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Family Law News

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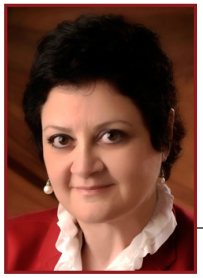
FROM THE CHAIR

Did you know that the Arizona Supreme Court has adopted revisions to the Arizona Child Support Guidelines that will take effect on July 1, 2015? It's possible that you missed this change because it was accomplished without the aid of a Quadrennial Child Support Guidelines Review Committee, which Committee had historically been in place until that requirement was recently terminated by the Legislature. As such, the Guidelines were not examined by the courts and practitioners with the same detail as in prior years. The Supreme Court obtained updated economic data that was relied on to modify the amounts in the Guidelines and allowed a generous comment period. I know various practitioners submitted comments, including, for example, the continued applicability of the method by which to adjust child support when the parents share equal parenting time; or whether the concepts within A.R.S. § 25-530 should apply to child support in addition to spousal maintenance. While the comments do not appear to have changed the Guidelines adopted, it is hopeful that they can remain topics of conversation. You can find information about the new Guidelines and the review process on the Supreme Court's website at **www.azcourts.gov/familylaw/Home.aspx**



Also be on the look out for changes to Rule 74 – Parenting Coordinators. A modification petition is pending, which petition was the result of a workgroup.

HELEN R. DAVIS – SECTION CHAIR

STATE BAR OF ARIZONA

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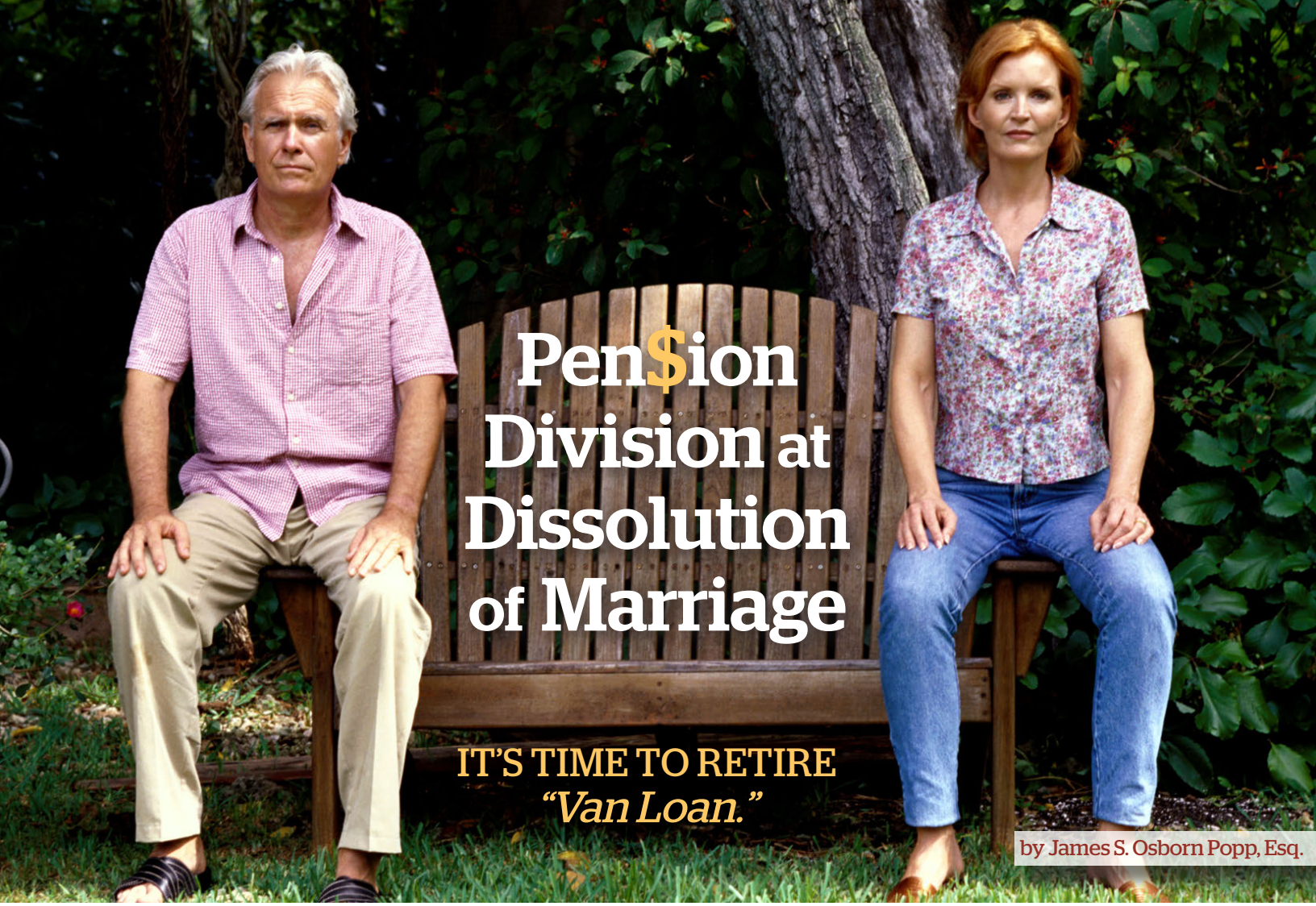
I strongly urge you to read the rule change petition and submit comments by the **April 27** deadline. You can use the following link to access the comments process:

http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/forumid/41/postid/2974/view/topic/Default.aspx

We are working on the 2015 Bar Convention presentations, which we hope will be engaging and informative. As you have seen in past years, we are trying very hard to make the presentations interactive and interesting such that presenters do not just "talk at" the audience. Have you ever wondered what professionals do to counteract the negative influence on children in programs that focus on alienation? If so, you can look forward to experiencing a mock intervention. We also will present a mock trial to show you how to make objections and preserve the record for appeal. We will discuss the usefulness and legality of those safe harbor provisions that are now all the rage. On the business side, look forward to assistance in ferreting out what errors to look for in business valuations and identifying and understanding advanced tax issues. You will also have the opportunity to obtain an hour of ethics credit focused on professionalism. Of course, no Bar Convention program would be complete without Kathleen McCarthy's case law and legislative update.

I hope to see you in June!



Pen$ion Division at Dissolution of Marriage

IT'S TIME TO RETIRE *"Van Loan."*

by James S. Osborn Popp, Esq.

