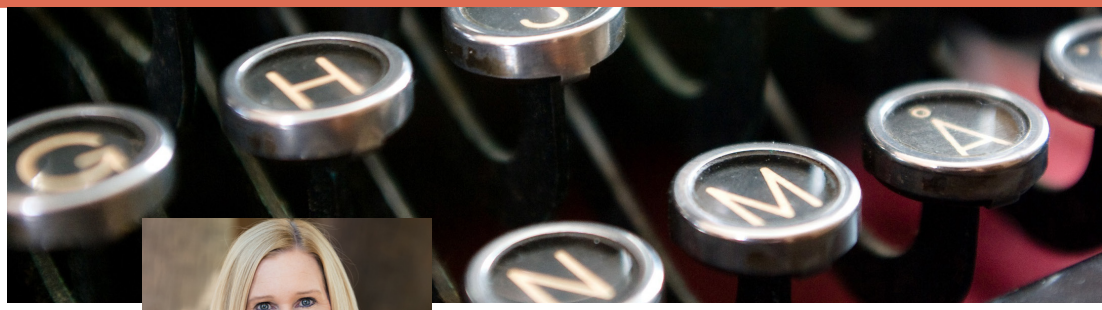
spring
2021

Family Law News

this issue...



FROM THE CHAIR

ANNALISA MOORE MASUNAS

Family Law Practice

A YEAR OUT FROM THE START OF COVID

IF YOU HAD ASKED me a year ago if COVID would still impact us as it has a year later, I would not have guessed correctly. However, we are now over a year later, and I have not been in a courtroom in person in over a year. As are many of you, I am now proficient in virtual hearings and client appointments, despite the occasional technical glitch. Our firm has adapted to a new normal, and we continue to adapt and change to meet the needs of our clients and others. One thing I miss in particular is my interactions with all of you, at various CLEs and other meetings that would otherwise have been held in person over the last year. I hope that as we navigate forward, we are able to resume more in person events in the near future.

I have said this before, but again, during this time of COVID and fewer in person trials, this is the time to remind clients how important it is to resolve cases and look for case resolution options

Parents who are working together can better navigate these times for their children, and we as attorneys can help them.

STATE BAR OF ARIZONA

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through mediation and settlement conferences. For those with children, it is more important than ever for parents to work together. Children are faced with not only difficult family situations if their parents are divorcing or separating, but they may not be in their normal school setting, they may not be in activities, they may not be seeing friends as before, and certain family members may not be able to see them. Parents who are working together can better navigate these times for their children, and we as attorneys can help them.

PLEASE MARK YOUR CALENDAR FOR THE STATE BAR VIRTUAL CONVENTION - *SOCIAL JUSTICE - LAWYERS AS AGENTS OF CHANGE*

Please mark your calendar for the Family Law Section CLE program at the State Bar Convention in June. The program will be remote, and will be held over two afternoons, on Thursday and Friday, June 17-18, 2021. You won't want to miss this excellent program! Also be on the lookout for CLE programs on the new child support guidelines. They are likely to be in final form in the near future, with an effective date of January 1, 2022, and there will be programs to discuss the changes and updated forms.

I wish everyone the best.. FL

ANNALISA MOORE MASUNAS is a partner in the Tucson firm of *MOORE, MASUNAS & MOORE, P.L.L.C.* Annalisa is a fellow of the American Academy of Matrimonial Lawyers (since 2004) and is a certified specialist in family law (since 2002). She was recognized by Best Lawyers in America in 2018-2021.

By
Stephen R. Smith
FROMM SMITH &
GADOW, PC

Part 1

Deciphering Executive Compensation[1]

Relying solely on the disclosure from an opposing party can be a hazardous proposition.

LITIGATING A DIVORCE between a corporate executive and his/her spouse will inevitably involve complicated issues of income and asset identification, valuation, and division. It is understood that corporate executives earn substantial income in comparison to the average American. According to AFL-CIO[2] calculations, total direct compensation for Chief Executive Officers ("CEOs") of the

S&P 500 index averaged nearly $14.8MM in 2019. Drilling down a little further, a study by the Economic Policy Institute ("EPI") found that realized CEO compensation at the 350 largest U.S. companies in 2019[3] averaged more than $21.3MM.[4]

The critical question for the divorce practitioner representing an executive or his/her spouse is "What should I be looking for?" This article will (1) identify and define several types of qualified and non-qualified components found in corporate executive compensation packages; (2) discuss discovery procedures and tools to identify which of these elements are included in an executive's compensation package; and (3) address strategies for dividing the community portion of such assets and the potential tax implications related thereto.

The critical question for the divorce practitioner representing an executive or his/her spouse is *"What should I be looking for?"*

ELEMENTS OF CORPORATE COMPENSATION

Some elements of an executive's compensation are relatively easy to identify and value. Typically, high level executives will have an employment contract that defines the specifics of base salary, performance bonuses (discretionary or nondiscretionary), and other benefits and perquisites such as health insurance, life insurance, and pension/profit-sharing plans. These *pieces of the compensation pie* are relatively easy to identify and understand. But in recent years, these have come to constitute the smaller portion of the highly compensated executive's overall pay package.

For many corporate executives, the lion's share of their compensation these days comes in the form of equity-based compensation (stock/options) and nonqualified deferred compensation (deferred stock, deferred investments, cash, or a combination thereof). These nonqualified plans are often referred to as *"Top-Hat plans."*

NONQUALIFIED VS. QUALIFIED

Nonqualified compensation means compensation that is paid through a plan or agreement which does not meet the qualification requirements under Section 401(a) of the Internal Revenue Code (26 U.S. Code § 401) and which is free from the constraints of the Employee Retirement Income Security Act of 1974 ("ERISA") and similar federal rules and regulations. Nonqualified benefits do not afford the same tax advantages to the corporate entity as qualified plans, like a 401(k). However, nonqualified plans are not constrained by the contribution limits and testing required under the IRC and ERISA, meaning corporations can provide substantially greater financial benefit to a limited number of key employees and executives.

Nonqualified plans are used by business entities for a variety of reasons including, but not necessarily limited to:

- Attracting and retaining senior management;
- As a supplement to pension benefits for highly compensated executives to bypass federal limits;

- As a pension supplement to attract key employees who may suffer a reduction in overall retirement plan benefits because of a midcareer or late-career employment change;
- To enhance early retirement programs or "golden parachute plans";
- As a substitute for equity incentive plans in closely held corporations; and
- As a tool for attracting and compensating members of a corporation's board of directors.

