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Family Law News

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this issue...

Judicial Interviews of Children

Proceed with Caution

by Helen R. Davis, Esq.

A.R.S. § 25-405, which Authorizes Judicial Interviews of Children, May Be Unconstitutional as Applied

Not infrequently in family law matters, when one parent believes that his/her child will make comments favorable to that parent's position regarding custody and/or parenting, the parent will ask the judge to interview the child. The argument typically made is that the child's preferences are a factor to be considered under A.R.S. § 25-403, that A.R.S. § 25-405 authorizes such an interview, that interviewing the child *in camera* will alleviate the harm to the child associated with testifying in open court and/or arising from a confrontation (through cross examination) by a parent and/or that the child wants to communicate his perspectives about parenting to the court. Commentators have identified risks to this process, including "(1) process risks (a child's increased entanglement in custody conflict); (2) information risks (a custody decision based on a child's inaccurate statements and unreasonable preferences); and (3) outcome risks (a child's burdensome sense of responsibility for the custody choice)."[1]

For the above stated and other reasons, many judicial officers refuse to interview children and rely, instead, upon custody evaluations, forensic interviews and/or interviews by conciliation personnel.[2] In this way, the court avoids the direct involvement of the child,

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imposes a process that analyzes the complete family dynamic rather than the child's statements alone, and minimizes the child's potential angst and/or guilt that he had a determinative impact on the custody outcomes, hurt the other parent or was disloyal toward the other parent.

Judges Should Refuse to Interview Minor Children

A review of Arizona law regarding *in camera* interviews of children evidences that though the authority and a process for doing so exists, that process prohibits cross-examination and, in some cases, access to the record of the interview, and as such, violates litigants' due process rights.[3] Based upon this analysis – in addition to the availability of other non-offensive methods to obtain the same information – judicial officers should refuse to interview children.

1 Statutes and Rules Allow the Court to Interview Children

A.R.S. § 25-405(A), provides that "the court ***may*** interview the child in chambers to ascertain the child's wishes as to the child's custodian and as to parenting time." (Emphasis added.) However, subsection (B) of the statute offers an alternative in that "the court may seek the advice of professional personnel" to interview children. This section goes on to instruct that when the court seeks advice from third parties, protections including written reports, disclosure of the reports to counsel and examination of the professional are afford to the litigants.[4] Interestingly, similar protections are not afforded by A.R.S. § 25-405(A). As a result, when the Arizona Rules of Family Law Procedure were adopted on January 1, 2006, Rule 12 was written to provide that the interview "shall" be recorded, but that the record "may be sealed, in whole or in part," and that the "parties may stipulate that the record of the interview shall not be provided to the parties or that the interview may be conducted off the record." Neither A.R.S. § 25-405 nor Rule 12 address in any way or allow parents to challenge the child's statements, including through cross-examination of the child. While the law does not expressly forbid the use of children as witnesses in their parents' divorce proceeding (whether in the first instance or following an *in camera* interview), the practice of the court in applying A.R.S. § 25-405 and Rule 12 is to forbid the cross-examination of the child.[5]

While A.R.S. § 406 does not address child interviews by the court, the statute identifies the procedure typically followed when parents disagree about how the Court should resolve custody and parenting issues – custody evaluations. Where both A.R.S. §§ 405(B) and 406 provide alternative processes that can be accessed by the court and the parties to receive a child's input regarding her parents' competing custody and parenting time claims, a court can conclude that the other methods are preferred.

2 *In camera* Interviews Without Cross-Examination Violate Due Process

Where a party has invoked the rules of evidence as required under Rule 2(B), Arizona Rules of Family Law Procedure, either parent's testimony regarding the child's out of court statements is impermissible hearsay absent an applicable exception.[6] Nor is the mere fact that a parent asked court to interview the child a requirement that the court must do so.[7]

The early case of *Bailey v. Bailey*,[8] reflects that, at one time, judicial interviews of children were a prevalent practice. However, the case also evidences the dangers inherent to the practice. In that case, the court interviewed one of the children in his chambers without the presence of the parents, their attorneys or a court reporter.[9] The parents did not stipulate to the interview, but neither did they object to the interview.[10] Because appellant's counsel did not object, the court of appeals found the interview was not in error. In so holding, however, the court stated as follows:

> In chambers conferences between the trial judge and the children of the litigants have been an important part of many domestic relations trials. It is interesting to note that in Galbraith on page 363 of the Arizona Reports, 356 P.2d 1023, at page 1027, the Court commented:
>
> > *'It should be noted here that the trial judge did not interview any of the children personally.'*
>
> Frequently these conferences are conducted with a promise by the trial judge that the information is confidential, that the child need not repeat that which has been said and the judge will not repeat that which has been said. It is vital that this confidence be observed.
>
> In this, one of the most difficult responsibilities of a trial judge, the judge is privileged to consider the information so secured in his final decision. *The information given to the trial judge during the in chambers conference may well be the crucial and determining factor in the court's decision.*[11]

As the reader can surely appreciate, and as the *Bailey* language above illustrates, taking evidence in any adversarial manner, especially evidence deemed "crucial" in a way that prohibits the litigants' ability to challenge or even hear the evidence is a serious problem.

A second early Arizona Supreme Court case, *Black v. Black*,[12] also commented on interviews of children in domestic relations matters. In that case, the trial court interviewed the children without the parents' stipulation, which the supreme court found was in error, albeit harmless, because the decision was supported by "substantial evidence apart from any consideration of the… interview."[13]

The above cases are the only reported family court decisions in Arizona regarding child interviews at this time; however, two interesting cases in the criminal and juvenile context exist. First, in *Stewart v. Superior Court*,[14] the state wanted to interview two minor children in a criminal child abuse case. The parents/defendants, agreed to the interview on condition that defense counsel would be present at the interviews.[15] The state objected to the condition, argued that the condition was unreasonably restrictive and sought the appointment of a guardian ad litem.[16] The trial court agreed with the state and granted the request, leading the parents to file a petition for special action.[17] The court of appeals granted the petition for special action, vacated the trial court's ruling and (among other rulings) found that the interview condition sought by the parents, *i.e.*, that their lawyer would be present at the interview, was not unreasonable.[18]

The interview of a child in a juvenile dependency action was addressed by the Arizona Supreme Court in *In Re the matter of Maricopa County Juvenile*.[19] In this case, the child's attorney filed a motion asking that the court not require the child to testify at the hearing regarding the alleged sexual molestation, but, instead, that the judge interview the child in chambers with all parties and counsel excluded.[20] The trial court granted the request over objection and interviewed the child in the presence of a therapist and court reporter.[21] The father appealed on the basis that he was "denied due process of law when he was not permitted to be present and cross-examine his daughter at her appearance before the trial judge in chambers."[22] The court of appeals affirmed the trial court's decision, but the Arizona Supreme Court reversed.[23]

In analyzing the due process issue in *Maricopa County Juvenile*, the supreme court reflected that "the right to custody and control of one's children is fundamental" and "the parent's interest in this relationship is protected and may not be changed by the state without due process of law and strict compliance with the statutes involved."[24] The court directed that the competing interests of the state, parents and children must be balanced and, in so doing, considered the argument that "serious emotional harm will be engendered if the minor is subjected to questioning in the presence of (father) or his attorney and to the rigors of cross-examination."[25] The further argument that the foregoing risks of harm outweighed any right to cross-examine the child also was proffered.[26] The Arizona Supreme Court disagreed and held as follows:

> It is essential under the adversary system that parents are given the opportunity to challenge the testimony of their children when such testimony is essential to establishing the parental misconduct alleged in the petition. Without the opportunity to test the reliability of a child's statements, the adversary process is subverted and made meaningless.[27]

Importantly, the supreme court went on to cite to *Black v. Black*, the family law case discussed above, and held that "we believe that the rule in *Black*, *supra*, is equally applicable to dependency matters."[28] This is very important because where the holding of a family court case is deemed applicable to a dependency case, then the holding of a dependency case should be deemed applicable to a family court case.

The *Maricopa County Juvenile* court held that "in the interests of fairness and impartiality, this court concludes that, absent stipulation of the parties, parents are denied due process of law when refused the right to cross-examine their children during a dependency hearing."[29] The court went on to:

> recognize, however, there may be instances in which the court may wish to limit the conditions under which children are examined by providing that examination be in chambers or by providing that only counsel for the parties be present. Testimony, which is traumatic in nature would merit an examination in chambers, and the presence of counsel alone would be justified where a party's presence is potentially inhibiting. Such reasonable limitations would protect the emotional interests of the child while preserving the parents' due process right of cross-examination.[30]

And children should not be placed in the vortex of their parents' custody disputes such that the child may think that she directed an outcome.

3 Interviewing a Child Without the Right to Cross-Examine Violates Due Process

While A.R.S. § 25-405, thus, allows a judge to interview a child in a family law matter and Rule 12 requires a record, the process excludes counsel and practice prohibits cross-examination. Of course, if the court were to allow cross-examination, which is technically not prohibited by the statute or rule, the due process issues would not materialize. That said, absent the opportunity to cross-examine the child, a parent's due process rights are violated and the interview cannot occur and the Court should decline to interview a child.[31]

Other Options Exist

This court's ability to obtain a child's input is not eliminated by refusing to interview the child *in camera*. The judge has many resources available that can be used to investigate not only what the child has to say about parenting, but to put those comments into context by analyzing the entire family dynamic. Not only would a more complete evaluative process typically provide the court with insights regarding the child, but with information regarding the child's relationships with siblings, each parent, extended family and friends. The court also would have the ability to learn why the child may or may not be taking positions regarding his living arrangements. For example, is a parent putting undue influence on the child; is one parent or the other holding the purse-strings and promising and/or withholding material goods that are important to a teenager in return for his loyalty; how bonded is the child to his parents; who actually provided the child's primary care; and so on?

Conclusion

As written, A.R.S. § 25-405 and Rule 12 allow judicial officers to conduct an *in camera* interview of a child. However, the practice of conducting this type of an interview violates a parent's due process rights. The court must keep in mind why a parent would be asking the court to interview the child – why is a parent interjecting the child himself directly into the parents' disputes? Typically, this occurs where alienation is a concern and/or where a parent feels confident that the child will tell the judge what the parent wants her to say. But most judges appreciate that children tell parents what they want to hear. And children should not be placed in the vortex of their parents' custody disputes such that the child may think that she directed an outcome. While the child may think he wants one outcome or another, the judge does not make decisions based on the child's input alone. Nor should the court receive evidence of this type of import in a virtual star chamber – *i.e.*, without allowing the parents their right to directly challenge the testimony. FL

about the author

HELEN R. DAVIS, ESQ. practices family law at The Cavanagh Law Firm, P.A. and is a frequent contributor to the Newsletter with her interesting lifestyle articles.