For almost 40 years, the Arizona Family Law community has cited to *Van Loan v. Van Loan,* 116 Ariz. 272, 569 P.2d 214 (1977), as a preferred method for dividing community property interests in defined benefit pension plans. The pension division formula in *Van Loan* has served us well, but due to statutory changes and more recent and accurate authority, it is time to retire "*Van Loan*."

Who can do the job if *Van Loan* is retiring? Say "hello" to *Heatherington*.[1]

Recall that a defined benefit plan, or pension plan, is an employer-sponsored program that pays a monthly amount at retirement, calculated according to the formula stated in the plan documents. Pension formulas almost always include three elements:

1. *years of qualifying employment,*
2. *final average salary and*
3. *a multiplier.*

For example, a pension plan participant with 20 years of service, $80,000 final average salary and a 2% multiplier would receive $32,000 per year/$2,666.67 monthly in retirement.

A private-sector employee with a pension is an endangered species. Only 14 percent of American workers currently are covered by pension plans. [*NYT* October 12, 2014.] Due to the costs of funding and managing pension plans, employers in growing numbers are terminating plans or freezing benefits. In the public sector, pensions are more commonplace. Arizona employees in the Arizona State Retirement System, Public Safety Personnel Retirement System, and other state-run pensions, may confront pension division issues at dissolution of marriage. Federal employees' pensions include the Civil Service Retirement System (for pre-1984 hires) and the Federal Employee Retirement System (for post-1984 hires), among other plans.

A *Van Loan* pension division directs that the benefit at retirement be multiplied by one half and by a fraction whose numerator is the number of years of pension-qualifying service during marriage and whose denominator is the total number of years of qualifying service. For example, if a couple were married for 10 out of 20 years of pension-qualifying employment, the former spouse's award is 25% of the benefit. (10/20 × .5 = .25).

Pension Division at Dissolution of Marriage: It's Time to Retire *"Van Loan."*

The *Van Loan* division formula language is actually more case-specific, affirming an award to the non-employee spouse as "an interest in the retirement pay in an amount equal to one half of the fraction 17 over the number of years served by appellant in the armed forces, if and when received by him."[2]

The formula itself was not part of the *Van Loan* holding in either published opinion. The issue presented was whether a marital community had rights to a pension that accrued but did not vest during marriage. The Supreme Court held that "an employee, and thereby the community, does indeed acquire a property right in unvested pension benefits [and] to the extent that such a property right is earned through community effort, it is property divisible by the court upon dissolution of marriage."[3]

In fact, neither the Court of Appeals nor the Arizona Supreme Court provided much of an endorsement for the formula. The Court of Appeals noted "No issue has been raised as to the use of this formula and we express no opinion as to its correctness."[4] The Arizona Supreme Court rejected a challenge to the formula for not having been raised at the trial level or in briefs before the Court of Appeals. The Supreme Court noted that "we neither condone nor condemn the correctness of the formula used by the trial court."[5]

Despite its lukewarm reception in 1977, the formula has endured because it provides an equitable division of an asset whose value is in part time-based. The Supreme Court of Arizona eventually ruled on the "proper method to be used in determining the wife's interest in the husband's retirement plan" in *Johnson v. Johnson*.[6] The Court instructed that "the community share of the pension is determined by dividing the length of time worked during the marriage by the total length of time worked toward earning the pension, … multipl[y] each future pension payment by that figure … then divide[] that part between the spouses.[7]

Both *Van Loan* and *Johnson* measure the community interest according to time in the plan during marriage, which is to say, through entry of a decree of dissolution. Starting with cases filed after July 22, 1998, the effective date of A.R.S. §§ 25-211 and 213, the acquisition of community property ceases upon the date of service of a petition for dissolution of marriage.

Since July 22, 1998, references to a *Van Loan* division in a decree invite confusion whether the numerator of the division formula should be calculated through the date of service of the petition, or through the date of dissolution. Given that these dates can be many years apart, the impact on the pension division can be significant. This author has encountered many instances where a party has exploited a *Van Loan* reference to measure the entire marriage for retirement division, when the date of service cut-off may have been intended.

Heatherington puts an end to any such confusion. Faced with the issue of dividing a defined benefit plan (the Arizona State Retirement System), the court cited approvingly to *Johnson* for the formula to divide a future pension benefit, and helpfully added: "Pursuant to Arizona Revised Statutes (A.R.S.) §§25-211(2007) and 25-213(B), all property acquired after the service of a petition for dissolution that results in a decree is the separate property of that spouse. Therefore, the date of service is relevant to determining when the community's interest in the retirement plan ended."[8]

As drafters of legal documents, we should avoid potentially confusing terms whenever possible. Our clients' decrees and our practices will benefit if we retire "*Van Loan*" and give the pension division job to a new friend: "*Heatherington*." FL

endnotes

1. *Heatherington v. Heatherington*, 220 Ariz. 16, 202 P.3d 481 (Ct. App. 2008)
2. *Van Loan v. Van Loan*, 116 Ariz. 178, 568 P.2d 1077 (Ct. App. 1977), *vacated, Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977).
3. 274, 216.
4. Footnote 1, page 1077.
5. 569 P.2d 214 at 217.
6. 131 Ariz. 38, 638 P.2d 705 (1981)
7. Johnson p 713 footnotes 4 and 5
8. *Heatherington*, 220 Ariz. at 24, 202 P.3d at 489, fn 3.

about the author

James S. Osborn Popp has been a Family Law sole practitioner for over 20 years, with more than 10 years' concentration on Qualified Domestic Relations Orders and retirement division issues.

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Court Corner *is a series of articles prepared by the author as time permits. It is not intended nor does it reflect the views of the Superior Court of Pima County or any other member of the bench.*

COURT CORNER

Title Seen On Bumper Sticker: *My Memorandum Decision Is Smarter Than Your Opinion*

BY HON. KC STANFORD

Today, Rule 28(C), of the Arizona Rules of Civil Appellate Procedure prohibits citation of unpublished decisions. They contain no precedential value and it is generally improper to cite to them in any court. A written, unpublished appellate decision is called a memorandum decision. A memorandum decision is distinct from a written opinion; the latter is intended as precedent. Sometimes an opinion can be depublished and relegated back to the status of a memorandum decision. Similarly, by motion, a party can request a memorandum decision be elevated to a written opinion. Got it? Good. Wait a minute, hold the presses: this rule will change effective January 1, 2015.