But above all these reasons, the primary purpose for which companies use nonqualified deferred compensation is to provide substantial economic benefits to key personnel or highly compensated employees of the company without the limitations created by the IRC.

Qualified deferred compensation plans such as 401(k)s, 403(b)', and defined benefit pensions must comply with a number of IRC mandated qualifications, including that the "***contributions and benefits"*** under such plans may not "***discriminate in favor of highly compensated employees."*** Companies often utilize nonqualified plans precisely so that they *can discriminate in favor of top-level executives and key personnel.*

Nonqualified plans are not constrained by the contribution limits and testing required under the IRC and ERISA, meaning corporations can provide substantially greater financial benefit to a limited number of key employees and executives.

SPECIFIC TYPES OF EXECUTIVE COMPENSATION

Deferred Compensation - A deferred compensation arrangement is, in essence, an agreement to delay payment of amounts otherwise owed to an employee until a later date. The employee's objective in such arrangements is to ensure that he/she will be taxed, generally at ordinary income rates, as and when such payments are received. With such a plan, employees may be able effectively to delay taxation and to reduce the rate of such taxation. The corporate objectives in adopting such plans are to offer an incentive to key employees and to ensure deductibility of the compensation payments in the future when they are actually paid.

Stock Appreciation Rights (SARs) - A stock appreciation right ("SAR") is a contractual benefit granted by a corporate employer which entitles the employee to receive - either in cash or in stock of the employer—the appreciation in the value of the employer's stock over a certain period of time. For example, assume Corporation X issues to CEO 1,000 SARs. Each SAR entitles CEO to receive the appreciation in one share of the employer's stock between the issuance date and the exercise date. If the price of Corporation X's stock on the issuance date is $10.00 per share and the price per share increases to $20.00 on the exercise date, then CEO would be entitled to receive $10,000 ($10 of appreciation times 1,000 SARs). Depending on the SAR agreement, the payment may be made in cash or in shares of corporate stock. Typically, SARs provide that if not exercised by a specific date, they expire.

"OVER THE LAST DECADE, THE PREVALENCE OF BASE SALARY, ANNUAL BONUS, AND PERQUISITES AS ELEMENTS OF COMPENSATION FOR CEOS HAS REMAINED FAIRLY CONSTANT IN BOTH THE S&P 500 AND THE RUSSELL 3000. WHAT KEEPS INCREASING, HOWEVER, IS THE USE OF STOCK AWARDS."[5]

Phantom Stock Plan - The term "phantom stock plan" generally refers to a long-term incentive program which grants employees "units" equivalent to the actual shares of a

company's stock. These units are referred to as "phantom stock." Phantom stock is a contractual agreement between a corporation and its employees that bestows upon the grantee-employee the right to a cash payment at a designated time or in association with a designated event in the future, which payment is to be in an amount tied to the market value of an equivalent number of shares of the corporation's stock. As with any incentive based compensation, the amount of the payout will increase as the stock price rises, and decrease if the stock price falls, but without the grantee actually receiving any stock. Phantom stock plans are non-qualified compensation arrangements and do not involve the actual issuance of stock or securities by the company. These plans allow key executives, employees, or directors to participate in the growth of a company, without adding actual additional shareholders.

Restricted Stock Plans - Restricted stock means just that - stock which is awarded to an employee under various types of "vesting" restrictions and conditions. Under a restricted stock plan, a corporation (usually through its Board of Directors) determines to whom restricted stock is to be issued. The stock restrictions are conditioned on the employee's continued service to the company over a specific number of years (or other criteria, such as meeting performance objectives). A portion of the employee's shares become unrestricted stock owned by the employee at the completion of each year of service (known as periodic vesting) or, in some cases, all the shares become unrestricted at the end of a single, specified period (known as *cliff vesting).*

Incentive Stock Options - A stock option is simply the right granted to an employee to purchase a certain number of shares of the corporation's stock at a pre-established price (the *"Strike Price"*). *Incentive stock options* (ISOs) are stock options issued by a corporate employer which meet the requirements of §422 of the IRC. (A discussion of those requirements is beyond the scope of this article.) Generally, stock options are granted to employees at a price which is greater than the market price of the corporate stock on the date of the grant. Said option therefore creates the "incentive" for the employee to work hard and improve the market value of the company, thus raising the value of the stock option.

SARs ... the price of Corporation X's stock on the issuance date is $10 per share and the price per share increases to $20 on the exercise date, then CEO would be entitled to receive $10,000...

Non-Qualified Stock Options - Options that do not meet the requirements of an ISO under IRC § 422, are called nonqualified stock options (NQSO). Nonqualified stock options do not enjoy the same favorable tax treatment that incentive stock options do. NQSOs tax treatment is governed by IRC §83. Under the code, the tax consequences to the employee and the corporation depend on a determination of when the option has a "readily ascertainable" fair market value. Under the Regulations, the option has a readily ascertainable fair market value at the time it is granted only if traded on an exchange. In those cases where the option has a "readily ascertainable value, the option holder realizes income either (1) when his right in the option becomes transferable or (2) when his right in the option is not subject to a substantial risk of forfeiture. In essence, the difference between and ISO and an NQSO is that an ISO only triggers a taxable event when it is exercised, whereas an unexercised NQSO could still create a taxable event if it is "transferable" (i.e., vested and/or unrestricted) and is not subject to forfeiture or loss.

IDENTIFYING THE ELEMENTS OF THE EXECUTIVE'S COMPENSATION: THE DISCOVERY PROCESS

Federal securities laws require that publicly traded companies issue clear, concise, and understandable disclosure about compensation paid to CEOs, CFOs, and certain other high-ranking executive officers. Several types of documents that a corporation files with the SEC are public record and contain information about the company's executive compensation policies and practices. For example, you can locate information about the very top level executives' pay in corporate SEC filings like:

(1) The company's annual proxy statement;
(2) The company's annual report on Form 10-K;

(3) Registration statements filed by the company to register securities for sale to the public.

