# Family Law News

summer
2017

this issue...




STATE BAR OF ARIZONA

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## FROM THE CHAIR

MICHAEL AARON

## Warm greetings...

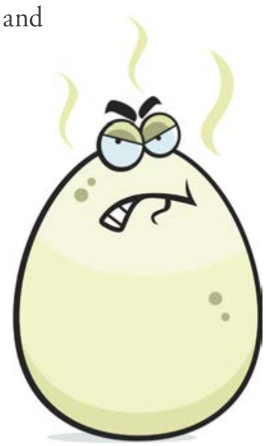
... as our weather heats up and the days of beach, motorcycles and fishing is upon us. As of this writing, the Legislature was busy trying to pass laws, including terminating our mandatory bar association. Last year a similar Bill failed by a close margin and the Bill has not passed the Senate yet. However, there is a Rule Change Petition before the Supreme Court, sponsored by the Goldwater Institute that is proposing a similar bifurcated Bar. Keep a look out about the status of our Bar!

The Task Force on the Rules of Family Law Procedure has started its work in cleaning up the Rules and is using the Task Force on the Civil Rules as a guideline. The work is expected to be done by December 2017, a very ambitious goal Chief Justice Scott Bales has set.

The Nomination Committee is finishing its task of reviewing applications to be on the Executive Council and new officers for this year. It is a wonderful group to choose from.

I had hoped that since my last letter that our political environment would have changed with an election over but my naivety has shown again. The one environment we can change however is amongst ourselves and our communities.

I have contact with legal professionals throughout the state. One of the first concerns is; what is the Bar and the Family Law Section doing to help our new and younger professionals? I have reviewed the survey results sent out to the YLD and newer attorneys. It is clear that you want more seminars that assist you in knowing the changes in the substantive and procedural law and rules as well as in developing trial skills. The Family Law Section is committing to assisting our Bar in these areas. AAML is providing extensive training through a new mentoring program, both in Maricopa and Pima Counties. Look for announcements to join this wonderful program.



We are committed to having CLEs in 2018 that will review and explain the amended AZ Rules of Family Law Procedures once they are finalized and approved. The Family Law Section also posts the new published family law cases on our website (**www.azbar.org/sections-committees-panels-workinggroups/sections/familylaw/familylawcaselawupdates/**). I would also encourage all of you to attend any seminar when Kathleen McCarthy is presenting her case law updates and stinky egg award.


Finally, to those newer to family law, I urge you to get a mentor, either through the State Bar of Arizona, the AAML programs or informally with an attorney of your choice. A practice point I suggest to all is for us to re-invent the personal contact with one another. Pick up the phone and call the counsel on the other side. Call the other party if they are self-represented and treat them with the same courtesy and respect as you would an attorney. Look at, and practice our *Lawyer's Creed of Professionalism and the Preamble of A Lawyer's Responsibilities*. Look into alternative organizations to join like AZAFCC or other bar associations. Become a certified specialist and join AAML.

We have the power and obligation to assist each other. To improve the lives of families and children. To assist each other to enjoy this practice of law and to improve our local communities. I urge you to attend as many family law seminars as you can when the panels have leading local attorneys and judges presenting. Personally, any younger or newer attorney should attend every Advanced Family Law Seminar and the AZAFCC annual Sedona conference. When I first started practicing law in Arizona it did not take long for me to realize that all of the big name attorneys ALL attend EVERY meaningful CLE. I realized if I did not attend these seminars I would only fall further behind what they know and how to use it. The Executive Council is continuing to find ways to make these CLEs affordable and meaningful to all of you.

It has been a pleasure to serve you this past year as the Chair.

Michael Aaron | Section Chair

## about the author

**MICHAEL AARON** graduated from Southeastern University and received his law degree from the University of Montana in 1988. Michael is admitted to the State Bar of Montana and has practiced in Arizona since 1991. Michael is the current Past President of the Arizona Chapter of the Association of Family and Conciliation Courts, sits on the Board of Directors for the Pima County Bar Association and is the pro bono in house counsel for the Primavera Foundation. Michael currently volunteers as a Judge Pro Tem for Superior Court in Pima County and a Judge Pro Tem for the Town of Marana Court.

# UNDERSTAND RETIREMENT PLAN DIFFERENCES

## WHEN DIVIDING RETIREMENT BENEFITS

BY ERWIN KRATZ
ERISA BENEFITS LAW, PLLC

When dividing retirement benefits in a divorce, it is critical to understand the features of each retirement benefit, so that you get your client their fair share of this important community asset. The first step is to identify the type of retirement plans involved.