As of January 1, 2015, counsel may cite memorandum decisions for their persuasive value and not as precedent as provided in Rule 111(c)(1)(C), 17 A ARS, Supreme Court Rules. This sub-section will be incorporated by reference into Rule 28(C), ARCAP. With the New Year, memorandum decisions can be cited for their persuasive value on two conditions: if no published opinion adequately addresses the issue before the court and the memorandum decision itself is not a depublished opinion. Furthermore, unlike an opinion, if a memorandum decision is persuasive against your client's position, the Rule provides you have no duty to cite the memorandum decision.

At first blush, memorandum decisions may be helpful to counsel, parties and the trial court in the same way as a well-written argument presented by brief or an examination of the same issue in a sister state opinion. I would think attorneys being strong advocates will go full speed ahead in arguing the wisdom or ignorance displayed in various memorandum decisions. At the same time, I suspect the trial bench will take them with a grain of salt. The general public will just ask: did I win or lose? FL

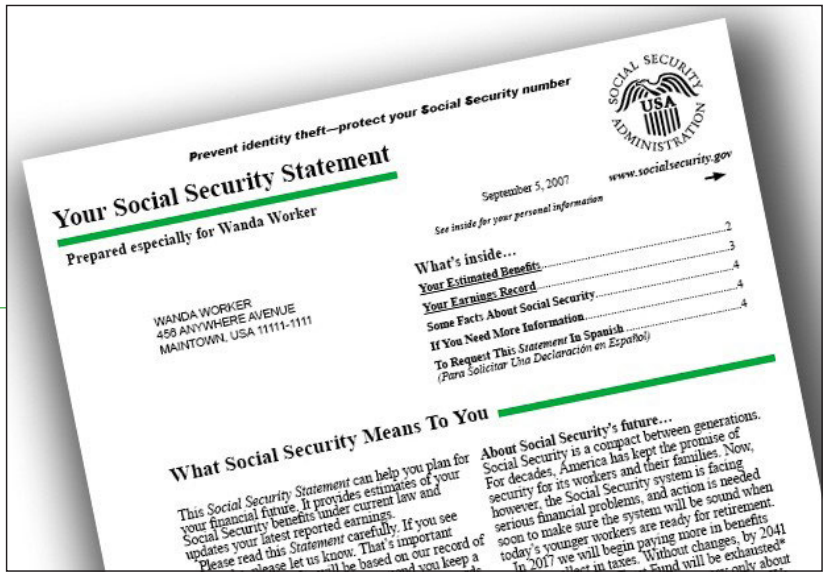
JUDGE K.C. STANFORD was appointed by Governor Jan Brewer in January 8, 2012. He previously served as a Court Commissioner in Pima County as of April 7, 1997. His focus as a Commissioner for fourteen years was family law litigation. He currently serves as a Juvenile Court. Judge Stanford grew up in Tucson, Arizona. He graduated from Amphitheater High School and received a B.A. in Economics from the University of Arizona in 1976. He graduated from the College of Law at the University of Arizona in 1979. He is married with two children and five grandchildren.

He was admitted to practice by the State Bar of Arizona and Federal District Court in 1979. He was a private attorney in Tucson from 1979 to 1989. He practiced law in every major litigation area: civil and criminal, family, probate and juvenile. A predominant portion of his time was spent in family law. He was appointed a City Magistrate for Tucson City Court in 1989 and served as the Associate Presiding Magistrate from 1992 to1997. He is an instructor and mentor for new judges.

Judge Stanford is the chair of the Dependency Reactivation Workgroup of the Pima County Juvenile Court. He is active in his faith and community. From 1993 to 2001 he served on the Board of Greater Tucson Leadership. From 1999-2000 he was President of GTL. He also served as a member of the Board of Governors of the Arizona Bar in 1988 and several years on the Board of Directors of the Pima Bar Association. He founded the Young Lawyers Division of the Pima County Bar in 1984 and served as President of the State Young Lawyers Division in 1988. He served as National Chair for Community Law Week for the American Bar Association in 1989. He is a past President of the Arizona Association of Family and Conciliation Courts, a non-profit multi-disciplinary organization dedicated to professional education and research on families and children in legal or dysfunctional crisis. His commitment is to develop the best bench, bar and community possible.

Using the Social Security Statement in Trial and Settlement

By Jason R. Simon
Family Law Practitioner


Prevent identity theft—protect your Social Security number

Your Social Security Statement

Prepared especially for Wanda Worker

September 5, 2007

www.socialsecurity.gov

See inside for your personal information

WANDA WORKER
456 ANYWHERE AVENUE
MAINTOWN, USA 11111-1111

What's inside...
Your Estimated Benefits 2
Your Earnings Record 3
Some Facts About Social Security 4
If You Need More Information 4
To Request This Statement In Spanish 4
(Para Solicitar Una Declaración en Español)

What Social Security Means To You

This Social Security Statement can help you plan for your financial future. It provides estimates of your Social Security benefits under current law and updates your latest reported earnings.
Please read this Statement carefully. If you see

About Social Security's future...
Social Security is a compact between generations. For decades, America has kept the promise of security for its workers and their families. Now, however, the Social Security system is facing serious financial problems, and action is needed soon to make sure the system will be sound when today's younger workers are ready for retirement. In 2017 we will begin paying more in benefits

That White and Green Piece of Mail

Annual Social Security Statements are often a useful tool in developing, negotiating and trying a family law case where spousal maintenance is an issue. The Social Security Statements provide evidence of the parties' earnings histories, help estimate the benefits to which the parties may be entitled, and assist in retirement planning. While this primer will primarily focus on spousal maintenance, the Statements may also prove useful where child support is an issue. In years past, the Statements were mailed annually by the Social Security Administration. Budget cuts suspended that practice. Now, the Statements are available through online registration and retrieval. It may also be possible to obtain the Statements by phone or at a local Social Security office. It's more than worthwhile to have our clients obtain their statements or request them in discovery.

Some Preliminary Matters

The Social Security Statements warn that they only provide estimated benefits because the benefits are subject to change with cost of living adjustments, changes in law, changes in the recipient's earnings and special types of employment. There are many rules affecting social security, disability, and Medicare, as evidenced by the fact that some attorneys specialize in federal benefits. Short of consulting a specialist in this field, useful links in the Statements and on the Social Security Administration's website (www.ssa.gov) can more thoroughly explain the variables affecting the benefits. It's often good practice to delegate the task of researching the parties' benefits to our clients, who can navigate the online resources or get reliable information in person at a Social Security office. As we remind our clients of the uncertainty that comes with trying the issue of spousal maintenance, this should help our clients think realistically about their future income and take ownership of the facts used to build the case. The Social Security Statements claim to be more reliable as the recipient is nearer to retirement; indeed, this context serves to underscore the utility of this evidence.