Proxy statements are a great starting point for information regarding the executive divorce litigant. In the annual proxy statement, a company must disclose information concerning the amount and type of compensation paid to its chief executive officer, chief financial officer, and no fewer than the three other most highly compensated executive officers. A company also must disclose the criteria used in reaching executive compensation decisions and the relationship between the company's executive compensation practices and corporate performance.[6]

SEC proxy statements are required to include a *Summary Table* which presents a condensed listing of the entire compensation package for, at minimum, the five most highly compensated executives (including the chief executive officer and chief financial officer). These tables are intended to capture every form of compensation paid to the executives including cash salary and bonuses, stock or other equity awards, non-equity incentive compensation, and the value of any other forms of compensatory benefit.

But what if the executive does not work for a publicly traded company or is not one of the five highest paid executives? Just because a company isn't publicly held doesn't mean that it can't be very large. Each year, Forbes magazine publishes a list of the largest private companies in the world. The 2020 list includes Fidelity Investments ($21B in annual revenue), SC Johnson ($10.5B), and Koch Industries ($115B), the largest privately held company in the U.S. Privately held companies often utilize nonqualified deferred compensation tools to compensate their highly paid executives. Because these companies are privately held, they are not necessarily required to publish the same types of information that publicly traded companies must. When dealing with private companies, the best source of information is going to be the company itself.

Whether the company is publicly traded or privately held, a well drafted subpoena to the corporate entity is likely to be the best method for obtaining detailed information regarding the compensation package. Under the Arizona Rules of Family Law Procedure, the executive spouse is, of course, obligated to disclose any and all information and details regarding his employment compensation and benefits. But relying solely on the disclosure from an opposing party can be a hazardous proposition. From a "best practices" standpoint, it is wise to issue a subpoena to the opposing party's employer even when he/she is willing to provide complete disclosure. The role of a divorce attorney is to *trust but verify* the information provided by the opposing party. Issuing a well drafted subpoena to the other party's employer is simply a step in the *trust-but-verify* process. FL

STEPHEN R. SMITH is a partner in the Phoenix firm of *Fromm Smith & Gadow, P.C.* His practice is limited to complex family law litigation, mediation, and appellate matters.

NOTES:

1. **This article is adapted from Materials presented by the author at the 2021 Family Law Institute Seminar.**
2. **The *American Federation of Labor and Congress of Industrial Organizations* (AFL–CIO) is the largest federation of labor unions in the United States.**
3. **https://aflcio.org/press/releases/sp-500-ceos-comp**
4. **https://files.epi.org/pdf/204513.pdf**
5. **CEO and Executive Compensation Practices in the Russell 3000 and S&P 500 | 2020 Edition, Hodgson and Tonello (2020). https://www.conference-board.org/research/ceo-and-executive-compensation-practices/ceo-and-executive-compensation-practices-2020**
6. **http://www.sec.gov/answers/execomp.htm**

By
Hon. Karen S. Adam
(Ret.)

Licensed Legal Advocates:

A new model of legal services for DV Survivors

https://law.arizona.edu/news/2020/02/new-licensed-legal-advocates-pilot-program

AT THE BEGINNING OF APRIL 2021, two lay legal advocates from Emerge Center Against Domestic Abuse in Tucson assumed new roles and responsibilities as the first Licensed Legal Advocates (LLAs) working within a non-profit agency in the United States. They began offering limited family law legal advice and assistance to Emerge domestic abuse survivor clients, pursuant to the Supreme Court of Arizona Administrative Order 2020-88. This pilot program targets a significant access to justice gap: 97% of low-income survivors of domestic violence (DV) in the United States experience a civil legal problem, and 86% of them receive inadequate or no professional legal help.

The Administrative Order includes a description of the LLA Scope of Service and the LLA Code of Conduct. The Scope of Service provides that the LLAs may provide advice and assistance to Pilot Program participants in basic family law and order of protection matters, such as petitions for dissolution or separation, orders establishing paternity and child support, parenting plans, and seeking and defending orders of protection. In court, the LLAs can sit with the self-represented participant to offer quiet assistance and support. They will not speak for the participant but are allowed to answer questions from the judge.

..students complete a rigorous eight-hours per week eight-week training program developed by the Innovation for Justice (i4J) Program at the Rogers College of Law at the University of Arizona. The LLA Pilot Program is a collaboration among i4J, the Supreme Court of Arizona, and Emerge Center Against Domestic Abuse...

The LLAs must refer issues outside of the Scope of Service to attorneys or agencies, such as Step Up to Justice and Southern Arizona Legal Aid. Complex matters such as relocation, third-party custody, out-of-state orders, immigration and financial abuse are outside the Scope of Service. The case can return to the LLA if the referral attorney or agency acknowledges that the complex issue has been resolved or that LLA engagement will not negatively impact that part of the case.

The minimum requirements for an LLA include a bachelor's degree and at least 2,000 hours of experience at Emerge. Once accepted into the Pilot Program, the students had to complete a rigorous eight-hours per week eight-week training program developed by the Innovation for Justice (i4J) Program at the Rogers College of Law at the University of Arizona. The program included online instruction, a weekly meet-up with faculty, and weekly testing administered by the Supreme Court of Arizona. Faculty members taught not only law and procedure but, as importantly, how things work in the "real" world of family law litigation.

The LLA Pilot Program is a collaboration among i4J, the Supreme Court of Arizona, and Emerge Center Against Domestic Abuse, and received significant funding support from the federal State Justice Institute (SJI). The SJI grant requires that an LLA Evaluation Team collect and analyze data about the Pilot Program and publish the results.

"THE HOPE IS THAT THE MODEL OF THIS PILOT PROGRAM WILL MAKE A DIFFERENCE IN THE WAY JUSTICE IS DELIVERED TO DOMESTIC ABUSE SURVIVOR SELF-REPRESENTED LITIGANTS..."

The all-attorney faculty team of Ari Kerr, Kristy Clairmont, Hue Le, and Marissa Sites has been critical to the success of the Pilot Program. All practice juvenile and family law and are actively engaged in additional activities, such as Lawyers for Literacy, the Southern Arizona Legal Aid Volunteer Lawyer Program, Step Up to Justice, the Pima County Bar Association Foundation and Family Law Section, and the State Bar of Arizona Family Law Section. Each has agreed to serve as a mentor to the newly-minted LLAs for the next year.

