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Family Law News

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STATE BAR OF ARIZONA

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FROM THE CHAIR

DAVID N. HOROWITZ

Hi, everyone!

IT SEEMS SURREAL that we are entering another holiday season already. In our business, the holidays are always an interesting time, and the last thing anyone wants to hear from a doctor, lawyer or mechanic is, "*This is interesting.*"

We have seen so many changes and adaptations in our practices and in our lives, and I know that many of us are busier than we have ever been. During this time, we urge everyone to stay as sane as possible and to manage to fit in some vacation time - or at least some time for self-care. In-person holiday celebrations seem to be starting up again, and so all of us on the executive council wish everyone a safe and happy holiday season.

The council is thoroughly engaged in making plans for the 2022 State Bar Convention to be held at the Sheraton Wild Horse Pass Resort in the Phoenix area. We are also working with the courts and other resources to assist in providing information about the new child support guidelines that will take effect in January. We will see significant structural changes and updates to the guidelines as well as a brand

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new statewide child support calculator. The Family Law Section will do everything we can to keep our members updated and informed about these changes.

As always, thank you for your continued support of the section. Please continue to let us know how we may be of service to you and your practice! FL

DAVID N. HOROWITZ, a Certified Family Law Specialist and a Fellow, American Academy of Matrimonial Lawyers with *Warner Angle Hallam Jackson & Formanek PLC*, began practicing in 1990. A summa cum laude graduate of the University of Arizona College of Law in 1990, David has focused his practice in all areas of family law for almost thirty years.

How can the FAMILY LAW EXECUTIVE COUNCIL help you?

The Family Law Executive Council of the State Bar of Arizona is **looking for ways to serve and support our Family Law community**. If you have any suggestions for how we can improve or meet a need within the community, please e-mail Chair **David N. Horowitz** or Newsletter Committee Chair **Annie M. Rolfe**.

Contact David Horowitz: **DHorowitz@WarnerAngle.com** or Newsletter Chair Annie Rolfe: **ARolfe@RolfeFamilyLaw.com**

clash of the titan$

The (Misunderstood) Legacy of Johnson, Van Loan, and Koelsch

To understand the complex and often misunderstood legacy of ***Johnson,***[1] ***Van Loan***,[2] and ***Koelsch***,[3] we should start at **the beginning.**

CALIFORNIA DREAMING - **THE PRECURSOR TO VAN LOAN.** On January 16, 1976, the Supreme Court of California[4] held that "**[p]ension rights**, whether or not vested, **represent a property interest**; [and] to the extent that such rights derive from employment during coverture, they comprise a **community asset** subject to **division in a dissolution** proceeding." *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 126 Cal. Rptr. 633, 637, 544 P.2d 561, 565 (1976).

...*Van Loan I*, which dealt with the division of an unvested military pension. The trial court had previously awarded Wife an interest in Husband's retirement pay based on a fraction.

...the Court of Appeals held that a pension, vested or not, is a property interest subject to division at dissolution.

VAN LOAN I. [5]

On January 20, 1977, the Court of Appeals decided *Van Loan I*, which dealt with the division of an unvested military pension. The trial court had previously awarded Wife an interest in Husband's retirement pay based on a fraction.[7] The numerator was the number of years the parties were married while benefits accrued in the pension and the denominator[8] was the number of years served by husband if and when he received the pension.[9] The sole issue on appeal was whether an unvested, non-contributory pension[10] was divisible community property.

Citing In re Marriage of Brown, supra, the Court of Appeals held that a pension, vested or not, is a property interest subject to division at dissolution. As to the fraction[11] used by the trial court, the Court specifically noted that "[n]o issue has been raised as to the use of this formula and we express no opinion as to its correctness."[12]

JUDD v. JUDD.[13]

On March 29, 1977, California[14] formally coined the phrase "the time rule," and defined the community's interest in a pension plan as "the ratio[15] of the number of months of community service in proportion to the total number of months served."

VAN LOAN II.[16]

On July 22, 1977, the Arizona Supreme Court published the now infamous *Van Loan* decision, which vacated *Van Loan I*. The Supreme Court stated that the issue was not whether or not a pension is vested, but whether the employee spouse's rights in the pension are a property interest purchased with community funds and/or labor.

The Court found that an employee's right to a pension is a contractual right derived from the terms of an employment contract, which cannot be unilaterally modified by the employer. "That there is yet a condition to be fulfilled prior to the maturation of the right to payment of pension benefits does not in any way vitiate[17] the firm and binding nature of the pension terms of the contract."[18] In Arizona, contractual rights are a form of property and to the extent any property right is earned through community effort, it is properly divisible by a court upon dissolution of the marriage.

As to the appropriateness of the fraction[19] used by the trial court, the Supreme Court noted the issue was not properly before it and remarked "we neither condone nor condemn the correctness of the formula used by the trial court."[20] *Van Loan v. Van Loan*, 116 Ariz. 272, 275, 569 P.2d 214, 217 (1977). Thus, contrary to popular belief, the time formula used by the trial court was neither adopted nor approved by either the Court of Appeals or the Arizona Supreme Court.

Justice Holohan, however, dissented, stating the decision by the majority amounts to the confiscation of the appellant's separate property. "It has been the law of this state from statehood that in a divorce action the Superior Court may not divest the parties of their separate property... The formula[21] used by the Superior Court to provide a division of the appellant's military retirement **is fundamentally wrong and results in the loss of the appellant's separate property.**[22]

IN ARIZONA, CONTRACTUAL RIGHTS ARE A FORM OF PROPERTY AND TO THE EXTENT ANY PROPERTY RIGHT IS EARNED THROUGH COMMUNITY EFFORT, IT IS PROPERLY DIVISIBLE BY A COURT UPON DISSOLUTION OF THE MARRIAGE.

PROMOTIONS IN RANK, INCREASES IN PAY FOR LENGTH OF SERVICE, AND OTHER FACTORS NECESSARILY INCREASED THE VALUE OF APPELLANT'S PENSION RIGHTS. THESE INCREASES ARE SEPARATE PROPERTY.

Promotions in rank, increases in pay for length of service, and other factors necessarily increased the value of appellant's pension rights. These increases are separate property. The Superior Court ignored the future increases and arbitrarily fixed appellee's share as a percentage of what appellant would later receive. By this action the trial court divested the appellant of a portion of his retirement which was separate property. The development of a percentage division is a proper method if it is applied correctly. **When the benefits of the retirement are subject to increases because of the efforts of employee after the dissolution of the community, the Superior Court has the duty to establish a formula which does not take from the employee that which is separate property ..... A number of jurisdictions have wrestled with the problems associated with the division of nonvested pension rights. The court has given little guidance to the trial courts of this state, and it certainly did not help the situation by refusing to condemn the patently incorrect formula used by the Superior Court judge in this case. It would have been helpful if this court had suggested or approved some of the methods that have been used in other jurisdictions to solve the problem .....**[23]

The take-away: *Rights to a non-contributory pension, whether vested or not, are divisible community property to the extent the rights were acquired during the marriage.*

NEAL v. NEAL.[24]

In October of 1977, the Arizona Supreme Court acknowledged the inherent problems associated with use of the time equation used by the *Van Loan* trial court. Unlike the pension in *Van Loan*, however, the *Neal* pension had already matured[25] by the time of dissolution. The Court noted, "[s]ince appellant was retired at the time of the decree, we are not faced with the problems alluded to in the *Van Loan* (sic) dissent."[26]

Neal is important because the husband had entered military service five months before he was married, but the trial court had divided the pension equally. The Supreme Court held that a trial court "must recognize the existence of separate property and cannot, *ipse dixit,*[27] change that property into a community asset."[28] Although the Court acknowledged the trial court's use of the *Van Loan* equation, it declined the opportunity to expressly approve or disapprove of that method in this decision.

The take-away: *If a pension is mature at the time of dissolution, it can be divided by the Van Loan because the fraction would not include credit accrued in the benefit post-dissolution. The formula's use to value an unmatured pension may be problematic.*

WOODWARD v. WOODWARD.[29]

In November of 1977, the Court of Appeals declined to adopt a specific method for calculating[30] the community's interest in an unvested military pension. The Court stressed **"there may well be more than one method or formula[31] ...which the trial court can use in making a division of this property. For that reason, we do not purport to announce a rule for the trial court to follow."**[32] The Court, however, did say that Wife's share of Husband's pension must be calculated by reference to a formula in which one of the factors is the "number of retirement credits" represented by the number of months when Husband's "military career and the marriage coincided. The case was remanded back to the trial court with instructions to figure out which equation[33] to use to calculate the community's interest in the pension.

The take-away: *There is no preferred method or formula for dividing an unvested pension. The Van Loan equation was still not an approved method for dividing pensions, let alone THE method for dividing pension.*

IN RE MARRIAGE OF FURIMSKY.[34]

On April 4, 1979, the Arizona Supreme Court reaffirmed that the portion of retirement pay attributable to the effort of the community was deemed community property, but again neither approved nor disapproved of the trial court's use of the *Van Loan* equation.[35]

CZARNECKI v. CZARNECKI.[36]

That same day, the Court of Appeals decided *Czarnecki*; a case in which the trial court used a time formula[37] that did not include as community property the years during the marriage when Husband lived and worked in other "non-community property" states. The Court held that Wife was entitled to one-half of the community interest in Husband's unvested military retirement regardless of where he lived. The case was sent back down for the trial court to calculate Wife's interest in the pension, but again no particular equation was suggested.

TESTER v. TESTER.[38]

Tester was decided on May 18, 1979. This is the case that recognized the community may have equitable liens against a spouse's separate property, but it also

...Arizona Supreme Court reaffirmed that the portion of retirement pay attributable to the effort of the community was deemed community property,...

set forth the procedure for valuing unmatured pension benefits.

[T]here is some community interest in the retirement benefits and the only question is the value of these benefits It is clear that this community interest **must be valued as of the date of dissolution of the community.** Such value should be the actuarial current value of the community interest of the benefits or any other method which reflects the present value of the community interest in the benefits. Once this value is determined, if the community musters sufficient assets to do so, the preferable mode of division is to award the pension rights to the employee and property of equal value to the spouse."[39]

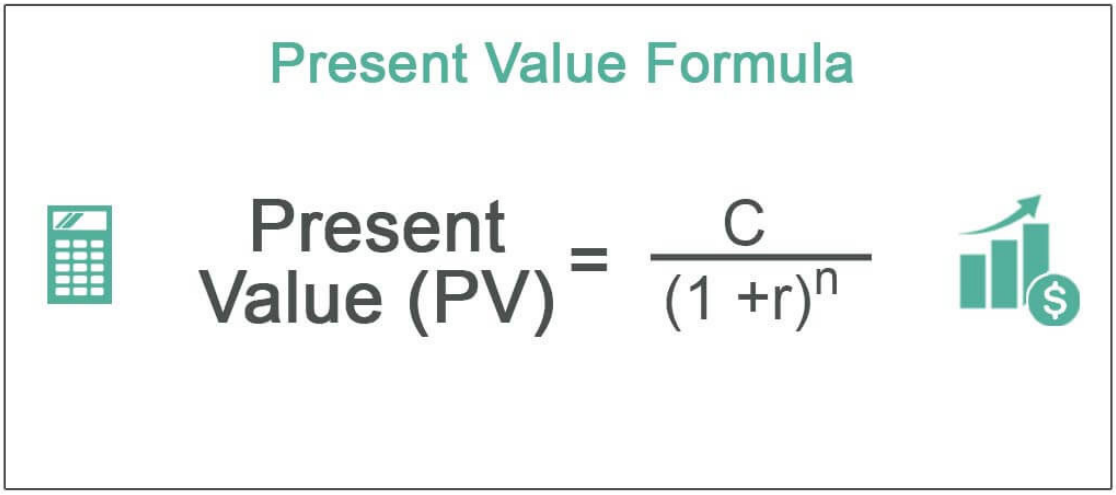
This approach is now known as the present value method for dividing unmatured pensions.

Question: *Does "date of dissolution of the community" refer to the date of service or the date of the decree? The answer is - date of service. Contributions made to a contributory*[40] *pension after the date of service are clearly separate property.*[41]

The take-away:

The present cash value of a pension is not equivalent to the amount of the employee's own contributions. Rather, it is the pension's actuarial value or a method similar thereto.[42]

The preferred method for dividing an unmatured pension is to determine its present cash value, award the pension to the employee spouse, and property of equal value to the non-employee spouse.



The preferred method for dividing an unmatured pension is to determine its present cash value,...

LUNA v. LUNA.[43]

It wasn't until December 27, 1979, that the so-called *Van Loan* formula was officially adopted by the Court of Appeals through what amounts to an off-the-cuff remark in the opinion. The issue on appeal was the divisibility of a military disability pension benefit, which was already in pay status. To resolve that particular issue, the Court first had to determine what portion of the disability pension was community property. To do that, the Court added up the number of months Husband served in the military while married and divided it by the total number of months he'd served. That fractional interest was defined as the community's interest in the benefit.[44]

A NON-EMPLOYEE SPOUSE MAY BE AWARDED THEIR COMMUNITY INTEREST IN THE EMPLOYEE SPOUSE'S PENSION BENEFITS UNDER EITHER OF TWO METHODS. THE FIRST IS CALLED THE "PRESENT CASH VALUE METHOD," THE SECOND, THE "RESERVED JURISDICTION METHOD".

JOHNSON v. JOHNSON.[45]

In December of 1981, in an opinion written by Justice Holohan (the author of the *Van Loan* dissent), the Arizona Supreme Court once again weighed in on the issue of pension valuation. The *Johnson* case is important because it introduces the "reserved jurisdiction method," which also originated out of California.[46] *See In re Marriage of Brown, supra.*

The *Johnson* opinion dealt with a pension that would not mature until 15 years after dissolution.

A non-employee spouse may be awarded his or her community interest in the employee spouse's pension benefits under either of two methods. The first has been called the **"present cash value method,"** in which the court determines the community interest in the pension, figures the present cash value of that interest, and awards half of that amount to the non-employee spouse in a lump sum, usually in the form of equivalent property; the employee thus receives the entire pension right free of community ties.

Under the **"reserved jurisdiction method,"** the court determines the formula for division at the time of the decree[47] but delays the actual division until payments are received, retaining jurisdiction to award the appropriate percentage of each pension payment if, as, and when, it is paid out.[48]

The Court stated a clear preference for the present cash value method because the reserved jurisdiction method requires continued court supervision and keeps the parties financially entangled.

Citing In re Marriage of Judd, supra, the Court determined that under the present cash value method, the

community interest in an unmatured pension is determined by dividing the length of time worked during the marriage by the total length of time worked toward earning the pension.[49] This is the *Van Loan* formula. Inapposite of its directive that the trial court is to determine the appropriate formula when dividing a pension, buried in footnote five of the opinion, the Court adopted the same time formula[50] for the reserved jurisdiction method. Each future pension payment is multiplied by that fraction to determine which portion of the payment is community property. Any time an employee spouse is ordered to pay their former spouse with funds that are only available in the future, the reserved jurisdiction method is implied.[51]

The take-away: *When the reserved jurisdiction method is used to divide an unmatured pension, the non-employee spouse is only paid their fractional interest as and when the employee spouse actually retires.*

Under the reserved jurisdiction method, the jurisdiction reserved by the court ends when the employee spouse retires, not when the pension matures after dissolution.

Above, the non-employee spouse is only paid their fractional interest as and when the employee spouse actually retires...