Spouses at or Near Retirement

The Social Security Statements provide the age at which the recipient can take normal or early retirement benefits. If the term of maintenance being negotiated or sought in court approaches or will encompass the time period in which a party is eligible to receive benefits, then the Statement is evidence of anticipated changes in income. Estimated Social Security retirement income may suggest the time at which maintenance should reduce, terminate, or even increase. If a spouse is eligible for the retirement benefit but is not taking it, then the Statement is evidence of available income, whether to pay maintenance or meet the needs of the spouse seeking it. As noted, there are nuances affecting the benefits and, consequently, affecting the arguments to be made.

It may or may not be prudent for a spouse to take the early benefit. A spouse who continues to work while taking the early retirement benefit may be entitled to a greater benefit at a later time. For those inclined to crunch numbers, be mindful that the spouse working and taking early retirement will also receive a reduced benefit during the working years prior to and the year of reaching normal retirement age. The earnings record, age, and employment status of both spouses (and still other factors) are all important. If one spouse doesn't have sufficient credits to qualify for the retirement benefit on that spouse's "own record," he or she may still qualify to receive a benefit on the other spouse's record. Thus, it may be necessary to have one spouse's Statement to estimate the benefit the other spouse will receive. The utility of the Statements extends beyond the retirement context as well.

Other Fact Patterns

Perhaps the greatest benefit to having the Social Security Statement in hand is that it provides a concise, chronological, and life-long history of a party's earnings. This is particularly useful where old tax returns are unavailable, or, even if the returns are available, where no W-2's are available to determine the parties' respective incomes in a particular year. Past income tells a story. For example, does Wife claim that she stopped working or her income dramatically decreased at the time of marriage? Does she claim this occurred at the

time of having children? Does Husband claim his earnings had already peaked at the time of marriage? Does he claim that his income has rapidly declined? Does the expert predict the seeking-spouse's income to be higher than ever before? The Social Security Statement can bolster or poke holes in the story being told by the parties or their experts.

The fine print remains important. The Statement lists the earnings record by year, with the corresponding taxed social security earnings and taxed Medicare earnings for each year. The Statement explains that *all* earnings have been subject to Medicare tax since 1994. Thus, the reported, taxed Medicare earnings from 1994 and thereafter should be a reliable summary of total earnings for those years. The Statement reports income from both employment and self-employment. It also reminds us of the social security and Medicare tax rates in effect the prior year.

ADMITTING THE STATEMENT

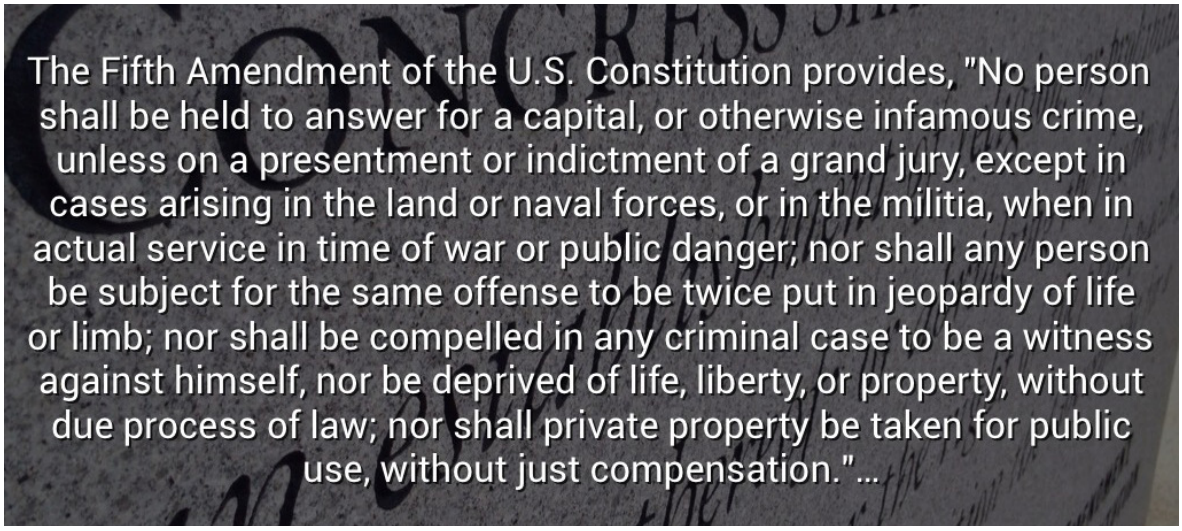
If admission of a Social Security Statement into evidence is challenged on the grounds of hearsay, then consider the following arguments. The public records exception to hearsay does not require that the record be publicly available; rather it must be a record of a public office. Arizona Rules of Evidence, Rule 803(8). That the Statements are so commonplace suggests that they may qualify under the residual exception to hearsay under Rule 807. Finally, the Statements can always be offered for the purpose of impeachment on cross examination. FL

about the author

Jason Simon is a Tucson native and practices family law with The McCarthy Law Firm. He earned his Bachelor's Degree from the University of Arizona and is a 2008 graduate of the University of Arizona, James E. Rogers College of Law. Prior to entering private practice, Jason clerked for Hon. Christopher Browning of the Arizona Superior Court in Pima County. For fun, he pretends to be a handyman and plays acoustic guitar.

INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN FAMILY COURT

BY J. ALEXANDER DATTILO
The Cavanagh Law Firm



When a family court litigant has committed a possibly criminal act and is questioned about that act during pretrial discovery or trial, he or she has the option to invoke the Fifth Amendment privilege against self-incrimination. This scenario is most common in the context of custody issues when a parent is questioned about topics such as prior drug use, solicitation of prostitution, or domestic violence. In the financial context, it may arise if one party dissipated community and/or joint property in furtherance of an illegal act. This article will explore two threshold issues that arise when the privilege is asserted in a family court proceeding – whether the party asserting the privilege can still be compelled to respond, and what consequences follow at trial if a party validly invoked the privilege. It will further explain why an Arizona trial court should impose stringent restrictions and/or penalties on the party asserting the privilege in order to limit the gamesmanship that can ensue when a litigant attempts to thwart discovery of his potentially criminal behavior.