This faculty team, the LLA Pilot Program team, and the LLAs are breaking new ground. The hope is that the model of this Pilot Program will make a difference in the way justice is delivered to domestic abuse survivor self-represented litigants, not only as the data is collected next year, but long after in many more court systems across the nation. FL

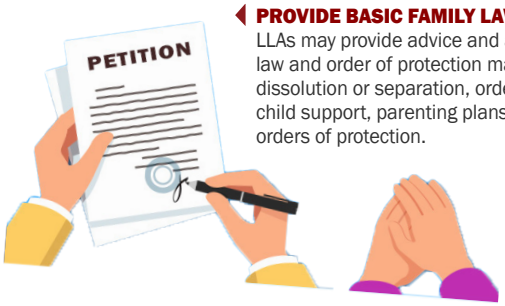
KAREN ADAM retired from the bench in November 2015 after 34 years of service as a Tucson City Court Magistrate, a Superior Court Commissioner, and a Superior Court Judge. She was presiding judge of the Pima County Juvenile Court from 2011-2014. Judge Adam is a member of the Self-Represented Litigants Network, the National Council of Juvenile and Family Court Judges (NCJFCJ), the Arizona and National Chapters of the Association of Family and Conciliation Courts. She is past-president and member of the board of the Children's Center for Law and Policy and teaches and consults on Family Treatment Drug Court grants and programs for the National Drug Court Institute and Child and Family Futures. She is also a member of the High Conflict Institute speakers roster. Judge Adam writes and lectures on juvenile and family law topics and has served as faculty for the National Judicial College since 2007 and as a Professor of Practice for the University of Arizona Rogers College of Law since 2018. She most recently designed the curriculum for the Licensed Legal Advocate Pilot Program.

New Licensed Legal Advocates (LLAs) Program

TARGETS JUSTICE GAP FOR DOMESTIC VIOLENCE SURVIVORS, AND PROVIDES NEW PATH FOR LEGAL SUPPORT

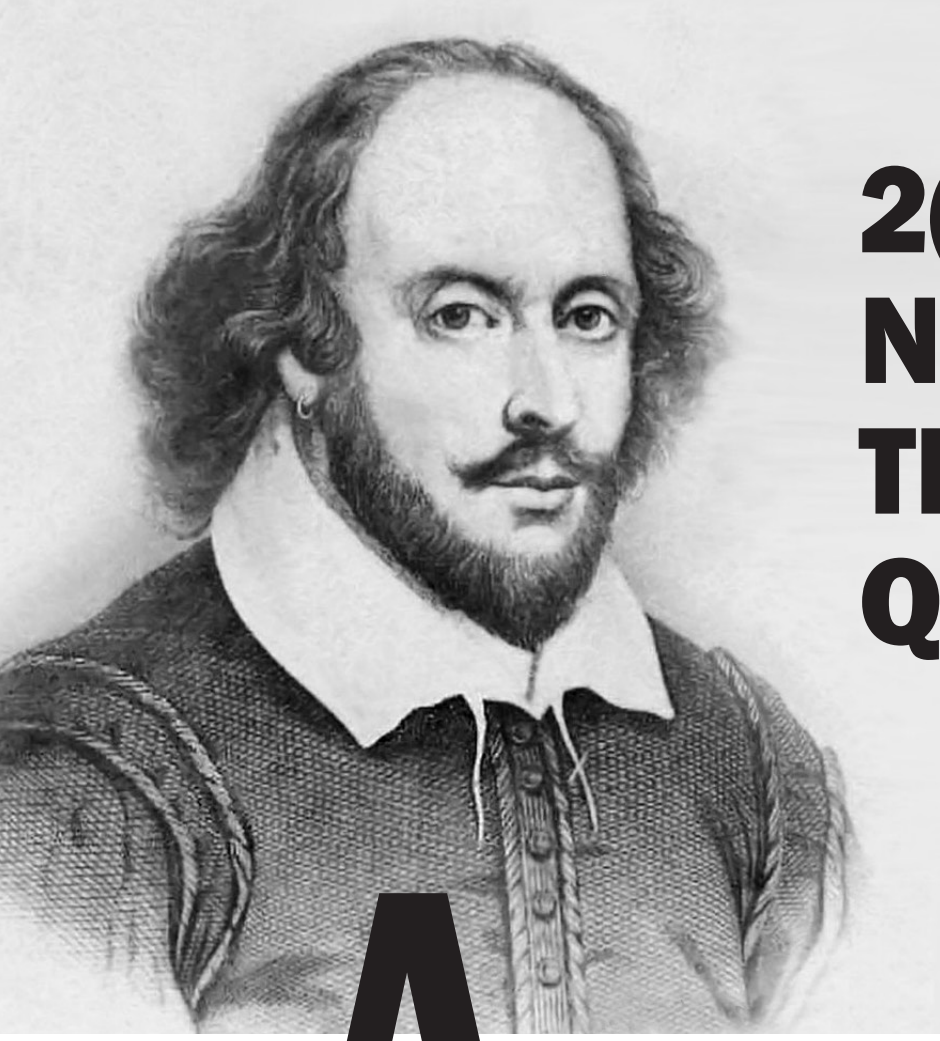
TARGETS JUSTICE GAP
The pilot program targets a significant access to justice gap: **97%** of low-income survivors of domestic violence (DV) in the United States experience a civil legal problem, and **86%** of them receive inadequate or no professional legal help.

ADVICE AND SUPPORT
Two lay legal advocates from Emerge Center Against Domestic Abuse in Tucson became the first Licensed Legal Advocates (LLAs) offering limited family law legal advice and assistance to Emerge domestic abuse survivor clients, pursuant to the Supreme Court of Arizona Administrative Order 2020-88.



PROVIDE BASIC FAMILY LAW
LLAs may provide advice and assistance in basic family law and order of protection matters, such as petitions for dissolution or separation, orders establishing paternity and child support, parenting plans, and seeking and defending orders of protection.

QUIET ASSISTANCE
In court, the LLAs can sit with the self-represented participant to offer quiet assistance and support. They will not speak for the participant but are allowed to answer questions from the judge.



2(a)[1], or Not 2(a) - That is the Question

This is the question, which is especially true, when it is not clear to an attorney what implications invocation will involve, and how it could affect a case.

Image from the title page for William Shakespeare's collected works the *First Folio*, 1623. Copper engraving of Shakespeare by Martin Droeshout.