KOELSCH v. KOELSCH.[52]

Koelsch was decided on January 28, 1986. The opinion consolidated two cases. One with a matured contributory pension at dissolution and the other with a contributory pension that matured six months after dissolution.[53] By the time the opinion was issued, both husbands were working beyond their normal retirement date. The wives each sought immediate payment of their separate property interests. Both trial courts applied what the Arizona Supreme Court later referred to as "the so-called *Van Loan* formula"[54] and found that neither wife was entitled to payment until their respective husband actually retired.[55] The cases were consolidated by the Court of Appeals.

COURT OF APPEALS.

As to the pension that matured after dissolution, the Court of Appeals reversed and approved a modified time formula[56] that froze the value of wife's proportional interest in the pension at the time of dissolution despite the fact husband continued to accrue separate property benefits in the plan.[57] As to the already matured pension, the Court of Appeals held that the *Van Loan* formula should be used to calculate Wife's interest at the time of dissolution and that the pension plan administrator should start to pay Wife her share directly despite the fact the Husband was not yet retired.[58]

The trail court figured the community property ... retirement benefit payment by multiplying the amount of the payment by... the number of months enrolled in the pension plan while married is the numerator and the total number of months worked is the denominator.

ARIZONA SUPREME COURT.

The Supreme Court opinion, authored by Justice Holohan, rejected all of the formulas[59] used by the trial courts and the Court of Appeals because they contravened established community property principles, in part, because they both awarded a share of the employee spouse's earnings after dissolution to the non-employee spouse. *Citing* to his own dissent *(love it!)*, Justice Holohan took a chunk out of *Van Loan*:[60]

> The trial court's [*Van Loan*] formula figures the community property interest of the retirement benefit payment by multiplying the amount of the payment by a factor of which the number of months enrolled in the pension plan while married is the numerator and the total number of months worked is the denominator. One-half of that amount is then awarded to the non-employee spouse at the time that it is awarded to the employee spouse. **If the amount of the monthly benefit at retirement is greater than the monthly benefit would have been had the employee spouse retired at the normal retirement date, any increases will be due to separate labors of the employee spouse.** *See Van Loan*, 116 Ariz. at 275-76, 569 P.2d at 217-18 (Holohan, J., dissenting) (arguing that even though the validity of the formula applied by the trial court in that case had not been challenged on appeal, the court should nonetheless reverse the award since it was **fundamental error to award non-employee spouse a percentage of the separate labors of the employee spouse**).[61]

With respect to dividing an unmatured pension, the Court reaffirmed that the *Johnson* opinion controlled. The Court once again expressed its preference for a lump sum buyout of the non-employee spouse's interest in an unmatured pension, but also stated:

> The other method, the "reserved jurisdiction method," provides that the court determines the formula for division at the time of the decree but delays the actual division until payments are received, retaining jurisdiction to award the appropriate percentage of each pension payment if, as, and when, it is paid out. We expressed preference for the lump sum method but approved of the reserved jurisdiction method. **The reserved jurisdiction method is appropriate when the benefit is not matured and not immediately payable**..... If there are insufficient other community assets to offset the pension plan value, and if the employee spouse is unwilling to buy out the interest of the non-employee spouse, there is no alternative in the non-matured pension cases but to reserve jurisdiction to award the pension when it does mature.[62]

THE COURT ONCE AGAIN EXPRESSED ITS PREFERENCE FOR A LUMP SUM BUY-OUT OF THE NON-EMPLOYEE SPOUSE'S INTEREST IN AN UNMATURED PENSION,...

IF A PENSION IS UNMATURED AS OF THE DATE OF DISSOLUTION, *JOHNSON* CONTROLS AND THE PENSION IS DIVIDED BY EITHER THE PRESENT CASH VALUE METHOD OR THE RESERVED JURISDICTION METHOD,...

Since the pensions in the present case were now both mature, the Court found that the reserved jurisdiction method in *Johnson* was inapplicable. It did, however, adopt *Johnson's* present cash value method for valuing mature pensions.

> The community property portion of the [matured and payable] retirement benefit would be calculated by multiplying the lump sum present value of the pension plan [as determined actuarially] at the date of maturity by a fraction in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan **up to the date of dissolution** is the denominator. The non-employee spouse would then be awarded one-half of that amount. This formula assures that only the amount attributable to community effort or to the intrinsic quality of the community asset is divided as community property. **By fixing the percentage of the community property interest as of the date of dissolution and the amount of the benefit as of the date of maturity**, we avoid the problem of dividing the fruits of separate labor that is inherent in the formulas of both the trial court and the court of appeals.[63]

The Court held that if a buy-out of the matured pension was not possible or equitable, the monthly pension amount which would have been paid if the employee spouse had retire is multiplied[64] by a fraction in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan **up to the date of dissolution is the denominator**. Each spouse would receive one-half of the amount.

The fraction used to determine the community's interest in a matured pension is not the *Van Loan* formula.[65] The Court's directive that the denominator excludes any time after the date of dissolution means this formula only applies to pensions that are mature as of the date of dissolution. If a pension is unmatured as of the date of dissolution, *Johnson* controls and the pension is divided by either the present cash value method or the reserved jurisdiction method, which we know from *Johnson* is the *Van Loan* formula.

There is no authority in either *Johnson* or *Koelsch* for a pension that matures post-dissolution to be divided pursuant to *Koelsch*. The non-employee spouse is not entitled to have their interest in the pension increase in value due to the separate property efforts of the employee spouse (*Van Loan*) while simultaneously being paid that very interest pursuant to *Koelsch*. To do so would be "double dipping."[66]

It would seem then, as to a pension that is not mature at dissolution, if a non-employee spouse wants to receive *Koelsch*-type payments when the pension later matures, the pension has to be divided by *Johnson's* reserved jurisdiction method, but the denominator would be limited to the amount of accredited service accrued by dissolution. At that point, the non-employee's

spouse's interest would be fixed and could no longer benefit from the on-going separate property contributions of the employee spouse. (There is no legal authority that supports this opinion.)

The *Koelsch* formula is distinct from *Van Loan* in another way. The *Koelsch* equation identifies the numerator as "the total months married while enrolled in the pension plan." Under the present interpretation of *Van Loan,* however, the numerator is the number of months of "accredited service" earned during the marriage. The difference is subtle, but important. For example, Spouse is hired on June 1st, but does not qualify for and cannot enroll in benefits until October 1st. The *Van Loan* formula includes the months of employment that were prerequisites for Spouse's enrollment in the pension. *Koelsch* only considers the number of months of actual enrollment which reduces the value of the non-employee's interest in a matured pension.[67]

If a contributory pension is mature and payable at the time of dissolution, the method of valuation must be based on the pension's present cash value either through a buy-out, "*Koelsch* payments," or some other method of compensation that is fair and equitable.

The take-away: *If a contributory pension is mature and payable at the time of dissolution, the method of valuation must be based on the pension's present cash value either through a buy-out, "Koelsch payments," or some other method of compensation that is fair and equitable.*

If the pension is not mature at the time of dissolution, it must be divided pursuant to Johnson. Under the reserved jurisdiction method, the non-employee spouse cannot receive payments for their interest in a pension until the employee spouse actually retires.

Dividing a matured pension pursuant to the Van Loan equation, which includes in its denominator benefits accrued after the date of dissolution, is fundamental error.

The Van Loan formula is approved for valuing a unmatured pension through the reserved jurisdiction method. There is no authority for Koeslch-type payments just because an unmatured pension at dissolution later matures.

GOFF v. GOFF.[68]

Goff is a memorandum decision from November of 2009. The case is interes*t*ing because the Court of Appeals clarifies the breadth of the *Koeslch* decision. *Koelsch* states, in part:

> The court of appeals [devised] a formula which would permit [a] spouse to share in the future increases in the pension benefits. This compromise is improper... [because]...it improperly allows the non-employee spouse to share in the post-dissolution separate property earnings of the employee spouse. Since the non-employee spouse cannot legally share in the prospective benefits of the delayed retirement, he or she should not be forced to share in the potential risks of such a venture. The non-employee spouse should not be made to be an involuntary investor in an ex-spouse's pension plan.[69]

The *Goff* decision says this paragraph means Wife cannot be awarded a share in any future increases in Husband's pension benefits *in consideration of her foregoing her present enjoyment of the husband's retirement benefits.*[70] Restated, a trial court cannot waive the non-employee spouse's receipt of her portion of the present cash value in a mature pension in favor of dividing the pension pursuant to the reserved jurisdiction/*Van Loan* equation. This reiterates Justice Holohan's assertion that matured pensions must be valued at dissolution and the use of a time formula[71] that includes service benefits which accrued after dissolution is fundamental error. The non-employee spouse's interest in the present cash value of a mature pension must be calculated at dissolution. Once the value is known, a scheme for payment of that interest by the employee spouse must be devised to include trading assets or a payment plan.

That said, if the parties agree to use an improper time formula[72] such as *Van Loan*, to value a matured pension, that agreement will be enforced.

Both *Kelly* and *Koelsch* involved a community interest division of retirement benefits... in the absence of an express property settlement agreement negotiated by the parties that clearly defined the parameters of such division. Accordingly, the court in each case was free to interpret and apply Arizona family law and equitable principles in determining the community interest in retirement benefits... Here, however, we are presented with a DRO that... memorialized an express property settlement agreement negotiated by the parties that effectively converted what would otherwise be separate property into divisible community property.. [T]rial courts lack the authority to *sua sponte* award one spouse's separate property to another spouse... however, it is well-recognized that parties may convert their separate property into community property by agreement.

The Goff decision says this means Wife cannot be awarded a share in any future increases in Husband's pension benefits in consideration of her foregoing her present enjoyment of the husband's retirement benefits.

By agreeing to use the *Van Loan* formula, "the parties.... effectively precluded the court from applying the general equitable principles governing the division of community interest that would apply under Arizona family law absent agreement."[74]

The take-away: *The application of the Van Loan equation to a mature, contributory pension is fundamental error because it converts separate property into community property. Its use will only be upheld if the parties agreed to it. A trial court cannot sua sponte use the Van Loan formula to divide contributory pension benefits that are mature at dissolution.*

COOPER v. COOPER.[75]

In November of 1990, the Court of Appeals delivered the *Cooper* opinion. The case involved a retirement benefit that did not have a maturity date. Instead the Husband earned service credits (points) in a defined benefit in which he was already vested.

As part of its holding, the Court of Appeals reiterated that *Koelsch* only applies to contributory defined benefit plans[76] that are already mature at the time of dissolution.

We also note Justice Holohan's dissent in *Van Loan v. Van Loan, supra,* cited in *Koelsch*, where he stated that any and all post-dissolution increases are separate property. We believe this blanket statement fails to account for the differences in benefit plans, i.e., defined contribution [*e.g.*, 401(K)] versus defined benefit [*e.g.*, pension], and if applied here would inadvertently overrule *Johnson v. Johnson, supra.*

In a defined contribution plan,[77] there is a specific amount of money assigned to the participant's account at any moment in time and the best estimate of present value is the amount currently credited the employee. *Johnson v. Johnson, supra*. By contrast, in [Husband's non-contributory pension], no account is kept for the employee. The [pension's] present value must be determined according to the amount anticipated to be payable at normal retirement discounted by various factors to reflect risks inherent in awarding the money early. Such a calculation must include the inherent increases in credit value [after the date of dissolution].[78]

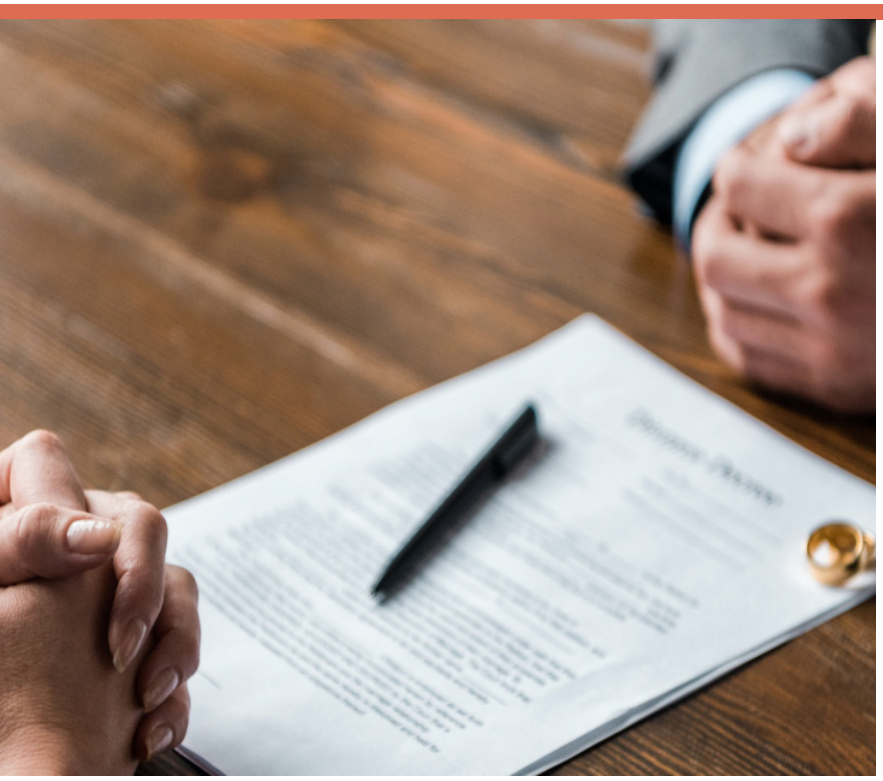
The Court reminded us that *Koelsch* itself held that unmatured pension benefits must be valued pursuant to *Johnson, supra.*[79]

Johnson held that where the employee spouse does not have an immediate right to benefits, there are two methods for awarding the non-employee spouse his or her community interest: the present cash value method... or the reserved jurisdiction method, which determines the community share at dissolution but applies it when the benefit is received. Both methods determine the community share of the pension by employing a time formula from California case law also known as the *Van Loan* formula.[80] The rule states that where the total number of years served by the employee spouse is a substantial factor in computing the benefits... that spouse will receive... the community is entitled to have its share based upon length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits.[81]

By contrast,... no account is kept for the employee. The [pension's] present value must be determined according to the amount anticipated to be payable at normal retirement discounted by various factors to reflect risks inherent in awarding the money early.

This is a detail habitually overlooked in family law practice and reiterates that there is no authority in *Koelsch* for a non-employee spouse to receive payments based on both methods of valuation. **If the *Van Loan* formula is used to value the community's interest in an unmatured pension, the non-employee is not paid their portion of the pension until the employee spouse actually retires and is precluded from also receiving the so-called *Koelsch***

THIS IS A DETAIL HABITUALLY OVERLOOKED IN FAMILY LAW PRACTICE AND REITERATES THAT THERE IS NO AUTHORITY IN KOELSCH FOR A NON-EMPLOYEE SPOUSE TO RECEIVE PAYMENTS BASED ON BOTH METHODS OF VALUATION.



payments when the pension matures post-dissolution even if the employee spouse continues to work beyond normal retirement (unless the parties agree otherwise).

The take-away: *Unmatured, non-contributory pensions are divided pursuant to the reserved jurisdiction method (Van Loan).*

Koelsch only applies to pension benefits that are mature by the date of dissolution.

BONCOSKEY v. BONCOSKEY.[82]

Decided in September of 2007, the Court of Appeals succinctly reiterated that unmatured (contributory) pensions shall be divided pursuant to *Johnson* and "[a]ctual division of pension payments occurs "if, as, and when" the pension is paid out."[83] *Johnson* does not authorize a court to order the employee spouse to begin making monthly payments to the non-employed spouse once the pension matures.[84]

The Court also clarified that the definition of a mature[85] pension is the unconditional right to immediate payment. The employee spouse's early retirement date only gives them the right to conditional retirement benefits in the form of reduced benefits. *Koelsch*, therefore, only applies to a pension that matured on an employee's normal retirement date at the time of dissolution.