Assuming that a party properly invoked the privilege because he would face a substantial risk of criminal liability if he responded to the question(s) posed, an Arizona trial court must impose certain restrictions on the party asserting the privilege, but retains some discretion as to what degree penalties are imposed. In *Montoya v. Superior Court In & For Cnty. of Maricopa*, 173 Ariz. 129, 840 P.2d 305 (App. 1992), the Arizona Court of Appeals decided the issue of whether a trial court may sanction a party for invoking his Fifth Amendment right against self-incrimination in response to potentially incriminating discovery requests, by striking that party's pleadings and entering a default judgment against them as to the issue of custody. The *Montoya* court held that such a penalty "imposed an undue cost on the exercise of the privilege." *Id.* at 131, 840 P.2d 307. In *Montoya*, the father invoked the privilege against self-incrimination in a child custody proceeding when he refused to answer both questions from a custody evaluator during a court-ordered custody evaluation and questions from the mother in 190 of 200 Requests for Admission, all relating to the father's past drug use. *Id.* at 130, 840 P.2d 306. The trial court denied the father's motion for a protective order and ordered him to respond to the drug-related questions. *Id.* The Arizona Court of Appeals then accepted special action jurisdiction, and reversed the trial court, ruling that the father had a right to refuse to answer the questions of the mother in formal discovery and of the custody evaluator. *Id.* On remand, the trial court struck the father's pleadings, entered a default judgment against him, and awarded custody to the mother pending the default custody proceeding. *Id.* The father then filed his second special action as to the issue of whether the trial court improperly sanctioned him for his invocation of the Fifth Amendment privilege against self-incrimination. *Id.* The Court of Appeals held that a party does not violate a discovery order when he has a constitutional right to invoke the Fifth Amendment. *Id.* The court then outlined the consequences that flow from a party's invocation of the privilege in responding to a Request for Admission in a custody proceeding:

> **Although the trial court cannot impose Rule 37(b) sanctions, strike the pleadings, or enter a default judgment, we conclude the following consequences may follow the father's invocation of his Fifth Amendment rights. First, the trial judge may draw a negative inference from the father's invocation of the Fifth Amendment.** *Buzard,* 89 Ariz. at 48, 358 P.2d at 158; *Ikeda v. Curtis,* 43 Wash.2d 449, 458, 261 P.2d 684, 690 (1953). **Unlike other jurisdictions, however, our supreme court allows the father to extinguish the negative inference by later choosing to testify at trial.** *See Buzard,* 89 Ariz. at 48-49, 358 P.2d at 158 (although defendant invoked Fifth

Amendment during his deposition, he extinguished the negative inferences when he testified at trial); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018, at 149 (1970) (criticizing Arizona's approach).

Second, if the father later chooses to testify, he waives the privilege against self-incrimination. *Brown v. United States,* 356 U.S. 148, 155-56, 78 S.Ct. 622, 627, 2 L.Ed.2d 589 (1958); *see also State v. Taylor,* 99 Ariz. 85, 90, 407 P.2d 59, 62 (1965); *see also State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 159-60, 735 P.2d 767, 769-70 (1987). **A party cannot testify for his or her own advantage and then invoke the privilege and claim the right to be free from cross-examination.** *Brown,* 356 U.S. at 155-56, 78 S.Ct. at 627; *Taylor,* 99 Ariz. at 91, 407 P.2d at 63. **Thus, if the father chooses to retain the protection of the Fifth Amendment, he may not offer personal testimony to support his case**.

If the father chooses not to personally testify at trial, he may still offer other evidence to meet his burden of proof. *Federal Practice and Procedure* § 2018, at 149-50 (1970). In awarding custody, the court must be guided by "the best interests of the child." A.R.S. § 25-332(A). In addition, "the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." A.R.S. § 25-332(K). We conclude that the trial court cannot make specific findings that are in the best interests of the child if it enters a default judgment when one party invokes the privilege against self-incrimination. The court should not treat child custody as a penalty or reward for a parent's conduct. *Annest v. Annest,* 49 Wash.2d 62, 64, 298 P.2d 483, 484 (1956).

…

The father may either offer personal testimony to support his case or invoke the protection of the Fifth Amendment. If he chooses the latter, the court may draw negative inferences and the father may not offer personal testimony at trial. He may, however, offer other evidence to support his case.

Id. at 131-32, P.3d 307-08 (citations omitted). (Emphasis added).

Montoya provides an "all-or-nothing" rule in holding that the party in a custody proceeding who asserts the privilege has two options. First, he can refrain from testifying at trial altogether and retain the full protection of the privilege, but the trial court is then free to draw negative inferences against him for his exercise of the privilege, and would be free to assume that the potentially criminal behavior being inquired about actually occurred.[1] Alternatively, the party who asserted the privilege in pretrial discovery may elect to testify at trial and waive the privilege against self-incrimination entirely, and therefore could be compelled to answer any questions regarding his potentially criminal activity during cross-examination. It thus would appear at first glance that under Arizona law, it is possible for a family court litigant to dodge pretrial discovery regarding his potentially criminal activity, without ever suffering the consequence of a negative inference being drawn if he ultimately testifies at trial.

The court should not treat child custody as a penalty or reward for a parent's conduct.

However, a handful of family law opinions from other jurisdictions have upheld restrictions imposed by the trial court on a party who invoked the privilege in response to discovery requests, and held that such restrictions would not constitute an "undue cost on the exercise of the privilege" as it was narrowly defined under *Montoya*.[2] A trial court order like the one that was issued in *Meyer v. Second Judicial Dist. Court In & For Washoe Cnty.*, 591 P.2d 259 (Nev. 1979), giving the options to the party asserting the privilege of either responding to discovery requests regarding the potentially criminal act by a certain date, or waiving the right to testify if no response is given by that date, and limiting disclosure of the discovery responses to the court, parties, and counsel, would not be invalid under *Montoya*. This restriction would prevent a party from being able to stymie pretrial discovery as to his past criminal act by asserting the privilege, without suffering a negative inference by the court if he testifies at trial. The purpose of the privilege against self-incrimination is not to allow a party to ambush the other side with surprise testimony at trial, effectively using the privilege as both a sword and a shield.[3]

Under *Montoya*, the trial court is prohibited from making a custody award as a punishment to the party exercising the privilege. *Montoya* is silent as to whether the trial court may impose a financial penalty as punishment against the party exercising the privilege, such as awarding an offset to the other party when they have asserted a waste claim. At the very least, the trial court would have significant discretion to make a negative inference regarding the amount of property that was wasted or dissipated if a party exercises the privilege in response to an inquiry related to a financial issue.

