MCBA

MARICOPA COUNTY BAR ASSOCIATION

FAMILY LAW SECTION NEWSLETTER

OCTOBER 2017

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For membership information, information about this newsletter, or a Family Law Section meeting or program from the Maricopa County Bar Association, please call (602) 257-4200.

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Editors: Sylvina Cotto, Jennifer Mauet Raczkowski, Amy Witzleb, James Schmillen and Oksana Holder

MARICOPA COUNTY BAR ASSOCIATION

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ANNOUNCEMENTS

Judge *Pro Tempore* Recruitment

Dear MCBA Family Bar Section;

As you all are well aware, ADR/settlement conferences are paramount to the effective management of the family department. Without ADRs our calendars would be even more crowded than they already are. Also, settlements also are good for families. But we need volunteers to make ADR successful.

Right now the Court is setting ADR's in February. Please consider volunteering for the Pro Tem positions. If you do not feel that ADR is your "thing" consider "pro temming" for a court assignment. You can choose!

We appreciate your time.
Judge Suzanne Cohen
Family Department Presiding.

Changes to Rules of Family Law Procedure

The Rules Task Force will finish its review of all family law rules of procedure by December and will submit a petition with the changes that should be out/public by January. There will then be several months for public comments on the proposed changes. Usually the comments are due by mid-May but that's often extended for a couple of months. The likelihood is that rule changes will then be adopted in the fall of 2018 to become effective January 1, 2019.

It's impossible to talk about any particular rules changes at the moment, but it's safe to assume that changes will include updated language and styling/ organization of the rules, and there will be some renumbering.

(Special thanks to Annette Burns for this update)

New Judge at Southeast

Judge Michael Mandell will be taking over Judge Green's calendar at the Southeast Court Facility, on or about November 6, 2017.

MCBA FAMILY LAW CLEs and EVENTS

Save the Date for Brown Bag Lunch with Presiding Family Law Judge

Presiding Family Law Judge S. Cohen invites you to attend an informal lunch discussion of various family law topics and issues. This is open to all family law attorneys. Bring your own brown bag lunch and questions for the Judge.

Date: October 27, 2017
Time: 12:15-1:15pm
Location: Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, Arizona 85004

Annual Holiday Judicial Reception

Wednesday, December 6th from 5 to 8 p.m. the Phoenix Country Club
(2901 N. 7th Street, Phoenix, AZ 85004)

Must be a member to attend.

Understanding Safe Harbor and The Alphabet Soup of Family Court Resources

Have you ever had a therapist refuse to provide services because they were afraid to "get involved" in Family Court? How do you balance the interests of parents' rights/due process against a child's right to have his own safe harbor therapist? Are you lost in the sea of FCA (Family Court Acronyms)? Have you wondered the difference between CFE and FA, BIA and CAA or are you confused if a PC means a Parent Conference or Parenting Coordinator? Understanding Safe Harbor counseling and the alphabet soup of family court resources—can make or break a case.

Presenters: David Weinstock, J.D., Ph.D., Diana Vigil, LPC, RPT, and Gregg Woodnick
Date: December 8, 2017
Time: 8:00 am – 10:30 a.m. (2.5 hours)
Location: Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, Arizona 85004

Special Real Estate Commissioner & Receivership Appointments in Family Law

Beth Jo Zeitzer, Esq., President/Designated Broker of R.O.I. Properties, and Stuart Rodgers, Esq. Partner at Lane & Nach, P.C. will be discussing the ins and outs of receiverships and real estate commissioner appointments in your family law matter. Discussions will include:

Bringing Order to the Disposition of Real Estate Assets in Family Law Matters

- What is a Special Real Estate Commissioner?
- Drafting Orders and Customized Order Provisions
- Valuing Real Estate Assets

- How to Ensure Parties Achieve Maximum Value in the Sale of Real Property
- How to Negotiate a Favorable Contract in a Court-Ordered Sale

Leveling the Playing Field, Through Receivership Appointments

- Operating Closely- Held Businesses and Real Estate Assets
- Financial and Physical Forensics
- Compiling and Delivering Financial and Operational Report
- Maximizing Operations/Valuation
- Valuing Assets in Receivership
- Sale of Businesses and Assets in Receivership

The Power of a Neutral Third Party to Maximize Value and Achieve Resolution

- Bringing Impartiality to a Contested Matter
- A Trusted Source of Information for the Court
- Winding down the Estate

Date: Friday, February 16, 2018
Time: 11:30-1:00
Location: Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, Arizona 85004

News from the clerk of the Maricopa County Superior Court

Excerpt from October edition:

Play by the rules

The Arizona Supreme Court took action on rule change petitions at the end of August and will consider more petitions in December. The Court Rules Forum is online and a one-stop source for pending petitions, links to the current rules, recent amendments, historical amendments, pending local rule changes, frequently asked questions and more. See the Forum online at http://www.azcourts.gov/Rules-Forum.

Adopted rule change petitions usually take effect the January following the Court's rules agendas (August and December). Because of extensive and novel changes in some recent rules, implementation of those rules have been pushed back to July 1, 2018. While the legal community will be reading the new rules as usual, this delayed implementation for some rules is a sign that practitioners and support staff should be looking for continuing education, articles, and other promotional events to learn about the changes and how to implement them so they are prepared on the effective date. This unusual grace period is welcome, but those who are not familiar with and prepared for the changes could find themselves in a tough spot defending their practices or citations to rules that no longer apply. Most of the rules from the August and December agendas will still be effective on January 1, 2018.

