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Family Law News

this issue...

Taking the high road...

I feel like the current political environment is so similar to our legal system today.

We have polarizing parties with the future a huge unknown. In family law, we do have viable alternatives to avoid that path. In politics there will be a clear winner but will that person bridge our gaps and heal our wounds? I typically tell clients it is not about winning or losing but damage control. How do we move forward to make our legal environment vastly different and better then our current political one?

I urge all of us to find a better and more powerful way to be more civil and professional with each other, to the bench and to the parties. Learn who the attorney is on the other side and develop relationships and respect for each other. We are in this journey together. We need to get back to the days when we had a case WITH John Smith and not AGAINST Jane Jones. It is no longer the norm that a law school graduate goes to a law firm out of law school and gets mentored. We need to engage in the State Bar and local mentoring programs like AAML in assisting our younger or newer members in the practice of law. Go the extra step to help a new colleague. Our system of justice is adversarial by its nature, but we don't need to model that in our practice and our relationships. Our leadership is crucial since we are mandated by our Supreme Court to "promote access to justice" and to "aid the courts in the administration of justice." We need to take some time to reflect on how each of us is fulfilling this requirement.

This is such an exciting and challenging time to practice family law in Arizona. From the validation of same sex relationships to more fathers wanting equal parenting time. From the rise of self-represented parties to the vast knowledge our clients have from doing their own "research". Some changes you cannot fight so why not make those changes better, healthier and more enjoyable.

STATE BAR OF ARIZONA

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I receive numerous phone calls from other attorneys. When not asking my opinion on a case, they consistently are troubled by the demeanor and behavior of the other attorney. It appears common these days to act like Trump and Clinton on a debate stage rather then as cooperative members of the same team seeking better outcomes for families and children. We have drifted into the path that is hostile and critical of each other. We need to shake hands more often and perhaps even share a hug. We need to defend each other and not attack. Obviously there can be attorneys and behaviors that are exceptions to this, just like there are good and bad cops. Our clients need us to provide a model on how to behave, however difficult that may be, so let's not let them down. We can elevate the conversation and work together to make our process more enjoyable.

We can also assist the Court and the self-represented party without sacrificing our duty to our clients. We can ask the appropriate questions with the appropriate demeanor. We can even assist them in getting their exhibits admitted. The Court relies on us to assist it in the administration of justice. Our job is to make the Court's job easier.

We find these challenges during a time that this country is more polarized since the 60's and early 70's. Special interest groups abound and our tolerance for those with opposing views seems diminished. The number of cases with self-represented parties continues to increase and we need to understand this dynamic and rise to a new level of respect when the other side is self-represented. We need to treat that person the same as if they were an attorney and be the person who elevates the discussion, the tone and our profession.

It is time for us to be active in our legal profession and not just a participant. Volunteer opportunities abound and we need to find our niche in a way that improves our profession. We need to do random acts of kindness to balance the public perception of attorneys and a broken legal system. We need to understand why the public is so angry with us and resolve the gap between us.

This process though begins with each one of us. I have heard countless stories where one attorney was overly aggressive and unprofessional to another attorney. This practice must stop. We need to take the high road and elevate those around us. We are not serving the public and our clients by playing in the mud with opposing counsel. Remember the Golden Rule? We should treat each other in a manner we wish to be treated. We should assume the best in each other and not the worst.

Our Section has had great leaders and ideas over the years. Many of those icons are no longer actively involved because of health and retirement. Our Section needs younger and more energetic participation from you. As we continue this process of growth and change, let's make it enjoyable and rewarding for all involved.

Finally, I want to know what do you want from the Family Law Section? What can we change to make your practice and process better and more enjoyable? Do you have ideas on how to make our Section better and to improve our practices and lives? What do you not like and want to change?

The mission of the Family Law Section "is to promote education and professionalism among family law attorneys .... and to improve the public image of family law attorneys." Our Bar Mission Statement states that the Bar "serves the public and enhances the legal profession by promoting the competency, ethics and professionalism of its members and enhancing the administration of and access to justice."

Together we can accomplish these goals and make a difference in the lives of those in our communities and profession. We can make our practices more enjoyable and be an asset to the Court. In order to meet these objectives we rely upon you. We need your involvement and ideas. Please contact a council member and continue this dialogue. FL

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 (Silver anniversary). Michael is the current 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 is a part time Judge Pro Tem for the Town of Marana Court.

Who is a "Parent" in Arizona?

BY KEITH BERKSHIRE
BERKSHIRE LAW OFFICE

The Issue of Same-Sex and Third Party Rights to Parent

It is fair to say, that in the last five years, the topics of same-sex parenting and third party rights have been thrust to the forefront. In June 2015, when the Supreme Court of the United States ("SCOTUS") decided the pivotal case of *Obergefell v. Hodges*, which mandated that states must allow same-sex marriage, another corresponding area of dispute was opened up: the rights of same-sex individuals in custody cases. Frankly, this area of law is currently under much debate in Arizona, as are the rights of individuals with respect to the children to which the disputes relate. A significant amount of disparity exists across the country as to how to deal with these issues.

Reproductive science has now advanced to such a point where a child can have the genetic information of three adults. This means that lesbian couples could potentially produce a child that is biologically-related to both women in that the mitochondrial DNA from one woman can be implanted into the egg in the birth mother's womb.[1] This thus creates the dilemma of how same-sex couples can have children. The two obvious answers are (1) adoption or (2) sperm/egg donor where the genetic material of only one of the parties is used. And if this is done, then what happens to the rights of the non-biological parent?

