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Family Law News

this issue...

STATE BAR OF ARIZONA

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FROM THE CHAIRS

DAVID HOROWITZ & ANNALISA MASUNAS

WITH THIS BEING A TIME OF YEAR FOR GIVING THANKS, we would like to thank each of you for being a part of our family law legal community. We are engaged in important, yet challenging work, and we value the significant role each of you plays in assisting spouses, parents and family members through our family law courts throughout Arizona.

We would also like to thank you for reading our final Family Law Executive Council Newsletter for 2022 and thank the Newsletter Committee, and in particular Annie Rolfe, for continuing to produce top-notch legal content issue after issue.

As we progress through the final months of 2022, are you starting to take stock of the accomplishments you've made this year and beginning to ponder what's in store for you in 2023?

If getting together with your colleagues has been a highlight for you this year, then consider attending the Advanced Family Law CLE in Tucson on November 17th. Yet, if you can't make it to Tucson this month but would like to go in the near future, consider joining us for the Family Law Day at the State Bar Convention June 14-16, 2023.

Whether we see you soon in person or not, we wish you happy holidays and a wonderful new year! FL

Estate Planning

FOR LGBTQIA+ FAMILIES IN THE WAKE OF *DOBBS*

By
Brad D. Frandsen
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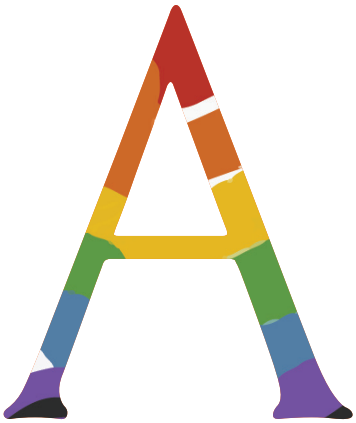
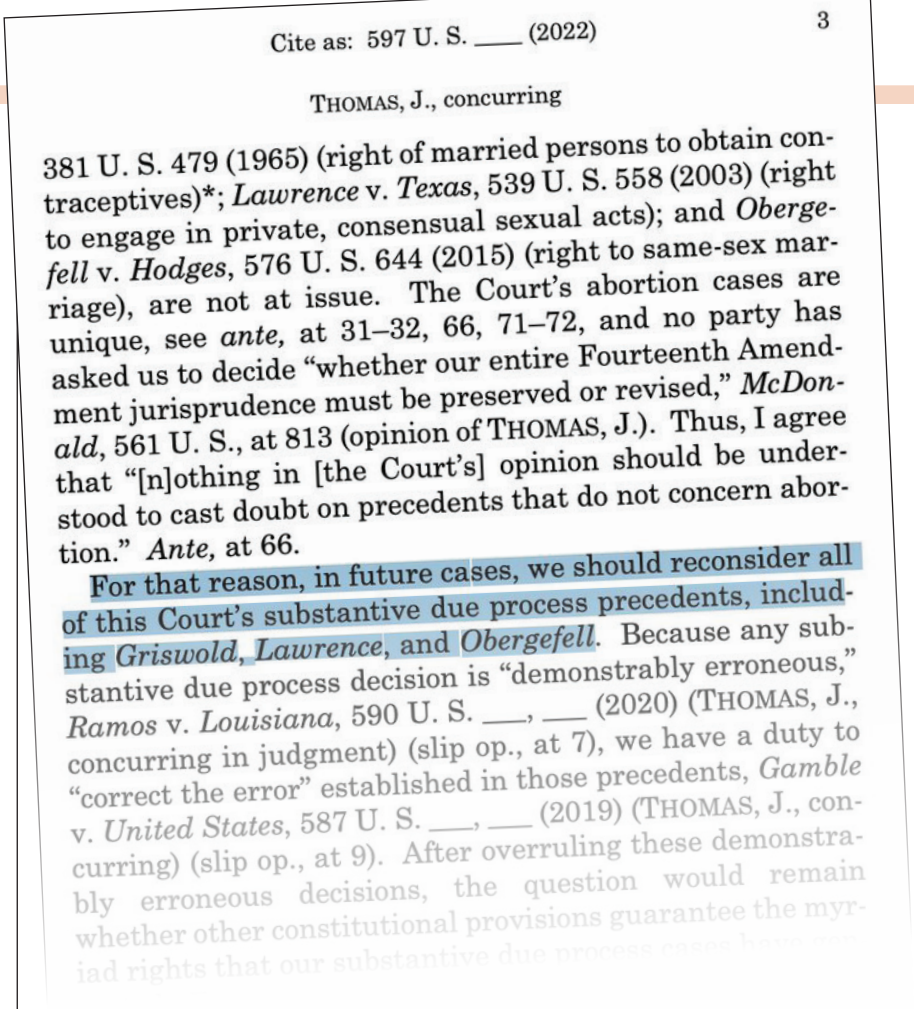
Jennings, Strouss & Salmon)



AS THE RIGHTS OF THE LGBTQIA+ community continue to develop at the state and federal levels, it is imperative that we advise our LGBTQIA+ clients to take control of their health and financial outcomes by implementing comprehensive estate plans today. Without an estate plan in place, these clients are left to rely on Arizona law to decide what happens to their person and property during times of their incapacity and at death. These laws do not account for their potentially unique relationships and family circumstances and oftentimes result in unintended outcomes. In light of recent statements made by Justice Clarence *Thomas* in his concurring opinion to the *Dobbs v. Jackson's Women's Health Organization* decision, it is especially important that our LGBTQIA+ clients not rely on Arizona law alone to ensure their person and estate are managed as they intend. Instead, we should advise our clients to take control by executing comprehensive estate plans that ensure our clients, their loved-ones, and their property are appropriately cared for and managed.

THE *DOBBS* DECISION IMPACTS ESTATE PLANNING FOR MARRIED, SAME-SEX COUPLES



Cite as: 597 U. S. ____ (2022) 3

THOMAS, J., concurring

381 U. S. 479 (1965) (right of married persons to obtain contraceptives)*; *Lawrence* v. *Texas*, 539 U. S. 558 (2003) (right to engage in private, consensual sexual acts); and *Obergefell* v. *Hodges*, 576 U. S. 644 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, see *ante*, at 31–32, 66, 71–72, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," *McDonald*, 561 U. S., at 813 (opinion of THOMAS, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." *Ante*, at 66.

For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (THOMAS, J., concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 9). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have

Justice *Thomas* suggested that the Court should next move on to the landmark decisions that relied on similar constitutional foundations.

On June 24, 2022, the U.S. Supreme Court issued its ruling in *Dobbs v. Jackson's Women's Health Organization*, overturning Roe *v. Wade* and eliminating the constitutional right to abortion. In Justice Clarence *Thomas*' concurring opinion, *Thomas* explicitly stated that the Court should revisit and reexamine other substantive due process rights created under the line of cases related to *Roe*, including the right to same-sex marriage recognized by the Court in *Obergefell v. Hodges*, decided in 2015.

As the Court considers additional cases affecting the rights of LGBTQIA+ individuals in the 2022-2023 term (such as *303 Creative L.L.C. v. Elenis*), married, same-sex couples, and other same-sex couples hoping to become married, are becoming increasingly concerned about the possible overturning of

IN LIGHT OF RECENT STATEMENTS MADE BY JUSTICE CLARENCE THOMAS IN THE *DOBBS V. JACKSON'S WOMEN'S HEALTH ORGANIZATION* DECISION, IT IS ESPECIALLY IMPORTANT THAT OUR LGBTQIA+ CLIENTS NOT RELY ON ARIZONA LAW ALONE TO ENSURE THEIR PERSON AND ESTATE ARE MANAGED AS THEY INTEND.

Obergefell and the loss of their relatively-new right to same-sex marriage. These concerns are further exacerbated as Democratic senators delay votes on the Respect for Marriage Act, legislation intended to protect the rights of individuals to enter into interracial and same-sex marriage. For same-sex couples who entered into marriages in states where same-sex marriage would be illegal or unconstitutional but for the Court's ruling in *Obergefell*, there are additional concerns that same-sex marriages performed in these states could be "undone." Although an unwinding of marriages is unlikely, the possibility makes it particularly important that same-sex married couples develop new (or review existing) plans to ensure that a change in state or federal law will not result in an unintended change in their estate plans.