LAW PRACTICE TIPS

To obtain a copy of an electronic recording of a Child Interview in your case*; please put your request in writing and include your case number, the date that the Child Interview occurred, your name, and your telephone number. Your request will be forwarded to the Conciliation Services supervisor and you will be contacted regarding your request within 10 business days*

DELIVER, MAIL, or FAX your Request to Family Court Administration at the following addresses:

Downtown Phoenix
Family Court Administration Central Court Building
201 West Jefferson, 3rd floor Phoenix, Arizona 85003
PHONE: 602-506-1561
FAX: 602-506-1670

Northeast Regional Court Center Family Court Administration 18380 North 40th Street
Phoenix, Arizona 85032
PHONE: 602-372-7700
FAX: 602-372-7923

Southeast Regional Court Complex Family Court Administration
222 East Javelina Drive, Suite 1300
Mesa, Arizona 85210
PHONE: 602-506-2300
FAX: 602-506-3272

Northwest Regional Court Complex Family Court Administration
14264 West Tierra Buena Lane Surprise, Arizona 85374
PHONE: 602-372-0492
FAX: 602-372-9440

Tips for Settlement Conferences

1. Be Prepared for the conference. The Court is allocating resources (settlement conference officer or commissioners) to hear the case and help you try to resolve it without having to go to trial. If you are not prepared for the settlement conference, you are wasting the Court's time, your time and your client's time and money. Plus, you could be sanctioned by the Court.
2. About 40-50% of settlement conferences FAIL due to lack of preparation and/or unreasonable expectations of litigants.
3. Don't schedule a settlement conference if you aren't going to be prepared by the time of the conference. Perhaps you are waiting for some asset to be appraised or discovery to be completed. Get your work done as quickly as possible.
4. Settlement statement: You should begin the preparation of a settlement conference statement at the BEGINNING of a case. Develop a form or checklist that covers all of the issues in your case. After a case commences, as you learn things about assets, you should include them into your statement. The settlement conference statement should grow as your involvement in the case grows and your knowledge of assets and issues grows.
5. Don't wait until the last minute to prepare your settlement conference statement. If your settlement conference statement is 3 pages long and looks like you wrote it at 5:30 pm on the day before your conference, you probably did!
6. If possible, deliver a copy of your settlement conference statement directly to the Commissioner's office. This is helpful, even if you have submitted your confidential statement per the system. We would like to have them at least 1 week before the settlement conference.
7. **Preparation, preparation and more preparation.** There are many ways you should be prepared.
   a. You should know information about your party (age, employment status, prior work history, what do they want to do with the house or vehicles? Sell them? Keep them?)
   b. You should know what assets are owned by the parties. This generally is called "discovery" and it is a good idea to get it completed before the settlement conference. If you need to file a motion to compel discovery responses, then do it.
   c. You should know if the parties have an IRA, 401(k), pension plan or other retirement benefits. Obtain the plan info from the plan trustee or employer. Many employers will even provide you with a copy of a "sanitized" plan they regularly use. If your clients wants a 'buy-out' in the other party's retirement benefits, have you utilized the services of an actuary or other professional to determine the 'cash value' of the plan?
   d. You should know if one of the parties in the military or formerly in the military. Do you know what 'grade' in the military they are? Do you know how many years of military service vs. years of marriage were involved? Do you know the laws regarding military pension plans changed as of December, 2016? Do you know what DFAS stands for, and where they are located? If you don't know these basics, you should bring in an expert to assist you.
   e. You should know if your client has an accountant or tax preparer. Have you discussed your client's issues with them? Are there tax carry-forwards that must be considered?
   f. You should submit a complete list of assets. This would include a complete list of all vehicles and bank accounts, etc. The list should include a description of the item, and a statement of its approximate value.
   g. You should be aware of the values of your client's assets (FMV, debt and equity of house; Kelly Blue Book or similar for automobiles; balances in a bank account.)

h. You should know if your client has life insurance and whether it has a "cash surrender value".

i. You should know how your client wishes to divide the assets. For example, is your client agreeable to conducting a division with "roll-over" of an IRA or 401(k), or do they want "cash only". Do they want the house sold? Any problems with the other party keeping the house but paying your client their equalizing share? Does your client have a maximum period of time he/she is willing to wait before being paid off?

j. You show know about ALL debts owed by your client or the other party. Is there a 401(k)-secured loan? Is there a loan on life insurance? How does your client wish to divide the debts? Don't tell us that the other party should pay all of the debts because your client was 'wronged' as a marital party.

k. You should know about the personal property. Have the parties already divided all of the household furnishings, collectibles and family heirloom items? If not, what does your client need to get back from the other party? What do they have in their possession that the other party is probably going to want to have returned? Are there baseball cards or other collections that were acquired or added to during marriage? What is the CP value of these collections?

l. You should know if the community property assets consist of property owned by the other party in Mexico or other foreign county. If so, you have two choices: (1) obtain the information about the property and be prepared to discuss it thoroughly at the settlement conference, or (2) tell your client to forget it. If you don't know about it, I'm surely not going to know about it or be able to discuss it.

m. You should know your client's income and you should know the income of the other party – BEFORE THE SETTLEMENT CONFERENCE. Don't let your client be vague or mysterious when describing their income.

n. You should know if one of the parties owns or runs a business. Is there business value being claimed and subject to division? If so, have you obtained the books and records of the business and reviewed them with an accountant? Does the business value include vehicles and certain banking accounts?

o. You should know if your client claims reimbursement for community expenses made after service of the petition. Don't be afraid to make a list of them and identify the information about the expense and why it was made.