I will start with the somewhat easier area of adoption. One of the key areas that SCOTUS discussed in *Obergefell* was the rights of same-sex couples to raise families, including through adoption. There is little dispute right now, given the explicit holding of *Obergefell*, that a state must allow a same-sex married couple to jointly adopt. So from this standpoint, the easiest route to ensure full rights for both parties is adoption. The more difficult issue is that of cases prior to *Obergefell*, where only one party adopted. In that situation, it seems that the Division One case of *Sheets v. Mead,* 238 Ariz. 55 (App. 2015) is the current controlling precedent. In *Sheets*, the Court of Appeals held that the same-sex partner of an adoptive parent could not seek any visitation with the child, as there was no provision under A.R.S. § 25-409 that allowed for such visitation. Under that statute, the child must be born "out of wedlock" for there to be a claim for *in loco parentis* visitation. In *Sheets*, the Court of Appeals found that the juvenile adoption statute, A.R.S. § 8-117, specifically stated that an adopted child was to be treated as "born in lawful wedlock" for all legal purposes, and therefore, there was not a statutory ground for *in loco parentis* visitation. The lesson from this is to make sure that both parties have adopted the child, or one party may literally get nothing, despite significant involvement in the child's life. And as adoption and third

party rights are "creatures of statute" solely within the control of the legislature, it would appear that the legislature is the only one who can change this outcome.[2]

The second situation is where one party has a biological child, and their same-sex spouse/partner is seeking visitation or parenting rights. This type of situation can also be broken down into two different situations of assisted reproduction, *i.e.*, artificial insemination or *in vitro* fertilization ("IVF"), or the old-fashioned way of reproduction.

Each of the two areas potentially has a significantly different standard, and it also appears to matter if the child was born while the parties were married. To start with a biological child, not "conceived" through assisted reproduction, it appears that the *in loco parentis* standard would apply under A.R.S. § 25-409, unless the other party adopted the child after birth. That statute was recently interpreted this year by Division One, in *Goodman v. Forsen*, 239 Ariz. 110 (App. 2016). In that case, the same-sex girlfriend of the biological mother sought visitation with the child, after significant period of involvement with the child. The Court of Appeals clarified the weight to be given to the biological parent, and their wishes, finding that: *"The court's role is not to engineer what it perceives to be the optimal situation for the child, but to determine whether compelling circumstances warrant state interference with a fit parent's decisions. The nonparent must prove that the child's best interests will be substantially harmed absent judicial intervention."* This clarified the significant weight given to the parent in non-parent cases. Additionally, a "non-parent" cannot be given joint legal decision-making with the parent, as stated by the Court of Appeals in *Thomas v. Thomas*, 203 Ariz. 34 (App. 2002).

The most complicated issue, potentially, is the issue where the parties agree to artificial insemination, and one party gives birth to a child that is biologically-related only to that party. In a very recent published opinion out of Divison 2, in *McLaughlin v. McLaughlin*, (citation pending October 2016) the Court of appeals found that the "paternity" presumption of a child born during marriage would also apply to the same sex female spouse, if the parties had agreed to the artificial insemination. The Court of Appeals upheld the trial court ruling, while finding that none of the legal reasoning of the trial court applied. And while the Court found that A.R.S. § 25-814(C) allowed for paternity to be rebutted by a DNA test, they found that signing a consent for artificial insemination waived the right to utilize the rebuttal statute.[3]

The most complicated issue, potentially, is the issue where the parties agree to artificial insemination, and one party gives birth to a child that is biologically-related only to that party.

And while the *McLaughlin* case may have clarified the issue for children born via consent, or through artificial insemination, during marriage, there still remain other questions about the child born via a sperm donor, or born prior to marriage, where A.R.S. S 25-814 would not apply. In *Egan v. Fridlund-Horne*, 221 Ariz. 229 (App. 2009), the Court of Appeals dealt with the issue of a child born through artificial insemination to a non-married same-sex couple.[4] In that case, the trial judge ordered equal parenting time as a temporary order, and the biological parent appealed. On appeal, the Court stated that Arizona does not recognize "de facto" parenting, as established under the Uniform Parentage Act, and overturned the trial court ruling. The Court of Appeals also held that *in loco parentis* "visitation" must be limited such that it is "visitation" and not "parenting time," finding that visitation is a far less intrusive process. While not giving a specific quantifiable definition of the difference between the two, the Court did find that when visitation exceeds a certain amount, such that the non-parent could "direct the up-bringing of the child," then it is no longer "visitation" but rather "parenting time."

In closing, there is one thing that I am certain of, and that is the legislature can modify the definition of parent to be more inclusive if they chose to do so. Whether they should is clearly a topic for another day, but it is unquestionably within their powers. As of now, it appears at least to me, that the only parties who get the status of "legal parent" are those who have a biological link to a child, have adopted the child, or unless *McLaughlin* is overturned, those who agree to a child born via artificial insemination during marriage. Otherwise, the claims fall in the realm of our *in loco parentis* statute—A.R.S. § 25-409. FL

endnotes

1. This science is in its very, very early stages, though, and, according to my research, has not yet occurred in the U.S. and has only occurred in other countries to heterosexual couples who were at risk of having a child with mitochondrial genetic disease.
2. I do acknowledge that there is one current trial court level case pending wherein the trial judge did find the distinction between adopted children and biological children unconstitutional, but that case has not yet been appealed.
3. A Petition for Review is being filed to the AZ Supreme Court.
4. Arizona didn't recognize same-sex marriage until October 2014.

Preparing Clients for Court-Related Psychological Evaluations

The court process is inherently stressful for clients, especially when they must take a psychological evaluation. Clients worry about the implications their test results will have on their case. As an attorney, one way to calm these fears and to assist your client is to prepare your client and the evaluator in advance of the psychological evaluation.

by Holly Joubert, Psy.D.

Before engaging a psychologist for an evaluation or otherwise in a case, an attorney should understand the specific role of the psychologist as it pertains to their case and explain the same to the client. This can decrease the confusion to the client. An excellent article that details the roles and responsibilities of the forensic psychologist with respect to different types of cases can be found here: http://fisherpub.sjfc.edu/cgi/viewcontent.cgi?article=1121&context=ur

Next, ***what IS a psychological assessment?*** Basically, assessments are tests that psychologists administer to find out information about people in different areas of the person's functioning. The tests may be paper-and-pencil, including fill in the blanks, essay, and bubble sheet, while others might involve answering questions verbally or completing tasks. Tests assess areas related to personality, ability, daily functioning, competency, parenting, learning disability, intelligence, readiness for a surgical procedure, and/or fitness for duty.

