Handling the Divorce Case From Start to Finish

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Presenters

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LEONCE A. RICHARD III is a partner at Dickinson Wright PLLC. Mr. Richard has been a certified specialist in family law since 2002 and has served as a pro tem judge and mediator in family law for the Maricopa County Superior Court. His practice focuses almost exclusively on handling complex family law/domestic relations matters of all types, including divorce, legal separation, annulments, paternity, child custody and visitation; various post-divorce matters, such as modification and enforcement of child custody/visitation, modification and enforcement of child support and spousal maintenance; enforcement of judgments and decrees; and relocation of children. Mr. Richard is a fellow of the American Academy of Matrimonial Lawyers. He earned his B.A. degree, high distinction, from the University of Arizona and his J.D. degree, with distinction, from the University of Arizona College of Law.

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Submitted by Stephen Vincent

Client Intake and Motions in Divorce

Written by Robert Hendricks, David P. Uffens and Stephen Vincent
Presented by David P. Uffens and Stephen Vincent

A. Handling the Client Interview

1. Interviewing and Screening Clients

As one can imagine, handling potential new clients is an essential part of any successful law firm. When interviewing clients, it is important to develop a process that will provide for a successful relationship between the firm and the client. We believe that our firm benefits from having a system in place. We have developed our system over the past twelve years. It might or might not work for your firm. Please utilize any of our ideas or forms. We provide several ways for a person to initially contact our firm:

- **Webform**. Potential new clients can fill out a Webform on our Web site, www.bestlawaz.com, to request a phone call or meeting. Clients tend to use this form most on the weekends or after hours. The form requests the Potential Client's full name, phone number, email, and type of family law issue. The Web form also allows for the PNC to type a brief message (character limits).

- **Phone Call**. A potential client may call the firm and request to speak to an attorney. Our firm utilizes a virtual reception service to answer our phone calls. The client first speaks to the receptionist, who gathers information such as the client's name, contact information, and opposing party's name. The phone call is then transferred to our client intake attorney or the receptionist will take a message and the call is returned that same day if possible. This enables our firm to run a conflict check before connecting the caller with one of our intake attorneys.

- **Voicemail**. Potential clients often call after business hours. They will leave a message. We return these voicemails the next business day.

- **Email**. Some prospective clients email or call our attorneys directly; either because they are a former client or they were personally referred to our firm.

2. Initial Phone Call with Potential New Clients

When to Call. Our philosophy is to speak with potential clients as soon as possible—but no later than one business day. We have found that when a potential client calls us, they are frequently calling other firms as well. In our experience, they are most likely to schedule a consultation with the firm who reaches them first.

If someone contacts us during the business day, we try to contact them within an hour of their inquiry. If someone contacts us after business hours, we call them first thing the next business day

following their initial contact. After 5 p.m., we call anyone who did not answer the first time we called. We have found that most people are available after 5 p.m.

Who to Call. We generally return all phone calls. One of our attorneys tells the story of when he was planning his wedding. His father-in-law was going to spend tens of thousands of dollars on the wedding. He called six wedding venues; only one called back. That is, of course, the venue that he hired. It is just good customer service to return phone calls.

We want anyone who calls our firm to have a positive experience with our firm. So, in the event someone calls and asks for advice on a non-family law matter, we will still call them back. When they call about a matter that is not family law, we will explain to them that we can't help them with that issue, and if we know of an attorney who can help them, we will refer them.

What to Do First. Our first task is to run a conflict check. This is critical and must be done prior to gathering additional information and especially before giving them anything that can be constituted as legal advice. Ideally, we will have the opposing party's information prior to the phone call so that we can run the conflict check before we call. If it has not been provided, we first ask the prospective client for the opposing party's name and conduct the conflict check at that time.

Some PNCs are hesitant to provide names right away but assuring them the necessity is to run a conflict check under the ethical rules most often resolves that issue. We have experienced instances where the prospective client either would not or could not provide the opposing party's name. In those instances, we politely inform them that we will be unable to speak to them because we cannot run a conflict check.

What to Say on the Phone Call. Once again, our goal is for the caller to have a positive interaction with our firm. We want to build a connection and schedule an office consultation, but we also want the person to feel good about this first contact with our firm. We try to be friendly and kind.

The tricky part is that every person is different. Some want to talk; others want to schedule a consultation and get on with their day. Much of what happens on the call is going to be driven by how we read the person on the phone. It is important to be attuned to their needs and personality. It is important to listen and, where appropriate, to be sympathetic.

Our initial phone call is not a consultation, but we believe it is helpful to let someone talk for a few minutes, if that is what they need to do. We want them to feel heard. But we do not obtain enough information in a short call to give them legal advice. We also make sure to emphasize that this initial phone call does not establish an attorney client relationship. For example, a caller may want to know if the Court will let her relocate with her children. That is a fact-intensive analysis and cannot be answered in a few minutes. We take notes and ask questions. We are looking to identify several pieces of information:

- What type of case is it? (Typical cases include divorces, establishments for unmarried parents, modifications, relocations, and third-party cases).

- Where do the parties and/or their children reside?

- Has anything been filed? If so, what has been filed, and is anything pending?

- What outcome is most important to them?

We advise the caller what to expect at their initial consultation and we charge a reduced rate to meet with one of our attorneys for a consultation. The goal is to schedule a consultation, usually in person, but we can also do it over the phone or on FaceTime, or Skype.

When Someone Else Answers the Prospective Client's Phone. If we call a PNC and a person who might be their spouse answers, we find it is best to end the call quickly without identifying ourselves or the purpose of the call.

When They Don't Answer. We try to be very cautious in leaving a voicemail. We do not want the potential client's spouse to inadvertently learn that they are getting divorced from an answering machine. We only leave a message if the voicemail identifies the prospective client by name and does not identify anyone else. In those instances, we feel confident that we are reaching the prospective client's personal number and not a family phone. If we do not reach them, we send them an e-mail, (if they provided their e-mail address) letting them know they can call us to schedule a consultation.

When They Do Not Schedule a Consult. We do not pressure anyone into scheduling a paid consultation with us. It is the client's choice whether to schedule a consult. If they are interested but don't schedule a consultation, we will follow up with them via e-mail after a few days to remind them that we are available to schedule a consultation.

When They Schedule a Consultation. When they schedule a consultation, we record it on the firm calendar, and we send them email and text reminders. Within minutes of scheduling a consult, we send them the e-mail that contains their confirmed appointment time and directions to our firm.

3. Conducting the Consultation

We follow a 20/20/20 consult structure. Our consults are broken into three different segments: Information gathering, potential strategies, and representation options. This is our general rule, but these are adjusted to the needs of a client. The most important aspect to conducting the consultation that needs be considered: Building rapport and trust.

Information Gathering. During the information gathering phase, we let the client do most of the talking. We want the client to feel heard. But we also believe that we cannot provide sound advice until we have sufficient information. We look at this as a time to gather information and build a connection with the client, understand their motivations, and define their objectives. Generally,

this is not a time for legal advice, it's our time to listen. We can guide this conversation with questions. We want to identify what is most important to the client.

Representation Options. We want every prospective client to leave the consultation with a positive experience and to be aware of what options exist. We also want to ensure that the client has every question answered. This is the time for the client to ask questions and for us to explain to them what options are available. We provide these choices.

- **Legal Consultation or "Coaching":** This an ongoing consultation option for people who are representing themselves. Whenever they need help navigating a particular issue or motion or hearing in their case, they call us and set an appointment. These are charged at our standard hourly rates.

- **Document Preparation**: This is preparing a Court document on a limited scope flat fee basis, which is filed by client as a *pro per*.

- **Limited Scope Representation:** Hire an attorney to represent the client at a specific hearing or trial with a detailed limited scope fee agreement. This agreement explicitly outlines what we will do and what we won't do.

- **Full Retainer**: Pay an advanced fee (also known as a retainer), and have full access to the firm's attorneys and staff, billed by the hour from beginning to end.

Alternatives to Divorce. Sometimes, clients will come seeking a divorce not because they want their marriage to end but because their spouse is making poor choices that could harm them financially. Common examples of this include a spouse with a drinking problem who insists on driving drunk or a spouse who is accumulating significant debt. Frequently, they seek a divorce because they believe divorce is the only option that protects them financially. But there are two alternatives that you can discuss in such a situation: Legal separation or post-nuptial agreement.

- **Legal Separation.** Legal separation is like a divorce in that it severs the community, divides the property, and determines spousal maintenance and child custody. The difference, though, is the parties are still married when the legal separation litigation ends. You should advise your client that a Petition for Legal Separation is often converted to a Petition for Dissolution by the other party at a later date.

- **Post-Nuptial Agreement.** Like a prenup, a post-nuptial agreement is a way for the parties to agree to avoid the community property laws and divide debts and assets in community property states. This may help one spouse escape liability for the other spouse's actions, though the terms would likely only be enforceable through indemnification.

Building Rapport and Trust. An important goal of any consultation should be to build rapport, trust, and to demonstrate competence. To this end, attorneys need to listen, express understanding, and show sympathy. They also need to be genuine. The abilities to listen and connect with others are important skills that attorneys should work to develop. The client should do most of the talking during the first part of the consult, and attorneys should do more listening than advising at first.

Toward the end of the consultation, the attorneys should control the conversation and be explaining a strategy.

When clients feel like their attorney listened to them and understood their concerns and developed a competent strategy to help them achieve their goals, the clients are not only more likely to sign up, they are more likely to trust in the attorney. This helps set the foundation for the client and attorney have a harmonious relationship during litigation.

B. Developing Comprehensive Intake Forms

An intake form helps attorneys have the information they need from the client to both conduct the consultation and represent the client. These are two very different functions. The information need to consult with a potential client is far less than the information needed to represent a client. For example, you don't need to know the opposing party's address and other contact information to conduct a consultation. You will need it in representation to prepare a petition or include on a mailing certificate.

While all attorneys presumably will gather the same types of information from their clients, they way that information is organized varies. Each firm should develop an intake form that works for their needs.

What we share here is what has worked for us. While you are free to borrow from us, you should develop your own materials to suit your needs. Some considerations when developing an intake form:

- What information do you need to conduct a consult?
- What information do you need to represent a client?
- Do you want to gather all that information prior to the consultation or do you want to adopt a two-form approach, i.e., a form for the consult and a second form for representation?
- If you were in the client's shoes, would you feel comfortable disclosing this information to an attorney prior to having met with an attorney?
- What information do you need that a client might feel uncomfortable disclosing in an initial intake?

C. Managing Client Expectations

Every attorney will experience a client relationship that gets heated and acrimonious. Sometimes, this will occur through no fault of the attorney—some clients are just difficult. (To that end, beware of clients who are habitually hiring and firing attorneys; it is one thing to be someone's second attorney, it's another to be their third, fourth, or fifth attorney. You should also be wary of anyone who mentions they want to file a bar complaint against their previous attorney). Other times, the attorney plays a role in the demise of the relationship. Most commonly, attorney-client relationships sour when a client has unrealistic expectations or if the process and costs are not clearly explained. A skilled attorney helps his or her client manage their expectations.

1. Managing Expectations Re: Cost

Divorce litigation is expensive. It is one of the bigger expenses many people will take on during their lifetimes. The cost of divorce litigation varies greatly. A case where the parties come to quick agreements obviously costs a fraction of a drawn-out divorce where the parties fight about everything from the children to the kitchen sink. Here are some tips for controlling clients' expectations regarding costs:

- **Detailed explanation of the billing process.** For many clients, the first time they have hired an attorney is when they hire a divorce attorney, and they do not understand how an attorney bills. For example, some clients do not understand that emails and phone calls are part of their bill. We like to spend a few minutes in our consults explaining how we bill and warning of areas, like phone calls and emails, where a client can unwittingly incur fees. We also send them a billing packet after they retain explaining what they can do to curtail their costs. We also advise them on how to address any questions or concerns about their invoices. Investing time up front to educate clients about billing practices protects your relationship with your client and protects you from having your time taken up by billing disputes.

- **Explain the costs of major events.** Attorneys know from experience how much a trial, mediation, or a deposition cost. This information must be shared with the client. The client should have ample information to make the decision of whether to pursue an agreement or move forward with costly litigation.

2. Managing Expectations Re: Outcomes

Clients often have unrealistic expectations. You may hear something like, "I want full custody because I have a better job than he does", or "She should not get anything from the divorce because I earned all the money." When a clients' opinions are divorced from reality, attorneys should not indulge the client's unrealistic expectations.

In trying to make the sale, many lawyers overpromise and then underdeliver in representation. These lawyers' clients leave largely unsatisfied with their lawyer and are unlikely to refer friends and family to that lawyer. The better approach is to honestly discuss the potential outcomes and risks in litigation. Clients should have ample information to understand potential and likely outcomes in deciding what to pursue in litigation. For example, if a client understands that equal parenting time is a likely outcome in litigation, they hopefully will not choose a litigation strategy that will cost them tens of thousands of dollars to reach the same result.

3. Managing Expectations Re: Time

Many clients want to be divorced *right now*. That is not, of course, how it works. Attorneys need to explain to clients how long the process takes. We explain that the earliest a person can get divorced is sixty (60) days after the Petition for Dissolution is filed *and served* on the other party, and that trials can be as much as nine months or a year in the future—or even longer if the divorce becomes heavily litigated. While we don't have a crystal ball to anticipate any case's future

timeline, you can help as experienced counsel by explaining the process and the general timelines associated with matters like theirs.

4. Managing Expectations Re: Treatment of Others

Frequently, we get a potential new client who asks us to mistreat their spouse and/or their counsel under the guise of being aggressive. They want to make them hurt. But being harsh or rude to the other party is not a good legal strategy. When a potential client expresses that they want you to make the other party suffer, an attorney should explain that such treatment does not help them or their case and it may even leave them vulnerable to an award of attorney's fees. Moreover, an attorney should set the boundary that the attorney will act professionally at all times. When clients cannot let go of that desire to harm the other side through litigation, that is a sign to not take on that client's case.

Similarly, clients need to be aware of how their treatment of their spouse may affect their case. Some clients blithely text insults to their spouse or send emails disparaging their spouse's role as a parent. Some clients scream at—or even attack—their spouse. We warn clients that a divorce is a time for a person's best behavior, not their worst. And that everything they write or say to their spouse are likely to show up in an exhibit at trial.

5. Managing Expectations Re: Litigation Events

Clients do not intuitively know what is happening in litigation. Attorneys do. The better your client understands the process, the less likely they are to project their anger and frustration at you. For example, many litigants think the Resolution Management Conference (RMC), which is often the first Court hearing, is *the* trial, and their case will be over at that day. We explain to them that the RMC is basically a meet-and-greet with the judge where the parties discuss what each of them wants out of litigation, and the judge tries to see what agreements can be reached or what assistance the Court can provide in helping the parties reach agreements. Taking the time to explain these litigation events prevents clients from being unduly upset when their case is still going after the RMC. We have found that when we have these conversations with clients beforehand, the client better regulates their emotions in the event their Motion is denied because they were advised that was a likely outcome. This has guarded against embarrassing courthouse hallway meltdowns by our clients.

D. Determining Jurisdiction

1. Components of Jurisdiction

- **Personal Jurisdiction.** ***Int'l Shoe Co. v. Washington*****,** 326 U.S. 310 (1945).
    - Minimum contacts
    - **When challenged?** Immediately. **ARFLP Rule 32(B)(2)** requires personal jurisdiction to be raised in Motion to Dismiss.

    - **Special Appearance:** means you appear specially to challenge jurisdiction. A general appearance will waive a personal jurisdiction challenge. ***Shah v. Varkwala***, 244 Ariz. 201, 418 P.3d (App. 2018).
- **Subject Matter Jurisdiction.** A Court's Constitutional and statutory authority to hear a case. ***State v. Maldonado***, 223 Ariz. 309, 223 P.3d 653 (2010).
    - **When Challenged?** At any time during the proceedings. ***Gnatkiv v. Machkur,*** 239 Ariz. 486, 372 P.3d 1010 (App. 2016)
- **Venue.** A court may dismiss case where another court is much better suited to hear the case.
    - **When Challenged?** Immediately. ARFLP Rule 32(B)(4) requires personal jurisdiction to be raised in Motion to Dismiss.
        - ***Sierra Tucson v. Lee***, 230 Ariz. 255, 282 P. 3d 1275. Before the time for filing an Answer is expired, the defendant must file an affidavit establishing why venue is not proper, identifying the proper venue, and requesting the case be transferred accordingly.

2. Jurisdiction for Divorce

Divorce jurisdiction has three components:

- **Dissolution of Marriage:** One of the parties resided in Arizona for ninety (90) days. A.R.S. § 25-312
- **Child Custody:** Arizona is the home state of the child, i.e., Arizona is the last state in which the child resided for six (6) consecutive months. A.R.S § 25-1002; A.R.S. § 25-1031.
- **Division of Property/Child Support:** Personal Jurisdiction. A.R.S. § 25-1221.

Bifurcated Divorce: Where two states handle different aspects of the divorce, e.g. one state may dissolve the marriage, and the other state may divide the property.

Key cases

- ***Taylor v. Jarrett***, 191 Ariz. 550, 959 P.2d 807 (App. 1998). A parent may participate in a child custody in Arizona without exposing themselves to personal jurisdiction over the division of property.
- ***In re Marriage of Peck***, 242 Ariz. 345, 395 P.3d 734 (App. 2017). Arizona did not have personal jurisdiction over Wife to divide the marital estate but may dissolve the marriage.

3. Jurisdiction for child custody under the UCCJEA.

- **Which state makes the initial determination?** The home state or the state that was the home state within six months before the commencement of the proceeding. A.R.S. § 25-1031(A).
- **What is the home state?**

    - The state where the child lived with a parent or person acting as a parent for six consecutive months immediately before the commencement of the proceeding. A.R.S. § 25-1002(7)(a)
    - **Law for children under six months:** "[T]he state in which the child lived from birth with a parent or person acting as a parent." A.R.S. §25-1002(7)(b).
- **Which state has continuing, exclusive jurisdiction?** The state that made the initial determination. A.R.S. § 25-1032(A).
- **When does a state lose continuing, exclusive jurisdiction?** When it declines to exercise jurisdiction or a court of the initial state or another state determines the children and parents no longer reside in the state. A.R.S. § 25-1032(A).
- **When would a state decline jurisdiction?** When it finds that it would be an "inconvenient forum." A.R.S. § 25-1037(A). *See also* A.R.S. § 25-1037(B) (listing the inconvenient forum factors).
- **What if a person acting as a parent continues to reside in the state that has continuing, exclusive jurisdiction?** Then that state may continue to exercise continuing, exclusive jurisdiction. A.R.S. § 25-1032(A).
- **After the initial state loses jurisdiction, which state can take it?** The new home state. A.R.S. § 25-1032(B).
- **If another state does not have continuing, exclusive jurisdiction, is there anything Arizona can do?** Yes, it can enforce the other state's order.
- **Can a state modify custody if it does not have continuing, exclusive jurisdiction?** No. A.R.S. § 25-1033.
- **When can a state take temporary emergency jurisdiction?** When the child is in the state. A.R.S. § 25-1034.
- **What if someone obtained jurisdiction through questionable conduct?** The state has the option of not exercising jurisdiction. A.R.S. § 25-1038.
- **What if there is a juvenile proceeding happening at the same time as the divorce?** If the juvenile proceeding is a dependency proceeding, the juvenile court has jurisdiction over the children. **ARFLP Rule 5.1(a).**

Key Cases

- ***Welch-Doden v. Roberts,*** 202 Ariz. 201, 42 P.3d 1166 (App. 2002)**.** A Court can look beyond six months to determine which state is the home state. Best interests and "first in time" do not trump the UCCJEA.
- ***Gutierrez v. Fox,*** 242 Ariz. 259, 394 P.3d 1096 (App. 2017): When child under six months resided from birth with a parent, and the proceeding is commenced by a parent still living in Arizona within six months of the child leaving Arizona, Arizona remains the home state of the child.
- ***Mangan v. Mangan,*** 227 Ariz. 346, 258 P.3d 164 (App. 2011). Arizona, which entered the Decree of Dissolution, retained jurisdiction after Mother moved with the children to New Mexico because Father remained in Arizona.
- ***Prouty v. Hughes***, 246 Ariz. 36, 433 P.3d 1196 (App. 2018). Arizona may modify a foreign custody order even if the order is not properly registered in Arizona.

4. Jurisdiction for Child Support

- **Which state can make the initial determination?** The state with personal jurisdiction.
- **When can the state exercise jurisdiction over a non-resident?** By example and without limitation when any of the following are true:
    - Individual is served in Arizona.
    - Individual submits to Arizona's jurisdiction.
    - Individual resided with child in Arizona.
    - Individual resided in Arizona and provided prenatal expenses or support for the child.
    - Child resides in Arizona as a result of acts or directives of the individual.
    - Individual had sex in Arizona that may have resulted in the child being born in Arizona.
    - Individual asserted parentage of the child on an Arizona birth certificate.
    - Any other basis consistent with the Arizona and federal Constitutions for exercise of personal jurisdiction. A.R.S § 25-1221(A).
- **How long does personal jurisdiction last?**
    - It lasts as long as Arizona has continuing, exclusive jurisdiction. A.R.S. § 25-1222.
- **Which state has continuing, exclusive jurisdiction to modify child support?**
    - The state where obligor, obligee, or child resides. A.R.S. § 25-1225; or
    - The state the parties consent to modifying child support. A.R.S. § 25-1225.

Key Cases

- ***State ex rel. Dept. of Econ. Sec v. Tazioli*****,** 226 Ariz. 293, 246 P.3d 944 (App. 2011). Arizona issued the original child support order. Subsequently, the parties and the child resided in another state, and where Father consented to exercising jurisdiction but Mother did not. Arizona thus lacked jurisdiction because no party resided in Arizona and the parties had not both consented to Arizona jurisdiction.
- ***State ex rel. Dept of Econ. Sec. v. Burton*****,** 205 Ariz. 27, 66 P.3d 70 (App. 2003). Father consented to Arizona jurisdiction when he filed a modification in Arizona.

5. Jurisdiction for Protective Orders

- ***Shah v. Vakharwala***, 244 Ariz. 201, 418 P.3d (App. 2018): Trial Court must have both **subject matter jurisdiction** and **personal jurisdiction**.
    - Defendant waived personal jurisdiction argument by entering a general appearance. *Id.* at ¶7.
    - Arizona has jurisdiction to enforce Orders of Protection violated outside of Arizona. *Id.* at ¶10.
- **A.R.S. § 13-3602(P):** The superior court shall have exclusive jurisdiction to issue orders of protection in all cases if it appears from the petition that an action for maternity or

paternity, annulment, legal separation or dissolution of marriage is pending between the parties.

- **A.R.S. § 13-3602(N):** Any court in this state has jurisdiction to enforce a valid order of protection that is issued in this state and that has been violated in any jurisdiction in this state.

6. Jurisdiction for Special Actions and Appeals.

- **Special Actions** may be filed whenever there is no "equally plain, speedy, and adequate remedy available."
    - Generally used in family law to appeal temporary order decisions and rulings re: Petitions for Contempt.
- **Appeals** must be filed within thirty (30) days of all issues (including attorney's fees) being resolved. **ARCAP Rule 9(a).**
    - **Rule 78(b) exception.** Even if an issue (usually attorney's fees) is outstanding, the Court may use Rule 78(b) language and enter the order as a final, appealable order.
    - **What needs to be filed in those thirty (30) days?** Notice of Filing Appeal.
- **Cross-Appeals** must be filed within twenty (20) days of the Notice of Filing Appeal or thirty (30) days from the all issues being resolved in the trial court, whichever is later. **ARCAP Rule 9(b).**
    - **What needs to be filed?** A Notice of Cross-Appeal.
- **Petitions for Review** must be filed with the Arizona Supreme Court within thirty (30) days of the Court of Appeals decision. **ARCAP Rule 23(b)(2).**
    - **Cross-Petition for Review** within fifteen (15) days of the Petition for Review being filed or within thirty (30) days of the Court of Appeals' decision, whichever is later. **ARCAP Rule 23(b)(2).**

Key Cases

- ***In re Marriage of Kassa*, 231 Ariz. 592, 299 P.3d 1290 (App. 2013).** Trial court resolved claims regarding contempt, arrearages, and spousal maintenance. The trial court did not use Rule 78(b) language. The issues of child support and attorney's fees were still outstanding when Husband appealed. The Court of Appeals held it did not have jurisdiction.
- ***Natale v. Natale,* 234 Ariz. 507, 323 P.3d 1158 (App. 2014).** Ruling without Rule 78(b) language was not final and appealable until attorney's fees issue was resolved.
- ***Bollerman v. Nowlis*, 234 Ariz. 340, 322 P.3d 157 (App. 2014).** Family court order that did not resolve attorney's fees was not final, appealable order.
- ***Camasura v. Camasura*, 238 Ariz. 179, 358 P.3d 600 (App. 2015).** Where three issues were unresolved, the order was not final and appealable even though the parties had stipulated to two of three issues.

E. Weighing the Different Options - Litigation vs. Mediation vs. Collaboration

1. Benefits of Settlement

We are big proponents of settlement. Settlement saves clients time, stress, and money. While in some cases trial is an absolute necessity, we have found that in most cases clients are better served with settlement than litigation.

Settlement as a business consideration. The best way to build your business is to provide an excellent customer experience, and this includes helping clients resolve their cases. We certainly have encountered attorneys who seem to be determined to go to trial at all costs. Sometimes, attorneys find it easy to believe the worst about the attorney on the other side. We caution we never know what an opposing counsel's true motive is, but we worry that some attorneys litigate to get every last cent out of their client. It is *not* a brilliant business strategy to overbill clients and eschew settlement. You do not build a firm by gouging clients or adopting a trial-at-all-costs approach. Rather, you build a firm by being focused solely on a client's best interest. That includes making settlement a priority. Customer service is always the best way to set yourself apart from the competition. This is how you build a referral network where your old clients send their friends and family members to you.

Factors to Consider. Not every case is the same. As you decide which option is best for your client's situation, here are some factors to consider:

- **Costs.** All three options (mediation, collaborative divorce, and litigation) are costly, especially to a person making an average wage or less. Of the three options, mediation tends to be the cheapest, and litigation the costliest.

- **Nature of the Issues.** Sometimes, the case is not one where settlement is possible. For example, in some cases where domestic violence has occurred, mediation or collaboration may not be appropriate.

- **Personalities of the Parties.** In every case we have had at Best Law Firm, we have at least attempted settlement through a Settlement Letter. But in rare instances, we have found it appropriate to not seek out mediation, settlement conferences, or other options at settlement. Those instances all have one thing in common: A vexatious *pro per* on the other side. In one instance, we actually agreed to a mediation with a *pro per*, but the mediator canceled the mediation immediately upon receiving the other side's Mediation Memorandum that was full of threats toward us.

- **Likelihood of Success.** Mediation can shortcut one's expenses, but it also adds to the parties' expenses if it is unsuccessful.

2. Settlement Letters

The Initial Settlement Letter. A settlement letter is always our first attempt at settlement. If we are the petitioner in a divorce action, we like to include a settlement letter among the documents served on responding party. We do this for two reasons:

(1) **To reduce the temperature of the divorce from the outset.** It is an emotional event for parties to be served with divorce paperwork. Even when the divorce may be expected, it is a difficult moment. These emotions are often exacerbated by the sheer number of documents being served on the party, the majority of which contain confusing legalese that a lay person does not understand. As a party reads these documents, one can only imagine the anxiety they feel. They naturally worry what their life will be like post-divorce and divorce papers make that picture clearer. This only increases their anxiety and frustration. The one document a party can understand, though, is a Settlement Letter. This helps the other party understand what our client is proposing and wanting. Oftentimes, a settlement letter can help avoid misunderstandings that can transform an amicable divorce into a heated one. Although it is unlikely the first settlement letter will result in a total transformation.

(2) **To narrow the issues.** The more issues you resolve, the less your client has to spend, particularly in cases where the parties have limited resources, this allows clients to spend their money where it is needed most. Additionally, it spares us from the embarrassment of having to stand in front of the judge and ask the judge to divide personal property. Clients should spend funds to have a judge divide a coffee pot.

What proposals should not be included in an initial settlement letter? Any items that you would need discovery and disclosure to ascertain their values. But you can include general language, such as, "Subject to disclosure and discovery, Wife proposes the parties equitably divide all community retirement accounts" or "Father proposes child support be awarded in accordance with the Arizona Child Support Guidelines."

Why send out a settlement letter before disclosure and discovery is complete? To get the ball rolling. It is understandable—and expected—that disclosure and discovery will need to be completed before assets get divided. That does not mean you cannot indicate a willingness to settle and begin to get both sides to think of what a settlement might look like. If, for instance, the parties are agreeable to Husband buying out Wife's interest in the home, we can get started with what needs to happen to accomplish buy out, including appraisals and refinancing.

Can you propose mediation in an initial settlement letter? Yes. In fact, we often include in that Settlement Letter a line along the lines of, "Mother proposes that the parties attend mediation with ------ once discovery and disclosure are complete."

3. Mediation

Mediation is where the parties discuss settlement with the assistance of a neutral third party. The best mediators often neutral assessments of the case and help parties think of ways they can resolve their differences.

We are strong advocates for mediation. We both conduct mediations and represent clients at mediation. Our practice includes mediation for unrepresented parties who are about to file for divorce or who have just filed for divorce. Robbie Hendricks at our firm, as a *judge pro tempore*, also conducts court-ordered mediations called Alternative Dispute Resolution Conferences (see below) at our firm. The bulk of our firm's business, though, is representation. In almost every case we have, we at least propose mediation, and the majority of our cases go to mediation. Because of all this involvement in mediation, we spend a considerable amount of time in mediation each week. In our experience, we find mediation as a valuable part of the divorce process.

Types of Mediation.

- **Early Resolution Conference.** In cases where both parties are unrepresented, this is the first Court hearing the Court sets. The parties meet with a staff member at the Court and work to resolve issues. If an attorney notices into the case, the Early Resolution Conference may be vacated and a Resolution Management Conference (which is not a mediation) will be set instead.

- **Parenting Conference.** In a divorce with children, the parties can ask the Court to send them to a Parenting Conference. This is a mediation with a staff member of the Court (known as the Parenting Conference Provider) that will be focused solely on the issues of legal decision-making and parenting time. The other issues in a divorce—child support, division of property, and spousal maintenance—will not be decided in a Parenting Conference.

  We like Parenting Conferences, especially where the parties are not far apart on their positions but need some help reaching an agreement. We also find them useful where the other side is not represented because the Parenting Conference Provider can help them understand what is likely to happen in Court. The final advantage of the Parenting Conference is that the provider will prepare a Report that will be submitted to the Court. The Report will detail what occurred in mediation. And then the Parenting Conference provider will make recommendations and go through a discussion of the best interests factors. We have found these Reports to be helpful in continuing the settlement dialog. They are so helpful if a trial has to be set on legal decision-making and parenting.

  Additionally, the Parenting Conference is a relatively cheap form of mediation. Currently, the Court is charging each party $300.00 for the Parenting Conference. That makes the Parenting Conference a relative bargain, and the parties receive a lot of bang for their buck—they either settle the parenting time and/or legal decision-making issues or they receive a report that can help them in future settlement discussions and litigation. That makes the Parenting Conference one of the most cost-effective parts of litigation.

As with any time your client meets with a third-party provider, you should spend some time prepping your client for the meeting. They should go into the Parenting Conference knowing what outcomes are likely in Court and what agreement in a Parenting Conference would be appropriate. Because a report can be issued, we talk with our clients about points of emphasis and the importance of managing their emotions at the Parenting Conference.

Because the Report will have a discussion on the best interests factors, we find it useful to ensure our clients know how to answer each of the factors. Prior to our Parenting Conference preparatory meeting, we like to send our clients a list of the best interest factors in a Word document. We ask them to write in their responses. We will review those with them at the prep meeting.

- **Alternative Dispute Resolution (ADR).** This is a mediation through the Court usually conducted by a commissioner or a *judge pro tempore.* Unlike the Parenting Conference, this mediation will cover all topics in a divorce.

  Like the Parenting Conference, this is a cost-effective mediation. Unlike the Parenting Conference, there will not be a detailed report filed with the Court.

  An attorney preparing for an ADR or private mediation should take several steps:

  - **(1). Ensure discovery and disclosure is complete and review the discovery and disclosure prior to the ADR.** Understandably, most attorneys are not going to make financial agreements until they see what the finances are. We once attended ADR in a case that had been pending for a year. Discovery and disclosure had long been completed. We attended the ADR hopeful that we could resolve the case and finally be done—except when we arrived at ADR, opposing counsel informed us he had not reviewed the discovery and disclosure we had sent him months ago, so he and his client would not be making any agreements that day. We were not pleased.

  - **(2) Prepare the memorandum.** Prior to an ADR, the parties will each submit a memorandum to the commissioner or JPT. In our experience conducting ADR's, we find these memoranda important, as we can begin considering ways we can help the parties resolve their issues. A well-prepared memorandum can give your client the advantage in mediation.

  - **(3) Set your client's expectations.** Nothing derails a mediation like one party's unreasonableness. Both parties should have had a reality check well in advance of mediation. Parties who attend an ADR with reasonable expectations tend to have achievable goals that can be accomplished through mediation.

- **(4) Know what outcome is most important to your client.** This helps you protect what's most important to your client and also helps you know aspects of the negotiation you can compromise on.

- **Private Mediation.** This is the most expensive form of mediation and, in our experience, the most effective. Whenever we can, we like to go to private mediation because most cases can be resolved with a private mediator.

  We tend to work with mediators who are either retired judges or who are seasoned family law attorneys. The traits we most value in a mediator are ones who can provide meaningful insight to a case, who can push the parties toward making a settlement, and who maintain respect and professionalism for the parties at all times. If a private mediator is disrespectful or rude, we are not going to go back to that mediator.

  Most lawyers have a good sense for what mediators they prefer to work with. We have a mediator who we think works well for parties who have little money, another mediator who is fantastic for parties dealing with custody issues, and another mediator who is top notch when it comes to financial issues. We have some mediators we avoid. But largely, we have tremendous respect for the outstanding mediators we have in our community.

4. Collaborative Divorce

Collaborative divorces are governed by Rule 67.1 of the Arizona Rules of Family Law Procedure?

What if one spouse objects to a collaborative divorce? A person cannot be compelled to participate in a collaborative divorce. *See* **ARFLP Rule 67.1(e)(2)** ("A tribunal may not order a party to participate in a collaborative law process over that party's objection).

What if someone changes their mind about the collaborative process? Can they back out of it? Yes.

What happens if a party backs out of the collaborative process? The collaborative process immediately terminates, and the collaborative attorneys must all resign as the attorney for the parties. *See* **ARFLP Rule 67.1(i)(1)** ("[A] collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter").

When a collaborative attorney is forced to resign, can another attorney within the firm step into the case and handle the litigation? No with four exceptions:

- (1) To ask the Court to approve an agreement reached in collaboration. *See* **ARPLP Rule 67.1(i)(3)(A)**
- (2) To seek or defend an emergency order. **ARPLP Rule 67.1(i)(3)(B)**
- (3) Where the firm represents the party *pro bono* in litigation, and the client qualifies for *pro bono* services, the collaborative agreement allows such

substitution, and the collaborative attorney is screened from any involvement in the litigation. *See* **ARPLP Rule 67.1(j).**

- (4) The party the firm represents is a government entity so long as the collaborative agreement allows such a substitution and the collaborative attorney is screened from any involvement in the litigation. **ARPLP Rule 67.1(k).**

Does the collaborative process alter a collaborative lawyer's ethical duties? No. *See* **ARFLP Rule 67.1(m).** But, as discussed below, a collaborative lawyer may have additional duties imposed upon her under the Rules.