In addition to these considerations, one should also determine whether the party who has asserted the privilege can still be compelled to testify about their potentially criminal act. The right to assert one's Fifth Amendment privilege against self-incrimination does not depend upon the likelihood, but rather the *possibility* of prosecution.[4] The privilege extends beyond obvious admissions of guilt, to encompass statements that may only *tend* to incriminate, by furnishing one link in the chain of evidence required to convict.[5] However, for a witness to validly invoke the privilege, she must apprehend a real and appreciable danger of prosecution.[6] If a witness asserts the privilege, but no possibility of conviction or criminal liability exists, the design for which the privilege is created is not present, and there is no privilege.[7] A witness need not conclusively demonstrate that his answers will subject him to prosecution in order to effectively invoke the privilege, but the witness must establish a factual predicate from which the court can, by use of "reasonable judicial imagination" conceive of a sound basis for the claim.[8] In a civil trial, the privilege against self-incrimination does not prevent opposing counsel from asking potentially incriminating questions, and the privilege cannot be claimed in advance of the questions actually propounded.[9] The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself, as it is always for the court, and not the witness to determine whether there is a proper basis for invoking the privilege.[10]

The party asserting the privilege may not face a "real and appreciable" risk of prosecution and therefore have no valid basis under which to assert the privilege, possibly due to the fact that the statute of limitations for the crime in question has run, or the risk of prosecution is merely imaginary. This second scenario often arises because the party asserting the privilege is not being investigated or prosecuted for the act at issue, or the question regarding the potentially criminal act does not demand a response with information specific enough to either incriminate or lead to the discovery of evidence that could incriminate.

If the statute of limitations for the underlying offense has expired, the privilege does not apply.[11] Several family law cases hold that a party is not entitled to any protection against self-incrimination if the statute of limitations for the crime in question has run.[12] If the offense was not committed within the past year and was only a misdemeanor, the statute of limitations may have already run for that crime.[13] However, in Arizona the statute of limitations does not necessarily begin to run upon the completion of the crime, but rather when the government, through the exercise of reasonable diligence, "should have" discovered probable cause to believe an offense has been committed.[14] Thus, enough ambiguity may exist with regard to the statute of limitations issue that the party asserting the privilege can declare that it is at least *possible* that he would face prosecution if compelled to answer.

Even if the statute of limitations for the underlying crime has not run and prosecution is still theoretically possible, the privilege cannot be validly invoked if the risk of prosecution is so unlikely that it is merely "imaginary and unsubstantial."[15] Thus, if the party asserting the privilege has not been charged, his argument as to why he should not be compelled to testify about the potentially criminal act may rely on the remote possibility that a prosecutor is monitoring this particular family court proceeding. This is a textbook example of imaginary risk, which the Arizona Court of Appeals has deemed an insufficient basis to support invocation of the privilege. In *Phelps Dodge Corp. v. Superior Court In & For Cochise Cnty.*, 7 Ariz. App. 277, 438 P.2d 424 (1968) *abrogated by State v. Ott*, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990), the Arizona Court of Appeals held that the privilege against self-incrimination may not be validly invoked in lieu of a response to Request for Admission.[16] Of particular relevance was the *Phelps Dodge Corp.* court's disapproval of a law review article arguing for a broad application of the Fifth Amendment privilege, due to the possibility that a party's admission of a particular fact could spark a criminal prosecution:

> A law review article advocating a contrary result to that enunciated here is unpersuasive. Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962). The author reaches the conclusion that the basic reason for upholding a Fifth Amendment claim of privilege in opposition to a Rule 36 request for admission is that the admission of the particular fact may be the precipitating cause of criminal charges. 71 Yale L.J. at 385. He criticizes the Logsdon decision because an indictment against the defendant in that case had already been returned when the request for the admission had been made. If Finman's reasoning is sound, then we see only the most insubstantial grounds for frustrating this rule of discovery. Assuming there are prosecutors following the proceedings in a civil action such as this, it would seem equally probable that they would be stimulated into action by a direct assertion of the privilege to a Rule 36 request as by a failure to respond to the request, an option clearly left open under this Rule.
>
> *Id. at* 287, 438 P.2d 434.

In ruling that the privilege could not be invoked in response to Requests for Admission, the *Phelps Dodge Corp.* court based its reasoning on the fact that the language of the applicable rule, A.R.S. Rule 36(B), afforded the option to the party to whom the request is made to ignore the request, and in that event his or her conduct would be deemed an admission only in the pending action. *Id.* Therefore, an admission in response to a Request for Admission is not testimony that could implicate the defendant in criminal activity. *Id. Phelps Dodge Corp.* was called into question in *State v. Ott*, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990). *Ott* also decided the issue of whether a party's assertion of the privilege against self-incrimination in response to Requests for Admission was valid, and held that the privilege can be validly invoked in response to a Request for Admission if the response would likely be self-incriminating, noting "Because rule 36 does not protect against derivative use of information obtained through admissions, its protection is not coextensive with the scope of the privilege against self-incrimination." *Id.* at 426, 808 P.2d 311. However, in *Ott* the defendant asserting the privilege had already been indicted on two criminal counts and his criminal case was still pending at the time the Court of Appeals issued its decision. *Phelps Dodge Corp.* would seem more applicable in situations where the party asserting the privilege has not been charged for any crime.

Even if the family court litigant faces a realistic possibility of criminal prosecution and therefore should not be compelled to respond to the inquiry, the trial court should restrict that party's options, and prevent him from thwarting discovery of his possibly criminal acts until trial. *Montoya* limits the authority of the trial court only from making a custody award as a punishment for a parent's assertion of the privilege. Absent harsh penalties for asserting the privilege, any family court litigant can block discovery without repercussion merely because his actions rose to the level of criminal activity. FL

