION OF THE INCREASE IN VALUE**

If that heading sounded weird, it was. But what is weirder is that Division One issued both opinions – which clearly conflict. In October (2021), the Arizona Supreme Court heard oral arguments on the ***Saba*** matter, which will hopefully clarify the conflict. Details coming soon! But first, it is important to understand the two rulings at the Court of Appeals level.

Femiano and ***Saba*** rest on similar facts. In both cases:

- The parties purchased property after marriage with community funds, and thereafter paid all of the mortgage.
- One party (Titled Party) obtained the mortgage in their name alone and took title as separate property because of the other party's credit issues.
- The Non-Titled Party signed a Disclaimer Deed.
- Fraud either was not pled, or was pled untimely.

Yet in ***Femiano*,** Division One found that the correct formula to determine a community lien was to give the community credit for 100% of the reduction in principal (because the community made all the payments); and to give the community a lien for 100% of the appreciation. Effectively, it prioritized **home equity** as the basis for the lien.

Unlike ***Drahos*** and related cases, ***Femiano*** involved property acquired during marriage and paid for solely with community funds. Thus, the case was found distinguishable from ***Drahos***, where property was acquired during marriage, and both separate and community funds had been expended during marriage.

The Arizona Supreme Court denied review of ***Femiano*** on December 15, 2020. See CV-20-0153- PR.

In ***Saba*,** Division One (a different department) applied ***Drahos***, where the formula for a community lien is:

(CRP), which is community reduction to principal; plus
(CRP/PP*(TA), which is the community's share of appreciation, expressed as a fraction, – the numerator is the community reduction in principal and the denominator is the purchase price – multiplied by the total appreciation.

The result is a dramatically reduced lien compared to the ***Femiano*** approach. That is because ***Drahos*** does not focus on home equity. Instead, the goal is to reimburse the community for principal contributions and reward those contributions with a proportionate share of appreciation.

The difference is dramatic. For example, in ***Saba***, the community lien was **$68,558** based on the ***Drahos*** formula where CRP ($39,741) = community reduction to principal; PP ($199,900) = the purchase price; and TA ($145,110) = total appreciation.

Applying the ***Femiano*** formula to the same example would net a community lien of **$184,851** ($39,741 + $145,110).

Additionally, the fate of disclaimer deeds hangs in the balance.

In ***Femiano*****,** the Court held that the Disclaimer Deed served to disclaim interest in the actual ownership of the property, but it does not affect the calculation of the community lien.

In ***Saba***, the Court held that a Disclaimer Deed cannot be analyzed as a post-nuptial agreement under ***In re Harber*** because a Disclaimer Deed is signed by just one party; and does not define each spouse's property rights in the event of death or divorce– they simply renounce ownership in property. The Disclaimer Deed effectively justifies the windfall that a ***Drahos*** formula produces in favor of the Titled Party. However, a Disclaimer Deed does not cause the non-owning party to forfeit a community lien.

The Arizona Supreme Court granted review in ***Saba*** on August 24, 2021 on the sole issue of whether the application of a ***Drahos/Barnett*** formula is appropriate where it grossly favors the separate property holder, thus, creating an inequitable result. A.R.S. § 25-318 requires the court to equitably divide community property and to confirm separate property to its owner, while impressing a community lien upon such property if appropriate.

Femiano v. Maust, 248 Ariz. 613, 463 P.3d 237 (Div 1, April 23, 2020), review denied (Dec. 15, 2020); ***Saba v. Khoury***,481 P.3d 1167 (Div. 1, January 21, 2021), as amended (Feb. 23, 2021), as amended (Mar. 23, 2021).

[**Editor's Note 1:** Applying ***Drahos*** means that the identical community contributions can translate into a different lien depending solely on the purchase price of the property.]

[**Editor's Note 2:** Disclaimer deeds for property acquired after marriage in one party's name due to credit or other issues are a common occurrence. Be sure to plead and prove claims of fraud and list the issue in the Pretrial Statement.]

[**Editor's Note 3:** Always ask for findings of fact and conclusions of law– ***before*** the trial.]

[**Editor's Note 4:** The preliminary injunction does not preclude a party from selling separate property prior to trial, even one that has a community lien asserted against it. But the non-owning party should be sure to ask the Court to sequester the proceeds until the issue can be resolved.]

[**Editor's Note 5:** Be ever so careful when drafting a Disclaimer Deed. It does not necessarily protect against a community lien. Make sure you include a disclaimer of all future interests.]

[**Editor's Note 6:** It is good to remember that in ***Bell-Kilbourn***, the Court went out of its way to point out that no community funds had been used with respect to the property. That left an opening for the Court's decision in ***Femiano*** where only community funds had been used.]

31. ***DIAZ*: BORROWER MISSING A PAYMENT ON A HELOC DOES NOT START CLOCK ON STATUTE OF LIMITATIONS ON ENTIRE DEBT OWED**

For a home equity line of credit (HELOC) secured by a deed of trust with a defined maturity date, the statute of limitations does not begin to run on future, unmatured installments unless the creditor accelerates the debt, or until the deed of trust reaches its maturity date. So a debtor can miss several mortgage payments and the creditor still can sue on missed payments without having to sue for the entire debt – unless or until the creditor accelerated the debt or until the deed of trust's maturity date.

The Court of Appeals held that a HELOC should be treated like a secured debt, instead of an unsecured debt like a credit card. The statute of limitation on credit card debts runs from the date of the first delinquent payment. ***Mertola, LLC.v Santos***, 244 Ariz. 488, ¶ 21 (2018).

The Court of Appeals also held that the discharge of the HELOC debt in bankruptcy did not start the clock on the statute of limitations.

Diaz v. BBVA USA, 252 Ariz. 436; 504 P.3d 945 (Div. Two, 1/7/22).

32. ***DETLOFF-MEYER:* WISCONSIN COURT REJECTED BOTH VALUATION EXPERTS' REPORTS**

The valuation opinions of two experts were deemed not credible for a business caught up in a marital dissolution. In this case, the husband was the out-spouse arguing for a high value of the wife's business (Dr. Paul's brand of herbal products for treating livestock). The wife had bought the business from her parents one year prior to the divorce filing (no gift involved). The purchase price was $500,000 (100% financed by a note from the parents), and she also borrowed $57,920 from them shortly after for working capital. The circuit court rejected the valuation opinions of the experts on bothsides and found that the best measure of value was the purchase price/loan plus the working capital loan less any remaining principal at the time of trial, for a net value of $45,230.

One of the husband's arguments was that the purchase price was not fair market value because it was not at arm's length. While the court agreed the transaction was not arm's length, it was the best indicator of value especially since neither expert's valuation of the business made "logical sense." The husband appealed, but the appellate court upheld the circuit court's decision.

Detloff-Meyer v. Meyer**,** 2022 Wisc. App. LEXIS 205 (a case analysis and full opinion are available on the BVLaw platform).

JURISDICTION

33. ***COSTARAS*: WHERE A FOREIGN JUDGMENT SOUGHT TO BE DOMESTICATED IN ARIZONA AFTER THE FOUR-YEAR STATUTE OF LIMITATIONS (A.R.S. §12-544) CONTAINS BOTH SUPPORT AND NON-SUPPORT AWARDS, THE NON-SUPPORT PORTION IS AFFECTED BY THE STATUTE OF LIMITATIONS WHILE THE SUPPORT PORTION IS EXEMPT FROM IT**

The parties were divorced in Ohio. In 2016, the Ohio Court entered judgment for Wife in 2016, ordering Husband to pay a certain amount for spousal maintenance arrearages and fees ("Support Portion"), with the remainder characterized as non-support ("Civil Portion"). Husband then relocated to Arizona. Almost five years after the judgment was entered, Wife domesticated the full judgment in Arizona and filed an application with the superior court to garnish Husband's earnings. Husband objected arguing that the Civil Judgment portion was unenforceable because it was time barred under A.R.S. §12-544. The trial court ruled in favor of Wife holding that the judgment was a "single judgment" and therefore the entirety of it was properly domesticated under the doctrine of full faith and credit. Husband appealed as to court's decision as to the Civil Portion. Division Two sided with Husband as to the Civil Portion. It reasoned that:

a. The Arizona statute of limitations (A.R.S. 12-544) must be exclusively applied. Neither the UEFJA nor the Full Faith and Credit Clause say or require otherwise. This is true even if it bars enforcement of a foreign judgment filed under the UEFJA. Arizona law controls.

b. Under that statute, foreign judgments must be domesticated within four years after they become enforceable; however, support judgments are exempt. A.R.S. 12-544k(3) compels a different treatment for support judgments. See 25-503(M) (notwithstanding any other law, any judgment for support and for associated costs and attorney fees is exempt from renewal and enforceable until paid in full).

c. A.R.S. 25-500(9) defines "support as the provision of maintenance or subsistence including arrearages, interest, past support, and interest due thereon.