**ABOUT THE AUTHOR**

**ERWIN KRATZ** is an attorney at ERISA Benefits Law, PLLC practicing exclusively in the areas of ERISA and employee benefits law, focusing on tax and regulatory matters relating to qualified and nonqualified deferred compensation and welfare benefits. ERISA Benefits Law offers QDRO services to family law attorneys, mediators, and divorcing parties through Arizona's QDRO Practice at **www.qdroaz.com**.

### TYPES OF RETIREMENT PLANS

There are three broad types of retirement plans –

- Defined Contribution Plans (both private and governmental)
- Private Defined Benefit Plans
- Government Defined Benefit Plans

Many employers have multiple plans. For example, it is quite common for a publicly owned corporation to have both a traditional defined benefit plan and a defined contribution plan. Many corporations will also have separate plans for hourly and salaried employees. Employees who went from one classification to another may have benefits in both plans – i.e., separate plans for hourly (non-union), union and salaried employees. Benefits in one plan may be coordinated with benefits accrued in the other.

It is critical that you correctly identify the plans involved, and understand the different types of plans you are dealing with, or you may not get your client everything they are entitled to. In addition, in most cases it is necessary to enter a separate order directed specifically to the retirement Plan to divide the retirement plan assets – simply stating in the Decree that each party is



awarded their community share of the plan is not sufficient. This article refers to all such separate orders generically as QDROs (Qualified Domestic Relations Orders), though technically the orders directed at governmental plans are not "Qualified" under ERISA (the Employee Retirement Income Security Act) and the tax Code.

This article summarizes the differences in the three main plan types, and the issues practitioners need to consider in dividing benefits in these plan types.

It is critical that you correctly identify the plans involved, and understand the different types of plans you are dealing with, or you may not get your client everything they are entitled to.

## DEFINED CONTRIBUTION PLANS

In a defined contribution plan, the employer contributes an amount to the plan each year for the participant. The contribution can be determined by the participant (as an elective deferral), fixed by the plan, discretionary with the employer (either as a matching contribution or as a non-elective contribution), or some combination of the foregoing. The trustee invests the funds and maintains an individual account for each participant. Earnings are periodically credited to the account balance, sometimes daily, but sometimes only once a year. The participant's benefit *is* the account balance. When you divide the benefit, you are dividing the account balance, including any earnings and losses attributable to the account as of the date of division.

## ISSUES TO CONSIDER WHEN DIVIDING DEFINED CONTRIBUTION PLAN BENEFITS

- ***If there is pre-marriage money in the plan, how should the QDRO account for it?***

  The problem is that most plans will not calculate the present value of a pre-marital account balance (i.e. what the account balance on the date of marriage is worth years later). Therefore, either the parties need to negotiate this, or the court needs to decide the issue. This is the most intractable problem with dividing defined contribution plan accounts that we deal with on a day-to-day basis. Simply stating that the alternate payee is awarded their community share of the 401(k) plan fails to answer the question. You will need to determine how much pre-marital money there was, and how to adjust that amount for earnings (or losses) through the division date.

- ***How should the QDRO account for a loan that is outstanding on the date of division?***

  Plans will not actually allocate any of the loan balance to an alternate payee, but it may be necessary to include the loan balance when dividing the account. For example, if the participant takes out a loan shortly before the dissolution case is filed, and uses the proceeds for non-community purposes, it may be equitable to include the loan balance when dividing the plan account 50-50. On the other hand, where a loan was taken out before the case was filed and used for community purposes, the loan should ordinarily be excluded when calculating the alternate payee's 50% share.

- ***When will the alternate payee receive their award?***

  Most (but not all) defined contribution plans will make a distribution to the alternate payee as soon as the plan can process the order. However, some plans make no distributions until there is a triggering event, such as the participant's separation from service, or reaching earliest retirement age under the Plan. Even if the plan permits a current distribution, it may take several months for the plan to process the QDRO and the request for a distribution. Therefore, if your alternate payee is counting on receiving a distribution of the award and putting the money to some other use (such as paying off debt or buying a house), you need to know when the award will actually be distributed, or your alternate payee might be in for an unpleasant surprise.

- ***What is the effective date of the award?***

  In most cases, the award will be made as of the date the marital community terminated (i.e. the date of service). The Plan will account for any earnings (and losses) on the award from the designated date, until the award is actually distributed to the alternate payee. However, this can present problems in some cases:


- If the QDRO is not entered until many years after the division date, the Plan may not have records going back to the date of division, and therefore may not be able to calculate earnings (and losses) on the award. This causes much the same problem as accounting for pre-marital money.
- In many small plans, the plan only posts allocations and investment returns once a year, usually as of the last day of the plan year. A midyear division date would therefore not include a portion of the contribution for that year. In addition, if both the division and the distribution are made in the same year, the alternate payee could lose out on any earnings (or losses) on their award.
- Employee Stock Option Plans (ESOPS) present similar challenges. ESOPS are valued annually, and the annual allocations are often not made until several months after the end of the year. In addition, ESOPs invariably have delayed distribution provisions, so if the Alternate Payee is looking for a cash distribution, they will usually not find it from an ESOP.

