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Family Law News

this issue...

STATE BAR OF ARIZONA

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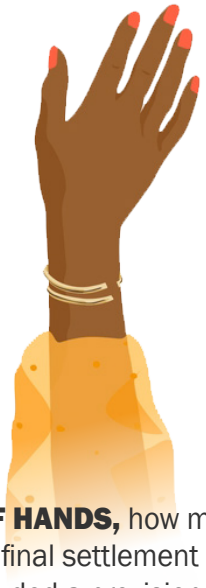
Caveat Drafter:

"EACH PARTY IS AWARDED ALL PERSONAL PROPERTY IN THAT PARTY'S POSSESSION."

By
Judge Bruce R. Cohen
(Family Court Presiding Judge/
Maricopa County Superior Court)

Old Adage

"possession is 9/10ths of the law"



BY A SHOW OF HANDS, how many either have drafted or read final settlement documents or orders that included a provision that "each party is awarded all personal property in that party's possession?" I assume that if you have engaged in the practice of family law, your hand is now raised. Question 2: Keep your hand up if you have drafted or read final settlement documents or an order that included this provision to divide the "stuff" the parties had accumulated; you know, the furniture, appliances, dishes, silverware, Tupperware, family memorabilia and the like. I will assume that many of you, if not all, still have your hands up.

In fact, this provision is among the most common of provisions contained in settlement documents or court orders that purport to divide the "stuff" of the parties. It is a generally understood provision that serves as a substitute for having to inventory and list all of the pots and pans. It relies on the old adage "possession is 9/10ths of the law" so if a party possesses any of the "stuff" at the time of the settlement, that party keeps that stuff.

Wow. Quite an epiphany, no? Well, stay with me.

Remember law school? Way back then, we were taught that there were two types of property. Real property is generally defined to be fixed property, principally land and buildings. Personal property is understood to be everything else, often considered property exclusive of land and buildings. It is sometimes referred to a movable property. So, pop quiz: The martial residence, real or personal property? Correct - it is real property. The set of linens in the martial residence, real of personal property? Right again - it is personal property. We all did learn something in law school beyond *International Shoe*. One more: the joint checking account of the parties? Right again - it is personal property.

...family lawyers have either drafted/read a typical final settlement document/order that include a provision that "each party is awarded all personal property in that party's possession."

Way back in law school, we were taught that there were two types of property: real property... and personal property...

So where am I going with this?

Consider the case of *In re the Estate of Lamparella*, 210 Ariz. 246 (App. 2005). During marriage, Husband acquired an annuity policy and designated Wife to be the beneficiary. The annuity was funded from and as a replacement to the retirement plan that Husband had through his employer. Three years later, Wife filed for divorce and used a "fill-in-the-blanks" form. Husband and Wife jointly filled out the sections regarding the division of real and personal property, including checking the box of one provision that each would "retain any and all personal property in their respective possessions and/or control" and another checked-box that read that each "shall retain as their own, any and all pensions and/or retirement benefits pursuant to their employment which are due and/or to become due." There was no specific reference to the annuity. A final decree was entered.

After entry of the decree, Husband took no steps to remove Wife as the beneficiary on the annuity. He then passed away in 2002. His estate made a claim for the annuity proceeds as did Wife. The proceeds were then deposited with the court to allow the battling claims to be decided. The Probate Court eventually awarded the annuity proceeds to the estate and Wife appealed.

...WIFE USED A "FILL-IN-THE-BLANKS" FORM. HUSBAND AND WIFE JOINTLY FILLED OUT THE SECTION FOR DIVISION OF REAL AND PERSONAL PROPERTY, INCLUDING CHECKING THE BOX OF ONE PROVISION THAT EACH WOULD "RETAIN ANY AND ALL PERSONAL PROPERTY IN THEIR RESPECTIVE POSSESSIONS AND/OR CONTROL" ...

Among the issues on appeal was the impact of the terms of the decree from the two "checked-box" provisions regarding personal property and retirement. Wife asserted that the terms were ambiguous and subject to more than one interpretation. She maintained that it did not include the annuity and, as such, it was omitted property. This argument failed. The Court of Appeals wrote:

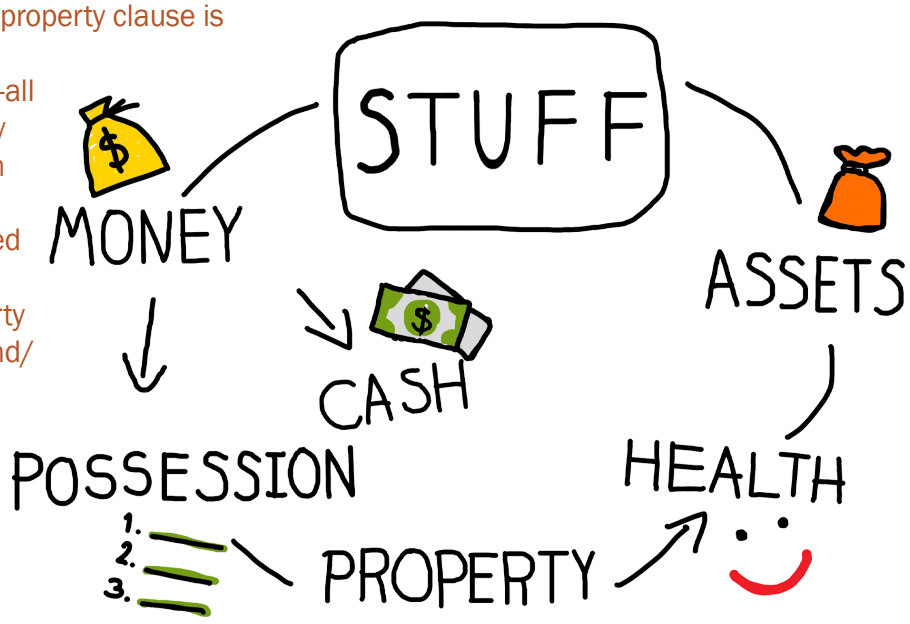
"On its face, the personal property clause is all encompassing. It is difficult to imagine a more unqualified catch-all disposition. The personal property clause is not subject to more than one interpretation and there is nothing ambiguous about it. Stated plainly, the words "each ... shall retain any and all personal property in their respective possessions and/or control" mean exactly that and are not reasonably susceptible to Pamela's interpretation that they did not encompass the annuity policy." at 251

Let's move on, shall we?

Consider the case of *Rinegar v RInegar,* 231 Ariz. 85 (App. 2012). After 25 years of marriage, the parties were divorced in 2005. Following trial, the Court entered a decree and included "catch-all provisions" that each party was awarded "...all vehicles, household furniture, furnishings and appliances, and other real and personal property" in each party's possession. There was no reference made to certain benefits Wife had accumulated during marriage through her employment with Qwest, such as her non-qualified pension plan and stock options.

Five years later, Husband served a subpoena upon Qwest seeking information about the non-qualified plan and stock options. Wife moved to quash the subpoena, asserting that these assets were awarded to her under the "catch-all" provision. A hearing was conducted, following which the trial court allowed Husband to reopen the decree and found that Husband was entitled to one-half of the non-qualified plan and one-half of the stock options. Wife appealed.

The Court of Appeals distinguished the facts of *Rinegar* from *Lamparella*. They wrote that *Lamparella* involved filling in the blanks of prepared forms and proceeded by default. Here, there was evidence presented at trial regarding the subject assets and that "the



decree mistakenly omitted the assets entirely and the catch-all provision did not apply to them."

And that takes us to a recent Memorandum Decision from the Arizona Court of Appeals. In the case of *Christoff v Christoff*, 1 CA-CV 21-0559 (May 17, 2022), the issue on appeal involved a UPS pension plan that accumulated during marriage as part of Husband's employment. While drafting final settlement documents, certain valuation corrections were needed but in the process of editing the PSA, the pension plan was omitted. The court entered the decree, incorporating the PSA. The error was not caught until after the decree was entered. When drafting the QDROs, the third-party attorney realized that the pension plan was not expressly listed in the PSA. Upon disclosure of this "omission," Wife maintained that it was an unallocated asset under the decree while Husband argued that it was awarded to him under the catch-all provision that awarded him any personal property in his possession. Finding that this case more closely resembled *Rinegar* than *Lamparella*, the Court of Appeals concluded that the pension plan was subject to division between the parties.

GET RID OF THE CATCH-ALL PROVISION IN ITS PRESENT FORM.... GET RID OF THE TERM "PERSONAL PROPERTY" BECAUSE, AS WE LEARNED IN LAW SCHOOL, PERSONAL PROPERTY MEANS MUCH MORE THAN JUST "STUFF."

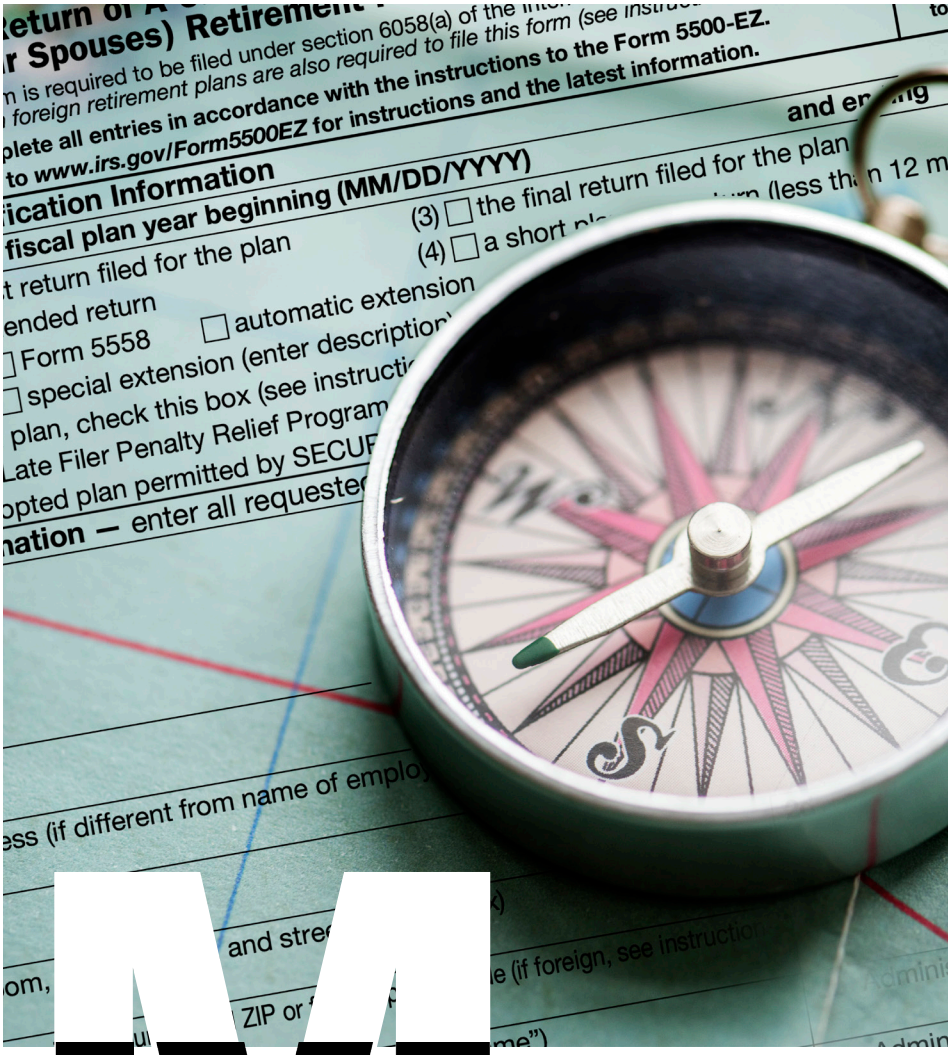
Rinegar and *Christoff* suggest that if the parties' actions at the time of the entry of the decree manifest an intent to divide an asset that is then not specifically detailed in the decree, there is the opportunity to pursue that omitted asset as unallocated. But if there is no such manifestation, as appears to be true in Lamparella, the catch-all provision of each being awarded personal property in that party's possession may be fatal to a later claim that an asset was unallocated.