Division One affirmed the enforcement of the Support Portion, but vacated and remanded for the court to determine whether Wife domesticated the Civil Portion within the four year statute of limitations.

Costaras v. Costaras, 1 CA-CV 21-0401, 2022 WL 1467900 (Div. 1, 5/10/22)

34. ***MAJOR/COLEMAN*: CASE MAY BE DISMISSED WITH PREJUDICE, BUT COURT CAN STILL RETAIN JURISDICTION TO ISSUE ORDERS**

Trial court erred in concluding that it did not have the authority to enter an order, upon stipulation, dismissing the case with prejudice but retaining jurisdiction to enforce the parties' settlement agreement in the event of a future default in payment. Courts have inherent or incidental powers that are impliedly given even though the powers may not be catalogued in the constitution or statute. Arizona courts also have recognized that a superior court can issue orders as an exercise of its inherent authority to take actions necessary to effectuate the administration of justice in cases pending before it. Furthermore, the Court of Appeals has previously acknowledged that a trial court, in other circumstances, may dismiss an action while retaining enforcement authority.

Major v. Coleman, 491 P.3d 1152 (5/5/21)

[EDITOR'S NOTE: This case may be useful to obtain the Court's approval on a post-nuptial agreement which will survive the entry of dismissal of a Legal Separation or Dissolution action].

35. ***NELSON v. NEVADA*: A TRUST MAY BE A PARTY TO A DIVORCE ACTION SUBJECT TO A PRELIMINARY INJUNCTION BASED ON THE PARTIES' COMMUNITY INTEREST THEREIN**

In this writ proceeding, the Supreme Court concluded a preliminary injunction applied to the parties' respective spendthrift trusts because the injunction applies to all property subject to a claim of interest.

Nelson v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 137 Nev. Adv. Op. 14, 484 P.3d 270 (2021).

APPEALS

36. ***BLOS:* A SPECIAL ORDER ENTERED AFTER FINAL JUDGMENT IS NOT APPEALABLE UNDER ARFLP RULE 83 (MOTION TO ALTER OR AMEND JUDGMENT)**

In this consolidated appeal, the family court entered post-decree special orders on custody issues. Appellants then moved to alter or amend the special orders under Rule 83, rather than timely file notices of appeal from the special orders. By the time the motions were denied, the deadline to notice an appeal of the special orders had passed. Division One declined jurisdiction because Rule 83 is inapplicable to special orders entered after final judgment. A motion to alter or amend a judgment is proper only after and from entry of a final judgment, not a special order. Because the consolidated appeals were not timely noticed, the court lacked jurisdiction.

A motion to alter or amend a special order under Arizona Rule of Family Law Procedure 83 does not toll the limitations period to notice an appeal from a special order that includes finality language under Ariz.R.Fam.L.Proc. 78(c). Appellants in these consolidated appeals challenged post-judgment special orders, but neither appellant filed a notice of appeal within 30 days after the contested special order was entered, per Ariz.R.Civ.App.P. 9(a). Appellants would have had to file a time-extending motion in the family court under Arizona Rule of Civil Appellate Procedure 9(e).

A notice of appeal is timely if filed with the clerk of the family court "no later than thirty days after the entry of the judgment or order from which the appeal is taken. The court further held that Rule 83 is inapplicable to special orders entered after final judgment. A motion to alter or amend a judgment is proper only after and from entry of a final judgment, not a special order.

Blos v. Blos, No. 1 CA-CV 21-0639 FC, 2022 WL 969571, at *1 (consolidated with ***Hopkins v. Hopkins***, No. 1 CA-CV 21-0639 FC, 2022 WL 969571, at *1 (consolidated with ***Hopkins v. Hopkins***, 508 P.3d 790 (Consolidated 3/31/22).

37. ***YEE*: UNDER A.R.S. §12-2101(A)(2), A POST-DECREE ORDER IS A "SPECIAL ORDER MADE AFTER FINAL JUDGMENT", AND IS APPEALABLE WITHOUT RULE 78.C LANGUAGE, BUT ONLY IF THE COURT RESOLVES ALL RELIEF SOUGHT IN THE MOTION; A RULING ON A RULE 85 MOTION FOR RELIEF THAT DOES NOT CULMINATE IN A RULE 78.B or 78.C FINAL JUDGMENT CANNOT BE CHALLENGED BY A RULE 83 MOTION TO ALTER OR AMEND**

This case is just the latest in a long history of iterations on the age-old question of when a family court order is appealable. At least Division One recognized the legal fog and that the court **has not spoken with one voice**. It ended up punting the issue to the Supreme Court by asking for a clarifying rule for family law post-decree cases. In the meantime, this is what we have. The outcome is plain enough. The road getting there was really circuitous.

It all started in 2009 with a Decree of Dissolution. Fast forward to 2016. The Court entered post-decree orders in Father's favor. Due to Mother's intervening bankruptcy, Father did not file an application for fees until April 2018. Mother never objected and in May 2018, the Court ordered that Mother pay Father $59,000 in fees.

Mother waited until August 2019 to file a Rule 85 (Motion for Relief from Judgment) Motion, which the Court denied in December 2019. On January 14, 2020, the Court entered judgment and ordered Mother to pay additional fees. In late December 2019, Mother filed a Rule 83 Motion to amend the December 2019 Order, which the Court denied on 1/21/20. On 2/4/20, the Court issued an MEO clarifying the January 14, 2020 Order. In March 2020, Mother asked for an Order for Rule 78.C language, which the Court granted in April 2020. Two days later, Mother filed an appeal from all of the above orders.

Father requested dismissal of the entire appeal because each post-decree ruling was a "**special order made after final judgment**" under A.R.S. §12-2101(A)(2), meaning they were immediately appealable even without Rule 78 language. Mother relied on A.R.S. §12-2101(A)(1), which allows for an appeal from "a final judgment entered in an action . . . commenced in a superior court." In dismissing the appeal, the Court made several key points:

- **Special Orders After Final Judgment.** To constitute a "special order made after final judgment," under A.R.S. §12-2101(A)(2) an order must: (1) **involve different issues than "those that would arise from an appeal from the underlying judgment"** and (2) **affect the underlying judgment by enforcing it or staying its execution**.

- **Special Orders Do Not Focus on Rule 78.C Language.** An analysis of what constitutes a special order made after final judgment does not focus on Rule 78.c. language. Rather, it focuses on the issues resolved in the order and whether it seeks to enforce or stay the decree. A Court Rule (such as Rule 78) cannot expand appellate jurisdiction beyond a statutory grant and is irrelevant to the Court's interpretation of its statutory authority under A.R.S. §12-2101. (Here, the May 2018 judgment awarding Father more than $59,000 in fees and costs resolved the entirety of the post-decree motion).

- **A Rule 85 Order *May* Qualify as a Special Order.** A Rule 85 Order addressing resolution of a post-decree matter is appealable as a special order without Rule 78.C. language. For examples: *See, e.g.*, ***Cone v. Righetti***, 73 Ariz. 271, 275 (1952) (post-decree order affecting custody and support of minor children); ***Williams v. Williams***, 228 Ariz. 160, 165–66 ¶¶ 19–20 (App. 2011) (post-decree order modifying spousal maintenance); ***Sheehan v. Flower***, 217 Ariz. 39, 40 ¶ 8 (App. 2007) (post-decree order on grandparent visitation); ***Merrill v. Merrill***, 230 Ariz. 369, 371–72 ¶¶ 5–6 (App. 2012) (post-decree order on military retirement benefits). (Here, the December 2019 minute entry denying Mother's Rule 85 motion also was a special order after final judgment. By no later than the entry of the January 14, 2020 judgment awarding Father fees, the family court had resolved the entirety of that motion).