## DEFINED BENEFIT PLANS

Both private and governmental defined benefit plans generally provide an annuity benefit to the participant (i.e. a monthly benefit payable over the life of the participant and their designated survivor). The annuity benefit is determined according to a formula set forth in the plan. At retirement, participants can elect to receive benefits over their life (a single life annuity), or a reduced benefit over their life, plus a benefit for the life of a designated survivor (a Joint and Survivor Annuity). If a participant is married when they commence their benefits, they are required to elect a Joint and Survivor form of benefit naming their spouse as the survivor, unless the spouse waives that right.

## ISSUES TO CONSIDER WHEN DIVIDING DEFINED BENEFIT PLAN BENEFITS

**The key issues to address when dealing with defined benefit plans are:**

- Is the Participant already in pay status (post-retirement) or are we dividing the benefit pre-retirement?
- What to do about survivor benefits?
- Is this a private or a governmental plan?

### Pre-retirement Issues

- *When dividing benefits in a private defined benefit plan prior to retirement, the plan will provide each party a* ***separate benefit****.*

This means that the plan will carve out a separate benefit for the alternate payee as of the date the marital community terminated, and will treat the alternate payee as if they were a participant in their own right. Usually, the alternate payee may elect a life annuity benefit beginning at the participant's "earliest retirement age", or a survivor form of benefit naming anyone other than a second spouse as a survivor annuitant. The alternate payee's benefit is not affected by the participant's continued employment, their delayed retirement, or their death. Thus, when dividing a private defined benefit plan benefit before retirement, the parties can go their separate ways.



- *Governmental defined benefit plans always employ a shared* ***benefit approach****,*

  regardless of whether the participant is pre- or post-retirement. This means that an alternate payee can never get a separate benefit from a governmental defined benefit plan. The alternate payee has to wait until the participant actually initiates their benefits in order to receive anything, and then they share in the benefits as and when they are paid to the participant. This means that when dividing governmental plan benefits pre-retirement the division cannot be made as of the date the community interest terminates. Instead, the division has to be made as of the retirement date, which may be years in the future (and therefore will include post marital service and post marital benefit increases). This also raises the potential problem in *Koelsch v. Koelsch*, 148 Ariz. 176, 713 P.2d 1234 (1986), where the participant continues working past their normal retirement date and thereby delays the alternate payee's receipt of their share of the benefit.