QUIJADA v. QUIJADA.[86]

This February 2019 Court of Appeals case dealt with a pension that did not mature until several years after dissolution. The DRO conformed with *Johnson's* reserved jurisdiction method in that Wife could only receive her portion of Husband's pension at the same time and in the same manner payments were made to him. When the pension matured five years later and Husband kept working, Wife sued to receive "*Koelsch* payments" because, she argued, *Koelsch* permitted a post-decree modification of the property agreement.

The Court disagreed finding no authority in *Koelsch* to modify a property allocation made in a consent decree from which no appeal is taken and over which the court did not retain jurisdiction. "When the division of assets is based upon an agreement of the parties, entry of the decree shall thereafter preclude the modification of the terms of the decree and the property settlement agreement, if any, set forth or incorporated by reference."[88]

Citing Johnson, the Court suggested Wife "could have insisted upon a different valuation or distribution method at the time of dissolution - perhaps one whereby she received a *Koelsch*-type offset payment in the event Husband elected not to retire when first eligible, or one specifying the family court would retain jurisdiction to determine proper division upon maturation."[89]

It's unclear what the Court meant by "insisted upon." Pursuant to *Johnson*, a trial court can only value an unmatured pension by either its present cash value or the reserved jurisdiction method. If the reserved jurisdiction method is used, the court delays dividing[90] the pension **until payments are actually received by the employee spouse, thus, the non-employee spouse** can only be paid "if, as, and when, it is paid out" to the employee spouse.

THE COURT ALSO CLARIFIED THAT THE DEFINITION OF A MATURE PENSION IS THE UNCONDITIONAL RIGHT TO IMMEDIATE PAYMENT.

As stated earlier, there is no authority in *Johnson* or *Koelsch* for a court to reserve jurisdiction just until the pension matures and then order "*Koelsch*-type payments" to begin even though the employee spouse does not intend to retire. This is especially true under the facts of this case because the DRO already awarded Wife an interest in the benefits Husband earned post-dissolution. The only way Wife could "insist upon" receiving "*Koelsch*-type payments" is if Husband agreed to it.

The *Quijada* holding is frequently misunderstood as a cautionary tale to lawyers to make sure their clients "opt in" to *Koelsch* payments at the time of dissolution so they can receive both *Koelsch* and *Johnson* (*Van Loan*) benefits. *Koelsch* does not authorize "*Koelsch*-type payments" for a pension that matures after dissolution. *Koelsch* payments are only permitted if a pension is mature at (or perhaps near) the time of the dissolution of the community and the separate property interest of the non-employee spouse cannot be bought out. If a pension is not already mature at the time of dissolution, then *Johnson* is the controlling authority. As explained above, according to *Johnson* itself, the reserved jurisdiction method involves a fraction,[91] the denominator of which includes separate property benefits earned from the date of dissolution until the date of retirement.

That said, the parties can make any agreements they want for dividing a pension, including awarding the non-employee spouse a portion of the employee spouse's separate property interest.

One possible method for calculating the community interest in a pension that matures after the date of dissolution, is to multiply the amount of the monthly pension benefit which would have been paid if the employee spouse retired by a fraction[92] in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan up to the **date of maturity** is the denominator. Each spouse would receive one-half of the amount. Once the interest of the non-employee spouse is known, the court could choose to order *Koelsch*-type payments or implement any other payment scheme that is fair and equitable. There is, however, no legal authority for this approach.

THE PARTIES CAN MAKE ANY AGREEMENTS THEY WANT FOR DIVIDING A PENSION, INCLUDING AWARDING THE NON-EMPLOYEE SPOUSE A PORTION OF THE EMPLOYEE SPOUSE'S SEPARATE PROPERTY INTEREST.

OTHER INTERESTING CASES

LAMBERT v. SHEETS.[93]

In May of 2018, the Court of Appeals addressed the Deferred Retirement Option Plan ("DROP program")[94] associated with PSPRS.[95] At the time of dissolution, Husband's pension benefit was mature and payable and Wife started to receive *Koelsch* payments. A year later, Wife filed to receive a portion of the lump sum settlement Husband would receive from the DROP program. The Court determined that Wife's property interest in the PSPRS benefit would not be used to generate the accumulated interest in Husband's DROP account because she was already receiving her separate and full interest in the pension through Husband's *Koelsch* payments. As such, no part of Wife's separate property was being contributed to the DROP program, therefore, the lump sum payment was Husband's sole and separate property.

BARRON v. BARRON.[96]

In May of 2019, the Arizona Supreme Court held that *Koelsch* does not apply to military retired pay because doing so is prohibited by federal law.

DELINTT v. DELINTT.[97]

In 2020, a trial court ordered the employee spouse to make *Koelsch* payments despite the fact his pension did not mature until seven years after the entry of the decree. The Court of Appeals affirmed the trial court decision only because, at the time of dissolution, the parties had entered into a written agreement to divide the benefit pursuant to the reserved jurisdiction method. Specifically, the decree was silent as to the timing and terms of how Wife was to receive her portion of Husband's pension but reserved the court's jurisdiction to resolve any disputes. Under the reserved jurisdiction method, the division[98] of a pension was deferred until it matured. Once the plan

matured, the court had continuing jurisdiction to divide the benefit at that time. When a pension is mature, the methodology of *Koelsch* applies.

STOCK v. STOCK.[99]

In January of 2021, the Court of Appeals held that if community funds are used to purchase credit in a pension pertaining to a period of employment that predates the marriage, the time purchased is the employee spouse's separate property. The employee must reimburse the community for the funds spent to acquire their separate property, but the time purchased is not converted to community property and is, therefore, not added to the numerator in a time formula. [100]

SUMMARY

Pensions that are mature at the time of dissolution (or shortly thereafter) are valued/divided pursuant to *Koelsch* and not the *Van Loan* equation.

The time formula used to value *Koelsch* payments is not the *Van Loan* formula because the denominator does not include accredited time accrued in the benefit after dissolution.

Pensions that mature after dissolution are valued/divided pursuant to *Johnson*, which under the reserved jurisdiction method approves the use of the *Van Loan* formula.

Koelsch payments and the reserved jurisdiction method, however, are mutually exclusive unless the parties agree otherwise (and why would the employee spouse ever agree to double dipping?).

If you've made it to this point, congratulations! You've suffered through enough bad math[101] humor to last a lifetime. Just one more for the road:

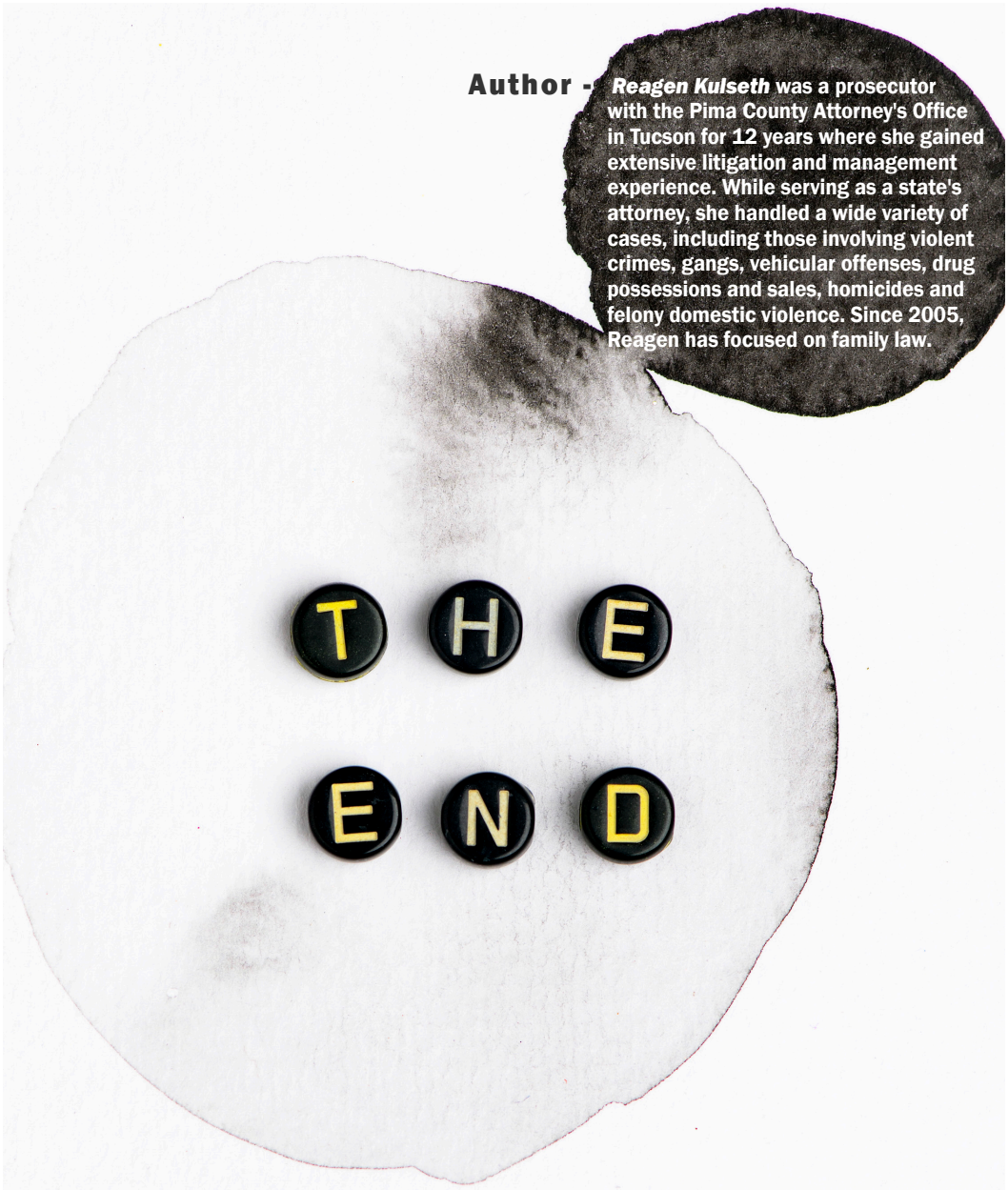
If I throw an isosceles triangle out a car window while traveling at 35 MPH, and wind resistance is actually a thing, how many cupcakes can Alice buy with one human soul?[102] FL

Notes

1. *Johnson v. Johnson*, 125 Ariz. 120, 608 P.2d 57 (Ct. App. 1979).
2. *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977).
3. *Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (1986).
4. All the best things originate from California (*e.g.*, popsicles, skateboards, The Wave, egg McMuffins, pet rocks, martinis, and squeegees); they've got it all.
5. *Van Loan v. Van Loan*, 116 Ariz. 178, 568 P.2d 1076 (Ct. App. 1977) overturned by *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977).
6. "Vested" refers to that portion of a retirement benefit owned by the employee and to which they are entitled if they retired, quit, died, or became disabled. A vested benefit is one the employer cannot forfeit, or take it back, for any reason. A non-vested pension plan is one in which the employee has not yet completed the years of creditable service required in order to qualify for the right to receive benefits under the plan. Most pension plans require members to be employed for a certain number of years before being entitled to pension benefits.
7. What did the Little Mermaid wear to her math class? An Algebra.
8. There's a fine line between being a numerator or a denominator. Tap, tap, tap. Is this mic on? Tap, tap, tap.
9. *Van Loan v. Van Loan*, 116 Ariz. at 178-79.
10. A non-contributory plan is a type of benefit plan that is paid for entirely by the employer using a specific formula to determine the amount of the annual contributions. Participants in the plan are not required to make any payments. Non-contributory pension plans are earned through community labor rather from deductions from the employee's salary or compensation. Carpenter *v.* Carpenter, 150 Ariz. 62, 64, 722 P.2d 230, 232 (1986).
11. Why is getting dumped like algebra? Because you've got an X and you don't know Y.
12. 116 Ariz. 178, 179 n.1, 568 P.2d 1076, 1077.
13. 68 Cal.App.3d 515, 519, 137 Cal.Rptr. 318, 322 (1977).
14. Seriously, what's not to love about California? It gave us Nixon, "Weird Al" Yankovic, the Hillside Strangler, and most of the Kardashians.
15. Five out of four people don't understand fractions.
16. 116 Ariz. 272, 569 P.2d 214 (1977).
17. "To destroy or impair the legal validity of something." Yes, I did have to look it up. #notashamed
18. 116 Ariz. 272, 273-74, 569 P.2d 214, 215-16 (1977).
19. What do you call dudes who love math? Algebros.
20. The Urban Dictionary defines "punt" as the act of getting out of a bad scenario.
21. How does a mathematician plow his corn fields? With a pro-tractor.
22. 116 Ariz. at 276, 569 P.2d at 218 (*internal citations omitted*)(emphasis added).
23. 116 Ariz. 272, 276-277, 569 P.2d 214, 218-219.
24. 116 Ariz. 590, 570 P.2d 758 (1977).
25. A retirement benefit is either mature or not mature. A pension is mature if the employee has an unconditional right to immediate payment. Boncoskey *v.* Boncoskey, 216 Ariz. 448, 449, 167 P.3d 705, 706 (Ct. App. 2007). In the absence of such a right, the benefit is not mature.
26. 116 Ariz. at 593, 570 P.2d at 761.
27. Ipse Dixit - "an unsupported statement that rests solely on the authority of the individual who makes it." Hey, Latin isn't dead. It's just Roman around.
28. 116 Ariz. at 593, 570 P.2d at 761.
29. 117 Ariz. 148, 71 P.2d 294 (Ct. App. 1977).
30. Why was the fraction hesitant to marry the decimal? Because she'd have to convert.
31. Which king loved fractions? Henry the 1/8th.
32. 117 Ariz. at 150, 571 P.2d at 296.
33. What's a butterfly's favorite class? Mothmatics.