What about a third party professional who is a mandatory reporter? If they are participating as a neutral professional in a collaborative divorce, are they still required to report abuse? Yes, they are. A practitioner's professional responsibilities are unaffected *See* **ARFLP Rule 67.1(m).**

What additional duties does a collaborative lawyer have?

- **Duty to Advise on Appropriateness.** Collaborative lawyers have a duty to assess the appropriateness of the collaboration process with the client and discuss the material benefits and risks. **ARFLP Rule 67.1(n)(1).**
- **Duty to Advise Re: Termination.** Collaborative lawyers must advise their clients that starting a proceeding or seeking Court intervention in a proceeding terminates the collaborative process, that either party has the right to terminate the process, and in the event the process is terminated, the collaborative lawyer and his or her firm may not represent the party in Court. **ARFLP Rule 67.1(n)(3).**
- **Ongoing Duty to Assess for Coercive or Violent Relationship.** Collaborative lawyer have a duty to make "reasonable inquiry" as to whether their client has a "coercive or violent" relationship with the other party. The collaborative lawyer further has an ongoing duty to assess whether the relationship is "coercive or violent."
    - The Rule does not define what constitutes a "coercive or violent" relationship.
- **Duty to not Begin or Continue where Relationship is Coercive or Violent.** Where the collaborative lawyer "reasonably believes" the relationship is coercive or violent, "the lawyer may not begin or continue a collaborative law process unless the client wants to begin or continue and the attorney reasonably believes their safety can be protected. **ARFLP Rule 67.1(o).**

Can parties still use third-party professionals? You can have neutral third parties to help make important assessments. For example, a neutral third party could be in charge of valuing the business and another one could coach the parties on their co-parenting, including their communication.

LITIGATION

This is the most expensive option. It is likely to include discovery, disclosure, multiple court hearings, a pretrial statement, exhibits, and a trial. It is an intensive, costly, and stress-filled option.

In family law, some cases are destined for trial at the outset, such as where there are significant fitness concerns about a party that will result in the other party having full custody (i.e., being awarded sole legal decision-making and being designated primarily residential parent). In other cases, either one or both of the parties are high-conflict individuals who refuse to even consider settlement. Other cases end up at trial simply because the parties are too far apart on their settlement positions. This frequently occurs in spousal maintenance cases where the outcomes are less predictable than other areas of family law.

F. Initial Complaint/Petition for Divorce

This document is the most important of the nine documents initially filed. This document sets out the necessary facts of the divorce and lets the court know exactly what the Petitioner is seeking in the divorce, including, without limitation, requests for legal decision-making, parenting time, child support, spousal maintenance, and division of property.

While the Petition is general, some critical decisions need to be made in the Petition. Important to parenting time and legal decision-making cases, the Petitioner must take a position as to whether domestic violence has occurred during the marriage and as to whether the Petitioner will seek sole legal decision-making or ask that the other party have supervised parenting time. As for spousal maintenance, the Petitioner must decide whether to allege whether one of the parties is entitled to an award of spousal maintenance. The Petition may be amended by Rule 28 prior to service, by stipulation, or by leave of Court. The initial Petition sets the tone for your client's requests and reasonableness.

Several other documents accompany the Petition:

- **Notice of Your Rights About Health Insurance Coverage.** This legal notice outlines how the parties' health insurance coverage could be affected after the dissolution is finalized.
- **Notice Regarding Creditors**. This notice explains that both spouses are responsible for community debts. It also suggests that they may want to contact your creditors to discuss the debts and the effects of your divorce or legal separation.
- **Preliminary Injunction.** The preliminary injunction is a set of statutory rules that must be followed by both spouses after a spouse is served with dissolution or legal separation paperwork. These rules are mandated for every couple going through the process of dissolution or legal separation. It is important not to violate any of these rules.
- **Parent Information Class.** Each party with minor children common to the parties must complete the parent information class. It is recommended each party take this class as soon as possible. Failure to do so could result in not being awarded parenting time. Military parents may qualify for an exemption.
- **Affidavit Regarding Minor Children.** In this affidavit, the Petitioner must confirm who the minor children are and where they have lived during the past five (5) years. This

document also asks whether there are any court cases that you have been a party to or witness to that involved the custody or parenting time of the children and whether the Petitioner knows of any person, other than the petitioner or respondent, who has physical custody or who claims custody or parenting time rights of any of the children named in the affidavit.

G. Emergency (Ex Parte) Motions and Protective Orders

1. Emergency Motions

a. What is an Emergency Motion?

Emergency or *ex parte* motions ask the Court to put temporary orders into effect the same day the motion is filed without prior notice to the other party. Rule 48 governs emergency motions. Rule 48(b) provides the grounds for an emergency order to be granted. That Rule reads:

> *A court may grant temporary orders without written or oral notice to an adverse party or that party's attorney only if the verified motion:*
>
> *(1) clearly shows by specific facts that if an order is not issued before the adverse party can be heard, the moving party or a minor child of the party will be irreparably injured, or irreparable injury, loss, or damage will result to the separate or community property of the moving party; and*
>
> *(2) the moving party or attorney provides written certification of the efforts to give notice to the other party, or why giving notice should not be required.*

There must be an underlying, active Petition previously filed with the Court or filed simultaneously with the Motion. The filing of the motion triggers a temporary orders evidentiary hearing that must be set within thirty (30) days.

b. How to File an Emergency Motion.

This section and the FAQ's section are excerpted from a guidebook we prepared to give to unrepresented parties on how to file an Emergency Motion:

These are the steps for filing an emergency motion with the Court. We advise you that if you genuinely believe your child is in imminent danger of death or serious bodily injury, that you contact the police or other emergency personnel. The police will perform a welfare check on a child if you request they do so.

Step One: Make Sure an Active Petition is Pending

You cannot file an emergency motion unless a petition is pending that his put the custodial issues of legal decision-making and parenting time at issue. These petitions include a

divorce petition, a petition to establish custody, or a petition to modify custody[1]. If no petition is active, you will need to file a petition along with your motion.

Step Two: Prepare the Emergency Motion

You can get the emergency motion form from the Court, the Court's Web site, or by contacting Best Law Firm. Best Law Firm can either send you the Court form or you can hire Best Law Firm to draft one for you.

Step Three: Prepare the Emergency Motion for Filing

You should prepare an original plus three copies of every document that is required to filed by the Court.

Step Four: File the Emergency Motion in the Superior Court

Take your copies and file it with the Superior Court. If you don't know where to file, ask the person at the information desk. The clerk will process the copies, and the clerk should keep one copy. The clerk will stamp the other copies and provide them back to you.

Step Five: Find Out Which Judge Will Be Hearing Your Emergency

Immediately after filing, go to Family Court Administration and ask which judge will be hearing your emergency motion that day. You should ask Family Court Administration where the Judge's courtroom is located.

Step Six: Contact the Judge's Division and Provide the Judicial Assistant with the Paperwork.

Take the paperwork and contact the judicial assistant via the intercom/phone system in the Courthouse. The judicial assistant will come out and collect the paperwork.

Step Seven: Wait for the Court's ruling.

You will wait outside the Courtroom while the judge reviews your paperwork. If the judge is in a hearing, it could be several hours before you find out the ruling. Sometimes, a judge will ask you to come in for a hearing. But most frequently, the judicial assistant will come out and hand you the paperwork with the judge's ruling.

Step Eight: Serve the Opposing Party

Regardless of how the Court rules, the judge is likely to set another hearing in the next few weeks. It is your job to ensure the other party is served with all the paperwork you filed,

[1] In legalese, these Petitions are called a Petition for Dissolution of Marriage, a Petition to Establish Legal Decision-making and Parenting Time, or a Petition to Modify Legal Decision-making and Parenting.

the Court's ruling, and the Order to Appear that the Court will give you. Because of the short amount of time, it is recommended you use a process server.

c. Emergency Motion FAQ's

When should I file an emergency motion? An emergency motion should be filed if the child is likely to suffer "irreparable harm or injury" if they remain in a parent's care. In other words, if you believe your child to be in real danger, you can file an emergency motion.

What are some common emergency situations? Some common emergency motion situations include when a parent is using illegal drugs around the child, has allowed a child sex offender to be around the child, is abusing the child, has been arrested for driving drunk with the child in the vehicle, or has kidnapped or moved with the child in violation of a Court order or without the other parent's permission. In some instances, the Department of Child Safety may have also instructed a parent to request emergency custody.

Emergency motions regarding property are rare. The common reason for an emergency motion regarding property is that one party is attempting to or may drain accounts and hide the money from the other party.

Will the Court grant my emergency motion? If the Court believes your child is in immediate danger, it will grant your motion. You should be aware, though, that because emergency motions are filed *ex parte* (i.e., without the parent being present), a Court is most likely to deny the emergency and allow the other party a chance to respond. This does not mean the Court did not believe you or that you lost. It simply means the Court wants to give the other party a chance to respond before it makes a decision.

What do I do if the Court grants my emergency motion? If the Court grants your emergency and if you need get the child out of a dangerous situation, contact the police for assistance and wait for them to arrive before you do anything. Then you need to make sure the other party gets served right away.

What do I do if the Court does not grant my motion? We know it is disappointing when an emergency motion gets denied, but you should brace yourself for that possibility. Whatever you do, do not mistreat the Court's judicial assistant. Thank them for their help and wait to react emotionally until you get outside the Courthouse.

Additionally, you should not be dismayed. As we explained above, most motions are denied simply to allow the other party a chance to respond. The issue has not been decided. There will be a hearing and a trial, usually within the next few weeks.

How do I tell if a Petition is active? A petition is active when it is still pending. A petition is not active if the Court ruled on that petition by ordering a Parenting Plan or if the Court dismissed a petition. If you are not currently in family court litigation, there is probably not an active petition.

Where do I find the filing desk, family court administration, the Courtroom, and phone/intercom system? We certainly understand that Courthouses are mazes. Every courthouse has an information desk. Start there to find out where to file and where to go to find the filing desk and Family Court Administration. For finding the Courtroom and the phone/intercom system, Family Court Administration is the best place to ask since you'll need to go there to find out which judge is hearing emergencies.

How soon should I serve the other party? The family rules are clear on this point, "as soon as possible." We strongly advise you to hire a process server immediately and get going on service. If you have questions regarding service, please contact Best Law Firm.

What happens if I don't serve the other party before the hearing? The hearing will most likely be continued for several weeks or even months.

2. Protective Orders

A.R.S. § 13-3602 (A) limits Orders of Protection to restraining acts of domestic violence, A.R.S. § 13-3602 (C) requires the Petitioner to specifically state the act of domestic violence, and A.R.S. § 13-3062 (E) requires a Court find that an act of domestic violence has occurred or will occur before it issues the Order of Protection.

A.R.S. § 13-3602 requires that a court find an underlying act of domestic violence before it can uphold an Order of Protection. Domestic violence is defined in A.R.S. § 13-3601 (A), and essentially has two requirements: (1) An act listed in the statute, and (2) a relationship between perpetrator and victim that is defined in the statute.

- **Listed Acts.** The listed acts are all references to the criminal statutes. Therefore, the act of domestic violence must be a criminal act against a person in a protected relationship. If the act does not meet the requirements of the listed criminal statute, it is not domestic violence. And if it is not domestic violence, then an Order of Protection cannot be confirmed under A.R.S. § 13-3602. Thus, the commission of one of these acts is a condition precedent to upholding an Order of Protection. "Granting an Order of Protection when the allegations fail to include a statutorily enumerated offense constitutes error" even under an abuse of discretion standard. *In re Savord v. Morton*, 235 Ariz. 256, 259, 330 P.3d 1013, 1016 ¶ 11 (App., 2014).

- **Protected Relationship.** To be granted an order, you must have one of the following relationship:
    - A spouse or former spouse of the defendant or a person of the opposite sex that resides or resided in the same household.
    - A parent of a child of the defendant.
    - Pregnant by the defendant.
    - Related to the defendant or the defendant's spouse by blood or court order as a parent, grandparent, child, grandchild, brother or sister, or by marriage as a parent-

in-law, grandparent-in-law, stepparent, step-grandparent, stepchild, step-grandchild, brother-in-law or sister-in-law.

What court can issue an Order of Protection? Orders of Protection can be issued by any court in Arizona, regardless of the location of the plaintiff and defendant. But for family law cases, it is recommended they be filed in superior court, and they will need to be transferred there eventually.

How long is an Order of Protection in effect? An Order of Protection is good for one year after service on the defendant. Only the judge can terminate or change them.

Between the judge issuing it and the Order of Protection being served on the defendant, is the Order of Protection in effect? No. It is not effective until served.

What is the filing fee for an Order of Protection? At the time of this writing, there is no filing fee for an Order of Protection.

Can the child be included on the Order of Protection? Yes, but it is unusual. Courts are likely to not include a child if they know custody proceedings are pending or about to begin, as the Protective Order Court is likely to refer the parties to family court to determine what happens with a child.

What assistance do the Courts offer to people seeking Orders of Protection? Each Maricopa County Superior Courthouse has a Protective Order Center. As a client enters the center, an employee will direct you to a computer to file your petition for the Order of Protection. (A plaintiff may request that information regarding his or her current address, phone number and employment be kept confidential and not be disclosed to the defendant.) The petition asks the plaintiff a number of questions, including their name, address, the defendant's name and address, and whether the plaintiff and defendant have any children together. Most importantly, the plaintiff will have the opportunity to write and explain three (3) instances when he or she has been the victim of domestic violence at the hands of the defendant.

H. Temporary Orders with Notice

1. What are temporary orders?

Temporary orders are orders that are put in place while the case is still pending. A party can request temporary orders by motion. The Court must hold a temporary orders hearing within sixty (60) days of receiving the motion. Before the Court can issue temporary orders, it must hold a trial (evidentiary hearing). Temporary orders trials tend to be short, usually around an hour. Although temporary orders haerings are short, because they involve a trial, which include a Pretrial Statement, exhibits, and testimony, temporary orders can still be time-consuming and expensive.

Temporary orders remain in effect until further order of the Court or a date certain set by the Court.

2. **Requests that can be made at temporary orders.**

The following are some of the most common reasons for why someone requests temporary orders:

- **Temporary Parenting Time.** This is most commonly used when one parent is withholding or limiting the other parent's access to the child. This is perhaps the prevalent reason for why temporary orders are filed.
- **Temporary Legal Decision-making.** This often accompanies a request for temporary parenting time. Occasionally, there may be a pressing need for one party to have temporary legal decision-making, such as the other parent's refusal to enroll the child in school or make appropriate and necessary medical decisions.
- **Temporary Child Support.** Commonly requested when parenting time is already the subject of a temporary orders hearing or when child support is necessary to help a party make support the child(ren).
- **Exclusive Use of the Marital Residence.** When parties get divorced, at least one party may need to move out. While most couples can decide this issue between themselves, some cannot, and they can ask the Court to decide who gets to remain in the house on a temporary basis. If they still cannot agree who should live in the house by the time final trial is held, the Court is most likely order the house to be sold.
- **Temporary Spousal Maintenance.** This becomes especially important where one party did not work during the marriage or where the parties have a substantial disparity in income. Spousal maintenance helps that spouse meet his or her reasonable needs while the divorce is pending. A common resolution for temporary spousal maintenance is for the working spouse to maintain all community bills while the divorce is pending.
- **Interim Award of Attorney's Fees.** Where one spouse earns significantly less than the other spouse, temporary orders can be used to order the higher-earning spouse to pay a certain amount of the lower-earning spouse's attorney's fees. We recommend aiming high because we have seen too many litigants get awarded interim fees but still not have enough to cover the cost of litigation.

Discovery, Evidence and Experts – Finding Hidden Assets and More

Submitted by Thomas J. Griggs

Discovery, Evidence and Experts – Finding Hidden assets and More

This presentation is intended to cover the following areas:

A. Financial Affidavits and Disclosure
B. Interrogatories, Requests for Admissions and Requests for Production of Documents and Things
C. Managing Time and Expenses in Discovery
D. Finding Hidden Assets
E. Working with Experts such as Legal Decision-Making/Parenting Time Evaluators; Guardians Ad Litem; and Financial Experts.
F. Direct Examination and Cross-Examination (Quick Tips)
G. Depositions in Divorce
H. Authenticating and Admitting Evidence in Divorce

Those are broad topics. Each area could serve as an individual seminar presentation. Each area, however, has subjects that can be highlighted.

Affidavits of Financial Information

Rule 49, Ariz. R.F.L.P. defines disclosure for purposes of Arizona Family Law Practice. The suggested Affidavit of Financial Information ("AFI") form provides areas of inquiry and response which are beneficial. For example, the AFI asks for information related to the affiant's employer and annual income. Gross income for the prior three years is also sought. Current monthly income is requested. The AFI also seeks information concerning things like:

- Children's expenses as applicable,
- Monthly expenses of the parties; and
- Outstanding debts and accounts.

Essentially, the AFI provides a snapshot of the basic financial life of a party. The information provided in the AFI is not the end of the discussion, but rather serves as the beginning of the inquiry. A completed AFI requires complete copies of the affiant's federal income tax returns for the last three years. It also requires the last three years of

all W-2 and 1099 forms from all sources of income. A fully completed AFI conforms to the requirement found in Rule 49, Ariz. R.F.L.P. at subsections: (e) child support; (f) spousal maintenance and attorney's fees and costs related to claims on those topics.

Disclosure

Rule 49, Ariz.R.F..P. represents the Court's goal to insure that each party to an action is fairly informed of the facts, data, legal theories, witnesses, documents and other information that is relevant to the case. *See,* Rule 49(a) (1), Ariz. R.F.L.P. A party must disclose information in the party's possession and control, as well as information that the party can determine or acquire by reasonable inquiry and investigation. *See,* Rule 49(a) (2), Ariz. R.F.L.P. As most practioners know, or should know, disclosure represents an inexpensive process to start the collection of necessary data for use in settlement negotiations or trial. The key is to insure that one's client provides sufficient information so that the disclosure can be complete. Disclosure should be meaningful. In the ideal situation each party would posses full disclosure so that there would be no surprises at trial. One should remember that a trial judge's decision is only as good as the information provided to the trial judge. The trial judge's decisions should be based on the evidence presented at trial. Pursuant to the Arizona Rules of Evidence and the Arizona Rules of Family Law Procedure that evidence should be material previously disclosed in the case. The AFI, therefore, is a useful first step.

Interrogatories, Requests for Admission and Requests for Production

If done right, one's own client will provide good data for consideration. If done right, the adverse party will provide good data for use. Rule 49(m) provides that nothing in Rule 49 precludes a party from conducting additional discovery under Rule 51, Ariz. R.F.L.P. Specifically, Rule 51 notes that a party may obtain discovery by:

- Depositions under Rule 57;
- Written interrogatories under Rule 61;
- Requests for production of documents or things or permission to enter onto land or other property for inspection and other purposes, under Rule 62;
- Physical, mental, and vocational examinations under Rule 63;

- Requests for admissions under Rule 64;
- Subpoenas for the production of documentary evidence or for inspection of premises under Rule 52.

One should be mindful of the point that pursuant to Rule 51 (b) (1) (A):

> ". . . Written discovery to a party may not request information that party is required to disclose under Rule 49".

One take away from the disclosure and discovery requirements is that trial by ambush is to be avoided.

Depending upon the issues of the case, the Rule 49 disclosure requirements mandate the production of things such as past or current orders of protection involving a party or a member of the party's household; psychiatric or psychological treatment providers for a party; copies of deeds or purchase agreements for real property; six months of bank statements; pension and retirement records; and related data.

Rule 49 disclosure should provide the basis for information concerning the financial life of the parties. Used in conjunction with discovery tools described in Rule 51, then each party should have a good idea as to the size and value of the financial estate. Once one is comfortable with the information presented by each of the parties, then the parties will be in a position to analyze whether or not there are subjects that would affect an equitable division of assets and debt, or trigger areas such as equitable liens or tracing issues. Information on disclosure is a necessary process to determine issues that may also include hidden assets.

Every practitioner is familiar with the traditional discovery tools provided in the Arizona Rules of Family Law Procedure. One should use a focused approach to these discovery tools. Rule 51 (b) (1) (A) and (B) and (b) (2) provide guidance on the use of discovery tools to obtain information on any non-privileged material relevant to any party's claim or defense. One should weigh considerations such as the proportionality of the discovery request to the issue(s) of the case. What access is there to the requested data from more convenient sources? What is the monetary cost related to the discovery

request? What is the burden of the discovery request versus the benefit of the information to be obtained from the discovery request? These and similar questions should be considered as one prepares discovery requests. As noted earlier, one should also keep in mind the provisions of Rule 51 (b) (1), Ariz. R.F.L.P. Requests for Admissions, as an example, can generate benefits. One can commit the adverse party to a certain factual scenario. One can force the adverse party to admit facts they would prefer not to discuss. One can force the adverse party to choose a position on a specific subject. All of this can be assembled into exhibits for use in any settlement negotiations or for trial.

Managing Time and Expenses in Discovery

As referenced above Rule 51 (b) (1) discusses the scope of discovery. One must weigh the importance of the issues at stake; the amount in controversy; the parties' relative access to relevant information; the parties' resources' the importance of the issue sought in discovery to resolving the issues of the matter; and whether the burden or expense of the proposed discovery outweighs its likely benefit. In consideration of issues surrounding discovery and disclosure the wise practitioner will create a litigation budget in consultation with the client. The budget should acknowledge the issues of the case together with a focus on the tupe of discovery to be employed. For example, because of the document production requirements of Rules 49, Ariz. R.F.L.P. a request to produce documents might be limited or deemed unnecessary.

One should avoid discovery requests which are cumulative, particularly as to electronically stored information. *See,* Rule 51 (b) (1) (B), Ariz. R.F.L.P. and Rule 51 (b) (2), Ariz. R.F.L.P. The discovery practice can be an evolving process pursuant to the Rule 49 disclosure provided by the adverse party. Based on disclosure mandates, one can take action with disclosure provided.

Finding Hidden Assets

In any litigation, but particularly in Family Law litigation there is not a high degree of trust between the parties. When documents are disclosed or produced the

practitioner is often asked by their client "is it complete?" Sometimes the practitioner might be concerned about their own client's disclosure and ask "is it complete?"

A starting point for any practitioner or their staff can be a simple review of the internet records available to the public. One source, for example, is through the county assessor. Perhaps it will be a review of corporate filings with the State of Arizona available online. Look for any unusual cash transfers. In some cases, determining the parties' financial applications submitted to lenders in the three (3) years prior to the filing of the action can be a good first step. Perhaps the review can be related to the historic pattern of bonuses issued by a party's employer. Are bonuses being delayed? Has income been earned, but not paid?

One well known source to review is the examination of the parties' joint tax returns. Schedule A related to itemized deductions; Schedule B interest on assets; Schedule C profit/loss from business interests' and Schedule D capital gains or losses on assets.

Sometimes the issue is sufficiently large that a financial investigator would be hired to do the digging.

Perhaps the simple lesson to learn in the disclosure/discovery of assets is the admonition about trust. One can trust, but one should also verify.

Working with Experts – Legal Decision-Making/Parenting Time evaluators; Guardians Ad Litem; and Financial Experts

One should be familiar with Rule 702 and Rule 703, Arizona Rules of Evidence. Rule 702 provides:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue:
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case."

The Rules of Evidence also discuss the basis of an expert's testimony. Rule 703, Arizona Rules of Evidence provides that an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on these kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. While an expert may reasonably base the expert's opinion upon reliable reports of others (Rule 703) such reliance does not allow the expert in court to read the out of court report of another into evidence as substantive proof of the point. The better approach is for one's expert to be focused on their own reports. *See also, Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). One should also be aware that the admissibility of expert opinion testimony has been embedded in the Arizona statutory framework in A.R.S. § 12-2203. That statute effectively directs that one will follow the *Daubert* standard. In particular that statute provides structure for expert evidence . Admissibility of expert opinion testimony shall fit the following :

A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
    1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.
    2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
    3. The opinion is based on sufficient facts and data.
    4. The opinion is the product of reliable principles and methods.
    5. The witness reliably applies the principles and methods to the facts of the case.

B. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible:

1. Whether the expert opinion and its basis have been or can be tested
2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
3. The known or potential rate of error of the expert opinion and its basis.
4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

One should be sure that experts in the case, for any issue in controversy, can match the *Daubert* standard.

Direct and Cross-Examination Tips

The theme of the case is something to be determined through discovery and disclosure. Once one knows the theme, then one can arrange relevant exhibits and start the review of testimony by the witnesses. The parties' testimony as well as the testimony of non-party witnesses should be reviewed as to how the witness testimony will advance the theme of the case. Part of that process is to remember the job of the witness in direct examination. The job of the witness, first and foremost, is to listen. In my experience I have found that most people have poor listening skills. Often the person "listening" is just waiting for an opening to try and make their next point. Emphasize the listening aspect to each witness as a part of their direct testimony preparation. The witness should hear the question on direct examination and understand the question before attempting to answer.

Direct examination is tied to the Arizona Rules of Evidence. Pursuant to Rule 101, the Rules of Evidence apply to proceedings in courts in the State of Arizona. The Rules of Evidence are to be construed so as to administer every proceeding fairly; to ascertain the truth of the matter; and to secure a just determination. See, Rule 102, Ariz. Rules of Evidence. In conjunction with that requirement the prudent practitioner should also think about the order of witnesses to be presented in the direct examination presentation. The classical wisdom is for the direct examination of witnesses to start

strong and finish strong. Part of that process will be the substance that each witness will bring to Court in their testimony. Part of the analysis is also related to the comfort level of each witness in Court. Will the witness hold up or fold up?

Direct examination should be straightforward. For example, as Petitioner's counsel it might be as simple as:

"Q.: State your name".

"Q: Where do you reside?"

"Q: Are you employed?"

Ideally, questions should be short and concise. The use of "who, what, when, or how" questions would be an excellent way to keep questions on topic without becoming leading in their format.

Direct examination should avoid leading questions. In fact, Rule 611, Arizona Rules of Evidence provides that leading questions should not be used on direct examination except as necessary to develop the witness' testimony. That said, ordinarily the Court should permit leading questions on cross-examination and when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. See, Rule 611 (c) (1) and (2), Arizona Rules of Evidence. For purposes of Direct Examination one should tell the client's story. Sometimes the client story can be illustrated through the use of demonstrative exhibit evidence. Seeing a document can allow the reader, in this instance the judge, to focus at trial on key language being discussed. As a secondary point, the lawyer should review all of the exhibits listed by the other side. One should have a copy of each of those exhibits. Review them. Perhaps they can be used as part of your own direct examination. If so, then one should give some thought to using them in your own case and the direct examination of witnesses. Determine which witness can address relevant points taken from that exhibit of the adverse party. The use of the other side's exhibits against them can add persuasion to the theme of one's presentation.

Depositions in Divorce

Depositions remain part of the tools for any practitioner in a family law matter. *See,* Rule 51 (a) (1) and Rule 57, Ariz. R.F.L.P. Specifically:

> ". . . A party may depose (A) any party; (B) any party's current spouse; and (C) any person disclosed as an expert witness under Rule 49 (j). A party also may depose any document custodian to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not depose any other person or depose a person who has already been deposed under the current petition. A party may not unreasonably withhold its agreement to additional depositions under this rule."

See, Rule 57 (a) (1), Ariz. R.F.L.P. Depositions of a party may still be necessary in a case. That said, one should analyze the benefits, costs and time involved with the deposition of a party. Part of that process will be to determine how realistic it is to expect full disclosure and discovery responses from the adverse party. The deposition of an expert, however, in the opinion of the author, is a necessary part of trial preparation. When dealing with experts one should also keep in mind to check the articles written by the expert as well as the standards for practice promulgated by the relevant professional or regularity body which governs the expert.

Authenticating and Admitting Evidence in Divorce

Perhaps it rates as a first principle, but the family law trial lawyer should have more than a passing knowledge of the Arizona Rules of Evidence and the Arizona Rules of Family Law Procedure. For example, a record of regularly conducted activity as defined in Rule 803 (6) of the Arizona Rules of Evidence or reports prepared pursuant to Rules 68 or 73 may be admitted into evidence without testimony of a custodian or other qualified witness regarding its authenticity if the record is relevant, reliable, and was timely disclosed. *See,* Rule 2 (c), Ariz. R.F.L.P. Likewise Affidavits of Financial Information ("AFI") that are required to be filed or served may be considered evidence if offered as evidence by a party and admitted into evidence by the court. *See,* Rule 2 (d), Ariz. R.F.L.P. Rule 68, Ariz. R.F.L.P. discusses Conciliation Court and the tools of mediation of matters pertaining to legal decision-making and parenting time as well as

other services including assessments and family education services. Rule 73, Ariz. R.F.L.P. defines the role of the Family Law Conference Officer. Rule 803 (6), Arizona Rules provides five specific examples of what constitutes records of a regularly conducted activity. Rule 901, Arizona Rules of Evidence defines the authentication and identification of evidence. Among other things Rule 901 provides that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. *See,* Rule 901 (a), Arizona Rules of Evidence. Additionally, one should keep in mind that a stipulation for the admission of all exhibits to be entered into evidence is not preferred. Likewise, the admission of an exhibit into evidence does not end the discussion. One should be prepared to explain to the court, through witness testimony, what the exhibit in evidence is and why it is important for the court to consider it.

Rules, Facts and Preparation

Practicing law in the area of Family Law presents a lawyer with many opportunities to develop and showcase their skills sets. Discovery, Disclosure and Evidence should be areas that the practitioner knows well.

Gathering Social Media, Text and Email Evidence

Submitted by Stephen Vincent

III. Gathering Social Media, Text and Email Evidence

Prepared by Robert Hendricks, David Uffens, and Stephen Vincent
Presented by Robert Hendricks and David Uffens

A. Practical Tips for Family Law Practitioners in Arizona Re: Social Media, Text Messages, and Emails.

Divorce is an emotionally charged event. Individuals often experience anger, fear, uncertainty, rejection, and loneliness when going through a divorce. Their lives are changing in ways they cannot control. Electronic communications, which include social media, text, and email, have become primary forms of communication. Electronic communications are quick, easy, and, in many cases, permanent. Unfortunately, many parties to a divorce use these tools as an outlet to express their negative emotions without considering the consequences. They vent their frustrations and anger in emails, text messages, and social media posts. These often become damaging evidence in their divorce case.

The emotional nature of divorce combined with the ease in sending a quick message, and how these communications are stored creates an evidentiary gold mine in divorce litigation. In one impulsive message, a spouse can create a toxic exhibit that can undermine their case. We have seen these electronic communications serve as the basis for an Order of Protection and we have seen them used for arguments to deny parenting time. Using electronic communications inappropriately during a divorce can have a negative, lasting impact on the outcome.

1. Advising Clients on How to Use Social Media, Texts, and Emails Appropriately

Every family law attorney has experienced this: You are working hard to help a client successfully navigate the divorce process in order to achieve their goals, and then a disclosure statement arrives in the mail. The disclosure statement contains text after text from your client to the opposing party with abusive language and threatening messages. Or maybe it is a social media post that shows your client using drugs. Your heart sinks because you know this disclosure undermines all your arguments. Here are just a few examples of social media posts, texts, and emails that we have seen disclosed in a family law cases:

- A text from a father to a friend asking how to beat a drug test.
- A social media post showing where the mother ridicules a father for trying to be a part of the child's life.
- An email where a wife confides to a friend that she took out an Order of Protection against her husband solely to get the house.
- A Facebook post showing that mother has moved in with her abusive boyfriend who has a long history of violent felonies.
- Emails between the parties where Father calls the teenage daughter gross, insulting names.

- Emails or text messages one party sent to the other party in violation of an Order of Protection or in violation of the Court's order that parties not disparage each other in email communications.
- A Facebook post where a parent brags about getting high that weekend.

It is easy to see how these posts, emails, and texts can negatively impact a case. A client can in one post, email, or text undo months of their attorney's work. Family law attorneys should review with their clients on how to appropriately use these technologies during a divorce. Here is some advice you can consider providing your clients:

- **Understand that a judge might see everything you write or post.** Don't react. Take a moment and think about what you're writing. Imagine that a judge is going to see what you write. And ask yourself, is this message something you want the judge to see?
- **If your ex texts something mean to you, don't take the bait.** Frequently, we have clients inform us about the vitriolic messages they are receiving from their spouse. When they show us the texts, they are often cruel and demeaning. But we also see their side of the conversation, which is often just as nasty. We then have to explain to our client why the texts do not help their case.
- **Insulting messages from the opposing party are intended to provoke you.** Your spouse knows you well. They know what triggers you and how to make you angry. Some spouses are only trying to goad their ex into a predictably explosive response. If your spouse begins writing hateful things to you, do not respond. Turn off your device, block them, ignore their provocations, and go do something positive or relaxing.
- **Communicate with your ex only when absolutely necessary.** Divorces are emotional events, and the parties are usually best served by not talking to each other during the divorce proceedings. Texts and email exchanges can get heated and misinterpreted. Completely ceasing all communication is sometimes impossible. Especially when children are involved and they must still co-parent together. In those circumstances, parents should restrict communications to the parenting of the children only.
- **Short and to the point.** The more you elaborate, the higher the likelihood of saying something that can harm your case. A lengthy diatribe to your spouse is almost guaranteed to contain multiple emotional outbursts. For the divorce, you may want to impose on yourself a text message limit of 160 characters.
- **Social media is not the place to air the secrets of your divorce.** Increasingly, people post details of their case on social media. This is not appropriate. Your Facebook friends do not need to know the details of your litigation. Posting emotional reactions on your Facebook page is only going to hurt your reputation and negatively impact the outcome of your case.
- **No cussing and no insults.** We understand divorces are emotional but texting the other party vulgar insults is almost certainly going to be used against you for the purposes of child custody and/or attorney's fees.
- **Change your passwords.** When you are married, it is common to know each other's passwords. This means your ex may know how to get into your email

account, devices, or even bank accounts. In one case, a husband logged into his wife's Netflix account and changed her name on Netflix to a derogatory and inappropriate name.

- **Keep the children out of it.** Your children are not your confidants. Children struggle with their parents' divorce. When parents unnecessarily speak with their children, children frequently suffer. Children are not well-equipped to handle the traumatic details of their parents' breakup. Spare them. We have seen children struggle greatly when a parent tells them why the marriage is breaking up or what is happening in litigation. We have seen this lead to alienation, suicide ideation in the child, and we have even seen children act out violently against the other parent. Judges have seen this too, which is why judges hate it when they find out one parent is involving the child in the case, and they may sanction the offending parent and even deny them custody as a result. Be careful too about involving your adult children; they also should not be asked to pick sides.
- **Don't text your children (or stepchildren) mean or nasty messages.** Sadly, sometimes someone going through a divorce will write a nasty text or email to their child or stepchild for taking the other spouse's side. That is always inappropriate and will be used against you in Court.
- **Confide in a close friend or family member but not the whole community**. Just like any other tough time in someone's life, everyone needs a constructive outlet during a divorce. Having a friend or family member who will listen to you and help carry your burdens. We find that clients who have someone standing by them during a divorce tend to do much better emotionally. But your inner circle should be small. Cases can get especially ugly when a whole neighborhood or church group turns against one of the spouses, and almost always that happens as a result of one spouse's oversharing.
- **Learn how to calm yourself.** Divorce can be overwhelming. We recommended that you spend time practicing stress-relieving exercises like meditation or yoga. When the emotions of divorce boil over into a heated war of words in texts or emails, evidence that will be used at trial will almost certainly result. If you find yourself in a written fight with your spouse, take a break and don't open your phone for several hours or even until the next day. Re-approach the topic when you have had time to cool down.
- **If you struggle regulating your emotions during the divorce, seek help.** We generally recommend anyone going through a divorce regularly meet with a counselor. We especially recommend counseling for individuals who struggle to regulate their emotions during a divorce. Commonly, parties find it easy to be angry. While emotional outbursts are understandable, you don't want to hand the other side a winning argument.
- **Perhaps most importantly, if you share an account or your device is linked to a shared account, remove yourself and your device from that account.** Because spouses often share an AppleID or cell phone service provider, they can see the messages the other party is sending. As you can imagine, some of those messages might be quite damaging to a party's case. *Any* device that is visible to the other party should be unlinked. In one famous example, a reporter and her boyfriend

synched their Fitbits, and when she noticed her boyfriend's physical activity suddenly spiked at 4 a.m. when he was not home, she realized he was cheating.