Prior to the assessment, inform the evaluator as to what questions the court and counsel wish to have answered by the evaluation. Some examples include:

- ❑ *What is this person's diagnosis?*
- ❑ *Does this person have ADHD? Bipolar? Anxiety?*
- ❑ *Does this person have a specific learning disability? What accommodations might s/he need to function in a classroom/job setting?*
- ❑ *Is this person competent to stand trial?*
- ❑ *Is this person a danger to self or others?*
- ❑ *Is this a person who is capable of parenting their child?*

Then, attorneys should provide their clients with the facts pertaining to the assessment and assist in managing client expectations. For example, attorneys should inform court-ordered clients that they are required to participate and the advantages and disadvantages to doing so before they arrive in the psychologist's office. It is also helpful if attorneys explain to their clients who is responsible for costs and encourage timely payment.

Explain to the client that deadlines may need to be flexible during an evaluation. This will help to manage a client's anxiety. Encourage the client to be patient and ask questions if he or she has concerns.

Attorneys should consider providing the evaluator with an overview of the case. This will decrease the client's stress as he or she does not have to repeat the entirety of the case. In addition, it assists in ensuring that the psychologist has accurate information. The overview can be simple (bullet points) or more complex. When done well, the overview will decrease misinformation and expedite the process, decreasing the cost to the client.

Clients should come to the assessment prepared, with a full list of current and past psychotropic medications, their dosages, and who prescribed them as well as the contact information for their past and current mental health providers. For court-ordered cases, clients should be prepared to sign a HIPAA waiver for any outside persons or providers the clinician may wish to be in contact with.

DO NOT attempt to coach your client on how to take the tests. Additionally, clients should not attempt to research how to answer psychological assessment questions. This is a dangerous road when the stakes are so high. Coached or inconsistent answers are apparent on psychological testing and only render the test invalid once discovered. The client then has to be administered additional testing at additional cost. However, the original testing results also get put into the testing indicating the concerns about the first test. Such a result may include words like "invalid," "defensive," and "evasive" in reference to YOUR client. These types of words don't bode well in court.

CLIENTS SHOULD PREPARE BY DOING THE FOLLOWING:

- ✔ Being clear with the psychologist about the date by which the testing is needed.
- ✔ Getting a good night's sleep the night before.
- ✔ Making sure they have eaten a good breakfast or lunch depending on the time of day.
- ✔ Bringing water and a snack for breaks.
- ✔ Being prepared to turn off electronic devices and having them stored at the front desk.
- ✔ Bringing a sweater in case the testing room is cold.
- ✔ Bringing corrective lenses, hearing aids, or other necessary adaptive devices they require.
- ✔ Making sure they have taken their regular medications unless otherwise indicated by the psychologist's office.
- ✔ Making arrangements, as necessary, so they can focus on the testing being conducted. For example, make sure childcare is in place so that they won't have to answer child-related calls during the testingtime.
- ✔ We recommend clients not bring children to the assessment, unless specifically requested.
- ✔ Arriving 15 minutes early to the time of the testing.
- ✔ Answering questions as honestly as possible.

For more details and additional information on how to best prepare a client or a child for a forensic psychological assessment, please visit our webpage at: **www.SunlightCenterForChange.com**.

ABOUT THE AUTHOR

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ARE YOU TALKING TO ME?

by Hon. James E. Marner
Pima County Superior Court

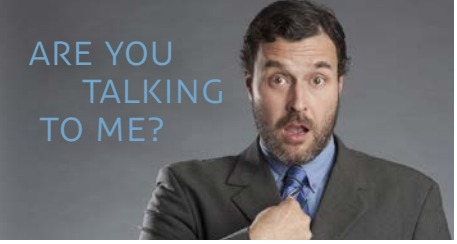
Before I took the bench, I did a fair number of jury trials. Like most lawyers who spend time in front of juries, I believed what I was presenting was important and interesting. Let's face it, if during trial you are thinking, "Boy – this sure is dull and I'm being repetitive and boring", you won't last very long in the litigation business. But in reality, I never really knew what was going through the jurors' minds. Sure, I would talk to them after the verdict and ask how I did and what they thought of my case. The thing is, jurors for the most part are courteous and complimentary. Typically they would say "you did a good job" or something to that effect, which was nice but not particularly useful. As a result, any meaningful insight from a juror was a rare thing.

Fast forward to July 2014 when I began my rotation on the family bench. From the get-go, I found myself serving as the trier of fact/the jury, day in and day out. In the past 2+ years I have listened to countless hours of testimony and argument. I have seen the direct and cross-examinations of hundreds of witnesses and looked at thousands of pieces of evidence. I decided I would use this experience to provide what I hope to be meaningful insight to the hard-working women and men who practice family law in Arizona.

What I have found, for the most part, is that attorneys do a good job of being aware of their audience and crafting their presentations accordingly. Occasionally though, I get the sense that a lawyer presenting a case in my courtroom thinks he/she is talking to a fact finder who:

- can't read the exhibits for himself,
- is not interested in hearing evidence about the various findings he, as the fact finder, must make per statute,
- thinks it is a good idea for the client to bring the new boyfriend/girlfriend to court to nod or shake his/her head in reaction to testimony,
- believes it is effective lawyering to get a parent to testify that if he/she disagrees with something said by a child in an interview, the child is a liar,
- is swayed by lawyers making personal attacks against opposing counsel,
- can read pages upon pages of profanity – laced text messages while paying attention to testimony that has moved on to other subjects,
- is impressed by …

You get the point.



Judges recognize the cases that come to court are contested. We understand litigation is adversarial and an attorney's job is to advocate for the client. We appreciate the importance of rigorous cross-examination.[1] We are not blind to the expectation by some parties that an attorney must "fight for their rights", even if it means injecting hostility into the courtroom. Judges understand litigants aren't always forthcoming with their attorneys. Most importantly, judges appreciate the unique demands that family law practitioners face almost every day in their practices.