34. 122 Ariz. 430, 595 P.2d 662 (1979).
35. Why is it frustrating to argue with a decimal? They always have a point.
36. 123 Ariz. 478, 600 P.2d 1110 (Ct. App. 1978)(Division II) overruled on other grounds, Czarnecki *v.* Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979).
37. Why should you never talk to Pi? Because she goes on forever.
38. 123 Ariz. 41, 597 P.2d 194 (Ct. App. 1979).
39. 123 Ariz. at 45, 597 P.2d at 198 (*internal citations omitted*)(emphasis added). The Court did reference *Van Loan*, but only as the case which held the community has a divisible interest in a spouse's retirement benefits to the extent that the benefits result from employment during the marriage. It did not comment on the appropriateness of the use of the *Van Loan* equation.
40. A contributory defined benefit plan is a type of pension plan that includes regular contributions from both an employer and an employee. In many situations, contributions from the employee are not optional. Contributory pension plans accumulate value from employee salary deductions and employer contributions.
41. Heatherington *v.* Heatherington, 220 Ariz. 16, 20, 202 P.3d 481, 485 (Ct. App. 2008).
42. *See* also Miller *v.* Miller, 140 Ariz. 520, 523, 683 P.2d 319, 322 (Ct. App. 1984) (The present cash value of the community's interest is the actuarial current value..... Expert testimony is necessary to ascertain the present cash value which reflects contingencies including mortality, interest, probability of vesting, and probability of continued employment.)
43. 125 Ariz. 120, 608 P.2d 57 (Ct. App. 1979).
44. Ta-da! The first case in which an appellate court adopted a specific mathematical scheme for calculating the community's interest in a pension is Luna, not *Van Loan*. "Petitioner served in the Air Force 183 months and was married for 177 of those months. 177/183 = 96.7% X 50%/1/2 = 24.2%." Luna *v.* Luna, 125 Ariz. at 125 n.3.
45. 131 Ariz. 38, 638 P.2d 705 (1981).
46. In California, it's illegal for women to drive vehicles while wearing a housecoat. I feel like I should be offended, but...
47. It's within the court's discretion to apply the formula it deems appropriate. Boncoskey *v.* Boncoskey, 2010 Ariz. App. Unpub. LEXIS 880, at *9 (Ct. App. Feb. 11, 2010).
48. 131 Ariz. at 41, 638 P.2d at 708 (emphasis added).
49. 131 Ariz. 38, 41 n.4, 638 P.2d 705, 708 (1981) *citing* In re Marriage of Judd, 68 Cal.App.3d at 522, 137 Cal.Rptr. 318 at 321. Inclusion of accredited service earned post-dissolution is explained in the Judd opinion. An employee's contributions in the early years of employment during the marriage, even though based on a smaller salary, may actually be worth more than contributions during the post-separation years, due to the longer period of accumulated interest and investment income prior to the commencement of benefit payments. Therefore, the years of service during the marriage must be given just as much weight as the years after separation.
50. Why did the little girl always wear glasses during math class? They improve di-vision.
51. Garalczyk *v.* Garalczyk, No. 1 CA-CV 10-0817, 2011 Ariz. App. Unpub. LEXIS 1490, at *15-16 (Ct. App. Dec. 6, 2011)
52. 148 Ariz. 176, 713 P.2d 1234 (1986).
53. The pension that had not quite matured as of the date of dissolution (1981) had been mature for several years as of the 1986 *Koelsch* opinion. The opinion reiterated that the rule for dividing matured and unmatured pension were different, but applied *Koelsch* to the previously unmatured pension presumably because it had matured during the appellate process and the reserved jurisdiction method was no longer applicable. Yet, later memorandum decisions from the Court of Appeals held *Koelsch* also applies to pension benefits that "matured at or soon after dissolution." Knox *v.* Knox, 2014 Ariz. App. Unpub. LEXIS 1331, at *11 (Ct. App. Nov. 12, 2014) (declining to apply *Koelsch* to a pension that would mature in four years). *See* also Pryor *v.* Pryor, 2011 Ariz. App. Unpub. LEXIS 1267, at *13 (Ct. App. Oct. 11, 2011) (holding *Koelsch* applies to benefits that mature fifteen months after dissolution). Although neither opinion can be cited as legal authority, it will be interesting to see what the Court of Appeals does in the future.
54. The Urban Dictionary defines "to speak of with disdain" as 'to be hatin'.
55. 148 Ariz. at 178, 713 P.2d at 1236.
56. What do you call a number that can't keep still? A Roman numeral.
57. The idea was that Husband could continue to work and deprive Wife of her receipt of her interest, but Wife's interest in the ever-increasing future monthly pension benefit would remain unchanged. For example, assume Wife's interest at the time of dissolution was 50% and, if husband retired, his monthly pension benefit would be $1,000. Under the time formula, Wife is entitled to $500 a month. Under the modified time formula, however, if Husband worked an additional ten years beyond his retirement date, thereby increasing his monthly pension benefit to $2,000 upon his actual retirement, Wife would still receive 50% of the increased pension benefit.
58. This is the right way to do it (she says humbly), but it's not permitted by statute. *See* A.R.S. §§ 38-844 & 38-350.
59. What do you call a snake that loves math? A Pi-thon.
60. Why can't 4 get into the nightclub? Because he's 22 (two square(d)).
61.. *Koelsch*, 148 Ariz. at 182, 713 P.2d at 1240 (emphasis added).
62. 148 Ariz. at 183, 713 P.2d at 1241.
63. 148 Ariz. at 184, 713 P.2d at 1242.
64. Why was math class so long? The teacher kept going off on a tangent.
65. The Urban Dictionary defines "poser" as one who gives off the impression that they are one thing when they are really another. Or more commonly, one who, when doing something successfully, takes more than enough credit for it.
66. Don't EVER research the definition of "double dipping" in the Urban Dictionary. My wbrain is still on fire!
67. The Urban Dictionary defines "problematic" as being "extra" for no reason.
68. 2009 Ariz. App. Unpub. LEXIS 816, at *9 (Ct. App. Nov. 19, 2009).
69. *Koelsch v. Koelsch*, 148 Ariz. at 181-82, 713 P.2d at 1239-40 (emphasis added).
70. 2009 Ariz. App. Unpub. LEXIS 816, at *10.
71. What did the triangle say to the circle? "You're pointless."
72. What did the bee say when it solved the math problem? "Hive got it!"
73. 2009 Ariz. App. Unpub. LEXIS 816, at *12-13.
74. *Id.*, at *20
75. 167 Ariz. 482, 808 P.2d 1234 (Ct. App. 1990).
76. Defined benefit plans provide eligible employees guaranteed income for life when they retire. The benefit is paid out as a lump sum, through periodic payments, or a combination of both. The amount of the payment is predetermined by a formula based on the employee's earnings history, tenure of service and age, rather than depending directly on individual investment returns. In these types of funds, the employer pays a fixed benefit to the retired employee without regard to the investment performance of the fund from which the employee is paid. A contributory defined benefit plan is a type of pension plan that includes regular contributions from both an employer and an employee. In many situations, contributions from the employee are not optional. Contributory pension plans accumulate value from employee salary deductions and employer contributions.
77. Defined contribution plans are funded primarily by the employee, but many employers make matching contributions up to a certain amount. In these plans, the employee has their own account within the employer sponsored investment plan. Since investment performance is not predictable, the ultimate value benefit at retirement is undefined. In these types of funds, any matching contribution by the employer to the fund is fixed. Think 401(K) and 457(b) Plans.
78. 167 Ariz. at 489, 808 P.2d at 1241.
79. "Our courts have considered valuation of the non-employee spouse's interest when the benefits are not yet matured, *Johnson v. Johnson*, 131 Ariz. 38, 638 P.2d 705 (1981)...." *Koelsch v. Koelsch*, 148 Ariz. at 180, 713 P.2d at 1238 (1986).
80. The Urban Dictionary defines "Humpf" as every possible curse word to ever exist in one word.
81. 167 Ariz. at 490, 808 P.2d at 1242.
82. 216 Ariz. 448, 167 P.3d 705 (Ct. App. 2007).
83. 216 Ariz. at 452, 167 P.3d at 709.

84. 216 Ariz. at 453, 167 P.3d at 710.
85. The Urban Dictionary defines "mature" as a person who doesn't read their boyfriend's emails and respond for him.
86. 246 Ariz. 217, 437 P.3d 876 (Ct. App. 2019).
87. 246 Ariz. at 221, 437 P.3d at 880.
88. 246 Ariz. at 220, 437 P.3d at 879.
89. 246 Ariz. at 221, 437 P.3d at 880.
90. What do you get when you cross geometry with McDonalds? A plane cheeseburger.
91. Why didn't the math problem go to the bar? Because it didn't want to drink and derive.
92. Why was the math book depressed? It had a lot of problems.
93. No. 1 CA-CV 17-0103 FC, 2018 Ariz. App. Unpub. LEXIS 769, at *5 (Ct. App. May 22, 2018).
94. When a participant in a qualifying pension attains 20 years of service, they can elect to participate in the DROP program instead of receiving their monthly pension benefit under the terms of the employer's defined benefit plan. While in the five-year program, the payment of the monthly pension benefit to which the participant is otherwise entitled is deferred and instead held into an employer sponsored investment plan in an individual account for the employee. During this five-year period, the employee's continued compensation and years of service are not taken into consideration for purposes of the defined benefit plan formula. The employee's account earns interest either at a rate stated in the plan or based on the earnings of the investment itself. At the end of the five years, the deferred pension payments and any market gains therein are paid to the employee in one lump sum. This payment in in addition to the employee's normal pension payments.
95. PSPRS = Arizona Public Safety Personnel Retirement System.
96. 246 Ariz. 449, 440 P.3d 1136 (2019).
97. 248 Ariz. 451, 461 P.3d 471 (Ct. App. 2020).
98. What do you call an empty parrot cage? A polygon.
99. No. 1 CA-CV 20-0015 FC, 2021 Ariz. App. LEXIS 8, at *6-7 (Ct. App. Jan. 21, 2021).
100. Do you know what's odd? Every other number!
101. If John has 32 candy bars and eats 28 of them, what does he have now? Diabetes.
102. Passive-aggressive ode to my elementary school teacher who insisted to nine-year-old me that math story problems would be relevant in my adulthood.



By
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Dealing with a Client-owned Franchise or MLM?

Franchise and multi-level marketing businesses (MLM's) may have unique characteristics that could significantly affect how they are valued. The primary issues are asset ownership and transferability.

Unique Business Valuation Issues to Consider

FRANCHISES

Let's use a hypothetical fast-food franchise as an example. ABC, LLC is a company owned by husband and wife that run three "Up and Down" franchise burger locations in Phoenix. ABC has consistently generated over $400,000 in annual profit over the past several years. Assuming this amount represents the annual economic benefit to the parties, it would be easy to simply capitalize this amount into a value for use in the couple's divorce proceedings. However, this could be a huge mistake.

It's important to read the franchise agreement carefully to determine what ABC actually owns. For example, assume the franchisor, Up and Down, owns the three buildings, all the equipment, furniture, fixtures and signage. These are the underlying assets that generate the $400,000 economic benefit. Furthermore, your research reveals that no bank ever lends money to Up and Down franchisees because there are no assets that can secure a loan. If a business appraiser uses the $400,000 to produce a value for ABC that includes an element of goodwill, who owns that goodwill – ABC or Up and Down?

You then find the franchise agreement prohibits the owners of ABC from transferring their franchises to anyone but Up and Down – and at a very nominal $50,000 amount. The owners of ABC cannot even leave the franchises to their children as part of their estate plan.

Finally, you *see* that the franchise agreement is only one year in duration. ABC must apply for an extension of the agreement annually. Furthermore, Up and Down can terminate the franchise agreement without cause, at any time, with only 30 days written notice to ABC. Up and Down would pay ABC $50,000 in this scenario.

These facts present several inter*esting* valuation issues.

First is ownership. The balance sheet of ABC has little in assets and no debt. Recall it does not own any of the assets used by the restaurants. What it does "own" is a contract with Up and Down to run three locations for a year at a time. The ownership of this contract allows ABC to realize $400,000 in economic benefit each year. What is that contract worth to the marital community?

It's important to read the franchise agreement carefully to determine what is actually owned.

One alternative is to attribute a $400,000 value to the contract (one year's worth of economic benefit).

Another is to apply a traditional capitalization of earnings valuation method. Based on certain assumptions regarding market compensation for the parties and an appropriate capitalization rate, the value for the contract could be over $1 Million.

ASSUMING THE AMOUNT REPRESENTS THE ANNUAL ECONOMIC BENEFIT TO THE PARTIES, IT WOULD BE EASY TO SIMPLY CAPITALIZE THE AMOUNT INTO A VALUE FOR USE IN THE COUPLE'S DIVORCE PROCEEDINGS. HOWEVER, THIS COULD BE A HUGE MISTAKE.

The contract could also be valued at the $50,000 fee Up and Down would pay ABC upon termination. Finally, the contract could be determined to have zero value. If so, then the $400,000 could be used to calculate a generous amount of spousal maintenance for the spouse not retaining the franchise.

While the hypothetical facts in this example seem extreme, they do exist in the real world. It's important to consider the provisions in the franchise agreement and how they affect the approach to value.

MULTI-LEVEL MARKETING BUSINESSES

MLM's (i.e., Herbalife, Tupperware, Avon, Isagenix, Beachbody, Mary Kay, Pampered Chef), are similar to franchise operations in many respects. However, one significant difference is the "pyramid" structure of most MLM's. The same issues of ownership and transferability apply to MLM's.

Let's use a hypothetical MLM as an example. Husband and wife own XYZ, Inc., a company that is part of the "Genexa" MLM. Genexa sells products that promote healthy living such as dietary supplements, aroma therapy items and yoga clothing. To sell Genexa products, XYZ signed up as an advocate, often referred to in the MLM world as a distributor, consultant or coach. When XYZ signed up, husband and wife were assigned an up-line advocate (we'll get into this later). They also received a small start-up kit with sample products, marketing materials and a personalized website/payment portal. XYZ also had to agree to the terms and conditions of Genexa.

Similar to a franchise, it's important to read the MLM agreement to determine the obligations and rights between Genexa and XYZ. Terms and conditions for MLM's are typically found online. Genexa's agreement specifies an annual $150 fee, precludes XYZ from participating in other MLM's, and requires husband and wife to actively participate in marketing/selling activities. Importantly, the agreement allows for the transfer of XYZ's rights and contract upon written consent from Genexa.

Like many MLM's Genexa pays advocates commissions as an independent contractor. XYZ earns commissions (i.e., revenue) from husband and wife's direct sales and their down-line advocate sales. Specifically, XYZ earns 25% of its direct sales (i.e., $25 on a $100 customer purchase) and an additional percentage of its down-line's sales based on Genexa's performance levels (i.e., 2% on level 1, 3% on level 2, 5% on levels 3 and 4, and 6% on levels 5 and 6). Genexa also offers bonuses if XYZ and its down-line advocates meet certain sales thresholds.

While husband and wife are required to sell Genexa products, their primary focus is on developing an active and profitable down-line. When XYZ first started as a Genexa advocate, husband and wife worked more than 40 hours a week to develop their downline. Now they spend only 25 hours per week on sales and down-line training. XYZ has consistently generated over $300,000 in economic benefit to the owners over the past several years. Unfortunately, husband the wife have decided to get a divorce and now need to value XYZ.

In this example, Genexa may allow a transfer to a third party, so XYZ actually has something to sell. Any goodwill value would be the property of XYZ – not Genexa. However, some agreements are more restrictive in that they permit transfers only to family members or an up-line advocate. While such provisions may limit the potential pool of buyers, it does

not negate the fact that XYZ owns an asset that can be transferred.

Another issue to consider is the amount of income being produced by XYZ's down-line advocates. They are free to stop selling Genexa products at any time and for whatever reason. A majority of successful MLM revenues are derived from its down-line. Accordingly, the loss of one or two top producing down-line advocates would have a significant negative affect on XYZ revenue.

Finally, the financial health and stability of Genexa needs to be considered. If Genexa is a relatively young MLM, then the risk of it succeeding in a very crowded market may be high.

These unique MLM issues must be considered when using the asset, income and market approaches to value XYZ.

Our first example provided a scenario where the franchisees didn't own the assets producing the profit. Nor could they transfer or sell their franchise operations. These conditions have a significant impact on value. The MLM example showed that while husband and wife owned something that could be transferred, other issues specific to MLM's may affect value. FL

Unique Business Valuation Issues

During Client-owned Franchise or MLM Divorce

FRANCHISE AND MULTI-LEVEL MARKETING BUSINESSES (MLM'S) MAY HAVE UNIQUE CHARACTERISTICS THAT COULD SIGNIFICANTLY AFFECT HOW THEY ARE VALUED.

How to Find the Value of a Franchise Contract for a Marital Community

1 ONE ALTERNATIVE IS TO attribute a $400,000 value to the contract (one year's worth of economic benefit).

3 ANOTHER IS TO USE the traditional capitalization of earnings valuation method, based on market compensation for the parties and an appropriate capitalization rate... contract's value could be over $1 Million.

5 THE CONTRACT COULD also be valued at the $50,000 fee that the Franchisee would pay upon termination.

7 FINALLY, THE CONTRACT could be determined to have zero value. Then the $400,000 could be used to calculate the amount of spousal maintenance for the spouse not retaining the franchise.

How to Find the Value of a MLM for a Marital Community?