endnotes

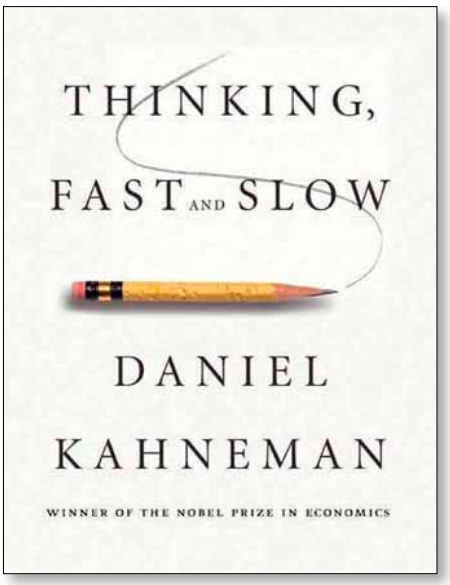
1. *See* Cynthia Starnes, *Swords in the Hands of Babes; Rethinking Custody Interviews After Troxel*, 2003 Wis. L. Rev. 115.
2. This statement is drawn from the author's primary experience in Maricopa County. It is understood, however, that in some of the smaller counties, judicial officers may interview children.
3. *See In Re: the Matter of Maricopa County Juvenile*, 131 Ariz. 25, 638 P.2d 692 (1981), *en banc*.
4. A.R.S. § 25-405(B)
5. In fact, it can be safely said that the professionals, including the judge, involved in a case never even consider the option of allowing a minor child to testify.
6. *See In re Marriage of Higgins*, 194 Ariz. 266, 272-73, 981 P.2d 134, 140-41, ¶¶28, 29 (App. 1999).
7. *See Graville v. Dodge*, 197 Ariz. 591, 598, 5 P.3d 925, 932, n. 6, ¶16 (App. 2000).
8. 3 Ariz. App. 138, 412 P.2d 480 (1966)
9. *Id.* at 141, 412 P.2d at 483.
10. *Id.*
11. *Id.* at 142, 412 P.2d at 484 (emphasis added).
12. 114 Ariz. 282, 560 P.2d 800 (1977)
13. *Id.* at 284, 560 P.2d at 802
14. 163 Ariz. 227, 228, 787 P.2d 126, 127 (App. 1989)
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 131 Ariz. 25, 638 P.2d 692 (1981).
20. *Id.* at 27, 638 P.2d at 694.
21 *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (citations omitted).
25. *Id.* at 28, 638 P.2d at 695.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. To be clear, most parents do not want to be placed in the position of cross-examining his/her child. In fact, most parents would not want his/her child to be subjected to any process at all. However, a parent should not be required to stand by while the child is involved to the detriment of the parent's fundamental rights and the child's best interests.

FROM THE CHAIR

by Dean Christoffel

value...

I confess there is no good reason that I continue to own a 45-year-old car nor for living in the same house for more than 24 years. Nor is there a good reason that my previous car was given to a charity to be auctioned off rather than traded in or sold. Nor a good reason that Goodwill and Beacon's Foundation have regularly scheduled pickups at my house. The reason (and remember, I did say it is not a good reason) is simply that I'd rather give something away than to try to sell it to someone. And the reason for this reason, if you will, is value. I find that when I go to buy something it is priced about 125% more than I think its value, and when I go to sell something, everyone else thinks its value is about 80% of my idea of its value. So, rather than fight about it, I figure I'll just keep it. Or just give it away. That way both the recipient and I get to maintain our notion of value.



In Daniel Kahneman's new book, *Thinking, Fast and Slow*, he describes an experiment designed to show the bias of what he refers to as the "Endowment Effect" – a tendency to value an object more highly when we own it than when someone else owns it.

A group of students, Kahneman says, were divided into two groups: buyers and sellers. The sellers were provided with coffee mugs which they were to sell to the buyers, the buyers had to use their own money. Sellers asked on average, $7.12, while buyers offered $2.87. Because the gap between the offering price and purchase offer was so large, almost no mugs were sold.

It is said that the results of this experiment destroy a central tenet of classical economics that in a free market buyers and sellers will agree on a price that both think is fair. Kahneman says that while this tenet may be true for professional traders in a stock market, it is not true for nontraders in a free market due to the Endowment Effect. The reason is that most people do not think like professional traders. They have their own notion of value.

Now this value thing is something that we deal with in the courtroom all of the time, but I can tell you for sure, *res ipsa* for certain, that value only comes from that which you contribute to. It's like owning it.

For example, working with the people who sit on the Executive Council of the Family Law Section makes my membership in the Section, by contributing, more valuable for me. Working with Leah Pallin-Hill on this newsletter is amazing as she goes about putting together a new issue just as soon as she finishes the last one. And for the last issue, when Leah was laid up with back surgery, it was Kiilu Davis who stepped up to get the issue published. Valuable? No, invaluable.

And adding value to the already Presidential Award winning Family Law seminar scheduled for this year's State Bar Convention, Council members Steve Serrano and Helen Davis, recruit and vet the very best speakers on the cutting edge of Family Law issues.

We'll be losing an amazingly valuable member when Steve Wolfson's term expires in June. Steve has been our man in the legislature for many years. In addition to reporting on (and warning about) bills being proposed in each legislative session, Steve has been a contributing member to the Domestic Relations Committee, recommending and drafting new legislation.


Steve Wolfson

From the folks who work to get out the most current family law cases with analysis to the Section to those who work tirelessly on putting together Advanced Family Law and Basic Seminars, as well as those who devote hours to prepare and give talks at these seminars, the Executive Council makes membership valuable. Having the honor as Chair this year to work with these outstanding family lawyers, I can say one cannot have a better opportunity to hear and learn from the finest lawyers in Arizona. I wish to thank them for all of the work they have so selflessly performed and to encourage you to join this select group. You can, by submitting a request to join and getting the votes of the Section, see how by giving value to the Section increase beyond measure the Section's value to you. The Endowment Effect will take over when you own the Section by becoming active.

Thanks for a great year and the opportunity to serve.

parenting plans after allegations or findings of sexual misconduct

by
John A. Moran, Ph.D.
Steven R. Gray, Ed.D.
Diana G. Vigil, M.A.

Sexual misconduct[1] may become a contested issue in a family court case. Such conduct almost always interferes with emotional connections among family members and can disrupt the healthy emotional development of children.

It is rare that arrest and conviction for a paraphilia[2] such as pedophilia lead parents in a contested custody matter to focus on sexual misconduct. More often, a parent[3] is discovered to have viewed violent and/or disturbing pornography, solicited sex acts or demonstrated questionable sexual boundaries with a child. Sometimes a child living at home is discovered to have sexually abused a sibling or a peer.

Allegations of sexual misconduct may be reported to the police but not prosecuted. Child Protective Services may investigate and conclude the allegation is unsubstantiated. Although a parent's sexual behavior may be within the law, one parent may allege the other parent is unfit following discovery of recurring Internet searches for violent or deviant pornographic images; accessing Internet dating sites related to sexual promiscuity; Internet phone or live webcam sexual contact with strangers; recent sexual involvement with a relative; applying perigenital cream to a female child without a doctor's supervision; or patronizing sex bars, gentlemen's clubs, massage parlors or escort services. When one parent suspects the other of such behavior, a parent and counsel's best option may be to engage a behavioral health professional[4] to investigate if the parent's behavior indicates underlying mental problems or poses a threat of harm to a child.

Forensic behavioral health assessments rely upon multiple methods and sources of information to gather data.[5] In addition to interviews and tests of psychopathology such as the MMPI-2-RF,[6] an evaluator may administer specialized tests

such as the Multiphasic Sex Inventory II (MSI-II),[7] which includes a Molester Comparison Scale,[8] or the Abel Assessment Questionnaire.[9] A sexual history polygraph examination may be employed to confirm the accuracy of a client's self-report of sexual history. Alternately, a polygraph could focus on a specific contested issue such as, "Since you have been 18 years old, have you had sexual physical contact with anyone under the age of 14 years old?"

After an evaluator or court concludes that sexual misconduct occurred, defining an appropriate parenting plan depends on multiple factors. These include the type and severity of the mental disturbance foundational to sexual misconduct. A sexual behavior problem may be related to the existence of another mental condition such as depression or substance abuse. Different threats for children are associated with different paraphilias.

As a group, for example, men who engage in exhibitionism frequently re-offend,[10] but they are less likely to commit a hands-on offense with a child than incest or extra-familial child molestation perpetrators. Pedophiles who assault male children are more high risk than those who assault females.[11] [12] Pedophiles who assault "stranger" children[13] are more dangerous than those who assault children with whom they have a relationship.

Age is another consideration; as men with pedophilia progress through the second half of their lifespan, their likelihood of re-offending diminishes.[14] The time duration since the most recent offense is important; convicted sex offenders who have lived in the community five years offense-free are about 50 percent less likely to be arrested or reconvicted for another sex offense.[15] The data regarding sexual re-offense rates for women and juveniles is different from the data regarding men.

How an individual participates in sex offender treatment helps to define the parameters of an appropriate parenting plan. Sex offender treatment, even with individuals who have been incarcerated for sexually violent offenses,[16] can reduce the risk of sexual acting-out for both "admitters" and "non-admitters".[17] The type of treatment needed depends on the nature and severity of the behavior. The court may wish to appoint a Therapeutic Interventionist (TI) and grant the TI authority to involve and organize a series of treatment interventions for various configurations of family members. A parent's family time with the children may be made contingent on the TI's favorable reports of treatment progress to a Parenting Coordinator (PC), who recommends implementation of a gradually increasing parenting time schedule. A TI might request follow-up polygraph examinations to motivate truthful participation in treatment and to inquire if "sexual sobriety" has been maintained. A spouse may be ordered to chaperone training as a non-professional supervisor.[18] Sometimes even after repeated competent investigations do not find sexual misconduct, a spouse insists "I know he is dangerous and I am not allowing my child to be around that man." Such a spouse needs specialized psychotherapy; her attitude may place the children at risk for an alienation dynamic.

Parenting plans reduce the risk that the children will be "sexualized" by identifying rules regarding sex-related behavior in the family. Sexual boundary rules apply when clinically significant allegations of sexual misconduct have been made and may include that family members, including parents, stepparents, siblings, extended family, and care providers, adhere to the following personal/family and media boundaries:

PERSONAL/FAMILY BOUNDARIES:

- **Nudity:** Adults and children are clothed at all times.
- **Private parts:** The non-accused/non-offending parent educates children on the function, proper names and rules for private parts.
- **Locked doors:** Adults lock their bedroom door during sexual contact. (Children have locks for their doors to limit further allegations of sexual misconduct.) An alarm device is installed on the bedroom door of a child who has had clinically significant sexual contact with a sibling to prevent them from leaving their bedroom after bedtime.
- **Bath time:** Children bathe separately from parents, siblings and friends. Children under age four wash their private parts with direction from the non-accused parent. Four-year-olds wash their private parts without adult assistance.
- **Bedtime:** Children, parents and siblings sleep/nap in their own beds and in their own bedrooms. Children are not permitted to play in the parents' bedroom.
- **Toileting:** Adults and children use toilets separately behind closed doors. Children wipe themselves after using the toilet. Diapers are changed by the non-accused parent.
- **Application of medication to private parts:** The non-accused parent applies medication to the children's private parts and teaches children over age five to apply medication themselves.
- **Pornography:** Pornography (written, in movies or on the computer) is prohibited in the home.
- **Adult conversations:** Adults do not discuss intimate or sexual topics in front of or within earshot of the children, and refrain from the use of profanity and swearing.

- **Friends:** For sexualized children, sleepovers with friends are not permitted until sexual behaviors is in remission (has stopped) for six months. If the child has play dates with friends, cousins or siblings, they play in rooms with an open door, or their play is supervised by an adult.
- **"No, go tell":** Parents/stepparents review rules for privacy and boundaries with their children including: If anyone makes you feel uncomfortable or unsafe, say "NO!" and go tell two trusted grownups (e.g., teacher, minister, counselor or parent/stepparent).

PHYSICAL BOUNDARIES:

- Family members maintain good personal boundaries. For example, children are taught the "space bubble" concept: Everyone has a special space or bubble around their body (the length of their arms all the way around their body); no one is allowed inside their "space bubble" unless we invite them in or say it is OK.

