winter
2020

Family Law News

this issue....

FROM THE CHAIR
MITCHELL REICHMAN

REFORMING OUR FAMILY LAW Community

OUR SHARED VISION OF CREATING AN ENVIRONMENT IN WHICH OUR FAMILY LAW COMMUNITY WILL THRIVE HAS INSPIRED A NEW GENERATION OF LEADERSHIP TO TAKE ACTION.

EDUCATIONAL INITIATIVES INCLUDE THE SCHEDULING OF "BROWN BAGS" FOR JUDGES, attorneys, and mental health providers to exchange ideas, discuss current issues and facilitate dialogue. Spearheaded by Presiding Judge Bruce Cohen of the Family Law Division of Maricopa County, these brown bag lunches are planned in each region. Once dates are scheduled, section members will receive notice through our online community, so be alert for those announcements.

Stakeholders in our family law community have recognized the value of judges providing more information about

STATE BAR OF ARIZONA

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themselves and the particular protocols in each of their divisions. A questionnaire is being developed which will be completed by each new appointee to a position in the Family Law department. It will be posted on the Superior Court website in place of the old, unstructured statements of "Protocol."

The new Family Court Improvement Committee, chaired by the Honorable Paul McMurdie, has now convened. It is tasked to:

- **Make recommendations** that would improve and enhance family law statutes, rules, court processes and procedures.
- **Develop and coordinate** policies and strategies that would improve the likelihood that child support will be paid.
- **Conduct** the federally mandated quadrennial Child Support Guidelines review and make recommendations on issues raised by the 2017 Committee for an Interim Review of the Child Support Guidelines.
- **Advise** the Administrative Office of the Courts Education Services Division about judicial officer and court staff educational needs.
- **Identify and respond** to the emerging trends and issues impacting family court services.

As part of the initiative for access to justice, a "3LP" or LLLP implementation committee has been formed. Under the oversight of the State Bar, non-lawyers who meet the certification requirements of "3LP," are going to be permitted to go to court and practice law.

Each of these initiatives provides each of us with the opportunity to help effectuate real change. To be part of the change process:

- **Share your ideas** for topic development at brown bag lunches in your region and then attend;
- **Give thought** and provide suggestions for information you would like to see included in the new profile questionnaires;
- **Offer insights** and suggestions for changes in rules and/or statutes to the Family Court Improvement Committee;
- **Identify items** the Child Support Guidelines in need of review or reform and send your ideas to Judges Goss and McMurdie;
- **Comment on** the requirements for 3LPs certification once they are disseminated for comment.

The vision is to revive our spirit of collaboration to allow us to build an environment in the family law community that we can all enjoy.

...these initiatives provides us with the opportunity to help effectuate change.

With your support we are working to reform our Family Law community, to encourage and value collaboration and respect, to support engagement, and to effectuate meaningful and perhaps transformational change.

It includes Initiatives, education, and training that promotes a higher level of professionalism and create opportunities for meaningful partnership and dialogue between bench, bar, and the mental health community. Our shared vision will create our best future.

On behalf of your Executive Council know that we are committed to promoting certain values within our community to make that best future a reality including:

- Caring about and valuing relationships with other lawyers and judges;
- Being honest in all interactions;
- Appreciating that our - or our client's - perspective is often not the only way to view a given situation or set of facts; and
- Being open to feedback, and embracing personal growth and lifetime learning.

With your support we are working to reform our Family Law community, to encourage and value collaboration and respect, support engagement, and to effectuate meaningful and perhaps transformational change. FL

what is HB 2249 impacted by

ORDERS OF PROTECTION

Effective date: January 1, 2020

- Orders of Protection [O of P]
- Emergency Orders of Protection [EOP]
- Injunctions Against Harassment [IAH]
- Injunctions Against Workplace Harassment [IWPH]

ORDERS OF PROTECTION RECORDS CENTRAL REPOSITORY

The Arizona Supreme Court shall serve as the Central Repository for all Orders of Protection, statewide, not only for Orders of Protection, but also for Injunctions Against Harassment and Injunctions Against Workplace Harassment

All served Orders of Protection shall be registered through the National Crime Information Center (NCIC)

IAH and IAWP

- For Injunctions Against Harassment (IAH) and Injunctions Against Workplace Harassment (IAWP), the petitioning party remains responsible for arranging and paying fees for service of process.
- The Supreme Court will serve as the central repository
- *Injunctions Against Harassment and Injunctions Against Workplace Harassment shall be registered through the National Crime Information Center (NCIC) following completion of service of process*

Service of ORDERS OF PROTECTION

- Service of process for Orders of Protection issued by the Superior Court will be the responsibility of the County Sheriff's Office or Constables.
- The Supreme Court, through AOC, will electronically transmit the Order of Protection to law enforcement for service.
- Proof of service shall be filed electronically within 72 hours of service. Presently, it is not electronically filed and the due date for submission of proof of service is 7 business days (which translates to 9 calendar days) after service of process.

MAJOR CHANGE RELATING TO SERVICE OF PROTECTION

- If service of process is not effectuated within 15 days, law enforcement agency is mandated to contact petitioning party to secure additional information that may assist in effectuating service.
- Law enforcement agency must continue with efforts to serve over the course of the year following entry of the order.

How HB 2249 Impacts Our Court

This piece was originally created by **Judge Bruce R. Cohen, Presiding Judge - Family Department Maricopa County Superior Court**, as a Power Point presentation explaining the highlights of the changes to the Order of Protection law.

Timing of Service of Process OF ORDERS OF PROTECTION

■ Under current law and procedures, the petitioning party has control over the timing of service of process. He or she can seek immediate service of process or wait as long as one year from issuance of the Order of Protection.

■ Major Change! Service of Process will be initiated almost immediately upon issuance of the Order of Protection. Rule 31 of the Arizona Rules of Protective Order Procedure mandates that the Order of Protection be transmitted electronically on the day of issuance of the order from the issuing court to the Central Repository for service

■ Only Exception: The petitioning party may request, or the issuing judge (in his or her discretion) may decide, to delay of service for 72 hours. The issuing court must make a finding as to why the delay is being ordered. In that event, the Order of Protection will be held from initiating service of processfor 72 hours from issuance.

EOP

■ Emergency Orders of Protection (EOP) are orders that are issued when courts are closed and are arranged through law enforcement. Presently, the effective period for such orders is until 5:00 pm on the next business day. Effective Jan. 1, 2020, Emergency Orders of Protection remain valid until 5:00 pm on the next business day OR 72 hours after issuance, WHICHEVER IS LATER.