Interesting stuff, right? But where is this taking us?

Let's return to catch-all provisions and how they often appear in the section of settlement documents or court orders that divide the "stuff" of the parties. Contextually, these provisions are part of something like the following: "Each party is awarded all furniture, furnishings, appliances *and personal property* in that party's possession." And I think most of us agree that in this context, the term "personal property" refers to the rest of the "stuff." But, was we see from *Lamparella*, *Rinegar* and *Christoff*, that may or may not be the final interpretation when something other than the "stuff" of the parties is not specifically referenced in the settlement documents or court order. It is quite possible that the inclusion of "...and personal property in that party's possession" may later be interpreted far more expansively and could encompass benefits and accounts that were not specifically delineated or divided.

So, what is the easy solution? Get rid of the catch-all provision in its present form. When the intent is to divide the "stuff," consider something like "Each party is awarded all furniture, furnishings, appliances and related items in that party's possession." Get rid of the term "personal property" because, as we learned in law school and are reminded in *Lamprella, Rinegar* and *Christoff*, personal property means much more than just "stuff." FL

JUDGE BRUCE R. COHEN is the Presiding Judge of the Family Department of the Maricopa County Superior Court. Prior to his appointment to the bench in 2005, he dedicated nearly all of his 24 years in practice to family law. He was a certified specialist and a Fellow in the American Academy of Matrimonial Lawyers.



IRS Form 5500 is a public record that is usually overlooked as a discovery tool in divorce actions.

Don't Forget About IRS Form 5500

ANY OF US routinely check public records related to our cases. IRS Form 5500 is a public record that is usually overlooked as a discovery tool in divorce actions. If you know the other party's employer, you have immediate access to a financial report disclosing valuable information about the retirement plan(s) sponsored by that employer. The following is a brief introduction to Form 5500, how to obtain this information for free, and how to incorporate this as a discovery tool.

Private employee benefit plans have public reporting and disclosure requirements. Plans are required to file with the Department of Labor (DOL) an annual report containing detailed information about plan finances and operation. ERISA § 103. The employer or administrator for every qualified plan must file an annual information return with the Secretary of Treasury. IRC § 6058. Every plan (whether or not qualified) to which vesting standards apply must file an annual registration statement. IRC § 6057. Most defined benefit plans have to file an annual report with the Pension Benefit Guaranty Corporation (PBGC). There is a lot of redundant information in the various reports. IRS Form 5500 solves the problem of redundancy. Plans can fulfill all the different reporting requirements by filing IRS Form 5500 or one of its variants. This Form is first filed with the IRS; the IRS then sends copies to the DOL and the PBGC. The filed Form 5500 is then made available for public review.

The information available includes the legal name of the plan, the identity and contact information for the plan sponsor, plan administrator, and unique characteristics of the benefit plan. There is statement of assets, liabilities and income. You can learn the number of participants in the plan and type of assets in which the plan invests. It is a treasure trove.

There is another document born of the same plan disclosure requirements that produced Form 5500: The Summary Plan Description, or SPD for short. The word "summary" is misleading - it can be hundreds of pages. The SPD is a statement designed to inform participants and beneficiaries of their rights and obligations under the plan. ERISA § 102(a). It is incumbent upon attorneys to review any applicable SPD if their client is either a participant or potential beneficiary of an interest in a plan. However, review of Form 5500 is the first step in gaining access to the SPD.

How do you access a filed Form 5500? You set up an account at www.freeerisa.com. There may be other websites with similar features - but this what I use. Once your account is set up, you'll see there is a search engine where you put the name of the employer that sponsors the retirement plan. Put the employer's name in the search engine, click on the employer's name, and you'll have access to the most recent Form 5500 for the plan(s) sponsored by the relevant employer.

I usually send a subpoena duces tecum to the plan administrator identified in Form 5500. I ask for the SPD for any benefit plan in which the other party participates. I request copies of annual benefits statements. The SPD can usually be obtained with a phone call to the plan administrator listed on the Form 5500. In my experience, the plan administrators are willing to give out copies of the SPD to anyone who asks for it. They will not, however, give out any individual's benefit statements without a subpoena or a release from the participant in the plan.

Section 8a of Form 5500 deals with plan characteristics. For example, is this a defined benefit or defined contribution plan? How are the benefits calculated? If a defined contribution plan, is their employer stock in the plan? A profit-sharing component? This Section of Form 5500 tells you the features of the plan that you should understand when you review the SPD.

...send a subpoena duces tecum to the plan administrator identified in Form 5500... the plan administrators are willing to give out copies of the SPD... They will not give out any individual's benefit statements without a subpoena.

Privacy goes out the window when you have a private company sponsoring a qualified benefit plan. With all its advantages, the ability for anyone to look inside the walls of a qualified plan is a major detriment. The system was set up primarily for regulators to keep tabs on the healthy operation of benefit plans - not for family law attorneys to conduct discovery about the soon-to-be divided retirement assets. In any event, this is an excellent tool that I hope many of you will use. FL

> ***"THE SYSTEM WAS SET UP PRIMARILY FOR REGULATORS TO KEEP TABS ON THE HEALTHY OPERATION OF BENEFIT PLANS."***

LUKE E. BROWN is a Certified Family Law Specialist who began practicing in 2010. As a father of five, he has substantial experience resolving complex property issues.

the Evolution of Drahos part 1

(Sorry, But You Have to Do Math)

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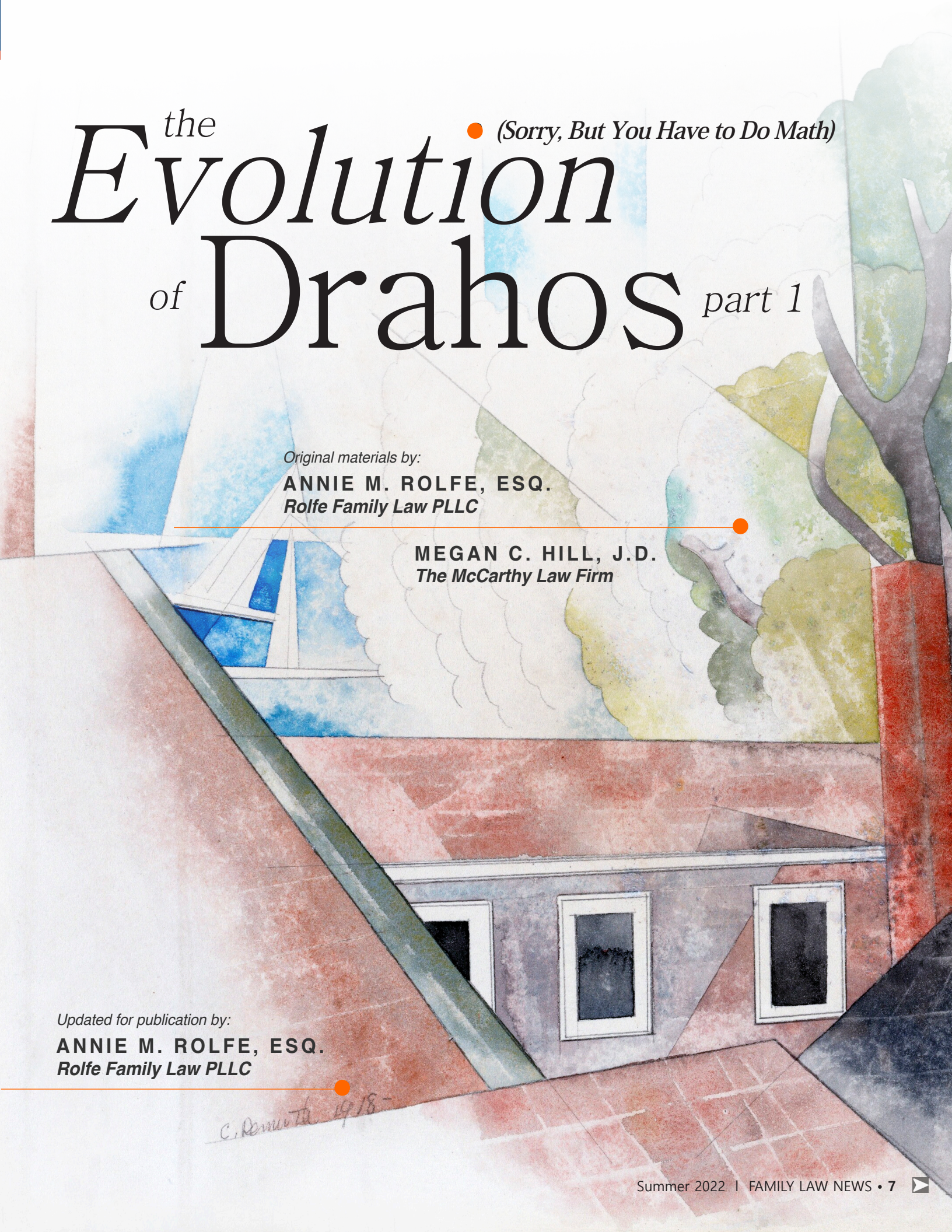

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Before there was *Drahos...*

LAWSON V. RIDGEWAY, 72 ARIZ. 253, 233 P.2D 459 (ARIZ. 1951)

RELEVANT FACTS: This is actually a probate case. The parties are the daughter of "Wife 1," acting as the administratrix of Wife 1's estate, against "Wife 2," who inherited Husband's estate. Wife 1 died during her marriage to Husband. Following Wife 1's death, Husband married Wife 2. Husband died nearly 20 years after Wife 1. Wife 2 survived Husband. Despite the length of time between Wife 1 and Husband's respective deaths, their estates were probated at the same time.

Wife 1, through her estate, claimed that Husband owed Wife 1 $9,300 as reimbursement of community funds used by Husband to improve his separate property during the marriage.