### Post-Retirement Issues

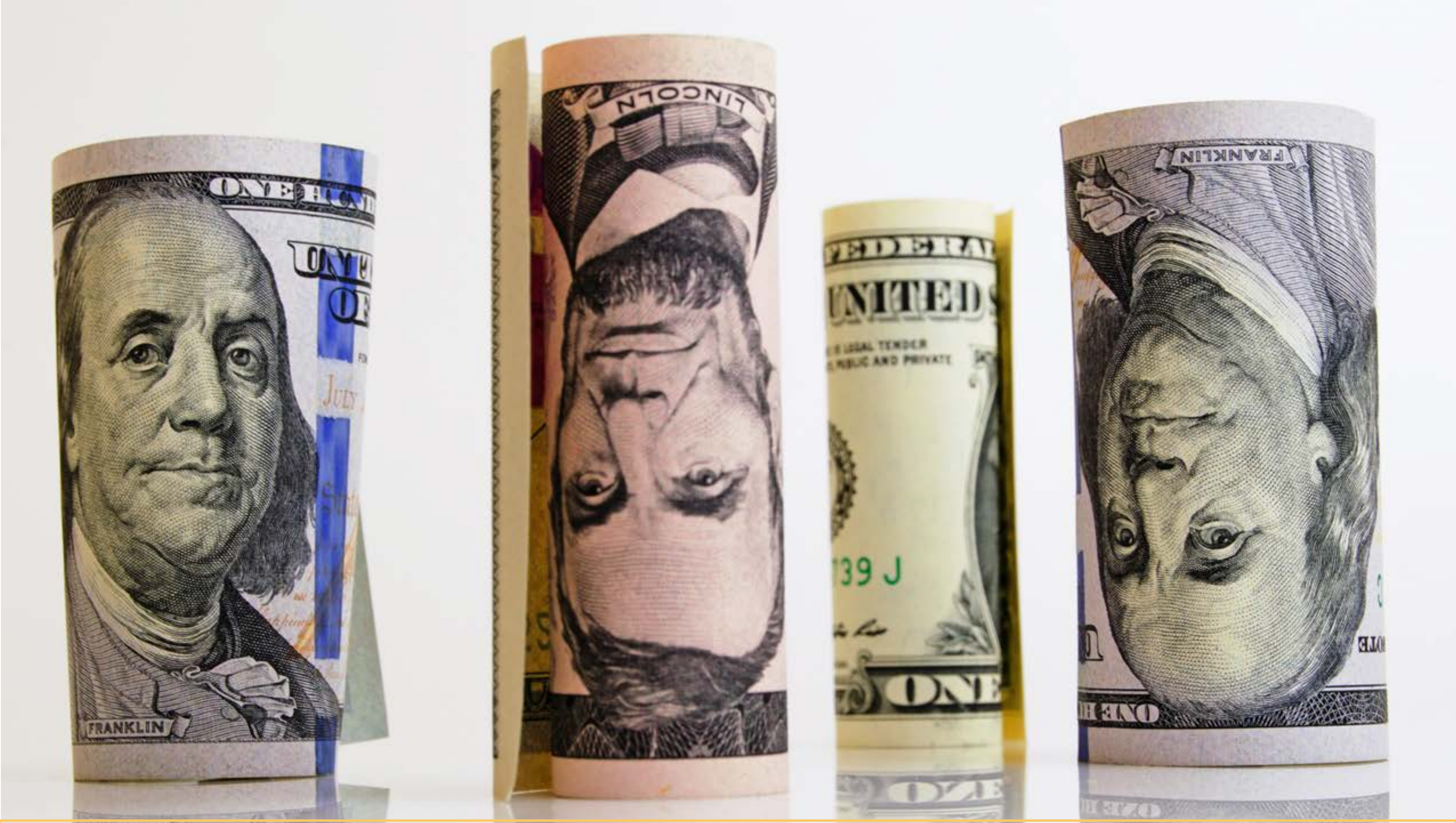
- *In a private defined benefit plan, where the benefit has already commenced, the participant's form of benefit elected at retirement cannot be changed.*

  Private plans use a ***shared benefit*** approach in these circumstances. This means that the parties can divide the pre-existing payment stream during the participant's life, but they cannot change the form of benefit elected at retirement, including survivor benefit elections (or lack thereof). Therefore, in a private defined benefit plan division post-retirement, the alternate payee may well receive *all* of the survivor benefits, even if the participant had pre-marital service.

- *In a governmental defined benefit plan, where the benefit has already commenced, the participant's previously elected form of benefit is usually converted to a single life annuity, with no survivor benefit for the ex-spouse,*

  regardless of the form of benefit elected at retirement, unless the decree and the DRO specifically preserve survivor benefits for the ex-spouse. Therefore, if you do not address survivor benefits for the alternate payee, you will lose them.

These are some of the most common issues that arise when dividing retirement benefits through a divorce. There are many other concerns not addressed in this article, which may arise depending on the particular circumstances in your case, or the specific plan involved. For example, a recent amendment to the definition of "disposable retired pay" will impact most military divorces finalized after December 23, 2016. If you are in doubt when you are assisting your clients with division of their retirement account, you should contact a qualified ERISA attorney or QDRO professional for assistance, preferably *before* finalizing any settlement or decree language. FL




# POST JUDGMENT ATTORNEY FEES

BY LISA C. THOMPSON

It is a myth that you can automatically collect attorney fees and other collection costs after judgment. Because garnishments and other post-judgment collection remedies are purely statutory, Judgment Creditors may only collect additional attorney fees as allowed per a statute allowing them or a judgment specifically awarding them. *Patrick v. Associated Drygoods Corp.*, 20 Ariz.App. 6, 509 P.2d 1043 (1973).

There is no statute that allows a blanket collection of post-judgment attorney fees. In short, post-judgment attorney fees for collection may only be collected if the judgment/order or underlying contract allows for them. *Blum v. Cowan*, 235 Ariz. 204, 330 P.3d 961(Ct. App. 2014).

In *Blum*, the Arizona Court of Appeals held that the Judgment Creditor was not entitled to a post-judgment award of attorney fees based on A.R.S. 12-341.01 even though the action arose from a contract. The Court found that garnishment proceedings are an original independent action to enforce a judgment and not interpret the contract. In sum, attorney fees to obtain the judgment stemming from the interpretation of the contract were awardable, but once the judgment was entered they were not.