■ The Judicial Officer who issues an Emergency Order of Protection telephonically is required to follow up with documentation on the next business day

SAFETY Planning

■ According to AOC, domestic homicides spike immediately following service of orders of protection. Many factors contribute to this uptick, including the alleged perpetrator/coercive controller perceiving the securing of the order to be an effort by the victim to separate

■ Petitioning party no longer has control over the timing of service of process. (other than requesting the 72 hour delay)

■ Before or at the time of issuance of the order of protection, consider discussing with the petitioning party whether he or she has a safety plan

■ There are many apps and websites that can serve as resources for those in need of a safety plan. An example is myplanapp.org, which was developed at Johns Hopkins University

ARIZONA PROTECTIVE ORDER INITIATION AND NOTIFICATION TOOL

AZ POINT is a technology project that supports the implementation of the new legislation.

It has three components: Petition Portal, Clerk Portal & Service Portal.

PETITION PORTAL

■ A party may electronically complete the questionnaire which will then serve to populate the forms

■ It is estimated that this process can be completed in approximately 15 minutes

■ There are a number of other benefits in the portal, such as:

- allowing a party up to 90 days to complete the forms from the time they begin the process
- presence of a “safety button” that closes the screen with one click if the other spouse, partner, family member or other household member approaches

Clerk Portal

■ Tracks status of service of process

■ Identifies agency assigned to effectuate service of process

■ Facilitates acceptance of service

Service Portal

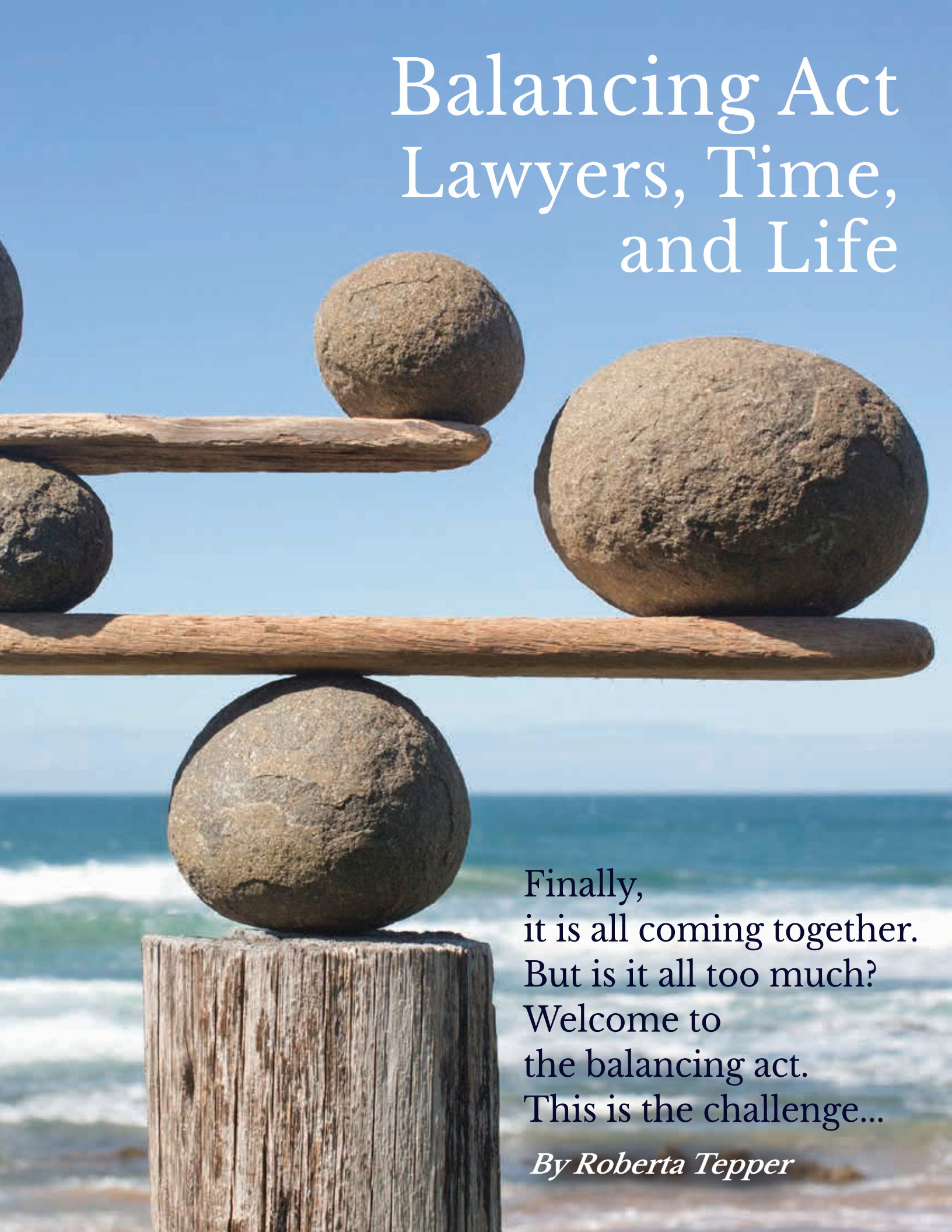
■ This will be utilized by law enforcement to pursue service of process. Law enforcement/constables are able to transfer Orders of Protection between each other. The system will track who is assuming/assigned responsibility for service.

■ If Order of Protection is quashed before service is effectuated, the service portal will electronically notify the serving agency that the Order of Protection was dismissed

■ Twice daily e-mails will be sent to serving agency as reminders that service of process is outstanding on a particular case

■ If out of state service of process is required, designated service agency in Arizona coordinates and once service is effectuated out of state, proof is provided to the Arizona service agency who then updates the service portal FL

Balancing Act
Lawyers, Time, and Life



Finally,
it is all coming together.
But is it all too much?
Welcome to
the balancing act.
This is the challenge...

By Roberta Tepper

FINALLY, IT IS ALL COMING TOGETHER. YOU'RE LICENSED. You are ready to practice on your own, in a firm or in some other setting. You've networked; you have prospective clients; you are getting referrals. It's all falling into place. But is it all too much? There are so many demands on your time - clients, the court, friends, family, your pet - everyone wants some of your time. You are constantly running, worried about getting behind, missing something, or not having time to see friends and family, a movie, binge-watch your favorite series, or just get a good night's sleep.