- **Not Every Post-Decree Order is Appealable. Full Resolution is Required.** Not every family court order addressing a post-decree motion or petition is appealable. The family court must have fully resolved all issues raised in a post-decree motion or petition before an appeal can be taken under A.R.S. §12-2101(A)(2). Significantly, the Court noted that the current Rules do not reflect this requirement. To avoid uncertainty and confusion, the court suggests the Arizona Supreme Court consider a rule change directing the family court to state when it has fully resolved a post-decree motion or petition.

- **Rule 83 Motion Can Extend Time for Filing Appeal, But it is Very Limited.** A Rule 83 Motion (alter or amend) can extend the time for filing an appeal, but Rule 83 is limited to a specific subset of judgments. *See* Rule 78(a)(1) (defining judgment as including "an order from which an appeal lies"). In other words, final Rule 78.C. language is required in the underlying Order from which a Rule 83 Motion is filed. Mother's Rule 83 Motion did not involve an underlying Order with final judgment language (*Note*: cases relying on Civil Rules 59 and 60 are inapplicable because those rules do not require final judgment language).
  Choy Lan Yee and Yee, 251 Ariz. 71, 484 P.3d 650, (Div. 1, 3/25/21).

38. ***CHAPMAN*: A CONTEMPT ORDER THAT ENFORCES A PRIOR PROPERTY DISPOSITION ORDER AND WAS CERTIFIED AS A FINAL JUDGMENT IS ONLY APPEALABLE BY SPECIAL ACTION**

Finding that it lacked jurisdiction, Division Two dismissed Husband's appeal from the trial court's order entering judgment for Wife as a result of Husband's failure to comply with a court order. It lacked jurisdiction to entertain a direct appeal from the trial court's order of contempt, which enforced a previous property disposition order and was certified as a final judgment pursuant to ARFLP Rule 78.

In re Marriage of Chapman, 251 Ariz. 40, 484 P.3d 154, (Div. 1, 3/23/21).

[**EDITOR'S NOTE:** ***Chapman*** footnote: It is appropriate to rely on cases interpreting civil rules that are identical to a family law rule.]

39. ***MORENO:* OOP IS ALWAYS APPEALABLE REGARDLESS OF FINALITY (SUPERSEDES *McCARTHY*)**

Moreno filed OOP against roommate (Beltran). After a hearing the OOP was dismissed and the Court directed Beltran to file a ***China Doll*** affidavit. Moreno filed a notice of appeal, after which Beltran submitted her application for fees, which the court granted. Moreno did not file another notice of appeal or amend or supplement his original one. Moreno argued the trial court erred by ruling on attorney fees while an appeal was pending. However, Division One found an OOP is always appealable regardless of finality, thereby overruling ***McCarthy v. McCarthy**,* 247 Ariz. 414 (Div. 2, August 20, 2019). ARPOP 42, as amended on 1/1/20, states that OOPs are not subject to the civil rules. Further, "a ruling on fees would neither negate the substance of the order of protection nor frustrate the appeals process resulting from the order".

Moreno v. Beltran, 250 Ariz. 379, 480 P.3d 647 (Div.1, 12/15/20), review denied (Apr. 13, 2021).

40. ***CARPENTER* (MEMORANDUM): RULE 83 MOTION TREATED BY THE COURT AS SUCH MAY EXTEND THE TIME FOR APPEAL EVEN IF IT IS REALLY A RULE 35.1 MOTION FOR RECONSIDERATION**

Father argued that Mother's Rule 83 Motion (Alter or Amend, which extends the time for appeal) was really a Rule 35.1 Motion (Reconsideration, which does not extend the time for appeal) in disguise. However, because the trial court treated and ruled on the Motion pursuant to Rule 83, the appeal was timely.

Generally, civil-contempt orders are reviewable only by special action. The exception, however, is when a contempt order goes beyond the finding of contempt and instead is based upon an underlying order, which is appealable pursuant to A.R.S.§12-2101. Here, Father's request for contempt was based on Mother's alleged interference with reunification therapy and failure to comply with provisions regarding the marital home. The relevant order required Mother, among other things, to refinance the marital residence and make the mortgage payments. It is, therefore, appealable under A.R.S.§12-2101(A)(2) because it was an order modifying an underlying dissolution decree, which is an appealable special order after judgment.

Rule 92 provides a separate ground for attorneys fees in contempt actions (in addition to A.R.S. §25-324). Under Rule 92, a court may in its finding of contempt order "appropriate sanctions for obtaining the contemnor's compliance with the order including attorneys fees, provided the order includes a purge provision.

Carpenter and Carpenter, No. 2 CA-CV 2020-0058-FC (Filed 4/5/21) (Memorandum Decision).

PROCEDURE/EVIDENCE

41. ***LATTIN:*** **NEITHER A.R.S. § 25-215(D) NOR DUE PROCESS REQUIRES A DEFENDANT SEEKING AN AWARD OF ATTORNEY FEES AND COSTS FROM A MARRIED PLAINTIFF TO JOIN THE PLAINTIFF'S SPOUSE IN THE LAWSUIT TO ENTITLE IT TO LATER EXECUTE A JUDGMENT AGAINST COMMUNITY ASSETS**

Wife (Lattin) filed an action as "a married woman dealing with her own separate property" against Shamrock Materials, LLC. The trial court entered judgment for Shamrock and awarded it attorneys fees and costs as the prevailing party. Shamrock then sought to garnish a bank account jointly owned by Lattin and her husband, who was not a party to the lawsuit. Pursuant to A.R.S. § 25-215(D), spouses must be sued jointly in any "action on (a community) debt or obligation." The issue here is whether A.R.S.§ 25-215(d) required Shamrock to join husband in the case to execute its judgment for attorney fees and costs against community assets. The Court held that A.R.S.§ 25-215(D) did not require joinder, and the trial court therefore erred by quashing the writ of garnishment on that basis.

The Court's reasoning was that if the court enters a judgment for attorney fees and costs in favor of the defendant, the plaintiff's spouse may intervene in any subsequent attempt to execute the judgment against community assets to argue the judgment is the plaintiff's sole and separate obligation, and community assets cannot be used to satisfy the judgment.

Lattin v. Shamrock Materials, LLC, 252 Ariz. 352, 503 P.3d 116, 120 (Div. 1, 2022).

42. ***ERTL:*** **SIGNED EMAILS BY ATTORNEY CAN CREATE A BINDING RULE 69 AGREEMENT; TO BE ENFORCEABLE A RULE 69 AGREEMENT REQUIRES AN OFFER, ACCEPTANCE, CONSIDERATION AND SPECIFIC STATEMENT OF ALL RIGHTS AND OBLIGATIONS– BUT THERE IS NO REQUIREMENT TO HAVE ALL THE BASIC TERMS WORKED OUT; NO FAIRNESS (A.R.S. §25-317) HEARING IS REQUIRED WHERE THE PROPERTY DISPOSITION IS BASED ON INCORPORATION OF A PRENUPTIAL AGREEMENT UNLESS A PARTY CLAIM UNCONSCIONABILITY UNDER A.R.S. §25-202; REQUIREMENTS TO ASSERT A UNILATERAL MISTAKE ARE DETAILED**

The attorneys for the parties agreed on all terms by signed emails. As for the property division, those emails adopted the terms of the prenuptial agreement. Wife refused to sign the formal settlement agreement claiming there was no meeting of the minds and that part of the deal was to include a $250,000 payment to her by Husband.

The trial court held that there was a signed Rule 69 Agreement even though not all of the Marital Settlement Agreement terms were included in the emails. Wife appealed claiming that a unilateral mistake of fact as evidenced by emails suggesting that Husband had agreed to pay her an additional $250,000; and that the trial court was required to hold a fairness hearing under A.R.S. § 25-317. Division One Affirmed and held as follows:

a. **The emails created an enforceable Rule 69 Agreement**. Note that the court did not explain in its rulings how it determined that the emails were signed (*See* Practice Tip below). Signed email communications are binding (*See* Editor's note).

b. **Basic requirements for a binding agreement.** Although an enforceable agreement requires an offer, acceptance, consideration, and a sufficiently specific statement of the parties' obligations, and mutual assent under ***Buckholtz***, there is no requirement that all of the basic terms have been worked out (*See* Editor's note). Mutual assent is determined by objective evidence. In this case, the objective evidence was the attorneys' emails, regardless of what Wife may have intended.

c. **Basic terms can be filled in by operation of law.** In this case, the allocation of the child-tax exemption and termination of child support were

covered by operation of law. Accordingly, a material term not raised by the parties is not missing when disposed of by operation of law.

d. **An A.R.S § 25-317 evidentiary hearing on fairness of property disposition if not required where the parties adopted their prenuptial agreement**. A prenuptial agreement standard is more stringent than a A.R.S. § 25-317 standard. The only defenses would be A.R.S. § 25-202 defenses. Wife did not raise these defenses.

e. **A unilateral mistake is an erroneous belief about a material fact; and that the other party knew of the mistake of fact and unfairly exploited the other party's error**. However, Wife provided no evidence that an equalization payment was a basic assumption of the Agreement. She did provide on appeal an email exchange to this effect, these emails were not submitted to the trial court and cannot be considered. (*See* Editor's note).