2. Addressing Electronic Communications in a Consent Decree

***Nash v. Nash*, 232 Ariz. 473, 307 P.3d 40 (App. 2013).** This case involved former NBA point guard Steve Nash. Parties agreed to not disparage the other party to the children. Mother tweeted highly critical comments of Father. The trial court ordered the parties to not disparage each other on social media. Mother appealed, arguing the order regarding social media went beyond the parties' agreement and violated the First Amendment. The Court of Appeals affirmed and explained:

> *We take judicial notice, however, of the fact that, depending on the circumstances, comments Mother posts on social media about Father may not remain private but may make their way to the children, perhaps in very short order. This is particularly true because Father has a highly visible profile as a professional athlete. Accordingly, we cannot accept Mother's argument that the order is invalid simply because it goes beyond the letter of the parties' agreement to refrain from making disparaging remarks about the other in the presence of the children. To the contrary, to the extent that the order prohibits Mother and Father from disparaging the other by way of public remarks that are likely to make their way to the children, the order is true to the spirit of the parties' agreement.* ***Nash v. Nash*, 232 Ariz. 473, 482, ¶ 35, 307 P.3d 40, 49 (App. 2013)**

While the Court classified the non-disparagement order as a "prior restraint" subject to the highest scrutiny, it nonetheless upheld the trial court's order. The Court, though, clarified that just because a communication order that bars certain communications to third parties is in the child's best interests does not necessarily mean that the order passes Constitutional scrutiny. *Id.* at ¶ 34.

It is worth noting that the *Nash* court overturned the trial court's order that prohibited the parties from disseminating or discussing the Court's order with third parties because the ruling violated the First Amendment.

The takeaway from *Nash* is that a family court may restrict the parties from discussing the case on social media when those comments are likely to make their way to the children.

But it is worth asking if the Court of Appeals would have upheld the trial court's social media restriction if the parties had not agreed to disparage each other.

3. Help for High-Conflict Individuals

It is not unusual for a Court to implement a communication order to facilitate improved communication between the parties.

a. Propercomm – This is a service that reviews emails between the parties and removes offending or threatening language. The service is expensive (as much as $5.00 per email), but it is useful in de-escalating conflict in cases where the parties cannot calmly communicate with each other.

b. Our Family Wizard – This is a service in which emails between the parties are compiled in one place. This makes the emails easy to find when using them as exhibits in Court. Although the emails are not edited, Our Family Wizard (and similar sites) can have a "placebo effect" on parties—because they know their emails may be used in Court, they tend to be worded better than they normally are.

c. Email-only. Texts, phone calls, and emails can all be very emotional and heated. But texts and phone calls tend to get heated faster than emails. Emails are a slower form of communication, and just slow enough to allow parties to cool down and better monitor their language. Additionally, it leaves a record. For these reasons, some courts restrict the parties to communicating via email only. In many high conflict cases, the parties may be restricted to one or two emails per week.

d. **Restricted Topics.** Another tool to lessen the conflict is to limit the parties to speaking only about settlement or the children. Fewer discussions lead to fewer conflicts.

B. Social Media Sites and Apps – What to Look for and Where to Find It

Social media posts are commonly used in family law proceedings. Family law attorneys should be aware of the social media's potential consequences and potential evidence.

1. Ethical Considerations for a Lawyer Accessing A Party's Social Media

Comment 6 to Ethics Rule 1.1 in Arizona. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (emphasis added)

2018 North Carolina Bar Ethics Op. 5 (July 19, 2019). A lawyer's duty of competence includes the duty to understand the benefits and risks associated with social media.

2018 North Carolina Bar Ethics Op. 5 (July 19, 2019). A lawyer representing a client may view the public portion of another person's social media page in connection with representation.

Colorado Formal Op. 127 (September 2015). Viewing the public portion of a social media page or any public posting made by an individual "does not implicate any of the restrictions upon communications between a lawyer and certain others in the legal system."

2018 North Carolina Bar Ethics Op. 5 (July 19, 2019). A lawyer may not use deception, such as creating a fake account, to gain access to someone social media page.

2018 North Carolina Bar Ethics Op. 5 (July 19, 2019). A lawyer, using his real identity, may gain access to an unrepresented person's restricted profile page, but may not gain access to a represented person's restricted profile page without express consent from the represented person's lawyer.

2018 North Carolina Bar Ethics Op. 5 (July 19, 2019). A lawyer may accept information from a third party who has access to an opposing party's social network.

2. **Social Media & Discovery Overview**

Electronic Stored Communications Act (18 U.S.C. §§ 2701 et seq.)

- The Act determines what an electronic communications provider, such as an ISP or Facebook, may disclose regarding the electronic communications.
- Important to family law attorneys, the SCA prohibits service providers from disclosing the contents of electronic communications, even in response to a subpoena. But the service provider may be required to disclose other information, including the name of an account holder and when a message was sent. In other words, they can disclose information about the message, but not the contents of the message. For example, in *Viacom International Inc. v. YouTube Inc*., 253 F.R.D. 256, 265 (S.D.N.Y. 2008), YouTube was ordered to disclose how many times a video was viewed, but it was not ordered to disclose the contents of the video.

If you cannot subpoena the contents of an opposing party's social media page, what can you do?

You can submit a discovery request requiring the party to disclose their social media history.

What if the opposing party shut down their social media account. Will their data still be available?

It will depend on each social media site. If it was done recently, the social media site may not have yet deleted the account information.

C. Facebook, Twitter, Instagram, and Snapchat.

1. Facebook

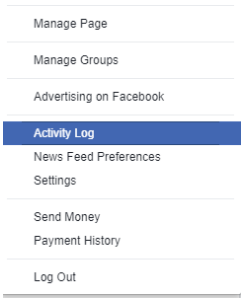
Launched in 2004, Facebook quickly became one of the most popular social media sites in the world. As of September 2019, Facebook had 2.45 billion active monthly users. In other words, roughly one-third on the Earth's population is active on Facebook each month. The percentages are much higher within the United States where a 2019 Pew Research Study found sixty-nine percent (69%) of American adults use Facebook.

Facebook allows people to post their photos, videos, new articles, or even just a short statement about something that is happening. The posts are then visible to all their Facebook friends and users have the option to make those posts visible to the public.

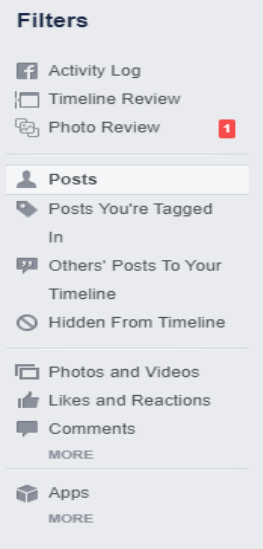
How do I see what I have posted on Facebook?

1. Log into Facebook
2. On the top right, find the button that looks like an arrow pointing downwards and click on it.

3. From the dropdown menu that appears, select activity log.



4. On the next page, there is a menu on the left titled filters that allows you to see what you have posted:

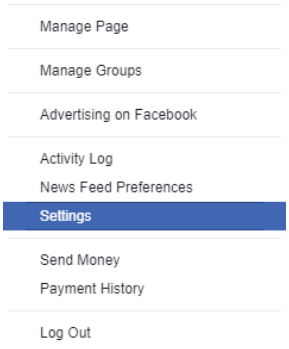


How do I download my Facebook data?

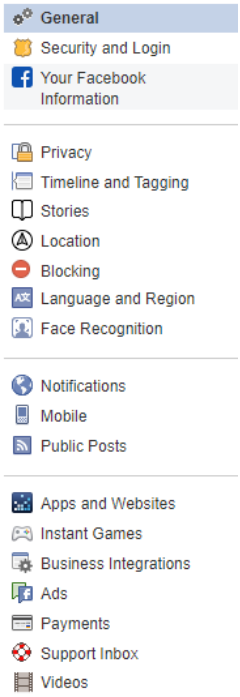
1. Log into Facebook.

2. On the top right, find the button that looks like an arrow pointing downwards and click on it.

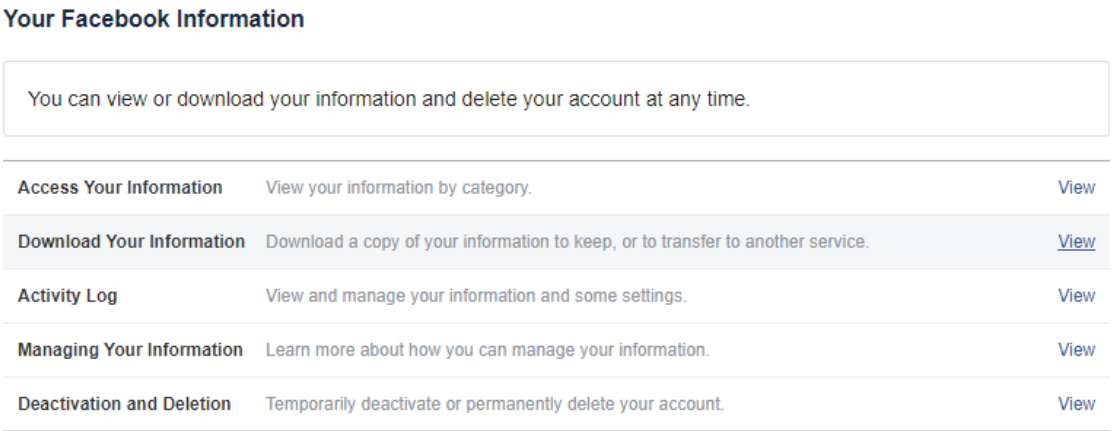
3. From the dropdown menu that appears, select settings.



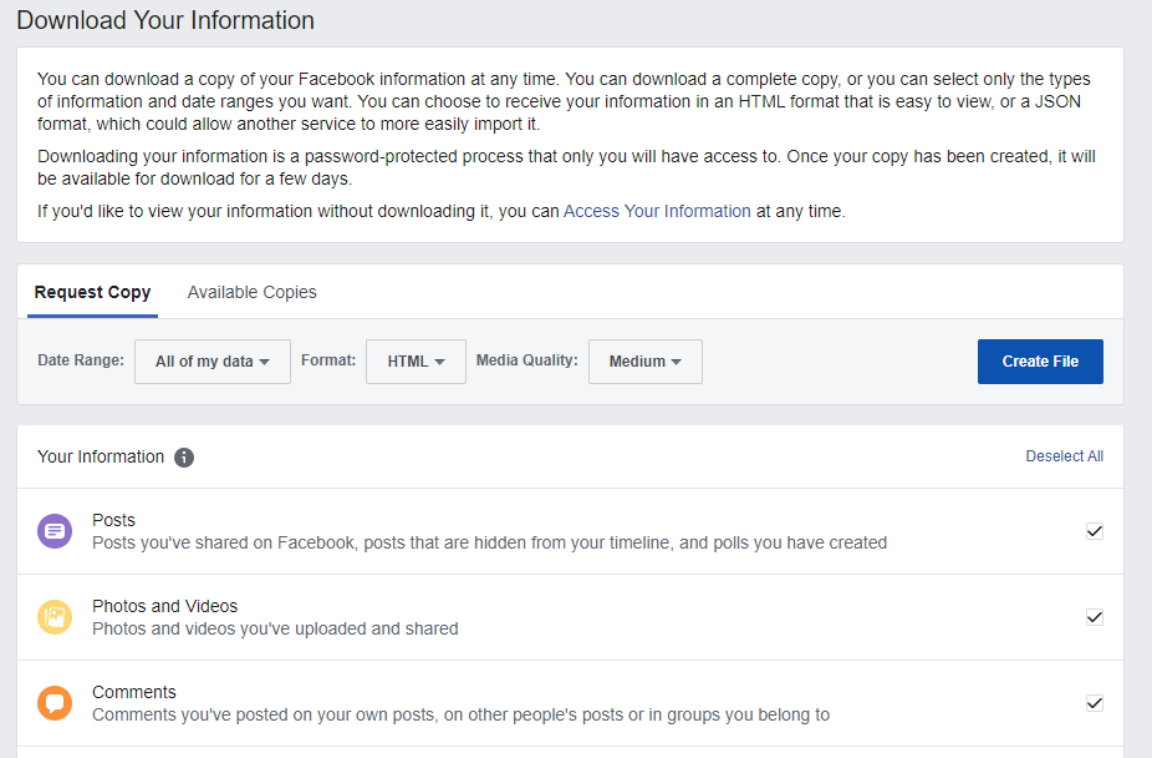
4. This will bring you to the General Account Settings page. On the left, you will see a menu. The third option from the top is titled “Your Facebook Information.” Click on that.



5. This will bring you to a page titled Your Facebook Information. You will see an option titled "Download Your Information." Click the word view next to that option.



6. On the "Download Your Information" page, you will see the options to select what data you want. You can choose "All of my data" and the data quality. Hit Create File.



7. The download will then appear as pending in the Available Copies section of the Download Your Information section. Click on Available Copies and click download and enter your password.

What parts of the Facebook profile are most useful?

- **Posts.** Certainly, what someone posts publicly can be very telling, particularly if they are posting threats or harassing statements against the other spouse.
- **Messages.** Facebook Messages are full conversations the spouse has had with other people on Facebook.
- **Security and Login Information.** This will tell you when the Facebook account has been logged into, periods of time the user has been active of Facebook, and the devices used to connect to Facebook.
- **Payment History.** A person's history of payments made through Facebook.

How long does Facebook keep data?

- **Open Accounts:** When the account is open, the data is available.
- **Deactivated Accounts:** Users can de-activate their account, which allows them to step away from Facebook but return later. In this case, Facebook does ***not*** delete account information.
- **Deleted Accounts.** Users can delete this account. Facebook, though, does not immediately delete their data. Facebook keeps the data for up to ninety (90) days.

What information might Facebook have on me after I delete my account?

- If someone has posted about you or posted a photo of you, those are not deleted when you delete your account.
- Facebook keeps log-in/log-out data.
- **Shadow profiles:** Facebook gathers their users' contacts data. If you are in someone's contacts, and they have shared their contacts information with Facebook, Facebook may have a "shadow profile" on you and know who your Facebook friends are. The idea behind this is that when and if you sign up for Facebook, they can suggest friends for you to add.

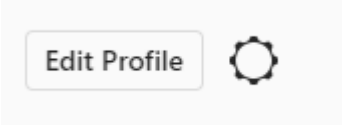
2. Instagram

How do I download my Instagram file?

1. Log into Instagram.

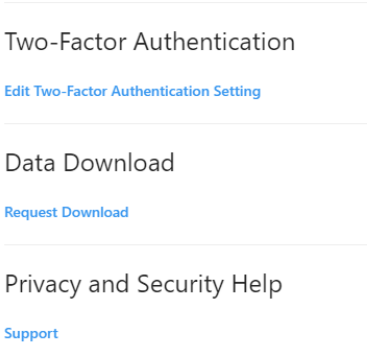
2. On the home page, you will see three icons on the top right. Click on the one that looks like a person. This will take you to your profile page.

3. On the profile page, you will see a gear button next to the Edit Profile button. Click on the gear button and a menu will appear.



4. Select Privacy and Security from the menu.

5. On the next screen, scroll to the bottom and you will see "Data Download" with an option to "Request Download"



6. Type in your email address and click next. Then enter your password and click Request download.

7. Instagram will email you a link with all your Instagram files within 48 hours.

What information does Instagram keep? Instagram keeps data on your contacts, your posts, profile information, search history, what you've liked, and your direct messages.

Can you recover deleted Instagram messages? The company itself does not keep deleted messages, but you may be able to recover deleted Instagram messages from the device they were stored on.

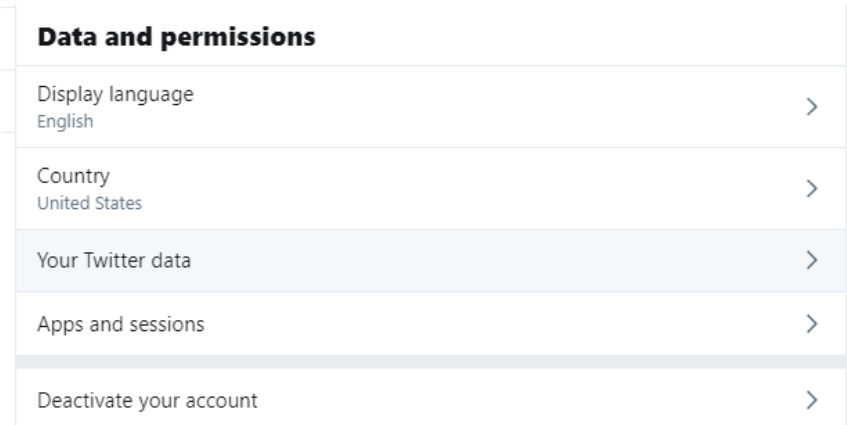
3. Twitter

How do I download my Twitter Archive (a.k.a. your data on Twitter)?

1. Log in to Twitter.

2. At the top of the page, you should see a menu. Click on Settings (you may need to press the "More" button for "Settings to appear.

3. Select Account. That will bring "Data and Permissions." An option under "Data and Permissions is "Your Twitter data"



4. You will see a section titled "Download your Twitter data" that asks for your password. Enter your password.

5. On the next page, click "Request Archive." Twitter will email you a link to your Archive.

How long does Twitter keep data?

If the account is active, Twitter keeps data indefinitely. Once a Twitter account is deactivated, Twitter can restore it for up to thirty (30) days.

How should we seek Twitter account information?

The simplest way is to make a discovery request, asking that the opposing party disclose their Twitter Archive

4. Snapchat

Snapchat is a social media service where the posts, a.k.a. "Snaps," automatically delete shortly after they are viewed. The best chance of preserving a Snap is to screen capture before it deletes.

In the rare chance you get the opportunity to inspect the other party's Snapchat account, the most useful feature to review is their "Friends" list. Snapchat will identify which friends they communicate with most often.

D. What to do if Messages, Posts, or Accounts Have Been Deleted

1. Recovery of your client's deleted emails, texts, and social media posts.

A. Recovery of emails from one's own computer.

We will go from simplest and cheapest to most complex and most expensive:

1. **Check Your Deleted Items Folder:** Select the emails you need to recover and click "Restore."
2. **Check the Default Folder on Hard Drive.** Sometimes, emails may be stored there.
3. **Call Someone Who Knows What They're Doing.** Many firms have either a dedicated IT specialist or someone at the firm who knows more about computers than anyone else.
4. **Hire Computer Forensics Specialist/Data Recovery Technician.** These professionals are great at what they do, but they can be expensive.

General Rule: The earlier the computer is given to a forensics specialist, the more likely they can recover deleted emails.

B. Recovery of text messages from one's own phone

Recovering deleted text messages can be difficult, if there is not a backup service such as iCloud being utilized. Contacting the service provider may allow the recovery of the content of messages, but the content can be deleted permanently within days and all that will be recoverable is the date/time/recipient number of the message.

2. Recovery of an opposing party's deleted emails, texts, and social media posts.

We will go from simplest and cheapest to most complex and most expensive:

1. **Hope They Disclose the Information You Want in Disclosure.** Obviously, this is very unlikely.
2. **Request the Information through Correspondence.** This is a cheaper option than formal discovery, but their cooperation is still voluntary.
3. **Request the Information through Discovery.** Since it is a discovery request, the other party can obey it, ask the Court to limit the scope of discovery to not include this information, or not disclose it and face a Motion to Compel or a negative inference at trial.
4. **Motion the Court to Order their Electronic Device be Forensically Examined.** This is rarely done in Arizona family law, and a forensic examination of device can be costly, and there may be additional costs to have the forensic examiner appear as an expert.

E. E-Discovery

What is E-Discovery? It is conducting discovery of any information that is stored on an electronic device.

December 1, 2006: Federal Rules were updated to include e-discovery.

January 1, 2008: Arizona adopts the Federal changes in civil procedure.

Ariz. Rule Fam. Law Proc. 49(k). Disclosure of Electronically Stored Information.

(1) Production of Electronically Stored Information. Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure statement, a party must produce the electronically stored information identified under Rule 49. Absent good cause, no party need produce the same electronically stored information in more than one form.

(2) Presumptive Form of Production. Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored

information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(3) Limits on Disclosure of Electronically Stored Information. Civil Rule 26(b)(2) applies to the disclosure of electronically stored information.

(4) Resolution of Disputes. If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information, the parties may present the dispute to the court in either a joint or individual motion. The motion must include the parties' positions and a good faith consultation certificate under Rule 9(c). In resolving any dispute regarding electronically stored information, the court may shift costs, if appropriate.

What to know about Rule 49(k)

- Rule 49 is the family law rule for what ***must*** be disclosed for different types of family law cases (i.e., legal decision-making or parenting, child support, spousal maintenance and attorney fees, property, and debts) as well as providing the deadlines for disclosure and the rules for disclosing witnesses.
- In our experience, Rule 49(k) is rarely invoked. If a party discloses the required Rule 49 information in paper format, that will suffice for most parties and counsel.
- Rule 49(k)(3) applies Civil Rule 26(b)(2) to the disclosure of electronically stored information.

Arizona Civil Proc. Rule 26(b)(2). Limitations on Frequency and Extent.

(A) When Permitted. The court may alter the limits in these rules on depositions, interrogatories, and requests for admission consistent with the procedures in Rule 26.2(g) and (h).

(B) Specific Limits on Discovery of Electronically Stored Information.

(i) Generally. A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense, including sources that are unduly burdensome or expensive to access because of the party's past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 26(b)(1). The court may specify conditions for the disclosure or discovery. Rule 26(e) applies in determining whether electronically stored information is not reasonably accessible as provided in this rule.

A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 51(b)(1). The court may specify conditions for the disclosure or discovery.

including sources that are unduly burdensome or expensive to access because of the party's past good-faith operation of an electronic information system or good-faith and consistent application of a document retention policy.
The court may specify conditions for the disclosure or discovery. Rule 26(e) applies in determining whether electronically stored information is not reasonably accessible as provided in this rule.

(ii) Specific Limits. A party is not entitled to obtain discovery of electronically stored information that is sought for purposes unrelated to the case. A party is not entitled to image or inspect an opposing party's data sources or data storage devices, or to discover electronically stored information that would require restoration of data through forensic means, unless the court finds: (1) that the information sought is relevant to a claim of fraud or other intentional misconduct; (2) that restoration is reasonably required to address prejudice arising from spoliation of evidence or a party's failure to comply with its obligation to preserve evidence under Rule 37(g); or (3) other good cause.

What to know about Rule 26(b)(2)

- ***Similarity of Rule 26(b)(2)(B)(i) to ARFLP 51(b)(2).*** Arizona Civil Proc. Rule 26(b)(2)(B)(i) is also reflected in the family rules in ARFLP Rule 51(b)(2) with one change. ARFLP Rule 51(b)(2) provides:

  Specific Limits on Discovery of Electronically Stored Information. A party need not provide discovery or disclosure of electronically stored information from sources that the party shows are not reasonably accessible because of undue burden or expense. If a party makes that showing, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause, considering the limits of Rule 51(b)(1). The court may specify conditions for the disclosure or discovery.

While there are textual differences between Rule 26(b)(2)(B)(i) and Rule 51(b)(2), they do not appear to be significant or to have an impact that would change a result.

- ***What are the limits in Rule 26(b)(1)?*** Under Rule 26(b)(2)(B)(i), even when a party opposing shows an undue burden or expense associated with discovering/disclosing ESI, the Court can still order such discovery/disclosure upon a showing of good cause and subject to the limits in Rule 26(b)(1).

- ***ESI discovery limited to purposes related to the case.*** Rule 26(b)(2)(B)(ii) limits discovery of ESI to only that discovery that is related to the case.
    - This can be important in family law cases where emotions can often drive discovery requests, particularly if you are dealing with an unrepresented party.
    - For example, evidence of adultery is generally inadmissible in a family law proceeding. If a party seeks the other party's cell phone to prove an affair was occurring, that would be a purpose unrelated to the case, particularly if no waste claim is pending.

- ***Rule 26(b)(2)(B)(ii) further limits the circumstances under which a forensic examination of a computer or device may take place.*** The right to search someone's computer or device forensically is not automatic. To get there, the person seeking a forensic examination has to get a Court order where the Court finds that the such an examination is necessary because of fraud, spoliation, or other good cause.

Attorneys should be aware that even if their examiners have a right to forensically examine a device, they do not necessarily have the right to access password-protected accounts of third parties that may be on the device.

Cases

***Lake v. City of Phoenix*, 222 Ariz. 547, 551, ¶ 14, 218 P.3d 1004, 1008 (2009).** *Lake* is one of the few published e-discovery cases in Arizona and is the most prominent. "[W]hen a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law." The Arizona Supreme Court clarified that a public entity can satisfy this request by providing the record to the requester in "its native form." *Id.* at ¶ 15.

The Final Limitation: Costs

A digital forensics investigation of a device can cost up to $100,000.00. Most investigations, though, are believed to fall between $5,000.00 and $15,000.00. Clients and/or the attorney should consult with the investigator they plan on using and get an idea

of what the expenses are going to look like. Those estimated costs need to be balanced against what you reasonably expect to gain from the forensics examination.

F. Electronic Communication & The Order of Protection

1. What counts as a contact in a no-contact order?

Most Orders of Protection and Injunctions against Harassment include instructions for the defendant to have no contact with the protected person. In social media, what is "no contact" can get tricky:

> *Courts across the country have in recent years ruled that "interacting with a person on Twitter, Facebook, Instagram, and other social media platforms does indeed violate the terms of a restraining order," as Fell pointed out. In 2009, a woman in Tennessee was arrested for allegedly violating a legal order of protection when she poked the protected person on Facebook. In 2016, a New York judge sentenced a woman to a year in jail for tagging someone who had a protective order against her in a post on Facebook, despite the woman's claim that the order "did not specifically prohibit" communication through Facebook. In one 2016 case, a man allegedly followed his ex-girlfriend on Instagram while she had an order of protection against him, triggering an Instagram notification on her phone. The judge ruled that he had indeed violated the order, and explained the decision this way: "The situation described here is exactly the same as if the defendant, using his iPhone, had asked Siri to place a call to the complainant, instead of dialing her number himself. Just as in this hypothetical there could be no legitimate claim that the defendant communicated only with Siri and did not himself telephone the complainant, here there can be no legitimate claim that the defendant communicated only with Instagram, and not with the complainant."* **Fetters, Ashley. "Why It's Hard to Protect Domestic Violence Survivors Online. *The Atlantic* (July 11, 2018). Available at https://www.theatlantic.com/family/archive/2018/07/restraining-orders-social-media/564614/.**

An Article from *The Atlantic* on protective orders and digital communications

***State v. Heffron*, 190 A.3d 232 (Me., 2018).** Maine Supreme Court found that defendant intended to have direct or indirect contact with the protected person on an Order of Protection through his Facebook posts even though they were not Facebook friends.

Protective order enjoined defendant from having direct or indirect contact with the plaintiff. Defendant posted several posts, naming the plaintiff and stating threats against her. The Maine Supreme Court held this violated the Order of Protection, even though the two were not Facebook friends because it was foreseeable the posts would reach the plaintiff.

> *Therefore, as found by the court, Heffron's contact with the protected person was not inadvertent or achieved through a means that was not reasonably seen to serve as an effective means of communication. Because his posts foreseeably reached the protected person, Heffron achieved his goal, and he cannot now successfully complain that he did not know that his conduct was proscribed. Wherever the boundary may lie between conduct that falls within and without the protection order's prohibition against contact, Heffron's Facebook posts do not approach that line.* ***State v. Heffron*, 190 A.3d 232, 236 at ¶ 10 (Me., 2018)**

The Maine Supreme Court also found that the defendant's posts were not protected speech:

> [*The protective order] was a constitutionally sound injunction against the very conduct in which Heffron later chose to engage, resulting in this prosecution. Based on the evidence presented at this criminal trial, the court correctly determined that Heffron's communications with the protected person fell short of those that deserve constitutional protection and that a conviction based on his violation of the protection order did not place his First Amendment rights at risk*. *Id.* at ¶ 12.

Read an NPR article on digital spying, divorce, and smart phones:

***State v. Craig*. 112 A.3d 559 (N.H., 2015).** Defendant violated the Order of Protection when he posted statements about the protected person on his own Facebook page which he chose to make public. The protected person and then went onto his page and saw what he had written. Because the posts were open to the public, this was a violation of the Order of Protection.

***Rios v. Fergusan*, 978 A.2d 592, 595 (Conn. 2008).** Order of Protection upheld because YouTube video of defendant brandishing a firearm stated he wanted to shoot the protected person. Message was more than posting to the Internet; it was targeted at a specific person.

***Shaw v. Young*, 199 So.3d (La. App., 2016).** Husband's posts about wife on Facebook were sufficient to sustain an Order of Protection against husband even though wife was not direct recipient of the Facebook posts.

2. Harassment via Electronic Communications

A.R.S. § 13-2916(A)(3) is listed as one of the crimes for which an Order of Protection can be granted under A.R.S. § 13-3601. That statute provides:

> *It is unlawful for any person, with intent to terrify, intimidate, threaten or harass a specific person or persons, to … disturb by repeated anonymous, unwanted or unsolicited electronic communications the peace, quiet or right of privacy of the person at the place where the communications were received.*
>
> *B. Any offense committed by use of an electronic communication as set forth in this section is deemed to have been committed at either the place where the communications originated or at the place where the communications were received.*
>
> *C. This section does not apply to constitutionally protected speech or activity or to any other activity authorized by law.*
>
> *D. Any person who violates this section is guilty of a class 1 misdemeanor.*
>
> *E. For the purposes of this section, "electronic communication" means a wire line, cable, wireless or cellular telephone call, a text message, an instant message or electronic mail.*

A.R.S. § 13-2916 (use of electronic communication to terrify, intimidate, threaten, or harass) is listed as one of the crimes for which an Order of Protection can be granted under A.R.S. § 13-3601.

Orbiting. Monitoring someone online or through social media through tracking apps or social media features, such as Find My Friends.

3. Advising Order of Protection Clients Re: Electronic Communication

Advice for Protected Parties

1. If you share any electronic accounts with the defendant, such as a cell phone plan, Apple ID, etc., get off those accounts and onto new accounts that the defendant does not have access to.
2. Change your passwords to everything. Log-out, revoke all sessions, and reset all sign-in devices. Having a shared account with the defendant can be an invitation for them to harass by sending fake emails, texts, or changing your username or to stalk you by monitoring your activities electronically. It is common for perpetrators of domestic violence to hack into their victim's emails and monitor what they are doing.
3. If necessary, change your email or phone number. Sometimes, it is necessary to change your email and phone number so that the Defendant cannot contact you at all.
4. Block, unfriend and unfollow the Defendant on all social media accounts. Again, make sure they do not have access to you.
5. Do not contact the defendant or try to bait the defendant into violating the Order of Protection. The only exceptions are to discuss the children or to negotiate/discuss legal issues.
6. Don't send a text or email where you try to negotiate the Order of Protection for a financial tradeoff (e.g., "I'll drop the Order of Protection if you give me the house").

Advice for Defendants

1. Do not make any posts on social media or Web site about the protected person. This could be considered a violation of the Order of Protection.
2. Block, unfriend and unfollow the protected person on all social media accounts.
3. Disable any features such as Follow My Friends or anything else that could possibly allow a person to stalk the protected person online. You want to avoid the very appearance of stalking so that you don't violate the Order of Protection.
4. If the protected person starts texting or emailing, do not respond unless it directly and only relates to a listed exception on the Order of Protection. If you respond to their texts and emails, you could be arrested.
5. Do not log into any account belonging to the protected person.

G. Getting Email Evidence

The easiest way to get email evidence is to have your client print out all communications between them and the opposing party. Those email chains should show the full conversation. In lengthy marriage, you may want to limit the amount of emails you have your client print out to a certain time period.

1. Making Sure Your Evidence is Legal and Legitimate

It is rare that a party will falsify evidence or illegally obtain evidence in a divorce, but it can happen. If you suspect this is happening, it is imperative that your client save and print every email between the parties. If you suspect your client is doing this, you have an ethical duty to ensure the information is legitimate before presenting it to the Court.

2. Wiretap Act: Interception of Wire Communications (18 U.S.C. § 2511)

Under this Act, you may not use or disclose intercepted wire communications--this includes emails intercepted by Spyware. Furthermore, these intercepted communications may not be used as an exhibit in Court. If they are, criminal penalties may apply to both client and attorney.

***Klumb v. Gloan*, 884 F.Supp.2d 644 (2012).** Wife, who was an attorney, installed spyware to intercept Husband's communications and alter them to present a false impression that he was having an affair. She also digitally altered the parties' prenuptial agreement. She was fined $10,000.00 in statutory damages, another $10,000.00 in punitive damages and hit with fees. Amazingly, the Tennessee Bar only publicly censured Wife.

3. Emails between attorneys

Remember that emails between attorneys may also be used in litigation, though generally limited to the issue of whether attorney's fees may be awarded. Attorneys should be professional in their communication toward each other. While Arizona does not have the civility requirements other states do, your lack of civility could cost your client money.

Also, some attorneys badger other attorneys to copy their staff on all emails. These same attorneys will send the opposing counsel a sternly worded, heavily exclamation-pointed email when they forget to do so. This is inappropriate and sends the signal that the attorney is disorganized and self-important. Attorneys have an ethical duty to ensure their mail, including email, is properly processed. If you need someone other than yourself to check your emails, the solution is not to force opposing counsels to do that work for you; rather, you should forward your email to your staff automatically. That said, if you are asked to copy another attorney's staff, you should do so as a professional courtesy.

H. Whose SmartPhone/Tablet is Discoverable

Both parties' Smartphone/Tablets are discoverable in divorce litigation. The children's might be as well. The Court generally lacks jurisdiction to order the forensic examination of anyone else's Smartphone/Tablet.

Additionally, a forensic examination of a spouse's Smartphone or tablet is rare in Arizona. Judges will likely want to see that ordering the forensic examination of one spouse's Smartphone or tablet is the only option, so it may be important to have exhausted all other options to retrieve the information. Finally, clients should be made aware that if they want to forensically search the other party's device, the other party will want to do the same to theirs.

I. Retrieving Texts from Messaging Apps

1. Printing Text Messages for Court

Text messages are valuable in family law proceedings, yet clients hand us printed text messages all the time that are just not presentable. We often face a "Goldilocks and the Three Bears" problem with text messages. The ones clients give us are either too big or too small and seldom are they "just right." Sometimes, they are blurry as well. Often, they don't have the date listed on them or are just a piece of the conversation. Since clients rarely can provide us with what we need, we have developed guideline for printing out text messages for Court.

Guidelines for Printed Text Messages for Court:

1. **The text messages must show the date of the conversation.** Text messages that say "Sent today at 5:37 p.m." are not as helpful as ones that say "Sent May 29, 2019 at 5:37 p.m."
2. **Print the whole conversation.** A text message where the other party is clearly writing a response, and we don't see the preceding message is unreliable. A judge will wonder what was said to make the other party react that way.
3. **The printout must be legible.** We have to be able to clearly see what was written on the printed-out text.
4. **The printout should be large enough for a judge to read but small enough to make the conversation easy to follow.** Generally, these means five or six normal-length texts (i.e., ones of one or two sentences) should fit on the page.