Now – the hopefully meaningful insight. First and foremost, recognize the power of common sense. Too often attorneys take unrealistic positions that defy logic and polarize the parties. Just as it would be foolhardy for a lawyer in a minor injury/low-speed accident case to ask for a million dollars from a jury, asking a judge for a spousal maintenance ruling or attorney's fees award that will financially decimate the opposing party is ill-advised. Demanding that all parenting time be supervised at the opposing party's expense when there is no credible threat to the well-being of the child is a poor strategy. And don't give into the siren song of "Well, that's what my client wants me to do." That makes about as much sense as a surgeon letting a patient choose the instruments and anesthesia for a procedure. Talk with the client about taking a reasonable approach before trial, rather than taking an untenable position in court. An attorney owes the client good judgment – not blind obedience.

…be realistic about the evidence you want the court to consider. Offering a year's worth of back-and-forth texts or emails and expecting the court to glean any useful information from them is wishful thinking.

Second, be realistic about the evidence you want the court to consider. Offering a year's worth of back-and-forth texts or emails and expecting the court to glean any useful information from them is wishful thinking. Letting a client ramble on about what a terrible person the other party is not only wastes time, it almost guarantees similar bad behavior when the opposing party takes the stand, resulting in more wasted time. Be vigilant against latching on to an issue that is largely immaterial while ignoring the more mundane matters that need to be addressed.

Third, remember the applicable statutes which require the trial court to make factual findings. I can't stress this point enough. The higher courts have made it clear that trial judges must document their findings. The legislature has provided statutes which read like scripts and provide an excellent outline for attorneys to follow. Despite this, the frequency with which attorneys fail to present evidence expressly called for by statute repeatedly surprises me. Too often I find it necessary to ask questions of witnesses or parties that neither attorney addressed but which directly relate to a finding I have to make. *Note – when I ask these cleanup questions, I use a copy of the statute as a script*.

There are many judicial officers serving on the family benches throughout Arizona. I'm sure they have many other thoughts and insights about their roles as triers of fact. This article provides insight from only one of them. Nonetheless, I suspect there is common ground across the family bench as a whole on the above subjects. We all work in fast-paced, high volume environments and are called upon, as triers of fact, to make decisions which dramatically affect people's lives. While the job will never be easy, we can be more effective when the attorneys appearing before us keep in mind who their audience is and tailor their courtroom presentation and behavior accordingly. FL

endnote

1. Cross-examination is one of the greatest tools an attorney has to seek the truth. *State v. Carter*, 1 Ariz. App. 57, 63, 399 P.2d 191, 197 (1965).

Timely Trial Tips for Family Law Practitioners

BY HON. KATHERINE COOPER
MARICOPA COUNTY SUPERIOR COURT

Strict time limits create a unique trial environment for Family Court practitioners. Counsel must deliver a lot of information in a short amount of time. They must arrive prepared and stay focused. Unfortunately, over the past year on the Family bench, I have seen cases suffer at trial for lack of the ability to use time effectively. Unproductive cross-examination and irrelevant testimony from a party who "just wants to tell their story" consume more hearings than I can count. Counsel have failed to leave quality time to present their own client or ignored exhibits that support their case. All because they ran out of time.

How do you present your best case under pressure? Here are some techniques I have seen used effectively by counsel.

Limit cross-examination

There is rarely time to do it well. Good cross takes time to build. You must lay the groundwork and ask the lead-up questions for cross to work. *"Sir, in January, you said X. In February, you said X again. In March, you sent a text stating X again. Now, you are now telling this Court Y, correct?"* One point made on cross-examination can take five minutes, particularly with a difficult witness. You simply do not have that kind of time in most hearings.

If you rush the process or wind up arguing with the witness, cross-examination becomes torture for the judge.

Similarly, much of the cross I hear consists of the attorney asking the opposing party to confirm something, the opposing party disagrees, and the attorney just moves on without proving up the point. Those exchanges are not helpful.

Generally, the purpose of cross in Family Court is to discredit the opposing party. For more effective discrediting, limit cross to the two or three most relevant issues. Use a prior written statement, photograph, letter, or other tangible evidence that the witness cannot argue about. Avoid the "he said-she said" areas entirely. Keep your questions short. Stay on one issue at a time. Never argue with the witness, talk over the witness, or raise your voice. If the witness refuses to answer the question, ask the court to instruct the witness to answer. Better yet, rephrase your question once and move on. If your questions were fair and the witness is behaving unreasonably, you made your point.

Prepare Your Client

If you prepare your client properly, you will know exactly how much time you need for your client's direct testimony and you can budget the balance of your time accordingly. Prioritize. For the judge, getting to know the parties – and assessing their demeanor and credibility while testifying – is critical.

Review with your client what you intend to ask. Show your client the exhibits you will use. Save yourself 30 seconds in trial by

assuring them that the copy in trial will be exactly the same except for the addition of a green tag. Arrive in time to put the exhibits in the order you wish to present them. Stop and re-direct your client if they start to wander. You are in charge of your time, not your client.

Exhibits

Marking exhibits during trial is a poor use of time when you have the opportunity before trial. The clock is ticking while counsel find a document, tell the court that they have an exhibit to mark, wait for the court to state the obvious (*counsel, you need to mark the exhibit*), walk to the clerk's desk, wait for the clerk to fill out the tag and staple it to the exhibit, and return to the podium.

For the same reason, bates-stamp any exhibit over three pages. It is time wasted getting everyone on the same page. It is also highly frustrating to the court. I appreciate receiving a bench copy, and I do follow along and read the exhibits. I frequently use post-its so that I can find a page later. If I cannot read and mark the page in trial during the questioning, it is unlikely that the document will carry the same weight later.

Use the Pre-Trial Statement for Opening Statement and Closing Argument

To save time, counsel usually forego an opening statement and closing argument. But opening and closing are still important. Use the Pre-Trial as a substitute. In addition to the fact that the Rules of Family Law Procedure require it, the Pre-Trial is another tool to educate and to persuade the court.

In your Pre-Trial statement, tell the judge what you want and why you want it – both as a matter of law and fairness. If the issue is legal decision making or parenting time, list each 403 factor, your client's position on that factor, and summarize the evidence that you intend to present to prove your client's position. Simply stating, *"Father/Mother will show that it is in the child's best interests pursuant to A.R.S. 25-403 for Father/Mother to have sole legal decision making,"* is a lost opportunity to argue your case. (At trial, use the 403 factors to organize your client's direct examination: *"Now I want to ask you some questions about the factors that the judge must consider. First, tell the court about your relationship with your children…."*) The same practice applies to the 408 relocation factors, 319 spousal maintenance factors, and child support.