RELYING ON ARIZONA LAW WILL LIKELY LEAD TO UNINTENDED CONSEQUENCES

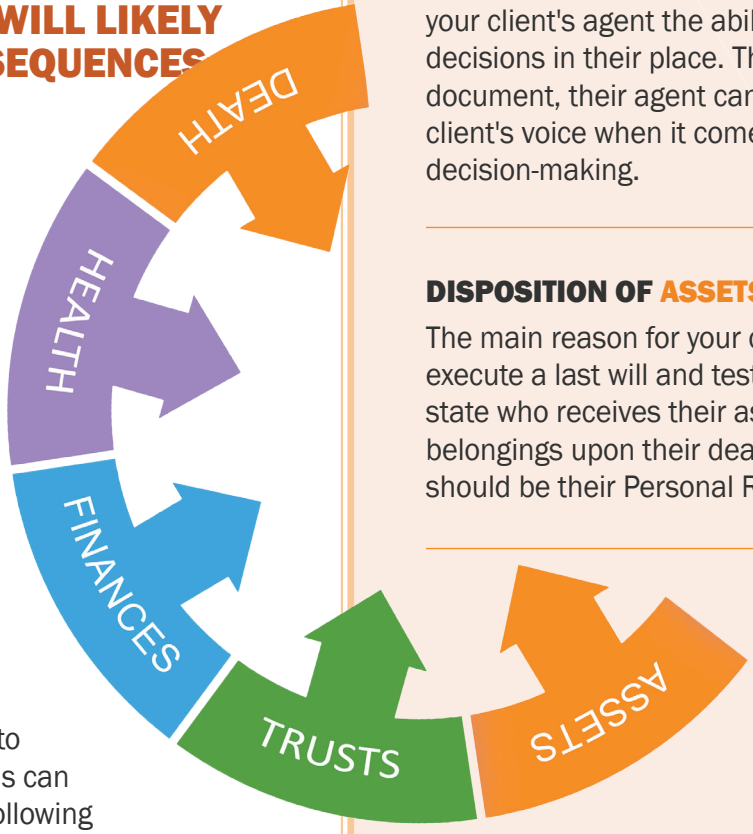
A comprehensive estate plan addresses the following questions:

1. Who can make health care decisions for me when I cannot make or communicate them for myself?
2. Who can make financial decisions for me when I cannot make them for myself, and what exactly can that person do?
3. Who will receive my property when I die, and who will be in charge of getting my property where it needs to go?

For members of the LGBTQIA+ community, relying solely on Arizona law to determine the answers to these questions can lead to unintended consequences. The following describes how Arizona law answers these questions and explains the benefits of a comprehensive estate plan.

HEALTH CARE DECISION-MAKING

Without a Health Care Power of Attorney or Advanced Directives, Arizona law dictates that a health care surrogate can be designated to make health care decisions for an individual who is unable to make or communicate those decisions for themselves. Pursuant to A.R.S. § 36-3231, health care decisions are made by relations in the following priority:



HEALTH CARE DECISION-MAKING

A simple, straightforward document the Advance Directive allows your client to express their wishes if they become incapacitated and unable to communicate on who will become involved in their health care and to act in the your client's best interest.

FINANCIAL DECISION-MAKING

A Power of Attorney is designed to grant your client's agent the ability to make decisions in their place. Through the document, their agent can act as your client's voice when it come to financial decision-making.

DISPOSITION OF ASSETS AT DEATH

The main reason for your client to execute a last will and testament is to state who receives their assets and belongings upon their death and who should be their Personal Representative

REVOCABLE TRUSTS

A revocable trust is a Will-substitute that allows your client to designate fiduciaries to handle their assets in times of disability and beneficiaries to receive their assets at their death, all outside of the view of a court or estranged family members.

1. the individual's spouse (unless they are legally separated);
2. an adult child of the individual (or a majority of the adult children);
3. the individual's parent;
4. the person's domestic partner;
5. a sibling; or
6. a close friend.

THE ORDER OF THIS LIST IS UNIQUELY SIGNIFICANT FOR UNMARRIED LGBTQIA+ INDIVIDUALS BECAUSE A PARTNER WHO WOULD LIKELY BE THE INDIVIDUAL'S FIRST CHOICE AS A HEALTH CARE SURROGATE IS LIKELY THE LAST-ELIGIBLE PERSON ON THE LIST FOR PRIORITY.

A "close friend" is defined as an adult who has exhibited special care and concern for the patient, who is familiar with the patient's health care views and desires and who is willing and able to become involved in the patient's health care and to act in the patient's best interest.

The order of this list is uniquely significant for unmarried LGBTQIA+ individuals because a partner who would likely be the individual's first choice as a health care surrogate is likely the last-eligible person on the list for priority. The likely outcome is that a parent, child or sibling would serve as the surrogate, a result that is probably not what the individual would have intended. This can become even more complicated for LGBTQIA+ individuals who are estranged from their family members for reasons related to the individual's sexuality or identity. A disagreeing family member acting as surrogate may block a partner from having contact with the individual – again, an outcome the individual probably never intended.

Although unlikely in Arizona, if *Obergefell* went the way of Roe and was overturned, there is a chance that some same-sex marriages could be deemed unconstitutional and void. Same-sex couples married in Arizona might no longer be deemed spouses, causing an individual's same-sex spouse to inadvertently go from first-in-line in priority to much further down the list.

To avoid these outcomes, your clients can use Health Care Powers of Attorney and/or Advanced Directives to pre-designate who should have health care decision making authority on their behalf. The documents can be drafted to ensure that your client's chosen designees remain eligible to serve, even if changes beyond their control affect their marital status. These documents can also memorialize your client's end-of-life care wishes and burial/cremation preferences.

FINANCIAL DECISION-MAKING

If an individual becomes incapacitated and has not previously prepared a Durable Power of Attorney granting financial decision-making authority to a specific agent, Arizona law requires the creation of a conservatorship and the appointment of a conservator to handle the incapacitated individual's assets and finances. Pursuant to A.R.S. § 14-5410, the court may consider the following to have

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priority to be appointed as the conservator for the incapacitated individual:

1. the individual's spouse;
2. the adult child of the individual;
3. a parent of the individual (or a person nominated by the Will of a deceased parent);
4. any relative with whom the individual has resided for more than six months;
5. the nominee of the person who is caring for or paying benefits to the protected person;
6. the department of veterans' services (if the person is a veteran); or
7. a licensed or other public fiduciary.

Here again, the order of priority is significant for unmarried LGBTQIA+ individuals because the person they would most likely want to make financial decisions on their behalf is not highly ranked on the list. Instead, a potentially-estranged family member or even an unfamiliar third-party would likely be appointed the conservator of the individual's assets during their incapacity over the individual's partner.

Assuming Justice *Thomas* is successful reversing *Obergefell*, as alluded in *Dobbs*, an individual's same-sex spouse could unintentionally move from first-in-line in priority to not even being on the list at all without a Durable Power of Attorney in place. An incapacitated individual's family member could suddenly be dropped in to oversee the private finances of the "formerly" married couple – again, a result the individual likely never intended.

Assuming Justice *Thomas* is successful reversing *Obergefell*, as alluded in *Dobbs*, an individual's same-sex spouse could unintentionally move from first-in-line in priority to not even being on the list at all...

To avoid this result, your client can create and execute a Durable Power of Attorney to pre-designate who should have financial decision making authority and control of their assets during any periods of incapacity. As with a Health Care Power of Attorney, a Durable Power of Attorney can be drafted to ensure that a spouse can remain eligible to serve as an individual's agent, even if changes in state or federal laws change their legal status as spouses.

DISPOSITION OF ASSETS AT DEATH

Without a Will or revocable trust in place, Arizona law determines who manages a deceased individual's estate and how the estate is ultimately distributed.

A.R.S. Title 14 Chapter 2 provides that an individual's estate passes as follows:

1. To their spouse (or their spouse and children, depending on the relationship of the children to the spouse);
2. To children;
3. To parents;
4. To siblings;
5. To nieces and nephews;
6. To more distant relatives.

When it comes to managing the estate – including the collection and distribution of the deceased individual's assets and items of personal property (clothes, furniture, jewelry, watches, etc.) – through the probate process, the person with priority to serve as the Personal Representative (the person with the

authority to manage the estate) matches the priority of the estate's distribution:

1. Spouse;
2. Children;
3. Parents;
4. Siblings;
5. Nieces and nephews;
6. More distant relatives.

Like before, the order of the distribution provided under Arizona law is important for unmarried LGBTQIA+ individuals because the partner, other individuals or charities they might want to leave their estate to are entirely excluded. Instead, a potentially-estranged parent or family member is left to inherit the deceased individual's assets and manage the deceased individual's estate.

For situations where the deceased individual was in a long-term relationship with a partner, this can be especially painful for the surviving partner because many of the deceased individual's assets could be joint assets, subjecting the surviving partner to the scrutiny and review of the deceased individual's potentially-hostile Personal Representative.

If *Obergefell* is someday overturned and same-sex couples married in Arizona are no longer deemed spouses, a same-sex married couple relying on Arizona law would be deeply disappointed to find themselves disinherited from their spouse's estate and excluded from the administration.

To avoid these results, your client can create and execute a Will to pre-designate who should inherit their estate and who should be their Personal Representative. The Will can be customized to contemplate changes in state and federal law to ensure that your client's wishes are carried out as intended.

REVOCABLE TRUSTS

To completely avoid the probate process and court involvement altogether, your client could put together and fund a revocable trust. A revocable trust is a Will-substitute that allows your client to designate fiduciaries to handle their assets in times of disability and beneficiaries to receive their assets at their death, all outside of the view of a court or estranged family members. The individual's spouse or partner can be a Co- or successor Trustee, regardless of marital status, as well as an ultimate beneficiary of the trust. Because revocable trusts can be amended at any time during the individual's life, they can be updated to account for changes in circumstances (whether legal or personal) at any time.