Welcome to the balancing act. This is the challenge - how to build and grow your practice, provide great service to your clients, but allow yourself to have the life you've hoped a lucrative practice would provide. On the one hand, you don't want to turn away clients or have them hire someone else. On the other hand, you are earning a decent income, would love to take a vacation, spend quality time with friends or family, or pursue the interests you set aside while you were in school and studying for the bar.

The solution is not easy, but it's simple. It will take discipline and determination, but it's doable. It's not rocket science: you should set priorities for your professional and personal lives, and then prioritize tasks and effectively manage your time. Certainly, some factors will always be out of your control and will be challenging—court dates, deadlines, and the uncertainty that comes with dealing with other people and their own priorities. Nonetheless, imposing some order on the chaos is necessary if you are going to thrive personally and professionally in the marathon that is the successful practice of law.

So, how can you achieve balance? First, take a deep breath and focus. No one thinks best under stress. Now that you have cleared the chaos from your mind, at least temporarily, here are a few tips.

Learn - and then consistently use - a time management strategy.

There are as many books, theories, and guides to time management as there are days of the year. Not all of them work equally well for everyone, but they share some commonalities. "To do" lists tend to become repositories of all the tasks and goals you want to achieve; what you need is a "to finish" list.

Take some time daily - not a long time, perhaps 15 minutes at the beginning of the day-to prioritize the three to five things that you must finish that day. Not just start but finish. Now, how much time will each of those tasks require? Make sure to allot the time necessary. Initially, you may not be expert at estimating the time needed for each, and a task may roll over to the next day's "to finish" list. But you'll get better at it.

Set a specific day and time of the week for administrative tasks and then stick to it. By setting aside time that is sacrosanct, barring a true emergency - think volcano eruptions or an imminent meteor strike - you will be certain that these essential tasks are regularly done.

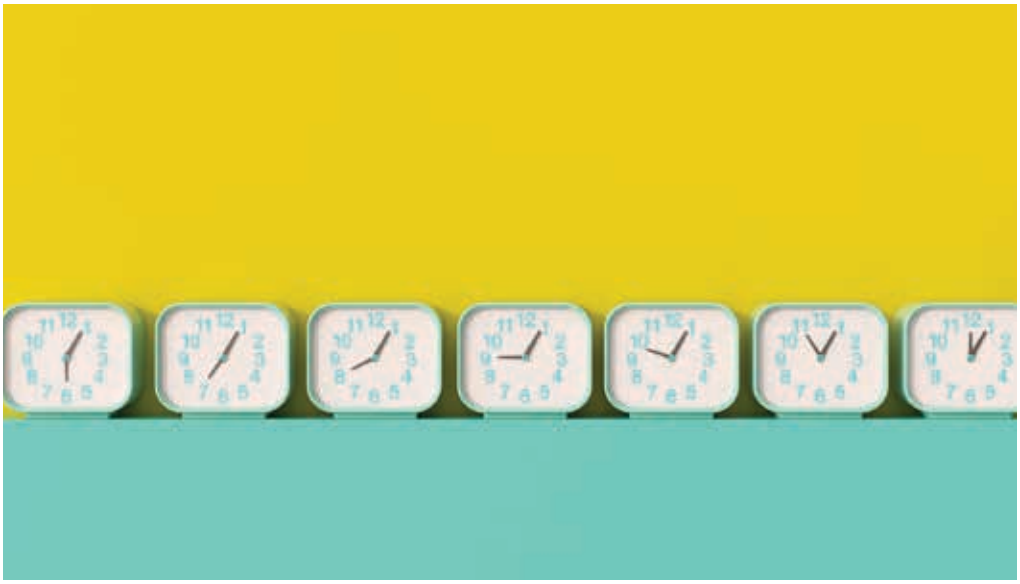
Tepper, R (2018). *Balancing Act - Lawyers, Time and Life* (Reprinted from LawPracticeToday.org, April 2018; https://www.lawpracticetoday.org/article/balancing-lawyers-time-life/?utm_source=April18&utm_medium=email&utm_campaign=April18LPTemail)

Admit that no one can multitask.

It's not you, and you aren't a failure. No one can effectively multitask. This myth that we can do multiple tasks at the same time with the same (high) level of attention and focus has led us to feel like failures when we must admit that we are unable to do that. What multitaskers really do, recent thought on this issue tells us, is either bounce relentlessly in minute periods of time or focus unequal attention to a broader range of simultaneous tasks. Either way, we are not doing a great job at any of them. So, turn off email notifications and put your phone on silent, vibrate, or even better, "do not disturb" while you are working on a task. Focus on one at a time, for a finite period, until it is done.

Set client boundaries and expectations for each representation.

No one is, or should be expected to be, available 24/7/365. No one can be all things to all clients, and certainly not always. An exhausted, over-stressed lawyer is the last thing even the neediest client needs or deserves. Make clear to clients the limitations of your availability. Maybe it is longer than the "traditional" 8 a.m. to 5 p.m. working day. But that doesn't mean that you need to be available always.



It is reasonable... to let clients know that if they call after hours they will need to leave a voicemail message...

Explain to clients what qualifies as an emergency and what does not. This will vary with practice area, so there's no bright-line rule. It is reasonable, however, to let clients know that if they call after hours they will need to leave a voicemail message, and when they may expect a return call for true emergencies.

Do not give clients your personal phone number or your personal email address. You should have a separate office phone number and email address. Apps like Sideline allow you to get a second number for your smartphone so that you may decide whether to answer a call to your office number after hours. Virtual receptionist services, if that is financially viable for you, also allow you to better manage calls and your time. Remind yourself that you deserve a personal life, time to refresh and renew, and to enjoy family and friends.

Unplug from time to time.

You were not born with a smartphone in your hand - it's optional (albeit very useful) equipment. You don't have to check texts, emails, or social media every hour of every day. Give yourself a break occasionally; decide to have a technology-free day on a weekend. Too radical for you? Okay, just give yourself a technology break a couple of hours before bedtime. The glow of your electronic device in the hours before bed may make it more difficult to get to sleep or maintain a restful sleep.

Wisely invest in and use technology.

Technology isn't always the answer, but when it comes to being efficient and not spending "lawyer time" on support functions, it is important. Invest in a good practice management product. Many offer a bit of everything you need and can minimize the time you spend on administrative tasks. Yes, you will still have to allot administrative time. But why not use these systems to minimize that time? Even on a shoestring budget,

practice management software is a wise investment. If you are in a state with a practice management program, the practice management advisors can assist by guiding you to a solution that will work best for you.