MEDIA BOUNDARIES:

- **TV/movies:** Parents monitor children's access to TV and movies. Adults do not watch R-rated or sexually explicit movies in the home. Children watch television programming written for children. Movies appropriate for children are G-rated. Children do not have a television in their bedroom.
- **Video games:** Parents monitor video games to ensure games have no sexual content. Video games appropriate for children are rated E (everyone).
- **Computer:** Children's computer use is monitored by an adult. Children do not have internet access in their bedrooms. Televisions and home computers have media accountability and/or a hardware/software filtering device installed (e.g., *Covenant Eyes*, *Norton Online Family*, *K9 Web Protection*, *FamilyShield*). The accused parent may be required to have accountability software installed to be monitored by a behavioral health professional. The accused parent is not to share his/her computer with the children.

Allegations of sexual misconduct in family court cases are not rare.[19] Following investigation of an allegation the meaning of findings for the children and both parents are contextualized. Conclusions are translated into a treatment plan for the family supported by the court-ordered parenting plan. The types of family and individual treatment indicated may vary. In many if not most cases supervision by the court following dissolution is needed. Communication between the co-parents is usually limited by widely disparate beliefs and interpretations of family events. Co-parenting conflict limits the children's ability to enjoy and benefit from their family. A parenting plan can stabilize the family system and provide a platform for renewed development when the court, attorneys, and behavioral health professionals align to contain and support the relationships between the parents and the children. FL

endnotes

1. Problematic sexual behavior is described as, but not limited, to the following: incest, exposure or masturbating in public (with or without the intent of being seen) to unwilling persons for sexual purpose; bestiality; obscene phone calls to unwilling person(s) for sexual purpose; compulsive phone sex; writing and mailing obscene letters; sex with strangers; use of prostitutes; bondage and discipline to either a compulsive degree or with an unwilling partner; sadomasochism; frottage (rubbing one's genitals against another for sexual purpose without their permission); forced sex (rape); sexual conduct between an adult (over age 18) and a minor (under age 18); a minor having sex with another minor three or more years younger; voyeurism; compulsive masturbation; transvestism or fetishism; child pornography; urophilia or coprophilia; sexual exploitation of incapacitated persons; sex with subordinates; sexual harassment; use of paraphilic pornography; surreptitious sexual videotaping; Internet chatting/texting with a minor related to solicitation for sex; sexual stalking.
2. In the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition, Text Revision (DSM-IV-TR; p. 522), Paraphilia is the category describing the sexually deviant behaviors.
3. The accused is most often a man. Usually, they are "non-admitters" to sexual misconduct, which has legal implications, although they may acknowledge using pornography (not child pornography), soliciting prostitutes, group sexual behavior or frequent masturbation.
4. An important distinction exists between forensic assessments and treatment assessments. A forensic evaluator does not offer treatment services to the parent. Treating professionals are advocates for the health of their clients, and their assessments are arguably less objective.
5. *Specialty Guidelines for Forensic Psychology*, American Psychological Association, 2011.
6. The Minnesota Multiphasic Personality Inventory-2-RF (MMPI-2-RF), a revised version of the MMPI-2, is an empirically based instrument for the assessment of adult psychopathology. The MMPI-2-RF was not designed to assess sexual misconduct. However, the presence of psychopathology may be related to sexual misconduct.
7. The Multiphasic Sex Inventory II Profile (MSI-II) is a theory-based, nationally standardized self-report questionnaire designed to assess the wide range of psychosexual characteristics of the sexual offender.
8. The Molester Comparison Scale of the MSI-II suggests commonality in thinking and behaving between the test-taker and a reference group of adult male sex offenders.
9. The Abel Assessment/Questionnaire is a visual reaction time test of sexual interest. It includes a Probability Score for clients who have been accused but deny sexually abusing a child. The higher the score the more likely the client is to match the denying child sexual abuser. It was developed using both extra-familial and incestuous sexual abusers of girls and boys, 17 years of age or younger.
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18. Arizona Association of Family and Conciliation Courts Guidelines for Non-Clinical Monitored Parenting Time 2012 Summit Project.
19. Bow, J. M., Quinell, F. A., Zaroff, M., & Assemany, A. (2002). Assessment of sexual abuse allegations in child custody cases. Professional Psychology: Research and Practice, 33(6), 566-575.

title 25 and the Family Court's Authority to Order Non-Consensual Substance Abuse Assessment and Testing: QUESTIONING ASSUMPTIONS

A. "You Must Be Kidding"

Sometimes it is necessary to question assumptions about family law practice that appear to be cast in stone. In this article, I question the judicial power of the Family Court to order substance abuse assessment and testing. I posit that warrantless non-consensual extraction of bodily fluids or tissue is likely unconstitutional and that there is no authority in Title 25 that permits a Family Court judge to order the warrantless extraction of bodily fluids or tissue without a parent's actual consent. The point of this article is not to argue that assessments and testing aren't helpful, useful or relevant; merely that they are ordered in Family Court without a parent's consent despite the lack of any authority granted by Title 25. This article does not address the authority of superior court judges in proceedings involving juveniles under Title 8 or cases where a parent voluntarily consents to assessments or alcohol/drug testing.

I have been practicing family law in Arizona since 1995. In the very first case I ever entered an appearance (it was against Jeff Pollitt, my writing instructor in law school) an Order was already in effect requiring my client to complete random drug testing. Looking back, I didn't know enough then to even think of questioning the authority of the Family Court judge to order the testing in that case because there was actual evidence of my client's use of crystal methamphetamine and it appeared to be part of "standard operating procedure." From that point on until just very recently, I never questioned a Family Court judge's authority to order drug testing in the multitude of cases I have participated in involving allegations of drug and alcohol use and abuse.

I have never heard one presenter at an annual family law continuing legal education seminar bring up the question (even at a seminar with the name "Drug Testing in Family Court" or something to that effect). I do recall one judge in a case of mine, thankfully, expressing minor doubt about the appropriateness of ordering testing in a case where there was no evidence to support allegations of drug use other than the other parent's mere suspicion. The judge's concern was more to the quality of the evidence, however, and not whether he had authority to order drug testing. No opposing counsel in any case I have litigated (many of whom are presumably reading this article) has ever objected to a request for drug testing or assessments based on a lack of statutory authority or on constitutional grounds and until recently neither did I.

Over the past year I began to question my assumptions about the Family Court's authority to order drug testing without a parent's consent after several cases I participated in involving a parent's alcohol or marijuana use. In one case I anticipated that Mother's counsel would ask the judge to order testing at an upcoming Resolution Management Conference ("RMC") regarding financial issues. Mother possessed a video taken of my client by his current wife of him in his home. In the video my client was nude and appeared to be very intoxicated. My client's children were not in the home because it was not his parenting time. Father's wife took the video on her cellular phone for reasons that are not germane to this article. The children recorded a copy of the video from Father's wife's cellular phone by taking a video with a cellular phone of the video while it was playing on the wife's cellular phone.[1] Presumably

one of the children saw the video and told Mother what she saw. Mother then told the children to record the video during Father's parenting time. Mother then viewed the video and disclosed it as evidence. It should be noted also that Father believed Mother had a history of problem alcohol use during marriage. The children also reported information to Father following separation that led him to believe that Mother's problem alcohol use was continuing. There were no Family Court orders that prohibited either parent from using alcohol until the judge entered one at the RMC.

At the RMC Mother's counsel orally moved for testing and the judge, who was very new to Family Court[2] and the bench, appeared eager to order the testing. The judge even asked me "If your client doesn't have anything to hide what's the harm in just agreeing to the testing?" In the preceding days I spent a little time digging deeper into the law and started to believe that there is no authority in Title 25 given to a Family Court judge to order non-consensual assessments or drug testing. But I honestly believed then that if I made the argument at the RMC even the "rookie" judge would laugh hysterically, sanction me or both. None of those outcomes seemed helpful to my professional reputation and career or helpful to my client. When the moment arrived I began to plaintively and quietly argue the issue to the judge, who had a background in criminal law before he became a judge, and as he listened intently I believe he understood the gravity of the issue that was being raised. He agreed the issue should be briefed so I had to spend more time developing my argument because a judge expected me to support the statements and arguments I made in court earlier.

Mother's counsel was not pleased with my argument or the judge's cautious approach because he assumed, rightly so based on the unseemly nature of the evidence that his client possessed, that the alcohol testing would be ordered at the RMC and it would swing the case in his client's direction and leverage her position on other issues. Mother's counsel asked the Family Court judge to order Father to complete an alcohol assessment, enroll in an inpatient facility, immediately commence alcohol testing and have supervised parenting time. The judge refused to grant the relief requested by Mother at the RMC but he did enter an order that prohibited either parent from using alcohol. Briefs were filed and the judge ultimately denied Mother's request to order alcohol testing or supervised parenting time.[3] The judge did, however, order Father to complete an alcohol assessment at TASC by a date certain, presumably subject to contempt. Although filing a Special Action was discussed, my client completed the assessment, the results of which are also not germane to this article.

B. The United States and Arizona Constitutions Guarantee A Right to Privacy and the Right to Parent

Both the United States and Arizona Constitutions guarantee a fundamental right to privacy.[4] Non-consensual extraction of blood implicates Fourth Amendment privacy rights.[5] I assume this same rationale applies to the non-consensual extraction of urine or a hair follicle sample. A search's reasonableness under the Fourth Amendment generally depends on whether the search was made pursuant to a warrant issued upon probable cause.[6] The State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified by law enforcement purposes.[7] In Family Court there is no law enforcement purpose for the assessments or testing and it is not merely minimally intrusive. Generally speaking, a citizen cannot be compelled to produce tissue, hair, blood or urine without a warrant supported by probable cause that the individual committed a criminal offense but it happens on a daily basis in Family Court.

The problem of ordering non-consensual assessments or testing in cases involving allegations of problem use of alcohol is even more acute because most custody orders do not prohibit a parent's use of alcohol and it is legal. To the extent that the non-consensual assessments or testing are made in response to allegations of a parent's problem use of alcohol, assessments or testing without probable cause appears to infringe on the fundamental right to parent one's children.[8] In cases where the allegation is use of alcohol, the Family Court often becomes an arbiter of moral values and he or she alone will determine how a parent may use alcohol (or marijuana) around his or her children. The lack of any objective guidelines results in different cases assigned to different judges with similar allegations having wildly different outcomes. I have been in two courtrooms on the same day dealing with nearly identical arguments about the necessity of immediately ordering random drug testing and received two completely different results. I'm certain many of you have had the same or similar experiences. I know there have been times where the court didn't order testing when it would have revealed a parent's use of alcohol or drugs and other cases where testing was ordered and there was perhaps a positive result for ethyl glucoronide that negatively affected custody or parenting time rights of an otherwise "fit parent." The lack of consistency cannot, in my opinion, survive constitutional challenge, nor is it in the best interest of children in Arizona.

In California, even with some basis for a drug testing order the Court of Appeals held that drug testing in Family Court proceedings is impermissible.[9] The California court recognized the drug testing without the consent of a parent would be unconstitutional.[10] The court stated that "interpreting section 3011, subdivision (d) to permit court-compelled drug testing in child custody disputes would present serious constitutional concerns."[11]

To the extent that the State has a compelling interest in the welfare of children to order testing of parents in cases, in other cases Arizona appeals courts have refused to permit judicial intrusion into the fundamental right of a parent by compelling immunization of a dependent child, to restrict the child's associations, to determine the child's religious upbringing, and to make major educational decisions.[12] That is to say, a judge's opinion or preference about a parent's use of alcohol (and now, perhaps, marijuana) impermissibly infringes on a parent's right to raise the parent's child in the lifestyle in which the parent believes is appropriate for the child. The point is illustrated in the point I made to the judge at the RMC: a Family Court judge has no authority under Title 25 to order children of married parents to participate in any assessment or testing of any form even if the judge witnessed the parent use drugs in front of the parent's children and the mere dissolution of the parents' marriage cannot result in parents of children in the State being treated differently from parents of children who are married or who are co-parenting a child born out of wedlock while living together in the absence of a Family Court order.