What apps are most commonly used to print text messages for court?

- **Iphone: Decipher Text Message**
- **Android: SMS Backup +.**

What if I'm not sure what kind of phone I have? Does it say iPhone on it? If yes, it's an iPhone. If no, it's most likely an Android. Android is the system used by almost all phones that are not iPhones. Common Android phones include those made by Samsung, Google, Motorola, LG, and HTC.

What if I don't have a Smartphone? Are my texts able to be printed and prepared for Court? Most likely, yes, but you'll need to either do some research as to how to do that or contact a tech professional. We do not include that specific advice here because the way to do it varies based on brand and model of your phone.

2. Screen Captures

Almost all phones allow screen captures. Most screen captures come with an inherent problem: They do not have the date and time stamp. Most frequently, the date is missing because the screen capture reads that the text message was sent "Today" or "Yesterday." We don't know when today or yesterday was when we are using it in Court. Sometimes, the date and time can be established through testimony, but even then, it has a feeling of unreliability. If a client hands you text messages missing a real date and time, ask them if they can provide the texts again, this time with the time and date on it.

How do I make a screen capture?

For iPhone: Generally, you hold the power button on the right side and click the home button at the exact same time. The screen will flash white and you'll hear the shutter for the camera when the screen capture is taken.

For Android: Generally, you hold the "Sleep/Wake Button" (a.k.a. the big button at the bottom of the phone) and the volume down button at the same time. Wait several seconds. You will know the image when the screen flashes.

3. Deleted Text Messages

These can be difficult to retrieve, but there are options:

- **Your client's deleted texts.** If your client has deleted text messages, they may be able to get it from the provider directly. They should also check any device that is synched to the phone. If not, a forensic expert will be necessary.
- **Opposing party's deleted texts.** If your client shares an account with the opposing party, your client may be able to get them from the provider, as they would with their own deleted texts. Otherwise, you can make a formal request to the other side to provide them. Failing that, a forensic expert may be necessary.

Be aware that most providers only store text messages for a short period of time, some for as little as a few days, making it difficult to acquire any texts from the provider.

J. Preservation and Spoliation Consideration

1. What is Spoliation?

Black's Law Dictionary (11th ed. 2019) "The intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible."

2. Celebrity Spoliation and Text Messaging Cases

Lynyrd Skynyrd. Following the deaths of band members Ronnie Van Zant and Steven Gaines in a plane crash in 1977, the surviving members signed a Consent Order that they would never again perform as Lynyrd Skynyrd. The Agreement further limited how they could use the name "Lynyrd Skynyrd." In 2016, one of the surviving band members, Artimus Pyle, began collaborating with a screenwriter who was working the band's former record label to make a movie on the plane crash. Pyle communicated with the screenwriter solely by text messages. The survivors of Van Zant sued the record label to prevent distribution of the film. They subpoenaed the screenwriter's text messages. But the screenwriter had gotten a new phone and not transferred the text messages. The Court determined this was spoliation and took a negative inference against the record label for whom the screenwriter worked.

3. Spoliation and Social Media

***Lester v. Allied Concrete Co.*, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. 2011 Sept. 6, 2011).** A 25-year-old man lost his wife when their car was struck by a speeding concrete truck. The man's Facebook page included posts that included a picture of him holding a beer can while wearing a T-shirt that reads, "I ♥ hot moms." The plaintiff's lawyer instructed his paralegal to purge his Facebook page of offensive material. When served with a discovery request for his Facebook page, the plaintiff, on advice of counsel, deactivated the page and responded that he had no Facebook page. The lawyer was sanctioned $542,000.00, and the plaintiff $180,00000.

4. Spoliation under Arizona Law

Duty to Preserve. Litigants in Arizona have a duty to preserve evidence they know—or reasonably should know—could be discoverable in litigation. ***Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997).**

ARFLP Rule 67(b)(1) lists the sanctions for failing to obey an order to provide or permit discovery. The sanctions include directing designated facts as being established, prohibiting the disobedient party from putting on a case, issuing a stay, dismissal of the action in whole or in part, and entering a default against the disobedient party.

***Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir.1988).** "Destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence

through the degrees of negligence to intentionality. The resulting penalties vary correspondingly."

Generally, an innocent failure to preserve evidence does not warrant the sanction of dismissal. ***Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250, 955 P.2d 3, 6 (App. 1997).**

Souza introduced a five-factor test a Court uses when considering whether to dismiss a case for spoliation:

1. Whether the destruction was willful or volitional.
2. Whether the disobedient party failed to comply with a court order or abused discovery or disclosure.
3. Whether the defendant had the right, opportunity, and ability to obtain the evidence.
4. Whether the destruction left the other party completely incapable of mounting a defense or irreparably prejudiced.
5. Whether lesser sanctions were available.

Arizona does not recognize spoliation claims as torts. See ***Lips v. Scottsdale Healthcare Corp.***, 224 Ariz. 266, 267, ¶¶ 2, 229 P.3d 1008, 1009 (2010) ("We declined to recognize a tort of third-party negligent spoliation" but not ruling on whether third-party intentional spoliation torts would be permitted*);* ***La Raia v. Superior Court In & For Maricopa County***, 150 Ariz. 118, 122, 722 P.2d 286, 290 (1986) (declining to recognize a tort for first-party spoliation").

Can you advise your client to delete his Facebook page?

Probably not. That can be considered spoliation. You can, however, instruct them to deactivate their Facebook account. Anything they posted in the past may be discoverable and must be preserved.

K. Authenticating and Getting Your Posts, Emails, and Texts Admitted

1. Rule 901

Note: We discuss Rule 901 here, but please be advised that in most family law cases in Arizona, Rule 901 will *not* apply because it is exempted by Rule 2 of the Arizona Rules of Family Law Procedure. But under Rule 2, a party can invoke the rules, reinstating the exempted evidentiary rules. For that reason, Rule 901 is worth learning.

> **Arizona Rule of Evidence 901:** *To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.*
>
> To be admissible, evidence must also be "relevant, which means its existence simply has some tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence. … [E]vidence can have this tendency only if it is what the proponent claims it is, i.e., if it is authentic" ***United States v. Browne*, 834 F.3d 403, (3rd, 2016).**

Rule 901 cases:

***State v. Griffith*, 449 P.3d 353 (Ariz. App. 2019).**
Facts. Police discovered, through a warrant on Facebook, a message from defendant's account listing a stolen iPad for sale. At trial, the state submitted the evidence without using a Facebook employee for authentication and without a certification from Facebook.
Holding 1.

> *[S]ocial media communications, when offered to prove the truth of what a user said, fall outside the scope of Rule 803(6), and thus are not self-authenticating under Rule 902(11) when offered for that purpose. Id. at 357 ¶ 13.*

Holding 2. Social media may be admissible "if reasonable extrinsic evidence tends to show the party made it." *Id.* at ¶ 16.

***U.S. v. Browne*, 834 F.3d 403 (3rd, 2016).** "To authenticate the [Facebook] messages, the Government was therefore required to introduce enough evidence such that the jury could reasonably find, by a preponderance of the evidence, that Browne and the victims authored the Facebook messages at issue." *Id.* at 410. But even though the Facebook posts did not qualify for admissibility under Rule 803(6) (business records) or under 902(11) (self-authenticating), the records were admissible because the moving party providence sufficient evidence to allow the trier of fact to "'reasonably find' the authenticity of the records 'by a preponderance of the evidence.'" *Id.* at 413.

***U.S. v. Barnes*, 803 F.3d 2019 (5th, 2015).** The standard for authentication is not a burdensome one, and conclusive proof of authenticity is not required for the admission of disputed evidence.

***U.S. v. Vayner*, 769 F.3d 125 (2nd, 2014).** Trial court erred in admitting Facebook page purportedly belonging to the defendant because evidence established only that it was a Facebook page *about* the defendant, not a page *created* by the defendant. *Id.* at 132. "Authentication merely renders evidence admissible, leaving the issue of its ultimate reliability to the jury." *Id.* at 131.

***State v. Forde,* 233 Ariz. 543, 315 P.3d 1200 (2014).** Evidence was sufficient to authenticate text messages from co-conspirator to defendant's phone where text was sent to the phone seized from defendant when arrested and the phone was registered in defendant's name.

State v. Fell,* 242 Ariz. 134, 393 P.3d 475 (App. 2017)*: Reversed trial court's order excluding text messages where the defendant did not have exclusive use of the phone. The standard for admissibility is not whether the evidence is authentic, but whether the trier of fact could reasonably conclude it is authentic. "If that standard is met, any uncertainty goes to the weight rather than the admissibility of the evidence." *Id.* at ¶ 6. What constitutes sufficient authentication varies from case to case. *Id.* at ¶ 12. Here, there was sufficient authentication because the defendant identified himself in a text message, and the recipient admitted to receiving the text messages.

2. ARFLP Rule 2 Exempts Hearsay and Authentication Rules

Rule 2(b)

(b) Effect of No Notice. If no party files a timely notice under (a),
(1) Arizona Rules of Evidence 602, 801-807, ***901-903****, and 1002-1005* ***do not apply****; and*
(2) the other Rules of Evidence, including Rule 403, still apply …

If no one files a Rule 2(a) Notice, the authentication requirement of Rule 901 does not apply. But if a notice is filed the hearsay rules in 801-807 and the authentication rules in 901-903 do apply.

How to File a Notice. At least 45 days before the hearing or trial, you can file a Notice of Compliance with the Rules of Evidence. This will reinstate the Rules of Evidence, including 901.There are two exceptions to the 45-day deadline rule:

- Where the Court sets another deadline.
- Where the Court sets the trial or hearing fewer than sixty (60) days in advance, you can file within 45 days of the hearing/trial, so long as the noticed is filed within a "reasonable time" of you being notified of the hearing or trial date.

3. Frequently Asked Questions

When is it advantageous to invoke the rules?

Generally, we do not like to invoke the Rules. In our experience, the invocation for the rules makes litigation more expensive, can annoy judges (especially where an attorney invokes the rules against a *pro per*), and usually does not make a meaningful difference in the outcome of the litigation.

But sometimes, invoking the rules is a worthwhile strategy, particularly if you are trying to keep out a piece of evidence that is likely to be kept out if the Rules are invoked.

How do you authenticate text messages, emails, or social media posts?

The most common way to authenticate text messages, emails, or social media posts is by testimony. Most commonly, you can accomplish this on direct examination of your own client.

You can also authenticate through a Request for Admission sent as part of the discovery process or through a deposition.

Valuing and Dividing Assets – QDROs, Stock Options, Business Assets and More

Submitted by Leonce A. Richard III

VALUING AND DIVIDING ASSETS

By Lee Richard

I. TRACING COMMINGLED/TRANSMUTED ASSETS

Transmutation of assets in the context of marital dissolutions refers to converting the legal status of sole and separate property into community or marital property for purposes of dividing it between parties. Generally, this can be accomplished in two ways: (1) voluntarily by gift or agreement; or (2) involuntarily (and usually inadvertently) by placing title to the asset in both spouses' names or "mixing-up"/combining claimed sole and separate assets with community assets to the point where the identities of the two types of assets are no longer distinguishable. The latter form of involuntary transmutation is termed "commingling". The effect of all the foregoing actions is to convert (or "transmute") the legal character of assets from sole and separate property into community property pursuant to Arizona's legal presumption in favor of community property.

The "commingling" of assets is probably the chief manner in which spouses inadvertently transmute their claimed sole and separate property into community property. It is important to note that the mere "mixing" of sole and separate assets with community assets is itself not sufficient to trigger a transmutation of sole and separate property into community property. Rather, it is only where the commingling results in an inability to identify the claimed sole and separate property that transmutation can occur. ***Porter v. Porter****, 67 Ariz. 273, 195 P.2d 132 (1948)*; *See also* ***Nace v. Nace*****,** *104 Ariz. 20, 23, 448 P.2d 76, 79 (1968) (*"[T]he mere commingling of funds does not have the effect of destroying the identity of the husband's separate property as long as it can be identified"); ***Potthoff v. Potthoff****, 128 Ariz. 557, 562, 627 P.2d 708, 713 (App. 1981)* (The principle of transmutation by commingling is not applicable where the identity of separate property is not lost)**.** In this regard, the concept of "commingling" does not apply at all "where the community component of the intermixture is comparatively small." ***Porter****, 67 Ariz. at 282; 195 P.2d at 138*; *see also* ***Kingsbery v. Kingsbery,*** *93 Ariz. 217, 223, 379 P.2d 893, 898 (1963) (citing Porter)*("[T]he loss of the separate property results from the presumption in favor of the community in the absence of identification of the separate property, and not from the mere fact of intermixture"); ***Battiste v. Battiste****, 135 Ariz. 470, 474, 662 P.2d 145, 149 (App. 1983)* (holding that "[a]ny evidence of commingling in the savings accounts was

de minimis and insufficient to transmute the character of the accounts[]"); ***Conley v. Quinn**, 346 P.2d 1030, 1036 (N.M. 1959)* ("But when there is a commingling of a negligible amount of community property with a large amount of separate property so that the separate property can no longer be identified, it would be most inequitable to follow the [community property presumption]. . . The doctrine of de minimis non curat lex must be applied"); ***Paxton v. Bramlette**, 228 So.2d 161, 165 (La. Ct. App. 1969)* (stating that "where the amount of community money is small in comparison with the separate funds with which it is commingled, the entire funds do not become community property[]"); ***Gregory v. Gregory**, 223 So.2d 238, 244 (La. Ct. App. 1969)* ("If only a relatively small amount of community funds are co-mingled with separate funds, then the mixing of such funds will be considered as inconsequential, not sufficient to constitute a co-mingling, and it will not warrant the designation of all such funds as community property").

Under Arizona law, "where community property and separate property are commingled, the entire fund is presumed to be community property unless the separate property can be explicitly traced." ***Cooper v. Cooper**, 130 Ariz. 257, 635 P.2d 850 (1981); **Porter**, supra.* Unfortunately, neither ***Cooper*** nor ***Porter*** – nor any other reported Arizona case law – provides any practical definition for what "explicitly traced" means. Nor do ***Cooper*** or ***Porter*** (or any other reported Arizona case) provide any explanation for the other terms typically utilized to describe the level of tracing necessary to overcome the presumption that all commingled assets are community property. *See e.g.,* ***Cooper*** ("clear and satisfactory evidence"); ***Porter*** ("clear and cogent proof"). Accordingly, the trial court is generally left to its own devices to determine what methodology and *quanta* of tracing must be presented to overcome the presumption that commingled sole and separate property has been transmuted into community property. Generally, the Arizona Court of Appeals, in various unpublished memorandum decisions, has indicated that a "dollar for dollar" tracing is <u>not</u> necessary (i.e., tracing each separate property dollar into and out of the commingled account) and that "gaps" in the accounting records are not necessarily fatal to a successful tracing. On the other hand, the Arizona Court of Appeals has rejected tracing methodologies such as "first-in/first-out" (that assumes the community portion of the commingled monies are first used to pay community expenses) and "total recapitulation" (that attempts to show marital expenses exceeded marital contributions <u>throughout the</u>

entire marriage with the implication that any remaining assets must therefore be sole and separate assets).

Generally, the Arizona case law regarding the tracing of commingled separate assets defers to the trial court's broad discretion to address the issue on a case-by-case basis with the only limitation being that the trial court act reasonably and "equitably" in dividing the parties' assets. See e.g., ***Weaver v. Weaver****, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982);* ***Proffit v. Proffit****, 105 Ariz. 222, 224, 462 P.2d 391, 393 (1969);* ***Crook v. Crook****, 80 Ariz. 275, 278, 296 P.2d 951, 952 (1956);* ***In re Marriage of Thorn****, 235 Ariz. 216, 221, 330 P.3d 973, 978 (App. 2014)(*the Court "shall order the division of the property of the parties in a manner that is just and right[.]"); *See also,* ***Toth v. Toth****, 190 Ariz. 218, 219–21, 946 P.2d 900, 901–03 (1997)* (stating that A.R.S. § 25-318 "expressly instructs the court to divide the marital property equitably" and that "[e]quitable . . . is a concept of fairness dependent upon the facts of particular cases."); ***In re Marriage of Flower****, 223 Ariz. 531, 534–35, 225 P.3d 588, 591–92 (App. 2010)* ("In determining an equitable division the family court has broad discretion in the specific allocation of individual assets and liabilities."); ***In re Marriage of Inboden****, 223 Ariz. 542, 544, 225 P.3d 599, 601 (App. 2010)* ("The family court has broad discretion in determining what allocation of property and debt is equitable under the circumstances."); ***Boncoskey v. Boncoskey,*** *216 Ariz. 448, 451, 167 P.3d 705, 708 (App. 2007)* ("In apportioning community property between the parties at dissolution, the superior court has broad discretion to achieve an equitable division[.]").

In light of the foregoing case law, a successful tracing of commingled separate property would entail the following approaches:

- *Determine first whether there has actually been a "commingling" of assets.* Remember, "commingling" entails a loss of identity and not merely a combining of assets where each asset remains separately identifiable. Only when the "mixing" of assets results in the loss of each asset's individual identity does transmutation occur.
- D*etermine if the commingling is significant.* Under its equitable powers, the trial court can ignore commingling where the

community portion of the mixed assets is insignificant or "*de minimus*" compared with the sole and separate portion.

- *Provide a clear picture for the trial court of what chronologically transpired with regard to the separate assets at issue*. This can and should include not only clear and accurate accounting records, but other documents and testimony of people with first-hand knowledge of what transpired regarding the assets in question in order to "fill in" any gaps in the accounting records. Expert testimony in the form of a forensic accountant, bookkeepers, tax preparers, and the like will often be necessary if the accounting records are incomplete or unclear with regard to what happened to the sole and separate assets at issue.

II. VALUATION OF ASSETS

As noted above, the trial court has broad discretion when it comes to dividing spouses' assets in connection with a divorce. This includes the broad discretion not only to select methods for valuing assets, but also the date of valuation – which can be critical to valuing a particular asset. *See* ***Sample v. Sample****, 152 Ariz. 239, 242–43, 731 P.2d 604, 607–08 (App. 1986)* ("[T]he choice of a valuation date should be dictated by largely pragmatic considerations, and that it is the equitableness of the result that must stand the test of fairness on review"). In fact, "a trial court must be allowed to utilize alternative valuation dates" and "[o]nly in this fashion can our courts make truly equitable awards as dictated by A.R.S. § 25-318(A)." ***Id****. at 242, 731 P.2d at 607.*

The trial court will generally take different approaches to valuing different types of assets:

A. Real Estate

There are two broad categories of real property that are subject to valuation and division as part of divorce: residential property and commercial property. Generally, in the absence of an agreement as to value, the trial court will expect the parties to provide it with an appraisal by an acknowledged real estate appraiser regarding the property's value. Appraising residential property is typically much easier and less costly than appraising commercial property. Most real estate appraisers will not appraise commercial property –

so you will need to be extra diligent in your search and selection of a commercial real estate appraiser if you are confronted with this type of property in your case.

In either case, the appraiser will (in accordance with ASA or MIA certification guidelines) analyze the real property's value under the three standard valuation methods:

(1) *The cost approach* – which looks to what it would cost to actually construct the property on its current location in order to determine value.

(2) *The market/comparable sales approach* – which looks at the local real estate market for recent sales of similar property in order to determine value based on a comparison of the prices obtained for those sales.

(3) *The Income approach* – which attempts to convert anticipated future cash flow from the property, plus any reversion value on sale, into an indication of the current value of the property. (There are a number of different "income" based methodologies - the two principal approaches involving direct capitalization – generally utilized when a property's income stream is stable – and discounted cash flow analysis – which is generally employed with respect to variable income streams).

While a qualified appraiser will consider all three of these approaches to appraising the property, he or she is not required to actually utilize all three approaches in his or her final appraisal and can, in their discretion, choose not to use one or more of these approaches if they do not find them to be applicable. Typically, most residential appraisers will primarily rely on the market/comparable sales approach. Most commercial appraisers will rely on a combination of the market/comparable sales and income approaches.

Note that an appraisal of the property is necessary only when one spouse wants to keep the property and buy out the other spouse. In such case, it is necessary to fix a value for the property. NO appraisal is necessary if the parties are simply going to sell the property to a third party on the open market. The market will set the actual value for the property when it is sold to a willing buyer.

Note also that special attention is required where the interest to be appraised is not the parties' ownership interest in community real property, but a community lien claim by one spouse against the other spouse's sole and separate property. These fall into two broad categories of lien claims:

(1) *Claims arising out of community improvements to one spouses' sole and separate real property*. The value of such liens must be determined by a comparison of the value of the property with the improvements and the value of the property without the improvments. *See* ***Honnas v. Honnas***, *133 Ariz. 39, 648 P.2d 1045 (1982)*. This requires TWO contemporaneous appraisals: a present appraisal with the alleged improvements and a separate present appraisal of the property without the alleged improvements.

(2) *Claims arising out of community payments of mortgage or acquisition costs of one spouse's sole and separate property*. The value of such liens must be determined by measuring the appreciation (or depreciation) of the property's value since the community's payments started in order to establish the community's claim. *See* ***Drahos v. Rens***, *149 Ariz. 248, 717 P.2d 927 (App. 1986)*. This requires TWO non-contemporaneous appraisals: one looking at the past value of the property starting at the time the community's payments began and a separate appraisal of the property's present value.

B. Business Valuations

As with real property, an expert appraiser will be required where the parties own an interest in a business. The business appraiser will generally apply the same basic valuation approaches discussed above with respect to the appraisal of real property (i.e., the cost approach, the market/comparable sales approach, and the income approach), although the methodologies will be much more complex. In the absence of an agreement on value, the trial court will essentially demand that the parties provide it with such an appraisal.

Some of the issues that should be considered in connection with valuing a business:

(1) *Is an appraisal even necessary?* As with real estate, an appraisal of a business is necessary only if one party wants to keep the business interest and buy out the other party. If the parties are simply going to sell their interest to a third party – or continue to jointly co-own their interest (which can be done if the interest is merely a minority, passive investment) – then there is no need for an appraisal.

(2) *What is the interest that is being valued?* Are the parties the sole owners of the business, or do they only own a partial interest in the business with others. It is crucial to any business valuation that you clearly explain to the business appraiser WHAT exactly is being appraised. For instance, the value of a controlling interest (51% or more) in a

business is going to be proportionally greater than the value of a non-controlling interest (anything less than 51%).

(3) *What is the valuation date for the business?* This is a crucial decision. When the business is valued can be a major driver of its appraised value. Obviously, many businesses that were worth millions the day before the stock market crash in 1929 were worthless the day after. If possible, the parties should agree on a valuation date in order to avoid unnecessary (and costly) appraisal work later on. A basic rule of thumb is that businesses whose primary profitability is generated by the operating spouse (e.g., most sole practitioner or small professional practices) should be appraised as of the date of service of the petition for dissolution. Those businesses whose primary profitability is not linked to the operating spouse (e.g., large companies or practices) should be appraised as close to trial as possible.

(4) *How "saleable" is the business – are there restrictions on the ability to sell?* If the parties own a minority interest in a small business made up of only a few owners, then it is unlikely that someone will want to "buy" their interest – significantly diminishing the market value for their interest. Further, most small, private (i.e., "closely held") businesses have restrictions in their operating agreements that prohibit owners from selling their interests to someone outside the business.

(5) *Is the business a "new", start-up business without any profit history?* If so, there might not be any "value" to the company. Note that the trial court will value the business based on current reality – not what the business *might* become in the future.

(6) *Is a joint appraisal a good idea?* Conducting a business appraisal is an expensive proposition. Sharing the cost of a joint appraisal has some advantages. However, it can lead to complications down the road that might offset any immediate cost savings.

(7) *Do you need a full appraisal now, or only an estimation of value?* Many business appraisers will do a cursory, "down and dirty" estimation of value giving you a "range" of values for a business purely for settlement purposes. Such estimations are not admissible in court, but they will give clients an idea of whether it is worth spending a lot of money litigating over the business or simply settling and moving on to other issues

C. Cars and Vehicles

The trial court will generally accept industry standard publications, such as *Kelley Blue Book*, as evidence of the value for vehicles. The biggest issue in this regard is the accuracy of the information used to come up with the given value (i.e., getting the right year and model, the proper mileage, and accurately depicting the condition of the vehicle). Unless the dispute is over a rare or collectible vehicle, the trial court will not expect expert testimony on the issue of vehicle values.

D. Furniture, Furnishing and Household Goods.

While there are services that will opine on the "value" of such items, they are expensive and the accuracy of their values is rather suspect. More importantly, unless you are dealing with an authentic historic item with a proven value, the trial court will be greatly annoyed with any party who takes up valuable court time to argue over the value of used chairs, couches, coffee tables, and television sets. The court will assume these items have a garage sale value and will either order the items divided in kind by some arbitrary mechanism or actually sold at a garage sale.

If there is an item of particular value, then you should have expert testimony available to prove that point.

E. Jewelry, Watches, and Artwork.

There are several factors to consider in dealing with these particular items:

(1) *Is it in fact divisible community property?* Jewelry and watches (and to some extent, artwork) are the type of property that is routinely the subject of personal gift-giving – either from one spouse to the other or to one spouse from third parties. If a particular item was, in fact, intended to be a gift to the recipient, then the item is not community property subject to division – but the recipient's sole and separate property. Accordingly, gender-specific jewelry and watches that were received by a spouse on his or her birthday, anniversary, or such traditional gift-giving days as Valentine's Day or Christmas, are presumably intended to be gifts and therefore the recipient's sole and separate property. Of course, the key is to establish that the item was received in connection with one of these traditional gift-giving occasions. Copies of receipts, photos of the occasion, the accompanying card that came with the item, and third party witness testimony all serve as evidence to bolster the claim that the item was intended to be a gift.

(2) *Is there independent documentary proof of value?* Expensive pieces of jewelry, watches or artwork are often listed on insurance riders with their insured value. Similarly, such items when purchased often come with a "guarantee" of value from the seller. These types of documentary evidence can be used to establish value.

(3) *Do you need expert testimony?* For unique or high-priced items, you may need to retain an expert to opine on the value of the item – especially where there is no documentary proof to support your client's claim.

III. QUALIFIED DOMESTIC RELATIONS ORDERS AND RETIREMENT PLANS

A. Types of Retirement Plans

There are generally two broad types of retirement plans:

(1) Defined Benefit Plans. These are traditional "pension" plans which guarantees the employee a set amount of monthly income for the rest of their life once they retire (after reaching the preset retirement age). Under these plans, the employee does not contribute money to the plan, but rather his or her "time" on the job. Unless the employee spouse is already receiving pension payments, these plans do not have a readily ascertainable value as there are a number of variables that govern how much the employee will receive from the plan – primarily whether or not the employee will continue working for the company long enough to qualify for the pension and how long they will live after they retire.

(2) Defined Contribution Plans. These are "account" based plans where the employee and/or the employer contributes a certain amount of money each paycheck into a retirement "savings" plan. Employee 401(k) plans are a typical example of a defined contribution plan. These plans have an actual, present "cash" value as they are simply a fund-based savings plan.

Irrespective of whether a retirement plan is a defined benefit plan or a defined contribution plan, it will fall within two additional broad categories of retirement plans:

(1) Qualified Plans. These are employer established retirement plans that "qualify" under the applicable IRS rules and regulations for special tax treatment. Most employer sponsored retirement plans, such as 401(k) plans, are qualified plans.

(2) Non-qualified Plans. These are retirement plans that are generally unique to specific employers and are aimed at specific employees – usually highly compensated employees who, due to their high incomes, "max out" their ability to contribute a portion of their earnings to a qualified plan. The employer will often create an additional retirement "savings" plan for the special employees to allow for additional retirement savings as part of their compensation. Such plans as profit sharing, SERP, and Keough plans usually fall into this category. These plans generally do not qualify for special tax treatment under IRS rules and regulations.

B. Dividing Retirement Plans In Divorce.

(1) Qualified retirement plans – whether defined benefit or defined contribution – can only be divided between divorcing spouses by a *Qualified Domestic Relations Order* ("QDRO"). These types of Orders are a specific creation of federal ERISA law.

A QDRO is a special Order from the divorce court directing the administrator of the qualified plan in question to segregate the non-employee's community share of the plan from the employee's share. With regard to defined benefit ("pension") plans, this will generally take the form of directing that a certain amount of each monthly payment of retirement benefits payable to the employee spouse be deducted from the payment and paid over to the non-employee spouse. With regard to defined contribution plans, the QDRO will usually direct the plan administrator to take the non-employee spouse's community share of the retirement account and roll it over into an IRA set up by the non-employee spouse. The QDRO will not direct that funds be immediately paid directly to the non-employee spouse.

(2) Non-qualified plans – are not subject to division by a QDRO (as a QDRO, by design, is intended to deal only with "qualified" plans). This can make dividing such plans complicated. Because the employer who created the non-qualified plan is usually not a party to the divorce case, it is not obligated to follow a court order directing the division of its own non-qualified plans – especially where the terms of the court order contravene the express terms of the plan itself (which typically prohibit any distributions to anyone but the employee spouse). Often, there is therefore no effective way of actually

"dividing" such plans between spouses on divorce. Rather, divorcing spouses must settle for either of the following mechanisms for "dividing" such plans:

- An Order granting the non-employee spouse an "equalizer" award from other community funds or property to compensate the non-employee spouse for his or her community interest in the non-qualified plan (which creates the problem of attempting to "value" the plan).
- An Order directing the employee spouse to pay to the non-employee spouse a certain percentage of each distribution of funds the employee spouse receives from the plan – net of taxes – if and when the employee spouse receives them.

C. Division of IRAs

Because IRAs (individual retirement accounts) are technically created by individuals rather than an employer and are generally accessible by the individual at all times (although with severe penalties and taxes), they are not governed by QDRO's. Consequently, a QDRO is not needed to divide an IRA. Rather, a simple provision in the divorce decree directing that a portion of the IRA be paid over to the other, non-owning spouse is sufficient. In order to avoid any adverse tax consequences, the decree should direct that the division should take the form of a "rollover" of funds from the one spouse's existing IRA into a new IRA set up by the receiving spouse. To do otherwise runs the risk of creating a tax event requiring the spouse who owns the IRA being divided to pay penalties and taxes on the distribution.

Note that there are two general types of IRAs: a "traditional" IRA where the individual gets a tax deduction for monies contributed to the IRA, but has to pay taxes on monies withdrawn from the IRA; and a "Roth" IRA where the individual does not get a deduction for contributing monies to the IRA, but then does not have to pay taxes on monies withdrawn from the IRA.

IV. DIVIDING STOCK OPTIONS

A. Determining Community Interest.

Stock options that are *granted* during the marriage that "vest" (become exercisable) prior to the service of a petition for dissolution are wholly community property subject to

division in divorce. Stock options that are *granted* after the service of a petition for dissolution are the sole and separate property of the employee spouse. An issue develops, however, where stock options are granted during the marriage but do not "vest" or become exercisable until after the service of a petition for dissolution. These "hybrid" options are treated as partially community and partially sole and separate property depending on the employer's intended purpose in granting the option. See ***Brebaugh v. Deane****, 118 P.3d 43, 49 (App. 2005)*. Where the employer's intent in granting the "hybrid" option was to compensate the employee spouse for past labor and efforts, then the community's interest in the "hybrid" option is determined by the following equation: (Number of months between the employee spouse's hire date and the service of the petition) ÷ (Number of months between the employee spouse's hire date and the option's grant date) x (the number of "hybrid" options). Where the employer's intent is to give incentive to the employee spouse's future labor and efforts, then the community's interest in the "hybrid" option is determined by the following equation: (Number of months between the option's grant date and the service of the petition) ÷ (Number of months between the option's grant date and the date the option vested or is exercisable) x (the number of "hybrid" options). ***Brebaugh****, supra*.

Unfortunately, the reality is that most employers will rarely give a single reason for granting such options and it is left to the parties and the court to determine which of the above-referenced equations should be utilized.

B. Determining Stock Option Value.

The value of most stock options are determined by a comparing the option's "strike" price and the current market value for the underlying stock. The "strike" price is the price the employee must pay to actually exercise the option. If the strike price is greater than the current market value of the stock (i.e., what the employee has to pay to exercise the stock is greater than what the stock is worth), then the option technically has no current "value". Conversely, if the market value for the stock is greater than the strike price, then the *prima facie* value of the option is the difference between the market value and the strike price. Note, however, that because stock options are generally given to employees as a form of compensation, the exercise of the option may trigger taxes on any money received

on the exercise of the option. This factor should also be considered in determining the true "value" of any stock option.

C. Methods for Dividing Stock Options.

Most employee stock options are restricted – meaning that the employer will not recognize a purported transfer of the option to anyone other than the employee (including the employee's spouse). Again, because the employer is not a participant in the divorce case, it is not bound by any Orders emanating from the divorce court. Accordingly, unless the employer will cooperate and will actually divide stock options "in kind" between the employee spouse and non-employee spouse (a rarity), there are only two general methods for dividing stock options:

(1) Fix a value for the stock options as of as particular date and award the non-employee spouse and equalizer payment to compensate him or her for his or her community share of the option (taking into account any taxes); or,

(2) Enter an Order for a constructive trust whereby the employee spouse retains legal ownership of the stock option(s) but holds the non-employee's community share of the option as a "constructive trustee" for the benefit of the non-employee spouse. This will require that the employee spouse provide regular notice to the non-employee spouse about the status of the option(s) and alert the non-employee spouse about any planned exercise of the options in order to allow the non-employee spouse to participate if he or she wants to do so.

V. LIFE AND HEALTH INSURANCE

A. Life Insurance

1. Types of Life Insurance.

There are two broad categories of life insurance:

- Term Life Insurance: which is a policy that simply provides for payment of the stated death benefit if the insured should die during the policy term. There is no provision for any type of savings or investment associated with this type of policy – it is payment of the death benefit and nothing more.
- Whole Life or Universal Life Insurance: which is a policy that provides not only a death benefit, but a savings or

investment component as well. Generally, this savings or investment portion of the policy grows over time with premium payments and can be borrowed against or paid out to the policy owner if the policy is cancelled.

2. Dividing Life Insurance On Divorce.

Arizona case laws holds that the value of an insurance policy "upon dissolution is its cash value." *See* ***Wisner v. Wisner****, 129 Ariz. 333, 631 P.2d 115 (App. 1981)* In this regard, term life insurance policies have no "cash value" as they have no savings or investment component – only the death benefit. Consequently, most courts will not entertain a claim for the "division" of term life insurance. (Although there may be a separate market for certain types of life insurance). Generally, the courts will only entertain a division of whole life or universal life insurance and will use its stated cash value (less any outstanding loans against that value) as the basis for the division.

B. Health Insurance.

In the case of dependent health insurance, coverage will generally terminate for the non-employee spouse shortly after entry of the decree of dissolution (when the non-employee spouse ceases being a "spouse"). At that point, the non-employee spouse has the option of electing to continue with the dependent coverage under COBRA (without the benefit of the employer subsidy, which may make such insurance financially untenable) or obtaining his or her own separate health insurance.

Note that the right to continue with dependent coverage under COBRA lasts only 3 years for divorcing spouses, at which point the non-employee spouse will need to find his or her own coverage.

One option that has existed in the past to avoid the loss of dependent health insurance coverage for a non-employee spouse – especially where there are pre-existing conditions that would drive up costs of new insurance – would be to consider a legal separation instead of a divorce. Under a legal separation, the non-employee spouse legally remained a "spouse". However, insurance companies have worked to close this loophole.

VI. DIVIDING REAL ESTATE

There are four basic mechanisms for actually transferring title to real property incident to a divorce:

1. Post-Decree judgment vesting title under Rule 89, ARFLP. Under the *Arizona Rules of Family Law Procedure*, where the divorce court is directing the transfer of title to specific property from one party to another and the party charged with conveying title fails to do so, the court may issue a post-decree judgment under Rule 89(b) divesting title from the one party and vesting it in the other party. Such a judgment has the legal effect of a title deed (and therefore should be recorded).