ENDNOTES

1. When a party who invokes the Fifth Amendment during pretrial discovery in a civil case later decides to testify at trial, opposing counsel may not then raise a negative inference by referring to that party's earlier refusal to testify. See *Buzard v. Griffin*, 89 Ariz. 42, 358 P.2d 155 (App. 1960).
2. See *Meyer v. Second Judicial Dist. Court In & For Washoe Cnty.*, 591 P.2d 259 (Nev. 1979) (Order prohibiting the former wife from testifying in the custody hearing unless she elected to answer deposition questions under specified conditions designed to limit disclosure of her answers to the court, counsel and parties did not impose a penalty on the former wife for the exercise of her constitutional privilege against self-incrimination, when she had refused on Fifth Amendment grounds to answer deposition questions relating to her use or purchase of drugs, the presence of drugs in her home, and use by friends or acquaintances); see also *Christenson v. Christenson*, 162 N.W.2d 194 (Minn. 1968) ("…a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened"); see also *Minor v. Minor*, 240 So. 2d 301 (Fla. 1970) (The wife was not permitted to further prosecute her divorce action upon her refusal to answer requests for admission related to the husband's affirmative defense of adultery); but see *In re Mark A.*, 68 Cal. Rptr. 3d 106 (Cal. App. 2007) (Striking the testimony of other witnesses as a sanction for the father's refusal to obey the court's order to testify was erroneous, even though it constituted harmless error).
3. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 577 (1st Cir. 1989) ("A defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial").
4. *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974).
5. *Flagler v. Derickson*, 134 Ariz. 229, 231, 655 P.2d 349, 351 (1982).
6. *Id.* See also *State v. Verdugo*, 124 Ariz. 91, 602 P.2d 472 (1979) (To invoke the right against self-incrimination under either the state or federal constitution, the danger of prosecution must be real and appreciable and not imaginary and unsubstantial).
7. *Anderson v. Coulter*, 16 Ariz. App. 27, 30, 490 P.2d 856, 859 (1971) *vacated*, 108 Ariz. 388, 499 P.2d 103 (1972).
8. *Id.* at 66, 461 P.2d 710.
9. *Thoresen v. Superior Court In & For Maricopa Cnty.*, 11 Ariz. App. 62, 66, 461 P.2d 706, 710 (1969).
10. *Id.*
11. *Stogner v. California*, 539 U.S. 607, 620, 123 S. Ct. 2446, 2454, 156 L. Ed. 2d 544 (2003); see also *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896).
12. See *Howard v. Howard*, 422 So. 2d 296, 297 (Ala. Civ. App. 1982) (The husband's constitutional right against self-incrimination was not violated when the judge compelled him to testify only as to acts occurring beyond the one-year statute of limitations); see also *Graham v. Miracle*, 556 P.2d 605, 607 (Okla. 1976) (Party was not entitled to Fifth Amendment privilege against self-incrimination when statute of limitations for adultery had run).
13. See A.R.S. §13-107(B)(2), stating that the statute of limitations for a misdemeanor is only one year; see also A.R.S. §13-107(B) ("…prosecutions for other offenses must be commenced within…[one year] after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred with the exercise of reasonable diligence, whichever occurs first.").
14. Under A.R.S. § 13-107(B), the limitation period commences on the date that the authorities knew or should have known that the offense was committed. *Taylor v. Cruikshank*, 214 Ariz. 40, 45, 148 P.3d 84, 89 (Ct. App. 2006); *State v. Jackson*, 208 Ariz. 56, 66, 90 P.3d 793, 803 (Ct. App. 2004) (Absent actual discovery of the crime, the limitation period will commence when the government, through the exercise of reasonable diligence, "should have" discovered probable cause to believe an offense has been committed, even though probable cause is only later established).
15. *Verdugo* at 92, 602 P.2d 473, citing *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).
16. The reasoning employed in *Phelps Dodge Corp.* was called into question in *State v. Ott*, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990). Ott held that an assertion of the privilege against self-incrimination in response to Requests for Admission was valid, noting that "Because rule 36 does not protect against derivative use of information obtained through admissions, its protection is not coextensive with the scope of the privilege against self-incrimination." *Id.* at 426, 808 P.2d 311. However, in *Ott* the defendant asserting the privilege in the civil action had already been indicted on two criminal counts involving the sale and distribution of cocaine and a criminal case was pending at the time of the Court of Appeals decision. In *Phelps Dodge Corp.*, as in this case, neither a criminal investigation nor a criminal proceeding had been initiated against the party asserting the privilege.

save the date: friday, june 26, 2015

(8:45am–5:15pm)

The State Bar of Arizona Family Law Section is sponsoring a seminar at this year's State Bar of Arizona Annual Convention. The seminar is entitled, ***Family Law: A Work In Progress.*** The full day session will provide informative presentations on a wide variety of topics (see below). Please join our panel of experts for this engaging seminar. 6 CLE Credit hours are available upon completion.

SEMINARS

FRIDAY ALL DAY

FRIDAY AFTERNOON

F-45 FRIDAY JUNE 26 3:45 P.M. – 5:15 P.M.

Who Is Responsible?

If you leave your firm, who is responsible for attending to client fee issues? What if you sell your law firm? Can you leave the client disputes to the attorney purchasing your firm? A panel discussion will address these issues and others that arise on the issue of who bears responsibility to address client fee disputes.

Presented by: Fee Arbitration Committee

Chair: Steven Guttell, Steven M Guttell PLC

Faculty: Renee Gerstman, Wells & Gerstman PLLC
Steve M. Guttell, Steven M Guttell PLC
Patricia Sallen, Director of Special Services & Ethics/Deputy General Counsel, State Bar of Arizona
Erin Walz, Udall Shumway PLC

1.5 CLE ETHICS CREDIT HOURS

F-46 FRIDAY JUNE 26 8:45 A.M. – 5:15 P.M.

Family Law: A Work in Progress

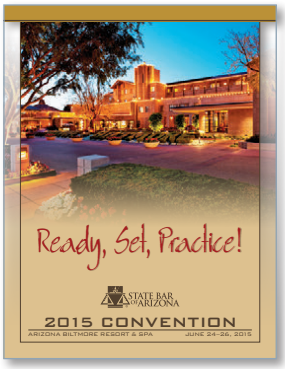
The seminar has been designed as a series of interactive, substantive and practical presentations for the advanced practitioner on a range of topics that are encountered, but not always solved in any concrete manner. The attendees will learn about advanced tax and business valuation issues, evidence, ethics/ professionalism and parenting topics. To continue recent trends in this area, mock programs will be presented on evidence and on intervention regarding children who are reluctant to engage with a parent.