C. Title 25 of Arizona Revised Drug Testing Does Not Provide Any Authority to the Superior Court to Order a Party in Family Court Proceedings to Complete Drug Assessments or Drug Testing Without the Consent of the Party

Article 6, Section 14 of the Arizona Constitution provides the Superior Courts in Arizona with original jurisdiction in divorce and child custody cases. The Legislature has enacted statutes relating to divorce, custody, parenting time and property and other issues in Title 25 of the Arizona Revised Statutes. Nowhere in Title 25 of the Arizona Revised Statues is there any statute that expressly provides authority to the Superior Court to order a party in Family Court proceedings to complete drug assessments or drug testing without the consent of the party. The only reference to drug testing in Title 25 is in A.R.S. § 25-403.04(B)(2). In that statute the Arizona Legislature has provided authority to the Family Court to consider evidence of random drug testing to rebut the presumption that a parent's prior drug offense precludes an award of joint custody.[13] The statute does not give the Family Court the authority to order the parent to complete drug testing without consent; rather, the statute only provides the Family Court with authority to consider evidence provided by a parent of random drug testing.

There is no statute in Title 25 that provides any standards to the Family Court or the public regarding when, how or why a Family Court judicial officer can or will order a parent to complete non-consensual drug assessments and testing. Quite often the evidence proffered by the party seeking the order for assessments and testing consists of nothing more than suspicion. It is fundamental that the authority of a judge in Family Court proceedings is restrained by Title 25.[14] The Family Court cannot use statutory or equitable powers not granted to it by statute unconstitutionally.[15]

There is also no support for the Family Court's authority in the Rules of Family Law Procedure for administration of non-consensual assessments or testing. Rule 63 merely provides the Court with the authority to order a party to participate in a "physical, mental or vocational evaluation." There is no specific authority given to allow a Family Court judge to order extraction of bodily fluids without actual consent of the party being evaluated. If Rule 63 presumes to allow forcible extraction of bodily fluids, it would also appear to be unconstitutional in the absence of probable cause.[16]

D. Treatment Assessment Screening Centers and the Standard Order

The Maricopa County Superior Court Family Court has used Treatment Assessment Screening Centers ("TASC") exclusively to perform drug testing and assessment for as long as I can recall.[17] TASC offers drug assessment services, has a "Family Court Drug Panel" and can even test for substances like steroids. Generally, most parents are ordered to participate in random testing. In recent years, TASC, has expanded its testing and began offering hair follicle, testing for an alcohol enzyme, ethyl glucoronide, and other testing. The parent is assigned a color by TASC and the parent must appear on the day the parent's color is called.

The Maricopa County Superior Court Family Court has used the same standard minute entry in Family Court cases

since at least 1995, it appears.[18] I suspect the order was written *ad hoc* by a Family Court judge in a particular case and was passed around the judges and became part of the form database used by Family Court judges. I suspect as well that the Family Court's relationship with TASC started informally when a judge wanted a parent to be tested but didn't know where other to send the parent other than to the laboratory that the criminal court was using. Those are just my own suspicions. According to the standard order the parent is *ordered* to "consent" to the testing at TASC and he/she must waive all confidentiality regarding the tests subject to the penalty of contempt, *including incarceration*. Forced consent is not actual consent, in my opinion. The standard order also provides that a party's positive test (including a "diluted" test), or a missed test could result in the immediate imposition of supervised parenting time *without a hearing*.[19] The drug testing results are a public record and are disclosed to counsel for the parent, the other party, his/her attorney and anyone else who wishes to possess the information (including prospective employers, for example). Positive tests can be tested with a more stringent gas chromatography test. The accuracy of the testing itself or the threshold amounts used to determine "positive" samples is not questioned in this article and neither is the relevance of drug or alcohol testing information to the ultimate issue of parental decision making or parenting time.

Urine testing requires a party to urinate in front of a TASC staff member. Hair follicle samples can be taken from the pubic area. Blood has to be extracted by unknown "medical" personnel. There can be no question the testing is invasive. Assessments require the parent to truthfully disclose private, confidential health information otherwise protected by HIPAA to unnamed individuals with unknown qualifications without the protection of a confidential, therapeutic relationship in a brief moment that can impact custody rights for years. Quite often clients provide additional "consent" to even more treatment and testing and counseling, at TASC and for a fee, of course, after TASC assesses the individual and determines that intervention is required. Parents usually provide this additional consent "on the spot" and have no meaningful opportunity to speak with counsel. If the parent refuses to consent to the additional intervention the parent's non-compliance will be reported to the Family Court and the parent can suffer loss of custody and parenting time rights as a sanction.

E. Conclusion

Warrantless, non-consensual extraction of bodily fluids, tissue and hair samples in Family Court is likely unconstitutional. Even if it is not, there is no reported case or statute in Arizona that provides a Family Court judge with authority to order warrantless extraction of bodily fluids and tissue often sought by parents in Family Court. The only authority granted by the Arizona Legislature only permits the Family Court to consider evidence of successful random drug testing to rebut the presumption against joint legal custody that would apply to a parent who has been convicted of a drug offense. I have come to the awkward conclusion that there is no authority granted to the Family Court in Title 25 to permit a Family Court judge to order a parent to provide blood, hair or urine samples without the parent's consent. Even if there was a statutory basis, testing without the actual consent of the parent is likely to be considered unconstitutional.

It is not sufficient that the parent ultimately "consents" to the testing under threat of incarceration and/or immediate loss of custody and parenting time rights without a hearing. Arizona now recognizes the right of citizens to obtain a license to use, possess and grow marijuana.[20] The only lawful way I can discern to obtain evidence that would otherwise be obtained through non-consensual drug testing is to obtain the actual, informed consent of the parent to be tested by using the threat of the possibility of removal of parenting time to obtain consent from a parent. In that event, the parent should be given a warning, akin to a "Miranda" warning in the Family Law context, which provides the parent with clear information in order to obtain informed consent from the parent. The information should include information regarding the process to extract the bodily fluid or tissue, information regarding confidentiality, information about the provider and the possibility that the information can become public. The parent should also be informed of the possible consequences of the parent's failure to voluntarily consent to the drug testing. Although there is obviously a very "coercive" taint to this threat, it is the only way that I can see to constitutionally obtain drug testing evidence in Family Court. I can imagine that very soon we will see a clash in Family Court between the Courts statutory obligation to protect the best interest of children and the right of citizens to use marijuana lawfully in homes where minor children subject to Family Court jurisdiction are present.

Assuming the Legislature has constitutional authority, the public can only benefit from having a thoughtfully crafted statute to guide the Family Court judges to determine the quantum of evidence necessary to order non-consensual testing, to specify procedures to determine what to do if a parent refuses to comply with the order, and to set forth rules regarding the public dissemination of the assessments and drug testing results. At a minimum, a Family Court judge should have a hearing prior to ordering a parent to participate

in assessments and testing to determine if there is a reasonable suspicion that the parent is using the substance and, if so, that the use of the substance seriously endangers the children's physical, mental, and emotional health. The results of the assessments and testing should be confidential and presumptively sealed in every Family Court case. There should be a hearing *after* any assessment so that *the Court* can determine whether the best interest of the child, after considering the assessment, requires the court to order a parent to participate in additional intervention or modification of custody and parenting time orders. Allowing TASC personnel to "recommend" (nee, order), a parent to participate in additional intervention under the threat of sanctions for non-compliance unlawfully delegates authority exclusively retained by the court under Title 25 to TASC. Finally, it is time for the Presiding Judge of the Family Court to review the use of the standard drug testing order in Maricopa County and eliminate forced consent, the threat of incarceration for non-compliance with the order, and the modification of parenting time orders without a hearing. FL

endnotes

1. The videotape raised concerns about the children's and/or Mother's commission of a criminal act by videotaping Father nude without his consent. *See*, A.R.S. § 13-3019(A)("It is unlawful for any person to knowingly photograph, videotape, film, digitally record or by any other means secretly view, with or without a device, another person without that person's consent under either of the following circumstances:
    a. In a restroom, bathroom, locker room, bedroom or other location where the person has a reasonable expectation of privacy and the person is urinating, defecating, dressing, undressing, nude or involved in sexual intercourse or sexual contact.
    b. In a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public.")
2. In one recent case I'm involved in that is assigned to a different newly appointed Family Court judge the parties and counsel were advised by the judge that he will always order both parents to participate in random drug testing in any case before him in Family Court upon request of a party, without any evidence or a hearing. The judge basically stated that the burden is on every parent before him to prove to him at all times that the parent isn't using alcohol or drugs.
3. Despite the judges' ruling Father decided to leave the girls' lives. The videotape caused a seemingly unforgiveable and massive rift in his relationship with his children and his wife. He gave up; he proposed that he only have parenting time for a few hours on Father's Day and that Mother could have sole custody. Mother agreed and the judge approved the agreement.
4. *See e.g.*, *Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, --- P.3d ---, 2011 WL 3516140 (Ariz.App. Div. 1, 2011).
5. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989) ("this physical intrusion, penetrating beneath the skin, infringes [a reasonable] expectation of privacy"); *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966) (compulsory blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment").
6. *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110 (1983).
7. *Michigan State Police Department v. Sitz*, 496 U.S. 444, 450, 110 S.Ct. 2481, 2485, 110 L.Ed.2d 412 (1990); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968).
8. *Pierce v. Soc'y of Sisters of the Holy Names*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that parents have a fundamental liberty interest, under the Constitution, "to direct the upbringing and education of children under their control"); *see also*, *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding that the liberty guaranteed by the Fourteenth Amendment includes freedom to "establish a home and bring up children"); *Jordan v. Rea*, 221 Ariz. 581 (2009)(recognizing a parent's right to make education decisions).
9. *Wainwright v. Superior Court*, 84 Cal.App.4th 262, 100 Cal.Rptr.2d 749 (2000) (holding that a family court's power to require "independent corroboration'" before considering allegations of a parent's drug or alcohol abuse did not authorize the court to order drug testing"); *see also*, *Deborah M. v. Superior Court*, 128 Cal. App. 4th 1181, 27 Cal. Rptr. 3d 757 (Cal. App., 2005) (overturning family court order for hair follicle testing when statute only permits urine testing).
10. *Id.*
11. *Id.*
12. *Diana H. v. Rubin*, 217 Ariz. 131 (2007) ("Because Arizona has not expressed a compelling state interest in overriding Diana's continuing right to direct the religious upbringing of her child while Cheyenne remains dependent, *see Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533, we vacate the juvenile court's order authorizing ADES to have Cheyenne immunized").
13. A.R.S. § 25-403
    "a. If the court determines that a parent has been convicted of any drug offense under title 13, chapter 34 or any violation of section 28-1381, 28-1382 or 28-1383 within twelve months before the petition or the request for custody is filed, there is a rebuttable presumption that sole or joint custody by that parent is not in the child's best interests. In making this determination the court shall state its:
        1. Findings of fact that support its determination that the parent was convicted of the offense.
        2. Findings that the custody or parenting time arrangement ordered by the court appropriately protects the child.
    b. To determine if the person has rebutted the presumption, at a minimum the court shall consider the following evidence:
        1. The absence of any conviction of any other drug offense during the previous five years.
        2. Results of random drug testing for a six month period that indicate that the person is not using drugs as proscribed by title 13, chapter 34."
14. *See e.g.*, *National Auto. & Cas. Ins. Co. v. Queck*, 1 Ariz.App. 595 (Ariz.App. 1965) (discussing limitations on court's authority to order Sheriff to arrest and restrain a party in divorce proceedings to ensure that the party attended the proceedings).
15. *Jordan v. Rea*, 221 Ariz. 581 (2009) ([o]f course, the "best interests of the child" standard does not and cannot abrogate a fit parent's constitutional right to direct the upbringing of his or her child").
16. Rule 63. Physical, Mental and Vocational Evaluations of Persons
    a. Order for Evaluation.
    When the mental, physical, or vocational condition of a party or any other person is in controversy, the court may order that person to submit to a physical, mental, or vocational evaluation by a designated expert or to produce for evaluation the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be evaluated (unless the person to be evaluated is a minor child of one or both of the parties), and to all parties and shall specify the time, place, manner, conditions, and scope of the evaluation and the person or persons by whom it is to be made. The person to be evaluated shall have the right to have a representative present during the evaluation, unless the presence of that representative may adversely affect the outcome of the evaluation. The person to be evaluated shall have the right to record by audiotape any physical evaluation. A mental or vocational evaluation may be recorded by audiotape, unless such recording may adversely affect the outcome of the evaluation. A copy of any record made of a physical, mental, or vocational evaluation shall be provided to any party upon request.
    b. Report of Evaluator.
        1. If requested by the party against whom an order is made under paragraph A or the person evaluated, the party causing the evaluation to be made shall deliver to the requester, within twenty (20) days of the evaluation, a copy of the detailed written report of the evaluator setting out the evaluator's findings, including the results of all tests made, diagnoses and conditions, together with like reports of all earlier