[**EDITOR'S NOTE 1:** In deciding that signed emails were binding, the Court apparently relied on the standard signature block, not an actual signature. Note also that the court relied in part on case law ***(Murray v. Murray,*** 239 Ariz. 174 (2016) that pre-dated the current Rule 69 rule which requires an actual signature.]

[**PRACTICE TIP:** Include a disclaimer in your signature block that this does not constitute a binding Rule 69 Agreement. Tip courtesy of Laura Belleau. Thank you Laura!]

[**EDITOR'S NOTE 2**: What is the difference between not having the "basic terms worked out" (which apparently does not preclude a binding agreement) and not agreeing on material terms (which does preclude a binding agreement)?]

[**EDITOR'S NOTE** 3: Had Wife produced these emails at the time of trial, it would be interesting to speculate if the outcome would have been different). The practice tip here is where the stakes are this high, a consultation with an attorney is worth the price of admission!]

Ertl v. Ertl, 252 Ariz. 308; 502 P.3d 466 (Div. 1, 11/9/21).

43. SUPREME COURT DITCHES CITATION BAGGAGE

A strategy disposing of "citation baggage" was just embraced at the Supreme Court. Baggage accrues when court decisions and briefs quote an earlier source, which quotes an even earlier source, etc. An FTC appellate lawyer proposed instead a single phrase - "cleaned up" in parentheses - to signal that extraneous material was removed. In a February decision, Justice Clarence Thomas adopted

the method without comment. This has swept the country and appeared in 5,000 judicial opinions. Thanks to Tim Eigo for this tidbit.

44. ***IN RE MH:*** **THE LEVEL OF INTERACTIONS BETWEEN A SOCIAL WORKER AND A CLIENT MUST BE SCRUTINIZED TO DETERMINE IF IT TRIGGERS A CONFIDENTIAL RELATIONSHIP UNDER A.R.S. § 32-3283; A ONE-TIME INTERACTION FOR ASSESSMENT FOR RISK OF HARM ONLY TOGETHER WITH FAIR WARNING ABOUT THE LACK OF CONFIDENTIALITY DOES NOT QUALIFY**

Interactions between social workers and a client may arise to a level that results in the creation of confidential behavioral health professional-client relationships under A.R.S. § 32-3283. However, this relationship is not created where the social worker interacts with a patient only once to assess whether the patient should be evaluated as a risk of harm to themselves or others; and where the social worker has warned the patient at the outset that any statements the patient makes about harming self or others will not remain confidential.

In re MH 2020-004882,251 Ariz. 584; 495 P.3d 924 (Div. 1, 7/20/21).

45. **PROPOSED AMENDMENT TO EXPERT WITNESS RULE (FEDERAL RULE 702): PREPONDERANCE OF THE EVIDENCE STANDARD IS THE TEST BEFORE ADMITTING EXPERT TESTIMONY; EXPERT OPINIONS STRAYING BEYOND THE EXPERT'S OWN METHODOLOGY INTO SPECULATION TO BE STRUCK**

Proposed amendment to Federal Rule 702: The proposed amendments instruct courts to use a "preponderance of the evidence" test before admitting expert testimony, meaning the judge must determine the expert relies upon sufficient facts and has reliably applied scientific methods to arrive at a conclusion. Judges will also be required to strike expert opinions that stray beyond the expert's own methodology into speculation, such as stating they are "100% certain" when that is scientifically implausible.

46. **FOIA REQUESTS: THEY ARE EASIER THAN YOU THINK IF YOU USE A ROBOT**

DoNotPay is the robot lawyer company known for helping you fight parking tickets, wrangle airline refunds, cancel gym memberships and file for unemployment. Now they have rolled out a tool to request information from government agencies under the Freedom of Information Act. Anyone can use FOIA to request public information, but where is that sweet spot between too broad or too specific? This feature guides you through how to file a request for information, as well as wrangle the fee waivers and option to expedite processing

— which is up to you to convince the government department why you should get the information for free and faster than regular FOIA requests. (In reality, the FOIA system is massively under-resourced, and responses can take months or years to get back.) After asking you a series of questions and what you want to request, DoNotPay generates a formal FOIA request letter using your answers and files it to the government agency on your behalf.

47. TIP: COURT ORDERED ASSIGNMENT OF DEBT MAY INCREASE ABILITY OF PERSON WHO REMAINS LIABLE ON A MORTGAGE TO OBTAIN A NEW LOAN

Check out the FNMA Seller's Guide, at:

https://url.emailprotection.link/?bCIjaobOCGN2SPOezJtWUKFyBTkoebYdNGSujp1rF84kz404SWz8nUjpq2_rNAdLhuAgOsHUN-rjQNM8ZgQVhK88vYnZs4f8IqyshOMvmXPz-U-CtzNhyRj7NWi9YckSBhK2huKkAABRUlxjum0yOLBYsXuMMYdwlmP1DW1qTufFs8oYdxwKSDdytUCLIXdiIZAcenjgyq4mz98t5XPTXritNcL-K2Q812nq3PvJUnHP6uDuvPGrA4GpBl5eqoe:

Court-Ordered Assignment of Debt. When a borrower has outstanding debt that was assigned to another party by court order (such as under a divorce decree or separation agreement) and the creditor does not release the borrower from liability, the borrower has a contingent liability. The lender is not required to count this contingent liability as part of the borrower's recurring monthly debt obligations. The lender is not required to evaluate the payment history for the assigned debt after the effective date of the assignment. The lender cannot disregard the borrower's payment history for the debt before its assignment.

[**EDITOR'S NOTE**: Tip courtesy of Ann Haralambie who actually reads all those emails from financial advisors, in this case, Douglas J. "Doug" Sanderson.]

48. *THOMPSON:* CALIFORNIA: FIRST IN TIME RULE APPLIES ONLY WHERE COURT HAS *IN PERSONAM* AND *IN REM* JURISDICTION

After husband John Thompson petitioned for separation from Wife Olivia Thompson in California, wife petitioned for dissolution of marriage in Massachusetts. Husband then amended his California petition to seek dissolution. Wife, in turn, filed a request for order to quash and abate the California proceedings, arguing her dissolution proceeding in Massachusetts was first and was a better suited forum. The trial court ordered the California case abated and stayed, finding wife's dissolution petition was first in time, the court lacked personal jurisdiction over wife, and "equitable factors" weighed in favor of Massachusetts. On appeal, husband contended his dissolution petition was first in time because it related back to his petition for separation, and regardless, the trial

court abused its discretion in abating the action based on the erroneous conclusion it lacked personal jurisdiction over wife. The Court of Appeals concluded the trial court did not have *in personam* jurisdiction over wife at the time husband filed his original petition for separation or his amended petition seeking marital dissolution. "Because the first in time rule applies only when the court has acquired both *in rem* and *in personam* jurisdiction, husband's first in time theory fails."

Thompson and Thompson, California Courts of Appeal, Docket: C091168 (Third Appellate District) (1/27/22).