Estate Planning Documents Keep Your LGBTQIA+ Client in Control

Although it is impossible to accurately predict what impacts the *Dobbs* decision and future decisions like it will have on same-sex marriage and the rights of members of the LGTBQIA+ community, it is important that we advise our clients affected by these types of decisions to be prepared for whatever may come. Particularly for LGTBQIA+ couples and families, who may or may not be married for a variety of reasons, having a plan in place can mean the difference between having sensitive decisions about health and finances be made by a partner they trust or an estranged family member who may not know or care about what they would have wanted. While issues of same-sex marriage and LGBTQIA+ rights work their way through the judicial system and through society as a whole, we can help our clients avoid unintended outcomes related to their death and disability by advising them to put comprehensive, estate planning documents in place. FL

"Informed consent" denotes the agreement by a person to a proposed course of conduct after a lawyer has communicated adequate information and explanation ...to the proposed course of conduct.

When Does My Representation Begin? or

How do I ensure I am not removed from the case if client's spouse sits in on client meetings?

FACT PATTERN:

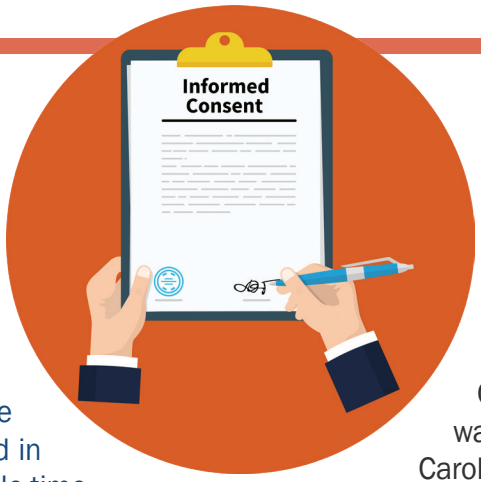
Loyal Lawyer is representing Harley Husband in a child support and custody modification proceeding against Sandy, his former spouse. Harley's current wife, Carol, is present for meetings between Loyal Lawyer and Harley. Loyal makes sure to tell Carol and Harley that Carol's presence in the meetings may waive the attorney-client privilege, and that Loyal is not representing Carol's interests, only Harley's. This disclaimer is given to Carol and Harley at the beginning of every meeting that Carol attends.

At a later date, Carol has her own legal woes and she asks Loyal Lawyer to represent her. Loyal declines and provides her recommended names of other lawyers. Now Harley comes to Loyal and wants to divorce Carol. Loyal has never represented Carol so he agrees to file the petition for dissolution on Harley's behalf. Is there a conflict?

If you've handled family law cases for any length of time, the above fact pattern is not out of the ordinary. In my opinion, there is no conflict presented by this fact pattern. Loyal has every right to file the petition of dissolution and serve Carol. But if Carol's lawyer raises an issue, what might a court do?

The Ethical Rules

LOYAL NEVER AGREED to represent Carol in any matter. Before the court should find such a relationship existed that would require Loyal's disqualification in the divorce action with



Harley, there has to be a reasonable expectation on the part of Carol that she formed an attorney-client relationship with Loyal.
ER 1.5(b) states:

> The scope of the representation and basis or rate of the fee and expenses for which the client will be responsible shall be communicated in writing, before or within a reasonable time after commencing the representation.

Compare relevant provisions of ER 1.18:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as would be permitted by ER 1.6 or ER 1.9 with respect to information of a former client.

WHEN SHE AND HARLEY insisted that Carol be present for meetings to discuss Harley's case against Sandy Former Spouse, would a reasonable person in Carol's position believe that she had an attorney-client relationship with Loyal? I submit not.

In *Foulke v. Knuck*, 162 Ariz. 517, 520, 784 P.2d 723, 726 (1989), the court stated:

> In determining whether a conflict exists, we must first determine whether Foulke (claimed former client) is Haralamie (the lawyer)'s former client. The existence of an attorney-client relationship "is proved by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession" [internal citation omitted]. The test is a subjective one; the court looks to such things as the nature of the services rendered, the circumstances under which the individual divulges confidences, and "the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice" [internal citation omitted].

While the definition of "Informed Consent" doesn't mention a requirement that the informed consent be documented in a writing signed by a present, or future client, the best practice is always to have such a discussion/ agreement documented in a signed and dated writing.

Applying this to the hypothetical, Carol's presence at Harley's meetings was to discuss Harley's legal situation, not Carol's. Carol would have to reasonably believe that she was consulting Harley about her divorce from Harley (which wasn't yet a known event) for this to create an impermissible conflict.

But courts can come to different conclusions. How can a lawyer better insulate from this scenario? Comment [6] to ER 1.18 offers some practical solutions.

- A lawyer may condition a consultation with a potential client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.

In our scenario, Loyal would not only explain in detail that Carol's presence at Harley's meetings does not create an attorney-client relationship between her and Loyal, but Loyal should give her a written statement containing that warning and request that she sign and date it whenever she is present for a meeting.

- If the agreement expressly so provides, the prospective client [or Carol in our hypothetical]

... explain in detail to your client's "guest" that being presence at meetings does not create an attorney-client relationship... and provide a written statement containing this warning and request that it is signed and dated when the "guest" is present at meetings.

may also consent to the lawyer's subsequent use of information received from the prospective client.

Informed consent should be obtained in this situation. That is defined in ER 1.0(e). It reads:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

While the definition doesn't mention a requirement that the informed consent be documented in a writing signed by the client, or prospective client, or Carol in our hypothetical, the best practice is always to have such a discussion/agreement documented in signed and dated writing.

You must still run into a court that misunderstands or misapplies the law and/or ethical rules regarding this scenario, but written documentation signed by the affected person will make that outcome less likely. FL

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the Evolution of *Drahos* part 2

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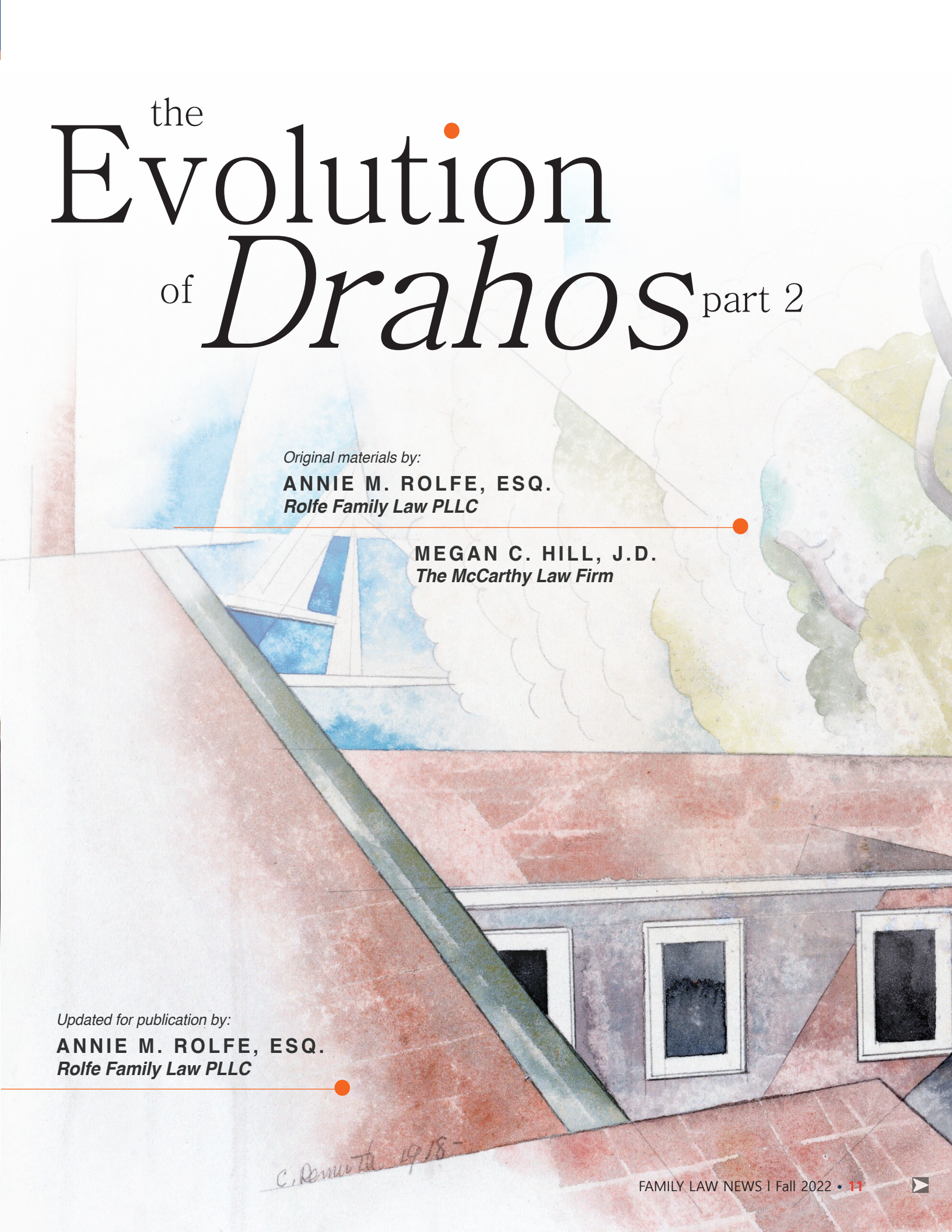

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But *what* do *you do when only* community *funds* are *used* to *improve* separate property?