Use checklists and written procedures.

These mechanisms will give help you be sure you aren't missing any important steps, tasks or obligations. Having a checklist or written procedure will make time management simpler by memorializing the steps necessary for specific office tasks, like calendaring or docketing. Save time and mental energy - avoid reinventing the wheel when completing

tasks that are not as commonly done. Why waste time wondering how you did it the last time when you could take a few minutes to create a checklist or document a procedure? Having written procedures also gives inherent value to your firm and will keep you organized.

Health and wellness.

You've heard a lot lately about lawyer well-being, mental and physical health, and mindfulness. These issues are vital to our competence as lawyers and to the success and longevity of our careers. Recent reports from national treatment centers and task forces highlighted what many have known for years - the physical and emotional toll of the practice of law can be extreme. Too many lawyers are burned out, stressed out, addicted, abusing alcohol, suffering anxiety and depression. Everyone has a different path to physical and emotional wellness. For some it may be physical activity, for some, it is yoga or meditation, for some... well, you get the hint. If you need help or think you may, don't wait to ask or to check out the resources offered by your state or local bar association.

Find a practice buddy.

You may already know another lawyer with whom you feel comfortable. Find someone with whom you may exchange ideas, experiences, or just vent in your first years of practice. Of course, you'll be mindful of client confidentiality, but having someone you talk with about your experiences and challenges, who is at the same stage of practice as you are, can provide a great outlet and resource.

Having a checklist will make time management simpler. Having someone you talk with about your experiences and challenges, can provide a great outlet.

It is possible to achieve balance.

You don't have to have a life coach by your side; it's not just those amazing people who never seem to need sleep who can achieve this balance. It does, however, take some planning, some discipline, and some thought, to be able to achieve balance. Take it a step at a time, reach out to the practice management program at your Bar association, or to someone who seems to have mastered this. And don't be discouraged if it doesn't come together all at one time. It'll happen if you persist. FL

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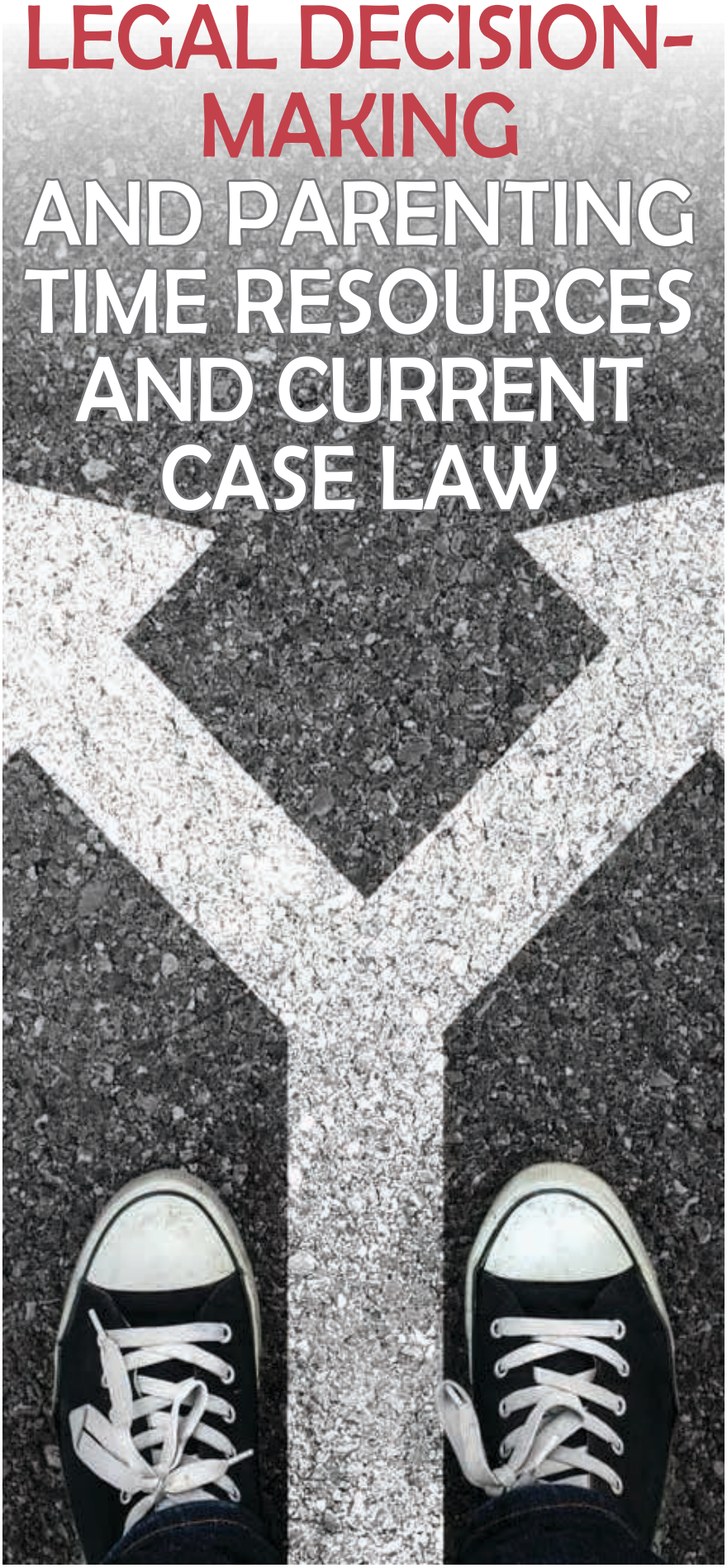
LEGAL DECISION-MAKING AND PARENTING TIME RESOURCES AND CURRENT CASE LAW



Maybe it's just me, but in the last several years I feel as though we have been experiencing a shift in the way that parenting time issues are addressed and the types of parenting time cases we are handling. In addition, I am terrible at remembering case names. As such, I have been keeping something of a cheat sheet for myself, and I thought it might be useful to share. I have no doubt that some of my personal materials come from *Kathleen McCarthy's Case Law Updates,* so thank you to Kathleen for always keeping us current! I also reviewed *Keith Berkshire's Top 10 Child-Related Cases in Arizona from the 2019 Family Law Institute* when making my cheat sheet, so thanks to Keith! And thank you to Reagen Kulseth for helping me to review my list and for suggesting some additions before I put it out there into the world.