Husband and Wife 1 married in 1913. Shortly before the marriage, Husband acquired 5 nearly unimproved blocks of real estate. During the marriage, Husband constructed on his separate property a home for him and Wife 1, 5 rental homes, and a water system. The cost of these improvements was $16,422, but the value at the time of trial exceeded the costs. In addition, during the marriage Husband and Wife 1 worked in the pre-existing general store located on the property, that Husband and Wife 1 shared in the proceeds from the business equally, and Husband and Wife 1 contributed monies from their joint account to the business. The finances were so commingled, that it was impossible to identify the separate contributions from the community contributions.

HOLDING: The Arizona Supreme Court held: "The measure of the lien or right to reimbursement, in such a case as this is the increase in value to the property and not the amount spent." The court held that Wife 1 was entitled to one-half of the value of the improvements, not the cost. This is also known as the "value-at-dissolution" formula.

... awarded wife one-half of the community funds expended as mortgage payments and improvements, but did not award wife any interest in the increase in value.

HONNAS V. HONNAS, 133 ARIZ. 39, 648 P.2D 1045 (ARIZ. 1982)

RELEVANT FACTS: Husband owned what became the family residence prior to marriage. The home was improved with community funds and appreciated in value during the marriage. During the marriage, community funds were also used to pay down the mortgage.

The court held that ***Wife 1 was entitled to one-half of the value of the improvements***, not the cost. This is also known as the "value-at-dissolution" formula.

The finances were so commingled, that it was impossible to identify the separate contributions from the community contributions.

The appellate court awarded wife one-half of the community funds expended as mortgage payments and improvements, but did not award wife any interest in the increase in value.

HOLDING: The Arizona Supreme Court held that, where community labors and funds were used for the benefit of the separate property, "the community is entitled to share in the enhanced value of the property due to this expenditure of funds and labor." The court also affirmed Lawson's decision adopting the "value-at-dissolution" formula for real property.

Drahos v. Rens *and* Barnett v. Jedynak *the* ***Formula***

DRAHOS V. RENS, 149 ARIZ. 248, 717 P.2D 927 (DIV.2, 1985)

RELEVANT FACTS: Husband owned a home prior to marriage. During the marriage, community funds were used towards the mortgage payment and to make repairs, but not necessarily to make improvements. At the time of divorce, the home was owned free and clear. In addition, it is noted that there was no appreciation in value prior to the marriage.

In a divorce action, the trial court awarded wife a 50% community lien on husband's premarital residence. Husband appealed and argued that the lien was inequitable because the residence was purchased prior to marriage.

HOLDING: Division II held that the evidence was insufficient to support a lien of 50%, and held that the amount of the lien could be determined by a formula.

The formulas:

$$SP = \text{SP down payment} + \left| \frac{\text{(SP down payment + SP principal payments)}}{\text{purchase price}} \times \text{Appreciation in Value} \right|$$

$$CP = \text{CP prin. payments} + \left| \frac{\text{CP principal payments}}{\text{purchase price}} \times \text{Appreciation in Value} \right|$$

The example:

If all loan payments were made with community funds and the current value of the house is $80,000, the formula applied as follows:

SP down payment:	$7,000
SP principal payments:	$0
Purchase Price:	$21,000
Appreciation:	$59,000
CP principal payments:	$14,000

$$SP = \$7{,}000 + \left| \frac{(\$7{,}000 + \$0)}{\$21{,}000} \times \$59{,}000 \right|$$

SP interest: $26,665

$$CP = \$14{,}000 + \left| \frac{\$14{,}000}{\$21{,}000} \times \$59{,}000 \right|$$

CP interest: $53,335

›››

BARNETT V. JEDYNAK, 219 ARIZ. 550, 200 P.3D 1047 (DIV.1, 2009)

RELEVANT FACTS: Husband purchased a home prior to marriage. Husband placed a separate property down payment on the home. However, prior to marriage, Husband was unemployed and Wife made separate property contributions to the mortgage. In this case, the home appreciated in value prior to the marriage.

Husband argued that the *Drahos* formula should be modified in order to account for the appreciation in value prior to the marriage. Wife argued that *Drahos* did not apply, because wife made separate property contributions to the mortgage prior to marriage, and requested an equal division.

The trial court largely adopted husband's formula and ordered that two appraisals be done: one for date of marriage and one for date of service.

Wife appealed. The sole issue on appeal is how to determine the community's interest in the home.

Division I dismissed wife's premarital contributions to the home.

INTERPRETATION OF *DRAHOS:* Division I interpreted *Drahos* as follows: "Where 'A' = appreciation in value of the property since purchase; Where 'B' = the purchase price of the property; and Where 'C' = community contributions to the principal, The value of the community's lien on the property is: C + [C/B X A]

The appellate court chose to distinguish *Drahos* from the current case because *Drahos* did not account for premarital appreciation in value.

HOLDING: When separate property appreciates both prior to and after the marriage date, the following formula applies:
Where "A" = appreciation of the property during the marriage;
Where "B" = the appraised value of the property as of the date of marriage;
Where "C" = the community's contributions to the principal,
The value of the CP lien is: C + [C/B X A]

and then the Market Tanked... Valento v. Valento

VALENTO V. VALENTO, 225 ARIZ. 477, 240 P.3D 1239 (DIV.1, 2010)

RELEVANT FACTS: During the marriage, the parties acquired many properties. One property, "27th Place," was titled in wife's name and husband signed a disclaimer deed. The trial court awarded the community a $200,000 lien on 27th Place.

The appellate court found that the evidence presented as to the purchase price, source of funds, and market value of 27th Place was conflicting and sparse and affirmed the trial court's findings that the property was purchased for $1.2 million, Wife made a $560,000 down payment from separate funds, the community paid down the mortgage by approximately $200,000, and the outstanding mortgage balance was approximately $400,000 at the time of trial.

The appellate court ***found that the evidence presented*** as to the purchase price, source of funds, and market value of 27th Place ***was conflicting and sparse...***

At trial, husband presented a year-old appraisal valuing the house at $1.65 million, but acknowledged that the market had declined by approximately 30% since the appraisal. Wife opined that the house was worth approximately $880,000 at the time of trial.

Husband also argues that community funds – approximately $100,000 – were used to improve the property, not just pay down the mortgage. There was no testimony as to how much these improvements increased the value of the property.

Ultimately, the trial court did not make any finding as to the value of the property at the time of trial, and based the community lien solely upon the reduction in principal resulting from the contribution to community funds. Husband contends that the court undervalued the lien, but wife argued that there could be no community lien where the property lost value during the course of the marriage.

DISCUSSION: The appellate court reasons that, while *Drahos* et al are generally controlling for determining a community lien, those cases do not address the community's interest where the subject property has depreciated during the marriage. The court reasoned that the formula set forth in the holding is nothing more than an application of *Barnett* in a declining market.

HOLDING:

1. It is necessary in all cases to determine the value of the property on the date of trial to compute the value of the community lien.
2. *When equity is negative,* the community lien can be valued as follows:
   C-[C/B x D]
   Where D = depreciation in value of the property during the marriage;
   B = value on the date of marriage;
   C = community contributions to principal or market value. FL

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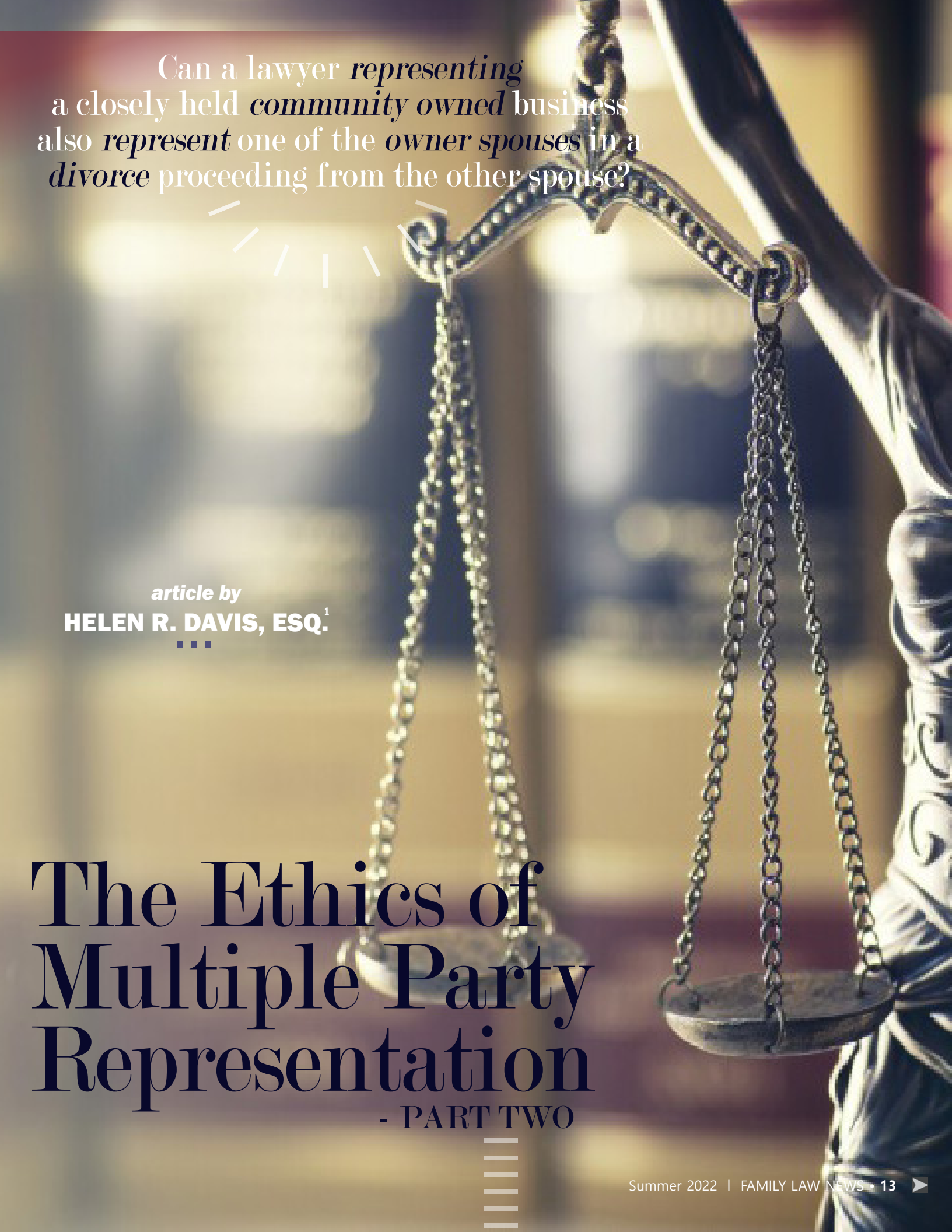

Can a lawyer *representing* a closely held *community owned* business also *represent* one of the *owner spouses* in a *divorce* proceeding from the other spouse?

article by
HELEN R. DAVIS, ESQ.[1]

The Ethics of Multiple Party Representation

- PART TWO

HOW MANY TIMES HAVE YOU, in your practice, been faced with a situation where you represent one of the parties to a divorce and the lawyer who appears for the other party or, more likely, that lawyer's firm, also represented the community-owned business? The alternative is the situation where your firm represented the community-owned business. In my experience, this is not a regular occurrence because a general understanding exists that the lawyer who has the dual role has a conflict. That said, other than a developed sense of ethics and standard of practice, what is the law that supports the conflict conclusion? To my knowledge, no Arizona court or ethics decision speaks to this issue directly.