ALTHOUGH NOT QUITE AS ELOQUENTLY WRITTEN as Shakespeare once posited, whether one should invoke Strict Compliance with the Arizona Rules of Evidence can still present itself as a dilemma. This is especially true when it is not clear to an attorney what implications invocation will involve, and how it could affect a case. Invoking *Arizona Rule of Family Law Procedure 2(a)* might be helpful in one case, yet cumbersome in another. To make matters more complicated, a case might initially benefit from strict compliance - only for new facts or issues to later arise, and strict compliance with the Rules of Evidence could begin to *complicate the presentation* of your client's case and positions in future proceedings. However, there are a few simple issues to consider and watch out for when determining whether *ARFLP* 2(a) can be helpful for your client.

Arizona Rule of Family Law Procedure 2(a), titled *Effect of a Rule 2(a) Notice; Time for Filing*, states that "any party may file a notice to require compliance with the Arizona Rules of Evidence at a hearing or trial. A party must file the notice at least 45 days before the hearing or trial. Or by another date set by the court. If a hearing or trial is set fewer than 60 days in advance, the notice is deemed timely if a party files it within a reasonable time after the party is notified of the hearing or trial date."

One of the biggest - yet most common - mistakes a family law attorney will make is adhering to a simple, "always or never" rule when it comes to invoking strict compliance with the Arizona Rules of Evidence. Attorneys will often embrace as their practice to either always request

1. **FORMERLY** *ARFLP 2(B) prior to the ARFLP rework for 2019.*

strict compliance, or simply never even consider doing so. But whether strict compliance should be invoked depends on the facts of the case. Before making that decision, certain circumstances should be considered. Each case requires its own independent analysis.

Consider what sort of evidence will be required to demonstrate your client's positions. *ARFLP* Rule 2(a) includes a list of the Rules of Evidence which would not apply without its invocation. However, certain Rules can be of greater consequence in family law proceedings. For example, if the client's interests hinge on proving the validity of complex business and financial documents that might not pass the scrutiny and burden of a higher standard of evidence, then an attorney should refrain from invoking Rule 2(a). In contrast, if a client is defending a high-end waste claim against him, and the opposing party may seek to submit as exhibits numerous "screenshots" of Venmo or Zelle transactions, then invoking strict compliance would benefit the client, to weed out evidence that would not pass the muster of Rule 2(a). Regardless of the contested issues, an attorney should also look a few steps ahead to trial and what may or may not be offered. One may also consider which attorney is representing the opposing party, as experienced attorneys may be familiar with the trial practices and tendencies of others. Regardless of what is evaluated, the decision of whether to invoke strict compliance is not a binary practice - it should involve a thoughtful examination as to what would be beneficial for your clients, even if the trial is not set to take place for months.

Perhaps the most impactful consequence of Rule 2(a) is the permission or removal of hearsay as evidence. Rules 801-807 address the numerous ways in which the Arizona Rules of Evidence deny a party's ability to offer hearsay into evidence. Recall that hearsay is defined as "out of court statement made offered to prove the truth of the matter asserted." In family law proceedings, these statements can be particularly of consequence. For example, if a psychiatrist or court-appointed advisor prepares a Report which would be useful at trial – but he/she is unavailable to attend or testify at the hearing - invocation of strict compliance would prevent an attorney from introducing the Report into evidence. If a case is prepared around the Report or the general recommendations of the expert, this can be absolutely devastating to a case. Or if the parties' child makes a serious statement regarding the way one of the parents treats him but does so in the privacy of the home and only in front of the parents, then what may have been a key issue for the judge to evaluate would be blocked by the Rules of Evidence and inadmissible.

> **NO FAMILY LAW PRACTITIONER CAN PERFECTLY PREDICT THE OUTCOME OF A CLIENT'S CASE AND WHICH MATTERS WILL AND WILL NOT ARISE. BUT BY ACTIVELY ANALYZING EACH INDIVIDUAL ISSUE AS THEY UNFOLD - AND THINKING AHEAD TO HOW THEY WILL BE BEST HANDLED AT TRIAL - ARIZONA RULE OF FAMILY LAW PROCEDURE 2(A) CAN BE USED AS A HELPFUL SWORD OR SHIELD FOR THE CLIENT'S INTERESTS.**

No family law practitioner can perfectly predict the outcome of a client's case and which matters will and will not arise. But by actively analyzing each individual issue as they unfold – and thinking ahead to how they will be best handled at trial – Arizona Rule of Family Law Procedure 2(a) can be used as a helpful sword or shield for the client's interests. The great Bard had said it best, as each practitioner is responsible to decide "whether 'tis nobler in the mind to suffer the slings and arrows of hearsay or take arms with the strict compliance." FL

JARED SANDLER is an associate with the firm of *Fromm Smith & Gadow, P.C.* and focuses his practice solely on family law matters. Mr. Sandler is a Certified Specialist in Family Law and was recently selected by his peers for inclusion in The Best Lawyers 2021 in the field of Family Law.

Annulment by Fraud

Wisniewski v. Dolecka, No. 1 CA-CV 19-0667 FC, 5/4/2021

Fraud justifying an annulment must be proved by clear and convincing evidence.

Procedural

Yee v. Yee, No. 1 CA-CV 20-0274 FC, 3/25/20211

Family court rulings that fully resolve postdecree petitions are appealable special orders entered after final judgment under A.R.S. § 12-2101(A)(2).

FACT: The parties divorced in 2009. In late 2016, the Court resolved a number of post-decree petitions, then Mother filed for bankruptcy. The bankruptcy complicated the family court proceedings. In 2018, Father filed an application for his fees. When Mother did not object, the Court entered a "judgment and order" in May 2018 awarding Father significant fees.

In August 2019 (more than a year later), Mother filed a Rule 85 motion for relief. In December 2019, the Court denied the motion and awarded Father additional fees related to the motion. In January 2020, the court entered a "judgment and order" for the additional fees.

Meanwhile, in December 2019, Mother filed a Rule 83 motion to amend the December 2019 minute entry. In January 2020, the trial court denied Mother's Rule 83 motion. In February 2020, the court issued minute entries clarifying and modifying the January 2020 minute entries *nunc pro tunc*.

In March 2020, Mother asked the court to enter a "final order" she submitted, which included Rule 78(c) language. In April 2020, the court entered Mother's proposed order with an irrelevant modification. Mother then appealed the Order, including the May 2018 attorney's fees award and all forward matters.