This article is a continuation from the summer's newsletter (Part 1) that addressed the historic case law regarding community property liens on separate real property. In this part, we will address the current court decisions, including *Saba*, and the argument for reasonable rental value. We strongly recommend that you review Part 1 if you have not already.

In 2020, Division One questioned whether or not *Drahos / Barnett* should apply to cases where only community funds were used towards separate property in *Femiano v. Maust.*

FEMIANO V. MAUST, 248 ARIZ. 613, 463 P.2D 237 (DIV.1, 4/23/2020)

During the marriage and in 2015, husband and wife purchased a home as the marital residence. Because of issues with wife's credit, husband obtained a home loan in his name only and took title to the house as his sole and separate property; wife executed a disclaimer deed. The down payment and all payments on the loan were made with community funds. In 2016, wife filed for divorce. Prior to the conclusion of the divorce, husband sold the marital residence.

Division One held that ***wife had the burden to establish fraud*** by clear and convincing evidence, and that it ***would not overturn*** the ***trial court's rejection*** of wife's argument.

...issues with wife's credit, husband obtained a home loan in his name only and took title to the house as his sole and separate property; wife executed a disclaimer deed.

At the trial level, wife argued that the disclaimer deed had been procured by fraud and that the marital residence should be considered community property. Wife testified that she signed the disclaimer deed in reliance on husband's promise to put her name on the title anyway, and claimed that she would not have signed the deed had she known she was giving up her rights to the home. Husband testified to the contrary, and stated that this was the second home they had purchased in this manner during the marriage. The trial court rejected Wife's fraud claim and found the home to be Husband's separate property. The trial court applied *Drahos* and found the community lien to be $16,095.78.

Wife appealed.

Division One held that wife had the burden to establish fraud by clear and convincing evidence, and that it would not overturn the trial court's rejection of wife's argument.

As to the community lien, Division One distinguished between a residence purchased prior to marriage where both separate and community funds were expended, and the present case where the house was purchased during the marriage and paid for solely through community funds. The court held that, when an asset is purchased during the marriage and no separate funds have ever been expended on it, the *Drahos* formula should not apply. Rather, the community should be entitled to a lien for the full increase in equity.

Less than one year later, a different panel of Division One ruled against *Femiano* in *Saba v. Khoury*.

... If the community were to receive 100% of the appreciation, then Husband would be rewarded with 50% of the property's upside with none of the risk on the downside. The result is inequitable and unreasonable."

SABA V. KHOURY, 481 P.3D 1167 (DIV.1, 1/21/2021)

During the marriage, husband and wife purchased two homes: Leisure Lane and 30th Way.

LEISURE LANE: The parties purchased "Leisure Lane" in 2010 from community property funds. They deeded the property only to wife as an "unmarried woman" in order to obtain a first-time homebuyer credit and because of husband's poor credit. Approximately 2.5 years later, the parties refinanced the property at a lower interest rate. Wife remained the sole borrower on the loan and the escrow company required husband to sign a disclaimer deed, and executed a new warranty deed awarding wife the house as her sole and separate property but as a married woman.

30TH WAY: The parties purchased 30th Way in 2010 using a combination of separate and community funds to make the down payment. Again, the parties put the home in wife's sole and separate name and husband signed a disclaimer deed.

The parties used both homes as rental properties. They deposited the rents in an account in wife's separate name and made the loan payments for both homes through this separate account.

Husband filed for divorced in 2017.

The facts state that the trial court allocated the parties assets and debts, but does not provide detail. On appeal, husband contested the validity of the disclaimer deeds. Husband did not argue that the deeds were procured by fraud, and instead argued that the deeds should be subject to the same heightened scrutiny as a postnuptial agreement (see *In re Harber's Estate*). The appellate court rejected husband's arguments.

Regarding the valuation, the trial court applied *Drahos* and *Barnett*. Husband explicitly argued the Court's holding in *Femiano*. The appellate court rejected *Femiano*. The appellate court held that, "[a]bsent fraud or mistake, the disclaimer deeds must be enforced." In addition, the trial court declined to apply *Femiano* and returned to applying *Drahos*. The court held: "We part company with *Femiano*. Awarding the community Leisure Lane's full appreciation ignores the reality of what the disclaimer deed represents. But for that disclaimer, Husband would be entitled to an equal interest in the full value of Leisure Lane. And an award under *Femiano* would ignore the fact that Wife remains solely liable for the outstanding loan balance. If the community were to receive 100% of the appreciation, then Husband would be rewarded with 50% of the property's upside with none of the risk on the downside. The result is inequitable and unreasonable."

On August 24, 2021, the Supreme Court of Arizona accepted review of *Saba*. On September 14, 2022, the Supreme Court of Arizona filed its Opinion.

SABA V. KHOURY, NO. CV 21-0023-PR (9/14/2022)

The Supreme Court provides a detailed history of the evolution of equitable lien claims against sole and separate property. The Supreme Court addressed the following question in its holding: "But until now, this Court has never opined on the use of the *Drahos/Barnett* formula, its application, or whether the community is entitled to a share of the equity in the property even where the community contribution did not actually enhance its value."

The Court rejected *Femiano* and affirms

Drahos/Barnett, and holds that the *Drahos/Barnett* formula is an appropriate "starting point" for determining a community's equitable lien on separate property. However, the Court specifically references the reasoning in *Drahos* that the *Drahos/Barnett* formula applies "when community funds are used to benefit but not necessarily improve separate property." *Drahos*, 149 Ariz. at 250. In short, the *Drahos/Barnett* formula accounts for the investment value of the community's contributions to the mortgage.

The Supreme Court draws a distinct line between cases where community funds were used solely towards the mortgage, and where community funds are used to actually improve the investment. Where the community only contributed to the monthly mortgage payments, the *Drahos/Barnett* formula is likely appropriate. On the other hand, where the community went above and beyond by making material improvements to the home, the non-owner spouse could argue for more; the Court referred to *Honnas v. Honnas*, 133 Ariz. 39, 40 (1982), and reasoned: "The marital community can make improvements or additions to the home, and in such cases the community is entitled to a fair return on its investment reflecting its contribution to the increase in the property's value." The Court did not address *how* to value a community's contribution to improvements, because the facts in *Saba* did not allege improvements to the property, however, it does open the door for arguments.

The Supreme Court also opened the door for the trial courts to diverge from the *Drahos/Barnett* formula on a case-by-case basis, if the trial court determines that a deviation is appropriate. "The formula is a baseline from which courts can evaluate whether the facts of a specific case warrant a modification of or departure from that formula. If the equities do warrant such a departure, the trial court may measure the lien using a different method, but only if the equitable lien amount reflects - at a minimum - the amount of the community contribution and a division of equity reflecting the increase in value due to the community contribution consistent with a market rate of return on that contribution." *Saba* at Paragraph 16.

Moreover, the Supreme Court notes that the question at hand is not the equitable division of community property under A.R.S. § 25-318(A). A.R.S. § 25-318(A) "does not apply to *reimbursement* of the community's contributions to separate property, which is the issue here." *Id.* at Paragraph 17. The Court reminds us that ***"the object is a fair reimbursement of community funds, not an equitable division of property."*** *Id.* at Paragraph 19.

The Supreme Court ***draws a distinct line*** between cases where ***community funds*** were ***used solely*** towards the ***mortgage***, and where community funds are ***used to*** actually ***improve the investment***.

» ***But*** don't forget ***reasonable*** rental ***value***

HANRAHAN V. SIMS, 20 ARIZ.APP. 313, 512 P.2D 617 (1973) (REASONABLE RENTAL VALUE AS OFFSET TO REIMBURSEMENT CLAIMS)

RELEVANT FACTS:

Probate case. Widow claimed that she was entitled to recover 50% of the total mortgage payments from made from community funds for the benefit of the decedent husband's separate property. The mortgage payments included principal, interest, taxes, and insurance.

The estate's position was that because the widow and the husband had lived in the home as a family residence during the marriage, benefitting the community, a reasonable rental value should be been used to offset any reimbursement. In the alternative, the estate argued that the widow was entitled to no more than 50% of the community funds used to reduce the principal balance of the mortgage.

The court looked at cases from several difference jurisdictions in determining what the appropriate method might be for calculating reimbursement. Additionally, the court affirmed repeatedly that the right to reimbursement is an equitable one.