This article is a continuation from the spring's newsletter (Part 1) that addressed Arizona cases and the ethical rules. In this part, I will address court decisions from other states that conclude that a conflict does, indeed, exist to preclude dual representation.

I. OTHER STATES HAVE ADDRESSED THE ISSUE AT HAND

A. California

In *Woods v. Superior Court,* 149 Cal.App.3d 931, 932 (1983), the California court was tasked with deciding "whether an attorney, who for years has represented the interests of a family corporation, can represent one spouse against the other in an action for dissolution of their marriage when the family corporation is a primary focus of dispute in the dissolution." The trial court denied the wife's motion for disqualification because "nothing was contained in wife's declarations to demonstrate that [the lawyer] ever acquired any 'knowledge or information which would be injurious' to wife." *Id.* The court of appeals disagreed because the "ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of such previously acquired information." *Id.* (emphasis added.) More importantly, the court of appeals "believe[d] the proper focus should be on the fact that *in representing an ongoing family corporation, [the lawyer] in a very real sense continues to represent wife."* *Id.* at 935. (Emphasis added.)

The arguments made by the parties in *Woods* are almost identical to the arguments that could be made under the hypothetical factual scenario. On one hand, the wife in *Woods* maintained that:

> there are serious problems when the attorney of an ongoing corporation owned by wife and husband also undertakes to act as counsel for husband or wife in a divorce action. . . . a corporate attorney owes undivided loyalty to the corporation and cannot take sides in a serious dispute between its owners. . . . the problem is amplified here in that she has moved to join the family corporation as a party to the dissolution proceedings.

Id. The court found that wife's contentions had merit. *Id.* On the other hand, the court found the husband's arguments to be inapplicable to the facts of the case. *Id.* One of the husband's arguments was that the lawyer "never really represented either spouse and therefore is not acting adverse to a client or former client by now representing husband against wife." *Id.* The court disagreed that the circumstances recited by husband were in line with the circumstances of the case before the court. *Id.* at 936. The husband also argued (just as Lawyer B might argue) that he did not and does not currently represent the wife, and as corporate counsel, the lawyer does not represent the officers personally. *Id.* at 935-36. In other words, the husband in *Woods* argued (and Lawyer B would argue) that the entity rule applied. Again, the court disagreed as follows:

> [the lawyer] necessarily represents both husband's and wife's interests in his role as attorney for the family corporation. A corporation's legal adviser must refrain from taking part in controversies among shareholders as to its control, and when his opinion is sought he must give it without bias or prejudice.

Id. at 936 (emphasis in original).

In a lengthy discussion and analysis of the various reasons why the lawyer's conduct in *Woods* was unethical, unprofessional, and warranted disqualification, the court stated as follows:

> We believe the fact that [the lawyer] continues to represent wife's interest in a family business which will be the focus of the marital dissolution is sufficient to disqualify [the lawyer] from representing husband. Under such circumstances [the lawyer] should be disqualified even in the absence of a showing that he has in fact obtained confidential information. *It has long been recognized that where ethical considerations are concerned, disqualification should be ordered not only where it is clear that the attorney will be adverse to his former client but also where it appears that he* ***might****.* Moreover, *the purpose of the rules against representing conflicting interests is not only to prevent dishonest conduct, but also to avoid placing the honest practitioner in a position where he may be required to choose between conflicting duties or attempt to reconcile conflicting interests.* Disqualification is proper here to avoid any appearance of impropriety.

Id. (*internal citations omitted*) (emphasis added). The court continued by providing "common sense" advice should a lawyer face such a predicament, once again taking into consideration the honor inherent in the profession of practicing law:

> It is better to remain on safe and secure professional ground, to the end that the ancient and honored profession of the law and its representatives may not be brought into disrepute.

Id. at 937. The court concluded by holding that "absent consent or waiver, the attorney of a family-owned business, corporate or otherwise, *should not* represent one owner against the other in a dissolution action." *Id.* (emphasis added).

B. Oregon

In re Conduct of Brandsness, 702 P.2d 1098 (Or. 1985), is an Oregon Supreme Court case that addresses the issues presented in our case. In *Brandsness*, a lawyer represented a husband in a dissolution proceeding after representing both the husband and the wife in execution of their wills and acting as corporate counsel related to the parties' closely held corporation. *Id.* at 1099-100. The husband was the President of the corporation, the wife was the Secretary-Treasurer, and their daughter was Vice-President. *Id.* The parties and their daughter formed the board of directors and were the only shareholders. *Id.* at 1100. The business began to decline and conflict ensued, causing the wife to retain an independent business lawyer. *Id.* The marriage then began to deteriorate and the husband hired the corporate lawyer for the parties' business to represent him in the divorce, and successfully obtained "a temporary restraining order granting [husband] the temporary use, possession and control of the business and restraining [wife] from encumbering or disposing of the assets of the business." *Id.*

Oregon Supreme Court held there was clear and convincing evidence of a conflict of interest...

> **... THE COURT CONCLUDED "THAT THE DISSOLUTION PROCEEDING CREATED AN ADVERSE RELATIONSHIP BETWEEN THE PRESENT CLIENT AND FORMER CLIENT OF THE [LAWYER]."**

After an extensive analysis regarding "open file" and "closed file" conflicts wherein the court cited to the *Banks* case (discussed below), the court concluded "that the dissolution proceeding created an adverse relationship between the present client and former client of the [lawyer]." *Id.* at 1103. The court reasoned that "the business that was established when [the lawyer] represented both his present and former clients necessarily was a focal point of the dissolution proceeding, with the attendant realignment of ownership, debt responsibility, and other financial interests." *Id.* The court further found that the lawyer's representation of the corporation involved representation of the wife that was "more than merely incidental" to the representation of husband, and cited the following example:

> The restraining order, requested by the [lawyer] and filed in the dissolution proceeding, effectively barred his former client from participating in the very business which the [lawyer] was instrumental in setting up, in part for the benefit of the former client. Had the representation of the parties been reversed, that is, the [lawyer] represented [wife] and obtained a restraining order preventing [husband's] participation in the business, the transactional conflict would be clear.

Id. at 1106. The court held there was clear and convincing evidence of a conflict of interest and that the lawyer's representation of the husband in the divorce case "would, or would likely, inflict injury or damage upon [wife] in relation to a specific matter, the business in which the [lawyer] previously represented [wife]." *Id.*

C. Ohio

The Ohio Supreme Court addressed a conflict issue similar to the case at hand in *Sturm v. Sturm*, 574 N.E.2d 522, 522 (Ohio 1991). While the majority opinion disposed of the case based on a waiver issue, thereby "avoid[ing] an important question of first impression in Ohio" regarding the conflict of interest issue, two dissenting justices analyzed the conflict. *Id.* at 525. The facts of *Sturm* involved multiple lawyers, a couple who eventually wound up in divorce court in two different counties and their closely held, solely and equally-owned real estate company. *Id.* at 522-23. The dissent succinctly summarized the relevant facts of the case as follows:

> On July 17, 1987, [wife] filed for divorce in Cuyahoga County. She named [husband] and the corporation as defendants. Wilsman and Hahn Loeser & Parks represented both [husband] and the corporation in the divorce action. At that time Robert I. Zashin was [wife's] attorney. Zashin and Wilsman negotiated a waiver of the conflict-of-interest claim. [Wife] subsequently replaced Zashin with James B. *Davis* as her attorney, and dismissed the case in Cuyahoga County . . . [Wife] then filed for divorce in Ashtabula County, again naming [husband] and the corporation as defendants. At the same time she filed the motion, at issue in this case, to disqualify Wilsman from representing [husband] and the corporation.

The Ohio Supreme Court building's reflection pool, veranda and public art courtyard.

AS AN ASIDE, THE VERY EXISTENCE OF A WAIVER INDICATES THE PARTIES AND COUNSEL CLEARLY HAD A PREMONITION THAT A CONFLICT OF INTEREST EXISTED.

> Wilsman and . . . Hahn Loeser & Parks continue to represent the [husband] and the defendant corporation in the present Ashtabula County divorce case. Furthermore, for legal services rendered to [husband] individually, Hahn Loeser & Parks has accepted payment from corporate funds. . . . that is, from the assets which are currently in dispute between the parties.

Id. at 524.

The need for the waiver provision was due to Husband's representation in the divorce by various lawyers of Hahn, Loeser and Parks, one of whom had represented the wife in the drafting of her will seven years prior to the divorce filing and another of whom had represented the parties' business since its inception. *Id.* As an aside, the very existence of a waiver indicates the parties and counsel clearly had a premonition that a conflict of interest existed. That said, wife's attorneys eventually moved to disqualify husband's attorneys/law firm on the basis of the conflict(s), but the majority opinion did not reach the conflict of interest because it disposed of the case by deciding whether the waiver provision was valid and enforceable. *Id.* at 523.

Nonetheless, the dissenting opinion thoroughly analyzed the same issues presented in our hypothetical, and answered the question: "[w]here an attorney represents a close corporation, what duty does that attorney owe to two equal shareholders who are involved in a dispute which involves the corporation's assets?" *Id.* at 525. The dissent concluded as follows:

> [b]y their past and present representation of the corporation, Wilsman and Hahn Loeser & Parks assumed a duty of loyalty to the corporation as an entity, and not to individual shareholders, officers, or directors. Wilsman should have refrained from taking part in the controversy between [the parties] over the control of the corporation.

Id. at 526 (citations omitted). The dissenting opinion cited *In re Banks* and reasoned that in closely held corporations, "the distinction between corporate and individual representation may become blurred." *Id.* The court further reasoned that:

> [t]he relationship between an attorney and a close corporation can be ambiguous, especially where the attorney's relations were with only one of the two equal shareholders. The apparent identity of interest between the shareholder and the close corporation may lead the shareholder to believe that corporate counsel is in fact his own individual counsel.

Id. As an example of the possible ambiguity, the dissent explained that:

> [Husband] maintains that in the past Wilsman and attorneys from Hahn Loeser & Parks represented him personally, and not the corporation . . . The record, however, indicates that Hahn Loeser & Parks represented the corporation at [husband's] request when the corporation was involved in legal disputes. Instead of showing a lack of conflict, [husband's] contention indicates just how confusing an attorney's representation of a close corporation can be.

Id. Further, the most powerful statement made by the dissent can be precisely applied to the hypothetical facts:

> As counsel to the corporation, Wilsman represented [wife's] interest in the family business as well as [husband's] interest. Wilsman had a fiduciary duty to protect the interests of both shareholders. When Wilsman continued to represent the corporation, he therefore continued to represent [wife]. The once identical interests of the corporation, [husband], and [wife] have now diverged. Particularly where the corporate assets are the focus of the divorce action, Wilsman cannot fulfill his fiduciary duty to [wife] and [husband] as corporate counsel, while representing either one of them individually. This conflict is sufficient to disqualify Wilsman from representing [husband] in the divorce proceeding.