For the case law, this is intended to be bullet point reminders so that I can refresh my recollection and go reread the relevant case law. Do not rely on me for quotes!
I am also not including paternity or third-party rights cases in this summary. If I do not receive too much hate mail regarding the cases I forgot to include in this list, I will put together lists of paternity and third-party cases in future newsletter(s).

Here's the shorthand key:
M = Mother
F = Father
TC = Trial Court
AC = Appellate Court
PT = Parenting Time
LDM = Legal Decision-Making
JX = Jurisdiction

JURISDICTION

GUTIERREZ V. FOX, 242 ARIZ. 259, 394 P.3D 1096 (CT. APP. 2017):

M and baby (2 months) moved from AZ to WI without F's consent. F petitioned for paternity and temp orders in AZ. Under ARS 25-1002(A)(1), AZ retains home state jx over an initial custody determination for a child less than 6 months old who has lived in more than one

state if AZ was the home state within 6 months of the commencement of the proceeding, the child is absent, and one parent continues to live in AZ.

Also, temporary orders do not require statutory finding under ARS 25-403.

Ramirez v. Barnet, 241 Ariz. 145, 384 P.3d 828 (Ct. App. 2016):

Potential father filed Petition to Establish Paternity 3 days after birth. Same day, Mother consented to adoption by residents of NY. 4 months later, the TC dismissed Father's Petition, finding it no longer had jurisdiction because the NY court had already completed the adoption. AC reversed. Under the PKPA, the NY judgment was not entitled to full faith and credit in AZ because the NY court failed to exercise jurisdiction consistent with the PKPA. The PKPA bars a custody proceeding in another state that commences after a custody proceeding has begun in the first state. When a case commences is governed by the laws of that state.

The case commenced in AZ first. The court rejected the argument that Mother's consent commenced the NY case.

In re the Marriage of Margain and Ruiz-Bours:

M & F married in Mexico, then moved to US where daughter was born. M and child left US and moved to Mexico for nearly 2 years. F brought dissolution in another state of Mexico, citing abandonment. M contested jurisdiction, but Mexico ruled in F's favor. M absconded to AZ with the child. The Mexico court awarded F custody. In AZ, M filed a Petition to establish custody. TC found that Mexico did not exercise jx in substantial conformity with the UCCJEA because jurisdiction was not based on where the child was living. TC awarded M custody. AC reversed, and found that Mexico had exclusive jurisdiction, and its order was valid and binding. When determining whether or not a foreign court substantially complied with the UCCJEA, it must consider the factual circumstances, not the legal circumstances. Based on where the child was abandoned and living.

In re Marriage of Tonnessen, 189 Ariz. 225, 941 P.2d 237 (Ct. App. 1997):

M becomes pregnant in CO but gives birth in AZ. F files for custody in CO prior to child's birth and CO grants him custody prior to the child's birth. AC holds that AZ is the home state of the child and that CO did not meet the requirements of the UCCJA (now UCCJEA) because CO did not have original jx. The UCCJA does not contemplate in utero time for determining domicile or home state.

LEGAL DECISION-MAKING

Paul E. v. Courtney F., No. CV-18-0111-PR, 2018 Ariz. LEXIS 391 (Nov. 20, 2018):

- A sole LDM parent has the legal right to make decisions and the court may not intervene with these decisions unless it finds an exception under ARS 25-410(A).
- The court may intervene where the parents have joint LDM.
- Any finding of endangerment or significant emotional impairment under ARS 25-410(A) must spring from *"the absence of a specific limitation"* on the sole LDM parent.
- Neither ARS 25-405(B) nor former ARFLP Rule 95(A) authorize the court to appoint a therapist for the child where one parent has sole LDM.
- Statute takes precedence over a rule of procedure.

Nicaise v. Sundaram, 245 Ariz. 566, 432 P.3d 925 (2019):

Final say does not convert joint LDM into sole LDM.

SCHOOL CHOICE

Baker v. Meyer, 237 Ariz. 112, 346 P.3d 998 (Ct. App. 2015):

The out-of-state boarding school case. F and M shared joint LDM and PT. F requested that the youngest be entitled to enroll in out-of-state boarding school which the other children attended. M objected, claiming that this was a matter of modification of parenting time or relocation, as

opposed to school choice. TC treated the matter as one of school placement and used the best interests standard. M appealed. AC held that, as a matter of law, this was not a school issue, but rather an infringement on parenting time.

Jordan v. Rea, 221 Ariz. 581, 584, 212 P.3d 919, 922 (Ct. App. 2009):

The court must apply a best interests standard when parents who share joint LDM are unable to reach an agreement regarding school placement. A private religious school may not be precluded from consideration as the child's school placement merely because it is a private religious school. The court has authority to order an objecting parent to pay child support for the school placement that is determined to be in the best interests of the child even if it is a private religious school. (Overruled by Nicaise I, which was later overruled by Paul E.)

RELIGION

Funk v. Ossman, 150 Ariz. 578, 724 P.2d 1247 (Ct. App. 1986):

Courts should maintain an attitude of strict impartiality between religions and should not disqualify a parent from exercising LDM or PT or from taking the child to a particular church except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.

PRESUMPTION OF EQUAL PARENTING TIME?

Barron v. Barron, 246 Ariz. 580, 443 P.3d 977 (Ct. App. 2018):

M and F have 3 children. TC awards M primary physical custody of the children, making a number of false presumptions.

Holdings:

- It is legal error to apply a presumption against equal parenting time. *"When each parent can provide a safe, loving and appropriate home for the children, there is no place in a parenting-time order for a presumption that 'stability and continuity' require the children to spend more time in one home than the other."*
- It is error to make gender-based presumptions (in this case, that daughters would naturally gravitate more towards their mother over time).
- *"Absent evidence in the record that a parent will be unable to properly care for a child, ...the superior court errs when it presumes ... that the child's best interests necessarily are served by affording more parenting time to the former stay-at-home parent than to the other."*
- The court erred in speculating that it would be less disruptive to award M primary custody now than when F (military) was eventually reassigned.
- It was an abuse of discretion to find that F's use of his parents for childcare weighed against his request for equal parenting time (especially in this case when M worked odd hours as well).

The AC noted that it would be proper for the TC to consider F's inflexibility in allowing M additional parenting time at temporary orders, particularly when F was at work, as a negative factor under ARS 25-403(A)(6) (which parent is more likely to allow the child frequent, meaningful, and continuing contact).