Presented by: Family Law Section

Chairs: Helen R. Davis, The Cavanagh Law Firm PA
Mitchell Reichman, Jaburg & Wilk PC

Faculty:* Helen R. Davis
Marc Fleischmann
Byron Fox
Yale Goldberg, Frazer Ryan Goldberg & Arnold LLP
Mary Boyte Henderson
David Jojola, Frazer Ryan Goldberg & Arnold LLP
Kathleen McCarthy, The McCarthy Law Firm
Lisa McNorton, Law Office of Lisa C McNorton
Annalisa Moore Masunas, Moore Masunas & Moore PLLC
John Moran, PhD
Mitchell Reichman, Jaburg & Wilk PC
Lisa Reilly, Frazer Ryan Goldberg & Arnold LLP
David Weinstock, PhD

6 CLE CREDIT HOURS 1 CLE ETHICS CREDIT HOUR

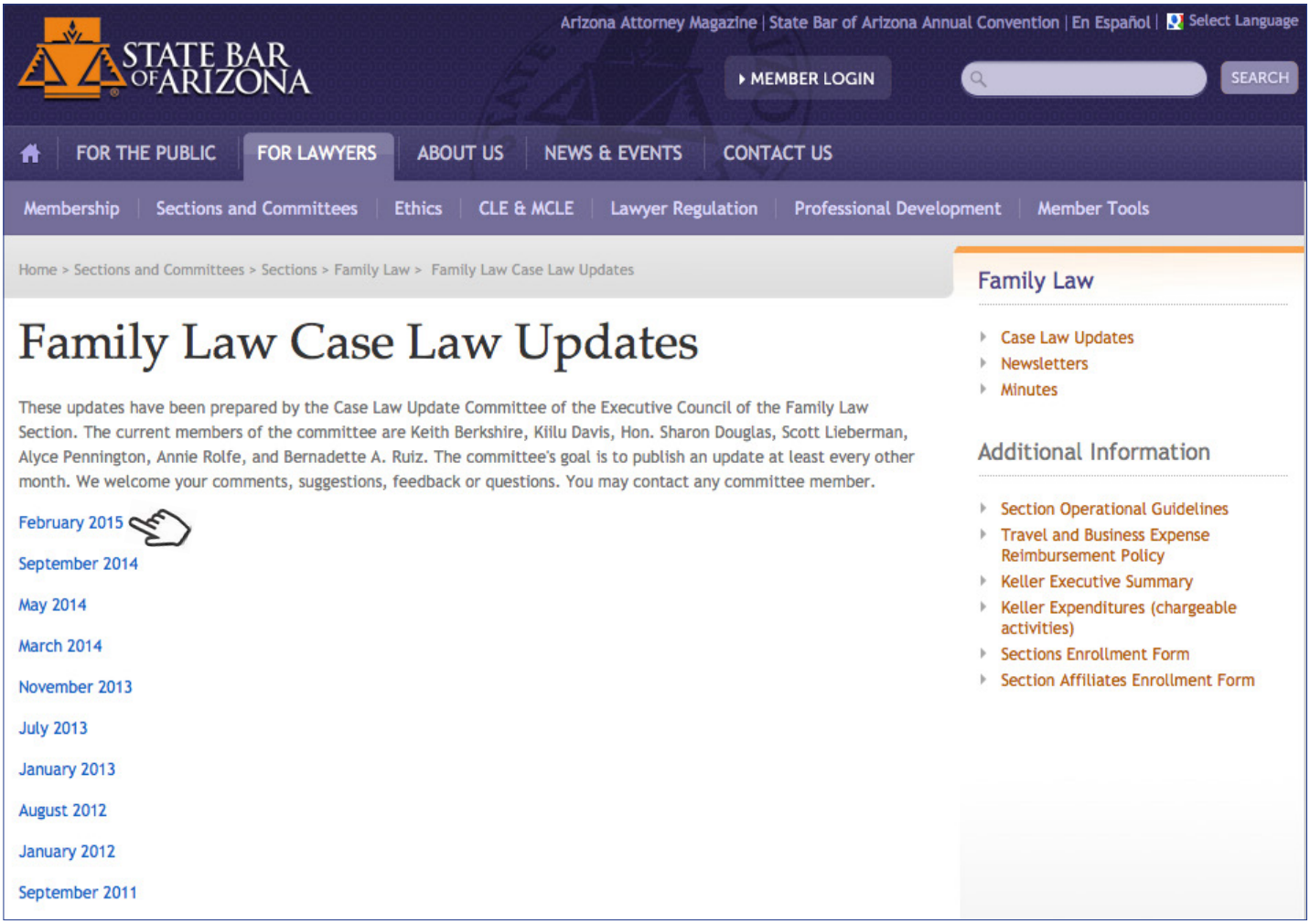


CASE LAW UPDATE

The Family Law Section regularly prepares a summary of recent Arizona family law decisions. Summaries are located on the Section's web page at:
www.azbar.org/sectionsandcommittees/sections/familylaw/caselawupdates

The most recent update – from February, 2015 – can be viewed here:
www.azbar.org/media/921860/case_law_update_feb._2015.pdf

Additionally, the previous update – from September, 2014 – can be viewed here:
www.azbar.org/media/866289/case_law_updates_september_2014.pdf



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

… If so, the deadline for submissions is June 15, 2015.

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?
- Tell us about a humorous, family court-related proceeding?

WE WANT TO HEAR FROM YOU!

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

PLEASE SEND YOUR SUBMISSIONS TO:

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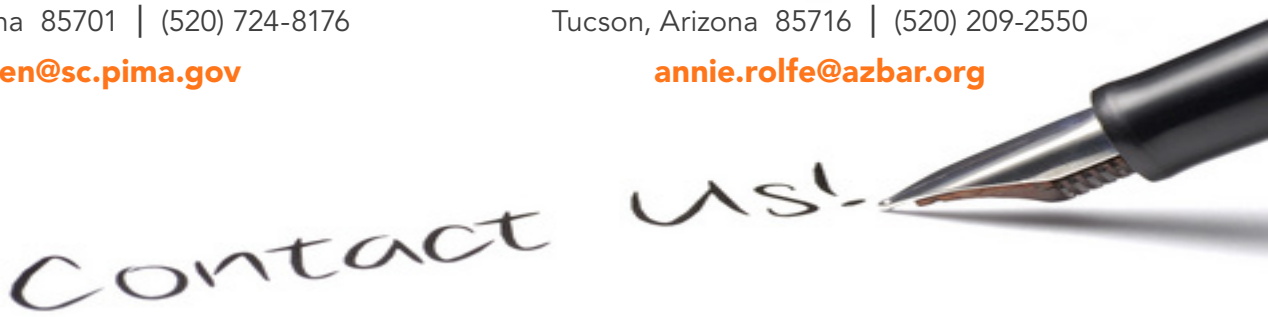

We reserve the right to edit submissions for clarity and length and the right to publish or not publish submissions.