RETIREMENT

49. ***SEBESTYEN*: EVEN WHEN ELIGIBILITY FOR A PENSION IS BASED ON A DISABILITY, WHEN THE PENSION PLAN CALCULATES THAT BENEFIT BASED SOLELY ON ACCRUED YEARS OF SERVICE, THE BENEFIT IS EARNED ENTIRELY THROUGH "ONEROUS TITLE" AS A FORM OF DEFERRED COMPENSATION, MAKING THE PORTION OF THE BENEFIT EARNED DURING MARRIAGE COMMUNITY PROPERTY SUBJECT TO DISTRIBUTION ON DISSOLUTION OF MARRIAGE**

A pension plan based its payment structure solely on Husband's accrued years of service, and not on his disability or its extent. This meant that Husband acquired the benefit by "onerous title", i.e., his previous "labor and industry", as opposed to "lucrative title", e.g. as compensation for his well-being. Onerous title translates into community property. Lucrative title translates into separate property.

The pension was, therefore, community to the extent it was earned during marriage. Husband argued that his disability gave him a choice to retire early; and that he could not have retired early but for his disability. Therefore, the payment was due to his disability. However, that choice did not change the **character o**f the payment from deferred compensation to disability compensation because of the way the Plan calculated the benefit. Even if Husband ceased being disabled, he would still be eligible to receive the pension at a future date. In setting up the pension the way it did, Husband's employer intended to reward Husband's past labor, not to provide him with prospective compensation. Other points of interest are:

- This is distinguishable from military and federal plans that use statutorily mixed formulas in calculating disability and retirement pay; or allows a retiree to elect between different forms of calculation based on the years of service or disability rating; here Husband's benefit was fixed once he became eligible for retirement regardless of his disability. His disability merely triggered his entitlement.

- This is also distinguishable from disability insurance benefits at issue in ***Hatcher and Hatcher***, 188 Ariz. 154 (App. 1996). There the employee voluntarily paid into the plan; and the plan expressly compensated the employee for disability.

Sebestyen v. Sebestyen, 250 Ariz. 537, 482 P.3d 416 (Div. 1, 3/9/21).

50. ***STOCK:*** **COMMUNITY HAS RIGHT TO REIMBURSEMENT PLUS INTEREST FOR PURCHASING OF A CREDIT FOR A SPOUSE'S PREMARITAL FEDERAL SERVICE; HOWEVER, THE CREDIT ITSELF DOES NOT BECOME A COMMUNITY ASSET; COURT MAY ORDER THAT A PARTY'S FEDERAL RETIREMENT BENEFIT BE PAYABLE TO THAT PARTY'S ESTATE**

During the marriage, the community purchased a credit for Husband's pre-marriage federal service, thereby increasing his ultimate benefit ("Benefit Credit"). After the divorce was filed, the parties entered into a settlement agreement, which provided that Wife was awarded *"her community portion of Husband's federal retirement benefits."* The trial court incorporated the settlement agreement into the Decree. The Decree was not appealed. Wife subsequently moved for entry of retirement benefit division orders that treated the Benefit Credit as community and required that her share of the retirement benefits be paid directly to her or her estate if she predeceased Husband. Husband lodged a competing order, which excluded any portion of the Benefit Credit from being awarded to Wife and required that payment be made to Wife, but not her estate. The trial court adopted Wife's order. Husband unsuccessfully moved to alter or amend the Decree. Division One reversed, holding as follows:

- **The court reviews an order denying a motion to alter or amend for an abuse of discretion. The court, review *de novo*, however, the court's characterization of community property.** Although Husband did not appeal the Decree itself, Husband did not waive his right to challenge post-decree orders. The court entered the post-decree orders noting they were consistent with, and done to effectuate, the agreements reflected in the Decree and Husband timely appealed those orders.

- **The community is entitled to reimbursement plus interest from the date of purchase for the community funds.** However, *as a matter of law,* the community did not acquire an ownership interest in retirement benefits attributable to Husband's pre-marriage service. Property acquires its character as community or separate depending on the marriage status of its owner at the time of acquisition. Time of acquisition refers to the time at which the right to obtain title occurs, not to the time when legal title

actually is conveyed. Citing bedrock Arizona principles, the Court held that when community funds are spent on identifiable separate property, "the community does not thereby acquire an interest in the title of the separate property itself, but merely has a claim for reimbursement." The fruits of labor expended during marriage are community property. The fruits of labor expended before marriage are separate property. Accordingly, a pension right acquired for labor expended before marriage is separate property, even if funds are used during the marriage to cause that pre-marriage property right to vest.

- **The payable to the estate provision was appropriate and did not modify the Decree in violation of A.R.S. §25-327(A)** when it ordered payment to the Wife's estate. Husband argued that the Court was precluded from entering this order because the parties did not include this provision in their agreement. However, the Court noted that the parties included the retirement benefits in their agreement, which resulted in corresponding provisions in the decree. Upon dissolution, Wife's community share became her "immediate, present, and vested separate property interest" to be disposed of as she wished (citing ***Koelsch v. Koelsch***, 148 Ariz. 176, 181 (Arizona Supreme Court, January 28, 1986). Accordingly, the Court *did not abuse its discretion* by including this provision.

[**EDITOR'S NOTE 1**: In addition to the reimbursement credit, the Court reaffirmed the ***Van Loan*** formula for dividing a defined-benefit plan. On remand, it ordered the trial court to apply a fraction with Husband's number of months of service during the marriage as the numerator and the denominator the total months of service.]

[EDITOR'S NOTE 2: The court appears to apply a different standard for calculating a community lien interest in a retirement plan than it does for real property. Under ***Barnett***, a community lien interest against separate real property does not just give the community the reimbursement principal amount plus interest; it also awards the community the benefit of any increase resulting from its investment.]

[EDITOR'S NOTE 3: After the Post-Decree Order was entered, Husband filed a supplemental response and notice of Social Security offset pursuant to ***Kelly v. Kelly***, 198 Ariz. 307 (2000). The Motion was untimely and the argument was waived. However, it is a reminder that ***Kelly*** offsets are still alive and kicking.]

[**EDITOR'S NOTE 4**: Husband failed to raise the issue of whether it would be inequitable to order an employee spouse to indemnify the non-employee spouse **before** the employee spouse actually retires because **married couples cannot receive retirement benefits before the employee spouse retires**. *See* ***Nold v.***

Nold, 232 Ariz. 270, 273 (Div. 1, May 30, 2013). Discerning readers should think about raising this issue.]

Stock v. Stock*,* 250 Ariz. 352, 479 P.3d 859 (Div. 1, 12/29/20).

51. TIPS FROM QDRO ATTORNEYS

a. Losing Survivorship Rights for your Client: CSRS and FERS

The Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS) provide retirement annuities to non-uniformed federal employees and are administered by the United States Office of Personnel Management (OPM). A dividing order must be done, which OPM refers to as a Court Order Acceptable for Processing (COAP). Benefits are not available to an Alternate Payee by OPM until the Participant is eligible for and applies for retirement benefits (***Koelsch*** claims do apply). Unlike Military Retirement Benefits where the maximum percentage that can be awarded to the Former Spouse as a property right is 50%, up to 100% of the net annuity can be awarded to the Alternate Payee (net is the gross amount minus certain deductions such as Medicare, health and life insurance premiums, and taxes).

b. Maximum Survivorship Annuity for CSRS and FERS.

The maximum survivorship annuity for CSRS is 55% of the employee annuity and 50% for FERS. If the Alternate payee remarries before the age of 55, the survivorship rights terminate. Unlike ERISA-governed plans, survivorship rights can be divided between a former spouse and a future spouse. Any level of survivor benefit protection is available up to the maximum level for CSRS. Under FERS, there is only a 25% or 50% survivor annuity. The cost of the survivorship rights can be allocated between the parties or assigned to one party.

c. Losing Survivorship Rights

If you have a pending divorce where the Participant has already retired and, at the time of retirement, named his/her spouse as a survivor annuitant, this is a designation for a spouse's survivor annuity. This designation must be converted to a Former Spouse's Survivor Annuity in the first order dividing community property – that is, the Decree. The Decree MUST confirm the award of the survivorship rights to the former spouse. This cannot be fixed in the COAP. If it is not in the Decree, it is lost, even if the Participant wants to give it to the former spouse. The Decree cannot be amended to correct it, nor can a *nunc pro tunc* order correct it. It is fatal if the designation is not in the decree, and it is hard to believe that a resulting malpractice action would not be successful. Furthermore, this rule also applies to a Participant who has not yet retired at the time of the pending

divorce action but retired after the decree was entered but before the COAP was entered and processed by OPM. If this is your circumstance, you might want to include in your client closing letter to get the COAP done before the Participant retires. This should protect you from a later malpractice claim.

d. It is always wise to have an experienced QDRO attorney review your decree before it is entered as he/she should be able to spot the error, if not to actually draft the language for the decree. Please let us know if you have any questions regarding this topic.