Post-trial, a well-written Pre-Trial Statement provides text for the court's ruling. My under advisement rulings often rely on a well-prepared Pre-Trial Statement that accurately reflects the evidence presented.

Final thoughts

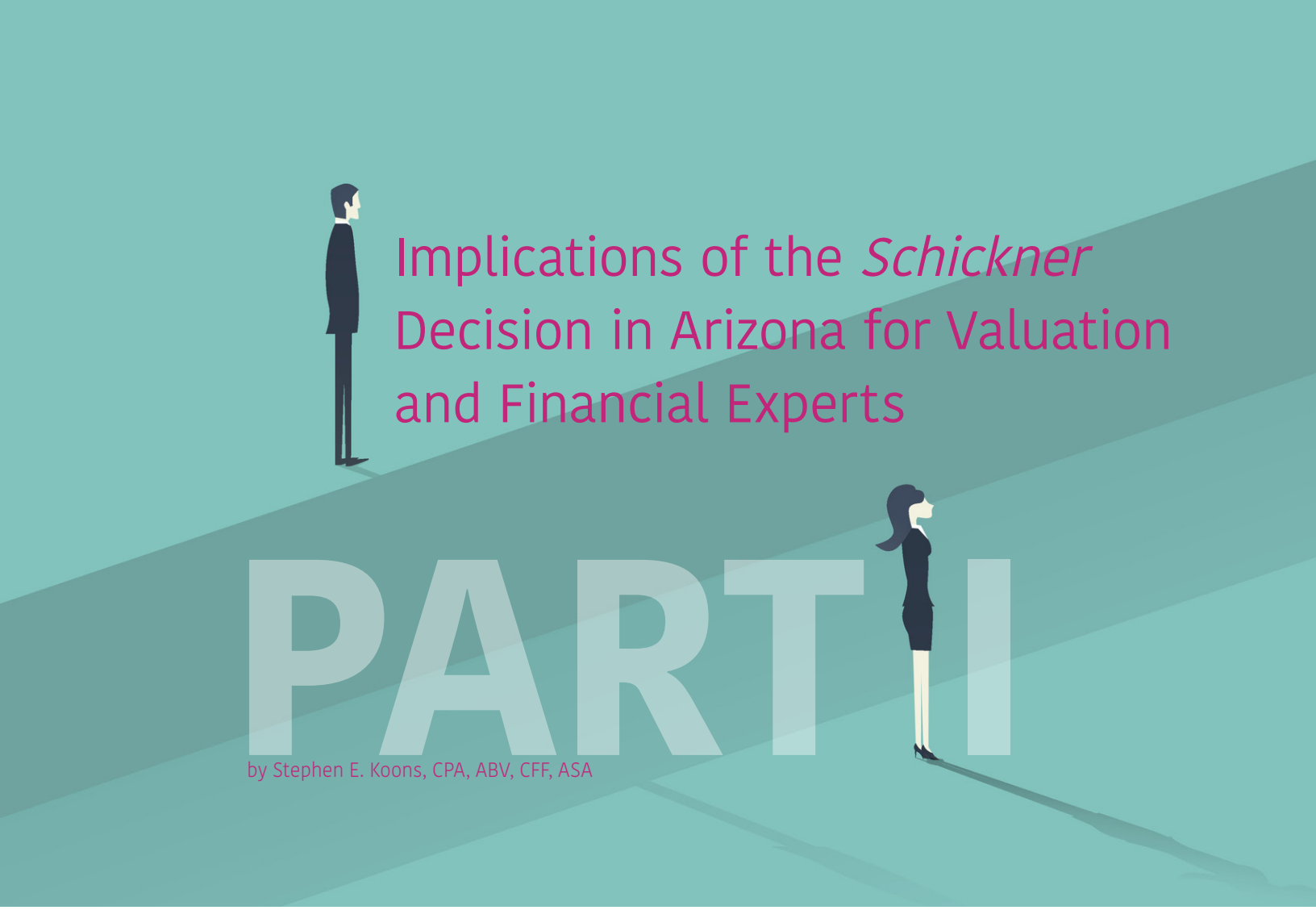
Work with opposing counsel and the court before trial to maximize your time to present evidence at trial. If you think the matter warrants more time, ask for it *at the trial setting conference*. Rarely do counsel ask unless the matter is a multi-issue dissolution.

Make sure that you timely disclose your exhibits to avoid an objection at trial. Disclosure objections take time for the court to figure out when counsel disclosed the exhibit and whether the objection is valid.

Last, finish on time, if not early. If the court gives you a two-minute warning, do not keep going until the judge stops you. Ask your last question and sit down. Your professionalism will be noted. FL

about the author

Governor Brewer appointed **Judge Katherine Cooper** to the Maricopa County Superior Court in 2011. She served on the Civil bench for almost three and a half years and has been on Family court since July 2015.



Implications of the *Schickner* Decision in Arizona for Valuation and Financial Experts

PART I

by Stephen E. Koons, CPA, ABV, CFF, ASA

In a case of first impression,

The Arizona Court of Appeals, Division One, handed down its decision in the *Schickner v. Schickner* matter in 2015.[1] The appellate court dealt with two major issues in the case. First, it considered whether valuation discounts were appropriate in the valuation of a 50% non-controlling interest for one business and a 20% non-controlling interest in another business. Second, it considered whether Wife was entitled to receive distributions from the businesses between the date of filing the petition for dissolution and the date of the entry of the decree. This decision has significant implications in Arizona divorce cases for valuation and financial experts that go well beyond the ruling of the Court. Part I of this article will deal with the question of valuation discounts. In Part II, we will consider the post-petition distribution issue.