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evaluations of the same condition and copies of all written or recorded notes filled out by the evaluator and the person evaluated at the time of the evaluation, providing access to the original written or recorded notes for purposes of comparing same with the copies. After delivery the party causing the evaluation shall be entitled upon request to receive from the party against whom the order is made a like report of any evaluation, previously or thereafter made, of the same condition, unless, in the case of a report of evaluation of a person not a party, the party shows that such party is unable to obtain it. The court, on motion, may order a party to deliver a report on such terms as are just, and if any expert fails or refuses to make a report the court may exclude the expert's testimony.

2. By requesting and obtaining a report of the evaluation so ordered or by taking the deposition of the evaluator, the party evaluated waives any privilege the party may have in that action, or any other involving the same controversy, regarding the testimony of every other person who has evaluated or may thereafter evaluate the party in respect of the same mental, physical or vocational condition.
3. Paragraph B applies to evaluations made by agreement of the parties, unless the agreement expressly provides otherwise. Paragraph B does not preclude discovery of a report of any expert or the taking of a deposition of any expert in accordance with the provisions of any other rule.

c. Alternate Procedure; Notice of Evaluation; Objections.

1. When the parties agree that a mental, physical, or vocational evaluation is appropriate but do not agree as to the evaluator, the party desiring the evaluation may seek it by giving reasonable notice in writing to every other party to the action not less than thirty (30) days in advance. The notice shall specify the name of the person to be evaluated, the time, place and scope of the evaluation, and the person or persons by whom it is to be made. The person to be physically evaluated shall have the right to have a representative present during the evaluation, unless the presence of that representative may adversely affect the outcome of the evaluation. The person to be evaluated shall have the right to record by audiotape any physical evaluation. A mental or vocational evaluation may be recorded by audiotape, unless such recording may adversely affect the outcome of the evaluation. Upon good cause shown, a physical, mental, or vocational evaluation may be video-recorded. A copy of any record made of a physical, mental, or vocational evaluation shall be provided to any party upon request.
2. Upon motion by a party or by the person to be evaluated, and for good cause shown, the court in which the action is pending may, in addition to other orders appropriate under paragraph A, order that the evaluation be made by an expert other than the one specified in the notice. If a party after being served with a proper notice under this subdivision does not make a motion under this rule and fails to appear for the evaluation or to produce for the evaluation the person in the party's custody or legal control, the court in which the action is pending may, on motion, make such orders in regard to the failure as are just, such as those specified in Rule 65(D).
3. The provisions of paragraph B shall apply to an evaluation made under this paragraph C.

17. **http://www.tascaz.org/cln_familycourt.htm**
18. I have not found any Maricopa County Superior Court Administrative Order regarding the standard order and there is no information available to the author of this article regarding the creation of the standard drug testing order.

    The standard order is as follows:

    IT IS ORDERED that [PARTY] shall participate in drug and alcohol testing.
    IT IS FURTHER ORDERED:
    1. [PARTY] shall appear in person at TASC, Inc. at a location of TASC, Inc., as indicated on the TASC Referral Form before 6:00 p.m. on [DATE];
    2. [PARTY] shall present to TASC the Court Ordered Substance Abuse Testing form issued by this Court, and shall provide all information necessary for its completion;
    3. [PARTY] shall provide such samples as are reasonably required by TASC to comply with this Order. [PARTY] shall submit to the Screen A drug test (full spectrum of drugs including alcohol).
    4. [PARTY] shall sign, execute and deliver such forms of consent and authorization as shall be reasonably required by TASC to comply with this Order;
    5. The results of said testing shall be reported directly to this Court in writing by TASC, with copies provided to counsel for both parties, or directly to the parties, if unrepresented;
    6. [PARTY] shall report for subsequent testing as directed by TASC, and shall present a photo I.D. at time of testing, along with any prescription medications currently being taken;
    7. [PARTY] shall pay the costs of (his or her) own testing IN MONEY ORDER OR CASHIER'S CHECK at the time of testing.
    8. All parties are advised that the failure, neglect or refusal to participate in testing may be considered an admission by the party that the testing, if conducted, would have revealed the use of the substance(s) tested for, which finding is contrary to the best interest of the child(ren); failure to submit to a drug test, absent good cause shown, may result in a finding of Contempt of Court, incarceration in the Maricopa County Jail, issuance of a Civil Arrest Warrant or other sanctions by the Court;
    9. The parties are also advised that a diluted test specimen may be considered an attempt to conceal the presence of illicit drugs, which finding is contrary to the best interest of the child(ren);
    10. [PARTY] shall be randomly tested NOT LESS THAN TWICE A MONTH commencing on [DATE], and continuing until further order of this Court;
    11. The parties are hereby advised that test results ARE NOT confidential and will be filed in the Court file upon receipt by the Court.
19. Modification of parenting time without a hearing also raises serious due process concerns and presumably violates A.R.S. § 25-408(A)("A parent who is not granted custody of the child is entitled to reasonable parenting time rights to ensure that the minor child has frequent and continuing contact with the noncustodial parent unless the court finds, *after a hearing*, that parenting time would endanger seriously the child's physical, mental, moral or emotional health.")
20. A.R.S. § 36-2801 *et seq.*

about the author

MICHAEL SHEW is a fourth generation native Arizonan. He obtained a Bachelor of Science in Justice Studies from Arizona State University in 1992 and a *Juris Doctor* from the Arizona State University College of Law in 1995. At law school, Michael was a Willard Pedrick Scholar at ASU, a member of the College of Law Clinic, a recipient of the Community Foundation Scholarship, a law clerk at Brown & Bain, P.A., and he served as a law clerk for a Superior Court judge.

Michael is an experienced matrimonial trial lawyer and has also been asked to provide mediation and arbitration services by referral from the Court and other attorneys. Michael served as a Judge Pro Tempore for the Maricopa County Superior Court and was a past member of the State Bar of Arizona Family Law Practice and Procedure Committee. He was the recipient of the 2005 Family Law Community Education Award from the Arizona Supreme Court and Volunteer Lawyer's Program, and was also a recipient of an annual award for the Top Pro Bono Attorney's from the Arizona Supreme Court. In his spare time, He plays guitar, worries about everything and contemplates life after family law.

Michael J. Shew, Ltd. | 15835 S. 46th Street, Suite 136 | Phoenix, AZ 85048 | (480) 940-3636 | mike@michaelshew.com

When CPS calls… in the Middle of a Divorce/Custody Case

by Gregg Woodnick and Brad TenBrook

All Family Law practitioners have received that phone call from a client who, in the middle of a divorce or custody case, comes home to find a note on the door from Child Protective Services ("CPS"). While the statistics show that the majority of child abuse allegations raised during custody disputes are unfounded, dealing with CPS is frequently far from pleasant.

Often Family Court practitioners are not aware of the mechanics of a CPS investigation. Understanding the functional component of CPS/DES (DES is the Arizona Department of Economic Security – CPS' keeper) should help you better advocate for your clients and know when it is necessary to bring in an attorney with experience contesting "substantiated" abuse allegations and/or dependency actions in Juvenile Court.

THE INVESTIGATION

Most CPS cases are initiated by someone calling the CPS Child Abuse Hotline (1-800-SOS-CHILD). The person calling may be a mandatory or discretionary reporter. Mandatory reporters, as defined in A.R.S. 13-3620, comprise a limited group of people, most typically people in professions that involve the care of children. These people must report, and their failure to do so is a crime. The discretionary (non-mandatory) reporters are usually family friends and, often in family court matters, take the form of intermeddlers. No matter who is calling and regardless of the allegations, CPS must take the report.

Once the report is taken, CPS enters the information into a database called CHILDS. CHILDS, which is managed by DES, is used to collect information regarding those involved. CPS will prioritize the call and determine the level of response needed. For example, a hotline report about a parent smoking pot in their backyard while the kids are playing on the swing set will receive less priority than that from a neighbor who found a 2-year-old walking in the street in the middle of the night.

CPS INVESTIGATION

Usually, CPS starts their investigation by interviewing the child or children. A case worker will go to the child's home or the child's school and begin collecting data. Often the police are involved, investigating any contemporaneous criminal matter. (This interplay is the subject of Governor Brewer's Arizona Child Safety Task Force.) CPS is charged with the duty of protecting the child and making a determination as to whether or not the child is at risk in the home. In turn, CPS will also determine if the child should be removed from the home. If there is no imminent risk, the child may stay at home with services provided to the parent(s) or with CPS simply documenting the report.

Additionally, CPS must determine whether or not the allegation is substantiated or unsubstantiated. A substantiated allegation could have draconian effects on certain clients (teachers, physicians, police, nurses, and other licensed professionals could lose their license once their employer catches wind of the abuse substantiation via DES' Central Registry of Child Abuse).

If CPS has served a temporary custody notice on your client you will most likely be appearing in Juvenile Court within a few days for a Preliminary Protective Hearing. If you have not represented a parent in a juvenile proceeding, now is the time to start seeking advice from someone who has. In reality, a Dependency proceeding is the intersection between custody and criminal law. Your client has likely been accused of abusing or neglecting a child, and CPS is alleging that there is no parent willing or capable of providing proper parental care and control. CPS could have legal custody of your client's child for months to years before the Dependency case is resolved. FL

FREQUENTLY ASKED QUESTIONS

1. **My client was in the middle of her divorce proceeding when CPS removed the child. Can we finish the divorce?** While the Family Court would still have jurisdiction over property-related issues, custody matters are within the exclusive jurisdiction of the Juvenile Court judge. There is no reason why you cannot finalize the divorce, but issues pertaining to the custody and care of the children will be left for later determination following the adjudication of the Dependency proceeding. In some cases, expediting the divorce is necessary. (E.g., the father is accused of abusing the child, and the mother is accused of failing to protect the child from the father. Here the divorce may convey to the court that the mother has separated from the abusive father.)