Id. The husband in *Sturm* argued, as a last resort, that disqualification was not warranted because the attorney's involvement in the divorce proceeding was minimal. *Id.* at 527. The dissenting opinion concluded that this argument fails because "[w]here the marital assets are primarily corporate assets, circumstances may force the attorney representing both the shareholder and the corporation to choose between his two clients." *Id.*

D. Louisiana

In the brief case of *Teel v. Teel,* 400 So.2d 357, 357-58 (La. App. 4th Cir. 1981), a lawyer was ordered to withdraw from representing the wife because he had represented the husband, the community corporation, and was still representing the husband in several law suits. The main contention between the parties was the partition of community property, of which the largest portion was ownership of the stock of a community corporation. *Id.* at 358. The lawyer was representing the corporation in pending law suits. *Id.* Some of the wife's allegations in the divorce pertained to diminishment of community property through fraud, fault, neglect, or incompetence of the husband. *Id.* The Court affirmed the order requiring the lawyer to withdraw. *Id.*

E. Summary

The foregoing cases decided by the courts of California, Oregon, Ohio and Louisiana presented the courts with factual scenarios that are extremely similar to the hypothetical case description. Each of those courts concluded that an attorney who represented a business entity owned by the spouses could not also represent one of the spouses. These cases, while not binding in Arizona, are extremely persuasive of a like result where Arizona has not directly addressed

the issue. In that situation, a court should disqualify Lawyer B.

III. OTHER STATES HAVE ADDRESSED THE DUTY ISSUE

A. Michigan

In *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 309 N.W.2d 645, 648 (Mich. App. 1981), the Michigan Court of Appeals decided a difficult case of first impression answering the question "of what duties, if any, an attorney representing a closely held corporation has to a 50% owner of the entity, individually." The court explained that "[a] fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice." *Id.*

...the Michigan Court of Appeals decided a difficult case of first impression...

B. Massachusetts

Citing Fassihi, the court in *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C.*, 541 N.E.2d 997, 1002 (1989), held that "[j]ust as an attorney for a partnership owes a fiduciary duty to each partner, it is fairly arguable that an attorney for a close corporation owes a fiduciary duty to the individual shareholders." That said, because the fiduciary duty issue was not dispositive in *Schaeffer,* the court did not need to explain what specific fiduciary duties an attorney for a closely held corporation owes its individual shareholders.

> **"*IN RE BANKS* WAS A CASE OF FIRST OF IMPRESSION IN OREGON AS TO WHETHER THE GENERAL "ENTITY THEORY" RULE, *I.E.*, THAT A 'CORPORATION USUALLY IS CONSIDERED AN ENTITY AND THE ATTORNEY'S DUTY OF LOYALTY IS TO THE CORPORATION AND NOT TO ITS OFFICERS, DIRECTORS OR ANY PARTICULAR GROUP OF STOCKHOLDERS,'"...**

C. Summary

Based on the foregoing cases, in addition to *Cottonwood*, Lawyer B has a duty not only to the Community owned Business, but to Wife.[2]

II. OTHER STATES HAVE ADDRESSED ANALOGOUS ISSUES

A. Oregon

In re Banks was a case of first of impression in Oregon as to whether the general "entity theory" rule, *i.e.*, that a 'corporation usually is considered an entity and the attorney's duty of loyalty is to the corporation and not to its officers, directors or any particular group of stockholders,'" "should be applicable to a closely held family corporation which is substantially controlled and operated by one person and where the corporation's attorneys have been that person's personal attorneys as well."

584 P.2d 284, 290 (Or. 1978). *Banks* involved two attorneys who represented a closely held family business where the spouses were equal majority owners, owning an equal amount of shares, and their daughters owned lesser shares. *Id.* at 285. The spouses and the daughters comprised the board of directors, with the husband acting as president and the wife acting in various capacities. *Id.*

The court held that cases involving closely held family corporations warrant a logical exception to the general "entity theory" providing that a "lawyer employed or retained by a corporation . . . owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." *Id.* at 291-92. The court reasoned as follows:

> In weighing the interests of the corporation and the desirability of avoiding conflicts of interest, it seems to us that *the balance should be struck the other way in closely held family corporations* where the operator of the corporation either owns or controls the stock in such a manner that it is reasonable to assume that There [sic] is no real reason for him to differentiate in his mind between his own and corporate interests. In such a situation all the reasons are in existence which give rise to the rule against conflicts of interest because there is no basis for the individual to believe that the attorney has or ever will have other than his individual interest at heart. It is our conclusion that the only ethical position for an attorney to adopt when substantially identical interests which he has represented become divergent is to represent neither the individual nor the corporation.

Id. (emphasis added).

Stained-glass skylight above the third floor courtroom in Oregon. This skylight replaced the one destroyed in 1962.

THE LAWYER AT ISSUE IN *BROWNSTEIN* INCORPORATED THE BUSINESS, REPRESENTED THE BUSINESS ON A ROUTINE BASIS RELATED TO LEGAL MATTERS, AND EVENTUALLY ASSISTED IN THE SALE OF THE BUSINESS.

Another Oregon case, *In re Brownstein*, 602 P.2d 655, 656 (Or. 1979), involved a closely held corporation owned by a father and son equally and an unrelated minority shareholder who had resigned as an officer and was no longer involved in corporate affairs by the time the conflict arose. *Id.* at 656. The lawyer at issue in *Brownstein* incorporated the business, represented the business on a routine basis related to legal matters, and eventually assisted in the sale of the business. *Id.* Prior to the sale, though, the lawyer also gave legal advice to a man whom the lawyer knew to be an investor and who subsequently loaned the business $15,000 and received stock in the business. *Id.* The note was personally guaranteed by the father and son/equal owners of the business and their wives. *Id.* "At the time of the consummation of this arrangement, no discussion was held concerning whom the [lawyer] was representing nor was any mention made of a possible conflict of interest or of the advisability of the participants having independent counsel." *Id.*

While the lawyer argued that he only represented the corporation and not any of the

individuals personally in the transaction as shown by the fact that he only billed the corporation and not any of the individuals, the court dismissed the argument, finding that payment by the corporation to the corporate lawyer is "a natural way to pay for the services if the [lawyer] also represented all the other parties involved" in the corporation. *Id. Citing In re Banks*, the court reiterated that "in a small, closely held corporation the rights of the individual stockholders who control the corporation and of the corporation are virtually identical and inseparable." *Id.* The court further held that "an attorney may not represent, *nor appear to represent*, a person in a transaction [related to the attorney's representation of the corporation] and then subsequently represent a person who has an adverse interest arising therefrom. *Id.* at 657 (emphasis added).

B. Nebraska

In *Sickler v. Kirby,* 805 N.W.2d 675, 689 (Neb. App. 2011), the Illinois appellate court held as follows:

> the financial well-being of the directors, officers, and owners of the corporation is usually inseparable from the interests and fate of the corporation. And, we suggest that the more closely held the corporation, the less separable the directors, officers, and owners are from the corporation.

Sickler further held that the principal owners/officers "were, as a matter of law, *third parties* to whom the [corporate counsel] owed the duty of exercising such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances." *Id.* at 693 (emphasis added).

C. California

Forrest v. Baeza involves two closely held, family-run corporations, both of which were owned by a husband and wife and the wife's brother, and both corporations and two of the corporations' three shareholders were simultaneously represented by the same lawyer. 58 Cal.App.4th 65, 68-69 (1997). The plaintiffs brought suit against a former shareholder and the former shareholder later filed a motion to disqualify the corporate counsel on the basis that he had previously represented the former shareholder. *Id.* at 69. The court provided compelling reasons for the disqualification of the lawyer taking into consideration the ethical high ground officers of the court are to always adhere to: "to maintain ethical standards of professional responsibility" and "preserv[e] . . . public trust in the scrupulous administration of justice and the integrity of the bar." *Id.* at 73. Further, the court explained that in cases involving an attorneys' simultaneous representation, "[t]he primary value at stake in cases of simultaneous or dual representation is the attorney's duty - and the client's legitimate expectation - of loyalty, rather than confidentiality." *Id.* at 74. The court easily resolved the case given that the law with respect to shareholders' derivative suits in California is clear that it is forbidden to dually represent "a corporation and directors in a shareholder derivative suit, at least where, as here, the directors are alleged to have committed fraud." *Id.*

III. CONCLUSION

In summary, most lawyers practicing family law recognize that they cannot represent a party to a divorce and a closely held, community owned business. This sense is, I believe, largely a function of the development of a standard of practice based on our ERs because no Arizona cases speak directly to the conflict. I hope this discussion, along with the multiple authorities from other jurisdictions that do address the issue, and have concluded the representation is not permissible, assists in clarifying the topic for Arizona practitioners. FL

NOTES:

1. Helen R. *Davis* is a Fellow of the American Academy of Matrimonial Lawyers, a Fellow of the International Academy of Family Lawyers, a Certified Specialist in Family Law, an adjunct professor at the Sandra Day O'Connor College of Law at Arizona State University, and writes and lectures frequently on all manner of family law topics.
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2. Moreover, Husband has a fiduciary duty to Wife and his retention of Lawyer B on behalf of the Community Owned Business and later retention on behalf of himself to take action adverse to Wife could be a violation of that duty. *See Gerow v. Covill,* 192 Ariz. 9, 18, 960 P.2d 55, 64 (App. 1998) (holding that "a fiduciary relationship between spouses does exist with respect to community assets until the marriage is terminated.").

How to Eliminate Drama for Your Clients

(Even when they don't want you to)

by
David Enevoldsen, Esq.

WHEN I WAS FIRST ADMITTED TO PRACTICE AS AN ATTORNEY, I decided to hang my shingle. I'd been working as a paralegal for quite a while, so I figured I knew a lot of the practical stuff already and there wasn't much reason to go work for someone else's law firm.

It wasn't long before that felt like a huge mistake. After my first year in family law practice my life felt like an absolute disaster. I made less as a lawyer than I had working an entry level job before law school. I was stressed out of my mind. I was working tons of cases and listening to everyone tell me about the horrible things happening to them in their divorces. I wanted desperately to help all these people stop the wrongdoers destroying their lives but felt powerless to do so. Judges would frequently take no action and I didn't know what else to do. My marriage rapidly deteriorated (ultimately resulting in my own divorce). My relationship with my kids also became very strained.

One day, after a particularly toxic argument with my then wife, I drove to the office to get away. I walked in, locked the door, and fell on the floor. I just wanted to die. After a bit of wallowing, I ended up calling the National Suicide Prevention Lifeline. It's the one and only time in my life I've ever done that.

The woman on the line talked to me for a while. I promised her I'd schedule an appointment with a mental health professional. And I did. From then on, I started seeing a therapist, a psychiatrist, and did group counseling. Independently, I started studying all sorts of self-help and psychology materials. Soon, life started to get better. I slowly started to experience more and more empowerment in all sorts of ways. My law firm started to make money. I started to establish clear

I wanted desperately to help all these people stop the wrongdoers destroying their lives but felt powerless to do so. Judges would frequently take no action and I didn't know what else to do.