2 MLM PARENT COMPANY may allow a transfer to a third party... so any goodwill value would be the property of the marital community.

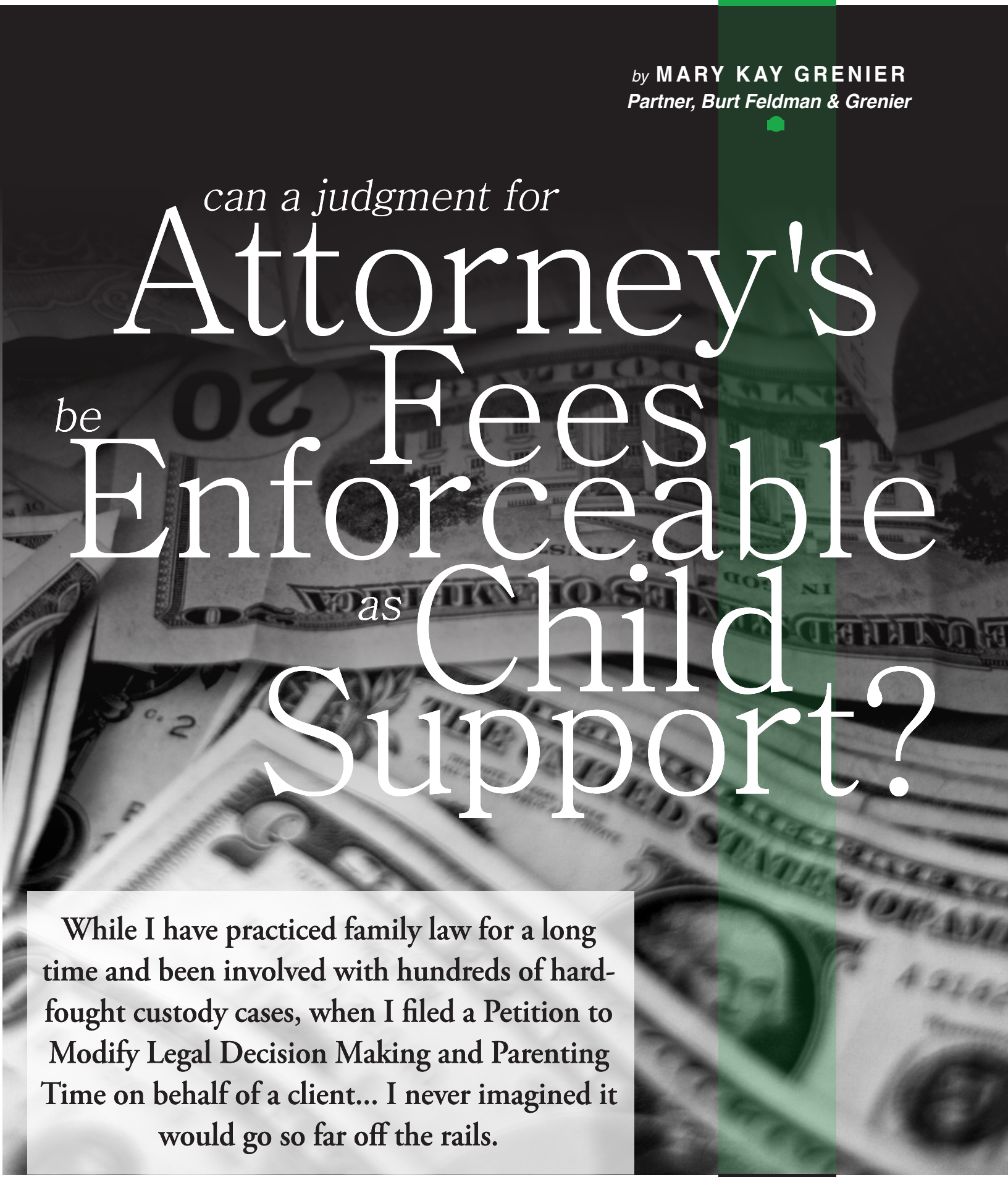
4 ANOTHER ISSUE TO consider is the amount of income being produced by down-line advocates. The loss of one or two top producing down-line advocates would have a significant negative affect on revenue.

6 THE FINANCIAL HEALTH and stability needs to be considered. As a young MLM, the risk of success could be high in a crowded market.

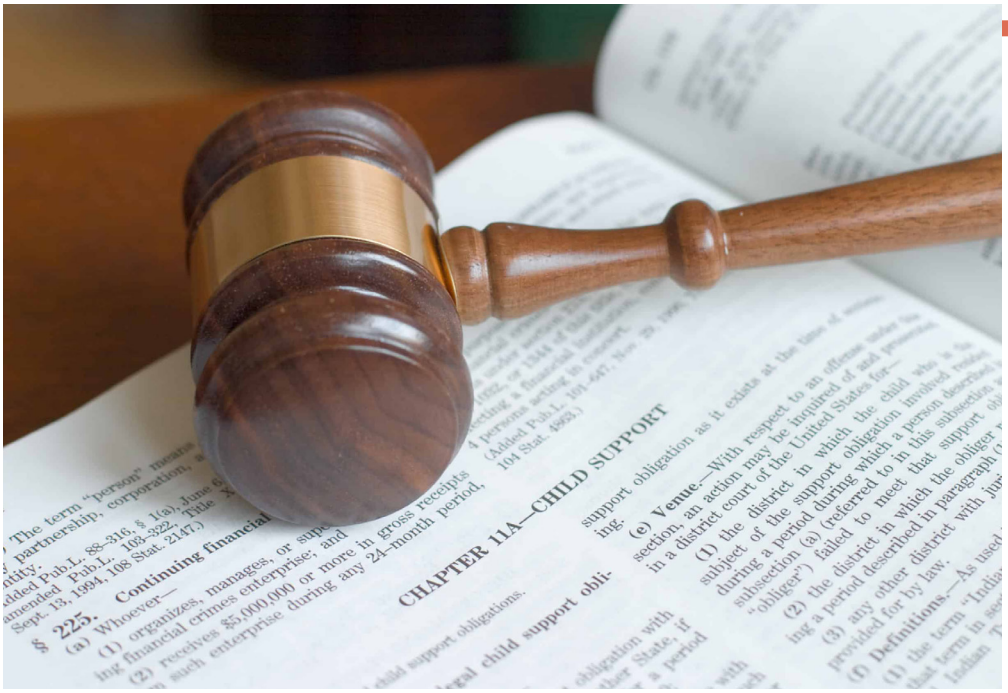
8 FINALLY, THE UNIQUE issues of a MLM business must be considered when using the asset, income and market approaches when looking for value.

by **MARY KAY GRENIER**
Partner, Burt Feldman & Grenier

can a judgment for Attorney's Fees *be* Enforceable *as* Child Support?



While I have practiced family law for a long time and been involved with hundreds of hard-fought custody cases, when I filed a Petition to Modify Legal Decision Making and Parenting Time on behalf of a client... I never imagined it would go so far off the rails.



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... at the end of the day, my client won an enforceable judgment for the efforts made to protect the child.

If you have ever taken a highly contested legal decision-making case to trial, you already know it comes at an alarmingly high cost and can be months or years of arduous fighting in the making. While I have practiced family law for a long time and been involved with hundreds of hard-fought custody cases, when I filed a Petition to Modify Legal Decision Making and Parenting Time on behalf of a client a while back, however, I never imagined it would go so far off the rails. What started in Family Court lead us to Bankruptcy Court before returning back to Family Court. The fact that my client prevailed aside, the aftermath of the case and what I learned along the way is as inter*esting* and educational as the litigation itself.

It began with a three-day trial in Family Court, where my client was awarded a substantial sum in attorney's fees and costs. There was no smoking gun that made this award obvious: we proved my client's former spouse had been surreptitiously and systematically poisoning the child's relationship with my client over a long period of time. Fortunately, the Court agreed it must stop.

Nevertheless, the award of fees came as a surprise. While my client certainly deserved it and the facts were clearly in favor of the award, attorney's fees are so elusive in this practice, particularly post-decree, that I really expected very little for my client. But, at the end of the day, my client won an enforceable judgment for the efforts made to protect the child.

Over the course of the next three years, the other parent tried to have the fee award discharged by filing bankruptcy in federal district court and in doing so, engaged in an inexplicable expenditure of attorneys' fees. Thankfully, that parent encountered an unapologetic and intolerant federal district court judge as well as my client's formidable defense against the effort to discharge the fee awards. **The fee award was found to be in "the nature of a domestic support obligation" because the underlying litigation involved child custody and parenting time. It was also considered non-dischargeable as a matter of law.** So, my client prevailed. But to get to this point, however, my client was forced to expend thousands to defend against the failed discharge and had yet another enormous legal bill.

...the parent encountered an unapologetic and intolerant federal district court judge as well as a formidable defense against the effort to discharge the fee awards.

One would think my client's attempt to collect fees for the costs incurred to defend the discharge at the federal level would be a slam dunk. Wrong.

Naturally, given the enormous costs to thwart the discharge, my client - as the prevailing party - filed to recover fees at the federal level. But the district court judge denied the motion for fees, stating he had no authority to make such an award "in the federal building." However, he mentioned my client was welcome to "walk across the hall" to state court and try to recover his bankruptcy fees there.

So, that is exactly what we d*id.* It turns out **Arizona caselaw supports recovery of attorney's fees and costs in state court incurred in federal court.**

> The appellate court said that a bankruptcy court should not provide a safe harbor from the operation of [an attorneys' fees statute] when a party has filed for bankruptcy as a strategic defense to a state court claim

> ...my client... filed to recover fees at the federal level. But the district court judge denied the motion... stating he had no authority to make such an award.

> ...we were unsuccessful in federal court,... we then argued before the family court that the other parent's grand scheme and sole objective in the bankruptcy proceeding was to prevent my client from recovering the attorneys' fees and costs...

When your client is awarded fees and costs in the context of maintaining or defending legal decision-making and/or parenting time, those fees are likely *deemed to be* in the nature of a *domestic support obligation* and *non-dischargeable in bankruptcy*

In *Zeagler v. Buckley*, 223 Ariz. 37, 219 P.3d 247 (App. 2009), the Arizona Court of Appeals addressed whether a state court can issue a judgment for attorneys' fees and costs incurred in a federal bankruptcy proceeding when that bankruptcy proceeding is related to a state court action in which the fee award is sought. Essentially the Court of Appeals found when claims are sufficiently similar there is no reasonable basis for a state court to deny recovery of legal fees incurred in federal court (if other relevant facts exist). The appellate court said that a bankruptcy court should not provide a safe harbor from the operation of [an attorneys' fees statute] when a party has filed for bankruptcy as a strategic defense to a state court claim. *Id.* at 39-40, 219 P.3d 249-50.

In my client's case, once we were unsuccessful in federal court, we argued before the family court that the other parent's grand scheme and sole objective in the parallel bankruptcy proceeding was to prevent my client from recovering the attorneys' fees and costs that were specifically awarded based upon unreasonable conduct in the child custody and parenting time matter.

The family court judge agreed and permitted me to file an application for fees and costs. My client was awarded another significant amount through the family court for the fees incurred to defend the othe parent's attempt to discharge the fee award through bankruptcy in federal court.

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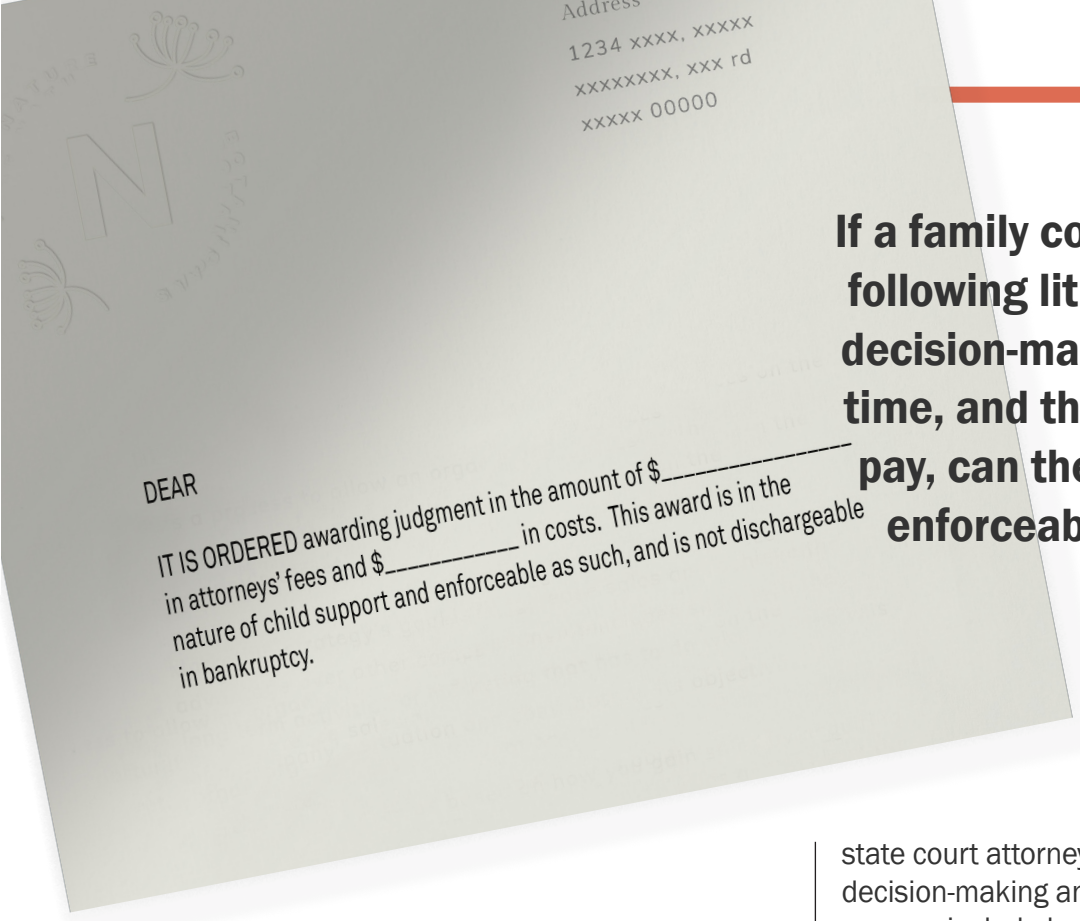
The first take away from all this is the following: When your client is awarded fees and costs in the context of maintaining or defending legal decision-making and/or parenting time, those fees are likely deemed to be in the nature of a domestic support obligation and thus non-dischargeable in bankruptcy.[1] The obvious reasoning is that the unreasonable or wealthier parent is forcing the other parent to spend money on litigation rather than on the child or children. (My client was the wealthier of the two parents here, so you can draw your own conclusions about the unreasonableness of the other parent).

The second take away is that if an opposing party, through bankruptcy, attempts to discharge an attorney's fees award granted in connection with maintaining or defending legal decision-making or parenting time, any such effort should be swiftly brought to the attention of the federal district court judge to determine if the fee award can be removed from the bankruptcy petition. Your client may also be able to recover fees incurred in connection with that bankruptcy, but it appears that must be done at the state court level.

But all of this discussion leads to this ultimate question: If a family court grants a fee award to your client following litigation involving legal decision-making and/or parenting time, and the other party does not pay, can the unpaid judgment be enforceable as child



If a family court grants a fee award following litigation involving legal decision-making and/or parenting time, and the other party does not pay, can the unpaid judgment be enforceable as child support?

support? If the award is deemed to be "in the nature of support" at the federal level and therefore is not dischargeable in bankruptcy, shouldn't it be deemed in the nature of support at the state court level for purposes of ease of collection on the judgment? As practitioners, would it even be legal (or enforceable) to include language in your Proposed Order (that accompanies a China Doll affidavit of fees and costs) that states:

"IT IS ORDERED awarding judgment in the amount of $_____ in attorneys' fees and $_____ in costs. This award is in the nature of child support and enforceable as such, and is not dischargeable in bankruptcy."?