The only time the garnishment statutes provide for any award of post-judgment attorney fees to a Judgment Creditor in a garnishment proceeding is when there is a hearing on the garnishment and the court specifically finds that the Judgment Debtor has objected to the Writ of Garnishment solely for the purpose of delay or to harass the Judgment Creditor. A.R.S. 12-1580. Even so, the award of post-judgment attorney fees will only be for the defense of the Judgment Debtor's objection and not for the fees in preparing the garnishment itself.

All of this seems unfair: 1) the Judgment Creditor is owed money pursuant to a judgment/order; and 2) the Judgment Creditor has to bear the costs of collecting the judgment without the possibility of compensation. There is nothing in the law that prohibits language in a judgment/order that would allow for the collection of attorney fees and

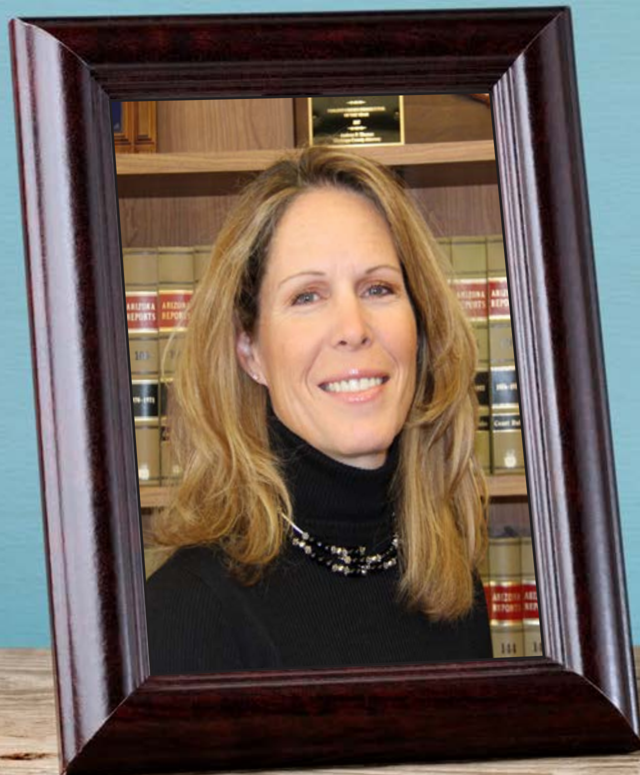


costs post-judgment. Moreover, if an underlying contract states specifically that attorney fees and collection costs may be collected post-judgment then they may be collected and your judge should have no problem including language in your judgment allowing for the collection of post-judgment attorney fees and costs. It also never hurts to ask. Worst case your judge says no, but best case your client is able to collect post-judgment attorney fees and costs. Additionally, any Judgment Debtor that objects to this language is really only indicating that the Judgment Debtor is not going to voluntarily pay the amount owed to the Judgment Creditor.

It is critical to keep all of this in mind when drafting contracts and judgments/orders. Adding language to allow for post-judgment collection of attorney fees and costs will allow you to do so without question. In addition, be sure to specify the interest rate in the judgment/order as it is no longer enough to state "interest to accrue at the statutory rate". Statutory interest rates on judgments now vary and are the lesser of ten percent per annum or the prime rate on the date of the judgment plus 1%. A.R.S. 44-1201. (If the judgment is for child support arrears or spousal maintenance, the judgment accrues interest at 10% per annum on the principle balance. A.R.S. 25-510; A.R.S. 25-500(1).) To avoid having to figure out the prime rate as of the date of entry of the judgment, state the specific interest rate in your proposed form of judgment. Prime rate on any given day may be determined by visiting **www.bankrate.com**. All interest on judgments accrues simply and does not compound.

## ABOUT THE AUTHOR

LISA C. THOMPSON is certified to practice law in Arizona, California, Nevada, and Washington, D.C. Lisa is the author of *Arizona Legal Forms – Debtor-Creditor* (Second Edition) and *Arizona Legal Forms – Limited Liability Companies and Partnerships* (Third Edition), and the co-author of the *Arizona Business Law Deskbook* series (Volumes 9, 9A, 10 and 10A). Lisa focuses her practice on bankruptcy, business law and student loan resolution.



# MEET JUDGE SUZANNE COHEN

**We are pleased to introduce Judge Suzanne Cohen, who is the Presiding Family Court Judge for Maricopa County. Judge Cohen was first appointed to the Bench in December 2012 and has continued with Family Court since her original appointment.**

**Prior to being appointed to the Bench, Judge Cohen served as a prosecutor with the Maricopa County Attorney's Office and with the Riverside County District Attorney's Office. During her tenure as a prosecutor, Judge Cohen prosecuted sex crimes, child abuse, domestic violence, and homicides (including capital cases). During such time, she served as a bureau chief and received numerous awards for her outstanding advocacy and service.**

**By William D. Bishop**

One of Judge Cohen's main goals since her appointment as Presiding Judge of Family Court has been updating the computer system, which will allow decrees and orders to be processed quicker and easier. Judge Cohen also serves on the Rules Committee, which is working on non-substantive changes to make the Rules more "user friendly."