8. Don't be the one complaining about the lack of success during a settlement conference unless you are able to say that you provided ALL of the information discussed above. We don't perform miracles.

Commissioner Roger Hartsell
Superior Court of Arizona in Maricopa County

ARTICLES & CONTRIBUTIONS

Who Is Your FATP?

David Cantor, CPA/ABV, CDFA®

Under ARS §25-320.02(A), The Court may order a federally authorized tax practitioner (FATP) to calculate the income from a self-employed individual when it comes to determining spousal maintenance and child support.

But what is an FATP? Well, buckle your seatbelts because it is a long ride to find out just exactly what an FATP is and does.

- ARS §25-320.02(A) states "…the court may order both parents to meet with a federally authorized tax practitioner if at least one of the parents is self-employed."

- ARS §25-320.02(D) defines the FATP as: "...the same meaning prescribed in §42-2069."

So, let's go to ARS §42-2069.

- ARS §42-2069(D)(1) clearly states (sarcasm intended): "Federally authorized tax practitioner" means an individual who is authorized under federal law to practice before the United States internal revenue service if the practice is subject to federal regulation under 31 United States Code section 330.

Are we there yet? Almost……

- 31 US Code §330 refers to section 500 of title 5. Besides having good character, reputation, necessary qualifications and competency, it then goes on to define (finally) five groups of professions that can qualify as an FATP. They are:

✓ Attorneys

✓ Certified Public Accountants (CPA's)

✓ Enrolled Agents

- ✓ Enrolled Actuaries

- ✓ Enrolled Retirement Plan Agents

What does it take to become someone who can advise the court on the crucial matter of self-employed income? The answer may not be what you would think.

Attorneys – I don't think that I need to explain how to become an attorney, so let's move on. By the way, how many of you would like to determine the income from a self-employed spouse who has 7 different entities that have inter-company loans, are management companies for each other and make no money…..but the family lives a million dollar per year lifestyle?

Certified Public Accountant – At least 4 – 5 years of college, a bachelor's degree with a required minimum amount of accounting classes (in my day, it was 10 accounting classes), passing a 2-day exam and usually one – two years of work experience under the supervision of a CPA. Just because someone is a CPA, doesn't automatically mean they can do family law accounting. Not every CPA should prepare, review, and audit financial statements for a business. To do so, one should have the proper experience, training and continuing education in this specific area of accounting.

Enrolled Agent:

- Be 18 or older

- Pass a background check

- Pass a 300 question, three-part exam on income taxes (you can self-study to prepare for the exam)

Enrolled Actuary/Enrolled Retirement Plan Agents – These professions are technically FATP's but their focus is limited to what their titles indicate. They, as a rule, do not prepare personal or business tax returns that you are likely to see in family law courts.

So realistically, the field of FATP's is narrowed down to three professions; Attorneys, CPAs and Enrolled Agents.

<u>Flaws With The ARS:</u>

I apologize in advance if I have stepped, or am about to step on toes here, but I do have some issues with how the ARS deals with this issue. I think it is extremely important to understand what appointing an FATP can result in.

Nowhere does the ARS indicate any required level of experience in family law accounting issues. Technically, the Court can appoint an 18-year-old who passed their enrolled agent exam last week (very unrealistic, but possible). Secondly, the ARS clearly indicates that the Court is looking for a "Federally Authorized Tax Practitioner". I don't think that this can be taken any other way than to mean somebody who knows taxes. But go look at Arizona Child Support Guidelines, paragraph 5. It reads "NOTE: Terms such as "Gross Income" and "Adjusted Gross Income" as used in these guidelines do not have the same meaning as when they are used for tax purposes." In other words, the final determination of income can be some number other than what is reflected on the tax

return…….that FATP's are taught how to prepare!!

I have been doing family law accounting since 1990. I know exactly what it means to have income related to support being different than income on a tax return. If you go to an attorney, CPA or enrolled agent who has never been in the family law arena, they are not going to know what that means nor will they understand the implications that this one sentence can have on support orders.

What Does All Of This Really Mean?

When you are asked to provide a list of FATPs, that list should be made up of attorneys, CPAs and/or enrolled agents. But remember, you are providing this list to allow the Court to select someone to deal with the income as it relates to your case. Don't you think it is prudent that you make sure the names on your list have family law experience? The implications of blindly following a tax return to determine income can have significantly large and erroneous financial impacts on your client. If that happens, and the FATP chosen was from your list, your client is not going to be happy with you.

What Can You Do Now To Avoid This Problem?

✓ Get to know experts in family law accounting. Find one, two or even three that you feel comfortable working with. When you are asked to provide a list of names, it should be those that you know.