REASONING:

"For an appeal from a decree or a pre-decree order, it may be that a certification of finality would be required for such an order to become an appealable "final judgment" under A.R.S. § 12-2101(A)(1). But for post-decree appellate jurisdiction over "any special order made after final judgment" under A.R.S. § 12-2101(A)(2), the inquiry focuses on the issues resolved in the order and whether it seeks to enforce or stay the decree, not whether the form of the order is a "final judgment" under Rule 78. Similarly, a court rule "cannot expand appellate jurisdiction

beyond any statutory grant." Rule 78 therefore does not instruct whether this court properly has appellate jurisdiction under A.R.S. § 12- 2101(A)(2) in this post-decree matter." [Internal citations omitted].

HOLDINGS:
As to the Rule 85 motion: "Applying these principles here, an order resolving a motion for relief under Rule 85 addressing resolution of a post-decree matter is appealable as a special order after final judgment under A.R.S. § 12-2101(A)(2). ...Because a ruling on a Rule 85 motion addressing a post-decree matter falls within § 12-2101(A)(2), it is appealable even if it lacks finality language under Rule 78(b) or (c)." [Internal citations omitted].

MORE BROADLY:
"[F]amily court rulings that fully resolve postdecree petitions are appealable special orders entered after final judgment under A.R.S. § 12-2101(A)(2). ...Although a special order made after final judgment in family court does not require a Rule 78 statement of finality to be appealable, the family court must have fully resolved all issues raised in a post-decree motion or petition before an appeal can be taken under A.R.S. § 12-2101(A)(2)." [Internal citations omitted].

In re Marriage of Chapman, No. 2 CA-CV 2020-0049-FC, 3/23/2021

Summary courtesy of Kathleen A. McCarthy, J.D.

A contempt order that enforces a prior property disposition order and was certified as a final judgment is only appealable by special action.

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

Mexico's declination of home state jurisdiction based only on the finding in a Hague Convention matter, but not the UCCJEA was sufficient for Arizona to exercise jurisdiction.

Children's Issues

Margain v. Ruiz-Bours, No. 2 CA-CV 2020-0005-FC, 3/30/2021

Summary courtesy of Kathleen A. McCarthy, J.D.

Mexico's declination of home state jurisdiction based only on the finding in a Hague Convention matter, but not the UCCJEA was sufficient for Arizona to exercise jurisdiction because: (1) Mexico has not adopted the UCCJEA; and (2) its findings clearly indicated it had declined jurisdiction, leaving no other home state; the lack of significant connections to the child in Arizona are irrelevant where the child's home state denies jurisdiction.

AFTER A LONG AND WINDING TALE of international child custody jurisdiction intrigue, this is - one hopes - the final chapter.

CHAPTER 1: Arizona Trial Court Declines to Recognize Mexico Custody Order, and orders that Arizona has Jurisdiction. It all started with a dissolution action filed by Father in Mexico in 2011 when the child (born in California) was 3 years old. The child is now almost 13. Along the way, each parent took their turn at absconding with the child. At the time the divorce was filed, the child had lived in Mexico for at least six months. In 2013, Father sought return of the child to Mexico by filing a Hague Convention action, which was denied. In 2014, the Supreme Court of Mexico affirmed jurisdiction was properly in Mexico and granted Father definitive legal custody ("Initial Mexico Order"). Father then filed a petition in the Pima County Superior Court seeking to enforce this Order. The trial court denied it finding that the Initial Mexico Order had not been made in substantial conformity with the UCCJEA.

CHAPTER 2: In 2016, Division Two Requires Recognition of The Initial Mexico Order Leaving Jurisdiction in Mexico In 2016, Father appealed the Arizona trial court ruling. Pending that appeal, Father absconded with the child back to Mexico in violation of an Arizona Order. Division Two, however, reversed the trial court and,

instead, held that Mexico had exclusive jurisdiction to issue the Initial Mexico Order because it was the home state of the child.

When determining if a foreign order is in substantial conformity with the UCCJEA, an Arizona court must examine the factual circumstances under which the foreign court exercised jurisdiction, not the legal circumstances. The factual circumstances complied with the UCCJEA jurisdictional requirement that is based on where the child is living.

CHAPTER 3: In 2018, the Mexico Supreme Court Vacates the Initial Mexico Order Putting Jurisdiction Back in Arizona. The Mexico Trial Court then Ordered the Child to be Returned to Arizona; However, in 2019, Another Mexico Court Enjoined the Child's Removal from Mexico In 2018 the Supreme Court of Mexico decided that Mexico had no authority to issue the Initial Mexico Order granting custody in Father because it was contrary to the court's finding in the Hague Convention action that the child was a habitual resident of the U.S. ("Second Mexico Order"). It observed that the child should be returned to Mother in Tucson during the pendency of the custody case in Tucson. In March of 2019, the Mexico trial court ordered the child to be returned to the United States. But then in November 2019, Father notified the Pima County Superior Court that another court in Mexico enjoined the child's removal from Mexico.

CHAPTER 4: In 2019 the Arizona Trial Court Refuses to Recognize the Second Mexico Order Claiming that It was Not in Compliance with the UCCJEA, Thereby Tossing Jurisdiction Back to Mexico. Division Two Reverses and Finds that the Second Mexico Order Abdicating Jurisdiction was Valid - Jurisdiction is Back in Arizona In 2019, the Pima County Superior Court determined that the Second Mexico Order was not entitled to full faith and credit because it was not in compliance with the UCCJEA; instead, its decision was rooted in the findings made in the Hague Convention case. If upheld, that decision would have put jurisdiction back in the Mexico Court with custody in Father. On appeal, Division Two reversed, effectively giving full faith and recognition to the Mexico Supreme Court's decision not to exercise home state jurisdiction and deferring to Arizona. Division Two reasoned that Mexico effectively declined jurisdiction, even though it relied on Hague Convention grounds. The fact that its order did not comply with the findings and language of the UCCJEA was irrelevant. Mexico is not required to follow a law that it has not adopted.

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

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

Legal Decision-Making and Parenting Time

Olesen v. Daniel, Burge, No. 1 CA-CV 20-0293 FC, 3/11/2021, Amended 3/12/2021

Summary courtesy of Kathleen A. McCarthy, J.D.