2. **What if CPS did not investigate properly and wrongly substantiated the allegation.** I hear this all the time. The reality is that there are a number of good CPS investigators with great skill and intentions, but some investigating case workers are overworked, underpaid, and occasionally very green. Some act as though they are qualified to conduct forensic interviews and make criminal findings. This can be a scary prospect if the interviewer does not possess the requisite experience. Unfortunately, the limited "forensic interview" training that case workers receive can lead to horrific results. A poorly conducted forensic interview of a child can impact a criminal prosecution and re-enforce a false belief. Essentially, the child may actually think something occurred because of what was improperly suggested during the flawed forensic interview. Notably, CPS rarely, if ever, records their interviews. So the investigation is completed based on the notes taken by the interviewer who may have had a preconceived notion when he or she began the process. This is contrary to standards in forensic interviewing and needs to be properly addressed with the Family, Juvenile, and Criminal courts so that triers of fact are aware of the issue. To combat this practice, I would recommend reading *The Science of False Memory* by C.J. Brainerd and V.F. Reyna. It is a forensic Psychology text that is helpful in preparing cross examination of "forensic interviewers".

3. **Can I fight the substantiated finding for my client?** You can and should. A substantiated finding of abuse by CPS is always used in domestic relations custody matters. How frequently do we see the CPS substantiated letter marked as an exhibit as if it proves child abuse? Too often. Yet the letter carries weight, even if all CPS did was a cursory investigation relying on information from a less than reliable source.

   The appeal process is two-fold. First, there is an internal review once the appeal is filed and second, assuming CPS stands by their findings (essentially agrees with themselves), there is relief available in the Administrative Law Court.

   For some, a substantiated finding could be career ending. An upheld substantiated finding (or one that is not appealed) means your client will be placed on DES' Central Registry – basically a list of child abusers. However, if your client's employment requires finger print clearance it is likely their employer will pull the clearance once they see your client's name on the Registry. As a result, the appeal could be the difference between your client keeping their professional license or losing their means.

about the authors

GREGG WOODNICK and **BRAD TENBROOK** instruct Mandatory Reporting seminars to Pediatric and Family Medicine physicians throughout the valley. Recently, the Catholic Dioceses invited them to present to their academicians. Brad is a former Assistant Attorney General and represented Child Protective Services. Gregg has represented countless parents involved in CPS investigations and those charged criminally with child abuse and/or neglect. Gregg and Brad are available to consult on cases involving CPS and criminal child abuse matters.

Mandatory use of federal income withholding form now

by Janet W. Sell, AAG and Gordana Mikalacki, AAG

In this depressed economy, collecting full child support payments each month is becoming increasingly difficult. Many non-custodial parents are struggling to hang onto their jobs while others are taking any work that they can get. Regardless of the situation, there is less money to go around causing non-custodial parents to choose between keeping up with household bills and paying monthly child support. Dilemmas such as these have increased the need for enforcement remedies such as income withholding orders ("IWO"). Fortunately, such remedies are not limited only to Title IV-D Programs[1] and courts. Attorneys and private individuals/entities are also authorized to send IWOs to employers of non-custodial parents. The only difference is that private parties must attach a copy of the underlying order. Because there are various groups utilizing this important enforcement mechanism, recent changes have been made to the IWO form to ensure overall consistency and clarity.

background

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public 104-193 ("PRWORA") provided that Title IV-D agencies, like the Arizona Division of Child Support Enforcement ("DCSE"), have the ability to administratively execute income withholding orders without advance notice to obligors who have existing obligations towards child support, spousal maintenance, and/or arrears of either. Arizona implemented the PRWORA requirement with the passage of A.R.S. § 25-505.01, which permits the DCSE to issue IWOs, electronically or otherwise, with the same force and effect as a court order. A.R.S. § 25-505.01(O). DCSE has been required to use the federal forms for IWOs since 1997. Now, courts, attorneys and private individuals/entities are also required to use the approved IWO form.

changes to the IWO form

In June 2010, the Federal Register solicited comments from employers, members of the judiciary, and state and federal child support representatives for revisions to the existing IWO form so that the income withholding order process would be improved. For example:

- The shading in various sections in the prior IWO form were removed because vital information often appeared obscured on faxed copies resulting in employers having to contact states to resend the form.
- A note was reworded on page one clarifying that employers receiving IWO requests from someone other than states, courts, or tribal child support agencies should ensure that a copy of the underlying order authorizing the IWO is attached.
- The remittance identifier, which employers should include when sending IWO payments, was moved to the first page to ensure employers/income withholders would use it when submitting payments.
- A checkbox was added to the second page so employers could indicate that the IWO was being returned because it did not direct payments to the State Disbursement Unit ("SDU")[2] or the IWO was irregular on its face.
- The notification of the employment termination section was expanded to include a change in income status.
- The form's instructions now provide guidance outlining the circumstances in which an IWO must be rejected and returned to the sender.
- The newly revised form can also be used for limited income withholding orders by checking the box labeled "One-Time Order/Notice for Lump Sum Payment." A.R.S. § 25-505. This use, however, is limited to the IV-D agency under Arizona law.

implementing changes to the IWO form

In addition to soliciting form revisions, the Federal Register also sought ideas for implementing the new IWO form. States, tribes, courts, and others were directed to begin using the new IWO form as of May 31, 2011. Any states needing additional time to implement use of the new IWO form have been instructed to continue honoring previous forms until May 31, 2012.

For new IWOs after May 31, 2012, if the IWO does not direct payments to the SDU or the document to withhold income was not issued on the approved form, the employer is instructed to reject the IWO and return it to the sender. For IWOs already processed by the employer, if the IWO was not directed to the SDU, the employer should contact the child support enforcement agency in the state that issued the underlying support order to request a revised IWO that directs payment to the SDU.[3] The employer should, however, continue sending payments to the non-SDU address until the state agency or sender issues a revised IWO directing payments to the SDU. Additionally, in instances where the income withholding request is not issued on the approved IWO form, there is insufficient information to process the IWO, or the order has been modified, the employer should contact the sender to request an approved form while continuing to withhold income until the new form has been received.

arizona's implementation of the revised IWO form[4]

To assist with implementation efforts, the current Order of Assignment form prescribed by the Supreme Court and provided on the AJIN Self Service Center website will be replaced with the OMB-approved form in order to be in compliance with federal mandates. A fillable Word version of the form will also be made available for use on the judicial branch's website. The Adminstrative Office of the Courts (AOC) will also be replacing the Order of Assignment form in the next release of the AOC Child Support Calculator so that it will generate the format required by federal regulations. Those courts using income withholding order forms generated by other means need to ensure they begin using the prescribed form no later than May 31, 2012. In the interim, courts are being advised to accept these federal forms the same as they would an order of assignment.

The Maricopa County Superior Court is already preparing to use the new form in its program to issue orders of assignment electronically. Maricopa County Superior Court Presiding Judge Norman Davis added the updated federal form to his Excel Child Support Guidelines calculator to be released on May 31, 2012.

note of caution

The federal form has a place for separate payments on arrears for child support, spousal maintenance, and cash medical support. Here in Arizona, IWOs should ***not*** provide for such separate payments. Any payment made that exceeds the amount of the current monthly obligation is applied to debts and distributed by the Clearinghouse in accordance with the legal algorithm. That algorithm can be found in A.R.S. § 25-510(A) for non IV-D cases, and in A.A.C. Rule R6-7-601 for IV-D cases. Therefore, only one payment on arrears should be established. Debt processing automation in ATLAS does not support separate arrears payments so any additional payments would not be applied to the specified debt. However, the court can and should consider the fact that the obligor is in arrears on multiple debt types in determining the amount of the payment on arrears established. FL

endnotes

1. Tribes operating Title IV-D Programs are also included in this group.
2. Section 454(B) of the Social Security Act ("Act"), 42 U.S.C. § 654, requires state agencies to establish and operate an SDU for the collection and disbursement of payments in IV-D cases and in non IV-D cases in which the support order was initially issued on or after January 1, 1994, and in which the income of non-custodial parent is subject to withholding. Arizona's SDU is called the "Arizona Child Support Payment Clearinghouse."
3. The State may use procedures under § 466(c)(1)(E) of the Act to direct the obligor or other payor to change the payment destination to the SDU so long as notice is provided to the obligor and obligee.
4. Although the revised form has a place for separate payments on arrears for child support, spousal maintenance, and cash medical support, Arizona IWOs should not provide for such separate payments as any payment in excess of the current obligation(s) will be distributed by the Clearinghouse in accordance with the legal algorithm.

about the authors

JANET WISE SELL was admitted to practice in Arizona in 1983 after graduating from the ASU College of Law. She began her career as a law clerk in the U.S. District Court for the District of Arizona, clerking for the Hon. Valdemar A. Cordova and Hon. Paul J. Rosenblatt. She then went into private practice for more than ten years, concentrating her practice in the areas of family and child welfare law. She joined the Child Support Section of the Arizona Attorney General's Office in 1996. After serving for several years as a trial attorney for that section, and ten years as the section's training attorney, she is now Unit Chief Counsel of the Legal Counsel and Complex Litigation Unit.

GORDANA MIKALACKI was admitted to practice in Arizona in 2009 after graduating from the Sandra Day O'Connor College of Law at Arizona State University. Prior to graduating law school, she worked as a legal intern for former Arizona Governor Janet Napolitano and as a judicial extern for the Honorable Donn G. Kessler at the Arizona Court of Appeals. Upon graduating from law school, Gordana served as Judge Kessler's law clerk for two years prior to joining the Arizona Attorney General's Office in 2010. Gordana now works as an Assistant Attorney General in the Child and Family Protection Division/Child Support Section where she appears in Accountability Court and handles constituent matters.

INCOME WITHHOLDING FOR SUPPORT

☐ **ORIGINAL INCOME WITHHOLDING ORDER/NOTICE FOR SUPPORT (IWO)**
☐ **AMENDED IWO**
☐ **ONE-TIME ORDER/NOTICE FOR LUMP SUM PAYMENT**
☐ **TERMINATION of IWO**

Date: _____

☐ Child Support Enforcement (CSE) Agency ☐ Court ☐ Attorney ☐ Private Individual/Entity (Check One)

NOTE: This IWO must be regular on its face. Under certain circumstances you must reject this IWO and return it to the sender (see IWO instructions **http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/publication.htm#forms**).
If you receive this document from someone other than a State or Tribal CSE agency or a Court, a copy of the underlying order must be attached.

State/Tribe/Territory _____
City/County/Dist./Tribe _____
Private Individual/Entity _____

Remittance Identifier (include w/payment) _____
Order Identifier _____
CSE Agency Case Identifier _____

_____
Employer/Income Withholder's Name

_____
Employer/Income Withholder's Address

_____

_____

Employer/Income Withholder's FEIN _____

RE: _____
Employee/Obligor's Name (Last, First, Middle)

_____
Employee/Obligor's Social Security Number

_____
Custodial Party/Obligee's Name (Last, First, Middle)

Child(ren)'s Name(s) (Last, First, Middle)	Child(ren)'s Birth Date(s)

ORDER INFORMATION: This document is based on the support or withholding order from _____ (State/Tribe). You are required by law to deduct these amounts from the employee/obligor's income until further notice.

$ _____ Per _____ current child support
$ _____ Per _____ past-due child support - **Arrears greater than 12 weeks?** ☐ Yes ☐ No
$ _____ Per _____ current cash medical support
$ _____ Per _____ past-due cash medical support
$ _____ Per _____ current spousal support
$ _____ Per _____ past-due spousal support
$ _____ Per _____ other (must specify) _____ .
for a **Total Amount to Withhold** of **$** _____ per _____ .