Woyton v. Ward, No. 1 CA-CV 18-0677 FC, 2019 Ariz. App. LEXIS 967 (Ct. App. Oct. 24, 2019):

While ruling on a relocation issue, the AC included the following language as dicta: *"As a general rule equal or near-equal parenting time is presumed to be in a child's best interests... Thus, the court errs, as a matter of law, when it applies a presumption against equal parenting time..."*

SIGNIFICANT AND CONTINUING CHANGE OF CIRCUMSTANCES

Johnson v. Provoyeur, 245 Ariz. 239, 426 P.3d. 1218, (Ct. App. 2018):

Failure to show a substantial and continuing change in circumstances precludes a change in children's primary physical residence. In

addition, court can exclude evidence based on untimely disclosure so long as it did not have a significant effect on the court's ability to determine best interests.

Engstrom v. McCarthy, 243 Ariz. 469 (Ct. App. 2018):

The court must consider alleged change in circumstances before modifying a Rule 69 agreement that was adopted as an enforceable order.

Johnson v. Johnson, 479 P.2d 721 (Ct. App. 1971):

The Superior Court has continuing jurisdiction to modify a divorce decree respecting the custody of the children of the parties as needed. The case law of this state requires a showing of change in circumstances materially affecting the welfare of the children in order to modify custody orders. *See also Hendricks v. Mortensen, 153 Ariz. 241, 735 P.2d 851 (Ct. App., 1987).*

ONE YEAR LIMITATION/RELOCATION

Murray v. Murray, 239 Ariz. 174, 367 P.3d 78 (Ct. App. 2016):

A contested relocation case brought less than 1 year after entry of the Decree. Although F objected to relocation at time of trial, M presented e-mails where F consented to relocation. F argued that these e-mails were not a Rule 69 agreement and were settlement negotiations. [Note: prior to revised Rule 69]

Holdings:

- Denied relocation because it would impermissibly alter parenting time, and PT statutes preclude a modification of parenting time one year or earlier from the date of a prior court order.

- If the proposed relocation involves a substantial modification of parenting time, then the court must make findings of fact, and must allow the parties to present evidence before making those findings.
- Rule 408 (Evidence) does not prevent M from presenting evidence that the parties reached an agreement.

Vincent v. Nelson, 238 Ariz. 150, 357 P.3d 834 (Div.1, 2015):

As long as relocating parent has the court's approval to move and does so within one year of that approval, the new address is the proper address from which to calculate the 100-mile standard in a relocation case.

RELOCATION PRIOR TO DECREE

Woyton v. Ward, No. 1 CA-CV 18-0677 FC, Filed 10-24-2019:

TC declined to apply 25-408 factors where M sought to "relocate" as part of the original dissolution. TC reasoned that 25-408 applied where the parties have a written agreement or pre-existing orders, and those facts are not present in an original decision. The AC found that, because Arizona is the child's home state and because Arizona had original and continuing and exclusive jurisdiction, any move outside of Arizona was, by default, a relocation, and the TC was required to apply 25-408.

SUPERVISED PARENTING TIME

Hart v. Hart, 220 Ariz. 183 (Ct. App. 2009):

In order to order supervised parenting time, the court must make detailed findings of fact that unrestricted parenting time would seriously endanger the child's physical, mental, moral or emotional health (ARS 25-411(D)) or that the child's physical health would be endangered or the child's emotional development would be significantly impaired (ARS 25-410(B)).

ORDERS OF PROTECTION

Courtney v. Foster, 235 Ariz. 613, 334 P.3d 1272 (Ct. App. 2014):

The superior court has inherent authority to modify protective orders when issuing a parenting time order to allow parenting time where the court is satisfied that such

modification would not endanger the child or impair the child's emotional development.

Vera v. Rogers, 246 Ariz. 30, 433 P.3d 1190 (Ct. App. 2018):

Although the court may act to harmonize parenting time and protective orders after a joint hearing, its authority to do so is limited once a coordinate member of the same court affirms the protective order following an evidentiary hearing.

INTERNATIONAL TRAVEL

Lehn v. Al-Thanayan, 438 P.3d 646 (Ct. App. 2019):

The court has discretion to permit international travel. In addition, the court has discretion to regulate international travel within the bounds of due process, including requiring bond.

EVALUATIONS AND FINDINGS OF FACT

Depasquale v. Super. Ct., 181 Ariz. 333 (Ct. App. 1995):

The court must weight all relevant evidence to determine the best interests of the child when determining LDM and PT, and cannot delegate it decision to an expert or give up its responsibility to exercise independent judgment.

Nold v. Nold, 232 Ariz. 270 (Ct. App. 2013):

The court must make specific findings of fact under ARS 25-403 factors and may not defer to an expert's findings in their report.

Christopher K. v. Markaa S., 233 Ariz. 297 (Ct. App. 2013):

The court may not incorporate the custody evaluator's findings by reference. The court may rely on a report, but must explain why it believes the report is correct and apply each of the factors.

Hart v. Hart, 220 Ariz. 183 (Ct. App. 2009):

The court must make detailed findings of fact on all relevant 403 factors in a contested custody case.

Hurd v. Hurd. 223 Ariz. 48 (Ct. App. 2009):

25-403(A) findings are not necessary if DV is found and the presumption is not rebutted under ARS 25-403.03.

Diezsi v. Diezsi, 201 Ariz. 524 (Ct. App. 2002):

Court must make specific findings of fact as to custody.

OTHER

Higgins v. Higgins, 194 Ariz. 266 (Ct. App. 1999):

The court cannot use a personal belief about adulterous cohabitation as competent evidence against a party having custody. There must be proof that there is harm to the children.

Hays v. Gama, 205 Ariz. 99 (2003):

The court must consider the best interests of the child when imposing sanctions against a parent.

Reid v. Reid, 222 Ariz. 204 (Ct. App. 2009):

An expert was permitted to testify even when he was untimely disclosed when the court determined that his opinion would allow it to make a more informed decision and where F could have deposed the expert before trial.

RESOURCES:

Child-Focused Parenting Time Guide, Minnesota Judicial Branch, 8/22/2019

Planning for Parenting Time: Arizona's Guide for Parents Living Apart, Arizona Judicial Branch, 2009.