[**EDITOR'S NOTE**: tips courtesy of R. Kevin O'Brien, Esq. and Robert Harrian, Esq.]

ATTORNEYS/ETHICS

52. NEW BEST PRACTICES GUIDES

The Ethics Advisory Group (EAG) has issued new Best Practices guides. Check out the FAQs regarding ER 1.1 (competence), ER 1.2 (scope/allocation), and ER 1.4 (communication). And watch for EAG's growing collection of other recommended Best Practices, coming soon.

53. REQUESTS FOR BINDING ETHICS OPINIONS

The Supreme Court has finally established its own committee/suborganization that will issue *binding* ethics opinions. These will be available on the Supreme Court website. The current ethics opinions from the State Bar are non-binding. The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168. Recent ones concern the following:

* Termination of Representation
* Recordings by Lawyers
* Fee Sharing

54. INABILITY TO COMMUNICATE WITH CLIENT

Q: What if I can't reach or locate my client?

A: If a client moves without leaving a forwarding address or fails to communicate/respond, you may withdraw from the representation. However, you must first use reasonable diligence to locate the client to inform her of termination and you must protect client interests when withdrawing. See Ariz. Ethics Op. 01-08.

55. **CONFIDENTIALITY**

Q: If the details of my former client's case are now public record, am I free to discuss them?

A: Not without client consent. The duty of confidentiality survives the representation and there is no public records exception. See ABA Formal Op. 479.

56. **SUBORNING PERJURY**

Q: After a child custody hearing, I learned that my client had given false material testimony. When I privately discussed this with the client, he fired me. Do I have to act further now that I am no longer counsel of record?

A: Yes, you must still take a reasonable remedial measure sufficient to undo the effect of the tainted evidence. See ER 3.3(a)(3) and new AEAC EO-20-0007.

57. **SUBPOENAS FOR CLIENT INFORMATION**

Q: I've received a subpoena for information regarding a former client. Now what?

A: Absent the former client's consent to disclosure, you will need to object to the subpoena. If the Court denies your objection, you should discuss with the client whether to seek review of that decision. See Comment 15 to ER 1.6 and Ariz. Op. 00-11.

58. **ADVERTISING MATERIAL**

Q: Do I still have to mark written solicitations as "advertising material" and send a copy to the State Bar?

A: No, this rule was deleted effective January 1, 2021.

59. **NEGATIVE ONLINE REVIEWS**

Q: May I respond to a negative online review of my legal services?

A: A negative online review does not waive client confidentiality or trigger ER 1.6(d)(4)'s self-defense exception. Avoid engaging online or simply invite the client to contact your office to discuss. See new ABA Formal Opinion 496.

[**EDITOR'S NOTE:** Oregon's Supreme Court reprimanded a lawyer for his response to a negative online review. A dissatisfied client called him "very

crooked" and "horrible". The attorney replied by posting the client's name and criminal record. The court said although criminal convictions are public, lawyers cannot reveal things that are embarrassing or detrimental to the client.]

60. **PARALEGALS MUST NOT SIGN CLIENTS**

Q: May I have paralegals or marketing staff sign clients?

A: No. Your nonlawyer staff may perform a variety of tasks under your supervision (including initial intake of client information) but giving a legal opinion, establishing the attorney-client relationship, and setting the scope of representation and the fee are nondelegable. See ERs 1.4, 1.5, 5.3, 5.5 and Rules 31(b), 31.2(a), Ariz. R. Sup. Ct.

61. **ATTORNEY REQUIRED TO ACTUALLY SPEAK TO CLIENT BEFORE SIGNING FEE AGREEMENT.**

Q: I use staff or online tools to sign clients. Do I have to speak with a client before the client signs the fee agreement?

A: Yes. "Before entering into any written attorney/client fee agreement for the firm, an Arizona licensed attorney must speak with the client and approve the legal fees to be charged and retention of the firm by the client. The attorney meeting with a potential client must be knowledgeable in the practice area, and issues that relate to the retention and retention decision must be discussed before a decision is made on the retention." *See* ***In re Phillips***, 226 Ariz. 112 (2010).

62. **PERMITTED DISCLOSURE TO SUCCESSOR COUNSEL**

Q: What may I disclose to successor counsel as I transition the client and the client's file?

A: Your ER 1.6 duty of confidentiality applies to these communications and precludes disclosures absent client's informed consent or authorization implied by the representation. When in doubt, seek client's consent as to what to provide to new counsel in your transfer of the representation. See new AEAC Ethics Op. EO-20-0001.

63. **REMOTE WORKING**

Q: I'm an Arizona lawyer, temporarily living in Utah, and working remotely for my Arizona clients. Any problem with that?

A: Probably not, but you will need to confirm that Utah does not deem this UPL and you should avoid any appearance of having a law office there. *See* ABA Formal Opinion 495 (December 16, 2020).

64. **SUBSEQUENT RETENTION AFTER MEDIATION**

Q: I am a solo practitioner in a small town. Last year, I mediated a dispute between two neighbors over maintenance of an overgrown oleander. Now, one of the neighbors is starting a business selling extra-wide shoes over the Internet, and she wants to retain me to draw up business formation documents. Am I allowed to represent her?

A: Yes. You are prohibited only from representing a party in connection with a matter in which you participated personally and substantially as a mediator. This representation involves a different matter, so you do not have a conflict of interest. See ER 1.12(a).*

65. **DIMINISHED CAPACITY CLIENTS**

Q. My elderly estate planning client seems to be showing signs of dementia. She doesn't remember our conversations, and she once became confused during a meeting and forgot she was in my office. She lives alone, but she has a son who lives a few miles away. Can I contact the client's son to express my concerns?

A. Under certain circumstances, you can take protective action when a client with diminished capacity is at substantial risk of harm and cannot act in her own interest. Protective action can include consulting with a family member, if you believe that family member will act in the client's best interests. This is a difficult issue to navigate, so read ER 1.14 and contact the Ethics Hotline for further guidance.

***See also* the new ARFLP Rule 37 Amendment.** Substitution of Parties: Death, Incompetency, Incapacity, and Transfer of Interest. Effective January 1, 2021.

> (b) Incompetency or Incapacity. If a party becomes incompetent or incapacitated, the court may—on motion or on stipulation of the parties and the incompetent or incapacitated party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent or incapacitated party's representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

66. CONFLICTS OF INTEREST WITH FORMER COLLEAGUES

Q: My former colleague left our firm to work for a competitor firm. While associated with our firm, this former colleague represented Husband in divorce from First Wife. Now, years later, Second Wife seeks to retain me to represent her in her divorce from Husband. Can I represent Second Wife, even though Husband is a former client of our firm?

A: Yes, as long as no lawyer in your firm possesses any information about Husband protected by ERs 1.6 and 1.9 c. See amended ER 1.10(b) and cmt. 5, which clarifies the mechanism for determining if the firm is in possession of protected information for conflict purposes.

67. Q: What is my ethical duty with respect to metadata embedded in electronic communications I send for client matters?

A: A lawyer has a duty to use software to scrub metadata, to avoid disclosure of confidential or privileged information. See new Ethics Advisory Committee EO-20-0008.

TECHNOLOGY AND CYBER SPACE TIPS

68. CYBER CRIMINALS LOVE LAW FIRMS; INSURANCE IS AN OPTION

Working remotely has created even more opportunities for criminals. The top vulnerabilities stem from unsecured work stations and data transmissions, personal devices, and not consistently enforcing the policies that keep your practice secure. Consider getting a cyber health checkup and obtaining cyber insurance.

69. VIRTUAL ASSISTANTS ARE NOT BOUND BY CONFIDENTIALITY

Alexa and all those other voice-activated devices in your home office are always listening and pose a risk to attorney-client confidentiality. At a recent Association of Professional Responsibility Lawyers conference, speakers noted that voice-prompted smart devices are on and listening **ALL OF THE TIME**. True, they may represent a low-level security risk for confidentiality breaches, but at a minimum, they ***must be turned completely off*** if it is within shouting range of where you are working. Because it is always "listening", it is not permitted to have such a device within range when you are speaking on the phone or zoom meeting or whatever. A quick check is to just shout to your device while you are on your call. If she responds, you are in trouble. Experts recommend unplugging them when they're not being used.