COURT MUST MAKE SPECIFIC FINDINGS as to whether a parent who committed an act of domestic violence failed to rebut the presumption against granting that parent legal decision-making authority; unlike subject matter jurisdiction, venue is waivable; although issue preclusion prevents a party from relitigating a prior court order finding domestic violence, party can offer evidence that there has been a substantial change of circumstances.

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

HOLDINGS:

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

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

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

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

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

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

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

Community Property

Saba v. Khoury, No. 1 CA-CV 19-0609 FC, 1/21/2021, Amended 2/23/2021 and 3/23/2021

Editor's Note: The Saba ruling on the appellate court's website has a typo. It says it was filed in 2020, but it was actually filed in 2021.

Division 1 disagrees with itself. Months after *Femiano*, Division 1 decides the opposite and holds that, where there is a disclaimer deed, *Drahos/Barnett* continues to apply regardless of whether or not 100% of the contributions are community in nature.

M.R.S. §25-311(A) grants the superior court jurisdiction to hear all matters relating to legal decision-making and parenting time, which is precisely what the trial court did here.

RELEVANT FACTS:
During the marriage, husband and wife purchased two homes: Leisure Lane and 30th Way.

LEISURE LANE: The parties purchased "Leisure Lane" in 2010 from community property funds. They deeded the property only to wife as an "unmarried woman" in order to obtain a first-time

homebuyer credit and because of husband's poor credit. Approximately 2.5 years later, the parties refinanced the property at a lower interest rate. Wife remained the sole borrower on the loan and the escrow company required husband to sign a disclaimer deed, and executed a new warranty deed awarding wife the house as her sole and separate property but as a married woman.

30TH WAY: The parties purchased 30th Way in 2010 using a combination of separate and community funds to make the down payment. Again, the parties put the home in wife's sole and separate name and husband signed a disclaimer deed. The parties used both homes as rental properties. The deposited the rents in an account in wife's separate name and made the loan payments for both homes through this separate account.

Husband filed for divorced in 2017.

Discussion: The facts state that the trial court allocated the parties assets and debts, but does not provide detail. Within the discussion, the appellate court notes that the trial court held that the account in wife's separate name was commingled, and gave the community credit for all of the payments made towards the mortgages from that account. The appellate court affirmed this ruling because wife did not trace the separate funds.

On appeal, husband contested the validity of the disclaimer deeds. Husband did not argue that the deeds were procured by fraud, and instead argued that the deeds should be subject to the same heightened scrutiny as a postnuptial agreement (see *In re Harber's Estate*). The appellate court rejected husband's arguments.

Regarding the valuation, the trial court applied *Drahos* and *Barnett.*

For Leisure Lane, the trial court credited the community with contributions of $39,741.29. The purchase price was $199,900 and the appreciation was $145,100. The trial court calculated a community lien of $68,588.02.

For 30th Way, the community contributed $25,176.70, the purchase price was $170,001, and the appreciation was $150,999. The trial court calculated the community contribution at $47,539.25.

Husband explicitly argued the Court's holding in *Femiano*. The appellate court rejected *Femiano*.

HOLDINGS:

Disclaimer deeds: "Absent fraud or mistake, the disclaimer deeds must be enforced."

FEMIANO AND *DRAHOS*: "We part company with *Femiano*. Awarding the community Leisure Lane's full appreciation ignores the reality of what the disclaimer deed represents. But for that disclaimer, Husband would be entitled to an equal interest in the full value of Leisure Lane. And an award under *Femiano* would ignore the fact that Wife remains solely liable for the outstanding loan balance. If the community were to receive 100% of the appreciation, then Husband would be rewarded with 50% of the property's upside with none of the risk on the downside. The result is inequitable and unreasonable." As such, the appellate court affirmed the application of *Drahos/Barnett.*

Retirement

Sebestyen v. Sebestyen, No. 1 CA-CV 20-0072 FC, 3/9/2021

Summary courtesy of Kathleen A. McCarthy, J.D.

Even when eligibility for a pension is based on a disability, when the pension plan calculates that benefit based solely on accrued years of service, the benefit is earned entirely through "onerous title" as a form of deferred compensation, making the portion of the benefit earned during marriage community property subject to distribution on dissolution of marriage.

A **PENSION PLAN BASED ITS PAYMENT STRUCTURE SOLELY ON** Husband's accrued years of service, and not on his disability or its extent. This meant that Husband acquired the benefit by "onerous title", i.e., his previous "labor and industry", as opposed to "lucrative title", e.g. as compensation for his well-being. Onerous title translates into community property. Lucrative title translates into separate property.

The pension was, therefore, community to the extent it was earned during marriage. Husband argued that his disability gave him a choice to retire early; and

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

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

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

Stock v. Stock, No. 1 CA-CV 20-0015 FC, 1/21/2021

Summary courtesy of Kathleen A. McCarthy, J.D.

Community has right to reimbursement plus interest for purchasing of a credit for a spouse's premarital federal service; however, the credit itself does not become a community asset; court may order that a party's federal retirement benefit be payable to that party's estate.

FACT:

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

HOLDINGS:

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

• The community is entitled to reimbursement plus interest from the date of purchase for the community funds. However, as a matter of law, the community did not acquire an ownership interest in retirement benefits attributable to Husband's pre-marriage service. Property acquires its character as community or separate depending on the marriage status of its owner at the time of acquisition. Time of acquisition refers to the time at which the right to obtain title occurs, not to the time when legal title actually is conveyed. Citing bedrock Arizona principles, the Court held that when community funds are spent on identifiable separate property, "the community does not thereby acquire an interest in the title of the separate property itself, but merely has a claim for reimbursement." The fruits of labor expended during marriage are community property. The fruits of labor expended before marriage are separate property. Accordingly, a pension right acquired for labor expended before marriage is separate property, even if funds are used during the marriage to cause that premarriage property right to vest.

• The payable to the estate provision was appropriate and did not modify the Decree in violation of A.R.S. §25-327(A) when it ordered payment to the Wife's estate. Husband argued

After the divorce was filed, the parties entered into a settlement agreement, which provided that Wife was awarded "her community portion of Husband's federal retirement benefits."

that the Court was precluded from entering this order because the parties did not include this provision in their agreement. However, the Court noted that the parties included the retirement benefits in their agreement, which resulted in corresponding provisions in the decree. Upon dissolution, Wife's community share became her "immediate, present, and vested separate property interest" to be disposed of as she wished (citing *Koelsch v. Koelsch*, 148 Ariz. 176, 181 (Arizona Supreme Court, January 28, 1986)). Accordingly, the Court did not abuse its discretion by including this provision.