I ended up calling the **National Suicide Prevention Lifeline**. It's the one and **only time** in my life **I've ever done that.**

boundaries with clients. I felt way less stressed out. I felt empathetic with clients and worked to get them in better places but didn't get unnecessarily dragged into the drama. My relationship with my kids improved. I got remarried. Life became great. Today I feel better than I ever have and every year seems happier than the one before.

While there were a lot of things that contributed to this transition, one of the big ones was an understanding of the ***Drama Triangle***. Once I began learning about it, I saw the game I and all my clients had been unconsciously playing. And I realized doing so kept us all trapped in a quagmire of pain and misery.

What is the Drama Triangle?

THE DRAMA TRIANGLE was first described by Dr. Stephen Karpman to explain how people behave when things aren't going the way they want. It's a game we play which we're generally completely unaware of.

There are three major roles you can play in this game all illustrated as different points on a triangle. Each of the roles is called an "orientation" as the theory is these are all about mindsets we embody at different times.

The roles include: the Victim, the Persecutor, and the Rescuer.

Victim Orientation.

The Drama Triangle begins with a victim. Victims feel helpless, promote that feeling, complain about their situation (but won't or can't take action to fix it), and basically feel lost to the situation around them. The victim is powerless. He or she feels oppressed by others or the situation they're in whether that feeling is legitimate or not.

Persecutor Orientation.

The persecutor sees injustice and lashes out at it through anger. Persecutors will criticize, pressure, coerce, or attack attempting to right what they perceive as wrongs. Note the wrongs don't have to actually be wrongs. They just have to be seen by the persecutor as something needing to be fixed. For example, the domestic violence offender may beat his spouse under the theory he needs to "teach her a lesson" for something she did incorrectly. That doesn't mean she either did something wrong nor needed to be taught a lesson, but the persecutor believes that's the case.

Rescuer Orientation.

The rescuer has the compulsion to save the day. He or she wants to be the white knight who solves the problem a victim is facing. They see injustice and want to fix it themselves, believing the victim doesn't have the ability, power, or authority to do it on their own. The rescuer thrives on the sense they're needed by victims. They will often intervene in a situation even when no one asked for their help. Importantly, they don't empower victims by getting them to solve the problem themselves. Rather, they solve the problem for the victim.

Orientations vs. Identity.

Each of the above roles is a mindset, not a definition of who someone is. This model is all about

the way we approach a problem and it's within our power to change at any time. You are not defined tomorrow by the orientation you take today.

For example, someone in victim orientation might be legitimately (or illegitimately) the victim of a situation. A person who is the victim of domestic violence is morally and ethically a victim by virtue of what is happening to them. However, their orientation can be one of victimhood or empowerment. If they sit, wallow, and lament over the idea they are held back and powerless, it's unlikely change will occur. They are embracing victim orientation. In contrast, if that same domestic violence victim silently plots a way to escape her abuser or otherwise improve the situation, the orientation has become an empowered one. Note, this is in no way to say that people must be islands or should never seek help. It's simply a description of the mindset someone is approaching a problem with.

We Move Around.

Another important note about the Drama Triangle is we are not confined to any particular role. When we're in it, we necessarily move around the triangle. When playing this game, you are not just a victim, persecutor, or rescuer. Rather we constantly shift orientations. We might have a tendency to drift to one role or another, but there's perpetual movement.

For example, consider the abusive husband example. He abuses his wife under auspices of teaching her a lesson and does so from a place of anger. He inappropriately feels she has committed a wrong he has a duty to right. He's acting like a persecutor.

When his wife tells her girlfriend about the abuse, the girlfriend's husband finds out, gets angry and lashes out at the abusive husband. He decides he's going to teach this guy what it feels like to be abused and proceeds to beat the heck out of him.

Subsequently, the now beaten husband feels angry, powerless, and abused over having been beaten up. While he was previously a persecutor, he shifts into a victim orientation. In his mind, he's become the oppressed.

The abused wife, who has been wallowing in her helplessness (thereby placing her in victim orientation) suddenly snaps as a result of all the abuse. She starts screaming back at her husband in frustration. She's acting out of anger and has taken on the persecutor role.

The examples of shifting from role to role are endless, but the underlying point is when we are in the Drama Triangle, we constantly jump around.

It's a Game.

The Drama Triangle is a game. We look for others to play with and offer them invitations to join in. They can play along by choosing one of the three roles related to the situation, or they can decline to play and allow the drama to continue on its own.

When someone begins speaking to you and within minutes finds a way to work into the conversation details about their illness, ailment, disability, struggle, or whatever conflict they're facing, they want you to come in and act as a rescuer. The invitation is to have you say, "oh my, that's terrible, you poor thing." The victim will feel heard. You'll feel needed (rescuer). You're playing the game.

When someone shows up and starts yelling at you because they believe you've wronged them in some way, they've invited you to play a role as either a victim or a persecutor. If you shut down and take the beratement and then sit around stewing, you're playing victim. By granting this screaming person total control of you, you become powerless to their assault.

In contrast, if you suddenly lash back and begin screaming at the injustice of it all you've become the persecutor. You allow the other person yelling at you the same choice in roles as victim or to continue as persecutor. You've taken your turn and it's now their move.

There are many permutations and ways to play. If you choose to play, generally the situation doesn't resolve itself on any long-term basis. Fighting perpetuates, problems don't get solved, drama amplifies, and everyone becomes stressed out and/or hurt. Playing the game, therefore, is a terrible way to live. Yet many people, including both attorneys and clients, end up doing so.

The Drama Triangle is a game where we look for others to play with and offer them invitations to join in.

When I spoke with clients who told me about the atrocities they were suffering at the hands of the other party, I felt compelled to help. I wanted to save the day (rescuer). I was caught in the game.

How I was Caught in the Game

Recall my beginnings as an attorney. When I spoke with clients who told me about the atrocities they were suffering at the hands of the other party, I felt compelled to help. I wanted to save the day (rescuer). I did so by stressing myself out without demanding adequate payment. This left me wallowing in misery (victim). Sometimes I'd lash out in pleadings or motions, on the phone, or in evidentiary hearings. I got angry or at least incensed at the other side's behavior toward my client (persecutor). When life started to unravel around me, I ran to my office and wanted to just die. I was taking no action to solve anything. Rather, I writhed in my unhappiness (victim).

When I started to study the Drama Triangle, the game I had been playing became apparent. I could see the invitations from clients. Their immersion in the game was clear. I knew I had been too willing to jump in and play along. We were all caught in the Drama Triangle game.

How do You Get Out of It?

Once you see it, that of course, begs the question: what do you do about it? There are several different remedies to the Drama Triangle. In my life and my practice, I aspire to combine two of them. One comes from a book called the ***Power of TED***. The other comes from Dr. Karpmen (the man who first identified the Drama Triangle).

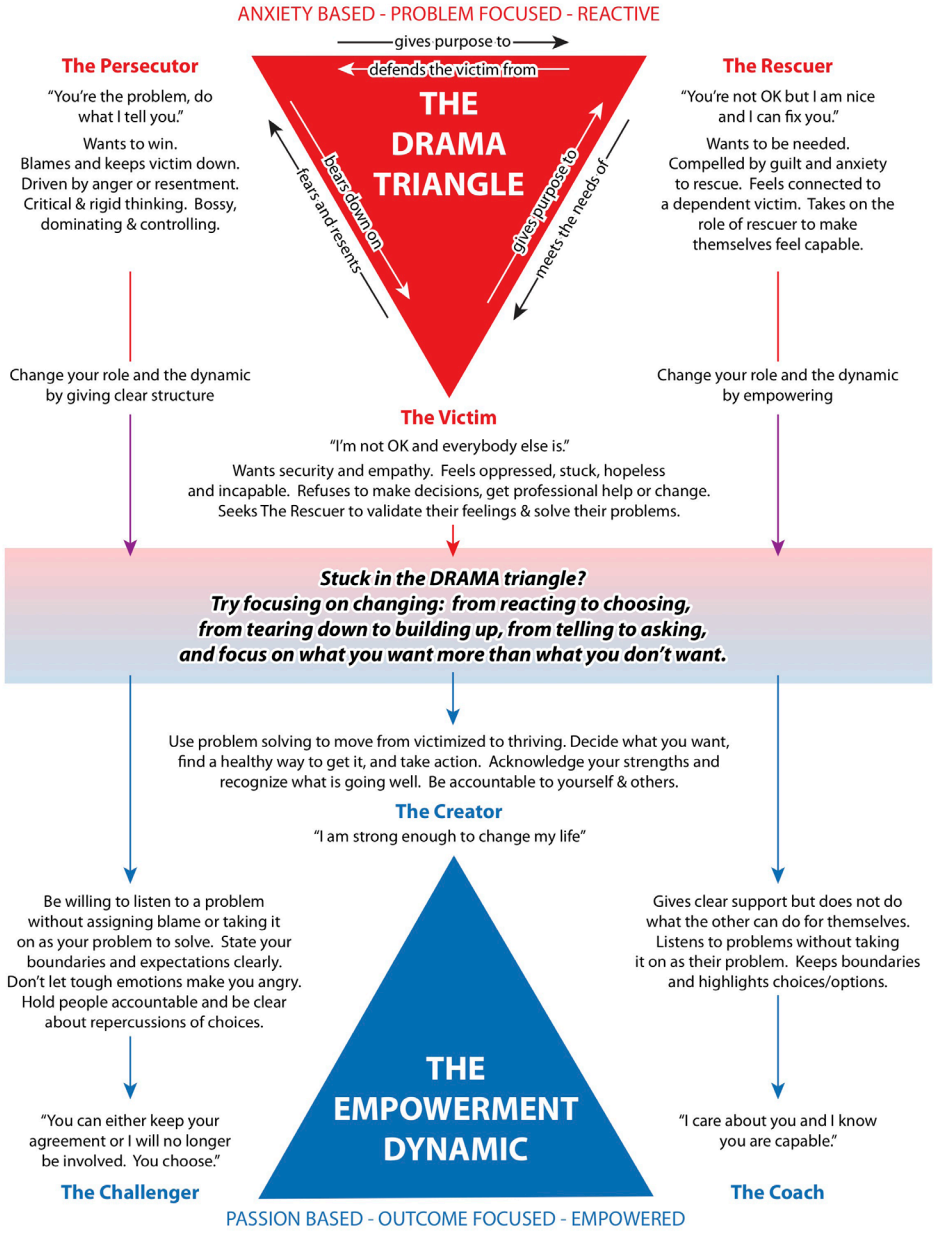
The Power of TED offers a reframed version of the Drama Triangle labeled, "The Empowerment Dynamic" (TED). Essentially it takes each of the roles in the Drama Triangle and turns them into a new role.

The victim becomes a creator. The creator's focus shifts from powerlessness to figuring out how to resolve the issues he or she is facing and taking action consistent with that vision. This mindset change results in movement toward resolution, rather than just freezing up and being miserable.