It is certainly worth exploring the question of what language can be included in the judgment for a state court attorneys' fee award involving legal decision-making and/or parenting time? Certainly you can include language that the award is not dischargeable in bankruptcy. But can the judgment also include language that the award is "in the nature of support" and that it is "enforceable as child support" through family court? If so, then a judgment for fees that remains unpaid on the due date can be treated like any other unpaid child support/arrears and should be subject to all support enforcement remedies. This way, the non-paying party can be ordered to pay a monthly payment by income withholding order or a purge payment and s/he can even be ordered to attend Support Enforcement Court in order to collect on the judgment.

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Who knows? It might save you and your client a trip to Bankruptcy Court. FL

NOTES

1. Specifically, the bankruptcy court concluded that the fee awards were: (a) determined as in the nature of support under Section 101(14A); (b) entitled to priority under Section 507(A)(1); and (c) non-dischargeable under Section 523(a)(5).

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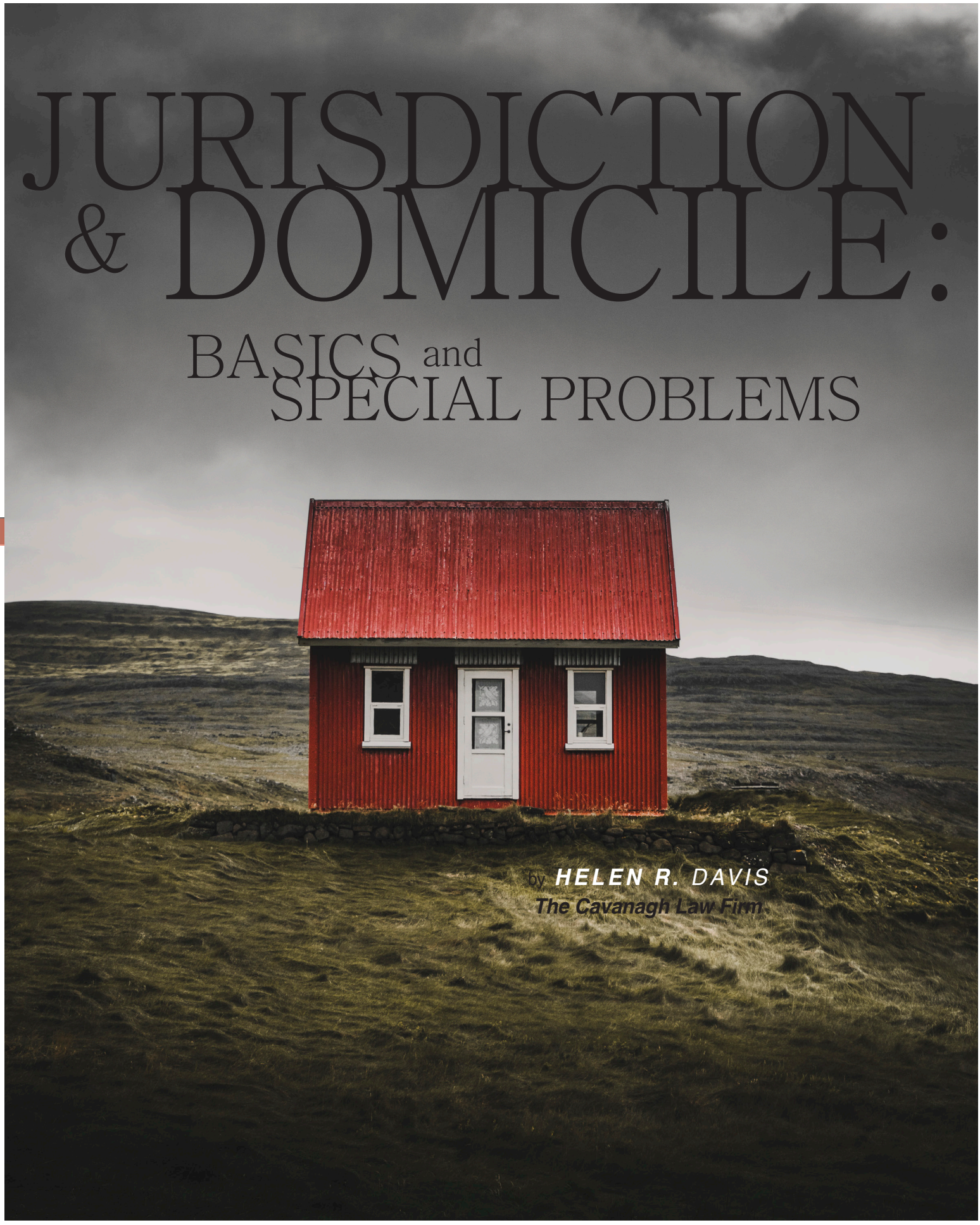
JURISDICTION & DOMICILE: BASICS and SPECIAL PROBLEMS



by **HELEN R. DAVIS**
The Cavanagh Law Firm

On any given day, a family law lawyer may be confronted with issues that raise questions about jurisdiction.

When faced with any jurisdiction scenario, does your mind immediately begin to run through an analysis of whether Arizona has jurisdiction? It should.

ON ANY GIVEN DAY, a family law lawyer may be confronted with issues that raise questions about jurisdiction. For example, a client comes into your office and asks you to file a divorce action in Arizona. The potential client has a traditional marriage (man and woman), has lived in more than one state over the past months and has a child.

...multiple different jurisdictional questions exist regarding the state that has jurisdiction to divorce the couple, to divide the property and debt, to award child support or to award spousal support.

On the other hand, you may see a potential client who registered a domestic partnership or union in multiple states before the *Obergefell* decision, may or may not have then married his or her partner, and has children that were adopted by one or both spouses - or were not adopted by one of the spouses. Or, what if you meet with a person who is a citizen of a foreign country, whose spouse lives in Arizona, and who has returned to that foreign country with the couples' children? When faced with any of these - or dozens of other - scenarios does your mind immediately begin to run through an analysis of whether Arizona has jurisdiction? It should.

In any of the foregoing factual snippets, multiple different jurisdictional questions exist regarding the state that has jurisdiction to divorce the couple, to divide the property and debt, to award child support or to award spousal support. The answers to those questions are informed by multiple laws in, potentially, more than one state or country.

A. The Basics

1. You Should Already Know This

ANY ARTICLE ABOUT JURISDICTION would be incomplete without a warning that if you are planning to challenge a court's jurisdiction, you should not enter a general appearance. That is, do not file a notice of appearance, do not request any relief, as doing so is construed as a consent to jurisdiction. *See Davis v. Davis*, 230 Ariz. 333, 336, ¶18, 284 P.3d 23, 26 (App. 2012) ("a party may affirmatively state his consent or take such steps or seek such relief that manifest his submission to the court's jurisdiction over his person"); *Tarr v. Superior Court*, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984) ("any act by which the defendant comes before the court and recognizes the case as pending, with the exception of a special appearance to contest jurisdiction over his person, will constitute a general appearance and subject him to the jurisdiction of the court").

2. Getting a Divorce

IN ARIZONA, ONE OF THE PARTIES must have established domicile for at least 90 days before filing the divorce petition. *See* A.R.S. § 25-312(1). It is not uncommon for litigants who live in states with more stringent pre-filing domicile/residency requirements to forum shop for jurisdictions among multiple states when trying to file for divorce. Nor is it unusual for spouses who have lived in multiple states or who maintain second homes in Arizona to compare the laws of the two states in an effort to improve their outcomes with respect to any number of issues by selecting the more favorable jurisdiction. While this practice can be limited by the application of uniform laws governing jurisdiction when issues involving children exist, not all parties have minor children.

The pre-filing domicile/residency requirements vary greatly by state. For example, some states have no minimum pre-filing domicile/residence requirement, *e.g.*, Alaska and Georgia; and others require one year, *e.g.*, Nebraska and South Carolina. Only two states, California and Hawaii, expressly reference same-sex unions. Included with this article at **Exhibit A** is a *Survey of the Domicile/ Residency Requirements to File a Petition for Dissolution in the 50 States and District of Columbia.* The Survey includes the pre-filing time requirements for filing a divorce petition along with a citation to the applicable authority, which is typically a statute.[1]

It is not uncommon for litigants who live in states with more stringent requirements to forum shop for jurisdictions.

3. Uniform Laws

THE PURPOSE OF UNIFORM ACTS WAS, generally, to create consistency in proceedings and avoiding disputes related to a court's authority to enter its orders. *See, e.g., Angel B. v. Vanessa J.*, 234 Ariz. 69, 72, ¶¶7 and 8, 316 P.3d 1257, 1260 (App. 2014). While you are

surely aware of the uniform acts that apply to custody and support, you are reminded of them below:

a. Adjudicating the Care and Control of Children

Arizona has adopted the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") at A.R.S. § 25-1001 *et seq.* Most states, the District of Columbia, Guam and the United States Virgin Islands have adopted the UCCJEA. Only Massachusetts and Puerto Rico have not done so. Attached as **Exhibit B** to this article is a table that summarizes the adoption of the UCCJEA state-by-state along with date of adoption and statutory citation.

In addition to the UCCJEA, "[t]he federal Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A, was enacted to 'provide for nationwide enforcement of custody orders made in accordance with the terms of (interstate jurisdictional statutes),' to discourage interstate forum shopping in child custody cases, and, like the (interstate jurisdictional statutes), to discourage parental kidnapping of children." *J.D.S. v. Franks*, 182 Ariz. 81, 88, 893 P.2d 732, 739 (1995). The federal government was seeking uniformity in custody litigation and "the principal problem Congress was seeking to remedy with the PKPA was the inapplicability of full faith and credit requirements to custody determinations." *Id., citing Thompson v. Thompson*, 484 U.S. 174, 181 (1988). The PKPA requires that Arizona give full faith and credit to another state's order if that state had jurisdiction to enter the order. *J.D.S.*, 182 Ariz. at 88. Importantly, it is not required that a state comply with the PKPA to exercise initial jurisdiction; "[h]owever, a state must comply with the PKPA if it wishes other states to give full faith and credit to its custody decrees." *Id.*

The ICPC is primarily procedural, providing a system of coordination among states when a child born in one state is placed for adoption in another state.

Interstate Compact for the Placement of Children ("ICPC")... has been adopted by all 50 states, "establishes a uniform system for placement of children in adoptive homes."

Another uniform law applicable to adoption cases is the Interstate Compact for the Placement of Children ("ICPC"). The ICPC, which has been adopted by all 50 states, "establishes a uniform system for placement of children in adoptive homes." *Id.* at 89. "[T]he purpose of the ICPC is to foster cooperation among the states in the placement of children and to promote 'appropriate jurisdictional arrangements for the care of children.'" *Id.* "The ICPC is primarily procedural, providing a system of coordination among states when a child born in one state is placed for adoption in another state." *Id.* In Arizona, the ICPC is codified at A.R.S. § 8-548 *et seq*.

b. Awarding Support

Arizona has adopted the Uniform Interstate Family Support Act ("UIFSA") at A.R.S. § 25-1201 *et seq*. Every state has adopted some version of the UIFSA.

In addition, the federal government has adopted the Full Faith and Credit for Child Support Orders Act ("FFCCSOA"), 28 U.S.C.A. § 1738B. UIFSA and FFCCSOA are similar and have like goals. *See Bowman v. Bowman*, 917 N.Y.S.2d 379, 381 (2011).

Jurisdiction for purposes of divorcing a couple raises the distinction, in some states, of residency versus domicile. No divorce can be granted without domicile in that state.

Congress required the states to adopt UIFSA "to alleviate the confusion engendered by multiple child support orders from different jurisdictions ... [and] is addressed to the courts' subject matter jurisdiction to entertain support proceedings where there is more than one state involved." *Id.* (citations omitted). Whereas, "FFCCSOA 'requires that all child support orders be given full faith and credit and precludes out-of-[s]tate modifications of such orders by establishing jurisdictional rules whereby [s]tates are to refrain from modifying or issuing contrary orders except in limited circumstances.'" *Id.* (citations omitted). As such, you must consider whether UIFSA is preempted by FFCCSOA in an action of enforcement where the competing support orders exist.

Finally, attached as **Exhibit C** to this article, you will find an article I wrote previously about child support jurisdiction that includes flow charts I created that outline the analysis of jurisdiction under UIFSA in Arizona.

c. Dividing Property and Debt

As mentioned above, Arizona has jurisdiction to dissolve the marriage so long as one of the parties was domiciled in Arizona for 90 days before the divorce petition was filed. *See* A.R.S. § 25-312(1); *Taylor v. Jarrett*, 191 Ariz. 550, 552, 959 P.2d 807, ¶7 (App. 1998). "The court may exercise this limited jurisdiction to dissolve the marriage without violating due process, even though it lacks personal jurisdiction over a non-resident party, as long as the court does not determine the monetary obligations of the parties." *Id.*, *citing Estin v. Estin*, 334 U.S. 541, 544 (1948); *Williams v. North Carolina*, 317 U.S. 287, 298-99, (1942); *White v. White*, 83 Ariz. 305, 307-08, 320 P.2d 702, 703-04 (1958). "The product of such limited jurisdiction is sometimes called a 'divisible divorce." *Id.* "Technical personal jurisdiction must be acquired, in contrast, before a court can decide issues of child support, spousal maintenance, or division of marital property. *Id.* at ¶9, *citing*, *Auman v. Auman*, 134 Ariz. 40, 42, 653 P.2d 688, 690 (1982) (division of marital property).

Arizona has jurisdiction to dissolve the marriage as long as one of the parties was domiciled in Arizona for 90 days before the divorce petition was filed.

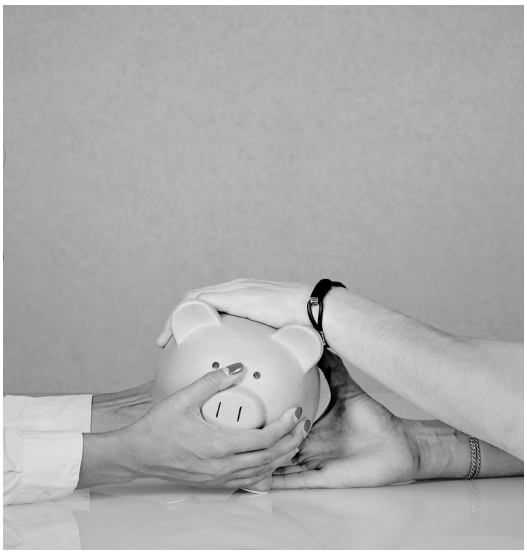
B. Challenges

1. Domicile vs. Residency

JURISDICTION FOR PURPOSES OF DIVORCING a couple raises the distinction, in some states, of residency versus domicile. No divorce can be granted without domicile in that state. *See Brandt v. Brandt*, 76 Ariz. 154, 158, 261 P.2d 978 (1953). Domicile requires physical presence and an intent to remain for an indefinite period of time. *See Clark v. Clark,* 124 Ariz. 235, 603 P.2d 506 (1979); *Lake v. Bonham*, 148 Ariz. 599, 601, 716 P.2d 56 (App. 1986); *Arizona Board of regents v. Harper*, 108 Ariz. 223, 228, 495 P.2d 453, 458 (1972).