- ✓ Reach out to opposing counsel to try and agree on the expert, or at a minimum narrow down the list provided to the Court so that only experienced experts are on the list.

- ✓ Remember, family law accounting experts can do more than just compute income. Consider retaining one to handle all of the financial issues of the case. By doing this, you will save your client money and also make sure that issues don't slip through the cracks because there are too many cooks in the kitchen.

We all realize that within professions there are subspecialties. And more often than not, these specialists are very good at what they do. So, if you break your arm and need surgery, are you going to go to your family's general practitioner, or your friend's neighbor who is a doctor, or are you going to find an orthopedic surgeon specializing in arms? Well, the same goes for accountants, vocational evaluators, real estate commissioners, and all of the other experts you may need on your case. Find the specialist.

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Working with Unrepresented Litigants

I am an Executive Board Member of the MCBA Family Law section and was a family law practitioner before taking the bench 2 years ago. As the judicial member of the board, I was asked to begin writing a column for the newsletter. Gladly, "I said," wondering what I got myself into. Frankly speaking, I am always eager to serve the family court in any way that might promote communication, respect and resolution in family court. I feel grateful for what I learned as a practitioner and have wanted nothing more than to show the family law community that I want to help better the area of practice if even from the bench. So- write a column, I will.

I asked for ideas from the board, and was given the first suggestion- discussing how judges prefer attorneys handle self-represented litigants and what expectations the Court has regarding such relationships, both professionally and ethically. My starting place was looking at the Rules of Professional Conduct.

The Preamble of the Rules of Professional Conduct gives some guidance (and I paraphrase):

As lawyers, and members of the legal profession you have a special responsibility for the quality of justice. Lawyers should conduct themselves honorably. **While the other party may not agree with your client's perspectives or positions, you can build and help promote the quality of justice by being fair and treating unrepresented individuals with respect.**

Lawyer should use legal procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system including towards other lawyers (which means opposing parties).

When I read the Preamble, I thought, "Isn't this enough?" A quick review of the Preamble reminded me of the responsibilities lawyers have when dealing with those cases. Then I tried to put on my practitioner's shoes for a moment, trying to recall the challenges I had in working against an unrepresented parties and also recalling times where I thought how difficult it was to oppose a particular lawyer- isn't that challenge enough?

I thought long and hard about the question posed to me as a judge about what we judges expect when lawyers are dealing with unrepresented parties. I first asked one of our court statisticians for some information about cases involving self-represented litigants. Here is the Court information:

Case Type	One Party Pro Per	Two Parties Pro Per	No Party Pro Per	Totals	% Both Pro Per	% One Pro Per	% No Pro Per
Civil Total	6,768	18,728	1,848	27,344	68.5%	24.8%	6.8%
Family Court Total	4,206	30,308	1,651	36,165	83.8%	11.6%	4.6%
Probate Total	4,141	2,134	519	6,794	31.4%	61.0%	7.6%

The reality is as a practitioner, there is a strong likelihood you will be dealing with unrepresented parties in your cases. Judges recognize these cases can be challenging. In reality, often lawyers do not trust each other and are not communicating with each other. If that is occurring, then it is even more difficult for non-lawyers to trust lawyers and for lawyers to trust what is being said by a non-lawyer. Self-represented litigants perceive they are being rolled over, manipulated and lied to by lawyers. We don't expect you to be able to convince them of what the law says. It is their jobs to consult with other lawyers or do the kind of research they need in order to represent themselves. However, we do have basic expectations of lawyers and these expectations apply to cases with or without lawyers on the other side. Some of the following are suggestions only.

1. Communicate, then communicate again and communicate diligently. If the party calls to discuss a case, do not ignore them. Ask yourselves if you would do the same to a lawyer. If you feel you need a follow up to the non-lawyer by email or mail, to memorialize discussions, certainly you are free to do so. When you ignore the other party, no matter the level of contention, you both call into question the professional responsibilities of the lawyer and your responsibility to the client and to the court. At the same time, no one expects either party to accept abuse or unnecessary hostility. Certainly, as professionals, you can gauge that in your cases.
2. Speak clearly. You should re-read your communications to self-represented litigants. You will find that your legalese is hard to decipher by them and it may be intimidating. The clearer you can make your communications, by speaking in plain English, the easier it might be to resolve the issues.
3. Stop threatening them with legal fees. What did she say? Yes. That is what I said. I am not suggesting an award of legal fees might not be appropriate and I am not saying that you should not remind them that fees may be requested and awarded by the Court. I am specifically using the term "threatening" in my statement. I have heard many times from litigants that they were threatened with an award of fees and then read letters making that statement. This relates back to item 3 above. Semantics make a difference.

As to what you absolutely should do:

Meet and confer before hearings, especially before a Resolution Management Conference. There has been consistent complaints by judicial officers that attorneys and parties/attorneys and attorneys are not talking. Again, this applies to cases with or without lawyers. Keep in mind that if the non-lawyer appears early, in conformance with my order, and you do not do so in an effort to narrow the issues, you have now increased your client's fees and failed to follow the Court's orders. Certainly, if the other party fails to appear, this omission is on him or her. I would suggest you remind the other party of the need to meet and confer in advance of the hearing in order to narrow the issues. Sometimes parties simply do not read our minute entries.