WME

The marital community owned a 50% interest in a successful ophthalmology practice (WME) located in Kingman, Arizona. Husband was employed in the practice. The other 50% was owned by another ophthalmologist who was also employed in the practice. WME was formed as an Arizona limited liability company that elected to be treated as a Subchapter S corporation for tax purposes. Therefore, WME paid no income tax; rather, the shareholders were required to report their pro rata

PART I

The appellate court noted that no Arizona case bars a court from applying a minority share discount when valuing minority interests for purposes of marital dissolution.

share of the company income in their personal tax returns. Both physicians were paid similar amounts annually representing a combination of compensation and distributions. Husband originally had received his share as W-2 salary. He converted a portion of what he had been receiving as wages to distributions of "S" corporation earnings on the advice of his CPA.

PSC

The marital community also owned a 20% interest in an ambulatory surgery center (PSC) located in Bullhead City, Arizona. The other 80% interest in PSC was owned by the other physician/owner of WME. Both of the physician/owners of WME performed surgeries at the PSC facility. In addition, other unrelated physicians could use the facility to perform outpatient surgeries. PSC was also formed as a limited liability company that elected to be taxed as a partnership for tax purposes. Therefore, PSC paid no income tax; rather, the owners reported their pro rata share of income, deductions and credits in their respective personal tax returns.

Valuation Discounts

The appellate court also stated that consistent with the majority of other jurisdictions, they do not adopt any bright-line rule. The appellate court stated that "…a trial court has discretion to consider whether a minority discount is appropriate, on a case-bycase basis, considering factors such as the minority shareholder's degree of control, lack of marketability, and the likelihood of a sale of the minority interest in the foreseeable future."[2]

The appellate court reviewed the lower court record and noted that Husband owns a 50% interest in WME, equal to that of the only other member of WME. They also stated that he "…holds significant power regarding financial decisions, as evidenced by his decision to convert one-half of his salary to distributions as a tax-saving strategy."[3] Noting that Husband was unable to alter the terms of building rents paid by WME, they stated that "…the record does not otherwise reflect any substantial limitations on his joint control of WME…" They also noted that there was no evidence that Husband intended to sell his interest. The appellate court vacated the lower court's ruling regarding the valuation of WME and remanded for a revaluation and equitable distribution of the community interest in WME.

It is unclear whether the appellate court considered all the elements of control, or lack thereof, affecting Husband's subject 50% interest in WME. WME is a manager-managed LLC and the Manager of WME is the other physician/owner. Since a majority of interest of the members is required to appoint the Manager, Husband does not have the unilateral power to do so. The LLC agreement specifies that the Manager shall have the exclusive authority to manage the business and affairs of WME subject to certain restrictions that provide blocking power to Husband as follows:

Control Factor	Subject 50% Interest Can Control	Subject 50% Interest Can Cast Blocking Vote	Notes
Appoint and replace management	No	No	(1)
Determine Manager and Member compensation	No	Yes	(1)
Terminate any contract or employment agreement with any Manager or Member except for termination of an employment agreement for cause	No	Yes	(1)
Approve distribution of profits	No	Yes	(1)
Sell or otherwise dispose of WME assets not in the oprdinary course of business	No	Yes	(1)
Acquire real or personal property not in the ordinary course of business	No	Yes	(1)
Amend the Articles of Organization of WME	No	Yes	(1)
Approval of any merger or plan of consolidation with another business entity	No	Yes	(1)
Approve any distributions other than quarterly distributions	No	Yes	(1)
Compel distributions of profits	No	No	(1) (2)
Make assignment for benefit of creditors , file a voluntary petition in bankruptcy or appoint a receiver for WME	No	Yes	(1)
Except for trade credit incurred in ordinary course of business in a aggregate amount of $50,000, at any time borrow money from anyone	No	Yes	(1)
Hypothecate, encumber or grant security interest in assets of WME to secure debts	No	Yes	(1)
Manage day to day affairs and all other aspects of the business	No	No	(1)

Notes:
(1) Source: Operating Agreement of Western Medical Eye Center, LLC dated September 28, 2005.
(2) Distributions required on quarterly basis pursuant to Article 6.3 of Operating Agreement. Distributions in excess of cash are not allowed and after distribution, assets of WME must exceed debts.

The ability of Husband to convert a portion of his salary from WME to distributions does not seem to represent a significant element of control. The other physician/owner was not adversely affected by the decision. Husband did not increase the total amount he was receiving. His share of the income from the practice remained the same. The conversion to distribution actually saved the practice money by virtue of a reduction in the employer share of Medicare taxes. It's hard to see how this action was perceived by the appellate court to be that significant.