Some states have determined that residence and domicile are synonymous. *See, e.g., Caheen v. Caheen*, 172 So. 618 (Ala. 1937); *McDougald v. Jenson*, 786 F.2d 1465 (N.D.Fla. 1984). Other states have defined the term "domicile" statutorily. *See, e.g.*, South Carolina (Code 1976 § 7-1-25); Louisiana (LSA-C.C. Art. 38). In Arizona, domicile is defined as follows:

> Domicile is primarily a state of mind combined with actual physical presence in the state. Either, without the other, is insufficient. One's domicile remains unchanged until a new one is acquired. Theoretically, one who goes from one state to another with the actual intention to remain and make his home in the second state, acquires a domicile in the second state immediately.



Top, ...jurisdictional conflicts is the treatment of jurisdiction for purposes of spousal support orders in addition to child support orders; however, it is clear that UIFSA applies to both types of support obligations. Above, Some states have determined that residence and domicile are synonymous while Other states have defined the term "domicile" statutorily.

Clark, 124 Ariz. at 237, 603 P.2d at 508, *citing Arizona Board of Regents v. Harper*, 108 Ariz. 223, 228, 495 P.2d 453, 458 (1972). When considering domicile, rebuttable presumptions exist that must be analyzed. *See Jizmejian v. Jizmejian*, 16 Ariz.App. 270, 273-74, 492 P.2d 1208, 1211-12 (App. 1972). According to *Jizmejian*, "[d]omicile is presumed to follow residence, and, as actual residence is merely one circumstance, the presumption raised thereby is not conclusive, but is rebuttable . . .." *Id.* The burden to rebut the presumption is on the person "contending to the contrary." *Id.*, *citing Hines v. Hines*, 418 S.W.2d 253, 255 (Tenn. 1965); 28 C.J.S. Domicile § 16 (1941). Furthermore, "domicile, once established, is presumed to continue until a change is shown." *Id.* at 274, 492 P.2d at 1212, *citing Griffin v. Griffin*, 264 P.2d 167 (Cal. App. 1953); 28 C.J.S. Domicile § 16 (1941). "The burden of proof is on the one asserting that an earlier domicile was abandoned in favor of a later one." *Valley Nat'l Bank v. Siebrand*, 74 Ariz. 54, 243 P.2d 771 (1952).

In Arizona, according to *Jizmejian*, residence is neutral in determining domicile for purposes of divorce. 16 Ariz.App. at 274, 492 P.2d at 1212. In other states, for example Florida, the terms are not the same. Specifically, in that state "residence" is statutorily defined as meaning "an actual presence in Florida coupled with an intention at that time to make Florida the residence." *See McCarthy v. Alexander*, 786 So. 1284, 1285 (Fla. App. 2001). Domicile, on the other hand, requires intent, or subjectivity, whereas residence is objective. *Id.* Thus, when, in your practice, you are analyzing where jurisdiction lies in a particular situation, please do not take for granted even that words have the same meaning and outcome. Research is always required when engaging in

this analysis. Better yet, engage with - or recommend the client or potential client engage with - counsel in the other state(s).

2. *Adoptions*

YOU MAY BE UNAWARE THAT JURISDICTION for purposes of adoption is not found under the UCCJEA. *See In re Baby Girl F.*, 932 N.E. 2d 428, 436 (Ill. App. 2008). The UCCJEA clearly states that "[t]his chapter does not apply to adoption proceedings . . .." A.R.S. § 25-1003; *see People ex rel. A.J.C.*, 88 P.3d 599, 600 (Colo. 2004), *en banc* (concluding that "the UCCJEA does not apply to . . . adoption proceedings, by specific language" of the statute); *Baby Girl F.*, 932 N.E. 2d at 436 (stating "the problem with all of these arguments, however, is that they are premised on the UCCJEA, which does not apply to adoption proceedings"). Both the PKPA and the ICPC apply to adoption proceedings. *See J.D.S.*, 182 Ariz. at 89 ("The ICPC, like . . . the PKPA, applies to adoptions"); *Baby Girl F.*, 932 N.E. 2d at 437 ("the PKPA applies generally to interstate custody disputes and specifically to adoptions"), *internal citations omitted*.

3. *Spousal Support*

ONE ISSUE I HAVE ENCOUNTERED while litigating around jurisdictional conflicts is the treatment of jurisdiction for purposes of spousal support orders in addition to child support orders; however, it is clear that UIFSA applies to both types of support obligations. UIFSA is a model law addressing cases involving "establishment, enforcement, and modification of orders for 'any duty of support' across state lines." UIFSA, Prefatory Note, (I)(A). Arizona courts have repeatedly held commentary on UIFSA to be highly persuasive because it is based on a uniform act. *See State ex rel. Dep't of Econ. Sec. v. Tazioli*, 226 Ariz. 293, 295, ¶8, 246 P.3d 944, 946 (App. 2011), *internal citations omitted*. "[A]s a matter of policy, UIFSA establishes a set of 'bright line' rules that are intended to prevent multiple, inconsistent support orders among the states." *McHale v. McHale*, 210 Ariz. 194, 198, ¶15, 109 P.3d 89, 93 (App. 2005). The UIFSA governs jurisdiction over support orders and "ensures that in every case only one state exercises jurisdiction over support at any given time." *In re Marriage of Haugh*, 225 Cal.App.4th 963, 968 (2014) (*quoting In re Marriage of Crosby & Grooms*, 116 Cal.App.4th. 201, 206 (2004)).

UIFSA defines "duty of support" as obligations of support "for a child, spouse or former spouse" and defines a "support order" as support including that for "a spouse or a former spouse." A.R.S. §§ 25-1202(4), (29). The commentary accompanying the UIFSA regarding the definition of "support order" states as follows:

> Subsection (28) "support order" is another definition that requires more careful reading than might be immediately clear. Virtually every financial aspect of a support order regarding child support or spousal support is covered. Throughout the act "support order" means both "child support" and "spousal support." "Child support" is used when the provision applies only to support for a child. The single provision applicable solely to spousal support is Section 211.

UIFSA § 28, cmts.

4. *Temporary Orders in Paternity Cases*

SOMETIMES LITIGANTS REQUEST temporary orders in a paternity case before the court has adjudicated paternity. The court only has the ability to do so in the following limited circumstances:

Sometimes litigants request temporary orders in a paternity case before the court has adjudicated paternity. The court only has the ability to do so in limited circumstances.

1. Genetic testing affirms at least a ninety-five per cent probability of paternity.

2. A notarized or witnessed statement is signed by both parents acknowledging paternity or separate substantially similar notarized or witnessed statements are signed acknowledging paternity and filed with the department of health services pursuant to section 36-334 or filed with the department of economic security.

3. The respondent admits or does not deny paternity in a written response filed with the clerk of the court.

A.R.S. § 25-817(A)(1) through (3). If the above conditions are not met, the court does not have jurisdiction to enter temporary orders. FL

NOTES:

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1. I did not survey the states regarding legal separation. Nor did I distinguish within the Survey between domicile and residency. The reader is cautioned to research independently the jurisdictional requirements without relying only on this type of summary starter resource. Note also that some states distinguish between the person filing for divorce and the other party with respect to whether the statute is satisfied.

Survey of Domicile/Residency Requirements to File a Petition for Dissolution of Marriage in the 50 United States and District of Columbia

State	Time Period	Citation
Alabama	No specific time period when both spouses are residents Six months when one spouse is not a resident	*Volin v. Volin*, 128 So.2d 490,491 (Ala. 1961) Ala.Code 1975 § 30-2-5
Alaska	Physical presence plus intent to remain; no specific time period	*Perito v. Perito*, 756 P.2d 895, 898 (Alaska 1988)
Arizona	90 days before filing	A.R.S. § 25-312(1)
Arkansas	60 days before filing a petition plus 90 days before decree entered	A.C.A. § 9-12-307(a)(1)
California	Six months before filing petition UNLESS same sex couple, California marriage, neither party resides in a state that will dissolve marriage	Cal.Fam.Code § 2320(a) Cal.Fam.Code § 2320(b)(a)
Colorado	91 days before filing	C.R.S.A. § 14-10-106(1)(a)(I)
Connecticut	Physical presence plus intent to remain; no specific time period	C.G.S.A. § 46b-44
Delaware	Six months before filing a petition	13 Del.C. § 1504(a)
District of Columbia	Six months before filing petition UNLESS same sex couple, California marriage, neither party resides in a state that will dissolve marriage	DC ST § 16-902(a) DC ST § 16-902(b)(1)
Florida	Six months before filing	F.S.A. § 61.021
Georgia	Maintains a matrimonial domicile at time of commencement or defendant resided in the state before action filed, whether cohabiting or not	Ga. Code Ann., § 9-10-91(5)
Hawaii	Three months prior to filing UNLESS Hawaii marriage, neither party resides in a state that will dissolve marriage	HRS § 580-1(a) HRS § 580-1(b)

Idaho	Maintenance of matrimonial domicile at time of act giving rise to filing	I.C. § 5-514(e)
Illinois	Maintenance of matrimonial domicile at time of act giving rise to filing	735 ILCS 5/2-209(5)
Indiana	Six months prior to filing	IC 31-15-2-6(a)
Iowa	No specific time period	I.C.A. § 598.2
Kansas	60 days prior to filing	K.S.A. 23-2703(a)
Kentucky	180 days prior to filing	KRS § 403.140(1)(a)
Louisiana	No specific period of time if domicile established	Turpin v. Turpin, 175 So.2d 357, 359 (La. Ct. App. 1965)
Maine	Six months prior to filing	19-A M.R.S.A. § 901(1)(A)
Maryland	If grounds for divorce occurred outside state, six months prior to filing	MD Code, Family Law, § 7-101
Massachusetts	Except as in § 5, must live as husband and wife in state, but if cause occurred outside state, must have lived as husband and wife in state and one spouse still present Plaintiff lived in state for one year before filing if cause occurred outside state OR lives in state at filing if cause occurred in state	M.G.L.A. 208 § 4 M.G.L.A. 208 § 5
Michigan	Defendant domiciled in state at filing OR domiciled in state when cause occurred	M.C.L.A. 552.9a(a) and (b)
Minnesota	One of the parties resided in state for 180 days prior to filing OR one of the parties has been a domiciliary of the state for 180 days prior to filing	M.S.A. § 518.07(1) and (2)
Mississippi	Six months prior to filing	Miss. Code Ann. § 93-5-5
Missouri	90 days prior to filing	V.A.M.S. 452.305(1)(1)
Montana	90 days prior to filing	MCA 40-4-104(1)(a)
Nebraska	One year prior to filing OR married in state and one person continuously lived in state since marriage	Neb.Rev.St. § 42-349
Nevada	Plaintiff and Defendant actually resided in the county where action accrued OR one party lived in state for six weeks	N.R.S. 125.020

New Hampshire	No time limit if jurisdiction over parties	N.H. Rev. Stat. § 458:4
New Jersey	Either party resides in state at time cause of action arose and maintained residence up to filing and, except for cause of adultery, had maintained residence for one year prior to filing OR Either party, since cause of action arose, has become a resident and maintained residence for one year prior to filing	N.J.S.A. 2A:34-10(1) N.J.S.A. 2A:34-10(2)
New Mexico	Resided in NM for at least six months before filing and maintained domicile in NM	N. M. S. A. 1978, § 40-4-5
New York	Married in state and either party resided in state for one year before filing OR Parties resided in state as husband and wife and either resided in state for one year before filing OR Cause occurred in state and either resided in state for one year before filing OR Cause occurred in state and both parties are residents at filing OR Either party has been a resident for two years prior to filing	McKinney's DRL § 230(1) McKinney's DRL § 230(2) McKinney's DRL § 230(3) McKinney's DRL § 230(4) McKinney's DRL § 230(5)
North Carolina	Six months before filing	N.C.G.S.A. § 50-8
North Dakota	Plaintiff resides in state six months before filing, but if not six months before filing six months before decree is entered	NDCC, 14-05-17
Ohio	Six months before filing	R.C. § 3105.03
Oklahoma	Six months before filing	43 Okl.St.Ann. § 102(A)
Oregon	When married in the state and either party is a resident at filing no time limit for certain causes OR	O.R.S. § 107.075(1)

	Where marriage was not solemnized in the state and certain causes are alleged one person must be a resident for six months prior to filing	O.R.S. § 107.075(2)
Pennsylvania	Six months prior to filing	23 Pa.C.S.A. § 3104(b)
Rhode Island	Plaintiff resides in state for one year prior to filing OR deemed satisfied if Defendant resided in state at time of filing for one year and is served, Plaintiff residency requirement is deemed satisfied	Gen.Laws 1956, § 15-5-12(a)
South Carolina	Plaintiff resides in state for one year prior to filing OR Defendant resided in state for one year prior to filing OR if both parties are residents at filing Plaintiff resides in state for three months before filing	Code 1976 § 20-3-30
South Dakota	Plaintiff must reside in state at time of filing, but no time limit	SDCL § 25-4-30
Tennessee	For certain causes if they occurred while Plaintiff was a resident of the state OR if the causes occurred outside the state and the Plaintiff resided in state for six months before filing	T. C. A. § 36-4-104
Texas	Either party a domiciliary in state for six months AND resident in county for 90 days before filing	V.T.C.A., Family Code § 6.301(1) and (2)
Utah	Three months prior to filing	U.C.A. 1953 § 30-3-1
Vermont	Six months prior to filing	15 V.S.A. § 592
Virginia	Six months prior to filing	VA Code Ann. § 20-97
Washington	No time limit; resident at filing	West's RCWA 26.09.030
West Virginia	If married in the state no time limit if one party resident at filing OR If married outside the state one year before filing BUT If cause is adultery one party must be resident at filing and if Defendant is non-resident who cannot be served in the state	W. Va. Code, § 48-5-105(a)(1) W. Va. Code, § 48-5-105(2)

	Plaintiff must have been resident for one year before filing	
Wisconsin	For certain causes 30 days before filing or married in the state within the year before filing OR For other causes six months before filing	W.S.A. 767.301
Wyoming	60 days before filing OR if married in the state and one party continuously lived in the state from date of marriage to filing	W.S.1977 § 20-2-107

By
Claudia D. Work and Isabel Ranney

6 Years Post-*Obergefell*:

Same-sex Parenting Rights in Arizona

THE PATH TO THE LANDMARK ruling of *Obergefell v. Hodges* (2015) was a long and arduous one, filled with decades of small victories and crushing losses, many of which went unrecognized. When same-sex marriage was finally deemed constitutional by the Supreme Court six years ago, it released all of the pent-up energy that had been steadily building in the hearts and minds of pro-same sex marriage advocates, legislators, lawyers, and judges. *Obergefell* opened the door for significant legal advancements to occur at the legislative and judicial levels in states across the nation, including Arizona, at a once unimaginable pace.

When the United States was hit by the COVID-19 pandemic, important issues, such as same-sex rights, fell to the wayside and all attention was placed on stemming the tide of the pandemic. Now that the vaccine is readily available and people are returning to their offices, it is a good time to assess the advancements made in Arizona, six years post the landmark ruling of *Obergefell v. Hodges* (2015).

When same-sex marriage was deemed constitutional by the Supreme Court, cases such as *Obergefell* opened the door for significant legal advancements to occur at legislative and judicial levels in states across the nation, including Arizona, at an unimaginable pace.

Same-sex rights are still unfolding on a national level. As recently as May 2021, the State Department reversed its policy that "denied citizenship to some babies born abroad to same-sex parents," according to a report by *The New York Times* [1]. Prior to the reversal, children born to same-sex parents in a foreign country were denied citizenship if the person carrying the child was not a United States citizen - even if the other parent was a citizen. For some, this may seem like a no brainer. After all, when the Supreme Court legalized same-sex marriage in *Obergefell v. Hodges*, didn't they automatically grant same-sex couples the same parenting rights as opposite-sex couples? The answer is not so simple.