The rescuer becomes a coach. The coach finds ways to help someone in a victim/creator role by encouraging them to resolve the issue. It could be in developing a plan with the injured person or in giving them a little help while they demonstrate they're taking steps to solve the problem until they're on their feet. The important part, however, is the coach is not just solving the problem.

Finally, a persecutor becomes a challenger. The challenger finds ways to channel anger or frustration into constructive change. Said differently, the challenger stops himself from simply lashing out or reacting. Instead, he or she thinks carefully about the problem and implements a plan to result in as peaceful or amicable a resolution as possible.

The TED model is crucial because it reorients everything toward fixing problems rather than sitting around pointing fingers. That's necessary for problem-solving, however, it's a little incomplete as most clients need understanding. Most of the time, when I meet with clients, they seem compelled to vent everything about their situation. If I immediately and coldly redirect them to resolution the client won't feel heard and thinks I don't understand them. When I initially tried to do that in my practice a few of them expressed anger at me.



A second solution helps with this problem. Dr. Karpman developed the ***Compassion Triangle*** which looks at each of the roles in the triangle and analyzes their behavior with the assumption that at least 10% of the intention behind the role is coming from a good or forgivable place. For example, the persecutor at some level is trying to right a perceived wrong. The victim doesn't understand how to repair their situation and chooses to take abuse or calamity rather than project it outwards. The rescuer wants to help the victim improve their problem.

By assuming that glimmer of good intent, we can express apology to the persecutor, sympathy to the victim, or appreciation to the rescuer. In so doing we inherently make the person wrapped up in the drama game feel understood. From there you can move toward resolution.

Applying it to Yourself and Clients

As attorneys, we can jump into any of the Drama Triangle roles. It's easy to want to save the day for our clients (rescuer). If we don't establish effective boundaries and clients take advantage of us, we can feel oppressed (victim). If we feel an opposing party has done wrong, we react angrily (persecutor).

Recognize any roles you may be playing in the game. Any time you find yourself in one with a client or opposing party, shift to the corresponding TED role. This practice alone dramatically changed my life. Once I ceased feeling like a victim, stopped over-extending myself, started establishing clear boundaries, and started encouraging clients to solve their life problems (rather than trying to solve them myself), everything got better.

Next, pay attention to what advice you're giving clients and the direction you point them. Don't be a rescuer. Encourage them to take proactive steps to solve their crises. Obviously, you'll be helping with the legal work, but when you give advice about the day-to-day actions, encourage them to take steps toward empowerment. When they shift into victimhood, express understanding. Then redirect them toward solutions. Don't get caught up in blame and don't join them in a finger-pointing session. Steer it all to a solution.

You don't have to (and frankly shouldn't) get into an explanation of the Drama Triangle with clients. Instead, you can use this knowledge to implement a whole new approach to your life and law practice. When you pull yourself out of the drama game and encourage your clients to take actions to do the same, you'll likely find your life and your clients' lives significantly improving as you are no longer carrying the burdens of being immersed in the Drama Triangle and are placing your clients on the path to empowerment and freedom. FL

DAVID ENEVOLDSEN spent much of his practice working on family law cases. Currently he does traffic-related criminal and civil matters with Traffic Law Guys. He also promotes the cultivation of emotional strength through a project called Emotional Embuffination (www.embuffination.com).

Parenting-Related Decisions

Stock v. Barton, 1 CA-CV 21-0499 FC (May 5, 2022)

ONCE THE TRIAL COURT awards sole legal decision-making to a parent, the court is limited in how much it may usurp that authority under 25-410(A).

Facts: Parties have one child, born in 2018. In 2019, Mother filed a petition to establish LDM and parenting time. At trial, the trial court noted two concerns: First, that Father had threatened to take the child from Mother and move to the Navajo nation where, he claimed, the tribe would give him "full custody." As for Mother, there were concerns from Father that Mother was unwilling to permit the child to be exposed to Father's Navajo culture and heritage. After trial, Mother was awarded sole legal decision-making. But Mother was affirmatively ordered to expose the child to his Navajo culture, traditional ways and values. She had to allow the child to participate with Father and his family in traditional ceremonies that were held off the Navajo reservation. If held within the Nations' territory, Mother or a designee would accompany the child. Mother appealed the trial court's ruling requiring her to facilitate the child's exposure to the Navajo Tribe's culture, traditional ways, and values.

On appeal, the trial court's ruling was affirmed.

Discussion: At trial, Mother did not oppose the child's exposure to the child's culture. In fact, the appellate court notes that "Mother testified she thought it was important for the child to learn about his Navajo heritage and stated she has never been opposed to him learning about the Navajo heritage." When Mother asserted that A.R.S. § 25-410(A) prevented the court from placing a limitation on her authority, the appellate court reasoned: "the ruling does not infringe on Mother's right under A.R.S. § 25-410(A) to determine the child's upbringing. Mother acknowledged the importance of [the child] learning about his Navajo heritage and stated she had never opposed it. Read in conjunction with the court's two-paragraph discussion of culture and tradition, the court's ruling directing that the child be allowed to participate with Father and his family in ceremonies off the reservation merely means that Mother is not to interfere or seek to curtail the child's exposure and development in the Navajo culture. And the ruling addresses Mother's stated concerns by providing that on-reservation Navajo ceremonies are at Mother's option, and that Mother or her designee must be permitted to accompany the child. We find no abuse of discretion."

Practice Pointer

Had Mother opposed the exposure, there may have been a different result, because having vested sole legal-decision making authority in

Mother, the trial court must follow the requirements of 25-410(A) if it is going to infringe upon that decision-making authority.

Gish v Greyson, 1 CA-CV 21-0472 FC (June 28, 2022)

THE COURT, not an appointed professional, must decide whether parenting time may be increased.

Appointment of a behavioral health expert must be based upon parties' ability to pay.

Facts: Parties have one child, who has been diagnosed with autism spectrum disorder. From the time of divorce in 2017 through 2021 the parties were engaged in highly contentious litigation. Much of it centered around Mother's resistance to facilitating Father's parenting time. In 2019, despite concerns about Mother, the court maintained to award of joint legal decision-making with Mother having final say in the event of a dispute. Father was limited to supervised parenting time as directed by a therapeutic interventionist (TI), who was to determine when unsupervised parenting time would be appropriate. While progress was made, the TI reported continuing concerns about Mother's influence over the child. A few months later, the child refused contact with Father. The TI was "at a loss about how to move forward." Father then filed a petition to modify, claiming that Mother was sabotaging his contact and not cooperating with the TI. The TI continued working in this matter but had concerns about Father as well. The hearing on Father's petition was held in April, 2021, and the trial court found that the parties could not work cooperatively although there were also concerns about awarding either party sole legal decision-making authority. Despite the misgivings, the trial court awarded Father sole legal decision-making authority, but the child resided with Mother and Father exercised supervised parenting time. The TI was to continue and the increase of Father's parenting time toward equal time would be at the direction of the TI. Each party was directed to pay one-half of the fees for the TI. Mother appealed and while the appeal was pending, Father asked that a Court-ordered behavioral interventionist (COBI) be appointed to replace the TI. Over Mother's objection, the court granted Father's motion and appointed a COBI, ordering each parent to pay one-half of the fees.

Discussion: There were a number of issues addressed by the Court of Appeals. The key issues, and the court's reasoning in addressing those issue, are as follows:

JURISDICTION OF SUPERIOR COURT WHILE APPEAL IS PENDING - The COBI was appointed while this matter was on appeal. Generally, the filing of a notice of appeal divests the trial court of jurisdiction to proceed other than to issue orders to further the appeal or address matter unrelated to the appeal. See *In re Flores and Martinez*, 231 Ariz. 18, 21 (App. 2012). There are exceptions, including that the superior court retains jurisdiction while the appeal is pending to take actions necessary to "enforce it previously entered judgment." *Henderson v Henderson*, 241 Ariz. 580, 589 (App. 2017). Also, when an appeal is pending, a modification action may be considered by the superior court so long as it is based upon changed circumstances arising since the last order. Ultimately, this issue was not addressed by the Court of Appeals for other reasons, but this remains usable guidance when issues return to court while an appeal is pending.

CAN SUPERIOR COURT AWARD SOLE LEGAL DECISION-MAKING AUTHORITY TO THE PARENT WHO HAS LIMITED PARENTING TIME? Yes. There is no statutory provision that links an award of decision-making authority to the amount of parenting time the sole legal decision-maker has with the child. Rather, it is determined through a best interests analysis.

WEIGHT TO BE GIVEN TO CHILD'S WISHES - Mother argued that the trial court erred by not considering the child's wishes, who was 12 years old. The Court of Appeals rejected this argument, noting the trial court had found the child not to be of suitable age and maturity. This finding was supported by the TI's reports that the child was "unduly susceptible to Mother's influence."

COURT MUST CONSIDER WHETHER THE PARTIES HAVE THE ABILITY TO PAY FOR A TI - The trial court ordered that the fees be paid one-half by each parent. While Rule 95(b) authorizes an order for engagement in behavioral health services, the court "must determine on

the record whether the parties have the ability to pay for services as well as allocate the costs of those services." See Rule 95(a). Here, the trial court failed to make an on-the-record determination as to whether either party have the resources to pay for the services.

TRIAL COURT CANNOT DELEGATE AUTHORITY- The 2021 parenting order along with the COBI appointment order delegated the decision as to Father's parenting time to the appointed professional. This is impermissible. See *DePasquale v Superior Court,* 181 Ariz. 333, 336 (App. 1995). Rather, 25-405(B) and 406(A) allows the court to seek advice from an appointed professional, leaving the best interest determination solely with the court. Importantly, this does not prohibit the trial court from establishing milestones for a parent to receive additional parenting time, so long as those "milestones are self-effectuating." Otherwise, the court, and not the behavioral health expert, must determine whether the requirement has been met.

Editorial Note: The COBI was developed following years of appointments of TIs in refuse-resist cases. By its design, the trial court must first determine that there are no parental fitness issues that impede implementation of the specific parenting-time orders entered by the court. Upon meeting that threshold, the COBI is to work with the parties and the child to implement the court-ordered schedule and to advise the court along the way. This is a different model than what has historically been ordered under the appointment of a TI. The *Gish* decision suggests that use of the COBI (and TI for that matter) must be as part of a pending action, not ordered for services following entry of final orders.

J.F. v Como, 1 CA-SA 21-0123 (July 12, 2022)

WHEN THERE IS A CONFLICT between statutory privilege and determining a child's best interests, protection of the child is paramount but with safeguards for the sanctity of the privilege.

The *Gish* decision suggests that use of the COBI (and TI for that matter) must be as part of a pending action, not ordered for services following entry of final orders.

Facts: After 7 years of marriage and 3 children, Mother filed for divorce. Both parents sought legal decision-making and parenting time. As part of temporary orders proceedings, it was established that Father had an alcohol-use disorder. Mother asked Father to execute a release for his counseling and alcohol rehab records. He refused, citing privilege under state and federal law. Mother sought restrictions on Father's parenting time.