70. **ENDING VICIOUS SLANDER CYCLES**

Google's searching for a way to end a vicious slander cycle that works like this: Web sites solicit unverified complaints about supposed cheaters, sexual predators and scammers. Then anonymous posts appear high in Google results for the names of those targeted on sites like BadGirlReport or PredatorsAlert. They or their middlemen oblige victims to pay thousands to delete the posts. Now, Google's changing its algorithm to prevent such sites from appearing in the results when someone searches for a person's name. Victims whose nude photos were posted without consent also can request that Google suppress explicit results for their name.

71. **ADVISE YOUR CLIENTS RE: CYBER SECURITY CONCERNS. HERE ARE SOME TIPS:**

a. **Smart/Internet-Enabled Devices.** Let them know to take precautions to ensure the security of your smart, or internet-enabled devices, computers, vehicles, phones, Ring doorbell/cameras, garage door openers, and even household lighting.

b. **Removing Malicious Software.** There are several programs out there that can remove this kind of malicious software; one such program is Spybot Search and Destroy.

c. **Recording Calls.** Smartphones allow someone to record conversations with third parties, even though such a practice may be illegal.

d. **Disable Drop-Ins and Change Passwords.** On Alexa (and presumably other smart devices), there are options for "drop-in". If those functions are enabled, you can say "Alexa, drop in on the kids' room" and the webcam and/or smart speaker will start listening or viewing those rooms. Now imagine that you and your spouse have not been living together for a long time and if you have not changed the passwords, your spouse still has the ability to spy on you or your kids from anywhere in the world, at any time. This has created virtual stalking issues. Clients should disable any of the drop in options if the account or passwords were accessible by their spouse. When they were set up, the client was given a password. When going through a separation/dissolution, people forget about these. They may have been set up YEARS ago. Change all passwords on everything.

e. **Stop An Ex From Stalking Through Your Phone.** In your iPhone, there is a thing called iPhone Photo "Locations" in your photos. This shows where you took pictures, where you were, etc. You can disable this. You need user names and passwords. Same thing when you are trying to mine

data from someone's phone, they might say that they were at one place, but photos tell you that they were actually someplace else. These are pretty well protected by Apple. In order for you to see things you would have to have the owner's device, open it and data-mine from there. There is also something on Apple products called Significant Location Data: it is generally set to let it collect information from your device automatically. You are able to turn that off within your settings, but they do not make it easy to find.

f. **Clients should get their own Apple ID for themselves and their children.** Each person, including the kids, should have their own Apple ID. If a parent or a spouse has the Apple ID or password of their spouse or child, they have access to almost everything. When changing passwords, make sure that they have your own Apple ID and that no one else has access to it. The same thing with the children. A parent could actually log in as a child and obtain information that way. Be certain as to how the child's Apple ID is being utilized. Another consideration for having your own Apple ID is this - when your client tries to separate their phone service, if their spouse is primary on the account, they may not want to "release" the phone, Apple ID or even the number to you, even if it has been your number for years. A court order may be required.

72. **VIDEO-CHATS WITH LAWYERS.** A new website is trying to make the prospect of hiring a lawyer less intimidating for consumers. Potential clients at Pro Help Legal can video-chat with attorneys in their state with clear disclosure of pricing in advance. Consumers share their legal issue and location and are matched with possible lawyers. If a selected lawyer happens to be online, the client can connect instantly - for $7.99 plus any fee the attorney charges. Attorneys and clients may extend the consult beyond the initial 15 minutes, but that happens off the platform.

THE ALL THINGS EGG SECTION

IN CASE YOU WERE GETTING BORED
Compliments of Tim Eigo

STINKY EGG

The Lemonade insurance app powered by artificial intelligence tweeted that it analyzes videos of customers and gathers 100x the data points traditional insurers use. The info shapes customer profiles, predicts behavior and red-flags possible fraud. Immune to its own creepiness, Lemonade boasted that its 1M customers' details translate into billions of data points to feed its ever-growing AI. Lemonade was forced to fend off bias and discrimination accusations and send assurances its AI doesn't use physical features to deny claims. Thanks Tim Eigo!

SECOND STINKY EGG– OR AT LEAST AN UNSETTLING ONE
Compliments of Tim Eigo

A backseat driver was awarded $5.2M after catching STD in a car- after having car sex with the insured, who gave her the STD. There are no boundaries these days!

THIRD STINKY EGG
Compliments of Tim Eigo

A medical school in Japan admitted it had made entrance tests more difficult for women, but insisted it was not discrimination. Get this: Administrators claim that because women are more mature than men of the same age and better at communicating, women have an unfair advantage. Therefore, they argue the scheme didn't stack the deck, but evened the playing field.

AROMATIC EGGS

A growing number of world leaders are advocating for a new international crime - environmental destruction, aka ecocide. They say widespread ecological disasters pose a major threat to humanity and should be criminalized in the International Criminal Court. Such a step, which faces a long road of global debate, would mean political leaders and corporate executives could face imprisonment for ecocidal acts. Advocates say decades of deforestation, oil and mineral extraction, and other enterprises have created ecological disasters, but the ICC can't currently hold corporations or governments accountable. Meanwhile, the Pope's on board, proposing making environmental destruction a sin.

On a related note: The Dutch Supreme Court has ruled people have fundamental rights to protection from climate change, and government must take urgent action to

protect them. The ruling stems from an environmental group's lawsuit – the first to use human rights law to force governments to cut greenhouse gas emissions. The court based its ruling in part on the European Convention on Human Rights – which binds 47 nations. So residents of those countries could use the Dutch ruling to sue their own – increasingly likely as people globally warm up to the climate change fight. ***Again, thanks for this from Tim Eigo.***

In line with this a similar suit was filed in Florida. Lake Mary Jane sued to protect itself from development that would wipe out its wetlands. In an effort to protect herself, Mary Jane is suing. The lake has filed a case in Florida state court, together with Lake Hart, the Crosby Island Marsh, and two boggy streams. According to legal papers submitted in February, the development would "adversely impact the lakes and marsh who are parties to this action," causing injuries that are "concrete, distinct, and palpable." Lake Mary Jane's case is a first in America. Never has an inanimate slice of nature tried to defend its rights in an American courtroom.

A number of animals have preceded Mary Jane to court, including Happy, an elephant who lives at the Bronx Zoo, and Justice, an Appaloosa cross whose owner, in Oregon, neglected him. There have also been several cases brought by entire species; for instance, the palila, a critically endangered bird, successfully sued Hawaii's Department of Land and Natural Resources for for allowing feral goats to graze on its last remaining bit of habitat. (The palila "wings its way into federal court in its own right," Diarmuid O'Scannlain, a judge on the U.S. Court of Appeals for the Ninth Circuit, wrote in a decision that granted the species relief.)

For the fascinating history behind this, see full article in the New Yorker excerpting from the April 18, 2022 print edition article in the ***American Chronicles*** by by Elizabeth Kolbert: *"Testing the Waters".*

SECOND AROMATIC EGG

Chilean lawmakers are grappling with how to secure people's minds. The South American nation aims to be the world's first to legally protect citizens' neurorights. Lawmakers are expected to pass a constitutional reform blocking technology that affects people's thoughts without their consent. Proponents say advancing tech could threaten the essence of humans and their free will, and countries need to legislate together on the issue. Think they're jumping the gun? Scientists are already playing "Inception" with rats. Thank you Tim Eigo.

LEGISLATION

FULL LEGISLATIVE AND RULE CHANGES UPDATES WILL BE IN JUDGE COHEN'S AND JUDGE SAKALL'S MATERIALS

73. HB2604 amends ARS § 13-3602 (Order of Protection) and ARS § 13-3624 (Emergency Order of Protection) by increasing the duration of each type of protective order. HB2604 increases the duration of any Order of Protection (OP) served on or after the effective date of the legislation to two years. OPs served prior to the effective date will expire one year from date of service. This bill also extends the duration of any Emergency Order of Protection (EOP) to seven calendar days from issuance. Currently, an EOP expires 72 hours from issuance or on the next judicial business day, whichever is longer. Signed 4/22/22.