HOLDING: The measure of compensation for using community funds to enhance the value of a spouse's separate property is generally the increased value of the property due to the improvement; in stances where a spouse's equity has been increased through actual payment of community funds to the payment of debt thereon the measure should be the amount by which the equity is enhanced. *SO... IT SOUNDS LIKE PRINCIPAL ONLY, RIGHT?*

The Court then sent it back to the trial court with the instructions that the maximum recovery that the widow receive is an amount equal to the reduction of principal on the mortgage.

But... taxes and insurance and interest as reasonable rental value?

In this case, the community had use of the property during the decedent's lifetime and "it would not be inequitable to consider payment of taxes and interest a far (sic) expenditure for the use of the premises." *Hanrahan v. Sims*, 20 Ariz.App. at 318, 512 P.2d at 622.

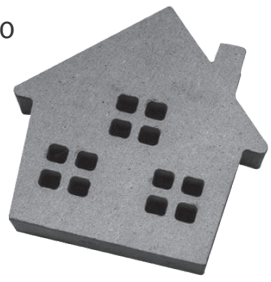
The Court also, very helpfully, noted that the measure of reimbursement when the community expends funds to improve the separate property of one of the spouses is not uniform. The facts of each case will dictate the method of calculating reimbursement.

TESTER V. TESTER, 123 ARIZ. 41, 597 P.2D 194 (1979) (REASONABLE RENTAL VALUE AS OFFSET TO REIMBURSEMENT CLAIMS)

RELEVANT FACTS: Wife had a separate interest in a second home that she and her sister inherited from their mother. During the 11 years between the sisters' inheriting the house and the parties' separation, the parties and their family lived in it for 7 years. They rented it the other four. The mortgage, expenses, and repairs were paid out of community funds and the rents received were deposited in the community checking account. Husband did most of the repairs himself, including building a patio and a new fence.

There were two reimbursement issues: 1) community funds spent on mortgage payments; and 2) reimbursement for the work and money the community expended on repairs and improvements on the house.

HOLDING: Division 2 cited to both *Hanrahan v Sims* and *Lawson v Ridgeway* in its discussion of the community's right to reimbursement when community funds are used to increase one spouse's equity in separate property. In deciding the issue of reimbursement for mortgage payments, the *Tester* court



specifically declined to adopt a reimbursement formula based upon the facts of the case, stating "[w]hether the measure of reimbursement if the amount of community funds expended or the amount by which the value of the separate property has been enhanced need not be answered here." *Tester*, 123 Ariz. at 43, 597 P.2d at 196. The court declined to award any reimbursement for this claim based upon the amount of funds the community benefitted from during the marriage. Here is the math the Court did:

--Evidence of $3,000 in community funds spent on mortgage payments.

--$7,590 from rents deposited into community checking account

--$3,000 of additional separate property of Wife was used for community purposes

These amounts could be used to set off any contribution the community used to the separate property.

Regarding Husband's claim for reimbursement for community labor, *Tester* confirmed that the measure of reimbursement here is the increase in the value of the property due to improvements. *Id.* at 44, 197. The Court declined to award Husband a reimbursement for this claim for a variety of proof-related reasons, but, in doing so, also noted that Husband's claim for reimbursement was an equitable one, and stated that, therefore, "it is appropriate to take into account the fact that the *Tester*s lived in wife's separate property rent-free for seven years...[t]he trial court properly rejected the husband's claim for reimbursement." FL

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article by
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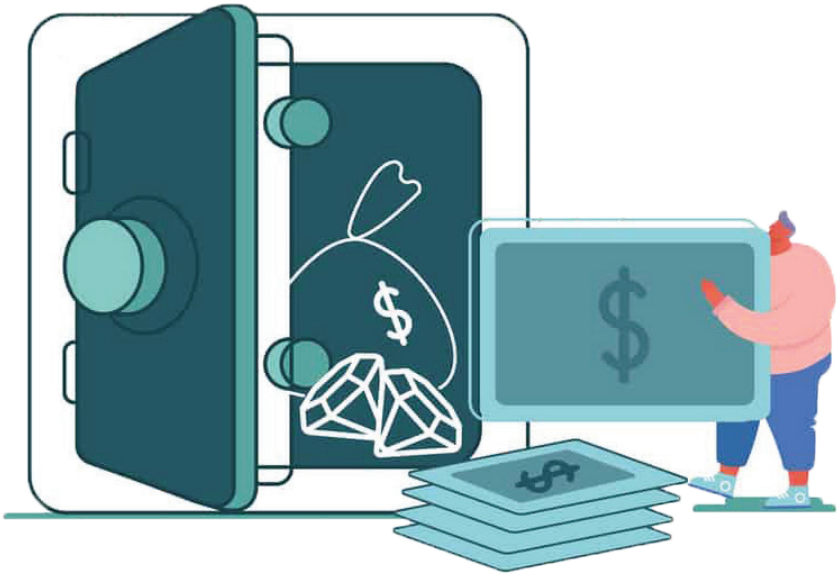
Missing Money?

What's needed for a tracing and why



Divorces are scary in their own right, but fear climbs to a whole new level when one party or the other realizes they don't know everything about their community's financial situation. We've all seen it - accounts emptied, strange transactions, commingled investments, unfiled tax returns, hidden credit cards, and a storm of emotions. For this reason, we'll break down some typical tracing processes, as well as give you insights into the information required to help your client rise above the clouds of confusion.

Let's imagine you have a client with a few financial concerns, we'll call her Nancy.

CONCERN NO. 1

Nancy and her husband—we'll call him Brad—own a community business. Nancy informs you that Brad frequently brags about the personal expenses he runs through the business to keep their taxes low. Nancy knows the mortgage on their second home is reported as rent on the business return, but, other than that, she doesn't know how any other personal expenses are disguised.

The Solution:

A forensic tracing will provide you with the true "economic benefit" Nancy and Brad receive from their

business. Each of Brad's discretionary, non-operating business expenses may benefit the community - whether it be the mortgage on a second home reported as rent, a vacation to Hawaii reported as continuing education, family dinners reported as meals and entertainment, or a new AC unit for the family home reported as repairs and maintenance. These types of expenses, along with any salaries or benefits provided by the business to the community, should be combined with business income to determine the economic benefit the community receives from the business.

BE SURE TO GET:

- ☑ QuickBooks (or similar) file and tax returns for the business
- ☑ Payroll reports for Nancy, Brad and other related parties
- ☑ Business bank statements and copies of canceled checks
- ☑ Statements for credit cards paid down by the business

CONCERN NO. 2

Nancy is worried that Brad may be transferring money from their business to an unknown bank account. Their accountant recently shared the community's tax returns and reviewed the distributions reported on Nancy and Brad's K-1 forms. According to Nancy, the distributions reported each year don't appear to tie to her initial review of their joint bank account.

The Solution:

An asset tracing can tell you where the money went and how much money was involved. Transfers, withdrawals, deposits and more leave a trail to inform you if and when Brad hid the distributions from Nancy. Perhaps the distributions were hidden in a bank account under his name only, or maybe they were gifted to a new sweetheart, or possibly they were invested in other assets not available to Nancy. There's also the chance the trail tells you Brad and Nancy simply spent the money classified as distributions. That is to say, their accountant could have reclassified obvious day-to-day discretionary expenses within the business as distributions. Once traced, the trail can help you determine marital waste or assist you to alleviate your client's concerns.

NON-OPERATING BUSINESS EXPENSES,... ALONG WITH ANY SALARIES OR BENEFITS PROVIDED BY THE BUSINESS TO THE COMMUNITY, SHOULD BE COMBINED WITH BUSINESS INCOME TO *determine the economic benefit the community receives from the business.*

Transfers, withdrawals, deposits and more leave a trail to inform you if and when Brad hid the distributions from Nancy.

BE SURE TO GET:

- ☑ QuickBooks (or similar) file and tax returns for the business
- ☑ Business bank statements and copies of canceled checks
- ☑ Bank statements for accounts held by Nancy and Brad
- ☑ Investment statements for accounts held by Nancy and Brad

CONCERN NO. 3

Nancy recalls that, during their marriage, Brad inherited an investment account from his late father. Since the inheritance, Brad has regularly transferred money from their joint bank account to the investment account. Nancy does not know how much money has been transferred into the investment account. In addition, she does not have access to the investment account.

VARIOUS TRACING METHODS CAN BE EMPLOYED TO HELP YOU DETERMINE SOLE AND SEPARATE PROPERTY VERSUS COMMUNITY PROPERTY. ***However, we recommend the direct tracing method as it meets requirements of Arizona law.***

The Solution:

Various tracing methods can be employed to help you determine sole and separate property versus community property. However, we recommend the direct tracing method as it meets requirements of Arizona law. You'll want a tracing to answer:

- *"What portion of the investment account is community property versus Brad's separate property?"*
- *"Are Brad's inherited investments identifiable such that they maintain their separate property character?"*
- *"Was Brad's inheritance commingled with the*

QuickBooks, business and bank statements, plus inherited and other accounts statements can greatly assist when needing to trace missing money.

community deposits such that the separate property identity was lost?"