Remember that the Preamble states: "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship." Am I telling you anything above that you don't already know? Likely not. Maybe it serves as a reminder that sometimes your jobs are that much more challenging- communicating with someone who already has a built in distrust just because you are a lawyer. You might not change that person's mentality but you might just make resolution of the case less challenging for yourselves and your clients.

Judge Ronee F. Korbin Steiner
Superior Court of Arizona in Maricopa County

TIPS FROM THE BENCH

20 Tips from 20 Family Court Judges
Thank you, Judges Barton, Beresky, Blair, Campagnolo, Cohen, Cooper, Culbertson, Fish, Green, Hopkins, Korbin Steiner, Lang, Minder, Moskowitz, Polk, Ryan-Touhill, Smith, Sukenic, Svoboda, Thomason

1. We hear complaints about the cost of obtaining a relatively straight forward divorce where few, if any, issues are disputed. Please be conscious of the cost of divorce to litigants.

2. When filing a Motion to Withdraw as Attorney of Record, include the date and time of any pending hearing within the body of your Motion. Stating, the client is aware of all pending dates isn't good enough.

3. In consent decrees involving children, please include the jurisdictional language required by A.R.S. § 25-1031(a) and § 25-402(A).

4. Always treat the judicial staff with courtesy and respect. The staff is an extension of the Judge, and they are to be treated the same as you would treat the Judge.

5. Calling something expedited/accelerated or some other adjective does not move the pleading to the top of the pile. If it truly is an emergency then file the appropriate motion under Rule 48.

6. Manage your time. Get to the point. Too often, attorneys spend too much time on information that is not relevant and run out of time to cover information that is. If the judge gives an indication as to what the judge finds important, start there. When the judge gives a two-minute warning, ask your last question and sit down. Do NOT keep going and going and going until the judge cuts you off.

7. Please do not use exclamation marks! Or, ALL CAPS in pleadings.

8. There is a duty to meet and confer before court appearances - please do so.

9. Respect the clerks and follow the rules regarding when exhibits are due. Please do not bring your 15 or 150 exhibits into court on the day of trial and ask they be marked.

10. Do not file a discovery motion without conferring with the opposing party or lawyer and then certifying this has been accomplished.

11. Please do not give us hundreds of pages of emails and texts, particularly without bates stamp numbering. If need be, provide a summary under the rules of evidence. We know your clients want us to read it all but please do not expect us to go through hundreds of pages of emails unless you are going through those pages with your client during testimony. We don't like to guess which part of the communications apply to your issues.

12. If you request a continuance without complying with L.R. 2.14 (indicating whether opposing counsel objects or not), your request is likely to be denied.

13. Not all "yes or no" questions are so simple. For important issues, if you interrupt the witness' explanation, I'll usually allow further testimony while your clock continues to run.

14. When there are two attorneys in the case, one for each side, please speak to each other before coming to court for an RMC or any other hearing, and please file a Joint Pretrial Statement for trial.

15. Write a good pretrial statement that includes citations to exhibits and anticipated testimony. Remember that evidence need not be presented as to any facts that are listed as undisputed in the joint pretrial statement. Thus, a well-written joint pretrial statement can save time at trial. For example, if the joint pretrial statement lists as undisputed certain child support and custody (§§25-403, 403.01, -403.03, -403.04, and -403.05) factors, you don't need to present any testimony or other evidence regarding those factors.

16. Please use your manners. Respectful dialogue bolsters credibility of you and your client.

17. Don't file motions to "dismiss" other parties' motions. Don't file motions to "strike" other parties' motions. A Rule 32(B) motion to dismiss is appropriate in limited circumstances. A Rule 32(E) motion to strike is appropriate in even more limited circumstances. There is a motion, response, and reply; briefing is complete at that point. If you believe that a sur-reply is necessary, seek leave to file it.

18. Check judicial profiles. Most of us have gone to the effort of including lots of information on how we run our courtrooms. They are full of tips. Please review those profiles on the website and even suggest to unrepresented litigants that they do the same.

19. Please review Rule 84 regarding motions for reconsideration. They should not be directed at final judgments. Lawyers sometimes improperly use this rule as a substitute for Rule 83 or Rule 85(C) motions. If you use that rule on a final judgment, where a Rule 83 or Rule 85 motion is appropriate, you should expect to have your motion denied.

20. Please don't demonize the other parent. If the parent has some issues, such as drug abuse, you can make your point professionally. It does no good to embarrass the other parent or act like they should never get to see their kids.