AMOUNTS TO WITHHOLD: You do not have to vary your pay cycle to be in compliance with the *Order Information*. If your pay cycle does not match the ordered payment cycle, withhold one of the following amounts:

$ _____ per weekly pay period
$ _____ per biweekly pay period (every two weeks)
$ _____ **Lump Sum Payment:** Do not stop any existing IWO unless you receive a termination order.
$ _____ per semimonthly pay period (twice a month)
$ _____ per monthly pay period

REMITTANCE INFORMATION: If the employee/obligor's principal place of employment is _____(State/Tribe), you must begin withholding no later than the first pay period that occurs ____ days after the date of _____ . Send payment within ____ working days of the pay date. If you cannot withhold the full amount of support for any or all orders for this employee/obligor, withhold up to ____% of disposable income for all orders. If the employee/obligor's principal place of employment is not _____ (State/Tribe), obtain withholding limitations, time requirements, and any allowable employer fees at ***http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm*** for the employee/obligor's principal place of employment.

Document Tracking Identifier _____ OMB 0970-0154

For electronic payment requirements and centralized payment collection and disbursement facility information (State Disbursement Unit [SDU]), see http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm.

Include the ***Remittance Identifier*** **with the payment** and if necessary this FIPS code: _____ .

Remit payment to _____ (SDU/Tribal Order Payee)
at _____ (SDU/Tribal Payee Address)

☐ **Return to Sender [Completed by Employer/Income Withholder].** Payment must be directed to an SDU in accordance with 42 USC §666(b)(5) and (b)(6) or Tribal Payee (see Payments to SDU below). If payment is not directed to an SDU/Tribal Payee or this IWO is not regular on its face, you *must* check this box and return the IWO to the sender.

Signature of Judge/Issuing Official (if required by State or Tribal law):
Print Name of Judge/Issuing Official: _____
Title of Judge/Issuing Official: _____
Date of Signature: _____

If the employee/obligor works in a State or for a Tribe that is different from the State or Tribe that issued this order, a copy of this IWO must be provided to the employee/obligor.
☐ If checked, the employer/income withholder must provide a copy of this form to the employee/obligor.

ADDITIONAL INFORMATION FOR EMPLOYERS/INCOME WITHHOLDERS

State-specific contact and withholding information can be found on the Federal Employer Services website located at:
http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm

Priority: Withholding for support has priority over any other legal process under State law against the same income (USC 42 §666(b)(7)). If a Federal tax levy is in effect, please notify the sender.

Combining Payments: When remitting payments to an SDU or Tribal CSE agency, you may combine withheld amounts from more than one employee/obligor's income in a single payment. You must, however, separately identify each employee/obligor's portion of the payment.

Payments To SDU: You must send child support payments payable by income withholding to the appropriate SDU or to a Tribal CSE agency. If this IWO instructs you to send a payment to an entity other than an SDU (e.g., payable to the custodial party, court, or attorney), you must check the box above and return this notice to the sender. Exception: If this IWO was sent by a Court, Attorney, or Private Individual/Entity and the initial order was entered before January 1, 1994 or the order was issued by a Tribal CSE agency, you must follow the "Remit payment to" instructions on this form.

Reporting the Pay Date: You must report the pay date when sending the payment. The pay date is the date on which the amount was withheld from the employee/obligor's wages. You must comply with the law of the State (or Tribal law if applicable) of the employee/obligor's principal place of employment regarding time periods within which you must implement the withholding and forward the support payments.

Multiple IWOs: If there is more than one IWO against this employee/obligor and you are unable to fully honor all IWOs due to Federal, State, or Tribal withholding limits, you must honor all IWOs to the greatest extent possible, giving priority to current support before payment of any past-due support. Follow the State or Tribal law/procedure of the employee/obligor's principal place of employment to determine the appropriate allocation method.

Lump Sum Payments: You may be required to notify a State or Tribal CSE agency of upcoming lump sum payments to this employee/obligor such as bonuses, commissions, or severance pay. Contact the sender to determine if you are required to report and/or withhold lump sum payments.

Liability: If you have any doubts about the validity of this IWO, contact the sender. If you fail to withhold income from the employee/obligor's income as the IWO directs, you are liable for both the accumulated amount you should have withheld and any penalties set by State or Tribal law/procedure.

Anti-discrimination: You are subject to a fine determined under State or Tribal law for discharging an employee/obligor from employment, refusing to employ, or taking disciplinary action against an employee/obligor because of this IWO.

OMB Expiration Date – 05/31/2014. The OMB Expiration Date has no bearing on the termination date of the IWO; it identifies the version of the form currently in use.

Employer's Name: _____ Employer FEIN: _____
Employee/Obligor's Name: _____
CSE Agency Case Identifier: _____ Order Identifier: _____

Withholding Limits: You may not withhold more than the lesser of: 1) the amounts allowed by the Federal Consumer Credit Protection Act (CCPA) (15 U.S.C. 1673(b)); or 2) the amounts allowed by the State or Tribe of the employee/obligor's principal place of employment (see *REMITTANCE INFORMATION*). Disposable income is the net income left after making mandatory deductions such as: State, Federal, local taxes; Social Security taxes; statutory pension contributions; and Medicare taxes. The Federal limit is 50% of the disposable income if the obligor is supporting another family and 60% of the disposable income if the obligor is not supporting another family. However, those limits increase 5% - to 55% and 65% - if the arrears are greater than 12 weeks. If permitted by the State or Tribe, you may deduct a fee for administrative costs. The combined support amount and fee may not exceed the limit indicated in this section.

For Tribal orders, you may not withhold more than the amounts allowed under the law of the issuing Tribe. For Tribal employers/income withholders who receive a State IWO, you may not withhold more than the lesser of the limit set by the law of the jurisdiction in which the employer/income withholder is located or the maximum amount permitted under section 303(d) of the CCPA (15 U.S.C. 1673 (b)).

Depending upon applicable State or Tribal law, you may need to also consider the amounts paid for health care premiums in determining disposable income and applying appropriate withholding limits.

Arrears greater than 12 weeks? If the *Order Information* does not indicate that the arrears are greater than 12 weeks, then the Employer should calculate the CCPA limit using the lower percentage.

Additional Information:

_____

NOTIFICATION OF EMPLOYMENT TERMINATION OR INCOME STATUS: If this employee/obligor never worked for you or you are no longer withholding income for this employee/obligor, an employer must promptly notify the CSE agency and/or the sender by returning this form to the address listed in the Contact Information below:

☐ This person has never worked for this employer nor received periodic income.

☐ This person no longer works for this employer nor receives periodic income.

Please provide the following information for the employee/obligor:

Termination date: _____ Last known phone number: _____

Last known address: _____

_____

Final payment date to SDU/ Tribal Payee: _____ Final payment amount: _____

New employer's name: _____

New employer's address: _____

_____

CONTACT INFORMATION:

To Employer/Income Withholder: If you have any questions, contact _____ (Issuer name) by phone at _____, by fax at _____, by email or website at: _____ .

Send termination/income status notice and other correspondence to:

_____ (Issuer address).

To Employee/Obligor: If the employee/obligor has questions, contact _____ (Issuer name) by phone at _____, by fax at _____, by email or website at _____ .

IMPORTANT: The person completing this form is advised that the information may be shared with the employee/obligor.

INCOME WITHHOLDING FOR SUPPORT - Instructions

The Income Withholding for Support (IWO) is the OMB-approved form used for income withholding in Tribal, intrastate, and interstate cases as well as all child support orders which are initially issued in the State on or after January 1, 1994, and all child support orders which are initially issued (or modified) in the State before January 1, 1994 if arrearages occur. This form is the standard format prescribed by the Secretary in accordance with USC 42 §666(b)(6)(A)(ii). Except as noted, the following information must be included.

Please note:

- For the purpose of this IWO form and these instructions, "State" is defined as a State or Territory.

COMPLETED BY SENDER:

1a. **Original Income Withholding Order/Notice for Support (IWO).** Check the box if this is an original IWO.

1b. **Amended IWO.** Check the box to indicate that this form amends a previous IWO. Any changes to an IWO must be done through an amended IWO.

1c. One-Time Order/Notice For **Lump Sum Payment.** Check the box when this IWO is to attach a one-time collection of a lump sum payment. When this box is checked, enter the amount in field 14, Lump Sum Payment, in the *Amounts to Withhold* section. Additional IWOs must be issued to collect subsequent lump sum payments.

1d. **Termination of IWO.** Check the box to stop income withholding on an IWO. Complete all applicable identifying information to aid the employer/income withholder in terminating the correct IWO.

1e. **Date.** Date this form is completed and/or signed.

1f. **Child Support Enforcement (CSE) Agency, Court, Attorney, Private Individual/Entity (Check One).** Check the appropriate box to indicate which entity is sending the IWO. If this IWO is **not** completed by a State or Tribal CSE agency, the sender should contact the CSE agency (see http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm) to determine if the CSE agency needs a copy of this form to facilitate payment processing.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

This IWO must be regular on its face. Under the following circumstances, the IWO must be rejected and returned to sender:

- IWO instructs the employer/income withholder to send a payment to an entity other than a State Disbursement Unit (e.g., payable to the custodial party, court, or attorney). Each State is required to operate a State Disbursement Unit (SDU), which is a centralized facility for collection and disbursement of child support payments. Exception: If this IWO is issued by a Court, Attorney, or Private Individual/Entity and the initial child support order was entered before January 1, 1994 or the order was issued by a Tribal CSE agency, the employer/income withholder must follow the payment instructions on the form.
- Form does not contain all information necessary for the employer to comply with the withholding.
- Form is altered or contains invalid information.
- Amount to withhold is not a dollar amount.
- Sender has not used the OMB-approved form for the IWO (effective May 31, 2012).
- A copy of the underlying order is required and not included.

If you receive this document from an Attorney or Private Individual/Entity, a copy of the underlying order containing a provision authorizing income withholding must be attached.

COMPLETED BY SENDER:

1g. **State/Tribe/Territory**. Name of State or Tribe sending this form. This must be a governmental entity of the State or a Tribal organization authorized by a Tribal government to operate a CSE program. If you are a Tribe submitting this form on behalf of another Tribe, complete line 1i.

1h. **Remittance Identifier (include w/payment).** Identifier that employers must include when sending payments for this IWO. The remittance identifier is entered as the case identifier on the Electronic Funds Transfer/Electronic Data Interchange (EFT/EDI) record.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

The employer/income withholder must use the Remittance Identifier when remitting payments so the SDU or Tribe can identify and apply the payment correctly. The remittance identifier is entered as the case identifier on the EFT/EDI record.

COMPLETED BY SENDER:

1i. **City/County/Dist./Tribe.** Name of the city, county or district sending this form. This must be a governmental entity of the State or the name of the Tribe authorized by a Tribal government to operate a CSE program for which this form is being sent. (A Tribe should leave this field blank unless submitting this form on behalf of another Tribe.)

1j. **Order Identifier.** Unique identifier that is associated with a specific child support obligation. It could be a court case number, docket number, or other identifier designated by the sender.

1k. **Private Individual/Entity.** Name of the private individual/entity or non-IV-D Tribal CSE organization sending this form.

1l. **CSE Agency Case Identifier.** Unique identifier assigned to a State or Tribal CSE case. In a State CSE case, this is the identifier that is reported to the Federal Case Registry (FCR). For Tribes this would be either the FCR identifier or other applicable identifier.

Fields 2 and 3 refer to the employee/obligor's employer/income withholder and specific case information.

2a. **Employer/Income Withholder's Name.** Name of employer or income withholder.

2b. **Employer/Income Withholder's Address.** Employer/income withholder's mailing address including street/PO box, city, state and zip code. (This may differ from the employee/obligor's work site.) If the employer/income withholder is a federal government agency, the IWO should be sent to the address listed under Federal Agencies – Addresses for Income Withholding Purposes at http://www.acf.hhs.gov/programs/cse/newhire/contacts/iw_fedcontacts.htm.