Following a hearing, the court ordered temporary joint legal decision-making with the children residing primarily with Mother. Father's parenting time was unsupervised and conditioned on him submitting to alcohol testing and continued therapy. A few months later, Father sought an order to increase his parenting time to equal, claiming that he had established an additional four months of sobriety. Yet he continued to refuse having his records released. Another hearing was conducted and the court increased Father's parenting time but also ordered that his counseling records be released. Father filed this Special Action.

Discussion: In the Special Action, Father cited ARS Section 32-2085(A) and asserted that he had never waived the associated privileges. In addressing this issue, the Court of Appeals focused on the mandate that the trial court assess the best interests of the children and that ARS Section 25-403(A)(5) requires the court to consider the mental and physical health of the parties. In addition, the Court of Appeals pointed out that the legislature recognized an adverse presumption that could be made against a parent who abused drugs or alcohol within the prior 12 months. ARS Section 25-403.04(A).

The Court of Appeals noted that a statutory privilege may be waived in writing or through in-court testimony. It may also be waived implicitly by "pursuing a course of conduct inconsistent with the observance of the privilege." *Bain v Superior Court*, 148. Ariz. 331, 334 (1986). This is particularly the case when a party places a specific medical condition at issue as part of a claim or defense. There is even a lesser required showing of implicit waiver when the court is serving as the gatekeeper by first requiring an *in camera* review of the record. Such a review represents "a smaller intrusion" on privacy interests. See *US v Zolin*, 491 U.S. 554, 572 (1989).

Holding: The Court of Appeals recognized the "tension between Arizona child custody laws, which hinge on a child's best interest, and a parent's privacy interest" under a statutory privilege. In doing so, the Court of Appeals stated definitively "when a parent's privacy interest squarely conflicts with a child's best interest, the child wins." Here, the Court of Appeals found there to be an implied waiver by Father for not only seeking legal decision-making, but also "affirmatively seeking unsupervised parenting time and then a reduced alcohol testing requirement..." Father "wielded" his treatment path as "affirmative evidence to prove that he presents no danger to the children. Having brandished that sword, Father cannot turn around and hide behind the privilege, depriving the court of material it reasonably concluded was necessary to protect the children's safety and welfare."

However, the Court of Appeals stressed "... that courts must narrowly craft their disclosure order to minimize the intrusion on a patient's privacy interests." It is suggested that an *in camera* review is one method to balance these competing interests.

Munguia v Ornelas, 1 CA-CV 21-0620 FC (July 26, 2022)

WHEN THE CHILD'S GIVEN NAME is contested between the parents, best interest analysis applies.

Facts: Mother and Father were never married and had 2 children. By the time their second child was born in April, 2021, they were no longer in a relationship. Immediately after giving birth, Mother named the child *Legend Messiah Ornelas*. Father filed a paternity action and, among other relief, asked that the child's first name be *Angel* (which by Father's family's tradition is the name given to all first-born sons). Mother objected. The trial court ordered that the child's name be *Angel Legend Messiah Munguia Ornelas*. Mother appealed..

Discussion: The standard for review by the Court of Appeals was abuse of discretion and it affirmed the trial court. Therefore, this case does not stand for favoring the granting or denying of a name change under these circumstances. Rather, it addresses what the trial court should consider. In that regard, the Court of Appeals noted that the same consideration applies for addressing a child's first name as applies to a contested surname. Citing *Pizziconi v Yarbrough*, 177 Ariz. 422 (App. 1993), the best interest factors include: "the child's preference; the effect of the change on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; the motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity."

Spousal Maintenance

Huey v Huey, 1 CA-CV 20-0547 FC (July 26, 2022)

ONCE THE TRIAL COURT awards sole legal decision-making to a parent, the court is limited in how much it may usurp that authority under 25-410(A).

Facts: The parties married in 2006. They had two children. Wife earned $90,000 per year as a manager as recently as 2015, but was currently unemployed due to Major Depressive Disorder and anxiety, allegedly caused by Husband's treatment of her. Wife filed for legal separation in 2018, which was thereafter converted to a divorce. The trial court found that Wife was eligible for spousal maintenance and awarded her $2500 per month for an indefinite duration on the basis of her mental health condition. There was no evidence that Wife's mental health condition was permanent, but the evidence was that the duration was uncertain.

Holding: An indefinite term of spousal maintenance is inappropriate where the disabling disorder is not permanent.

Discussion: The court acknowledges that spousal maintenance, whether term or indefinite, is modifiable. Under an indefinite order, the burden falls on the payor spouse to demonstrate a significant and continuing change of circumstances. "[i]t would place Father in the untenable position of having to decide whether to challenge Mother's subsequent mental health condition without ready access to mental health records and with a relatively limited basis from which to assess a change in circumstances." The court noted that placing the burden on Husband would also create a likelihood for multiple challenges whenever Husband perceived changes in Wife's mental health condition.

IN CONTRAST, A FIXED TERM PLACES THE BURDEN ON THE RECEIVING SPOUSE to show a change in circumstances warranting extending the award beyond the fixed term. The court notes that here the cause of Mother's mental health condition was arguable the relationship with Father. "Thus, after the court imposes a fixed-term award on remand, the subsequent burden properly falls on Mother to demonstrate circumstances showing why a transition toward financial independence should be further delayed to justify future modification." The appellate court noted in footnote that the "superior court on remand should include an express statement to that effect to ensure the records remains clear that Mother may establish a future change in circumstances justifying extension of the award by showing that her condition has not resolved."

Property and Debts

Ferrill v Ferrill, 1 CA-CV 21-0553 FC (June 30, 2022)

A DEFENSE TO A REIMBURSEMENT claim for post-filing community mortgage payments using sole and separate funds is "ouster," which must be based upon factual findings.

Facts: Parties were married in 1990. Husband moved out of the marital residence in July 2019 and Wife filed for divorce in October 2019. Wife remained in the home and made the monthly community mortgage payments using her sole and separate funds. Wife sought reimbursement for the payments she made using sole and separate funds and Husband countered that those payments should be offset by the benefit Wife had by virtue of exclusive possession of the home. The trial court denied Wife's reimbursement claim because of Wife's exclusive occupancy in the home while the matter was pending. Wife appealed.

Discussion: There is a presumption of a gift when one spouse uses separate funds to pay a community obligation during marriage. *Baum v Baum*, 120 Ariz. 140, 146 (App. 1978). But that presumption does not exist following the filing of a petition for dissolution. *Bobrow v Bobrow,* 241 Ariz. 592, 596 (App. 2017). Rather, the paying spouse "is generally entitled to reimbursement for the expenditure of separate funds on community debt." This is true even if the paying spouse exclusively occupies the residence for which the payments are made, reasoning that because "...parties have a right to use community property, one party's use of the property alone does not provide a basis for denying that party's right to reimbursement for paying a community debt with separate funds." A defense to such a reimbursement claim is "ouster." Such ouster cannot be based solely on how untenable it would be to share a home when going through "the emotions of divorce." In fact, other states have applied this notion of "constructive ouster," but the Court of Appeals rejected this doctrine. Rather, whether ouster has occurred must be based upon the facts of a case. Ouster may be found through the actions of the party in possession to deny the rights of the other party that demonstrate a decisive intent and purpose to occupy the residence to the exclusion of the other party. Here, the Court of Appeals found it to be unclear as whether that occurred. On remand, if Husband can demonstrate ouster, he may then seek an offset for one-half of the fair market rental value of the residence during the time period in which Wife had exclusive occupancy but he would have the burden of proof to establish that value.

A defense to such a reimbursement claim is "ouster." Such ouster cannot be based solely on how untenable it would be to share a home when going through "the emotions of divorce."

Huey v Huey, 1 CA-CV 20-0547 FC (July 26, 2022)

COMMUNITY OBLIGATIONS PAID with sole and separate funds after termination of the community may be subject to a reimbursement claim .

While the *Huey* case focuses primarily on a challenge to an indefinite award of spousal maintenance, it also addressed reimbursement claims made by Husband for community obligations he paid after the community terminated and while the case was pending. In *Bobrow*, the Court held that post-petition payments made by one spouse using sole and separate funds to satisfy community obligation are not presumed to be a gift to the community and could give rise to a reimbursement claim. *Bobrow v Bobrow*, 241 Ariz. 592 (App. 2017). Here, the parties entered temporary orders requiring Husband to pay a number of community property obligations and pay additional spousal maintenance to Wife. At trial, Wife asked for additional retroactive spousal maintenance. See *Barron v. Barron*, 246 Ariz. 580 (App. 2018). Husband responded by requesting reimbursement for the expenses he paid under temporary orders and an additional $10,000 he paid towards community tax obligations, which were not included in the temporary orders obligation. The trial court awarded Wife additional retroactive maintenance but denied Husband's request for reimbursement. The Court of Appeals found that the expenses addressed at temporary orders were properly considered in the trial court's discussion of retroactive spousal maintenance. However, the appellate court found that the $10,000 tax debt exceeded temporary orders and was not properly considered by the trial court: "[T]he superior court here did not explain why Father's payment of this community expense should not be reimbursed (at least to some degree) or how it was otherwise accounted for in the property division. Accordingly, we vacate the implicit denial of reimbursement as to 2018 tax payments and remand for the court to address this issue." FL

In *Bobrow*, the Court held that post-petition payments made by one spouse using sole and separate funds to satisfy community obligation are not presumed to be a gift to the community and could give rise to a reimbursement claim.

IMPORTANT DATES

Sept. 15, 2022	**CLE Affidavit Filing Deadline**
Oct. 1, 2022	**Final Deadline for Specialist Application (with Late Fee)**
November 1, 2022	**Family Law Firsts Part 4: UCCJEA**
November 17, 2022	**Advanced Family Law CLE (Tucson)**
June 14-16, 2023	**State Bar Convention**

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

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PLEASE SEND YOUR SUBMISSIONS TO:

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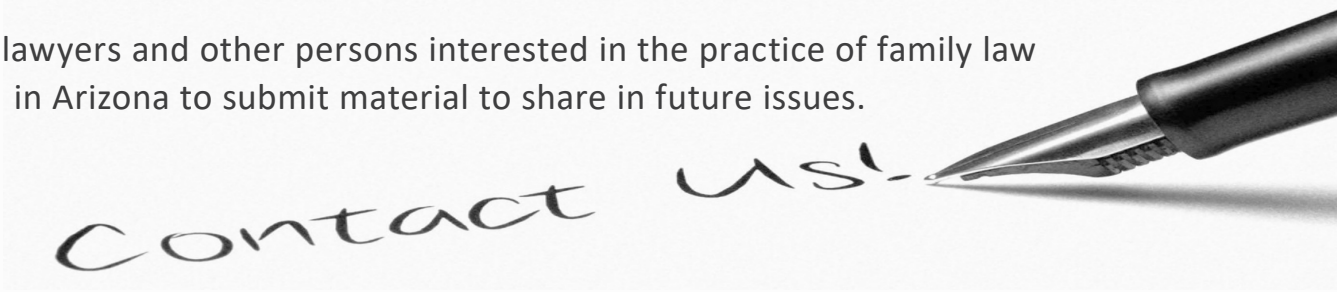
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



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