2. Quit Claim Deed. This is the most minimal of title deeds. It simply provides that the grantor is waiving whatever rights or interests he or she may have in the property in favor of the grantee. However, the grantor does not make any representations that he or she actually has any legal rights or interests in the property. [Note that a Quit Claim Deed is different from a Disclaimer Deed. A Quit Claim Deed provides that the grantor is giving to the grantee whatever interest he or she has in the property. A Disclaimer Deed provides that the grantor is warranting that he or she has no interest in the property and never had an interest in the property.]

3. Special Warranty Deed. By this deed, the grantor represents that he or she does have apparent good title to the property, can transfer that title to the grantee, and warrants that he or she has personally not done anything to limit or prejudice that good title.

4. Warranty Deed. This deed is the gold standard among deeds. By this deed, the grantor represents that he or she has good title to the property, can transfer that title to the grantee, and warrants that he or she will defend that title should there be an issue with it even if the issue is not of his or her making. Very few divorcing parties will execute a warranty deed.

Note that all of these deeds should be recorded once executed in order to give notice to third parties of the change in title. (Note that recording a deed is not necessary to make it valid or operative *vis a vis* the grantor and grantee. The deed becomes effective upon execution AND delivery. Recording the deed only protects against claims by third parties).

VII. DEBTS, FORECLOSURE AND BANKRUPTCY

A. Division of Debts.

1. Arizona law provides that the divorce court is to divide community debt equitably, just as it divides community property.

2. Secured debts are usually assigned to the party who is awarded the underlying asset to which the debt attaches.

3. Undivided or unallocated debts remain the joint responsibility of both parties as ongoing community debt in the absence of some directive or agreement placing primary responsibility on one party. Note that the sole and separate property of the spouse actually incurring the debt at issue is also liable for the debt along with the parties' community property. Conversely, the sole and separate property of the non-incurring spouse is not liable for community debts incurred solely by the other spouse.

4. Remember, unless joined to the divorce case, third party creditors are not bound by the divorce court's allocation of responsibility for the payment of community debts. Creditors may ignore such allocations and pursue whichever spouse they choose – who will then need to seek reimbursement from the spouse assigned the debt.

B. Foreclosure

If community property is being foreclosed by a creditor during the divorce process, then the property will generally be treated as unavailable for division. Rather, the divorce court will focus primarily on the issue of whether there is any residual deficiency owed to the creditor once the property has been sold and the proceeds applied to the debt. Note that Arizona law provides anti-deficiency protection to residential homeowners against certain creditors seeking to collect any unpaid balance of the debt after the foreclosure and sale of their primary residence. This protection is increased for a married couple. See A.R.S. §33-729(A) (pertaining to mortgages) and A.R.S. §33-814(G) (pertaining to deeds of trust).

C. Bankruptcy

1. Filing for bankruptcy during a divorce process will cause an automatic stay of the divorce proceedings, which will remain in effect until the stay is lifted by the bankruptcy court.

2. Awards of child support and spousal maintenance are priority claims in bankruptcy and are not dischargeable.

3. Property settlement awards are also generally not dischargeable in bankruptcy (meaning that one spouse cannot seek to undo the division of property in bankruptcy).

4. If it is likely that one party to a divorce case will file bankruptcy or has filed bankruptcy, it is crucial to obtain the assistance of a knowledgeable bankruptcy attorney.

VIII. COMMON MISTAKES TO AVOID IN DIVIDING ASSETS

1. Failing to divide all assets and debts.

2. Failing to adequately describe assets and debts with sufficient precision to allow them to be clearly identified later in the event of disputes or for purposes of enforcement.

3. Failing to property identify specific retirement accounts and clearly defining how the account is to be specifically divided.

4. Failing to provide a valuation date or specific date of division for assets.

5. Attempting to compare apples and oranges by treating asset that have truly different "values" as equal. Some examples:

- Low basis stock vs. high basis stock.
- Residential property vs. commercial/rental property.
- Taxable retirement accounts vs. non-retirement cash accounts.
- Real property vs. bank account.

6. Failing to define the penalties/method for handling a party's default of the settlement terms.

IX. TAX ISSUES RE: DIVISION OF ASSETS

A. The Family Law Court and Tax Considerations.

1. A.R.S. §25-318(B) specifically authorizes the Family Law Court to consider the tax ramifications of dividing property in formulating an equitable division of property in conjunction with a divorce. A.R.S. §25-318(B) provides:

> B. In dividing property, the court may consider all debts and obligations that are related to the property, including accrued or accruing taxes that would become due on the receipt, sale or other disposition of the property. The court may also consider the exempt status of particular property pursuant to title 33, chapter 8 [A.R.S. §33-1101]. (Emphasis added).

2. Note that the statute makes the consideration of such taxes discretionary with the Family Law Court. The Court will often not opt to give consideration

to tax issues in dividing property if those issues are too speculative (such as being too far removed in time) or if they are too complicated or complex.

B. <u>Transfer of Property Between Spouses Incident to Divorce Is a Nontaxable Event</u>.

1. IRS Tax Code §1041 provides that no gain or loss is recognized for tax purposes on any transfer of real or personal property between spouses or former spouses incident to their divorce.

2. A transfer of property is deemed incident to divorce if it meets either of these two requirements:

(a) The transfer is made in accordance with the terms of the original or modified divorce decree or separation agreement within 6 years after the date the marriage ends; OR,

(b) The transfer is made within one (1) year of the date the marriage ends – whether or not it is in accordance with the terms of the divorce decree or separation agreement.

3. Exception: If the spouse is a non-resident alien, then the tax free exchange of property incident to divorce does NOT apply.

4. Subsequent transfers to third parties: The non-recognition rule only applies to exchanges between spouses incident to their divorce. Once property has been exchanged between the parties pursuant to their divorce, any further sale, transfer or exchange of the property to third parties will create a taxable "sale" for which the selling or transferring spouse may have to pay taxes.

C. <u>Specific Property Excluded From Tax Upon Exchange Between Spouses Incident to Divorce</u>.

1. A transfer of a spouse's interest in a Health Savings Account (HSA) or an Individual Retirement Account (IRA) incident to divorce are tax free exchanges under the IRS Code. (Note that, unlike qualified retirement plans like 401(k)s or pension plans, these types of retirement accounts do NOT have to be divided by a Qualified Domestic Relations Order (QDRO). It is sufficient to simply have the HSA or IRA divided by the terms of the parties' property settlement agreement and Decree of Dissolution of Marriage.)

2. Note that the transfer must be made from one spouse's IRA directly to the other spouse's predesignated IRA – never from the IRA directly to the spouse (which is a taxable event).

3. Once the interest in the IRA has been successfully transferred to the receiving spouse incident to divorce, he or she will be taxed on any further withdrawal of funds from the IRA. (Note that a 10% penalty may also apply in addition to taxes if the withdrawal is made before the receiving spouse reaches the age of 59½).

D. Joint Vs. Separate Tax Returns

1. The most common issue in divorce cases.

2. Generally, parties' will save themselves tax by filing jointly as a married couple as this offers the best tax rate (although filing separately as head of household may also offer benefits to the party who qualifies). Filing separately as a married couple is the most expensive tax option.

3. Filing jointly avoids disputes over allocating income and deductions (including such things as temporary spousal maintenance).

4. The Family Law Court may treat filing a separate return as "waste".

5. Must still be legally married as of December 31st of the tax year in question in order to file a joint return.

E. Overpayment of Taxes and Refunds.

1. Common way of "hiding" money during divorce.

2. Pay attention to past application of refunds to future taxes – another way of simply having the government "hold" monies to be released after the divorce.

3. Need to allocate between the parties.

X. PRENUPTIAL AGREEMENTS

1. Arizona follows the Uniform Premarital Agreement Act. *See A.R.S. §25-201 et seq.*

2. Under Arizona law, Premarital Agreements prepared in accordance with the statutory requirements presumed to be valid and the burden in on the party challenging the validity of the agreement to show that:

a. He or she did not sign the agreement voluntarily, OR

b. The agreement was unconscionable when executed AND all of the following are true:

- He or she was not provided a fair and reasonable disclosure of the property and financial obligations of the other party;
- He or she did not voluntarily and expressly waive in writing the right to any additional disclosure beyond that provided;
- He or she did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

3. Biggest problem with enforcing Premarital Agreements is not their validity, but determining ambiguous terms. An unclear or badly drafted Premarital Agreement is often worse for the wealthier party than not having a Premarital Agreement. It is imperative that the Premarital Agreement is clear and precise in its terms in order to be effective.

Custody, Visitation and Handling Parental Alienation/Abuse

Submitted by Stasy D. Click

Custody, Visitation and Handling Parental Alienation/Abuse –

A. Determining the Best Interest of the Child

1. 25-403 Factors

The court shall consider all factors that are relevant to the child's physical and emotional well-being, including:

1. The past, present and potential future relationship between the parent and the child.

2. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.

3. The child's adjustment to home, school and community.

4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.

5. The mental and physical health of all individuals involved.

6. Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.

7. Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.

8. Whether there has been domestic violence or child abuse pursuant to section 25-403.03.

9. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.

10. Whether a parent has complied with chapter 3, article 5 of this title.

11. Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.

2. Domestic Violence/Child Abuse issues

Arizona has become one of the deadliest states in the union for domestic violence and is 8th in the country for female homicides.

a. A.R.S. § 25-403.03(A) Notwithstanding subsection D of this section, joint legal decision-making shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to § 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.

b. ***Engstrom v. McCarthy*** (COA January 9, 2018) It may well be that some of Father's actions constituted domestic violence under the statute. The court, however, relied on many acts that do not statutorily constitute domestic violence, and did not explain why Father's actions amounted to "significant" domestic violence. As a result, we cannot determine whether the court would have reached the same conclusion had it considered only the acts that legally constituted domestic violence. Therefore, we find that the court erred by finding the existence of significant domestic violence, vacate the finding, and remand the issue back to the court.

c. A.R.S. § 25-403.03(A) (8) directing courts to consider "domestic violence pursuant to section 13-3601

d. A.R.S. § 13-3601 defining acts that constitute "domestic violence"

e. A.R.S. § 25-403.03(D) defining "an act of domestic violence"

f. What is Substantial Domestic Violence

- **i.** ***Hurd v. Hurd*****,** 219 P. 3d 25 (App. 2009) when the party that committed the act of violence has not rebutted the presumption that awarding custody to that person is contrary to the best interest of the child, the court need not consider all the other best-interest factors in A.R.S. § 25-403.A
  - **1.** The evidence cited by the court supported its finding that there was a significant history of domestic violence and not just the October 2004 occurrence. Mother testified about repeated acts of domestic violence against her in addition to the October 2004 incident. The court noted that Mother revealed a "history of domestic violence" to healthcare professionals at the hospital, and that the children reported other instances of violence to Conciliation Services. In addition to the Conciliation Services report, the court had before it the Surprise Police Department report, a Child Protective Services (CPS) report and a letter from the children's social worker in Idaho. The court found "a significant history of domestic violence" and that the children witnessed "incidents" of domestic violence.
  - 2. If the court determines that a parent who is seeking sole or joint legal decision-making has committed an act of domestic violence against the other parent, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child's best interests. This presumption does not apply if both parents have committed an act of domestic violence

ii. ***Caperon v. Caperon* (App. 2017)** although in *Hurd* we cited multiple sources of evidence supporting the trial court's finding of a "significant history of domestic violence," we did not purport to give one factor greater weight than another; nor did we suggest multiple sources of evidence were required. *See* 223 Ariz. 48, ¶¶ 14-17, 219 P.3d at 261-62. Additionally, § 25-403.03(C) does not designate a weight to be carried by any of the factors. The statute merely states "the court, subject to the rules of evidence, shall consider all relevant factors including" those listed. § 25-403.03(C). The fact Andrea only provided testimony, without additional support from police reports or medical records, does not diminish the weight of that testimony, or render it insufficient. *Cf. State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1976) (uncorroborated testimony of victim sufficient to sustain criminal conviction); *see also Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262.

iii. ***Orders of Protection (Modifications after hearing) McCarthy v. McCarthy* 2 Ca-Cv 2018—0184 (08-20-19).** The court could ultimately modify the order of protection in light of its decisions on the remaining family law claims. See In re Marriage of Kassa, 231 Ariz. 592, ¶ 6 (App. 2013); see also Vera, 246 Ariz. 30, ¶ 4 (order of protection transferred to superior court "for consolidation" with pending family matters, but assigned different case number pursuant to Rule 123, Ariz. R. Sup. Ct., and the Federal Violence Against Women Act). McCarthy v. McCarthy (Ariz. App. 2019).

iv. ***Deluna v. Petitto***: (App. 2019) A finding of no significant domestic violence or significant history of domestic violence under A.R.S. § 25-403.03(A) does not end the inquiry. If the superior court finds domestic violence that was not "significant," § 25-403.03(D) creates a rebuttable presumption that it is contrary to the children's best interests to award sole or joint legal decision making authority to the offending parent. Before awarding sole or joint legal decision-making authority to the offending parent, the court must make specific findings on the record that there is sufficient evidence to rebut the presumption. A.R.S. §§ 25-403(B), -403.03(D); *see also* ***Christopher K. v. Markaa S.***, 233 Ariz. 297, 301, ¶¶ 18-19 (App. 2013). In making its specific findings in this regard, the court must consider the factors listed in § 25-403.03(E). Because the court concluded that Father committed an act of domestic violence, it was required to explicitly determine whether Father had affirmatively shown that "parenting time will not endanger the child or significantly impair the child's emotional development." A.R.S. § 25-403.03(F)(1)-(9). "The court must then make specific findings explaining its reasoning and conclusions." See ***Engstrom***, 243 Ariz. at 474, ¶ 18. "If [the offending parent]

meets [his] burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm." Id.

B. Custody Options to Consider - Procedural Overview

ARS 25-401(3) defines legal decision-making as "the legal right and responsibility to make all nonemergency legal decisions for a child including those regarding education, health care, religious training and personal care decisions."

Sole Legal ARS 25-401(6) provides that sole legal decision-making "means one parent has the legal right and responsibility to make major decisions for a child."

Joint Legal ARS 25-401(2) states that joint legal decision-making "means both parents share decision-making and neither parent's rights or responsibilities are superior except with respect to specified decisions as set forth by the court or the parents in the final judgment or order."

Joint Legal w/ Final Decision Making (***Nicaise v. Sundaram***, 245 Ariz. 566, 432 P.3d 925 (Ariz. 2019)) *the Supreme Court vacated a portion of the court of appeals' opinion and affirmed the family court's order giving Father final legal decision-making authority over certain issues regarding the parties' child, holding that the words "final" and "sole" have different meanings in the context of a family court's award of joint legal decision-making that gives one parent final legal decision-making authority over certain matters.*

C. Negotiating Custody, Visitation and Parenting Plans

Joint versus Sole Legal Decision Making:

- The trial court shall NOT order joint custody if it finds **"significant"** domestic violence or a **"significant history"** of domestic violence. A.R.S. 25-403.03(A).
- The statute does not define the terms Significant or Significant History.
- The court need only find such a history by a **preponderance** of the evidence.
- The presumption is rebuttable A.R.S. 25-403(D) and does NOT apply if BOTH parents have committed an act of domestic violence.
- 25-403.03(B). The court **shall** consider evidence of domestic violence as being contrary to the best interests of the child. The court shall consider the safety and well-being of the child and of the victim of the act of domestic violence to be of primary importance. The court shall consider a perpetrator's history of causing or threatening to cause physical harm to another person.

25-403.03(D) What Constitutes Domestic Violence?

If the court determines that a parent who is seeking sole or joint legal decision-making has committed **an act of domestic violence against the other parent**, there is a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is contrary to the child's best interests. This presumption does **not** apply if both parents have committed an act of domestic violence. For the purposes of this subsection, a person commits an act of domestic violence if that person does any of the following:

1. Intentionally, knowingly or recklessly causes or attempts to cause sexual assault or serious physical injury.

2. Places a person in reasonable apprehension of imminent serious physical injury to any person.

3. Engages in a **pattern** of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child and the child's siblings.

THESE ARE THE ONLY EXCEPTIONS TO 25-403.03(A) significant domestic violence or significant history of domestic violence.

VonMenke v. Menke, 2 CA-CV 2010-0104 (Div 2, unpublished Feb 2011)

Father previously had obtained an order of protection against Mother in which the hearing officer found she had "committed an act of domestic violence against [Father] within the last year." That finding, however, **does not** necessarily meet the definition of "an act of domestic violence" under the more specific requirements of § 25-403.03(D)(1)-(3). The court was required to apply the presumption of § 25-403.03(D) **only** if it found Mother had committed an act constituting domestic violence under that section, not merely if there was any prior finding of "an act of domestic violence".

- Argued § 25-403.03(D) requires a trial court to apply the presumption "whenever the victim obtains or could have obtained an order of protection against the perpetrator."
- Court held the statute does not define domestic violence as any incident that would entitle the victim to an order of protection, but as a "pattern of behavior" that warrants such protection. § 25-403.03(D)(3).
- The requirement that the acts constitute a pattern is significant because an order of protection may be granted when a person has "committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists." A.R.S. § 13-3602(E)(2).

REMEMBER SIGNIFICANT DOES NOT MEAN SUBSTANTIAL

Pursell v. Pursell, 2 CA-CV 2010-0142 (Div 2, unpublished Feb 2011)

During an argument between the parties, Dad had grabbed Mom's arm in order to stop [her] from leaving with the child and as a result had bruised her arm. Based on that incident, the court found "by a preponderance of the evidence that [Dad had] recklessly caused [an] injury" to Mom satisfying the definition of domestic violence found in A.R.S. § 13-3601(A) and the definition of "significant domestic violence" in A.R.S. § 25-403.03(A). However, the court found the domestic violence incident to be "an isolated event" that did not meet the definition of "domestic violence" that would trigger a presumption against custody pursuant to § 25-403.03(D) because there was "no serious physical injury, no reasonable apprehension of serious physical injury and no 'pattern of behavior.

Found that joint legal custody was "not possible" due to the domestic violence incident and because the parties were "not able to communicate to the extent necessary to make joint decisions," and found that it was in child's best interest to award Dad legal and primary physical custody.

The definition of "domestic violence" in § 25-403.03(D) is more limited than the definition of that term in § 25-403.03(A). Whereas the former provides only three categories of behavior that trigger a presumption against custody, the latter allows any significant domestic violence act as defined by the criminal code to preclude joint custody. A finding of significant domestic violence under § 25-403.03(A) does not necessarily give rise to a presumption against custody pursuant to § 25-403.03(D).

Walliser v. May, 1 CA-CV 11-0039, 1 CA-CV 11-0433, Div One, April 2012

- Parties divorced by consent decree in 2008.
- July 2010 the parties argued, and Father attempted to take the child with him. Mother threw a bottle at Father, and Father pushed Mother and the child into the pool. Mother suffered a fractured arm from falling into the pool.
- Previous OOPs in 2004 and 2007.
- 2004 Mother alleged that Father threatened to kill her after finding out she was looking into crisis shelters.
- 2007, Mother alleged a series of escalating threats, one incident where Father shoved Mother and an attack on an unnamed victim in an unrelated incident.
- After a hearing on the 2007 order of protection, the court allowed Father to continue parenting time with the child upon successful drug testing.
- Father awarded sole custody DESPITE the allegations of domestic violence?
- Court rationalized that there was not significant domestic violence between the parties but recognized that the parties could NOT effectively coparent.
- Court found that Mother's relocation was not based on domestic violence.

Tips from Walliser:

(1) Order the trial transcript or the court will presume there was evidence to support

the judge's decision.
(2) Remember that one incident of domestic violence may not be enough to demonstrate a pattern of violence as required for the presumption.
(3) Remember that the standard for violence when granting an OOP is not the same for 403 presumptions.

How to Prove:
1. Findings from another court of competent jurisdiction.
2. Police reports.
3. Medical reports.
4. Child protective services records.
5. Domestic violence shelter records.
6. School records.
7. Witness testimony.

Rebutting the Presumption
1. Whether the parent has demonstrated that being awarded sole ldm or joint physical or legal ldm is in the child's best interests.
2. Whether the parent has successfully completed a batterer's prevention program.
3. Whether the parent has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.
4. Whether the parent has successfully completed a parenting class, if the court determines that a parenting class is appropriate.
5. If the parent is on probation, parole or community supervision, whether the parent is restrained by a protective order that was granted after a hearing.
6. Whether the parent has committed any further acts of domestic violence.

DV and Parenting Time

ARS §25-403.03(F). If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development. If the parent meets this burden to the court's satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm.

Restrictions on Parenting Time
1. Order that an exchange of the child must occur in a protected setting as specified by the court.
2. Order that an agency specified by the court must supervise parenting time. If the court allows a family or household member to supervise parenting time, the court shall establish conditions that this person must follow during parenting time.
3. Order the parent who committed the act of domestic violence to attend and complete, to the court's satisfaction, a program of intervention for perpetrators of domestic violence and any other counseling the court orders.

4. Order the parent who committed the act of domestic violence to abstain from possessing or consuming alcohol or controlled substances during parenting time and for twenty-four hours before parenting time.
5. Order the parent who committed the act of domestic violence to pay a fee to the court to defray the costs of supervised parenting time.
6. Prohibit overnight parenting time.
7. Require a bond from the parent who committed the act of domestic violence for the child's safe return.
8. Order that the address of the child and the other parent remain confidential.
9. Impose any other condition that the court determines is necessary to protect the child, the other parent and any other family or household member.

IX. Relocation

A.R.S. § 25-403(A)(6) and § 25-403.03(I) state that a parent's relocation or denial of parenting time shall not be held against that parent if such act is to protect the child from witnessing or being a victim of domestic violence or in response to an act of domestic violence by the other parent.

D. The Role of Best Interest Attorneys, Court Appointed Advisors, Parenting Evaluators and Parenting Coordinators

Rule 10(A)(2) ARFLP There are three specific positions to which the court may appoint qualified individuals under circumstances specified in the rule. *See* Ariz. R. Fam. L. P. 10(A)(2) (setting forth bases for appointment by the court of an attorney to represent a child or a court – appointed advisor); Ariz. R. Fam. L. P. 10(B), (C) (qualifications of an appointed child's attorney, best interests attorney, or a court-appointed advisor).

1. BIA Serves as an attorney in the matter. Does not write reports, calls witnesses, writes pretrial, cross examines.

2. CAA Court Appointed Advisor – Testifies as a fact witness, writes reports, testifies.

3. Custody Evaluators - Usually appointed by the Court as a fact witness/expert. Writes reports, testifies in court.

4. Parenting Coordinator – Rule 74 ARFLP require parties' consent before they can be appointed. Appointed after the fact to deal with issues.

(a) Purpose of a Parenting Coordination. Parenting coordination is a child-focused alternative dispute resolution process. The purpose for appointing a parenting coordinator is to protect and sustain safe, healthy, and meaningful parent-child relationships by:

(1) assisting parents with implementing and complying with their legal decision-making and parenting plan orders; and

(2) helping parents timely resolve conflicts that may arise concerning legal decision-making and parenting plans.

(b) Parents' Agreement and Understandings.

(1) *Appointment's Timing and Conditions.* The court may appoint a third party as a parenting coordinator in proceedings under A.R.S. Title 25 only after the court has entered a legal decision-making or parenting time order, and only if each parent has agreed to the appointment in writing or orally on the record in open court.

(2) *Agreement's Terms.* The agreement must state that both parents:

(A) agree to be bound by decisions made by the parenting coordinator that fall within the scope of the parenting coordinator's authority and that relate to issues submitted to the parenting coordinator for decision;

(B) understand the term of the parenting coordinator's appointment;

(C) agree to release documents that the parenting coordinator determines are necessary for performing the parenting coordinator's services;

(D) understand the method by which the parenting coordinator will be selected or the name of the agreed-upon parenting coordinator;

(E) understand how the parenting coordinator charges for services, including the parenting coordinator's hourly rate;

(F) agree that the parents can afford the parenting coordinator's services;

(G) understand how the parenting coordinator's fees will be allocated between the parents; and

(H) acknowledge they have read Form 11, Rule 97 (“Parent Information Regarding the Use of Parenting Coordinators”).

(3) *Option to Use Conciliation Services.* Rather than having a privately paid parent coordinating, parents may request, or a court may appoint, if available, parenting coordination assistance through conciliation services. Parents obtaining parenting coordinator services through conciliation services must agree to subparts (b)(2)(A) through (C).

E. Alienation: What it is and How to Prove it

Parental alienation describes a process through which a child becomes estranged from a parent as the result of the psychological manipulation of another parent. The child's estrangement may manifest itself as fear, disrespect or hostility toward the parent, and may extend to additional relatives or parties. This is not an estranged child based on abuse or neglect, but more so a rejected parent with feeling that are grossly negative and distorted or exaggerated. For the most part, the rejected parents falls within the broad range of “marginal” to “good enough: and has no history of physical or emotional abuse of the child.

How do you prove alienation?

1. Allowing the child to decide whether to have a relationship with the other parent

2. Discussing with the child challenging or emotional issues/court issues.

3. Positive reinforcement of the child's complaints about the other parent.

4. Providing the parent with emotional support for the divorce.

5. Allowing the child to read court documents/emails/overhear conversations.

6. Discussing the divorce with the child.

7. Rewarding bad behavior at the other parent's house.

Child and Spousal Support and Tax Implications

Submitted by David N. Horowitz

ARIZONA CHILD SUPPORT GUIDELINES

ADOPTED BY THE ARIZONA SUPREME COURT
EFFECTIVE APRIL 1, 2018

BACKGROUND: The Arizona Child Support Guidelines follow the Income Shares Model. The model was developed by the Child Support Guidelines Project of the National Center for State Courts. The total child support amount approximates the amount that would have been spent on the children if the parents and children were living together. Each parent contributes his or her proportionate share of the total child support amount.

Information regarding development of the guidelines, including economic data and assumptions upon which the Schedule of Basic Support Obligations is based, is contained in the June 27, 2014 report of Center for Policy Research, entitled Economic Review of the Arizona Child Support Schedule.

1. PURPOSES

A. To establish a standard of support for children consistent with the reasonable needs of children and the ability of parents to pay.

B. To make child support orders consistent for persons in similar circumstances.

C. To give parents and courts guidance in establishing child support orders and to promote settlements.

D. To comply with state law (Arizona Revised Statutes, Section 25-320) and federal law (42 United States Code, Section 651 et seq., 45 Code of Federal Regulations, Section 302.56) and any amendments thereto.

2. PREMISES

A. These guidelines apply to all natural children, whether born in or out of wedlock, and to all adopted children.

B. The child support obligation has priority over all other financial obligations; the existence of non-support-related financial obligations is generally not a reason for deviating from the guidelines.

C. The fact that a parent receives child support does not mean that he or she may not also be entitled to spousal maintenance.

If the court is establishing both child support and spousal maintenance, the court shall determine the appropriate amount of spousal maintenance first.

The receipt or payment of spousal maintenance shall be treated in accordance with Sections 5.A and 6.A. The addition to or adjustment from gross income under these sections shall apply for the duration of the spousal maintenance award.

D. A parent's legal duty is to support his or her natural or adopted children. The "support" of other persons such as stepchildren or parents is deemed voluntary and is not a reason for an adjustment in the amount of child support determined under the guidelines.

E. In appropriate cases, a parent having more of the parenting time may be ordered to pay child support.

F. Monthly figures are used to calculate the child support obligation. Any adjustments to the child support amount shall be annualized so that each month's child support obligation is increased or decreased in an equal amount, instead of the obligation for particular months being abated, increased or decreased.

EXAMPLE: At a child support hearing, a parent requests an adjustment for childcare costs (Section 9.B.1.). The parent incurs childcare costs of $150 per month but only for nine months of the year. The adjustment for childcare costs must be annualized as follows: Multiply the $150 monthly cost times the nine months that the cost is actually paid each year, for an annual total of $1,350. Divide this total by 12 months to arrive at an annualized monthly adjustment of $113 that may be added to the Basic Child Support Obligation when determining the child support order.

G. When determining the Basic Child Support Obligation under Section 8, the amount derived from the Schedule of Basic Child Support Obligations shall not be less than the amount indicated on the Schedule:

1. For six children where there are more than six children.

2. For the Combined Adjusted Gross Income of $20,000 where the actual Combined Adjusted Gross Income of the parents is greater than $20,000.

H. The "primary residential parent" is the parent who has parenting time with the child for the greater part of the year.

3. PRESUMPTION

In any action to establish or modify parenting time, and in any action to establish child support or past support or to modify child support, whether temporary or permanent, local or interstate, the amount resulting from application of these guidelines shall be the amount of child support ordered. These include, without limitation, all actions or proceedings brought under Title 25 of the Arizona Revised Statutes (including maternity and paternity) and juvenile court actions in which a child support order is established or modified.

However, if application of the guidelines would be inappropriate or unjust in a particular case, the court shall deviate from the guidelines in accordance with Section 20.

4. DURATION OF CHILD SUPPORT

Duration of child support is governed by Arizona Revised Statutes, Sections 25-320 and 25-501, except as provided in Arizona Revised Statutes, Section 25-1304.

Upon entry of an initial or modified child support order, the court shall, or in any subsequent action relating to the child support order, the court may, establish a presumptive date for the termination of the current child support obligation. The presumptive termination date shall be the last day of the month of the 18th birthday of the youngest child included in the order unless the court finds that it is projected that the youngest child will not complete high school by age 18. In that event, the presumptive termination date shall be the last day of the month of the anticipated graduation date or age 19, whichever occurs first. The administrative income withholding order issued by the department or its agent in Title IV-D cases and an Order of Assignment issued by the court shall include the presumptive termination date. The presumptive date may be modified upon changed circumstances.

An employer or other payor of funds honoring an Order of Assignment or an administrative income withholding order that includes the presumptive termination date and is for current child support only, shall discontinue withholding monies after the last pay period of the month of the presumptive termination date. If the Order of Assignment or administrative income withholding order includes current child support and arrearage payment, the employer or other payor of funds shall continue withholding the entire amount listed on the Order of Assignment or administrative income withholding order until further order.

For purposes of determining the presumptive termination date, it is further presumed:

A. That a child not yet in school will enter 1st grade if the child reaches age 6 on or before September 1 of the year in which the child reaches age 6; otherwise, it is presumed that the child will enter 1st grade the following year; and,

B. That a child will graduate in the month of May after completing the 12^{th} grade.

5. DETERMINATION OF THE GROSS INCOME OF THE PARENTS

NOTE: Terms such as "Gross Income" and "Adjusted Gross Income" as used in these guidelines do not have the same meaning as when they are used for tax purposes.

A. Gross income includes income from any source, and may include, but is not limited to, income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits (subject to Section 26), worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal

maintenance. Cash value shall be assigned to in-kind or other non-cash benefits. Seasonal or fluctuating income shall be annualized. Income from any source which is not continuing or recurring in nature need not necessarily be deemed gross income for child support purposes. Generally, the court should not attribute income greater than what would have been earned from full-time employment. Each parent should have the choice of working additional hours through overtime or at a second job without increasing the child support award. The court may, however, consider income actually earned that is greater than would have been earned by full-time employment if that income was historically earned from a regular schedule and is anticipated to continue into the future.

The court should generally not attribute additional income to a parent if that would require an extraordinary work regimen. Determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including the choice of jobs available within a particular occupation, working hours and working conditions.

B. Gross income does not include sums received as child support or benefits received from means-tested public assistance programs including, but not limited to, Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Nutrition Assistance and General Assistance.

C. For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income means gross receipts minus ordinary and necessary expenses required to produce income. Ordinary and necessary expenses do not include amounts determined by the court to be inappropriate for determining gross income for purposes of child support. Ordinary and necessary expenses include one-half of the self-employment tax actually paid.

D. Expense reimbursements or benefits received by a parent in the course of employment or self-employment or operation of a business shall be counted as income if they are significant and reduce personal living expenses.

E. If a parent is unemployed or working below full earning capacity, the court may consider the reasons. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a parent up to his or her earning capacity. If the reduction in income is voluntary but reasonable, the court shall balance that parent's decision and benefits therefrom against the impact the reduction in that parent's share of child support has on the children's best interest. The court may not attribute income to a person who is incarcerated, but may establish or modify support based on actual ability to pay. In accordance with Arizona Revised Statutes Section 25-320, income of at least minimum wage should generally be attributed to a parent after considering the specific circumstances of the parents to the extent known. This includes such factors as the parents' assets, residence, employment and earnings history, job skills, educational attainment,

literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parents, prevailing earnings level in the local community, and other relevant background factors in the case. If income is attributed to the parent receiving child support, appropriate childcare expenses may also be attributed.

The court may decline to attribute income to either parent. Examples of cases in which it may be inappropriate to attribute income include, but are not limited to, the following circumstances:

1. A parent is physically or mentally disabled,

2. A parent is engaged in reasonable career or occupational training to establish basic skills or reasonably calculated to enhance earning capacity,

3. Unusual emotional or physical needs of a natural or adopted child require that parent's presence in the home

4. The parent is a current recipient of Temporary Assistance to Needy Families, or

5. A parent is the caretaker of a young child and the cost of childcare is prohibitive.

F. Only income of persons having a legal duty of support shall be treated as income under the guidelines. For example, income of a parent's new spouse is not treated as income of that parent.

G. The court shall not take into account the impact of the disposition of marital property except as provided in Arizona Revised Statutes Section 25-320.D.7. ("...excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.") or to the extent that such property generates income to a parent.

H. The Schedule of Basic Child Support Obligations is based on net income and converted to gross income for ease of application. The impact of income taxes has been considered in the Schedule (Federal Tax including Earned Income Tax Credit, Arizona State Tax, and FICA).

6. ADJUSTMENTS TO GROSS INCOME

For purposes of this section, "children of other relationships" means natural or adopted children who are not the subject of this particular child support determination.

Adjustments to gross income for other support obligations are made as follows:

A. The court-ordered amount of spousal maintenance resulting from this or any other marriage, if actually being paid, shall be deducted from the gross income of the parent paying spousal maintenance. Court-ordered arrearage payments shall not be included as an adjustment to gross income.

B. The court-ordered amount of child support for children of other relationships, if actually being paid, shall be deducted from the gross income of the parent paying that child support. Court-ordered arrearage payments shall not be included as an adjustment to gross income.

C. An amount shall be deducted from the gross income of a parent for children of other relationships covered by a court order for whom they are the primary residential parent. The amount of the adjustment shall be determined by a simplified application of the guidelines (defined in example below).

D. An amount may be deducted from the gross income of a parent for support of natural or adopted children of other relationships not covered by a court order. The amount of any adjustment shall not exceed the amount arrived at by a simplified application of the guidelines (defined in example below).

EXAMPLE: A parent having gross monthly income of $2,000 supports a natural or adopted minor child who is not the subject of the child support case before the court and for whom no child support order exists. To use the Simplified Application of the Guidelines, locate $2,000 in the Combined Adjusted Gross Income column of the Schedule. Select the amount in the column for one child, $415. The parent's income may be reduced up to $415, resulting in an Adjusted Gross Income of $1,585.

7. DETERMINING THE ADJUSTED GROSS INCOME OF THE PARENTS

Adjusted Gross Income is gross income minus the adjustments provided in Section 6 of these guidelines. The Adjusted Gross Income for each parent shall be established. These amounts shall be added together. The sum is the Combined Adjusted Gross Income.

8. DETERMINING THE BASIC CHILD SUPPORT OBLIGATION

Locate the income closest to the parents' Combined Adjusted Income figure on the Schedule of Basic Child Support Obligations and select the column for the number of children involved. This number is the Basic Child Support Obligation. If the parents' income falls exactly in between two combined adjusted gross income amounts, round up to the nearest combined adjusted income entry on the schedule of basic child support obligations.