Judge Cohen has several suggestions for practitioners that can assist the Court with processing the cases more quickly and efficiently. First and foremost, attorneys should coordinate with opposing counsel prior to filing motions, *i.e.*, attorneys should call opposing counsel, explain what they want to accomplish, and inquire whether the opposing counsel or party has an objection to the proposed motion. If there is no objection, such can be submitted as a stipulation, or the attorney can include language in the motion that he or she has conferred with opposing counsel and that there is no objection to the request. The same thing applies with discovery motions. Although Rule 51(F), ARFLP, requires counsel to personally consult regarding discovery matters prior to filing discovery motions, such requirement is sometimes overlooked. Counsel should take efforts to confirm that matters are truly contested prior to filing motions, which will save the client attorney fees, will save time for the Court, and will expedite matters.

With regard to attorneys who do not yet have substantial experience in family law, Judge Cohen strongly recommends that such attorneys consider joining one of the available mentor programs. The Arizona Chapter of the American Association of Matrimonial Lawyers (AAML) and the State Bar of Arizona have a list of very experienced family law attorneys throughout Arizona that volunteer their mentor services at no charge.

Judge Cohen is very involved in continuing legal education programs, and often speaks at For Better Or For Worse, the State Bar Convention, and other Family Law education programs. Judge Cohen not only offers acute observations from the Bench, but also provides an abundance of humor and wit.

Judge Cohen's favorite past-times are running, spending quality time with her husband and seven-year-old child, and watching old episodes of the Gilmore Girls. We appreciate the dedication that Judge Cohen has brought to the Family Court. FL


# Transfers of Title to Real Property in Family Court

By Ari Ramras, Esq.

A recent Opinion by the Arizona Court of Appeals highlighted an issue frequently encountered by my colleagues in the title industry: a family court order requires one spouse to execute a deed transferring title to the other, but the deed is never signed and recorded. This is not only a problem for the intended transferee, but it can be the bane of a title company attempting to effectuate a subsequent sale or loan transaction. Occasionally practitioners will record the order requiring execution of a deed, but that is insufficient and unhelpful in the situation when the spouse required to sign is now unavailable (possibly deceased) or unwilling to do so. Even a slight delay in signing could cause havoc where the signing spouse has filed a bankruptcy petition or a creditor of the signing spouse has recorded a judgment lien in the interim.

And all of the above issues can be remedied by a simple drafting tip: instead of having the order require a party to sign a deed, have the order direct the conveyance. A.R.S. §33-456 provides: "When a judgment directs the conveyance of real property … the judgment shall pass title to such property without any act by the party against whom the judgment is given." And then record it.

Title companies will recognize a conveyance pursuant to this statute, and in fact they actually prefer it. Not only does it avoid the need to sign a deed, but it avoids an array of risks associated with any deed, such as the authority of the person signing or a defective notarization.

It is important to include, in any order affecting title to real property, a legal description of the property, i.e. not merely the address or assessor's parcel number. The reason is that, while the county recorder generally indexes conveyances by the parties' names, title companies do not. Instead, title companies maintain title plants which index conveyances by legal description. Since virtually all sale and loan transactions go through escrow in Arizona, it's vital to all parties involved in the transaction that title companies are able to find conveyances when they search for them. That being said, adding an address and assessor's parcel number to the legal description can be helpful to identify the property, or at least provide constructive notice in the case of a minor error in the legal description.

Another issue can arise in family court when one spouse has given a power of attorney to the other. Although there is an automatic injunction upon the filing of a dissolution action, third parties and title companies will generally not be aware that it has been entered. And, unlike actions taken in violation of a bankruptcy automatic stay, conveyances of real property in violation of the family court automatic injunction are not automatically invalid. Accordingly, in this situation, the best practice is to record a revocation of the power of attorney. FL