A direct tracing can be used to provide the clear, satisfactory and convincing evidence required to apportion the investment account.

BE SURE TO GET:

- ☑ Bank statements for accounts held by Nancy and Brad
- ☑ Investment statements for the account inherited by Brad

Nancy's concerns and emotions are real, and tracing isn't always a one-size-fits-all solution. Examples like this offer an opportunity to review just a few of the tracing processes we typically see in Arizona's family law cases. And no matter which type of tracing fits your case, remember there's certainly more detecting, tracking and unearthing that can be done during the divorce process to bring facts and calm to the situation. FL

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FEED YOUR SOUL

article by
JUDGE MELINDA K. HARDY
and by
JULIE A. LABENZ, ESQ.

How to find balance and joy as a family law attorney continually exposed to other people's trauma and pain

A shift continues to emerge in the legal community - we are finally ***giving ourselves permission to acknowledge the level of trauma and pain we are exposed to*** working in the field of family law.

Interestingly, at this summer's 2022 Judicial Conference, ***powerful discussions unfolded about the family law bench's exposure to trauma and secondary trauma*** and the importance of making self-care and wellness a top priority.

OF COURSE, FAMILY LAW attorneys are in the same boat. Their clients are in the mist of serious and deep trauma which produces chaotic energy that manifests as hurt, anger, and sadness.

Yet, how can family law lawyers and their staff shield themselves from secondary or vicarious trauma? After all, the family law bar and their staff endure prolonged exposure to their clients' traumatic experiences plus juggle all the other stresses inherit in owning/working at a law firm. Stress, however, has many negative consequences, including inflammation, auto immune problems, and immune system challenges. As it turns out, most doctor visits are due to stress-related illnesses.

We've typically learned and understood that a key to good health and wellness is a proper diet. Thus, you may be surprised to learn that the most important health strategy may not necessarily be the food you put in your mouth or your diet, but instead, what "foods" you feed your soul.

In 1964, the *Journal of the American Medical Association*[1] published a report about a study analyzing the Italian immigrant population in Roseto, Pennsylvania. This group of Italian immigrants drew the attention of the medical community when the town doctor reported the Roseto population's near immunity to heart disease. The study found that social support and close family ties within the tight-knit community served to buffer the deleterious effects of stress and life changes that generally lead to heart disease and sudden death.

The 1964 study compared the health statistics of the Roseto population to neighboring towns. During the seven-year study from 1955-1961, the researchers found that no one in Roseto under the age of 47 had died of a heart attack, that there was a complete absence of heart disease in men under the age of 55, the rate of heart attacks in men over 65 was half the national average, and the death rates from all causes were 35% lower than anywhere else. The study confirmed the town doctor's findings and further studies examined the factors that gave the Roseto population such improved health.

Further studies found diet was not the key as these particular Italian immigrants were mostly poor and ate high fat diet (up to 40%) of meatballs and sausages cooked in lard. Furthermore, the people of Roseto did not have a particularly healthy lifestyle as they worked hard in slate quarries or mines in extremely harsh working conditions with high rates of on-site accidents. In their leisure time, they drank wine and smoked cigars. Yet, despite their unhealthy diet and lifestyle choices, the people of Roseto enjoyed extremely low, to no heart disease.

These facts stumped the researcher. They studied possible other factors such as ethnicity, water supply and environment. Yet, in the end, they concluded the unusually low incidence of heart disease could not be attributed to any of those factors. Instead, the researchers observed, while living in Roseto, several major differences in how the Roseto people related to others within their community.

The researchers noted a remarkably close-knit social pattern that was cohesive and mutually supportive with strong family and community ties, and in which the elderly were not marginalized, but revered. The researchers could not help but conclude the low incidence of heart disease in the town was due to their relationship with each other within their close community.

Over time, sadly, the Roseto population become "Americanized" and their close ties started to unravel. The traditionally cohesive family and community relationships eroded, and the Roseto population became insular, separated and less supportive of one another. As these trends emerged, the Roseto population began to experience the mortality rates and heart conditions that those in the surrounding towns and the rest of the United States had been experiencing for decades.

Clearly, strong family and community connections are of upmost importance to leading a healthy, well-balanced life. These connections are "Soul Food" that come in two varieties: Primary and Secondary Food. Primary Food is the food of life, comprised of joy, spirituality, creativity, money, career, education, health, physical activity, home cooking, home environment, relationships and social life.

One way to infuse more satisfaction and happiness into your life with soul food, is to take a personal assessment of the Primary Foods in your life. What could be improved? What's missing from your life? Are you making joy a priority? Once you've completed your Primary Foods Life Assessment, consider shifting your perspective to start living in a way that enhances all of the primary foods in your life. Periodically, re-assess each Primary Food Category (listed above) as it applies to your life to see where you

The researchers noted a remarkably ***close-knit social pattern that was cohesive and mutually supportive with strong family and community ties,*** and in which the elderly were not marginalized, but revered.

are, how far you have come and where you would like to be.

Self-care is paramount and lawyers may not realize it can be easy to incorporate deeply beneficial self-care practices into their daily routines. Here are some simple self-care practices to consider: meditation (i.e., prayer, deep breathing, breathing into the 7 chakras), going outside and grounding by standing barefoot on the earth, relaxing music (sound therapy, tuning forks), body movement (dance, exercise, Tai Chi, yoga), soaking in a hot tub or hot shower, receiving physical touch (massage, tapping), or setting aside time for additional sleep, rest, and doing creative things you enjoy doing.

If you have a specific trauma you would like to clear, consider the following method: cross your arms, alternately tap the outside of your opposite arm, continuously deeply inhale and exhale, and while doing so, talk to a trusted individual about the specific trauma you would like to clear.

Regarding "Secondary Food" this variety of soul food pertains to actual food. Each of us has personal Secondary Food dietary needs and to discover yours, keep a daily journal chronically what you eat, when you eat, how you feel after you eat, and if you identify foods that lower your energy level or cause you physical pain, then consider eliminating foods you find problematic, which may include gluten, dairy, sugar (which feeds cancer) and/or night shade vegetables (tomatoes and peppers). After eliminating potentially problematic foods for a few weeks, you can gradually individually introduce each eliminated food back into your diet, again chronicling what you eat, when, and most importantly, how the food you eat makes you feel (good, brain fog, bloated). Consider thinking of food as fuel rather than just something you do 3 or more times per day. For example, collagen feeds your heart and fascia while blueberries feed your mind and mood.

Although convincing attorneys to engage in self-care may be a big request, consider the results of the study of the people of Roseto, Pennsylvania. The Roseto study is proof that good health involves more than just diet and exercise.

To best serve your clients, you must first serve yourself and your family. Consider investing your hourly rate in yourself each month and encourage loved ones and staff to do the same.

Finally, for those of you seeking more tangible law-based insights, here are three simple ways attorneys can make a family law Judge happier:

Self-care is paramount and lawyers may not realize it can be easy to incorporate deeply beneficial self-care practices into their daily routines.

(1) Make sure your family law pleadings contain the same information as the Forms provided by the Supreme Court of Arizona for parties who represent themselves. These Forms (pleadings, responses, parenting plans, parent's worksheets, and financial affidavits) contains helpful information for us judges for the hearings and finalizing orders/decrees.

(2) Provide Judges with the most current Forms found at the end of the *Arizona Rules of Family Law Procedure.* For example, both Form 13, Order to Appear; Pre-Judgment/Decree and Form 14, Order to Appear Post Judgment/Decree provide more than one type of proceeding option rather than just the proceeding the attorney would like.

(3) Provide Judges proposed Orders with your motions. Draft your proposed Orders to provide us with multiple choice options (this is not bankruptcy court; we like multiple choice orders). It is always nice to get proposed Orders with a blank line for other Orders.

As we settle into the final quarter of 2022, I challenge you to make self-care your top priority. FL

HON. MELINDA K. HARDY, was elected to the Superior Court bench in November 2020. She currently presides over Division II of the Navajo County Superior Court.

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Parenting-Related Decisions

Hustrulid v Stakebake, 1 CA-CV 21-0073 FC (Aug. 4, 2022)

ARS SECTION 25-409(A) DOES NOT ALLOW a third party to seek an award of joint legal decision-making with a legal parent. If a petition under 25-409(A) is not summarily dismissed, the elements under the statute must still be proven at trial.

This case came before the Court of Appeals by virtue of an appeal filed by Hustrulid after his third-party rights petition was dismissed by the trial court. The Court of Appeals lacked jurisdiction to hear the appeal and elected to treat it as a special action.

Hustrulid and Mears had two children. Their parental rights were terminated and, in 2019, Hustrulid's sister, Nicole Stakebake ("Mother") adopted the children. Hustrulid had limited contact with the children while in prison but claims that, once released, he had seen them regularly until Mother cut of all contact in 2020. He petitioned for third-party joint legal decision-making and placement of the children with him (25-409A) or third-party visitation (25-409C). Mother moved to dismiss, which was granted. Hustrulid appealed.