74. **H2675: ANTI-SEMITISM ; CRIMINAL OFFENSES; DATA COLLECTION** [Previously called: ***Right to Jury; Parent-Child Relationship];*** April 25, 2022 signed by Governor. Chap. 186, Laws 2022

    A party to any hearing for the termination of the parent-child relationship has a right to a trial by jury and that right cannot be arbitrarily denied. The court is required to provide written notice to all parties of the right to a trial by jury. If the court fails to provide notice, any subsequent proceedings or rulings do not have the force of law. If a party believes the party's rights have been violated and files a jury demand with the court within 20 days after court orders were filed, the court is required to set a new hearing before a jury within 20 days after the demand is filed. A party may have the jury reexamine discrete portion of the court's orders without the entire case being relitigated or reexamined. ARS Titles Affected: 8.

75. **S1566. Attorney Discipline. Signed by Governor May 9, 2022**: If the state bar of Arizona does not prevail in the final disposition of an "attorney discipline matter" (defined), the state bar of Arizona and the complainant are responsible to the attorney who is the subject of the charge for any attorney fees, investigation and court costs, any loss of future earnings, and damage to the attorney's reputation.

76. SB1653 revises the definition of "harassment" for purposes of an Injunction Against Harassment, and it also removes a reference to "dating relationship" regarding service fees. Signed 6/7/22.

77. SB1383 with all its new provisions re: legal separation; summary consent petition and decree; temporary orders; spousal maintenance guidelines Signed 6/14/22.

    Numerous changes to statutes relating to dissolution of marriage. Establishes a process to terminate a legal separation and restore the status of the parties to legally married. If the parties reach a comprehensive settlement of all issues before

either party initiates formal dissolution of marriage or legal separation proceedings, the parties are allowed to jointly elect to proceed with the dissolution or legal separation action as a summary consent decree proceeding with a reduced fee. Repeals and replaces statute governing temporary orders relating to possession of property and assets, legal decision-making and parenting time of a child, and other relief deemed necessary.

ON THE HORIZON, BUT NOT SIGNED INTO LAW YET

78. **Revision of the Change of Judge Rule.** This permits an affidavit alleging cause with no right of the court to review or discretion to withhold. This was passed by the House, but failed in the Senate. Stay tuned!

ADMINISTRATIVE ORDERS

RULE CHANGES

New rules re: summary consent decree process

·And pending rule petitions that we won't know if adopted until end of August:

oR-21-0040: Judge Paul McMurdie on behalf of FCIC

§Amend Rule 26(a) to pleadings to be signed by an electronically-executed signature

oR-21-0050: Judge Bruce Cohen

§Amend Rules 34(c) and 76(b) to require consultation in cases where there has been DV, if both parties are represented by counsel

oR-22-0005: Judges McMurdie & Samuel Thumma

§Amend Rules 78 & 91 would require 78(b) language on final judgments on petitions to modify or enforce a judgment

oAmended Petition filed in March 2022

§R-22-0006: Judge Sakall

§Amend Rule 14 to allow for acceptance of driver's licenses & government-issued IDs in lieu of notarization

§Similar to AO 2020-59

§Allows filer to redact protected address or sensitive data

§Would allow clerk to file it as a confidential record

oR-22-0007: Judges Sakall, Cohen & Michael Peterson

§Would amend Rule 77 & adopt Rule 77.1

§Following the lead of other states, it would adopt a voluntary informal family law trial (IFLT) process

§Questioning by judicial officer, rather than cross-examination for parties & lay witnesses

§Expert & CAA reports admitted

§Prompt rulings

oR-22-00015: State Bar

§Amend Rule 76.1 to require the submission of a "Notice of Issues"

oR-22-0014: State Bar

§Would amend Rule 51(a)(2) to correct an incorrect cross-reference

oR-22-0010: State Bar

§Would Amend Rule 76 to require an RMC statement to include a party's position without argument

§Harmonize with Rule 49(c)

79. NOTARY REQUIREMENT FOR LEGAL FILINGS UNDER ARFLP RULE 14.A. SUSPENDED AS OF APRIL 3, 2020– in the works to become permanent.

Only ARFLP 14.a. documents normally need to be notarized. Those include an acceptance of service; affidavit in support of application for default decree; a consent decree under Rule 45 and a stipulation that substantially changes parenting time or legal decision making (unless entered into in open court or through conciliation court). This requirement has been **SUSPENDED.** Now all you have to do is file a protected address copy of a driver's license or other government issued identification card with the signed filing. ***Admin. Order No. 2020-59 issued by the Arizona Supreme Court on April 3, 2020.*** http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-59.pdf?ver=2020-04-03-102602-800&fbclid=IwAR2eYuoDnji4xAZXt5z7JnOK8884duTYDyYzcQIPPRYN9-VcH5dD_5H42O4

[**EDITOR'S TIP:** Just FYI, under ARFLP Rule 14.b., any other rule that requires a verification is satisfied with an Unsworn Declaration.] Here is the form:

I declare under penalty of perjury that everything set forth in this Stipulation is true and correct and agreed to by me.

Dated: ______________________ Dated: ____________________

______________________________ ______________________________

NAME NAME

80. **ARFLP Rule 37 Amendment**. Substitution of Parties: Death, Incompetency, Incapacity, and Transfer of Interest. Effective January 1, 2021.

    (a) [No change]

    (b) Incompetency or Incapacity. If a party becomes incompetent or incapacitated, the court may—on motion or on stipulation of the parties and the incompetent or incapacitated party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent or incapacitated party's representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

    (c) [No change]

81. **ARFLP Rule 44(a)(2)(E) amended effective January 1, 2021.** <u>Establishes that service of process has been effectuated by either</u> (1) attaching a copy of the proof or acceptance of service *on the party in default*, or (ii) if proof *or acceptance of service appears in the court record,* by setting forth in the application the date and manner of service on the party in default.

82. **ARFLP Rule 9(c) Form 17 GOOD FAITH CONSULTATION CERTIFICATION**

83. **RULES OF EVIDENCE, RULE 513: APPLIES PRIVILEGE TO LEGAL PARAPROFESSIONALS AND THEIR CLIENTS**

84. **Licensed Legal Advocates.** This program designed by Emerge was established to license Legal Advocates to represent domestic violence victims. It requires an eight week course of study. This is very different from the Paraprofessional Licensure program, which allows any person, regardless of their degree, to represent someone in any family law proceeding.

85. **Licensed Paraprofessionals.** This Rule allows persons without a law degree to practice in family law. See Appendix.

86. **Summary Legal Consent Decrees.** Summary Consent Decree available in Maricopa County courtesy of the Honorable Bruce Cohen. See Appendix.

87. **Digital Evidence Storage.** A first in the nation, Arizona courts are creating a new digital evidence center to store sensitive documents, virtually. Pima County Superior Court and five others are piloting the program, with plans to roll it out statewide by the end of 2021. Officials say the storage, created by Thomson Reuters, will allow participants to share evidence remotely so everybody has the same version. Arizona's the first state in the country to create the Zoom-friendly digital evidence center. Though it wasn't done as a reaction to the pandemic, the courts say the timing couldn't be better and the system will be better whether courts are virtual or in person. Privacy Advocates have other thoughts.

APPENDIX

1. **Good Faith Consultation Certificate**

2. **Rule 513: Legal Paraprofessional**

3. **AZ ST CJA § 7-210 Legal Paraprofessional**

4. **Disclosure of Client Information pursuant to subpoena**

5. **Request for Ethics Opinion - Negative online reviews**

6. **Maricopa Summary Consent Decree link.**
   https://superiorcourt.maricopa.gov/llrc/drdsc1/. Forms can be used when all of the following apply:

   a. Both spouses want to get a divorce;

   b. Both spouses agree to ALL the terms of the divorce and will work together to complete, sign and file the necessary papers;

   c. You do not have a "covenant" marriage, (these papers will not work for a covenant marriage);

   d. Either spouse has lived in Arizona at least 90 days before you file the forms; or either spouse is a member of the armed forces and has been stationed in Arizona at least 90 days before you file;

   e. If you have minor child(ren), they have resided (lived) in Arizona at least 6 months before you file the forms or you talked to a lawyer who advised you that you could pursue the case in Arizona;

   f. You believe that the marriage is irretrievably broken;

   g. Either spouse has tried to resolve your marital problems through Conciliation Services, or there is no point in trying to resolve your marital problems.

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