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

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

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

KATHLEEN A. MCCARTHY is the owner of The McCarthy Law Firm, Southern Arizona's largest law firm that is devoted solely to the practice of family law. Ms. McCarthy has been a lawyer for over 44 years, is a Fellow of the American Academy of Matrimonial Lawyers (AAML) (and is certified as a private arbitrator by the AAML), is certified as a domestic relations specialist by the State Bar of Arizona, is listed in Best Lawyers in America, 1999-present (2010 Tucson Family Lawyer of the Year), Southwest Super Lawyers, 2007-pres., and in Martindale-Hubbell's Bar Register of Preeminent Lawyers. She has been a guest lecturer at the Judicial College for family law judges, has written a handbook on spousal maintenance for judges and she frequently lectures and writes on family law related issues.

ANNIE M. ROLFE is the owner of Rolfe Family Law, PLLC, and is a State Bar of Arizona Certified Specialist in Family Law. Ms. Rolfe is a graduate of Yale University and University of Arizona James E. Rogers College of Law and has been in practice since 2004. Ms. Rolfe serves on the State Bar of Arizona's Family Law Executive Council and is the Chair of the State Bar of Arizona's Family Law Newsletter. She also serves as a Parenting Coordinator, Child's and Best Interest Attorney, Court Appointed Advisor, and as a volunteer Judge Pro Tempore. Ms. Rolfe is rated AV-Preeminent by Martindale-Hubbell and was consistently listed among Super Lawyers' Rising Stars

HOT TIPS CORNER

Timely Disclosure of Legal Theories and Relevant Facts. According to A.R.F.L.P. Rule 49(a)(1) Purpose. This rule's disclosure requirements are intended to ensure that each party to an action is fairly informed of the facts, data, legal theories, witnesses, documents, and other information that is relevant to the case.

There is arguably a disconnect in the rule because the "intended" language in subsection (a)(1), as applied to relevant facts and legal theories, is not explicitly followed by mandatory language in the subsequent sections of Rule 49. This is different than Rule 26.1, A.R.C.P. which includes such as a specific mandatory obligation. See Rule 26.1(a)(2), A.R.C.P.

The comments to Rule 49 and caselaw support the conclusion that practitioners are required to disclose relevant facts, claims and legal theories in a timely manner.

Recommendations:

1. Automatically calendar Rule 50 deadlines for complex case designation in every case so you can make an informed decision with your client whether to file such motion.
2. Include relevant facts, claims and legal theories in your Resolution Management Conference Statements (Standard RMC Forms 4 and 5, A.R.F.L.P., do not include such information)
3. Add standard provisions to your Rule 49 Disclosure Statements that include relevant facts, claims and legal theories.
4. Make occasional requests to the opposing party for relevant facts, claims and legal theories that he/she intends to rely upon.
5. Carefully read the opposing party's disclosure statements to ensure that you raise relevant contrary facts, claims and legal theories in a timely manner

Conclusion: Last minute claims, legal theories and defenses are not uncommon in family law cases. Last minute claims invite last minute defenses. Some judges are more forgiving than others in determining whether a party has been prejudiced by a lack of disclosure. Stay proactive and make sure you have built in safeguards to ensure compliance.

The above topic only includes a portion of Rule 49, A.R.F.L.P. Practitioners should have intimate knowledge of the rule and read and re-read its requirements as such apply to every client.

Courtesy of **Bill Bishop** with Bishop Law Office, P.C.

The self-service forms are a great resource (or, at minimum) a starting point for preparing documents. Review of the self-service forms and instructions may assist in assuring you are filing the correct forms and providing all needed information.

Courtesy of **Hon. Patricia Green,** Pima County Superior Court

Lots of witnesses are relying upon notes while testifying remotely, or at least it appears they might be. Review Rule 612 re: documents to refresh recollection, and be prepared to argue your position re: right to inspect anything the witness is relying upon. Under Rule 2(b)(2), Rule 612 still applies.

Courtesy of **Anonymous**

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

May 26, 2021	Indian Child Welfare Act (ICWA) Update (GoToWebinar format)
June 17-18, 2021	Virtual Family Law Section CLE program- State Bar Convention
July 7-10, 2021	CLE by the Sea
August 1, 2021	Legal Specialization Applications Due
October 1, 2021	Late Legal Specialization Applications accepted
November 19, 2021	Advance Family Law CLE (virtual program)

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

… If so, the deadline for submissions is July 16, 2021.

Would you like to...

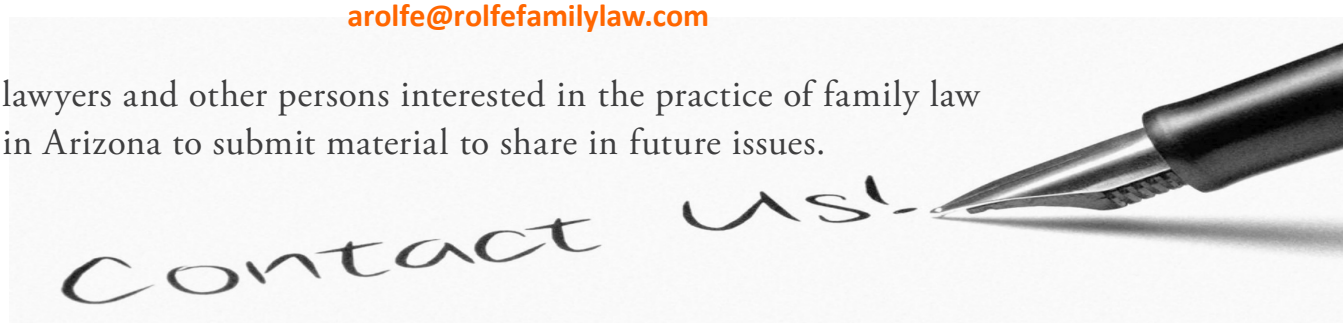
- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

ANNIE M. ROLFE, FAMILY LAW ATTORNEY
Rolfe Family Law, PLLC
2500 N. Tucson Blvd., Suite 120
Tucson, Arizona 85716 | (520) 209-2550
arolfe@rolfefamilylaw.com

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.