NEW ARIZONA CASES

Basic Information
Case name: McLaughlin v. Jones (McLaughlin) No. CV-16-0266-PR, Filed September 19, 2017
Procedural History
This is a case involving two women that were married and conceived a child via artificial insemination with an anonymous donor in 2011. The parties were married in California in 2008, moved to Arizona and entered into a parenting agreement in 2011, and separated in 2013. Kimberly moved out of the house with the child, and cut off Suzan's contact with the child. In 2013, Suzan filed petitions for dissolution, legal-decision making, parenting time and in loco parentis. During litigation, Suzan challenged the constitutionality of Arizona's refusal to recognize same sex marriages. The State intervened in the litigation. After the Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), that the Fourteenth Amendment to the United States Constitution guarantees same-sex couples the fundamental right to marry, the State withdrew as a party, and the trial court ordered the case to proceed as a dissolution of marriage action with children because Suzan was a presumptive parent under A.R.S. § 25-814(A)(1). The court reasoned that it would violate Suzan's Fourteenth Amendment rights not to afford her the same presumption of paternity that applies to a similarly situated man in an opposite-sex marriage. Additionally, the court held that Kimberly could not rebut Suzan's presumptive parentage under A.R.S. § 25-814(C). Kimberly sought special action review in the Court of Appeals. That Court of Appeals accepted jurisdiction but denied Kimberly relief, concluding that, under *Obergefell*, §

25-814(A) applies to same-sex spouses and that Suzan is the presumptive parent. *McLaughlin v. Jones*, 240 Ariz. 560, 564 ¶ 14, 565–66 ¶ 19 (App. 2016). Then, another division in a divided panel, reached a contrary result in *Turner v. Steiner*, 242 Ariz. 494 (App. 2017) (concluding that a female same-sex spouse could not be presumed a legal parent under § 25-814(A)(1) because the presumption is based on biological differences between men and women and *Obergefell* does not require courts to interpret paternity statutes in a gender-neutral manner). The Arizona Supreme Court granted review because the application of § 25-814(A)(1) to same-sex marriages after *Obergefell* is a recurring issue of statewide importance.

Ruling

The Arizona Supreme Court rejected Kimberly's argument based on *Turner v. Steiner*, and held that "Under A.R.S. § 25-814(A)(1), a man is presumed to be a legal parent if his wife gives birth to a child during the marriage. We here consider whether this presumption applies to similarly situated women in same-sex marriages. Because couples in same-sex marriages are constitutionally entitled to the 'constellation of benefits the States have linked to marriage,' *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015), we hold that the statutory presumption applies." The Arizona Supreme Court further held that Kimberly is equitably estopped from rebutting Suzan's presumptive parentage of their son.

The Arizona Supreme Court reasoned: "In sum, the presumption of paternity under § 25-814(A)(1) cannot, consistent with the Fourteenth Amendment's Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses."

In addition, the Arizona Supreme Court found that, "Extending the marital paternity presumption to same-sex spouses also better promotes strong family units. In *Obergefell*, the Supreme Court concluded that the right to marry is fundamental in part because 'it safeguards children and families.' 135 S. Ct. at 2590. By denying same-sex couples 'the recognition, stability, and predictability marriage offers,' the Court found that children of same-sex couples 'suffer the stigma of knowing their families are somehow lesser' and 'suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life.' *Id.* Extending the marital paternity presumption mitigates these harms. Children born to same-sex spouses will know that they will have meaningful parenting time with both parents even in the event of a dissolution of marriage. By contrast, nullifying § 25-814(A)(1) would only impose these harms on children of opposite-sex spouses."

The Arizona Supreme Court concluded that, "For these reasons, we extend § 25-814(A)(1) to same-sex spouses such as Suzan. By extending § 25-814(A)(1) to same-sex spouses, we ensure all children, and not just children born to opposite-sex spouses, have financial and emotional support from two parents and strong family units." The Arizona Supreme Court vacated the court of appeals' opinion, affirmed the trial court's ruling that Suzan is the child's legal parent, and remanded to the trial court for further proceedings consistent with the opinion.

Basic Information

Dammann v. Dammann, No. 1 CA-CV 16-0055 FC

(Memorandum Decision)

Procedural History

Husband appeals the trial court's order denying his post-decree motion for new trial based on its finding that Wife did not commit fraud on the court justifying setting aside the real property division in the decree.

Ruling

Ultimately, the trial court found that the property division issue was in dispute at the time of trial and denied Husband's motion, implicitly finding that no basis existed to find fraud on the court. The trial court could properly so find based on the record presented.

Accordingly, the record does not support Husband's argument that the status of the debts and ownership interests was not in dispute at the time of trial. The status of debts and ownership interests is a sub-issue of property division. The parties acknowledged this amongst other things, by listing the division of the community rental properties as a sub-issue of the contested issue of division of assets and debts in their joint pretrial statement.

Moreover, although Husband sought to enforce the settlement agreement, his attorney stated at trial that the division of assets and debts was a contested issue. The court advised that it might not enforce the settlement agreement and said that it would hear evidence. The parties brought to the court's attention the disparity in property valuation and equity as part of the division of debt, and testified about property encumbrances, comparative equity, and valuation. On this record, the division of assets and debts, including the sub-issues of the status of debts and ownership interests, was at issue before the court.

Husband alternatively argues that a party's perjury or misrepresentations can constitute fraud on the court when the adverse party is "prevented from presenting a defense." Nothing, however, prevented Husband from presenting any matter to the court on the issue of property and debt division.

Finally, the Appeals Court rejected Husband's argument that the court could not determine whether property division was at issue absent an evidentiary hearing. The court did not examine, and did not need to examine, whether Wife's actions constituted fraud on the court because it based its ruling on whether the issue of property division was before the court.

On this record, Husband has not shown that the court abused its discretion by concluding that the property division was at issue at trial. Therefore, the family court did not err by rejecting Husband's argument that Wife committed fraud on the court, and thus did not abuse its discretion by denying Husband's motion.