Child Centered Residential Guidelines, American Academy of Matrimonial Lawyers, 2015. FL

Annie M. Rolfe is a Certified Specialist in Family Law and the immediate past Chair of the Family Law Executive Council of the State Bar of Arizona. Annie received her undergraduate degree from Yale University and her law degree from the James E. Rogers College of Law. Annie is mother to three amazing girls and wife to a lucky and tolerant husband.

To Be Or Not To Be

Is coercive controlling behavior a form of domestic violence under Arizona law?

BY JUDGE BRUCE R. COHEN

Over the course of the last 40 years, views about domestic violence have significantly evolved. What was once viewed as a private matter to be addressed within a family, domestic violence is now rebuked and seen as a significant public safety issue.

With the increased public focus has been an increase in our understanding about domestic violence. It is commonly understood that most forms of domestic violence do not find at their roots anger management issues. Rather, the motivation is often control based, and is evidenced through violence and intimidation.

Control of a significant other comes in various forms. It certainly may be grounded in the fear of physical harm, but may also be through degradation, deprivation of basic financial needs and other oppressive behaviors. This has become known as "Coercive Controlling Behavior." There is wealth of information available that delves into this area and from that, there is a greater understanding as to how this should be systemically addressed in protecting domestic violence victims. But how does Arizona law treat Coercive Controlling Behavior in the context of parenting-related family law issues?

In the case of Engstrom v McCarthy, 243 Ariz. 469, 411 P.3d. 653 (2018), the trial court precluded Father from being awarded joint decision making authority because Father had engaged in "significant domestic violence." The trial court went to great lengths to detail the oppressive and repugnant behaviors of Father in supporting its conclusions. This included not only established events, but also expert opinion testimony that Father's behaviors constituted a form of domestic violence, even without the presence of physical harm or violence. Having made this finding, the trial court properly applied ARS §25-403.03(A). But on appeal, the question was whether the behavior found

While certain behaviors or a series of acts may not meet the statutory definition of domestic violence, those same behaviors or acts may be relevant to determining the interaction and interrelationship between the child and the perpetrating parent...

to have been engaged in by Father was, in fact, domestic violence.

The Court of Appeals did not question Mother's assertion that *"domestic violence can take many forms."* Rather, of concern was what constituted the statutorily proscripted behavior.

ARS §25-403 requires the court to assess whether there has been domestic violence (subsection (A)(8)). If so, the provisions of ARS §25-403.03 apply.

In that context, three different findings of domestic violence could impact the award of decision making authority. **First,** joint legal decision making authority shall not be awarded if it is found that there has been significant domestic violence. **Second,** finding evidence that there has been a significant history of domestic violence shall also serve to prohibit the award of joint decision making authority. (ARS §25-403.03(A)). **Third,** if there is a finding that a parent engaged in an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision making authority to the perpetrating parent is contrary to the child's best interests. (ARS §25-403.03(D)).

Whether the act was significant, or there was a significant history, or there was one act, the pivotal determination is whether the act or acts constituted domestic violence. For that, the Arizona Legislature has provided a statutory definition. Pursuant to ARS §13-3601(A), there are approximately three dozen separate specific acts that may constitute domestic violence.

In Engstrom, the Court of Appeals noted that Father's conduct may have been "distasteful" but for it to have been domestic violence, it must have been an act or acts that are among the statutorily defined domestic violence acts. The case was therefore remanded and the trial judge was directed *"to consider whether Father's conduct...amounted to domestic violence or 'significant domestic violence' by relying upon the §13-3601(A) statutory definitions... and not on the expert's own views"* (as to what constituted domestic violence). At page 474.

...other factor that the court would view to be relevant to the child's physical and emotional well-being.

This conclusion raises concerns that exist from around the country. For example, in 2013, the New York State Office for the Prevention of Domestic Violence published the following: *"Domestic violence laws focus on and respond to individual incidents according to the level of physical harm. Consequently, coercive control, where frequent low-level violence is accompanied by the other tactics, has no legal standing. Few elements of coercive control are currently considered criminal, or are only crimes when committed against strangers."*

Does Engstrom hold that coercive controlling behavior is not a form of domestic violence? Not necessarily. If the behaviors

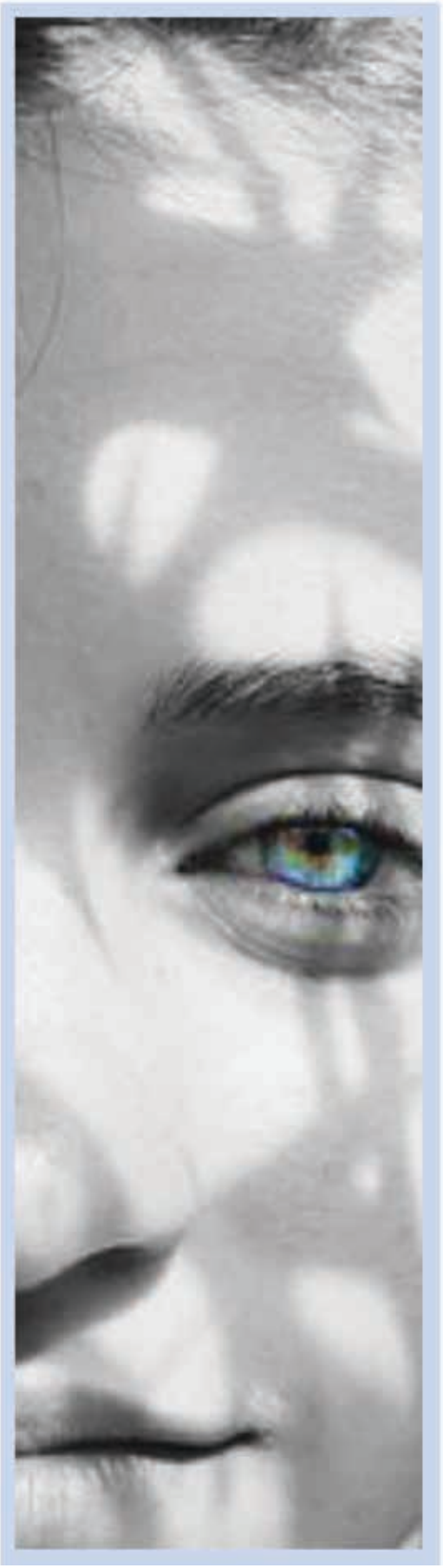
Control of a significant other comes in various forms. It certainly may be grounded in the fear of physical harm, but may also be through degradation, deprivation of basic financial needs and other oppressive behaviors. This has become known as "Coercive Controlling Behavior."

that form the coercive controlling behaviors include any of the acts delineated in ARS §13-3601(A), there may very well be the existence of domestic violence. The facts in Engstrom could lead one to conclude that Father engaged in threatening or intimidating ARS §13-1202), assault (§13-1203), disorderly conduct (§13-2904), stalking (§13-2923), or any number of other specific criminal offenses. But what is clear from Engstrom is that a coordinated set of actions that have become understood to be coercive controlling behaviors is not, in and of itself, domestic violence under Arizona law.