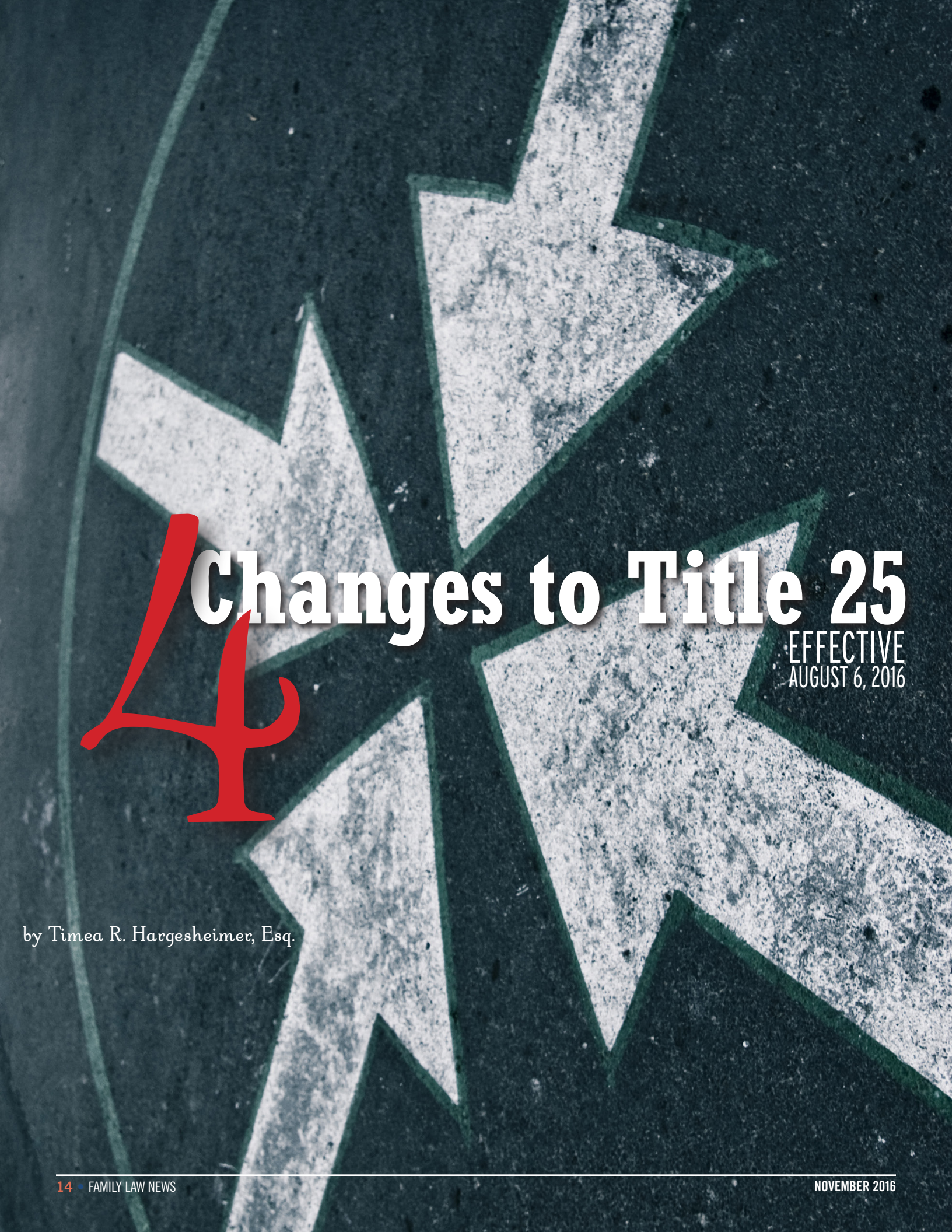
In the case of PSC, the court found the evidence to reasonably support the application of a minority share discount. There was no evidence to suggest that Husband intended to sell the 20% interest in PSC. However, the appellate court noted that there was no evidence to conclude that Husband's control over PSC was not substantially limited by the control vested in the owner of the other 80% interest. In fact, the owner of the 80% interest was also the Manager of PSC pursuant to the operating agreement. The application of minority share discount to the 20% interest in PSC was supported by the record.

Business appraisers have been providing valuations in the context of marital dissolution both with and without valuation discounts. This case at least brings some clarity to the issue of whether valuation discounts should be applied. However, there are still some unanswered questions

There were significant limitations on Husband's control over WME as evidenced by the control chart above. It is unclear whether the appellate court considered these limitations based on their statement that "…the record does not otherwise reflect any substantial limitations on his joint control of WME as a 50% member." Were these limitations considered by the appellate court? Do those limitations on his joint control constitute "substantial limitations"? Does blocking power over the specific actions listed constitute significant power over the business? What about the valuation of a 49% interest? We will have to wait for future decisions for more meaningful answers to these questions. FL

endnotes

1. In re the Marriage of: Daniel C. Schickner, Petitioner/Appellee, v. Renna M. Schickner, Respondent/Appellant, No. 1CA-CV 13-0513 (4-16-2015),
2. Ibid, at Par. 17.
3. Ibid, at Para. 18.



4 Changes to Title 25

EFFECTIVE AUGUST 6, 2016

by Timea R. Hargesheimer, Esq.

1 There is now a Prohibition on an Award (or Continued Award) of Community Property to a "Convicted Spouse."

A.R.S. § 25-318.02 was added to Title 25, stating as follows:

A. In an action described in section 25-318, subsection A, the court shall not award any community property to a convicted spouse.

B. If one spouse is required to make ongoing installment payments to a convicted spouse pursuant to a division of property as described in section 25-318 and the convicted spouse's conviction occurs after the order to make the installment payments, the spouse making the installment payments may petition the court for a modification of that ongoing payment.

C. For the purposes of this section, "convicted spouse" means a person who is convicted of an offense and who is sentenced to at least eighty years in prison or to life in prison, with or without the possibility of parole.

2 There is now a Prohibition on an Award of Legal Decision-Making or Parenting Time Rights to a Parent Who was Convicted of the Sexual Assault that Led to the Birth of the Child.

A.R.S. § 25-416 was added to Title 25, stating as follows:

If a person has been convicted of sexual assault under section 13-1406 and the sexual assault led to the birth of a child, the convicted person has none of the rights prescribed in this chapter related to legal decision making or parenting time in regard to the child.

3 It now Constitutes an Affirmative Defense to a Petition to Enforce Child Support Arrears that the Obligee has Voluntarily Relinquished Physical Custody of a Child to the Obligor.

A.R.S. § 25-503 was amended to add the following language:

J. Voluntary relinquishment of physical custody of a child to the obligor from the obligee is an affirmative defense in whole or in part to a petition for enforcement of child support arrears. In determining whether the relinquishment was voluntary, the court shall consider whether there is any evidence or history of any of the following:
   1. Domestic violence.
   2. Parental kidnapping.
   3. Custodial interference.

K. The relinquishment pursuant to subsection J of this section must have been for a time period in excess of any court-ordered period of parenting time and the obligor must have supplied actual support for the child.

4 A Preliminary Injunction Similar to that which is Entered in Dissolution actions is now Entered in Cases for Establishment of Legal Decision-Making and Parenting Time Where Paternity has Already Been Established.

A.R.S. § 25-808 was added to Title 25, stating in part as follows:

A. In an action to establish legal decision-making and parenting time for a child who was born out of wedlock, the clerk of the court shall issue, pursuant to an order of the superior court, a preliminary injunction that is directed to each party to the action if the petitioner has filed one of the following:
   1. A copy of the birth certificate that lists the father as parent.
   2. An affidavit or acknowledgement signed by the father admitting paternity.
   3. An adoption order listing both parties as parents.
   4. A court order establishing paternity.