For the foregoing reasons, the Court affirmed.

Basic Information

Schultz v. Schultz, 243 Ariz. 16 (2017).

Procedural History

Former wife filed a petition for contempt against former husband, asserting that husband owed $35,000 in spousal maintenance arrearages pursuant to prior decree of dissolution. Husband admitted that he was behind in his obligation, but argued he should receive credit for the payments he made directly to former wife that were not shown on the Clearinghouse statements. Mother did not deny receiving these payments, but argued Father was not entitled to credit for these direct payments pursuant to A.R.S. § 46–441(H).

Ruling

The Court of Appeals affirmed a trial court's decision that husband's spousal maintenance payments made directly to former wife, rather than through statutory clearinghouse, were permitted under the equitable defense of waiver, and thus former husband was entitled to credit for the direct payments.

Basic Information

Van Camp v. Van Camp, No. 1 CA-CV 16-0341 FC
(Memorandum Decision)

Procedural History

Father was found to have engaged in domestic violence at a temporary orders hearing and the Court ordered, among other things for Father to maintain his counseling. Father failed to do that. The judge at the time suspended Father's parenting time but did so without a hearing. That Judge recused himself and different judge was assigned. The new judge held a hearing and confirmed the suspension because Father admitted he was violating the Court's order. Father continued to ignore most of the orders, hired and fired counsel, then hired new counsel who then filed a motion to withdraw without client consent. While the Court waited the appropriate time for Father to respond to the motion

to withdraw, Father filed a motion for change of judge for cause, which the Court denied. The Court granted the motion to withdraw as attorney of record. On the day of trial, Father appeared late and requested a continuance, which the Court denied. Father then stormed in and out of the courtroom several times even after being warned trial would proceed without him.

Father challenges various aspects of a dissolution decree.

Ruling

The Court found that:

1) The Family Court Did Not Err by Granting Father's Second Attorney's Request to Withdraw and Proceeding with Trial;
2) Father Cannot Challenge the Family Court's Temporary Orders on Appeal;
3) The Family Court Did Not Err by Finding That Father Committed Domestic Violence;
4) Father Fails to Establish Any Judicial Bias;
5) Mother Is Entitled to Recover Attorneys' Fees on Appeal.

The Court of Appeals affirms.

Basic Information

Downham v. Downham, No. 1 CA-CV 16-0164 FC
(Memorandum Decision)

Procedural History

The parties divorced. Wife requested spousal maintenance (she was in school and not working). Trial court denied Wife's request for spousal maintenance because Husband was given more of the parties' debt. Trial court also denied Wife's request to remain Husband's survivor for his military survivor benefit plan (SBP).
Wife appeals from the decree dissolving her marriage to Husband. She argues the superior court abused its discretion by failing to award her spousal maintenance, military survivor benefits, and attorneys' fees.

Ruling

Spousal Maintenance:
The trial court's decree erroneous intertwines the issues of property division and spousal maintenance and justified its denial of spousal maintenance by ordering the an unequal division of community property and debt. The court's order in this regard did not comply with Arizona law. Instead, the superior court should determine spousal maintenance based on the evidence as applied to the law as written in § 25-319. By awarding Wife a greater share of the community property (or a lesser share of debt) as a substitute for spousal maintenance, the court erred. *See Foster*, 125 Ariz. at 211, 608 P.2d at 788. Accordingly, we reverse and remand for the court to separately decide the

issues of property division and spousal maintenance by application of the relevant statutes.

Survivor Benefit Plan:
The superior court erroneously denied Wife's request for SBP coverage based on "Husband's undisputed testimony . . . that Wife may not remain on this policy after the divorce is finalized." The court concluded that Wife's request was "not possible, even if this Court were to make such an order." Six months later, however, the superior court signed a QDRO, acknowledging Wife's entitlement to the survivor benefit and prohibiting Husband from revoking "the survivor benefit already elected." Under federal law, a former spouse may receive a survivor benefit following the death of a service member. *See* 10 U.S.C. §§ 1447(9), 1448(b), (d). Moreover, a state family court may require a service member to elect SBP coverage for a former spouse as part of a dissolution proceeding. *See* 10 U.S.C. § 1450(f)(4); *see also Richards v. Richards*, 137 Ariz. 225, 227, 669 P.2d 1002, 1004 (App. 1983) (directing the superior court to require husband to change the beneficiary designation for the SBP from his current wife to his former wife).

The trial court erred in relying on Husband's testimony and finding that, as a matter of law, Wife's claim for SBP coverage was not possible. We reverse the court's ruling on SBP coverage and remand to the superior court to consider Wife's request.

Attorney's Fees Pursuant to A.R.S. § 25-324(A), the superior court may award attorneys' fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings[.]" Disparity in financial resources alone "does not mandate an award of fees." *Myrick*, 235 Ariz. at 494, ¶ 9, 33 P.3d at 821.

In this case, we acknowledge both an apparent disparity in the parties' incomes and the superior court's discretion as to any award of attorneys' fees. Given that we are remanding the issues of spousal maintenance and survivor benefits, however, the superior court may also on remand reconsider the issue of attorneys' fees.