So how may the existence of coercive controlling victimization be addressed in a post-Engstrom period? First, the behaviors should be broken down into its components acts and an assessment should be made as to whether any of those component acts constitute domestic violence under ARS §13-3601(A). if so, it may trigger a finding that the acts were significant, that there is a significant history of the acts, or that there was at least one act of domestic violence.

If there is no corresponding statutory act, focus may shift to the factors delineated in ARS §25-403. While certain behaviors or a series of acts may not meet the statutory definition of domestic violence, those same behaviors or acts may be relevant to determining the interaction and interrelationship between the child and the perpetrating parent (subsection (A)(2)), the mental health of all individuals involved (subsection (A)(5)), which parent is more likely to allow the child to have frequent, meaningful and continuing contact with the other parent (subsection (A)(6)), as well as any other factor that the court would view to be relevant to the child's physical and emotional well-being.

In any event, if a court were to find the existence of on-going actions that domestic violence experts would characterize to be coercive controlling behaviors, it is certainly possible that the same court would find those behaviors to be contrary to a child's best interests. The key is not to debate whether coercive controlling behaviors are repugnant; they are. The challenge is to demonstrate how those same behaviors are either proscribed acts of domestic violence or are relevant to a best interest determination. FL



BRUCE R. COHEN is the *Presiding Family Law Judge in Maricopa County Superior Court*. He was appointed as a *Superior Court Judge to the Maricopa County Superior Court* in May, 2005, and has spent several years in the Family Court Department. Prior to his appointment to the Bench, Judge Cohen was in private practice for 24 years. He was a certified specialist in Family Law and served on the Family Law Board of Legal Specialization for the State Bar of Arizona. Judge Cohen also served a term on the Family Law Executive Council for the State Bar of Arizona. He was a *Fellow in the American Academy of Matrimonial Lawyers* and was named annually to the *Martindale Hubbell Preeminent Lawyers in America*. Judge Cohen has been an outstanding servant to the legal community. His full bio can be viewed here: https://superiorcourt.maricopa.gov/family/presiding-judge/

HOT TIPS CORNER

Courtesy of **JENNY GADOW,** Fromm, Smith & Gadow, P.C.

Use of Deposition Testimony. If the particular portions to be used at trial are not specifically identified by page number and line item in a pretrial statement, the deposition cannot be used. Rule 59 (c)(2) of the ARFLP states: A party intending to offer deposition testimony at trial or at a hearing, for any purpose other than impeachment, must designate the portions to be offered by page and line reference and identify the party or parties against whom it will be offered. The designations must be included in any pretrial or prehearing statement required by the court.
This is a great way to prevent depositions from being introduced based upon the failure to designate.

Put specific numbers in your pretrial statement regarding income, expenses, balances and values of assets. It allows the court to use those numbers in a final ruling. During trial, then ask your client to confirm the figures in the pretrial statement so that there is sufficient evidence in the event of an appeal. It can be as simple as: "did you assist in the preparation of the pretrial statement?" and "do you agree with those numbers?" Poof: in only two questions, you saved hours of testimony.

Maricopa County has implemented a "Summary Consent Decree" procedure. It is a hybrid between the current Consent Decree process and Default Decree process. It is to be used when the parties have reached a full settlement BEFORE either party has filed for dissolution. Check out https://superiorcourt.maricopa.gov/llrc/drdsc1/ for more information.

IMPORTANT CLE DATES

January 16 - 17, 2020	**Family Law Institute (Phoenix)**
June 10 - 12, 2020	**State Bar Convention**
August 1, 2020	**Deadline to Apply for Specialization Application**
July 12 -15, 2020	**CLE By The Sea (Coronado, CA)**
August 2 - October 1, 2020	**Application for Specialization Accepted with Late Fee**
September 15, 2020	**MCLE Affidavit Filing Deadline**
November 13, 2020	**Advanced Family Law (Tucson, AZ)**

CASE LAW UPDATE

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

Want to contribute to the next issue of Family Law News? … If so, the deadline for submissions is March 20, 2020.

Would you like to...

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

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

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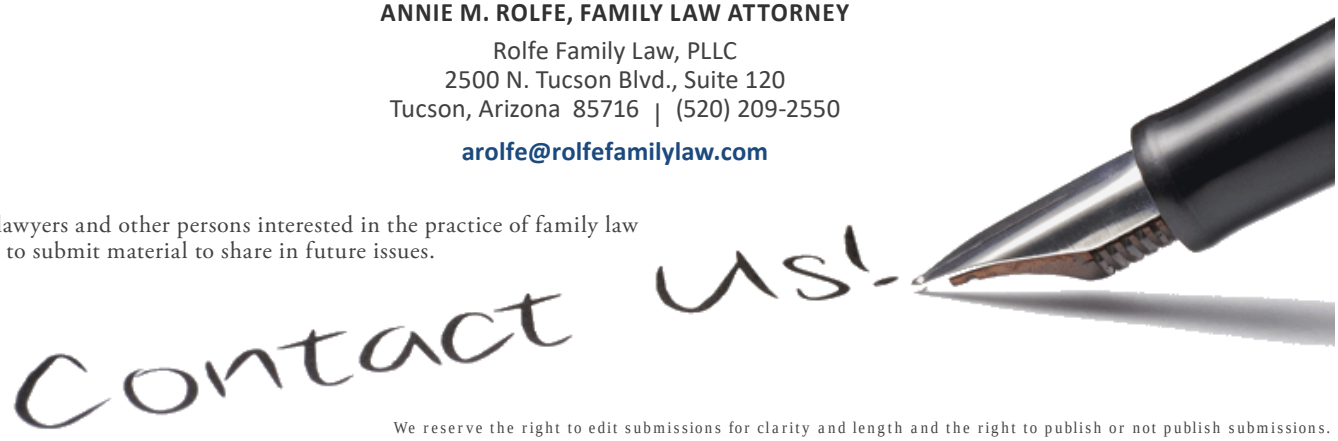
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



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