## ABOUT THE AUTHOR

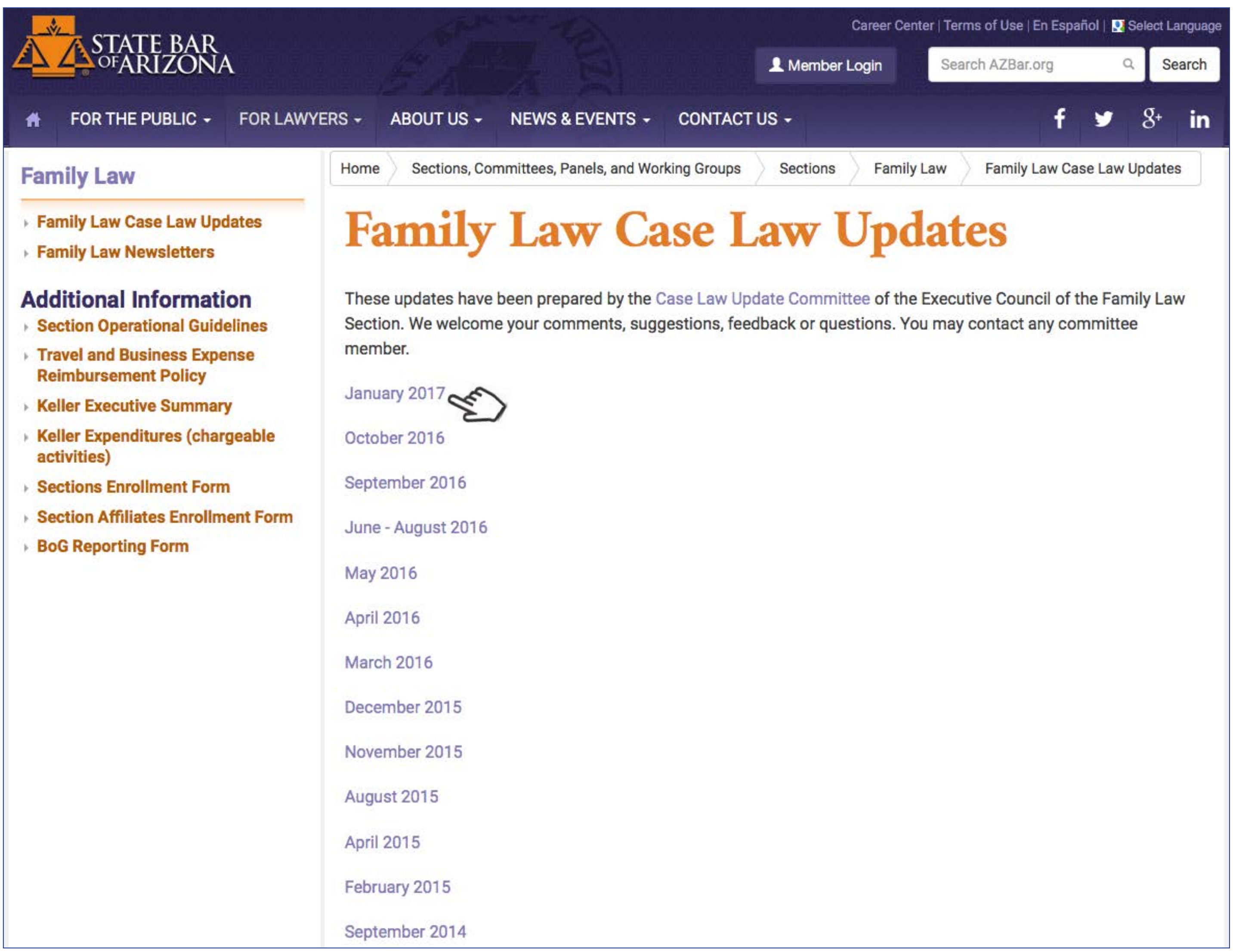
**ARI RAMRAS** is an attorney whose practice is dedicated to real estate and business litigation. He is a Certified Specialist in Real Estate Law (State Bar of Arizona Board of Legal Specialization), and has been selected for inclusion in the 2017 *Best Lawyers of America* for his work in the practice area of Litigation-Real Estate.