Prior to *Obergefell*, in 2008, Arizona voters passed Proposition 102, which created a definition of marriage as between one man and one woman in the Arizona Constitution. After *Obergefell*, 31 states, including Arizona,

still have language banning same-sex marriage in their Constitutions. Additionally, same-sex couples continue to face significant roadblocks accessing their parental rights, largely based on the "presumption of paternity" that states afford to children born of opposite-sex couples. While the Supreme Court of the United States held bans on same-sex marriage to be unconstitutional, states were left to determine how to incorporate *Obergefell* into their statutes and constitutions and their definitions of who is a parent.

PRESUMPTION OF PATERNITY

Under the traditional marital "presumption of paternity," courts presume children born during an opposite-sex marriage are products of the marriage, and the husband is the biological father of any children conceived during, or within ten months of, a marriage. The purpose of this presumption is to preserve the family unit. Historically, a person could rebut this presumption with evidence that it is impossible for the parent who did not give birth to be the biological parent of the child, or if the husband wanted to disavow paternity, he could do so. However, in most cases, if both spouses wanted to continue to assert that the husband is the child's father, even if it was biologically impossible, the actual biological father would be prevented from interfering in the family unit and proving his paternity.

"FOR SAME-SEX PARENTS, ...(WHERE) THE PARTNER WHO DOES NOT CARRY THE CHILD OR BIOLOGICALLY CONTRIBUTE TO THE CHILD'S CREATION MAY NOT BE AFFORDED THE PRESUMPTION OF PARENTAGE IN SOME JURISDICTIONS."

For same-sex parents, this means that the partner who does not carry the child or biologically contribute to its creation may not be afforded the presumption of parentage in some jurisdictions (the correct term is "parentage," as "paternity" is historically reserved for opposite-sex couples). In Arizona, the presumption of paternity statute is A.R.S. § 15-814.

CHILDREN BORN TO SAME-SEX PARENTS

This presumption continues to cause problems for children born to same-sex parents. In states that use the traditional marital presumption of paternity and have not adopted a gender-neutral interpretation, courts consider children born to same-sex couples to have one legal parent. For example, some view children born to same-sex couples through In Vitro Fertilization (IVF) to have one legal parent - either the person who carried the child or the biological father in the case of male couples. The other partner, though married to the person who carried the child or to the biological father, may not retain any legal decision-making authority over the child and may not be granted visitation in the event of a divorce. This is true regardless of whether the partner was a significant part in the upbringing of the child and/or if the legal parent intended for their partner to assume full parental rights.

In Arizona, paternity statutes must be interpreted in a gender-neutral manner. In 2017, the Supreme Court of Arizona held in *McLaughlin v. Jones* I the presumption of paternity recognized under A.R.S. § 25-814(A)(1) applies to same-sex spouses [3]. Not only was this case groundbreaking because it expanded the presumption of paternity to same-sex spouses, but it also suggested that gendered paternity statutes may be unconstitutional.

Practically speaking, the paternity presumption does not apply to children born to two men where neither can give birth. The presumption of paternity has only been applied to opposite sex and female-female couples because the statute is written specifically to grant parentage to the spouse of someone who gives birth. This means that in a relationship between a male and a trans-male who gives birth, the trans-male's spouse should be entitled to the presumption.

SAME-SEX ADOPTION

Fortunately, Arizona permits same-sex adoption by spouses regardless of gender and stepparent adoption without regard to sexual orientation. Under A.R.S. § 8-103, not only are same-sex couples able to adopt children but single individuals who identify as LGBTQ+ may also adopt. A stepparent adoption under A.R.S. § 8-106 allows one spouse to adopt the child of the other spouse if they already have custody (i.e., spouse B adopts the child from spouse A's previous relationship) [5]. Stepparent adoption treats the adopting party as a stranger to the child and requires them to be licensed to adopt and pass a home study unless the parties have been married for over a year and, in most cases, have lived with the child for at least six months. The adopting party also must pass a criminal background check.

SURROGACY IN ARIZONA

It should be noted that it is **presumed that surrogacy is not legal in Arizona**, and it is not a mechanism by which a same-sex couple can legally become joint parents of a child without taking the extra step of adoption. A "surrogate parentage contract" is a "contract, agreement, or arrangement" where an individual agrees to the implantation of a foreign embryo or to conceive a "child through natural or artificial insemination." A.R.S. § 25-218(D).

Under A.R.S. § 8-103, not only are same-sex couples able to adopt children but single individuals who identify as LGBTQ+ may also adopt.

Arizona's surrogacy statute - A.R.S. § 25-218—prohibits a person from entering into a "surrogate parentage contract," and states that the surrogate is the legal parent of the child and is entitled to custody of said child. The same statute also entitles any spouse of the surrogate the presumption of parentage, but this presumption is rebuttable.

The surrogacy statute has been partially overturned on equal protection grounds. In *Soos v. Superior Court* (1994), the biological father of triplets challenged the statute, which deemed the surrogate to be the legal mother of the children, even though the biological mother donated the eggs that led to the conception [4]. The Court of Appeals of Arizona held that A.R.S. § 25-218 violated the equal protection clause when it allowed a biological father to prove paternity and automatically granted the surrogate status as the legal mother but did not provide the means for the biological mother to prove maternity. It remains

unclear whether the remaining parts of the statute are enforceable and if surrogacy is still illegal in Arizona.

SAME-SEX MARRIAGE AND SOCIAL SECURITY BENEFITS

The Social Security Administration (SSA) awards survivors' benefits based on the length of marriage and the circumstances of the survivor. The length of marriage requirement is met "if the marriage on which the relationship is based took place no later than 9 months immediately preceding the day on which the worker died" [6]. The requirement is met for shorter marriages if the worker's death was accidental, occurred in the line of duty while in active military service, or the deceased spouse was institutionalized during the marriage [7].

Because same-sex marriage was not nationally legalized until 2015, it is difficult for certain individuals to receive survivors' benefits. There are class action lawsuits currently in the works seeking to address survivor's benefits: (1) for spouses who married after *Obergefell* but the spouse died before the requisite 9 months had passed and (2) for people who died before same-sex marriage became legal but are seeking (i) benefits for surviving children or (ii) to receive benefits by having their relationship recognized as a marriage retroactive to *Obergefell*.

WHAT'S NEXT?

Undoubtedly, *Obergefell* paved the way for significant changes in the way some states' statutes are interpreted with regards to parental rights. But getting to *Obergefell* was not easy. It is impossible to look toward the future of same-sex parenting rights in Arizona without acknowledging those who advocated and fought for marriage equality long before courts were willing to even consider the idea of same-sex marriage. It is a culmination of their dedication, tiny victories, and persistence in the face of adversity that has allowed Arizona to evolve its view on same-sex parenting rights and to pass laws reflecting the same.

Six years from now, who knows where we will be in terms of same-sex parental rights. There is still work to be done but, if you had asked someone just seven years ago, no one could have imagined we would have come this far. FL

NOTES:

[1] https://www.nytimes.com/2021/05/18/us/citizenship-babies-same-sex-parents.html

[2] ***Pavan v. Smith,*** **137 S. Ct. 2075 (2017) (holding both parents in a same-sex marriage have the right to be on their children's birth certificates).**

[3] ***McLaughlin v. Jones in and for County of Pima*****, 401 P.3d 492 (Ariz. 2017).**

[4] ***Soos v. Superior Court*****, 182 Ariz. 470 (Ariz. 1994).**

[4] www.lifelongadoptions.com/lgbt-adoption-resources/lgbt-adoption-laws/arizona

[5] https://secure.ssa.gov/poms.nsf/lnx/0200305100

[6] ***Id.***

[7] ***Id.***

CLAUDIA D. WORK is an attorney at Scottsdale Family Law who served as lead counsel in the seminal same-sex rights case in Arizona, *McLaughlin v. Jones* in and for County of Pima (Ariz. 2017). Claudia's practice focuses on all aspects of family law including same-sex family and unmarried cohabitant issues, guardianships, adoptions, assisted reproductive technologies (gestational carriers/surrogacy, IVF, AI, donation and embryo transfers), and contract disputes arising from personal relationships.

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Rule 69 and Prenuptial Agreements

Ertl v. Ertl, No. 1 CA-CV 20-0690 FC, 11/9/2021

FACTS: Wife was a nurse and Husband was a doctor. They decided to marry and entered into a prenuptial agreement. The parties married in 2003. After giving birth to twin daughters in 2005, Wife quit working to stay home and did not return to work (part-time) until 2011.

Husband petitioned for divorce in 2020.

Meanwhile, the parties' attorneys exchanged e-mails about a settlement of the remaining issues, which focused on child support, legal decision-making regarding the children, and property distribution. After extended communication between the parties and their attorneys, Husband's attorney e-mailed Wife's attorney that Husband and Wife "[we]re in full and final agreement" that (1) the parties' premarital agreement was valid and enforceable and would be applied to the resolution of the matter; (2) child support would be set at an upward deviation of $2,500; and (3) Husband's attorney would draft the terms of the final separation agreement to save Wife money. The parties also agreed to cancel Wife's deposition set for the next day. Husband's attorney noted, however, that Husband had requested joint legal decision-making about issues with the children and asked whether Wife would agree to joint legal decision-making. Wife's attorney responded that Wife also agreed to have joint decision-making authority with Husband and, with that addition, Wife was "in agreement with the terms."

Husband's attorney prepared the agreement and sent it to Wife's attorney. Wife's attorney withdrew. Wife denied that there was an agreement. Wife refused to review the separation agreement, and eventually told Husband's attorney that she would only sign the agreement with Husband paid her an additional $250,000.

Husband moved to enforce the parties' separation agreement as reflected by the e-mails. The Court ordered the parties to lodge a proposed decree. Husband did, and the trial court signed the decree over Wife's objections. Wife timely appealed.

The e-mails created an enforceable separation agreement.

The appellate court looked to Title 44 to hold that a record and signature in electronic form cannot be denied legal effect, and therefore signed e-mail communications involving court proceedings satisfy the requirements of Rule 69. Moreover, the e-mails combined with the parties' pre-existing parenting plan and premarital agreement "exhibits objective expressions of the parties' obligations in dissolution, supported by consideration, and their mutual assent to all material terms to the dissolution of their marriage." Citations omitted.

When parties incorporate a premarital agreement into a final separation agreement, distribution according to the premarital agreement is deemed fair under A.R.S. § 25–317(B) unless the premarital agreement is unenforceable under A.R.S. § 25–202(C).

"Wife's argument that the premarital agreement was unfair because of the disparity of distribution incorrectly imposes the demands of A.R.S. § 25–317, which governs separation agreements onto a premarital agreement, which is governed by A.R.S. § 25–202. ...This would vitiate the heightened unconscionability standard of a premarital agreement and the moving party's burden to prove the agreement's unconscionability. ... Thus, without evidence that the premarital agreement was unconscionable or involuntary under A.R.S. § 25–202(A), (C), the family court did not abuse its discretion in finding the parties' final separation agreement was fair without an evidentiary hearing."

Evidentiary Sanctions relating to Custody Evaluations

Kelly v. Kelly, No. 1 CA-CV 20-0441 FC, 11/16/2021

FACTS: Mother and Father are getting divorced. The trial court ordered a custody evaluation and ordered the parties to cooperate. Father refused to cooperate. The court sanctioned Father by precluding him from presenting any evidence at trial that he could have presented to the evaluators and preventing him from questioning witnesses on topics that he might have discussed with the evaluators.

Father appeals.

A **CHILD'S BEST INTERESTS REIGN SUPREME IN CUSTODY DISPUTES.** "The trial court cannot sanction a parent in a way that prevents the court from considering admissible, 'potentially significant information' about the child's best interests. ... The superior court may, for instance, impose a progression of monetary sanctions on contemptuous parents, even incarcerating them after a finding of civil contempt." FL

A child's best interests reign supreme in custody disputes. "The trial court cannot sanction a parent in a way that prevents the court from considering admissible, 'potentially significant information' about the child's best interests..."

HOT TIPS CORNER

As attorneys, we often have a self-represented person as the other party. Consider developing a letter that you provide to all self-represented parties that includes the following information in plain language:

1. You are not their lawyer, and you cannot provide them with legal advice.
2. Urge them to seek legal counsel of their own and provide a list of county resources (county bars, legal aid, court clinics)
3. Define what you can and will do in the case. For example, you will be able to assist in settlement offers and preparation of settlement documents for both parties to sign.
4. Provide some procedural guidelines. These should be presented as requirements of both parties. For example, consider sending information based on ARFLP Rule 9(a-c) and Rule 49. The entire text of the Rule need not be provided and, arguably, may not be very helpful to a self-represented party. Instead, consider explaining where the rules are located and briefly what they require of each party. The goal is to explain that there are rules that place requirements on both parties' behavior and participation in the case.
5. As a final suggestion, consider using this initial communication as a means of verification of information. You can provide the contact information you have on file for them and ask for updated information if appropriate.

As with most things in life (except taxes and death), there is no guarantee this early communication will make the case with a self-represented party easier. It does attempt to set a tone that is civil and professional, which in the long run may help your client's case.

Courtesy of **Kristy Clairmont,** Family Law Legal Consulting, PLLC

CASE LAW UPDATE

The Family Law Section regularly prepares a summary of recent Arizona family law decisions. Summaries are located on the Section's web page at:
https://www.azbar.org/for-lawyers/communities/sections/family-law/case-law-updates/

IMPORTANT CLE DATES

Nov. 19, 2021	**Advance Family Law CLE** (virtual program)
Dec. 9, 2021	**What every lawyer news to know about the new child support guidelines** (virtual program)
Jan. 21-23, 2022	**AzAFCC Annual Conference**
Jan. 26-28, 2022	**Family Law Institute featuring For Better or For Worse** (virtual program)
February 2022	**Pima County Pro Tem Applications Due**

Want to contribute to the next issue of Family Law News?

… If so, the deadline for submissions is Jan.14, 2022

Would you like to...

- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

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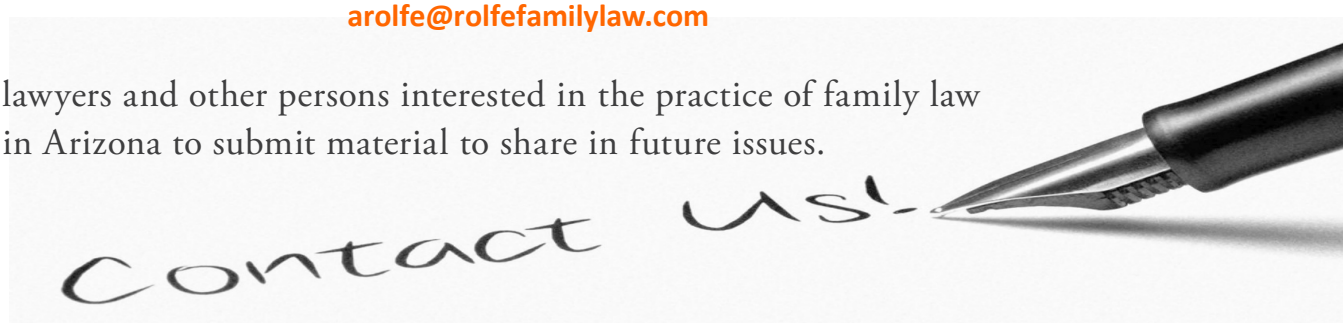
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



We reserve the right to edit submissions for clarity and length and the right to publish or not publish submissions. Views or opinions expressed in the articles are those of the author. The Council invites those with differing views and opinions to submit articles for the newsletter. Thank you from the Family Law Executive Council and the State Bar of Arizona.