B. The preliminary injunction shall contain the following orders:
   1. That both parties are enjoined from all of the following:
      (a) Molesting, harassing, disturbing the peace of or committing an assault or battery on the person of the other party or any natural or adopted child of the parties.
      (b) Removing any natural or adopted child of the parties then residing in this state from the jurisdiction of the court without the prior written consent of the parties or the permission of the court.
      (c) Removing or causing to be removed any child of the parties from any existing insurance coverage, including medical, hospital, dental, automobile or disability insurance.
   2. That both parties maintain all insurance coverage in full force and effect.

C. The preliminary injunction prescribed in subsection A of this section shall include the following statement: …

The statute then provides the exact language that belongs in the Preliminary Injunction.

The 53rd Arizona Legislature is calendared to begin in January, 2017.

Family Law Section Presentation at the State Bar Of Arizona 2016 Convention: A Resounding Success

by Mitch Reichman & Bill Bishop

The Family Law Section presentation at the State Bar Convention on June 17, 2016 once again provided excellent topics and speakers to round out the 2015-2016 CLE year. Mitch Reichman and Bill Bishop were the co-chairs for the presentation. The Family Law Section presentation was attended by **121** professionals, most of whom were attorneys, but also included judges, financial experts and other professionals. Departing from the various CLE programs throughout the year that addressed common family law topics such as valuation and various child related issues, the Family Law Executive Council took a different approach and presented speakers who provided information on developing skills that offered the opportunity for practitioners to realize greater success in the practice of law and enhance the quality of their lives.

The presentation ("Cooperative Justice") began with a distinguished panel of judges, including Superior Court judges Dean Christoffel (Pima), Suzanne Cohen (Maricopa), Maria Elena Cruz (Yuma), James Marner (Pima), Paul McMurdie (Maricopa) and Peter Swann (Ariz. Court of Appeals Div. 1). A list of questions had been prepared by the Executive Counsel in advance and disseminated to the judges, and additional questions were taken from the audience. Among the topics covered were school choice issues, what parenting issues the judges believe falls outside their statutory authority, parenting coordinator issues, implications for a party that refuses to sign HIPPA or other releases, deadline issues regarding expert reports, non-disclosed expert opinions, the appointment of Rule 72 masters and parameters, procedural aspects applicable to challenges to Rule 69 agreements, the role of the Court in parental alienation cases, bifurcation of trial issues, access to children's records, whether there is a presumption in favor of joint legal decision making and the impact of new rule and statutory changes.

Roger Dodd, the renown "Master Of Cross-Examination, and the co-author of several highly respected publications regarding cross-examination, provided an excellent presentation on successful cross examination skills, as well as commonly used methods of cross examination that are generally not effective. For those who have seen Mr. Dodd's presentations in the past, Mr. Dodd once again provided very informative, and sometimes hilarious, illustrations of such techniques and highly effective practice tips.

Mr. Jerry Acuff was the first presenter in the afternoon session. Mr. Acuff, who has been featured on MSNBC and the ABC Radio Network as well as in various publications, presented information and strategies to create, nurture and improve relationships. Mr. Acuff offered insights as to how a more successful practice is built on a network of positive and superior relationships with key individuals who are in a position to provide the most impact professionally and personally. He offered many examples of how building relationships strategically made his life better and dramatically more successful.

Dr. William Heywood, a Clinical Professor and Director of the PhD program at the Herberger Institute of Design and Arts provided a "resiliency workshop." Dr. Heywood provided insights to allow practitioners to increase their self-awareness, self-management, social awareness and social skills, explaining how to develop flourishing work and intimate relationships through enhancement of these core competencies. Dr. Heywood offered practical information to enhance skills of resilience and their applicability in the context of a family law practice.

Lois Zachary, author of several books on mentoring including *The Mentor's Guide*, *Creating A Mentoring Culture* and *The Mentee's Guide* is an internationally-recognized expert on mentoring, cited as "One of the Top 100 Minds in Leadership" today. Ms. Zachary offered insight to allow practitioners to understand the differences between coaching and mentoring, as well as a structure for preparing to have a mentoring relationship, facilitating learning within that relationship and coming to closure. Ms. Zachary's information allowed practitioners the opportunity to understand the difference between the traditional role of older lawyers helping younger lawyers to be better in the practice of law as compared to a modern paradigm of mentoring which can include goals for the mentee beyond the learning of legal skills.

Comments from those who attended the program were extremely favorable. 87% of those responding to the survey rated the seminar as very good or excellent. Participants comments included "it was great to have new and different speakers," "so nice to hear more than just a lecture on the law," and "terrific mix of topics and very engaging speakers!"

The Family Law Executive Council encourages all members of this section to send their ideas for next year's program to either Mitch Reichman and/or Bill Bishop as they are again co-chairing next summer's presentation and are in the process of formulating topics for the program. FL

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 June-August 2016 – can be viewed here:
www.azbar.org/media/1200776/caselawsummariesjune-aug2016.pdf

Additionally, the previous update – from May, 2016 – can be viewed here:
www.azbar.org/media/1200766/caselawsummariesmay2016.pdf

Upcoming Education for Family Law Practitioners

- The Family Law Institute For Better or Worse
  Phoenix — January 19-20, 2017
- The AZ Chapter AFCC Annual Sedona Conference
  Sedona — January 27-29, 2017
- Pima County Bar Association's Annual Family Law CLE
  Tucson — May 19, 2017
- 2017 State Bar of Arizona Convention
  Tucson — June 14-16, 2017

Family Law Executive Council Now Accepting Applications

- The Family Law Executive Council is accepting applications now through March 15, 2017. Applicants should send a copy of their resume and a letter expressing their interest in participating on the council to Hon. John J. Assini at jassini@sc.pima.gov. Members of the Council are required to regularly participate in meetings in Casa Grande, Arizona, approximately every six weeks, as well as volunteering on at least one committee within the Council (the committees may require more frequent meetings).

Annalisa Moore Masunas and Lisa C. McNorton who co-chaired an excellent Advanced Family Law seminar in Tucson, Arizona, on November 18, 2016.

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

… If so, the deadline for submissions is March 15, 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.