The Court of Appeals reverses and remands to the Superior Court.

Basic Information

Coburn v. Rhodig, No. 1 CA-CV 16-0399 FC

Procedural History

Husband and Wife were divorced in 2010 pursuant to a consent decree that ordered Husband to pay spousal maintenance of $3,000 per month for sixty months. The consent decree provided that the spousal maintenance was non-modifiable as to duration and amount. Husband fell behind on spousal maintenance payments. The parties signed an agreement in December 2010 to settle Husband's spousal maintenance arrearage. The agreement was that Husband would pay Wife a $5,000 lump sum plus $1,000 per month for twelve months. Wife agreed to waive any other unpaid support owed her by

Husband.

Wife filed a petition to enforce spousal maintenance arrearages alleging that she was unable to locate Husband after the December 2010 agreement to request payment of the arrearages pertaining to the 2010 consent decree and that she has signed the December 2010 agreement under duress. Husband argued that the parties had a binding agreement under Rule 69, ARFLP and that the equitable defenses of waiver, estoppels, and laches prevented Wife from collecting on her spousal maintenance arrearages claim. Wife argued that the spousal maintenance provision was non-modifiable and that, despite the written agreement, the superior court lacked jurisdiction to modify the decree pursuant to A.R.S. § 25-317(G).

The parties agreed that the superior court would decide as a matter of law whether the written agreement was enforceable. The superior court did not hear testimony from the parties but the parties' counsel presented oral argument and briefs on the issue. The superior court concluded that it lacked jurisdiction to modify or terminate the non-modifiable spousal maintenance provision and entered a arrearage judgment against Husband of $136,000 plus $37,259.39 in interest. Husband timely appealed.

Ruling

A.R.S. § 25-327(G) provides that a superior court does not have jurisdiction to modify a non-modifiable spousal maintenance provision in a decree. The superior court found that application of Husband's equitable defenses in response to a petition to collect spousal maintenance arrearages would require modification or termination of the decree and would violate A.R.S. § 25-327(G). The Court of Appeals disagreed and found that the superior court would not be modifying the decree if Husband established equitable defenses as the result would only be a denial of Wife's petition to enforce. Conversely, if Husband failed to establish equitable defenses, the superior court would simply grant the petition and enter an arrearage judgment. However, neither scenario required modification of the original consent decree and the superior court erred when it found it did not have jurisdiction to consider Husband's equitable defenses.

Wife argues on appeal that application of equitable defenses to a non-modifiable spousal maintenance provisions would undermine the public policy supporting such provisions. Husband's argued that Arizona courts have found no public policy reason to preclude the application of equitable defenses to child support arrearages and that it there is no difference to applying equitable defenses to spousal maintenance arrearages. The Court of Appeals found that there was no public policy that prevented application of equitable defenses to spousal maintenance arrearages.

Husband argued on appeal that the Court of Appeals could grant him relief as to the application of the equitable defenses as a matter of law. Wife contested the validity of the parties' agreement and argued that the superior court first needed to consider the threshold jurisdictional issue before considering whether evidence was needed regarding the enforceability of the December 2010 agreement. The Court of Appeal rejected Husband's argument and remanded the matter to the superior court to determine the validity of the December 2010 written agreement and to address Husband's equitable defenses.

Reversed and remanded.

Basic Information
Schultz v. Schultz, 243 Ariz. 16 (2017)
Procedural History
Former wife filed petition for contempt against former husband, asserting that husband owed $35,000 in spousal maintenance arrearages pursuant to prior decree of dissolution. Husband admitted that he was behind in his obligation, but argued he should receive credit for the payments he made directly to former wife that were not shown on the Clearinghouse statements. Mother did not deny receiving these payments, but argued Father was not entitled to credit for these direct payments pursuant to A.R.S. § 46–441(H).
Ruling
The court of appeals affirmed a trial court's decision that husband's spousal maintenance payments made directly to former wife, rather than through statutory clearinghouse, were permitted under the equitable defense of waiver, and thus former husband was entitled to credit for the direct payments.

Basic Information
Sundstrom v. Flatt, No. 1 CA-CV 16-0567 FC
Procedural History
Mother filed a Petition to Modify Legal Decision-Making (LDM), Parenting Time and Child Support requesting sole LDM and supervised or reduced parenting time to Father. Father moved for Temporary Orders requesting he be awarded sole LDM. He made the same request in his pretrial statement. Mother objected to Father's request because he had not filed his own petition to modify LDM. The Court awarded Father sole LDM. Mother appealed.
Ruling
"Neither the rule nor the statute require the party who is ultimately granted legal decision -making of the children to be the party that originally petitioned the court. A contrary reading would allow the court to rule only in favor of the party petitioning for a modification, and therefore require both parents to file petitions to allow the court to grant either party legal decision -making. Such a reading would be illogical. Once a party has petitioned to modify legal decision-making and the court has found adequate cause for a hearing, the petitioning party must be prepared for the possibility that the court will not view the evidence favorably to the petitioner. Because Mother petitioned to modify legal decision-making in accordance with the requirements of both §25-411 and Rule 91, and Father gave her sufficient notice of his request to award sole legal decision-making to him in the motion for temporary orders and his pretrial statement, the superior court did not err."