# 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/**

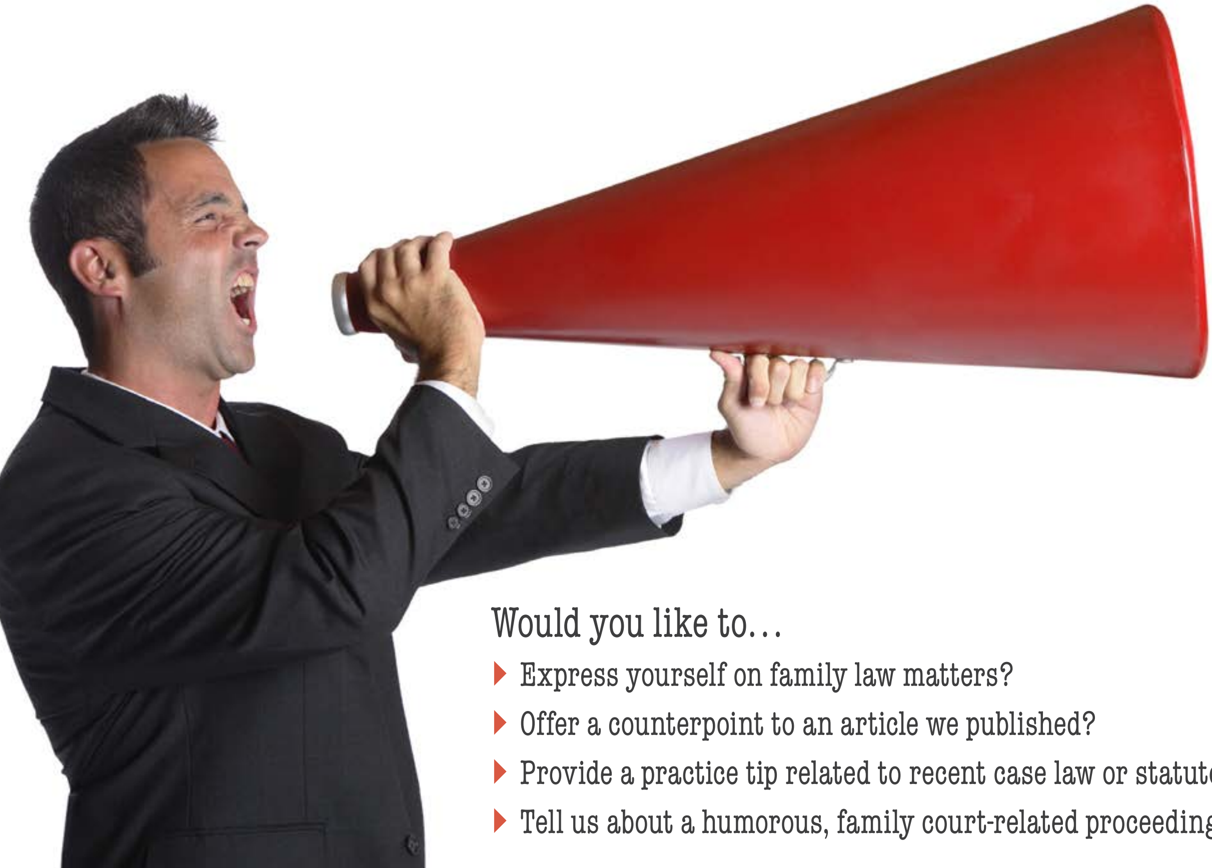
**The most recent update, from November, 2016 – January, 2017, can be viewed here:**
**www.azbar.org/media/1435769/caselawsummariesnov2016-jan2017.pdf**

**Additionally, the previous update, from October, 2016 – can be viewed here:**
**www.azbar.org/media/1398715/caselawsummariesoctober2016.pdf**



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

## … If so, the deadline for submissions is November 17, 2017.



Would you like to…

- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?
- Tell us about a humorous, family court-related proceeding?

# WE WANT TO HEAR FROM YOU!

We invite lawyers and other persons interested in the practice of family law

PLEASE SEND YOUR SUBMISSIONS TO:

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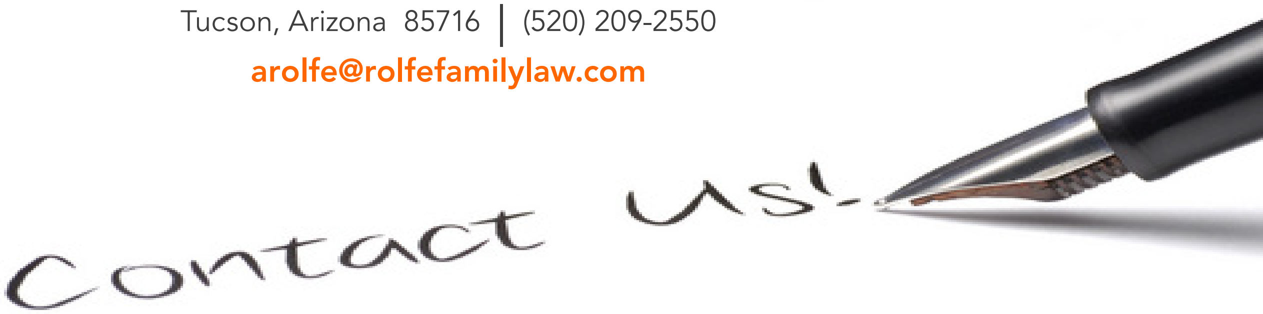


We reserve the right to edit submissions for clarity and length and the right to publish or not publish submissions.