EXAMPLE: The Combined Adjusted Gross Income of the parents' is $8,125 which is exactly between $8,100 and $8,150. Round up to the nearest combined adjusted income entry of $8,150 and use this amount as the Basic Child Support Obligation.

If there are more than six children, the amount derived from the schedule of basic support obligations for six children shall be the presumptive amount. The party seeking a greater sum shall bear the burden of proof that the needs of the children require a greater sum.

If the Combined Adjusted Gross Income of the parties is greater than $20,000 per month, the amount set forth for Combined Adjusted Gross Income of $20,000 shall be the presumptive Basic Child Support Obligation. The party seeking a sum greater than this presumptive amount shall bear the burden of proof to establish that a higher amount is in the best interests of the children, taking into account such factors as the standard of living the children would have enjoyed if the parents and children were living together, the needs of the children in excess of the presumptive amount, consideration of any significant disparity in the respective percentages of gross income for each party and any other factors which, on a case by case basis, demonstrate that the increased amount is appropriate.

9. DETERMINING THE TOTAL CHILD SUPPORT OBLIGATION

To determine the Total Child Support Obligation, the court:

A. Shall add to the Basic Child Support Obligation the cost of the children's medical dental or vision insurance coverage, if any (this provision does not imply any obligation of either parent to provide dental or vision insurance). In determining the amount to be added, only the amount of the insurance cost attributable to the children subject of the child support order shall be included. If coverage is applicable to other persons, the total cost shall be prorated by the number of persons covered. The court may decline to credit a parent for medical, dental or vision insurance coverage obtained for the children if the coverage is not valid in the geographic region where the children reside.

EXAMPLE: Through an employment-related insurance plan, a parent provides medical insurance that covers the parent, one child subject of the child support case and two other children. Under the plan, the cost of an employee's individual insurance coverage would be $120. This parent instead pays a total of $270 for the "family option" that provides coverage for the employee and any number of dependents. Calculate the adjustment for medical insurance as follows: Subtract the $120 cost of individual coverage from the $270 paid for the "family option" to find the cost of dependent coverage. The $150 remainder then is divided by three - the number of covered dependents. The resulting $50 is added to the Basic Child Support Obligation as the cost of medical insurance coverage for the one child.

An order for child support shall assign responsibility for providing medical insurance for the children who are the subject of the child support order. If medical insurance of comparable benefits and cost is available to both parents, the court should assign the responsibility to the primary residential parent.

The court shall also specify the percentage that each parent shall pay for any medical, dental or vision costs of the children which are not covered by insurance. For purposes of this paragraph, non-covered "medical" means medically necessary medical, dental or vision care as defined by Internal Revenue Service Publication 502.

Except for good cause shown, any request for payment or reimbursement of uninsured medical, dental or vision costs must be provided to the other parent within 180 days after the date the services occur. The parent responsible for payment or reimbursement must pay his or her share, as ordered by the court, or make acceptable payment arrangements with the provider or person entitled to reimbursement within 45 days after receipt of the request.

Both parents should use their best efforts to obtain services that are covered by the insurance. A parent who is entitled to receive reimbursement from the other parent for medical costs not covered by insurance shall, upon request of the other parent, provide receipts or other evidence of payments actually made.

B. May add to the Basic Child Support Obligation amounts for any of the following:

1. Childcare Costs

Childcare expenses that would be appropriate to the parents' financial abilities.

Expenses for childcare shall be annualized in accordance with Section 2.F.

A parent paying for childcare may be eligible for a credit from federal tax liability for childcare costs only if the parent has parenting time for the greater part of the year. In an equal parenting time situation, neither party shall be entitled to the credit for the purposes of calculating child support.

Before adding childcare costs to the Basic Child Support Obligation, the court may adjust this cost in order to apportion the benefit that the dependent tax credit will have to the parent incurring the childcare costs.

At lower income levels, the head of household does not incur sufficient tax liability to benefit from the federal childcare tax credit. No adjustment should be made where the income of the eligible parent is less than indicated on the following chart:

MONTHLY GROSS INCOME OF THE ELIGIBLE PARENT	
ONE CHILD	$2,600
TWO CHILDREN	$3,100
THREE CHILDREN	$3,400
FOUR CHILDREN	$3,550
FIVE CHILDREN	$3,650
SIX CHILDREN	$3,800

If the eligible parent's income is greater than indicated on the above chart, the court may adjust this cost for the federal childcare tax credit if the credit is actually claimed or will be claimed.

For one child with monthly childcare costs exceeding $200, deduct $50 from the monthly childcare amount. For two or more children with total monthly childcare costs exceeding $400, deduct $100 from the monthly childcare amount. See Example One.

For one child with monthly childcare costs of $200 or less, deduct 25% from the monthly childcare amount. For two or more children with total monthly childcare costs of $400 or less, deduct 25% from the monthly childcare amount. See Example Two.

EXAMPLE ONE: For two children, a parent pays monthly childcare costs of $550 for nine months of the year. To adjust for the expected tax credit benefit, first determine whether the average costs of childcare exceeds $400 per month. In this example, because the average cost of $413 ($550 multiplied by 9 months, divided by 12 months) exceeds the $400 maximum for two or more children, $100 per month may be subtracted from the average monthly cost. $313 ($413 - $100) may be added to the Basic Child Support Obligation for adjusted childcare costs.

EXAMPLE TWO: A parent pays monthly childcare costs of $175 for one child. Because this amount is less than the $200 maximum for one child, multiply $175 by 25% ($175 multiplied by 25% = $44). Subtract the adjustment from the monthly average ($175 - $44 = $131). The adjusted amount of $131 may be added to the Basic Child Support Obligation.

Any adjustment for the payment of childcare costs with pre-tax dollars shall be calculated in a similar manner. A percentage adjustment other than twenty-five percent may be utilized if proven by the parent paying the childcare costs.

2. Education Expenses

Any reasonable and necessary expenses for attending private or special schools or necessary expenses to meet particular educational needs of a child, when such expenses are incurred by agreement of both parents or ordered by the court.

3. Extraordinary Child

These guidelines are designed to fit the needs of most children. The court may increase the Basic Child Support Obligation to provide for the special needs of gifted or handicapped children.

4. Older Child Adjustment

The average expenditures for children age 12 or older exceed the average expenditures for all children by approximately 10%. Therefore, the court may increase child support for a child who has reached the age of 12 years by an amount up to 10% of the child support shown on the Schedule. If the court chooses to make an adjustment, the following method of calculation shall be used.

EXAMPLE: The Basic Child Support Obligation for one child, age 12, is $459. As much as $46 may be added to the basic child support obligation, for a total of $505. If not all children subject to the order are age 12 or over, the increase will be prorated as follows: assume the Basic Child Support Obligation for three children is $786. If one of the three children is age 12 or over, assign 1/3 of the Basic Child Support Obligation to the older child ($262). Up to 10% ($26) of that portion of the Basic Child Support Obligation may be added as an older child adjustment, increasing the obligation to $812. NOTE: This prorating method is limited to this section and should not be followed in Section 25.

10. DETERMINING EACH PARENT'S PROPORTIONATE SHARE OF THE TOTAL CHILD SUPPORT OBLIGATION

The Total Child Support Obligation shall be divided between the parents in proportion to their Adjusted Gross Incomes. The obligation of each parent is computed by multiplying each parent's share of the Combined Adjusted Gross Income by the Total Child Support Obligation.

EXAMPLE: Combined Adjusted Gross Income is $1,000. Father's Adjusted Gross Income is $600. Divide father's Adjusted Gross Income by the Combined Adjusted Income. The result is father's share of the Combined Adjusted Gross Income. ($600 divided by $1,000 = 60%). Father's share is 60%; mother's share is 40%.

11. ADJUSTMENT FOR COSTS ASSOCIATED WITH PARENTING TIME

Because the Schedule of Basic Child Support Obligations is based on expenditures for children in intact households, there is no consideration for costs associated with parenting time. When parenting time is exercised by the parent with less parenting time, a portion of the costs for children normally expended by the primary residential parent shifts to the other parent. Accordingly, unless it is apparent from the circumstances that the parent with less parenting time will not incur costs for the children during parenting time, when proof establishes that parenting time is or is expected to be exercised by that parent, an adjustment shall be made to that parent's proportionate share of the Total Child Support Obligation. To calculate child support in equal parenting time cases, see Section 12.

For purposes of calculating parenting time days, only the time spent by a child with the parent with less parenting time is considered. Time that the child is in school or childcare is not considered.

To adjust for the costs of parenting time, first determine the total annual amount of parenting time indicated in a court order or parenting plan or by the expectation or historical practice of the parents. Using the following definitions, add together each block of parenting time to arrive at the total number of parenting time days per year. Calculate the number of parenting time days arising from any block of time the child spends with the parent with less parenting time in the following manner:

A. Each block of time begins and ends when that parent receives or returns the child from the primary residential parent or from a third party with whom the primary residential parent left the child. Third party includes, for example, a school or childcare provider.

B. Count one day of parenting time for each 24 hours within any block of time.

C. To the extent there is a period of less than 24 hours remaining in the block of time, after all 24-hour days are counted or for any block of time which is in total less than 24 hours in duration:

1. A period of 12 hours or more counts as one day.

2. A period of 6 to 11 hours counts as a half-day.

4. A period of 3 to 5 hours counts as a quarter-day.

5. Periods of less than 3 hours may count as a quarter-day if, during those hours, the parent with less parenting time pays for routine expenses of the child, such as meals.

EXAMPLES: For the purposes of these examples, mother has parenting time 130 days per year and father is the primary residential parent.

1. Mother receives the child at 9:00 p.m. on Thursday evening and brings the child to school at 8:00 a.m. on Monday morning, from which father picks up the child at 3:00 p.m. on Monday.

    a. 9:00 p.m. Thursday to 9:00 p.m. Sunday is three days.
    b. 9:00 p.m. Sunday to 8:00 a.m. Monday is 11 hours, which equals a half day.
    c. Total is 3 ½ days.

2. Mother picks the child up from school at 3:00 p.m. Friday and returns the child to school at 8:00 a.m. on Monday.

    a. 3:00 p.m. Friday to 3:00 p.m. Sunday is two days.
    b. 3:00 p.m. Sunday to 8:00 a.m. Monday is 17 hours, which equals one day.
    c. Total is 3 days.

3. Mother picks up child from soccer at noon on Saturday, and returns the child to father at 9:00 p.m. on Sunday.

    a. Noon Saturday to noon Sunday is one day.
    b. Noon Sunday to 9:00 p.m. Sunday is 9 hours, which equals ½ day.
    c. Total is 1 ½ days.

If the children have different parenting time schedules, then see Section 16 to determine the parenting time adjustment or to determine if separate worksheets are required. After determining the total number of parenting time days, refer to "Parenting Time Table A" below. The left column of the table sets forth numbers of parenting time days in increasingly higher ranges. Adjacent to each range is an adjustment percentage. The parenting time adjustment is calculated as follows: locate the total number of parenting time days per year in the left column of "Parenting Time Table A" and select the adjustment percentage from the adjacent column. Multiply the Basic Child Support Obligation determined under Section 8 by the appropriate adjustment percentage. The number resulting from this multiplication then is subtracted from the proportionate share of the Total Child Support Obligation of the parent who exercises parenting time.

PARENTING TIME TABLE A	
Number of Parenting Time Days	Adjustment Percentage
0 - 3	0
4 - 20	.012
21 - 38	.031
39 - 57	.050
58 - 72	.085
73 - 87	.105
88 - 115	.161
116 - 129	.195
130 - 142	.253
143 - 152	.307
153 - 162	.362
163 - 172	.422
173 - 182	.486

EXAMPLE: The Basic Child Support Obligation from the Schedule is $667 for two children. After making all applicable adjustments under Section 9, such as an adjustment for one older child, the Total Child Support Obligation is $700 and father's proportionate share is 60%, or $421. Father has parenting time with the children a total of 100 days. On Parenting Time Table A, the range of days for this amount of parenting time is from 88 to 115 days. The corresponding adjustment percentage is .161. Multiply the $667 Basic Child Support Obligation by .161 or 16.1%. The resulting $107 is subtracted from $421 (father's proportionate share of the Total Child Support Obligation), adjusting the child support obligation to $313.

As the number of parenting time days approaches equal time sharing (143 days and above), certain costs usually incurred only in the primary residential parent's household are assumed to be substantially or equally shared by both parents. These costs are for items such as the child's clothing and personal care items, entertainment and reading materials. If this assumption is rebutted by proof, for example, that such costs are not substantially or equally shared in each household, only Parenting Time Table B must be used to calculate the parenting time adjustment for this range of days. Locate the total number of parenting time days per year in the left columns of "Parenting Time Table B" and select the adjustment percentage from the adjacent column. Multiply the Basic Child Support Obligation determined under Section 8 by the appropriate adjustment percentage. The

number resulting from this multiplication then is subtracted from the proportionate share of the Total Child Support Obligation of the parent who exercises parenting time.

PARENTING TIME TABLE B	
Number of Parenting Time Days	Adjustment Percentage
143 – 152	.275
153 – 162	.293
163 – 172	.312
173 – 182	.331

12. EQUAL PARENTING TIME

If the time spent with each parent is essentially equal, the expenses for the children are equally shared and adjusted gross incomes of the parents also are essentially equal, no child support shall be paid. If the parents' incomes are not equal, the total child support amount shall be divided equally between the two households and the parent owing the greater amount shall be ordered to pay what is necessary to achieve that equal share in the other parent's household.

EXAMPLE: After making all applicable adjustments under Sections 9 and 13, the remaining child support obligation is $1,500. The parents' proportionate shares of the obligation are $1,000 and $500. To equalize the child support available in both households, deduct the lower amount from the higher amount ($1,000 - $500 = $500), then divide the balance in half ($500 ÷ 2 = $250). The resulting amount, $250, is paid to the parent with the lower obligation.

13. ADJUSTMENTS FOR OTHER COSTS

If a parent pays a cost under Section 9.A. or 9.B. (except 9.B.4), deduct the cost from that parent's Proportionate Share of income to arrive at the Preliminary Child Support Amount.

EXAMPLE: Father pays for medical insurance through his employer. This cost is added to the Basic Child Support Obligation pursuant to Section 9.A, then prorated between the parents to arrive at each parent's proportionate child support obligation. Because the cost has already been paid to a third party (the insurance company), the cost must be deducted from father's child support obligation because this portion of the child support obligation has already been paid.

14. DETERMINING THE CHILD SUPPORT ORDER

Unless the calculation results in a negative number, the court shall order the parent with less parenting time to pay child support in an amount equal to his or her proportionate share of the Total Child Support Obligation. The parent receiving child support shall be presumed to spend his or her share directly on the children.

EXAMPLE: On the Schedule, the Basic Child Support Obligation for a Combined Adjusted Gross Income of $3,120 for one child is $610. To this the court adds $61 because the child is over 12 years of age (10% in this example). The Total Child Support Obligation is $671.

The father's share is 56% of $671, or $373. The mother's share is 44% of $671, or $298, and she has more parenting time than father. Under the court-approved parenting plan, parenting time will be exercised by father for a total of 100 days per year, resulting in an adjustment of $98 ($610 X 16.1%). After adjusting for parenting time, father's share is $275 ($373 less $98). Father shall pay the child support amount of $275 per month. The value of mother's contribution is $ $298, and she spends it directly on the child.

For all awards, the child support amount shall be rounded to the nearest whole dollar. A rounded amount is not a deviation under Section 20.

If the amount of child support is less than the current clearinghouse fee, the court shall not impose a child support award unless a deviated award is warranted under Section 20. It is not a deviation under Section 20 if an award is not imposed because it is less than the clearinghouse fee.

15. SELF-SUPPORT RESERVE TEST

In each case, after determining the child support order, the court shall perform a self-support reserve test to verify that the paying parent is financially able to pay the child support order and to maintain at least a minimum standard of living, as follows:

The self-support reserve shall be an amount equal to 80% of the monthly full-time earnings at the current state minimum wage at the time of the order (the self-support reserve amount). Deduct the self-support reserve amount from the paying parent's Adjusted Gross Income, except that the court may deduct from such parent's Adjusted Gross Income for purposes of the self-support reserve test only, court-ordered arrears on child support for children of other relationships or spousal maintenance, if actually paid. If the resulting amount is less than the child support order, the court may reduce the current child support order to the resulting amount after first considering the financial impact the reduction would have on the receiving parent's household. The test applies only to the current child support obligation, but does not prohibit an additional amount to be ordered to reduce an obligor's arrears.

EXAMPLE ONE: Before applying the self-support reserve test, the child support order is calculated under the guidelines to be $492. The adjusted gross income of the paying parent is $1,820 at a minimum wage of $10.50 per hour the self-support reserve amount is $1,456 ($10.50 x 40 hours x 52 weeks = $21,840 ÷ 12 months = $1,820 x 80% = $1,456). Subtracting the self-support reserve amount of $1,456 from the paying parent's adjusted gross income of $1,820 leaves $364. Because this resulting amount is less than the $492 child support order, the court may reduce the child support order to the resulting amount. However, before making any reduction, the court shall examine the self-support capability of the receiving parent, using the same self-support reserve test applied to the paying parent.

EXAMPLE TWO: The receiving parent's proportionate share of the total child support obligation is calculated under the guidelines to be $404. This parent's Adjusted Gross Income is $1,487. Subtracting the self-support reserve of $1,456 from the receiving parent's Adjusted Gross Income of $1,487 leaves $31. Because this resulting amount is less than the parent's proportionate share of the Total Child Support Obligation, it is evident that both parents have insufficient income to be self-supporting. In this situation, the court has discretion to determine whether and in what amount the child support order (the amount the paying parent is ordered to pay) may be reduced.

16. MULTIPLE CHILDREN, DIFFERENT PARENTING PLANS

When each parent exercises more than half of the parenting time with at least one of the parties' children, each parent is obligated to contribute to the support of all the children. However, the amount of current child support to be paid by the parent having the greater child support obligation shall be reduced by the amount of child support owed to that parent by the other parent.

EXAMPLE: (For simplicity, this example does not consider parenting time.) Combined Adjusted Gross Income is $3,000 per month. Father's gross income is $1,000 per month (33.3%) and he has more than half of the time with one child. Mother's gross income is $2,000 per month (66.6%) and she has more than half of the time with the other two children.

Prepare a Parent's Worksheet to determine child support for children in the mother's household. Locate the Combined Adjusted Gross Income figure of $3,000 on the Schedule. Select the child support figure in the column for the two children in this household, $857. Father's share is 33.3% of $857, or $285.

Prepare a Parent's Worksheet to determine child support for the child in the father's household. Locate the Combined Adjusted Gross Income figure of $3,000. Select the child support figure in the column for the one child in this household, $592. Mother's share is 66.6% of $592, or $394.

Mother is obligated to pay father $394 for child support. This amount is reduced by the $285 obligation owed by the father to the mother. Thus, mother must pay $109 per month.

When the parties have children with different parenting plans and one parent does not have more than half of the parenting time with any of the children, prepare only one worksheet. To determine the parenting time cost adjustment for the parent who does not have more than half of the parenting time, use an average of the total number of parenting days. Add the total amount of parenting days for each child. Divide that number by the total number of children.

EXAMPLE: The parties have two minor children, one who lives with mother full-time and one who splits time equally between parents. Prepare one worksheet. When entering the parenting time cost adjustment for father, divide father's total number of parenting days for both children, 182, by the total number of children, two (2). Thus, father's parenting time cost adjustment would be calculated for 91 days.

17. CHILD SUPPORT ASSIGNED TO THE STATE

If child support has been assigned to the state under Arizona Revised Statutes Section 46-407, the obligation of a parent to pay child support shall not be offset by child support arrearages that may be owed to that parent.

18. TRAVEL EXPENSES ASSOCIATED WITH PARENTING TIME

The court may allocate travel expenses of the child associated with parenting time in cases where one-way travel exceeds 100 miles. In doing so, the court shall consider the means of the parents and may consider how their conduct (such as a change of residence) has affected the costs of parenting time. To the extent possible, any allocation shall ensure that the child has continued contact with each parent. A parent who is entitled to receive reimbursement from the other parent for allocated parenting time expenses shall, upon request of the other parent, provide receipts or other evidence of payments actually made. The allocation of expenses does not change the amount of the child support ordered.

19. GIFTS IN LIEU OF MONEY

Once child support has been ordered by the court, the child support is to be paid in money. Gifts of clothing, etc. in lieu of money are not to be offset against the child support order except by court order.

20. DEVIATIONS

A. The court shall deviate from the guidelines, i.e., order child support in an amount different from that which is provided pursuant to these guidelines, after considering all relevant factors, including those set forth in Arizona Revised Statutes Section 25-320, and applicable case law, only if all of the following criteria are met:

1. Application of the guidelines is inappropriate or unjust in the particular case,

2. The court has considered the best interests of the child in determining the amount of a deviation. A deviation that reduces the amount of child support paid is not, by itself, contrary to the best interests of the child,

3. The court makes written findings regarding 1. and 2. above in the Child Support Order, Minute Entry or Child Support Worksheet,

4. The court shows what the order would have been without the deviation, and

5. The court shows what the order is after deviating.

B. The court may deviate from the guidelines based upon an agreement of the parties only if all of the following criteria are met:

1. The agreement is in writing or stated on the record pursuant to Rule 69, Arizona Rules of Family Law Procedure *(ARFLP)*.

2. All parties have entered into the agreement with knowledge of the amount of child support that would have been ordered under the guidelines but for the agreement,

3. All parties have entered into the agreement free of duress and coercion, and

4. The court complies with the requirements of Section 20.A.

In cases with significant disparity of income between the parents, a deviation may be appropriate.

21. THIRD-PARTY CAREGIVERS

When a child lives with a third-party caregiver by virtue of a court order, administrative placement by a state agency or under color of authority, the third-party caregiver is entitled to receive child support payments from each parent on behalf of the child. When calculating the amount of child support to be awarded to a third-party caregiver, consider the third-party caregiver's expenses under Section 9, but not the third-party caregiver's income.

EXAMPLE: The parties have one child together who is living with a third-party caregiver. Mother has an Adjusted Gross Income of $2,500 per month and father has an Adjusted Gross Income of $2,000 per month. Add both parents' income together for a Total Adjusted Gross Income of $4,500 per month. The Total Basic Support Obligation for one child would be $817. The third-party caregiver pays $500 per month for medical insurance. Place the $500 amount as an additional child support obligation under the third-party column. The parents have no recognized expenses under Section 9. Father should be ordered to pay the caregiver $585 per month and mother should be ordered to pay the caregiver $732 per month.

22. COURT'S FINDINGS

The court shall make findings in the record as to: Gross Income, Adjusted Gross Income, Basic Child Support Obligation, Total Child Support Obligation, each parent's proportionate share of the child support obligation, and the child support order.

The findings may be made by incorporating a worksheet containing this information into the file.

If the court attributes income above minimum wage income, the court shall explain the reason for its decision.

The child support order shall be set forth in a sum certain and start on a date certain. A new child support order shall be filed upon any change in the amount or due date of the child support obligation.

23. EXCHANGE OF INFORMATION

The court shall order that every twenty-four months, financial information such as tax returns, financial affidavits, and earning statements be exchanged between the parties.

Unless the court has ordered otherwise, at the time the parties exchange financial information, they shall also exchange residential addresses and the names and addresses of their employers.

24. MODIFICATION

A. Standard Procedure

Pursuant to Arizona Revised Statutes Sections 25-327 and 25-503, either parent or the state Title IV-D agency may ask the court to modify a child support order upon a showing of a substantial and continuing change of circumstances.

B. Simplified Procedure

Either parent or the state Title IV-D agency may request the court to modify a child support order if application of the guidelines results in an order that varies 15% or more from the existing amount. A fifteen percent variation in the amount of the order will be considered evidence of substantial and continuing change of circumstances. A request for modification of the child support amount must be accompanied by a completed and sworn "Parent's Worksheet for Child Support Amount," and documentation supporting the incomes if different from the court's most recent findings regarding income of the parents. If the party requesting the modification is unable to provide documentation supporting the other party's income, the requesting party shall indicate that the income amount is

attributed/estimated and state the basis for the amount listed. The state Title IV-D agency may submit a parent's worksheet.

The simplified procedure also may be used by either parent or the state Title IV-D agency to modify a child support order to assign or alter the responsibility to provide medical insurance for a child who is subject of a child support order. A modification of the medical assignment or responsibility does not need to vary by 15% or more from the existing amount to use the simplified procedure.

A copy of the request for modification of child support and the "Parent's Worksheet for Child Support Amount," including supporting documentation, showing that the proposed child support amount would vary 15% or more from the existing child support order shall be served on the other parent, or on both parents if filed by the state Title IV-D agency, pursuant to Rule 27, Arizona Rules of Family Law Procedure *(ARFLP).*

If the requested modification is disputed, the parent receiving service must request a hearing within 20 days of service. If service is made outside the state, as provided in Rule 42, *ARFLP,* the parent receiving service must request a hearing within 30 days of service.

A party requesting a hearing shall file a written request for hearing accompanied by a completed and sworn "Parent's Worksheet for Child Support Amount." Copies of the documents filed, together with the notice of hearing, shall be served on the other party and, if appropriate, the state Title IV-D agency by first class mail not less than ten judicial days prior to the hearing.

Upon proof of service and if no hearing is requested within the time allowed, the court will review the request and enter an appropriate order or set the matter for hearing.

If any party requests a hearing within the time allowed, the court shall conduct such hearing. No order shall be modified without a hearing if one is requested.

The notice provision of Rule 44, *ARFLP*, does not apply to this simplified modification procedure.

A request to modify child support, request for a hearing and notice of hearing, "Parent's Worksheet for Child Support Amount" and child support order filed or served pursuant to this subsection must be made using forms approved by the Arizona Supreme Court or substantially similar forms.

Approved forms are available from the Clerk of the Superior Court.

25. EFFECT OF CESSATION OF CHILD SUPPORT FOR ONE CHILD

If child support for more than one child was ordered under these guidelines and thereafter the duty to support one of the children stops, the order is not automatically reduced by that child's share. To obtain a modification to the child support order, a request must be made in writing to the court to recalculate the child support obligation pursuant to these guidelines. The procedure specified in Section 24 may be used for this purpose.

EXAMPLE: The child support order for Combined Adjusted Gross Income of $1,500, with four children is $621. One child graduates from high school and turns 18. In determining the new child support amount, do not deduct one-fourth of the order for a new order of $466. Instead, determine a new child support order by applying the guidelines. (NOTE: This method varies from the one used in Section 9.B.4).

26. INCOME AND BENEFITS RECEIVED BY OR ON BEHALF OF CHILD

A. Income earned or money received by a child from any source other than court-ordered child support shall not be counted toward either parent's child support obligation except as stated herein. However, income earned or money received by or on behalf of a person for whom child support is ordered to continue past the age of majority pursuant to Arizona Revised Statute Sections 25-320.E and 25-809.F may be credited against any child support obligation.

B. Benefits, such as Social Security Disability or Insurance, received by a parent on behalf of a child, as a result of contributions made by the other parent who is ordered to pay child support shall be credited as follows:

1. If the amount of the child's benefit for a given month is equal to or greater than the paying parent's child support obligation, then that parent's obligation is satisfied.

2. Any benefit received by the child for a given month in excess of the child support obligation shall not be treated as an arrearage payment nor as a credit toward future child support payments.

3. If the amount of the child's benefit for a given month is less than the parent's child support obligation, the parent shall pay the difference unless the court, in its discretion, modifies the child support order to equal the benefits being received at that time.

D. Except as otherwise provided in Section 5.B, any benefits received directly, and not on behalf of a child, by either the parent receiving child support or the parent paying child support as a result of his or her own contributions, shall be included as part of that parent's gross income.

27. FEDERAL TAX EXEMPTION FOR DEPENDENT CHILDREN

All the federal and state tax exemptions applicable to the minor children shall be allocated between the parents as they agree, or, in the absence of their agreement, in a manner that allows each parent to claim allowable federal dependency exemptions proportionate to adjusted gross income in a reasonable pattern that can be repeated in no more than 5 years. This may be done by allocating claiming of the children or claiming of specific years. To implement this provision, the proportionate share of the combined adjusted gross income of both parents is rounded to the nearest fraction with a denominator no larger than 5 (i.e. 1/2, 1/3, 2/3, 1/4, 3/4, 1/5, 2/5, 3/5, 4/5). For illustrative purposes, assume father earns $60,000 and mother earns $40,000 of the combined adjusted gross income of $100,000. Father's share of the combined income is 3/5. If father earned $30,000 and mother earned $20,000, then 3/5 would still be the fraction with a denominator of 5 or less that comes closest to father's share of the parents' combined adjusted gross income. The dependency exemption shall therefore be allocated utilizing this fraction. If a parent otherwise entitled to the dependency exemption would derive no tax benefit from claiming it in any given tax year, then the entire exemption for that tax year, and not just the share indicated by the preceding sentence, may be allocated to the parent who would derive a tax benefit for that tax year. An Internal Revenue Service Form 8332 may need to be signed and filed with a parent's income tax return.

The court may deny the right to present or future tax exemption when a history of non-payment of child support exists. The allocation of the exemption may be conditioned upon payment by December 31 of the total court-ordered monthly child support obligation for the current calendar year and any court-ordered arrearage payments due during that calendar year for which the exemption is to be claimed. If these conditions have been met, the parent receiving child support will need to execute the necessary Internal Revenue Service form (Form 8332) to transfer the exemption. If the paying parent has paid the current child support, but has not paid the court-ordered arrearage payments, the paying parent shall not be entitled to claim the exemption.

EXAMPLE: The paying parent's percentage of gross income is approximately 67% (2/3) and the receiving parent's percentage is approximately 33% (1/3). All payments are current. If there are three children, the paying parent would be entitled to claim the exemption for two children and the receiving parent would be entitled to claim the exemption for one child. If there is only one child, the paying parent would be entitled to claim the child two out of every three years, and the receiving parent would claim the child one out of every three years.

For purposes of this section only, a paying parent shall be credited as having paid child support that has been deducted on or before December 31 pursuant to an order of assignment if the amount has been received by the court or clearinghouse by January 15 of the following year.

28. CHILD SUPPORT ARREARS

A. When setting an amount for a payment on arrears, the court should take into consideration that interest accrues on the principal balance. If the court sets a payment on arrears less than the amount of the accruing monthly interest, the court shall make a finding why the amount is less than the accruing monthly interest. Upon a showing of substantial and continuing changed circumstances, the court may adjust the amount of payment on arrears.

B. When a current child support obligation terminates, before adjusting the order of assignment to an amount less than the current child support amount and the payment on arrears, the court shall consider the total amount of arrears and the accruing interest, and the time that it will take the obligor to pay these amounts.

29. EFFECTIVE DATE AND GROUNDS FOR MODIFICATION

A. Except for defaults or as otherwise agreed upon by the parties, all child support orders entered after March 31, 2018 shall be made pursuant to these guidelines, whether they be original orders or modifications of pre-existing orders, unless the court determines otherwise based on good cause shown. In cases of default, the guidelines in effect at the time of filing the action will be used. The parties may agree to use either the guidelines in effect at the time of filing the action or those in effect at the time the order is entered.

B. A substantial variance between an existing child support order and an amount resulting from application of the new guidelines may be considered evidence of a substantial and continuing change of circumstances for purposes of a modification. A variance of at least 15% would be evidence of a substantial and continuing change of circumstances.