The Court of Appeals first focused on the impact of terminating a parent's rights. They reasoned that once parental rights are terminated, it would seem contrary to ARS Section 8-117 and 8-539 (which divest a parent of all rights) to then turn around and allow that former parent to seek third-party rights under 25-409. That said, a review of 25-409 does not include any preclusion for a former legal parent to seek third-party rights. Had the legislature intended to preclude former parents like Hustrulid from seeking third-party rights after his parental rights were terminated, it would have done so in 25-409. Therefore, Hustrulid was not barred from bringing the action.

Addressing the merits of Hustrulid's claim, the Court of Appeals reaffirmed the reasoning in *Thomas v Thomas*, 203 Ariz. 34, 37 (App. 2002), which held that a court cannot award joint custody (legal decision-making) between a parent and a third party because the nature of a third-party "custody" award is based upon the notion that awarding "custody" to either parent would not be in a child's best interests. Applied to this matter, if Mother was a fit parent, then there would be no basis to award a third party any decision-making rights under 25-409(A). "Either it is in the child's best interest for a legal parent to have custody or it is not. The Court cannot reasonably find that it is in the child's best interest for a legal parent to have custody and that it is also in the child's best interest for a non-legal parent to have custody." *Thomas*. Further, the Court of Appeals found that the same logic applies to the "significant detriment" element of 25-409(A)(2). A third party cannot allege a significant detriment to a child if the child remains with a legal parent while also seeking to be awarded joint legal decision-making with that legal parent.

There is one more issue of note that was addressed. A petition under 25-409(A) is subject to an initial review by the trial court. The Court must determine whether the allegations in the petition, if true, establish the elements that a petitioning party must prove in order to seek third-party rights. If it does not, then the petition must be summarily denied. But the question raised is: what is the impact of finding that the petition, if true, establishes the 25-409(A) elements? In answering this question, the Court of Appeals addressed another decision – *Chapman v Hopkins*, 243 Ariz. 236 (App. 2017) – and some confusion that may have arisen therefrom. To ensure that there was not a misapplication of *Chapman*, the Court of Appeals made it clear that an initial finding that a petition passes the first review required under 25-409(A) does NOT mean that any of those elements are deemed established for the contested hearing. Rather, after the trial court hears the evidence, it "then must decide whether the petitioner has proved the 25-409(A) elements." The petitioning party cannot rely upon the fact that the trial court did not summarily deny the petition at the start as somehow being a finding that all of the elements under 25-409(A) have been established.

Child Support

Brucklier v. Brucklier, 1 CA-CV 21-0106 FC (Aug. 25, 2022)

REIMBURSEMENT CLAIMS for Over- or Under-Payment of Temporary Child Support Should be Addressed at Time of Decree. [this case is also addressed in the property section].

During the divorce proceedings, the court entered temporary child support orders. At trial, the court entered the final child support award, and it was made retroactive to the date of filing of the petition. This resulted in a few months of underpayment by Father and many more months of overpayment, netting an overall overpayment of about $2,400. Father asked the trial court for an offset for the overpayment and his claim was rejected, with the trial court reasoning that it could not address any alleged overpayment until the support obligation terminated when the child reached majority.

THE COURT OF APPEALS PROVIDED CLEAR DELINEATION ON THIS ISSUE. It is accurate that overpayment credits cannot be addressed until the support order terminates by operation of law, such as attaining the age of majority, the same is not true for temporary support orders. When the court enters temporary child support pending entry of the decree, any claim for over or under payment arising from the temporary orders must be accounted for at the time of entry of the decree. ARS Section 25-315(F)(1) supports this, noting that the temporary order does not prejudice the rights of a party to later adjudicate the child support amount at subsequent hearings. The trial court should have accounted for Father's overpayment of temporary support at the time of the decree.

Hoobler v Hoobler, 1 CA-CV 21-0331 FC (Oct. 6, 2022)

OVERTIME INCOME may be included for child support calculation purposes if historically earned and will continue into the future. (see also summary in Property and Debt Section)

Parties were married in 1995 and had three children, one of whom was a minor at the time of the divorce action. Father was a police officer and had substantial overtime and off-duty additional income. The trial court attributed to Father income greater than his base pay in calculating child support, but in an amount that was $4,000 less per month than what Mother had asserted. Husband appealed.

The Court of Appeals cited to the decision in *McNutt v McNutt*, 203 Ariz. 28, 32 (App. 2002), stating that voluntary overtime is excepted from the calculation to give a parent the choice to work more hours "without exposing that parent to the 'treadmill' effect of an ever-increasing child support obligation." This principle is part of the child support guidelines (see section II(A)

(3)(B) of the 2022 Guidelines). The Court of Appeals affirmed the inclusion of some of Husband's overtime pay in the child support calculation. They reasoned that there was historic overtime earning information and that the trial court was within its discretion when it found that the overtime income would likely continue into the future. If Father in the future actually stops working the overtime hours, he could move for a prospective modification of the award.

Property and Debts

Brucklier v. Brucklier, 1 CA-CV 21-0106 FC (Aug. 25, 2022)

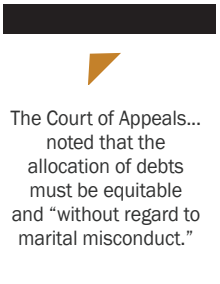
ACQUISITION OF AN EQUITABLE (but not legal) interest in property before marriage maintains the sole and separate nature of the property.

The failure to file taxes in the best net fashion for the community does not result in assigning all of the excess tax to the party who decided to file in that fashion. [this case is also addressed in the child support section]

Father was the sole member of an LLC that invested in real estate. He entered into a contract to purchase a residential investment property ("Falcon Ridge") before the marriage but did not acquire title in the name of the LLC that he owned before marriage until after the date of marriage in 2005. In 2018, Mother filed for divorce. At trial, the court found that community funds had been commingled into separate funds of the LLC account and found that all of the assets of the LLC, including the Falcon Ridge property, were community. The property was ordered to be sold and proceeds divided between parties subject to some offsets. Father appealed.

The Court of Appeals held that the LLC was formed before marriage, thereby rendering it Father's sole and separate property. Further, Father entered into the purchase agreement for Falcon Ridge before the date of marriage and paid $50,000 in earnest money from sole and separate funds. Father then paid for much of the purchase price from the sale of two other properties the LLC owned before the marriage, along with taking out a loan in his name only. From this, the Court of Appeals concluded that the LLC and the Falcon Ridge property were Father's sole and separate property. When he contracted for and paid the $50,000 earnest money before the date of marriage, the Court of Appeals concluded that Father had obtained an equitable interest in Falcon Ridge. The fact that his "equitable interest did not mature into a title to Falcon Ridge until after the marriage does not alter that he acquired the property before marriage," thereby rendering the property to be his sole and separate property. Any claim that the community may have therein would be through an equitable lien, not as a property owner. The extent of any community lien was remanded back to the trial court for determination.

There is also a tax issue addressed in this opinion. Father filed a separate income tax return for 2017. Mother asserted and the trial court found that this decision caused there to be a greater tax liability than there would have been had the parties filed jointly. As such, Father's request to be reimbursed for the excess taxes he paid was denied by the trial court. The Court of Appeals found this to be error, noting that the allocation of debts must be equitable and "without regard to marital misconduct." Here, the trial court acted in a punitive fashion for the fact that Father decided to file his returns in a more costly fashion. The Court of Appeals concluded that the trial court did not have the authority to do this.



Saba v. Khoury, CV 21-0023-PR (Sept. 14, 2022) - Az Supreme Court

IN DETERMINING THE AMOUNT of the marital community's interest in sole and separate property (equitable lien), the court is to start the analysis using the *Drahos/Barnett* formula.

NOTE: This is a long-awaited Opinion that addresses the disparate approaches for valuing an equitable lien claim of the community against separate property, as

espoused by Division One of the Arizona Court of Appeals in its holding in Saba [250 Ariz. 492 (App. 2021)] versus the decision in *Femiano v Maust* [248 Ariz. 612 (App. 2020)].

Husband and Wife were married in 2009. In 2010, they purchased two properties, one using community funds for the down payment and the other using both community and Wife's separate funds for the purchase. Both properties were placed in Wife's name only. A divorce action was filed in 2017 and, at trial, Husband made a claim for his share of the community's equitable lien. The trial court applied the *Drahos/Barnett* formula and held that the community was entitled to approximately 20% of the appreciation in one property and approximately 15% of the appreciation in the other. Husband appealed, claiming the community was entitled to all market-based appreciation proportionate to the funds contributed by the community. And since the community paid for one property using only community funds, he argued that the community was entitled to 100% of the appreciation, consistent with the holding on *Femiano*. The Court of Appeals disagreed with the reasoning in *Femiano* and affirmed the trial court's holding. Husband then filed his petition for review before the Arizona Supreme Court.

The trial court applied the *Drahos/Barnett* formula and held that the community was entitled to approximately 20% of the appreciation in one property and approximately 15% of the appreciation in the other.