Schedule of Basic Support Obligations

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
750	174	255	303	312	372	404
800	185	271	323	360	396	431
850	196	287	341	381	419	456
900	206	301	358	399	439	478
950	216	315	374	418	460	500
1000	225	329	391	436	480	522
1050	235	343	407	455	500	544
1100	245	357	424	473	521	566
1150	255	371	440	492	541	588
1200	264	385	457	510	561	610
1250	274	399	473	528	581	632
1300	284	414	490	547	602	654
1350	293	428	506	565	622	676
1400	303	442	523	584	642	698
1450	313	456	539	602	662	720
1500	323	470	556	621	683	742
1550	332	484	572	639	703	764
1600	342	498	589	657	723	786
1650	351	511	604	675	742	807
1700	360	524	620	692	761	828
1750	369	537	635	709	780	848
1800	379	551	651	727	799	869
1850	388	564	666	744	818	889
1900	397	577	681	761	837	910
1950	406	590	697	778	856	931
2000	415	603	712	796	875	951
2050	424	616	727	812	894	971
2100	433	629	742	829	912	991
2150	442	641	757	845	930	1011
2200	450	654	772	862	948	1031
2250	459	667	786	878	966	1050
2300	468	679	801	895	984	1070
2350	477	692	816	911	1003	1090
2400	486	705	831	928	1021	1109
2450	495	717	845	944	1039	1129
2500	503	730	860	961	1057	1149

2550	512	742	875	977	1075	1169
2600	521	755	890	994	1093	1188
2650	530	768	905	1010	1111	1208
2700	539	780	919	1027	1130	1228
2750	547	793	934	1043	1148	1248
2800	556	806	949	1060	1166	1267
2850	565	818	964	1076	1184	1287
2900	574	831	978	1093	1202	1307
2950	583	844	993	1109	1220	1326
3000	592	857	1008	1126	1239	1347
3050	601	870	1024	1144	1258	1367
3100	610	883	1039	1161	1277	1388
3150	619	896	1055	1178	1296	1409
3200	628	909	1070	1195	1315	1429
3250	637	922	1085	1212	1334	1450
3300	646	935	1101	1230	1353	1470
3350	655	948	1116	1247	1372	1491
3400	663	961	1132	1264	1391	1512
3450	672	974	1147	1281	1409	1532
3500	681	987	1163	1299	1428	1553
3550	690	1000	1178	1316	1447	1573
3600	699	1013	1193	1333	1466	1594
3650	708	1026	1209	1350	1485	1614
3700	717	1039	1224	1367	1504	1635
3750	726	1052	1240	1385	1523	1656
3800	735	1065	1255	1402	1542	1676
3850	744	1078	1270	1419	1561	1697
3900	753	1091	1286	1436	1580	1717
3950	760	1101	1297	1449	1594	1733
4000	765	1108	1306	1458	1604	1744
4050	771	1115	1314	1468	1614	1755
4100	776	1123	1322	1477	1625	1766
4150	781	1130	1330	1486	1635	1777
4200	786	1137	1339	1495	1645	1788
4250	791	1144	1347	1504	1655	1799
4300	796	1152	1355	1514	1665	1810
4350	802	1159	1363	1523	1675	1821
4400	807	1166	1371	1532	1685	1832
4450	812	1173	1379	1541	1695	1842
4500	817	1180	1388	1550	1705	1853
4550	822	1188	1396	1559	1715	1864
4600	827	1195	1404	1568	1725	1875
4650	833	1202	1412	1577	1735	1886

4700	838	1209	1420	1586	1745	1897
4750	843	1216	1428	1596	1755	1908
4800	848	1224	1437	1605	1765	1919
4850	853	1231	1445	1614	1775	1930
4900	858	1238	1453	1623	1785	1940
4950	863	1245	1461	1632	1795	1951
5000	869	1252	1469	1641	1805	1962
5050	874	1259	1477	1650	1815	1973
5100	877	1265	1483	1657	1822	1981
5150	881	1270	1489	1664	1830	1989
5200	885	1275	1495	1670	1837	1997
5250	889	1281	1502	1677	1845	2005
5300	892	1286	1508	1684	1852	2014
5350	896	1291	1514	1691	1860	2022
5400	900	1296	1520	1698	1867	2030
5450	903	1302	1526	1704	1875	2038
5500	907	1307	1532	1711	1882	2046
5550	911	1312	1538	1718	1890	2054
5600	915	1318	1544	1725	1897	2063
5650	918	1323	1550	1732	1905	2071
5700	922	1328	1556	1739	1912	2079
5750	926	1333	1563	1745	1920	2087
5800	930	1339	1569	1752	1927	2095
5850	933	1344	1575	1759	1935	2103
5900	937	1349	1581	1766	1942	2111
5950	941	1354	1587	1773	1950	2120
6000	944	1360	1593	1779	1957	2128
6050	948	1365	1599	1786	1965	2136
6100	952	1370	1605	1793	1972	2144
6150	956	1376	1611	1800	1980	2152
6200	959	1380	1616	1805	1986	2159
6250	962	1384	1620	1810	1991	2164
6300	965	1388	1625	1815	1996	2170
6350	968	1392	1629	1819	2001	2175
6400	971	1395	1633	1824	2006	2181
6450	973	1399	1637	1828	2011	2186
6500	976	1403	1641	1833	2016	2192
6550	979	1407	1645	1837	2021	2197
6600	982	1411	1649	1842	2026	2203
6650	985	1415	1653	1847	2031	2208
6700	988	1418	1657	1851	2036	2213
6750	991	1422	1661	1856	2041	2219
6800	994	1426	1665	1860	2046	2224

6850	997	1430	1670	1865	2051	2230
6900	1000	1434	1674	1869	2056	2235
6950	1002	1438	1678	1874	2061	2241
7000	1005	1442	1682	1879	2066	2246
7050	1008	1445	1686	1883	2071	2252
7100	1011	1449	1690	1888	2077	2257
7150	1014	1453	1694	1892	2082	2263
7200	1017	1457	1698	1897	2087	2268
7250	1020	1461	1702	1901	2092	2274
7300	1023	1465	1706	1906	2097	2279
7350	1024	1466	1708	1908	2099	2281
7400	1026	1468	1710	1910	2101	2284
7450	1027	1470	1712	1912	2103	2286
7500	1029	1472	1714	1914	2106	2289
7550	1030	1474	1716	1916	2108	2291
7600	1032	1476	1718	1918	2110	2294
7650	1033	1478	1719	1921	2113	2296
7700	1035	1479	1721	1923	2115	2299
7750	1036	1481	1723	1925	2117	2301
7800	1038	1483	1725	1927	2119	2304
7850	1039	1485	1727	1929	2122	2306
7900	1041	1487	1729	1931	2124	2309
7950	1042	1489	1731	1933	2126	2311
8000	1044	1491	1732	1935	2129	2314
8050	1045	1492	1734	1937	2131	2316
8100	1047	1494	1736	1939	2133	2319
8150	1048	1496	1738	1941	2136	2321
8200	1050	1498	1740	1943	2138	2324
8250	1051	1500	1742	1946	2140	2326
8300	1053	1502	1744	1948	2142	2329
8350	1054	1504	1745	1950	2145	2331
8400	1055	1505	1747	1952	2147	2333
8450	1058	1509	1751	1956	2152	2339
8500	1063	1516	1759	1965	2161	2349
8550	1068	1522	1767	1973	2171	2360
8600	1072	1529	1774	1982	2180	2370
8650	1077	1536	1782	1991	2190	2380
8700	1082	1543	1790	1999	2199	2391
8750	1087	1549	1798	2008	2209	2401
8800	1092	1556	1806	2017	2218	2411
8850	1096	1563	1813	2025	2228	2422
8900	1101	1570	1821	2034	2238	2432
8950	1106	1576	1829	2043	2247	2443

9000	1111	1583	1837	2051	2257	2453
9050	1116	1590	1844	2060	2266	2463
9100	1120	1597	1852	2069	2276	2474
9150	1125	1603	1860	2077	2285	2484
9200	1130	1610	1868	2086	2295	2494
9250	1134	1616	1874	2093	2302	2503
9300	1137	1620	1879	2099	2309	2509
9350	1140	1624	1884	2104	2315	2516
9400	1143	1629	1889	2110	2321	2523
9450	1146	1633	1894	2116	2327	2530
9500	1149	1637	1899	2121	2334	2537
9550	1152	1642	1904	2127	2340	2543
9600	1155	1646	1909	2133	2346	2550
9650	1158	1650	1914	2138	2352	2557
9700	1161	1655	1920	2144	2358	2564
9750	1164	1659	1925	2150	2365	2570
9800	1168	1664	1930	2156	2372	2578
9850	1171	1669	1936	2162	2379	2585
9900	1174	1674	1941	2169	2385	2593
9950	1178	1678	1947	2175	2392	2600
10000	1181	1683	1953	2181	2399	2608
10050	1185	1688	1958	2187	2406	2615
10100	1188	1693	1964	2194	2413	2623
10150	1191	1698	1969	2200	2420	2630
10200	1195	1703	1975	2206	2427	2638
10250	1198	1707	1981	2212	2434	2645
10300	1202	1712	1986	2219	2441	2653
10350	1205	1717	1992	2225	2447	2660
10400	1207	1720	1996	2229	2452	2665
10450	1210	1724	2000	2234	2457	2671
10500	1213	1728	2004	2238	2462	2676
10550	1215	1731	2008	2243	2467	2681
10600	1218	1735	2012	2247	2472	2687
10650	1220	1738	2016	2252	2477	2692
10700	1223	1742	2020	2256	2482	2698
10750	1226	1745	2024	2261	2487	2703
10800	1228	1749	2028	2265	2492	2708
10850	1231	1753	2032	2270	2497	2714
10900	1233	1756	2036	2274	2502	2719
10950	1236	1760	2040	2279	2507	2725
11000	1239	1763	2044	2283	2511	2730
11050	1241	1767	2048	2288	2516	2735
11100	1244	1771	2052	2292	2521	2741

11150	1246	1774	2056	2297	2526	2746
11200	1249	1778	2060	2301	2531	2752
11250	1251	1781	2064	2306	2536	2757
11300	1254	1785	2068	2310	2541	2762
11350	1257	1788	2072	2315	2546	2768
11400	1259	1792	2076	2319	2551	2773
11450	1262	1796	2080	2324	2556	2778
11500	1264	1799	2084	2328	2561	2784
11550	1267	1803	2088	2333	2566	2789
11600	1270	1806	2092	2337	2571	2795
11650	1272	1810	2096	2342	2576	2800
11700	1275	1814	2100	2346	2581	2805
11750	1277	1817	2105	2351	2586	2811
11800	1280	1821	2109	2356	2591	2817
11850	1283	1825	2114	2361	2597	2823
11900	1286	1829	2119	2366	2603	2830
11950	1289	1833	2123	2372	2609	2836
12000	1292	1838	2128	2377	2615	2842
12050	1295	1842	2133	2383	2621	2849
12100	1298	1846	2138	2388	2627	2855
12150	1301	1850	2143	2393	2633	2862
12200	1304	1854	2147	2399	2638	2868
12250	1306	1858	2152	2404	2644	2874
12300	1309	1863	2157	2409	2650	2881
12350	1312	1867	2162	2415	2656	2887
12400	1315	1871	2167	2420	2662	2894
12450	1318	1875	2171	2425	2668	2900
12500	1321	1879	2176	2431	2674	2906
12550	1324	1883	2181	2436	2680	2913
12600	1327	1887	2186	2441	2686	2919
12650	1330	1891	2190	2447	2691	2926
12700	1333	1896	2195	2452	2697	2932
12750	1336	1900	2200	2457	2703	2938
12800	1338	1904	2205	2463	2709	2945
12850	1341	1908	2210	2468	2715	2951
12900	1344	1912	2214	2473	2721	2957
12950	1347	1916	2219	2479	2727	2964
13000	1350	1920	2224	2484	2732	2970
13050	1353	1924	2229	2489	2738	2977
13100	1356	1929	2233	2495	2744	2983
13150	1359	1933	2238	2500	2750	2989
13200	1362	1937	2243	2505	2756	2996
13250	1365	1941	2248	2511	2762	3002

13300	1367	1945	2252	2516	2768	3008
13350	1370	1949	2257	2521	2774	3015
13400	1373	1953	2262	2527	2779	3021
13450	1376	1958	2267	2532	2785	3028
13500	1379	1962	2272	2537	2791	3034
13550	1382	1966	2276	2543	2797	3040
13600	1385	1970	2281	2548	2803	3047
13650	1388	1974	2286	2553	2809	3053
13700	1391	1978	2291	2559	2815	3059
13750	1393	1982	2295	2564	2820	3066
13800	1396	1986	2300	2569	2826	3072
13850	1399	1991	2305	2575	2832	3079
13900	1402	1995	2310	2580	2838	3085
13950	1405	1999	2315	2585	2844	3091
14000	1408	2003	2319	2591	2850	3098
14050	1411	2007	2324	2596	2856	3104
14100	1414	2011	2329	2601	2861	3110
14150	1417	2015	2334	2607	2867	3117
14200	1420	2019	2338	2612	2873	3123
14250	1422	2024	2343	2617	2879	3130
14300	1425	2028	2348	2623	2885	3136
14350	1428	2032	2353	2628	2891	3142
14400	1431	2036	2357	2633	2897	3149
14450	1434	2040	2362	2639	2903	3155
14500	1437	2044	2367	2644	2908	3161
14550	1440	2048	2372	2649	2914	3168
14600	1443	2052	2377	2655	2920	3174
14650	1446	2056	2381	2660	2926	3180
14700	1448	2060	2385	2665	2931	3186
14750	1451	2064	2390	2669	2936	3192
14800	1454	2068	2394	2674	2941	3197
14850	1457	2072	2398	2679	2947	3203
14900	1460	2076	2402	2684	2952	3209
14950	1463	2079	2407	2688	2957	3214
15000	1466	2083	2411	2693	2962	3220
15050	1468	2087	2415	2698	2968	3226
15100	1471	2091	2419	2703	2973	3231
15150	1474	2095	2424	2707	2978	3237
15200	1477	2099	2428	2712	2983	3243
15250	1480	2102	2432	2717	2988	3248
15300	1483	2106	2436	2722	2994	3254
15350	1485	2110	2441	2726	2999	3260
15400	1488	2114	2445	2731	3004	3266

15450	1491	2118	2449	2736	3009	3271
15500	1494	2122	2453	2741	3015	3277
15550	1497	2125	2458	2745	3020	3283
15600	1500	2129	2462	2750	3025	3288
15650	1502	2133	2466	2755	3030	3294
15700	1505	2137	2471	2760	3036	3300
15750	1508	2141	2475	2764	3041	3305
15800	1511	2145	2479	2769	3046	3311
15850	1514	2148	2483	2774	3051	3317
15900	1517	2152	2488	2779	3056	3322
15950	1519	2156	2492	2783	3062	3328
16000	1522	2160	2496	2788	3067	3334
16050	1525	2164	2500	2793	3072	3339
16100	1528	2168	2505	2798	3077	3345
16150	1531	2171	2509	2802	3083	3351
16200	1534	2175	2513	2807	3088	3356
16250	1536	2179	2517	2812	3093	3362
16300	1539	2183	2522	2817	3098	3368
16350	1542	2187	2526	2821	3103	3373
16400	1545	2190	2530	2826	3108	3379
16450	1547	2194	2534	2830	3114	3384
16500	1550	2198	2539	2836	3119	3391
16550	1553	2202	2544	2841	3125	3397
16600	1556	2206	2548	2846	3131	3403
16650	1559	2211	2553	2852	3137	3410
16700	1562	2215	2558	2857	3143	3416
16750	1565	2219	2562	2862	3148	3422
16800	1568	2223	2567	2867	3154	3429
16850	1570	2227	2572	2873	3160	3435
16900	1573	2231	2577	2878	3166	3441
16950	1576	2235	2581	2883	3172	3447
17000	1579	2239	2586	2888	3177	3454
17050	1582	2243	2591	2894	3183	3460
17100	1585	2247	2595	2899	3189	3466
17150	1588	2251	2600	2904	3195	3473
17200	1590	2255	2605	2909	3200	3479
17250	1593	2259	2609	2915	3206	3485
17300	1596	2263	2614	2920	3212	3491
17350	1599	2267	2619	2925	3218	3498
17400	1602	2271	2623	2930	3223	3504
17450	1605	2276	2628	2936	3229	3510
17500	1608	2280	2633	2941	3235	3516
17550	1610	2284	2638	2946	3241	3523

17600	1613	2288	2642	2951	3246	3529
17650	1616	2292	2647	2957	3252	3535
17700	1619	2296	2652	2962	3258	3541
17750	1622	2300	2656	2967	3264	3548
17800	1625	2304	2661	2972	3270	3554
17850	1628	2308	2666	2978	3275	3560
17900	1630	2312	2670	2983	3281	3567
17950	1633	2316	2675	2988	3287	3573
18000	1636	2320	2680	2993	3293	3579
18050	1639	2324	2684	2999	3298	3585
18100	1642	2328	2689	3004	3304	3592
18150	1645	2332	2694	3009	3310	3598
18200	1648	2336	2699	3014	3316	3604
18250	1650	2340	2703	3019	3321	3610
18300	1653	2345	2708	3025	3327	3617
18350	1656	2349	2713	3030	3333	3623
18400	1659	2353	2717	3035	3339	3629
18450	1662	2357	2722	3040	3344	3635
18500	1665	2361	2727	3046	3350	3642
18550	1667	2365	2731	3051	3356	3648
18600	1670	2369	2736	3056	3362	3654
18650	1673	2373	2741	3061	3368	3661
18700	1676	2377	2745	3067	3373	3667
18750	1679	2381	2750	3072	3379	3673
18800	1682	2385	2755	3077	3385	3679
18850	1685	2389	2759	3082	3391	3686
18900	1687	2393	2764	3088	3396	3692
18950	1690	2397	2769	3093	3402	3698
19000	1693	2401	2774	3098	3408	3704
19050	1696	2405	2778	3103	3414	3711
19100	1699	2409	2783	3109	3419	3717
19150	1702	2414	2788	3114	3425	3723
19200	1705	2418	2792	3119	3431	3729
19250	1707	2422	2797	3124	3437	3736
19300	1710	2426	2802	3130	3442	3742
19350	1713	2430	2806	3135	3448	3748
19400	1716	2434	2811	3140	3454	3755
19450	1719	2438	2816	3145	3460	3761
19500	1722	2442	2820	3150	3466	3767
19550	1725	2446	2825	3156	3471	3773
19600	1727	2450	2830	3161	3477	3779
19650	1729	2453	2833	3164	3481	3784
19700	1732	2456	2836	3168	3485	3788

19750	1734	2459	2839	3172	3489	3792
19800	1736	2462	2843	3175	3493	3797
19850	1738	2465	2846	3179	3497	3801
19900	1740	2467	2849	3183	3501	3806
19950	1742	2470	2853	3186	3505	3810
20000	1744	2473	2856	3190	3509	3815

Date: April 9, 2019

NO. _____

Parent A / Petitioner

and

Parent B / Respondent

Child Support Worksheet

(April 1, 2018 Guidelines)

DOB:						
Age:						
Youngest Grade Estimated:				Actual Grade:		
Presumptive Termination Date:			Calculate			
Number of Minor Children:			Children 12 or Over:			

Primary Residential Parent Is (X): [ ] Parent A [ ] Parent B [ ] Equal

Gross Monthly Income:	Monthly	Annually	Hourly	Parent A	Parent B	
Parent A:						1
Parent B:						
Court Ordered Spousal Maintenance (Paid) / Received: [Mandatory]						2
Court Ordered Child Support of Other Relationships (Paid) [Mandatory]						3
Custodian of A: [ ] B: [ ] Other Child(ren) Subject of Order [Mandatory]						4
Support of Other Natural or Adopted Children Not Ordered: [Discretionary]						5a
Parent A's [ ] Other Child[ren] Deduction Of:						
Parent B's [ ] Other Child[ren] Deduction Of:						5b
Adjusted Gross Income						6
Combined Adjusted Gross Income						7
Basic Child Support Obligation For Children:						8
Additions To Child Support Obligation:						
Adjustment For [ ] Children Over Age 12 at 10 % [Discretionary]						9
Medical, Dental and Vision Insurance Paid By: [Mandatory]						10
Monthly Childcare Costs For _____ Child(ren) Paid By: [Discretionary]						11
Less: Federal Tax Credit Allowed To Custodian of 25%:						11a
Extra Education Expenses Paid By: [Discretionary]						12
Extraordinary (Gifted or Handicapped) Child Expenses Paid By: [Discretionary]						13
Total Child Support Obligation						14
Each Parent's Proportionate Percentage of Combined Income						15
Each Parent's Proportionate Share of Total Support Obligation						16
Parenting Time Costs Adjustment [Mandatory]						
Parenting Time Table A For [ ] Days At _____ [ ]						17
Total Additions To Child Support Obligation From Above Paid By Each Parent						18
Preliminary Child Support Obligation						19
Adjustment For Essentially Equal Time With Each Parent				-		*
Self Support Reserve Test: Obligor's Adjusted Gross Income: $_____ [Discretionary]						
Less Paid Arrearages Allowed: $ [ ] [Discretionary]						
Less Self Support Reserve Amount: (1,525.33) 1,525.33						20
Self Support Reserve Test Not Applied (X): [ ] Max. C.S.						
Final Child Support Obligation Payable By Obligor:						21

25-319. Maintenance; computation factors

A. In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.

2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.

3. Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse.

4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

5. Has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse.

B. The maintenance order shall be in an amount and for a period of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors, including:

1. The standard of living established during the marriage.

2. The duration of the marriage.

3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.

4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.

5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.

6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.

7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.

8. The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children.

9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.

10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available.

11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.

12. The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved.

13. All actual damages and judgments from conduct that resulted in criminal conviction of either spouse in which the other spouse or a child was the victim.

C. If both parties agree, the maintenance order and a decree of dissolution of marriage or of legal separation may state that its maintenance terms shall not be modified.

D. Except as provided in subsection C of this section or section 25-317, subsection G, the court shall maintain continuing jurisdiction over the issue of maintenance for the period of time maintenance is awarded.

25-320. Child support; factors; methods of payment; additional enforcement provisions; definitions

A. In a proceeding for dissolution of marriage, legal separation, maintenance or child support, the court may order either or both parents owing a duty of support to a child, born to or adopted by the parents, to pay an amount reasonable and necessary for support of the child, without regard to marital misconduct.

B. If child support has not been ordered by a child support order and if the court deems child support appropriate, the court shall direct, using a retroactive application of the child support guidelines to the date of filing a dissolution of marriage, legal separation, maintenance or child support proceeding, the amount that the parents shall pay for the past support of the child and the manner in which payment shall be paid, taking into account any amount of temporary or voluntary support that has been paid. Retroactive child support is enforceable in any manner provided by law.

C. If the parties lived apart before the date of the filing for dissolution of marriage, legal separation, maintenance or child support and if child support has not been ordered by a child support order, the court may order child support retroactively to the date of separation, but not more than three years before the date of the filing for dissolution of marriage, legal separation, maintenance or child support. The court must first consider all relevant circumstances, including the conduct or motivation of the parties in that filing and the diligence with which service of process was attempted on the obligor spouse or was frustrated by the obligor spouse. If the court determines that child support is appropriate, the court shall direct, using a retroactive application of the child support guidelines, the amount that the parents must pay for the past support of the child and the manner in which payments must be paid, taking into account any amount of temporary or voluntary support that has been paid.

D. The supreme court shall establish guidelines for determining the amount of child support. The amount resulting from the application of these guidelines is the amount of child support ordered unless a written finding is made, based on criteria approved by the supreme court, that application of the guidelines would be inappropriate or unjust in a particular case. The supreme court shall review the guidelines at least once every four years to ensure that their application results in the determination of appropriate child support amounts. The supreme court shall base the guidelines and criteria for deviation from them on all relevant factors, considered together and weighed in conjunction with each other, including:

1. The financial resources and needs of the child.

2. The financial resources and needs of the custodial parent.

3. The standard of living the child would have enjoyed if the child lived in an intact home with both parents to the extent it is economically feasible considering the resources of each parent and each parent's need to maintain a home and to provide support for the child when the child is with that parent.

4. The physical and emotional condition of the child, and the child's educational needs.

5. The financial resources and needs of the noncustodial parent.

6. The medical support plan for the child. The plan should include the child's medical support needs, the availability of medical insurance or services provided by the Arizona health care cost containment system and whether a cash medical support order is necessary.

7. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.

8. The duration of parenting time and related expenses.

E. Even if a child is over the age of majority when a petition is filed or at the time of the final decree, the court may order support to continue past the age of majority if all of the following are true:

1. The court has considered the factors prescribed in subsection D of this section.

2. The child has severe mental or physical disabilities as demonstrated by the fact that the child is unable to live independently and be self-supporting.

3. The child's disability began before the child reached the age of majority.

F. If a child reaches the age of majority while the child is attending high school or a certified high school equivalency program, support shall continue to be provided during the period in which the child is actually attending high school or the equivalency program but only until the child reaches nineteen years of age unless the court enters an order pursuant to subsection E of this section. Notwithstanding any other law, a parent paying support for a child over the age of majority pursuant to this section is entitled to obtain all records related to the attendance of the child in the high school or equivalency program.

G. If a personal check for support payments and handling fees is rightfully dishonored by the payor bank or other drawee, the person obligated to pay support shall make any subsequent support payments and handling fees only by cash, money order, cashier's check, traveler's check or certified check. If a person required to pay support other than by personal check demonstrates full and timely payment for twenty-four consecutive months, that person may pay support by personal check if these payments are for the full amount, are timely tendered and are not rightfully dishonored by the payor bank or other drawee.

H. Subsection G of this section does not apply to payments made by means of an assignment.

I. If after reasonable efforts to locate the obligee the clerk or support payment clearinghouse is unable to deliver payments for the period prescribed in section 25-503 due to the failure of the person to whom the support has been ordered to be paid to notify the clerk or support payment clearinghouse of a change in address, the clerk or support payment clearinghouse shall not deliver further payments and shall return the payments to the obligor consistent with the requirements of section 25-503.

J. An order for child support shall assign responsibility for providing medical insurance for the child who is the subject of the support order to one of the parents and shall assign responsibility for the payment of any medical costs of the child that are not covered by insurance according to the child support guidelines. Each parent shall provide information to the court regarding the availability of medical insurance for the child that is accessible and available at a reasonable cost. In title IV-D cases, the parent responsible pursuant to court order for providing medical insurance for the child shall notify the child support enforcement agency in the department of economic security if medical insurance has been obtained or if the child is no longer covered under an insurance plan.

K. If the court finds that neither parent has the ability to obtain medical insurance for the child that is accessible and available at a reasonable cost, the court shall:

1. In a title IV-D case, in accordance with established title IV-D criteria, establish a reasonable monthly cash medical support order to be paid by the obligor. If medical assistance is being provided to a child under title XIX of the social security act, cash medical support is assigned to the state pursuant to section 46-407. On verification that the obligor has obtained private insurance, the cash medical support order terminates by operation of law on the first day of the month after the policy's effective date or on the date the court, or the department in a title IV-D case, is notified that insurance has been obtained, whichever is later. If the private insurance terminates, the cash medical support order automatically resumes by operation of law on the first day of the month following the termination date of the policy.

2. Order one parent to provide medical insurance when it becomes accessible and available at a reasonable cost.

3. Order that medical costs in excess of the cash medical support amount shall be paid by each parent according to the percentage assigned for payment of uninsured costs.

L. In a title IV-D case, if the court orders the noncustodial parent to obtain medical insurance the court shall also set an alternative cash medical support order to be paid by that parent if the child is not covered under an insurance plan within ninety days after entry of the order or if the child is no longer covered by insurance. The court shall not order the custodial parent to pay cash medical support.

M. In title IV-D cases the superior court shall accept for filing any documents that are received through electronic transmission if the electronically reproduced document states that the copy used for the electronic transmission was certified before it was electronically transmitted.

N. The court shall presume, in the absence of contrary testimony, that a parent is capable of full-time employment at least at the applicable state or federal adult minimum wage, whichever is higher. This presumption does not apply to noncustodial parents who are under eighteen years of age and who are attending high school.

O. An order for support shall provide for an assignment pursuant to sections 25-504 and 25-323.

P. Each licensing board or agency that issues professional, recreational or occupational licenses or certificates shall record on the application the social security number of the applicant and shall enter this information in its database in order to aid the department of economic security in locating parents or their assets or to enforce child support orders. This subsection does not apply to a license that is issued pursuant to title 17 and that is not issued by an automated drawing system. If a licensing board or agency allows an applicant to use a number other than the social security number on the face of the license or certificate while the licensing board or agency keeps the social security number on file, the licensing board or agency shall advise an applicant of this fact.

Q. The factors prescribed pursuant to subsection D of this section are stated for direction to the supreme court. Except pursuant to subsection E of this section and sections 25-501 and 25-809, the superior court shall not consider the factors when making child support orders, independent of the child support guidelines.

R. For the purposes of this section:

1. "Accessible" means that insurance is available in the geographic region where the child resides.

2. "Child support guidelines" means the child support guidelines that are adopted by the state supreme court pursuant to 42 United States Code sections 651 through 669B.

3. "Date of separation" means the date the married parents ceased to cohabit.

4. "Reasonable cost" means an amount that does not exceed the higher of five per cent of the gross income of the obligated parent or an income-based numeric standard that is prescribed in the child support guidelines.

5. "Support" has the same meaning prescribed in section 25-500.

6. "Support payments" means the amount of money ordered by the court to be paid for the support of the minor child or children.

Negotiating and Drafting the Marital Settlement Agreement and Trial Considerations

Submitted by Stasy D. Click

NEGOTIATING AND DRAFTING THE MARITAL SETTLEMENT AGREEMENT AND TRIAL CONSIDERATIONS

> Purpose of the PSA is to avoid litigation, avoid the need to ask for help in interpretation and to put all parties on notice as to what the expectations are. All assets and debts should be clearly and specifically defined and awarded to the parties. If a payment is due it should be specific as to the amount due and how it is to be paid. If the payment is not being made immediately, the payment terms should be specific, and the penalties for nonpayment should also be clear.

Under A.R.S. § 25-317(B), the terms of a settlement agreement relating to property distribution are "binding" on the superior court unless the court finds that the agreement is "unfair." A party challenging the validity of a settlement agreement bears the burden of proving any defect therein, and the superior court need not conduct a hearing "before independently resolv[ing] the issue of a fair and equitable division of property." *Hutki v. Hutki*, 244 Ariz. 39, 42, ¶ 14 (App. 2018).

Alcantara v. Alcantara (App. 2019) General principles of contract law govern determinations concerning the validity, interpretation, and scope of settlement agreements. *Emmons v. Sup.Ct.*, 192 Ariz. 509, 512, ¶ 14 (App. 1998). "The purpose of contract interpretation is to determine the parties' intent and enforce that intent." *Roe v. Austin*, 246 Ariz. 21, 26, ¶ 17 (App. 2018) (internal quotation omitted). "In determining the parties' intent, courts must decide what evidence is admissible in the interpretation process, bearing in mind that the parol evidence rule allows extrinsic evidence to interpret, but not to vary or contradict the terms of the contract." *Id*. "Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court." *Taylor v. State Farm Mut. Auto. Ins. Co*., 175 Ariz. 148, 158–59 (1993). We review de novo a superior court's interpretation of a settlement agreement as well as its conclusion that the agreement is enforceable. *Burke v. Ariz. State Retirement Sys*., 206 Ariz. 269, 272, ¶ 6 (App. 2003); *Schuck & Sons Const. v. Indus. Comm'n*, 192 Ariz. 231, 233, ¶ 6 (App. 1998).

A. To Merge or Not to Merge with the Consent Decree

> This Agreement shall be filed in the Superior Court for the consent, approval and ratification by the Court. However, except with regard to the paragraphs entitled REAL PROPERTY, SPOUSAL MAINTENANCE AND ATTORNEYS' FEES AND COSTS, this Agreement shall not be merged into any Decree and shall retain its character as a separately enforceable self-sustaining contract. This Agreement may and shall be considered to exist as a separately enforceable self-sustaining Agreement between the parties. It may be enforced by

appropriate action of law, equity or otherwise, including among other remedies, specific performance, or as a part of any Decree, as either party seeking enforcement may desire to proceed.

25-317€ There are two types of incorporation - merged and non-merged. A non-merged agreement is **not** a judgment. Merger is the norm and incorporation is the exception. Young, 142 Ariz. 415 (App. 1984).

If the PSA is explicitly not merged, the Court will lose authority to enforce per contempt except as to provisions that are always merged – child support, spousal maintenance; legal decision-making and parenting time. In such an event, the only option may be to file a civil action (unless you can file with another family law issue that the Court has authority to hear). Incorporated agreement ((non-merged) "is subject to the rights and limitation of contract law". File a contract action and request a civil judgment to enforce.

B. Real Property Considerations

The parties agree that xxxx shall be granted as his/her sole and separate property the residence located at xxxxx which has the legal description of:

xxxx AS RECORDED IN THE PUBLIC RECORDS OF MARICOPA COUNTY, ARIZONA

xxx shall be solely responsible for any and all maintenance and repairs, mortgage payments, HOA payments, taxes and insurance. xxxx shall sign a quit claim deed awarding the property to xxxxx at the time of the execution of the decree. xxx shall have xxxx days to refinance the property so as to remove xxx from the mortgage obligation associated with the residence. If xxxxx cannot refinance the property so as to remove xxx from the mortgage obligation, the property shall be immediately listed for sale and the proceeds shall be awarded to xxxxx.

C. List of Debts and Assets

PROPERTY AWARDED AND/OR CONFIRMED TO HUSBAND

1. The following bank accounts:

A. xxx Bank account in his name
B. xxx #x x
C. xxx # x

2. All furniture, furnishings, artwork, appliances, collectables, jewelry and items of personal adornment in HUSBAND'S possession, as well as those items in the storage unit including but not limited to:
    1. x
3. Any and all credit cards solely in his name subject to all encumbrances.
4. x
5. The VEHICLE.
6. The xx in his name.
7. The sum of $xxx,000 from Wife as and for an equalization payment.
8. All assets acquired by HUSBAND after (date of service) unless otherwise specifically set forth herein.

All Joint Accounts shall thereafter be closed, including all bank and credit card accounts. The parties shall cooperate in completing any forms necessary to close these accounts. Both parties shall remove one another as an authorized user from any account which they are the primary user.

D. Indemnification

Each party shall indemnify and hold the other harmless from all obligations assumed as part of this Agreement.

The duty created by law or in this Agreement for each party to indemnify the other shall include, but no be limited to, payment of: the liability or obligation itself; defense of the other party against any claim concerning the liability or obligation (if the other party, in his or her sole discretion, requests the indemnifying party to provide a defense); and payment of all reasonable costs and expenses incurred by the other party, either before or after a court action has been commenced, in connection with any claim asserted against said party concerning the liability or obligation indemnified against.

E. Bankruptcy Considerations

Each party avows that he or she has no intent of filing a petition for bankruptcy to discharge any obligation assigned herein. To the extent that any obligation arising under this Agreement may be discharged, canceled, terminated, diminished or in any way affected by the filing of a bankruptcy action or by making an assignment for the benefit of creditors, the party adversely affected by

such action shall be entitled to seek relief from any court or competent jurisdiction for modification of this Consent Decree into which it may hereafter be incorporated. The party who files such bankruptcy action or who makes such an assignment for the benefit of creditors hereby consents that in any proceedings brought by the other party pursuant to this provision, the Court, hearing and considering the same, may grant economic relief of any kind or nature whatsoever to relieve the other party of the adverse impact of the bankruptcy or assignment, irrespective of the otherwise applicable standard for such relief, including, but not limited to, the granting of spousal maintenance to a party who would otherwise not qualify for such relief under the criteria set forth in A.R.S. §25-319, or such other criteria as may prevail in the particular jurisdiction where the non-filing and aggrieved party may seek relief.

F. Forgotten Assets and Debts Language

A. The parties avow that the total community estate consists of those items delineated herein and/or on the attached Schedules. Pursuant to A.R.S. §25-318(B), any property for which no provision is made this Agreement shall, from the date of the Decree of Dissolution, be deemed to be held by the parties as tenants in common with each party possessed of an undivided one-half (1/2) interest. In the event such property is discovered after the entry of the Decree of Dissolution, said property shall immediately be divided equally between the parties or their heirs or devisees. If equal division cannot be made in kind, the property shall be sold and the proceeds equally divided.

B. Notwithstanding the provisions of sub-paragraph A above, in the event property is discovered after entry of the Decree and it is determined by the court that one party (the "concealing party") has knowingly concealed, hidden or failed to disclose said property in violation of rule 49 and/or Rule 50 of the A.R.F.L.P., the entire property shall be awarded to the other party (the "non-concealing party"). Such a disproportionate award of said property is deemed to be an appropriate sanction/penalty against the concealing party for violation of Rule 49 and/or Rule 50, A.R.F.L.P. Additionally, the concealing party shall be responsible for the non-concealing party's attorney's fees and costs incurred in enforcing these provisions.

C. If any debts or obligations which would be deemed to be community debts or obligations are discovered subsequent to the execution of this Agreement and are not otherwise allocated herein, the party incurring the debt shall be solely responsible for said debt and shall hold the other party harmless therefrom.

G. Enforcement Language and SOL

The failure of either party to insist, in any one or more instances, upon strict performance of any of the covenants or provisions of this Agreement shall not be construed as a waiver or relinquishment for the future of such covenant or provision or the right to strict and timely performance of the same but said covenants or provisions shall continue and remain in full force and effect. Should

one party have to file an action to enforce the terms of this Agreement, the prevailing party shall be entitled to their attorney's fees and costs.

The parties may have agreed herein upon specific remedies for either party's failure to perform in accordance with the terms of this Agreement. Such specification of remedies, however, shall not serve as a limitation on either party to seek performance or recover damages through any other available remedy, including the right to seek Court enforcement through alternative remedy. Specific remedies set forth herein shall be construed to be an available option and not the exclusive remedy.

Close Letters:

DATE

CLIENT NAME
CLIENT ADDRESS

Dear CLIENT:

Thank you for allowing my law firm to represent you in your divorce. Now that your case is complete, please find copies of your consent decree, property settlement agreement, child support order and child support worksheet.

Keep this folder in a safe place! You do not need to keep any other documents that preceded your decree, but from time to time people need copies of their divorce decrees and parenting plans for various things (ie you may need your divorce decree for future loans, purchases of property etc.)

There are important things that you will need to do:

(1) **Name Change:** I have included a second certified copy of your Decree so that you can take it the MVD to get a new license with your new name. You will also need to change your social security card, your passport, your credit cards, titles to your vehicles, your insurance and your retirement accounts

(2) Insurance. Make sure your beneficiaries are changed on your health insurance, any life insurance policies, and any retirement account (including any 401ks and IRAs). If your employer provided health insurance for xxxx you need to immediately notify them of the divorce and provide them with a copy of the consent decree. Your failure to do so could result in you being personally responsible in any claims filed under your insurance plan.

Notify your insurance agents of the divorce including for your auto, life and health insurance. Make sure your insurance company has your address and contact information, and that xxxx is removed as a contact.

(3) **Change of Address**. Notify the IRS of your dissolution and new address via form 8822. Forms can be found at www.irs.gov.

(4) **Taxable Income**. Make an appointment with your financial advisor and/or your tax preparer to discuss your new tax bracket. Your financial advisor is in the best position to advise you as to how best invest your post-dissolution funds. Additionally, talk to your tax preparer as to what payments are eligible for tax deductions or must be declared income.

(5) **Property Award**. Make sure all investments awarded to you in the decree are transferred to your name, including IRAs, mutual funds and bank accounts

Also make sure that the titles to the cars are transferred, and that your insurance agent is aware which cars are covered under your insurance policy.

(6) **Division of Retirement Accounts**: Remove xxxx as the beneficiary of any life insurance policy and all of your retirement accounts.

(7) **Debts**. Make sure xxxx is removed from all of your credit cards, and credit lines, as well as any bank accounts. Make sure you annually run your credit report to verify that this was done (you are entitled to one free credit report per year at www.annualcreditreport.com).

If xxxx fails to pay his portion of the debts as agreed, and/or you need to enforce any of the terms of the proposed Property Settlement Agreement regarding the payment of the debts, please be advised that if you wait longer than 2 years after the debt should have been paid to file a petition to enforce that agreement, the court can deem the issue to be waived and deny you the ability to enforce the agreement. Therefore, if you are having problems with xxxx following the terms of the agreement, we need to file a Petition to Enforce before the 2-year period has run.

(8) **Will**. Review your will if you have one. As a single person, you will want to have one drafted or modified. If you have a living will or durable power of attorney, you should also change your designations from xxxx to someone who you feel is in the best position to make these decisions for you.

(9) **Equalization Payment:** When you pay xxxx the $xxxxx make sure you make a copy of the check so there is no disagreement that the payment was made. You have until xxxxx to make the payment.

If you have any questions, please do not hesitate to contact my office

Sincerely,

ME

PROPERTY SETTLEMENT AGREEMENT
FOR
xxxxx AND xxxx
CAUSE NO. xxxx

THIS AGREEMENT is made and entered into in Maricopa County, Arizona, this _____ day of xxx 2019, by and **xxx**, hereinafter "WIFE" and **xxxx**, hereinafter "HUSBAND", and collectively "parties".

RECITALS

A. The parties entered into a non-covenant marriage on xxxx, and have ever since been and are now husband and wife.

B. There are no minor children common to the parties. Wife is not pregnant.

C. An action for Dissolution of Marriage has been instituted in the Superior Court of Arizona, Maricopa County, cause number xxxx; xxx is Petitioner and xxx is Respondent.

D. Pursuant to A.R.S. §25-211, the parties' community ceased to accumulate assets and liabilities effective xxxx.

E. There is no possibility of reconciliation between the parties.

F. Each party deems it to be in their best interest for each of them to mutually declare their rights respecting all property acquired and debts incurred by either or both of them during the marriage, and prior thereto, and to settle such rights forever.

G. Except as set forth in prior recitals or specifically within the covenants to this Agreement, HUSBAND and WIFE intend for this Agreement to address and resolve all matters dependent upon or arising out of their marital relationship.

NOW, THEREFORE, in consideration of the covenants between the parties hereinafter set forth, the sufficiency of which is hereby acknowledged, the parties hereby agree and declare as follows:

1. ADVICE OF COUNSEL

Each party has had the opportunity to seek the advice of separate counsel and warrants that he or she fully understands the nature and effect of all recitals and covenants prior to execution of this Agreement.

xxxx has sought the advice of xxxx, Esq., xxxxx xxxx, xxxxx. xxx has sought the advice of xxxx. Each party has given full and mature thought to the making of this Agreement.

2. TAX CONSEQUENCES

The parties recognize that there could be tax consequences as a result of any of the transactions contained herein. The parties acknowledge that xxxxx, Esq., on behalf of xxxx and has not provided any advice with regard to any tax consequences and that each party has had the opportunity to seek such advice from an accountant or tax expert or his or her choosing prior to entering into this Agreement.

3. PARAGRAPH HEADINGS

The paragraph headings used herein are for convenience and reference only and are not intended to define, limit or describe the scope or intent of any provisions of this Agreement.

4. CONSTRUED BY THE LAWS OF THE STATE OF ARIZONA

This Agreement shall be construed in accordance with the laws of the State of Arizona. It is expressly agreed that if this Agreement shall be made a part of any Decree, the provisions of law with regard to the retention of the Court's jurisdiction shall be as provided by the laws of the State of Arizona. This Agreement and its exhibits were drafted by counsel for xxxxx and subsequently were revised as a matter of convenience only and no provision of this Agreement shall be construed for or against any party as a result of a party's representative being the drafter or for any other reason.

5. APPROVAL BY COURT

This Agreement may be filed by the parties and incorporated in the pending domestic relations action in the Superior Court of Maricopa County for approval thereof. Each party expressly represents that this Agreement is fair and equitable to both parties and requests the Court to approve it.

In the event no final Decree is entered in this matter, for any reason, this Agreement shall remain valid and binding unless or until it is expressly rescinded or otherwise revised by both parties, or their representatives, in writing, or is disapproved by the Court.

6. NON-MERGER

This Agreement shall be filed in the Superior Court for the consent, approval and ratification by the Court. However, except with regard to the paragraphs entitled REAL PROPERTY, SPOUSAL MAINTENANCE AND ATTORNEYS' FEES AND COSTS, this Agreement shall not be merged into any Decree and shall retain its character as a separately enforceable self-sustaining contract. This Agreement may and shall be considered to exist as a separately enforceable self-sustaining Agreement between the parties. It may be enforced by appropriate action of law, equity or otherwise, including

among other remedies, specific performance, or as a part of any Decree, as either party seeking enforcement may desire to proceed.

7. SOLE AND ENTIRE AGREEMENT

There is no other contract, oral or written, between the parties' relative to the matters delineated herein. No promises, warranties or representations of any nature have been made, other than as specified in this Agreement, to induce either party to enter into this Agreement. The parties hereto acknowledge that neither of them has been unduly influenced in any way by the other in the making or executing of this Agreement.

8. MODIFICATIONS IN WRITING

Any changes in the terms and/or conditions of this Agreement shall be in writing, executed by both parties (or designated counsel) and shall become a part of this original Agreement. Said changes may be submitted to the Court for approval as an order.

9. BINDING UPON HEIRS

Except as otherwise expressly provided in this Agreement, each and every covenant and agreement herein contained shall inure to the benefit of, and shall be binding upon, the personal representatives, heirs, assigns, legatees, devisees, administrators and executors of the parties hereto, and no provision of this Agreement shall ever be deemed or construed to be made for the benefit of any person other than the two parties who have executed this Agreement, and their respective personal representatives, heirs, assigns, legatees, devisees, administrators and executors.

10. MUTUAL RELEASES

Subject to the provisions of this Agreement, each party hereby releases, grants, transfers, conveys and quit-claims any and all interest, claim or other right which he or she may now or hereafter have all earnings, income and/or property, real personal or mixed, and wheresoever situated, herein assigned to or hereafter acquired by or on behalf of the other party and such shall be deemed to be the sole and separate property of the other party.

11. WAIVER OF RIGHTS IN ESTATE OF OTHER PARTY

Absent a valid will or trust with provisions to the contrary executed subsequent to this Agreement, each party hereby: (a) waives and releases any right or interest, whether by law or dower or curtesy, or otherwise, in law, to or in all real or personal property which the other party may now own or hereafter acquire; (b) agrees that the estate of the other party, real and personal, shall go and belong at the death of that party to the person(s), other than HUSBAND or WIFE, who would have become entitled thereto; (c) waives all right to letters of administration upon the estate of the party; and (d) waives his or her right of election and every other right granted by the laws of any jurisdiction to take against any will of the other party, if such will shall have been executed before the date of this Agreement.

12. EXECUTION OF DOCUMENTS

HUSBAND and WIFE shall execute any and all documents or instruments necessary to transfer real or personal property in accordance with this Agreement or to effectuate the intent and purpose of this Agreement and the Decree of Dissolution, including, but not limited to, all instruments, deeds, conveyances, powers of attorney, authorizations, indemnities, trust termination documents, notices, directions or approvals to terminate credit, and other similar documents reasonably required to give effect to this Agreement and the Decree. Notwithstanding the foregoing, neither party shall be required to assume liability for any obligation or payment of money or to incur any liability other than as expressly required by this Agreement.

13. AGREEMENT AS DEED, TRANSFER AND VALID INSTRUMENT

This Agreement is intended to be and shall be deemed a sufficient deed, conveyance, assignment, transfer and bill of sale of all right, title, interest, claim and demand of every nature covered by this Agreement. This document may be filed and/or recorded as a valid instrument. These provisions, however, are not in lieu of each party executing all documents necessary to accomplish the terms of this Agreement as set forth in the paragraph entitled EXECUTION OF DOCUMENTS or elsewhere herein.

14. THIRD PARY BENEFICARIES

This Agreement shall not be interpreted as creating in any third party or class of persons not parties hereto or expressly designated herein any right or benefit of any kind or nature whatsoever.

15. GENDER, NUMBER AND LIMITATIONS

This Agreement shall apply to HUSBAND and WIFE according to the context hereof, and without regard to the number or gender of the words or expressions made herein. The words “include” and “including” shall mean without limitation regardless of the subsequent enumeration.

16. SETTLEMENT DOCUMENT

This Agreement constitutes a settlement document, shall not constitute an admission of any fact by either HUSBAND or WIFE, and shall not be admissible in any proceeding except a proceeding commenced to enforce either rights arising under this Agreement or resulting from an alleged breach of this Agreement.

17. TIME IS ESSENCE

Time is of the essence of this Agreement and each term and provision hereof.

18. SEVERABILTY

The provisions of this Agreement should be enforced to the fullest extent possible under the law and public policies applied in each jurisdiction in which enforcement is sought. If any particular provision of this Agreement, or portion thereof, is held to be wholly invalid or unenforceable, this Agreement shall be deemed amended to delete therefrom that portion thus adjudicated invalid and the deletion shall apply only with respect to the operation of said provision. To the extent a provision of this Agreement, or portion thereof, is deemed unenforceable by virtue of its scope, but may be made enforceable by limitation thereon, each party agrees the same shall be enforceable to the fullest extent permissible under the laws and public policies applied in the jurisdiction in which enforcement is sought.

Notwithstanding the foregoing, if deletion of a portion of this Agreement results in the distribution of property between the parties set forth herein becoming inequitable, this Agreement shall be reformed by a Court of appropriate jurisdiction, if HUSBAND and WIFE are not able to otherwise agree, to provide for an equitable distribution of property and obligations or offsetting money judgment based upon the property and obligations being divided upon the effective date of this Agreement.

19. INCORPORATION

The foregoing Recitals shall be considered a part of this Agreement and these covenants as if fully set forth herein. HUSBAND and WIFE hereby ratify and acknowledge each of the Recitals.

20. ENFORCEMENT ELECTION

The failure of either party to insist, in any one or more instances, upon strict performance of any of the covenants or provisions of this Agreement shall not be construed as a waiver or relinquishment for the future of such covenant or provision or the right to strict and timely performance of the same but said covenants or provisions shall continue and remain in full force and effect. Should one party have to file an action to enforce the terms of this Agreement, the prevailing party shall be entitled to their attorney's fees and costs.

The parties may have agreed herein upon specific remedies for either party's failure to perform in accordance with the terms of this Agreement. Such specification of remedies, however, shall not serve as a limitation on either party to seek performance or recover damages through any other available remedy, including the right to seek Court enforcement through alternative remedy. Specific remedies set forth herein shall be construed to be an available option and not the exclusive remedy.

21. FULL DISCLOSURE

HUSBAND and WIFE each hereby warrants that he or she has made a full disclosure to the other of all property owned by him or her separately, as community property, jointly, or in any other nature, has made a full disclosure of all property in which he or she has a beneficial interest, and has made full disclosure of all income presently being earned and all available employment benefits.

Each party does, by execution of this Agreement, represent, warrant, and guarantee that there is no other property owned in any manner by him or her other than the property mentioned in this Agreement, nor is there any property in anyone else's name in which he or she has a beneficial interest.

Each party further represents and warrants to the other that he or she has: (a) made full disclosure to the other party of all debts, obligations, judgments and liens which he or she has incurred separately, as community debts or obligations, jointly or in any other nature; (b) made full disclosure of all property on which such debts, obligations, liens or encumbrances exist as an encumbrance and; (c) guaranteed that the property assigned and transferred herein is no subject to any debts, obligations, liens or encumbrances except as otherwise specifically set forth in this Agreement.

HUSBAND and WIFE have relied upon this full disclosure and have entered into this Agreement in full reliance thereon. The parties acknowledge that this Agreement satisfies all of the requirements of Rule 49 and/or Rule 50, Arizona Rules of Family Law Procedure ("A.R.F.L.P.").

22. AFTER-DISCOVERED ASSETS AND DEBTS

A. The parties avow that the total community estate consists of those items delineated herein and/or on the attached Schedules. Pursuant to A.R.S. §25-318(B), any property for which no provision is made this Agreement shall, from the date of the Decree of Dissolution, be deemed to be held by the parties as tenants in common with each party possessed of an undivided one-half (1/2) interest. In the event such property is discovered after the entry of the Decree of Dissolution, said property shall immediately be divided equally between the parties or their heirs or devisees. If equal division cannot be made in kind, the property shall be sold and the proceeds equally divided.

B. Notwithstanding the provisions of sub-paragraph A above, in the event property is discovered after entry of the Decree and it is determined by the court that one party (the "concealing party") has knowingly concealed, hidden or failed to disclose said property in violation of rule 49 and/or Rule 50 of the A.R.F.L.P., the entire property shall be awarded to the other party (the "non-concealing party"). Such a disproportionate award of said property is deemed to be an appropriate sanction/penalty against the concealing party for violation of Rule 49 and/or Rule 50, A.R.F.L.P. Additionally, the concealing party shall be responsible for the non-concealing party's attorney's fees and costs incurred in enforcing these provisions.

C. If any debts or obligations which would be deemed to be community debts or obligations are discovered subsequent to the execution of this Agreement and are not otherwise allocated herein, the party incurring the debt shall be solely responsible for said debt and shall hold the other party harmless therefrom.

23. DIVISION/CONFIRMATION OF PROPERTY

This Agreement disposes of all community, joint and common property acquired subsequent to the date of the parties' marriage pursuant to A.R. S. §25-318, as well as confirms to each party all sole and separate property pursuant to A.R.S. §25-213. The parties acknowledge that the terms set forth in this section and the Agreement as a whole constitute an equitable division of the marital estate as well as confirmation of sole and separate property.

Each party hereby assigns, grants, conveys and transfers to the other, as their respective sole and separate property, all such property designated herein and on attached Schedules A and B.

24. REAL PROPERTY

The parties agree that xxxx shall be granted as her sole and separate property the residence located at xxxxx which has the legal description of:

> xxxx AS RECORDED IN THE PUBLIC RECORDS OF MARICOPA COUNTY, ARIZONA

xxx shall be solely responsible for any and all maintenance and repairs, mortgage payments, HOA payments, taxes and insurance. xxxx shall sign a quit claim deed awarding the property to xxx at the time of the execution of the decree. xxx shall have 90 days to refinance the property so as to remove xxx from the mortgage obligation associated with the residence. If xxxx cannot refinance the property so as to remove xxx from the mortgage obligation, the property shall be immediately listed for sale and the proceeds shall be awarded to xxxx.

25. PAYMENT OF OBLIGATIONS

HUSBAND shall assume and pay those obligations set forth herein and/or on Schedule C attached hereto and shall indemnify and hold WIFE harmless for the same. WIFE shall assume and pay those obligations set forth herein and/or on Schedule D attached hereto and shall indemnify and hold HUSBAND harmless for the same. Each party shall assume and pay any other obligations incurred by that party which are not referred to in this Agreement or set forth on Schedules C and D.

26. INDEMNIFICATION

Each party shall indemnify and hold the other harmless from all obligations assumed as part of this Agreement.

The duty created by law or in this Agreement for each party to indemnify the other shall include, but no be limited to, payment of: the liability or obligation itself; defense of the other party against any claim concerning the liability or obligation (if the other party, in his or her sole discretion, requests the indemnifying party to provide a defense); and payment of all reasonable costs and expenses incurred by the other party, either before or after a court action has been commenced, in connection with any claim asserted against said party concerning the liability or obligation indemnified against.

27. INCOME TAXES

HUSBAND and WIFE shall file separate federal and state income tax returns beginning with tax year 2019. Regarding said 2019 returns they shall be filed in accordance with the following:

A. HUSBAND and WIFE shall report, on their separate returns, all income, earnings and funds received by them from January 1, 2019 through December 31, 2019.

B. Each party shall be entitled to declare, on their separate returns, all income tax withheld from their compensation or earnings as a direct result of their employment and any and all estimated tax payments made by that party to federal and state taxing authorities.

C. Each party shall be entitled to report, on their separate returns, all deductions for payments actually made by that party and any and all deductions allowable in connection with separately owned property or property awarded to that party under this Agreement.

D. HUSBAND shall pay, and indemnify WIFE therefrom, all taxes, interest, assessments and penalties related to his separate 2019 returns.

E. WIFE shall pay, and indemnify HUSBAND therefrom, all taxes, interest, assessments and penalties related to her separate 2019 returns.

28. RETIREMENT ACCOUNTS

The parties have the following retirement accounts which shall be divided via QDRO taking into account the community interest from (inset date of marriage) until (insert date of service):

a. Husband's x
b. Husband's x
c. Wife's x
d. Wife's x

29. BANKRUPTCY

Each party avows that he or she has no intent of filing a petition for bankruptcy to discharge any obligation assigned herein. To the extent that any obligation arising under this Agreement may be discharged, canceled, terminated, diminished or in any way affected by the filing of a bankruptcy action or by making an assignment for the benefit of creditors, the party adversely affected by such action shall be entitled to seek relief from any court or competent jurisdiction for modification of this Consent Decree into which it may hereafter be incorporated. The party who files such bankruptcy action or who makes such an assignment for the benefit of creditors hereby consents that in any proceedings brought by the other party pursuant to this provision, the Court, hearing and considering the same, may grant economic relief of any kind or nature whatsoever to relieve the other party of the adverse impact of the bankruptcy or assignment, irrespective of the otherwise applicable standard for such relief, including, but not limited to, the granting of spousal maintenance to a party who would otherwise not qualify for such relief under the criteria set forth in A.R.S. §25-319, or such other criteria as may prevail in the particular jurisdiction where the non-filing and aggrieved party may seek relief.

30. ATTORNEYS' FEES AND COSTS

Each party hereto shall bear his or her own attorney's fees and costs incurred in this matter.

31. EFFECTIVE DATE OF AGREEMENT

The effective date of this Agreement shall be the date first set forth on page 1 herein, irrespective of the dates on which this Agreement is executed by the parties.

IN WITNESS WHEREOF, the parties have signed, sealed and acknowledged this Agreement and all attached Schedules the day and year above written.

_____ _____

xxxx **xxx**

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this _____ day of xxx, 2019, before me, a notary public, personally appeared xxxx, known to me or satisfactorily proven to be the person whose name is subscribed to this instrument and acknowledged that the same was executed for the purposes contained therein.

_____
Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this _____ day of xxx, 2019, before me, a notary public, personally appeared xxxx, known to me or satisfactorily proven to be the person whose name is subscribed to

this instrument and acknowledged that the same was executed for the purposes contained therein.

_____
Notary Public

My Commission Expires:

SCHEDULE A

PROPERTY AWARDED AND/OR CONFIRMED TO HUSBAND

1. The following bank accounts:
   A. xxx Bank account in his name
   B. xxx #x x
   C. xxx # x
2. All furniture, furnishings, artwork, appliances, collectables, jewelry and items of personal adornment in HUSBAND'S possession, as well as those items in the storage unit including but not limited to:
   1. **x**
3. Any and all credit cards solely in his name subject to all encumbrances.
4. x
5. The VEHICLE.
6. The xx in his name.
7. The sum of $xxx,000 from Wife as and for an equalization payment.
8. All assets acquired by HUSBAND after xxx unless otherwise specifically set forth herein.

All Joint Accounts shall thereafter be closed, including all bank and credit card accounts. The parties shall cooperate in completing any forms necessary to close these accounts. Both parties shall remove one another as an authorized user from any account which they are the primary user.

SCHEDULE B

PROPERTY AWARDED AND/OR CONFIRMED TO WIFE

1. Any and all bank accounts solely in her name, including:
    a. xxxx #xxxx x
    b. xxx #x x
    c. xxx #x x
    d. xx #x x
2. Any and all credit cards solely in her name subject to all encumbrances.
3. All furniture, furnishings, artwork, appliances, collectables, jewelry and items of personal adornment in WIFE's possession.
4. The VEHICLE subject to all encumbrances.
5. The following retirement accounts, subject to Paragraph 28
    a. Wife's Defined Benefit Planxx
    b. Wife's 401K with xx
    c. Wife's IRA with xxx
6. The business known as xxx, and all assets and debts associated therewith.
7. The business known as xxx, and all assets and debts associated therewith.
8. All assets acquired by WIFE after xxxx unless otherwise specifically set forth herein.

SCHEDULE C

DEBTS ASSIGNED AND/OR CONFIRMED TO HUSBAND

1. All debts incurred by HUSBAND and not specifically allocated to WIFE herein.
2. Any debts incurred by HUSBAND since XXXX unless otherwise specifically set forth herein.
3. All debts secured by any property assigned to HUSBAND herein.
4. The following credit card obligations:
    A. xxx in his name #

SCHEDULE D

DEBTS ASSIGNED AND/OR CONFIRMED TO WIFE

1. All debts incurred by WIFE and not specifically allocated to HUSBAND herein.
2. The x
3. All debts associated with the businesses known as xxxx, any and all lease agreements related to the business, any and all purchase contracts and or employee contracts associated with the business, and any and all credit cards, liens or taxes associated with the business including any sales tax, federal or state tax obligations associated with the business.
4. All debts associated with the businesses known xxxx, any and all lease agreements related to the business, any and all purchase contracts and or employee contracts associated with the business, and any and all credit cards, liens or taxes associated with the business including any sales tax, federal or state tax obligations associated with the business.
5. Any debts incurred by WIFE since xxx unless otherwise specifically set forth herein.
6. All debts secured by any property assigned to WIFE herein.

Legal Ethics

Submitted by Leonce A. Richard III

LEGAL ETHICS IN DIVORCE

By Lee Richard

I. CONFLICTS OF INTEREST

A. Conflict Checks

1. Imperative that conflict checks be performed in every divorce case. Most malpractice insurers actually require that attorneys have a dedicated system in place for checking conflicts and that it be routinely used as part of the attorney's practice.

2. A proper conflict check will include not only the two parties' full names, but the name of their employers and the full and proper name of any businesses in which they own an interest.

3. The ethical rules require attorneys to adopt "reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved." See E.R. 1.7 [Comment 3 to 2003 Amendment]

4. In the event that representation of a client is accepted despite their being a conflict of interest, "[i]gnorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule." Id.

5. Note that there is a distinction between being held accountable by the State Bar for an ethical violation due to a conflict of interest and the divorce court's disqualification of an attorney from a particular case due to the existence of such a conflict of interest. Following a proper established procedure for performing conflict checks will shield an attorney from discipline for an ethical violation. However, it will not be sufficient to avoid disqualification in the particular court case based on the actual existence of such a conflict. See E.R. 1.10 [Comment 9 to 2016 Amendment] This generally does not sit well with the attorneys' client, who may have already been billed significant monies for the representation.

B. Types of Conflicts to Avoid.

1. Taking on the representation of a client who is directly adverse to an existing client. This applies even if the conflicting matters are unrelated to one another (e.g., agreeing to handle the divorce of the wife of an existing client for whom you are handling a civil case). E.R. 1.7

2. Taking on representation of a client where the attorneys' ability to fully represent the client may be constrained by consideration of other client's interests (e.g., agreeing to represent grandparents and a parent in a custody/grand parents' rights case). E.R. 1.7

3. Taking on representation of a client where representation of that client would be adverse to a former client in the same or substantially related matter. E.R. 1.9. This prohibition comes into play with regard to consultations with potential clients who may not retain the attorney. If the attorney meets with such a potential client and receives confidential information about that client and the pending family law matter, then the attorney may not subsequently represent his or her spouse in connection with the same family law matter. See E.R. 1.18 ("Duties to Prospective Client")

4. Taking on representation of a client where the opposing party or attorney is a relative of the attorney.

C. Firm Disqualification

1. E.R. 1.10 prohibits any member of a law firm from representing a client when any one of them practicing alone would be prohibited from doing so.

2. Consequently, if an attorney's partner is already representing the husband, then the attorney is prohibited from representing the wife.

3. Where a new attorney joins the law firm who would be prohibited from representing an existing client of the law firm, the law firm is disqualified from the representation unless:

- The new lawyer did not have primary responsibility for the adverse matter; and,
- The new lawyer is "timely screened" from any participation in the matter and is apportioned no part of the fees generated by the matter (although the new lawyer can receive partnership distributions in the ordinary course); and,
- Written notice is promptly given to the any affected former client of the new lawyer (e.g., the adverse party).

II. RETAINERS AND ATTORNEYS' FEES

A. Fee Agreement Must Be in Writing

E.R. 1.5(b) provides that the attorney must communicate to the client "the basis or rate of the fee and expenses for which the client will be responsible" in writing "before or within a reasonable time after commencing the representation."

B. Permitted Fee/Retainer Agreements

1. E.R. 1.5 permits attorneys to require an advance payment of a fee (retainer) as long as the attorney is obligated to return any "unearned" portion of the retainer.

2. A lawyer may accept property in lieu of money in consideration for his or her services. Specifically, the Ethical Rules permit the attorney to accept an ownership interest in a business in lieu of money – as long as the business is not the focus of the litigation for which the attorney is retained to handle.

3. An attorney may accept payment of his or her fees from a source other than the client as long as:

- The client consents to the payment; and,
- The arrangement does not compromise the attorneys' ability to fully represent the client.

C. Prohibited Fee Arrangements

1. Contingent Fees Agreements In Family Court.

E.R. 1.5(d) prohibits attorneys from entering into contingent fees agreements for any family law matter where the fee is:

- Contingent on obtaining a divorce;
- Based on a percentage of the spousal maintenance or child support to be awarded by the court; or,
- Based on a percentage of the property to be awarded to the client by the court.

Note that this Rule does not prohibit contingent fees for post-decree enforcement actions where the amount of the fee is contingent on how much of the already awarded, but unpaid, spousal maintenance, child support, or property is collected through the attorney's actions. See E.R. 1.5 [Comment 6 to 2003 Amendment]

2. "Earned Upon Receipt" and "Nonrefundable" Retainers.

E.R. 1.5(d) also prohibits attorneys from entering into "earned upon receipt" or "nonrefundable" fee agreements unless the client is advised in writing that:

- He or she may still fire the attorney at any time; and,
- He or she may still receive a refund of the "nonrefundable" fees paid depending on the value of the representation provided.

Note that a nonrefundable "flat fee" agreement may be permitted where it is show that the client and the attorney openly bargained for the arrangement and the arrangement reflects a balancing of the risks to both the client and the attorney in the matter. See ***In Re Connelly****, 203 Ariz. 413, 55 P.3d 756 (2002).*

3. "Limited" Fee Agreements

The Ethical Rules prohibit attorneys from entering into fee arrangements that provide for the automatic termination of the attorney's services upon reaching a preset amount of fees where it is clear from the outset that more extensive fees will be needed to properly represent the client. However, the Rules do permit the attorney to define in advance the limits of the services that the attorney will provide in light of the particular client's ability to pay. E.R. 1.5 [Comment 5 to 2003 Amendment] Accordingly, it would be impermissible to enter in to an agreement with a client providing that the attorney will automatically stop working and withdraw from the case as soon as he or she has used up the client's $10,000 retainer where the attorney knows in advance that the representation will likely cost more than $10,000. However, it is permissible for the same attorney to limit the nature of the services to be provided in advance based on the client's known ability to pay for those services. (See *Rule 9(b), ARFLP*, "Limited Scope Representation").

D. Division of Fees

The ethical rules define a "division of fees" as a single billing to a client covering the fee of two or more attorneys who are not in the same law firm. E.R. 1.5 [Comment 8 to 2003 Amendment] Attorneys are permitted to divide fees in such a manner as long as the division:

1. Is in proportion to the services performed by each attorney billing the client or each attorney assumes joint responsibility for the representation; and,

2. Is approved by the client in writing; and,

3. Results in a reasonable fee.

E. Credit Card Payments

Rule 43(a) of the Arizona Supreme Court permits client's to pay legal fees, including the initial retainer, with a credit card. However, the Rule sets forth stringent requirements for how these payments are to be managed and accounted. Some of these strict requirements are as follows:

1. The credit card payments must be deposited into the client's trust account and never into the attorneys' personal or business account.

2. No funds other than the client's or the credit card company's funds may be deposited into the client's trust account except:

- The attorney may deposit an amount of funds reasonably estimated to be necessary to cover the credit company's service fees and other charges;
- The attorney may also deposit an amount of funds reasonably estimated to be necessary to cover merchant fees and such things as credit card charge backs or debits;
- Earned fees (credit card payments for services already rendered) IF they are part of the same credit card transaction that includes payment of retainer (unearned) fees AND the attorneys' chosen credit card company does not permit these payments to be made separately into different trust accounts.

3. Overdraft protection for the client's trust account is not permitted.

4. The attorney is required to maintain sufficient monies of his or her own in the client's trust accounts to assure that none of the client's money is ever used to pay bank charges or charge backs that are not the client's responsibility to pay. Failure to follow this rule may result in an improper conversion of the client's funds to pay the attorney's expenses – a major ethical breach. Rule 43 [Comment 6 to 2009 Amendment] One way to avoid this problem is to use a credit card company that allows bank charges or charge backs to be taken from the attorney's business or operating account rather than the client's trust account. This would avoid the need for keeping attorney funds in the client's

trust account as a "cushion" against these eventualities. Rule 43 [Comment 7 to 2009 Amendment]

III. SCOPE OF REPRESENTATION

A. Duties of Counsel

1. E.R. 1.2(a) provides that the attorney shall:

- Abide by the client's decisions concerning the "objectives" of the representation (i.e., the client sets the goals); and,
- Consult with the client as to the means by which they are to be pursued (i.e., the attorney and client both have input as to how those goals are to be met).

2. E.R. 1.5(b) provides that the "scope of the representation" shall be "communicated to the client in writing, before or within a reasonable time after commencing the representation."

3. As noted above, pursuant to E.R. 1.2, Rule 9(e), ARFLP, allows attorneys to engage in limited scope representation in the family court for clients. Under this provision, the attorney's duties are clearly defined for the court, the attorney, and the client. Under Rule 9(e), the attorney undertaking a limited scope representation my file a Notice of Limited Scope Representation alerting the family court as to the scope of his or her representation. The scope of the representation may limit the attorney's involvement to specific matter, hearing, or issues. "Upon the attorney's completion of the representation specified in the Notice of Limited Scope Representation, the attorney may withdraw from the action as provided in Rule 9(d)(2)(A)." Rule 9(e)(4).

IV. JOINT REPRESENTATION

There is nothing ethically wrong with jointly representing a client with another attorney. In fact, the ethical rules clearly provide for such arrangements. However, special care needs to be taken to assure that problems unique to such co-representation do not occur, such as:

1. "I thought you were handling that" – inadvertently allowing matters to go unattended based on the belief that co-counsel was handling the matter.

2. Conflicting communications with the client.

3. Conflicting goals and methods for achieving those goals.

4. Addressing misconduct by co-counsel.

5. Division of fees (see above).

Generally, most of these potential problems can be avoided by setting in place a method for constant communication between co-counsel and the client.

V. SETTING CLEAR EXPECTATIONS

Clients' unrealistic expectations are likely the most common and thorniest problem for attorneys practicing in the realm of family law. Clients are often motivated by irrational emotions such as fear, anger, and a desire to punish the other party that overwhelm their ability to objectively and thoughtfully address matters in a constructive way. Moreover, many fully rational people (including many attorneys) find the practical effects of Arizona's community property law and approach to child custody to be confusing and counter-intuitive. They simply have a hard time accepting that the law can be so "unfair" and "unfeeling". This is particularly true with regard to such issues as legal decision-making, parenting time, child support, spousal maintenance, and the preservation of sole and separate property.

In their initial meeting with a prospective client, many attorneys (especially young attorneys) may try to mollify unrealistic demands that are clearly unattainable in the hope that the client will retain them. The thought is that they can "educate" the client and rein him or her in later once they have been retained. This rarely works. It is far better for both the client and the attorney to set the record straight from the initial meeting. Bluntly telling the client upfront that what they want is not attainable in court will generally lead to a beneficial result one way or the other:

1. The client will simply not retain you as you "don't see eye-to-eye" or you're not a "fighter" for their cause – in which case you've dodged a bullet and allowed such a client to become someone else's problem.

2. The client will retain you, will still be disgruntled, but will also be more open to attempting to settle the issues since you have already made it clear that the judge is not going to give them what they want.

3. You will have earned the client's trust as you will have proven that you will tell them unpleasant news when they need to hear it and will not simply attempt to "snow" them (which is a major concern of many clients).

Setting clients' expectations early on is the best way to avoid an unhappy, recriminatory client later on.

VI. EMAILS AND CONFIDENTIALITY

E.R. 1.6(a) provides that an attorney "shall not reveal information relating to the representation of a client unless the client gives informed consent." This obligation continues even after the client-attorney relationship has terminated. See E.R. 1.9(c)(2).

Attorneys also have an ethical obligation to put in place standard safeguards in their practice to protect clients' confidential information. E.R. 1.6 [Comment 22 to 2003 Amendment] Pursuant to this obligation, attorneys must take care not to disclose confidential client information in their communications, such as e-mails. "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." *Id*. However, the Rule does not require the attorney to create heightened security measures as long as the attorneys' chosen method of protecting client confidentialities "affords a reasonable expectation of privacy."

VII. TERMINATION OF REPRESENTATION

A. Grounds for Termination

E.R. 1.16 sets out the grounds on which an attorney may withdraw from representing a client. These include the following:

1. The withdrawal will not materially adversely affect the client's interests (which would not be the case if the attorney is attempting to withdraw right before a scheduled hearing or trial);

2. The client is associating the attorney's services with some criminal or fraudulent activity;

3. The attorney fundamentally disagrees with the client's demands or finds them to be repugnant;

4. The client has breached the terms of the attorney's service agreement AND has already received a warning that the attorney will withdraw unless the client corrects the problem, but has failed to correct the problem;

5. Continued representation would create an unreasonable financial burden on the attorney; or,

6. The client has made the representation unreasonably difficult.

B. Duties To The Client Upon Terminating Representation.

Upon withdrawing from representation, the attorney is obligated to:

1. Take reasonable steps to protect the client's interests;
2. Returning the client's property and documents;
3. Promptly refunding the unused portion of the client's retainer; and,
4. Upon the client's request, turning over the client's file.

Note that an attorney is prohibited from charging the client for copying his or her file unless the client has already been provided with a copy of the documents contained in the file. Note that the fact that the client has received a copy of file documents does NOT excuse the attorney from turning over the complete file upon terminating representation – it only means that the attorney can charge the client for copying the file where appropriate.

C. Duties To The Court Upon Terminating Representation.

Rule 9(d)(2)(A), ARFLP provides that an attorney of record can withdraw from representing a party by simply filing a Notice of Withdrawal once a final judgment or decree has been entered in the case AND:

1. The time for appeal has expired; and,
2. There are no further matters pending before the court.

Note that, pursuant to Rule 9(d)(1)(B), ARFLP, an attorney who has appeared in a case on behalf of a client automatically remains the attorney of record "before and after judgment" until:

1. The time to appeal a final judgment has expired;
2. A judgment has become final AFTER an appeal has been prosecuted; or
3. The attorney has formally withdrawn from the case.

Rule 9(d)(2)(B), ARFLP, provides that, in order to withdraw from an active case, the attorney must either file a motion containing the client's written approval (which is filed ex parte with the court) or file a motion without the client's written approval (which must be served on the client and all other parties).

Note that Rule 9(d)(2)(C) precludes an attorney from withdrawing from a case where a trial date has been set unless (i) the client submits a signed statement that he or she

is aware of the trial date and will be prepared to proceed with trial or (ii) the attorney can show good cause for withdrawing prior to trial.

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