The Supreme Court provides a detailed history of the evolution of equitable lien claims of the community against sole and separate property. The Court acknowledged that there is difficulty in determining whether and to what extent appreciation in value during the marriage is attributable to community contributions versus other causes, such as market appreciation. Citing the lead case on equitable liens [*Cockrill v Cockrill*, 124 Ariz. 50 (1979)], "increases in separate property's value during the marriage are presumed to be the result of the community's contributions, absent clear and convincing evidence." *Id.* at 52. However, the *Cockrill* court went on to say that "seldom will the ... increase in value of separate property during marriage be exclusively the product of the community's effort or exclusively the product of the inherent nature of the separate property." *Id.* at page 53.

Since *Cockrill* was handed down, there have been cases that have assisted in how the community's value of its equitable lien is to be determined. The *Drahos v Ren* case (149 Ariz. 248 (App. 1985)) has been acknowledged to be one method for making this determination. The *Drahos* formula in C + (C/B x A), where "A" is the appreciation in the separate property's value during marriage, "B" is the appraised value of the separate value as of the date of marriage, and "C" is the community's contribution to principal. And while this formula has been routinely applied ever since, the Supreme Court had "...never opined on the use of the *Drahos/Barnett* formula, its application, or whether the community is entitled to a share of the equity even where the community contribution did not actually enhance its value." Now, the Supreme Court has held that the *Drahos/Barnett* formula **"...is an appropriate starting point for courts to calculate a martial community's equitable lien on a spouse's separate property for property that appreciates in value."** (Footnote 3 makes it clear that the issue of what to do when the separate property depreciates in value was not before the court.)

The words "starting point" are critical. The Supreme Court makes it clear that they are not mandating that courts apply the formula in all cases, writing that "...the uniqueness of each circumstance cuts against strict adherence to any one formula." Rather, the formula "...is a baseline from which courts can evaluate whether the facts of a specific case warrant a modification of or departure from the formula. If the equities do warrant such a departure, the trial court may measure the lien using a different method, but only if the equitable lien amount reflects - at a minimum - the amount of the community contribution and a division of equity reflecting the increase in value due to the community contribution consistent with a market rate of return on that contribution." **They remind us that *"the object is a fair reimbursement of community funds, not an equitable division of property."***

Hoobler v Hoobler, 1 CA-CV 21-0331 FC (Oct. 6, 2022)

WHILE THERE ARE TWO PRIMARY METHODS for dividing retirement assets ("present cash value" versus "reserved jurisdiction" formulaic approach), the trial court has discretion in using a method that best results

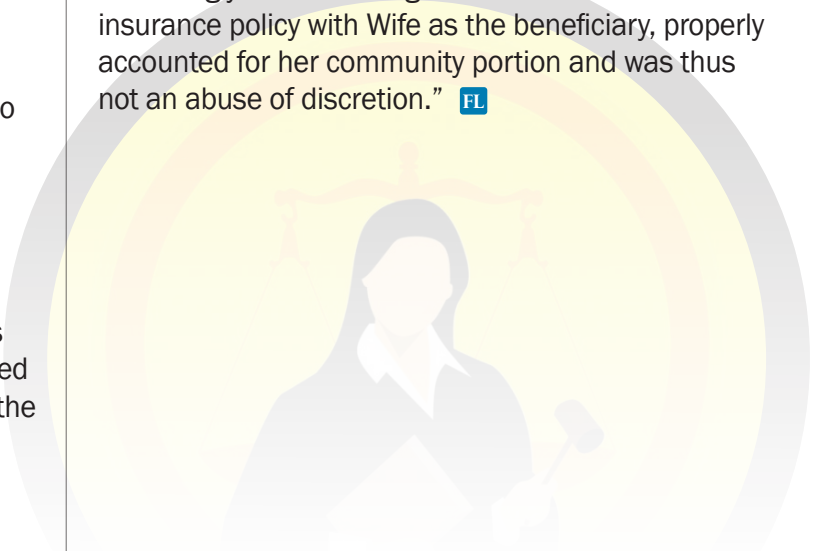
in an equitable division. (see also summary in Child Support Section)

Parties were married for approximately 25 years, during which time Husband worked as a police officer and accumulated significant retirement benefits. Following trial, the court held that starting in April 2024, Wife would be entitled to $7,800 per month as her share of the retirement plus $300,000 for her community interest in Husband's DROP Plan. Further, the trial court required Husband to maintain Wife as the death beneficiary of the DROP account. As part of its reasoning, the court noted that the death benefits would otherwise cease upon entry of the final decree. To "mitigate" this risk for Wife, the court considered its option of awarding Wife a lump sum present value of the plan. That amount, estimated to be $1.4 million, would result in Husband having nothing with which to move forward financially. The other option would be the employing a formulaic approach to the future benefits. The concern there is that this method for division is usually employed when the division could not occur at the present time. The trial court adopted a "hybrid" approach, and ordered that Husband maintain a $1,000,000 life insurance policy naming Wife as the owner and with the parties sharing the premium costs for the first 5 of the 10-year term policy.

THE COURT OF APPEALS OPINION reviewed the options for dividing retirement accounts; two methods for division were discussed. The first is the present cash-value method, which allows the court to award a lump-sum in exchange for the future payment stream. This "allows the employee spouse to take interest in the pension free and clear of community ties." See *Johnson v Johnson*, 131 Ariz. 38 (1981). This is preferred if the present value can be accurately determined and if there are sufficient marital estate assets to satisfy the non-employee spouse's claim without undue hardship to the employee spouse.

The second method is the reserve jurisdiction method. Using this method, the court determines the community interest through a formula but delays the actual division one the payments are received, "if, as, and when." This is the preferred method when the benefit has not yet matured and is not immediately payable. See *Koelsch v Koelsch*, 148 Ariz. 176, 183 (1986).

Here, the Court of Appeals affirmed the trial court's adopted "hybrid" approach. The appellate court reasoned that "The court did not abuse its discretion in developing a hybrid method of distributing the retirement accounts. The present cash-value method applies here because Husband's DROP is vested and mature: he has an unconditional right to immediate payment if he decided to retire earlier than 2024. The court considered the risk of Husband's premature death, which would divest Wife of her pension benefits. See A.R.S. § 38– 846(B); *Koelsch*, 148 Ariz. at 182. Wife's expert testified that the present value of the pension was $2,699,336 as of February 4, 2020, and, with the amount in the DROP account, her interest would be roughly $1.4 million. However, the community could not sustain a lump-sum award of Wife's interest without causing an undue hardship to Husband. The court further reasoned that in applying the present cash-value method, the court is not limited to awarding the divided assets as a lump sum but may use payment alternatives, "the choice of which depends on the equities of the individual case." *Koelsch*, 148 Ariz. at 185. The court's use of a "hybrid" approach, awarding Wife the entire Nationwide 457(b) and 401(k) accounts - reducing the PSPRS pension and DROP accordingly - and ordering Husband to obtain a life insurance policy with Wife as the beneficiary, properly accounted for her community portion and was thus not an abuse of discretion." FL



IMPORTANT DATES

November 1, 2022	**Family Law Firsts Part 4: UCCJEA**
November 17, 2022	**Advanced Family Law CLE (Tucson)**
Jan. 20-22, 2023	**AzAFCC Sedona**
Jan. 25-27, 2023	**2023 Family Law Institute (Virtual)**
June 14-16, 2023	**State Bar Convention (Family Law Day)**
July 9-12, 2023	**CLE by the Sea**
August, 2023	**The Trial Colleges**

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

… If so, the deadline for submissions is January 13, 2023.

Would you like to…

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

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

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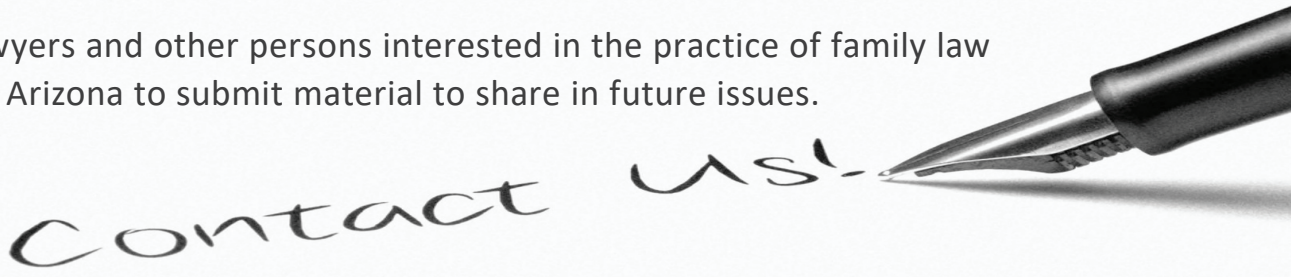
We invite lawyers and other persons interested in the practice of family law in Arizona to submit material to share in future issues.



We reserve the right to edit submissions for clarity and length and the right to publish or not publish submissions. Views or opinions expressed in the articles are those of the author. The Council invites those with differing views and opinions to submit articles for the newsletter. Thank you from the Family Law Executive Council and the State Bar of Arizona.