2c. **Employer/Income Withholder's FEIN.** Employer/income withholder's nine-digit Federal Employer Identification Number (FEIN) (if available).

3a. **Employee/Obligor's Name.** Employee/obligor's last name, first name, middle name.

3b. **Employee/Obligor's Social Security Number.** Employee/obligor's Social Security number or other taxpayer identification number.

3c. **Custodial Party/Obligee's Name.** Custodial party/obligee's last name, first name, middle name.

3d. **Child(ren)'s Name(s).** Child(ren)'s last name(s), first name(s), middle name(s). (Note: If there are more than six children for this IWO, list additional children's names and birth dates in field 33 - Additional Information).

3e. **Child(ren)'s Birth Date(s).** Date of birth for each child named.

3f. **Blank box.** Space for court stamps, bar codes, or other information.

ORDER INFORMATION - Fields 5 through 12 identify the dollar amount to withhold for a specific kind of support (taken directly from the support order) for a specific time period.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

Payments are forwarded to the SDU within each State, unless the order was issued by a Tribal CSE agency. If the order was issued by a Tribal CSE agency, the employer/income withholder must follow the remittance instructions on the form.

COMPLETED BY SENDER:

4. **State/Tribe.** Name of the State or Tribe that issued the order.

5a-b. **Current Child Support.** Dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

6a-b. **Past-due Child Support.** Dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

6c. **Arrears Greater Than 12 Weeks?** The appropriate box (Yes/No) must be checked indicating whether arrears are greater than 12 weeks so the employer/income withholder can determine the withholding limit.

7a-b. **Current Cash Medical Support.** Dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

8a-b. **Past-due Cash Medical Support.** Dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

9a-b. **Current Spousal Support.** (Alimony) dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

10a-b. **Past-due Spousal Support.** (Alimony) dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order.

11a-c. **Other.** Miscellaneous obligations dollar amount to be withheld **per** the time period (e.g., week, month) specified in the underlying order. **Must specify.** Description of the obligation.

12a-b. **Total Amount to Withhold.** The total amount of the deductions **per** the corresponding time period. Fields 5a, 6a, 7a, 8a, 9a, 10a, and 11a should total the amount in 12a.

AMOUNTS TO WITHHOLD - Fields 13a through 13d specify the dollar amount to be withheld for this IWO if the employer/income withholder's pay cycle does not correspond with field 12b.

13a. **Per Weekly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid weekly.

13b. **Per Semimonthly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid twice a month.

13c. **Per Biweekly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid every two weeks.

13d. **Per Monthly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid once a month.

14. **Lump Sum Payment.** Dollar amount to be withheld when the IWO is used to attach a lump sum payment. This field should be used when field 1c is checked.

REMITTANCE INFORMATION

15. **State/Tribe.** Name of the State or Tribe sending this document.

16. **Days.** Number of days after the effective date noted in field 17 in which withholding must begin according to the State or Tribal laws/procedures for the employee/obligor's principal place of employment.

17. **Date.** Effective date of this IWO.

18. **Working Days.** Number of working days within which an employer/income withholder must remit amounts withheld pursuant to the State or Tribal laws/procedures of the principal place of employment.

19. **% of Disposable Income.** The percentage of disposable income that may be withheld from the employee/obligor's paycheck.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

For State orders, the employer/income withholder may not withhold more than the lesser of: 1) the amounts allowed by the Federal Consumer Credit Protection Act (15 U.S.C. § 1673(b)); or 2) the amounts allowed by the State of the employee/obligor's principal place of employment.

For Tribal orders, the employer/income withholder may not withhold more than the amounts allowed under the law of the issuing Tribe. For Tribal employer/income withholders who receive a State order, the employer/income withholder may not withhold more than the limit set by the law of the jurisdiction in which the employer/income withholder is located or the maximum amount permitted under section 303(d) of the Federal Consumer Credit Protection Act (15 U.S.C. §1673 (b)).

A federal government agency may withhold from a variety of incomes and forms of payment, including voluntary separation incentive payments (buy-out payments), incentive pay, and cash awards. For a more complete list, see 5 Code of Federal Regulations (CFR) 581.103.

COMPLETED BY SENDER:

20. **State/Tribe.** Name of the State or Tribe sending this document.

21. **Document Tracking Identifier.** Optional unique identifier for this form assigned by the sender.

22. **FIPS Code.** Federal Information Processing Standards (FIPS) code.

23. **SDU/Tribal Order Payee.** Name of SDU (or payee specified in the underlying Tribal support order) to which payments are required to be sent. Federal law requires payments made by IWO to be sent to the SDU except for payments in which the initial child support order was entered before January 1, 1994 or payments in Tribal CSE orders.

24. **SDU/Tribal Payee Address.** Address of the SDU (or payee specified in the underlying Tribal support order) to which payments are required to be sent. Federal law requires payments made by IWO to be sent to the SDU except for payments in which the initial child support order was entered before January 1, 1994 or payments in Tribal CSE orders.

COMPLETED BY EMPLOYER/INCOME WITHHOLDER:

25. **Return to Sender Checkbox.** The employer/income withholder should check this box and return the IWO to the sender if this IWO is not payable to an SDU or Tribal Payee or this IWO is not regular on its face. Federal law requires payments made by IWO to be sent to the SDU except for payments in which the initial child support order was entered before January 1, 1994 or payments in Tribal CSE orders.

COMPLETED BY SENDER:

26. **Signature of Judge/Issuing Official.** Signature (if required by State or Tribal law) of the official authorizing this IWO.

27. **Print Name of Judge/Issuing Official.** Name of the official authorizing this IWO.

28. **Title of Judge/Issuing Official.** Title of the official authorizing this IWO.

29. **Date of Signature.** Optional date the judge/issuing official signs this IWO.

30. **Copy of IWO checkbox.** If checked, the employer/income withholder is required to provide a copy of the IWO to the employee/obligor.

ADDITIONAL INFORMATION FOR EMPLOYERS/INCOME WITHHOLDERS

The following fields refer to Federal, State, or Tribal laws that apply to issuing an IWO to an employer/income withholder. State- or Tribal-specific information may be included only in the fields below.

COMPLETED BY SENDER:

31. **Liability.** Additional information on the penalty and/or citation of the penalty for an employer/income withholder who fails to comply with the IWO. The State or Tribal law/procedures of the employee/obligor's principal place of employment govern the penalty.

32. **Anti-discrimination**. Additional information on the penalty and/or citation of the penalty for an employer/income withholder who discharges, refuses to employ, or disciplines an employee/obligor as a result of the IWO. The State or Tribal law/procedures of the employee/obligor's principal place of employment govern the penalty.

33. **Additional Information**. Any additional information, e.g., fees the employer/income withholder may charge the obligor for income withholding or children's names and DOBs if there are more than six children on this IWO. Additional information must be consistent with the requirements of the form and the instructions.

COMPLETED BY EMPLOYER/INCOME WITHHOLDER:

NOTIFICATION OF EMPLOYMENT TERMINATION OR INCOME STATUS

The employer must complete this section when the employee/obligor's employment is terminated, income withholding ceases, or if the employee/obligor has never worked for the employer.

Please Note: Employer's Name, FEIN, Employee/Obligor's Name, CSE Agency Case Identifier, and Order Identifier must appear in the header on the page with the Notification of Employment Termination or Income Status.

34a-b. **Employment/Income Status Checkbox.** Check the employment/income status of the employee/obligor.

35. **Termination Date.** If applicable, date employee/obligor was terminated.

36. **Last Known Phone Number.** Last known (home/cell/other) phone number of the employee/obligor.

37. **Last Known Address.** Last known home/mailing address of the employee/obligor.

38. **Final Payment Date.** Date employer sent final payment to SDU/Tribal payee.

39. **Final Payment Amount.** Amount of final payment sent to SDU/Tribal payee.

40. **New Employer's Name.** Name of employee's/obligor's new employer (if known).

41. **New Employer's Address.** Address of employee's/obligor's new employer (if known).

COMPLETED BY SENDER:

CONTACT INFORMATION

42. **Issuer Name (Employer/Income Withholder Contact).** Name of the contact person that the employer/income withholder can call for information regarding this IWO.

43. **Issuer Phone Number.** Phone number of the contact person.

44. **Issuer Fax Number.** Fax number of the contact person.

45. **Issuer Email/Website.** Email or website of the contact person.

46. **Termination/Income Status and Correspondence Address.** Address to which the employer should return the Employment Termination or Income Status notice. It is also the address that the employer should use to correspond with the issuing entity.

47. **Issuer Name (Employee/Obligor Contact).** Name of the contact person that the employee/obligor can call for information.

48. **Issuer Phone Number.** Phone number of the contact person.

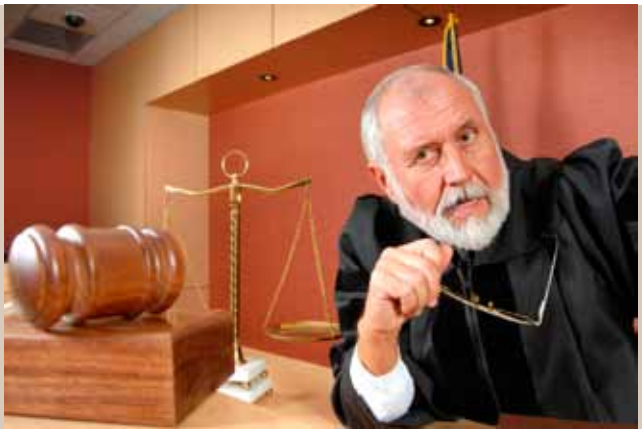
49. **Issuer Fax Number.** Fax number of the contact person.

50. **Issuer Email/Website.** Email or website of the contact person.

The Paperwork Reduction Act of 1995
This information collection and associated responses are conducted in accordance with 45 CFR 303.100 of the Child Support Enforcement Program. This form is designed to provide uniformity and standardization. Public reporting for this collection of information is estimated to average two to five minutes per response. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

FROM THE BENCH

The Honorable Daniel Kiley



"Judge, my client requests an award of several thousand dollars."

"What's the basis for your client's request, counsel?"

"Judge, that's none of your business."

FEE APPLICATIONS, *CHINA DOLL*, AND THE ATTORNEY-CLIENT PRIVILEGE

Would any lawyer expect to convince a judge with an argument like that? The answer, surprisingly, is yes. In fact, lawyers make arguments like that all the time – when they submit redacted billing records in support of attorney's fee applications.

A party requesting an award of attorney's fees bears the burden of establishing entitlement to such an award. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990). To establish entitlement to a fee award, a fee applicant must submit an affidavit identifying, among other things, "the type of legal services provided," supported by billing records "in sufficient detail to enable the court to assess the reasonableness of the time incurred." *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). *See also In re Guardianship of Sleeth*, 226 Ariz. 171, 178, 244 P.3d 1169, 1176 (App. 2010) (fee applicant bears the burden of establishing reasonableness of requested fees; each time entry on applicant's billing statements must provide sufficient detail to support an award for that entry). Fee requests must be denied if the supporting time entries indicate that an attorney's efforts were duplicative or unnecessary, or that the attorney spent an excessive amount of time performing the task in question. *China Doll*, 138 Ariz. at 188, 673 P.2d at 932; *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40 (1983.

Often, Family Court litigants seeking fee awards pursuant to A.R.S. § 25-324 will attach, to their fee applications, billing records that contain entries such as "Conference with client re: [**redacted**]" and "draft email to client re: [**redacted**]." Billing records that are redacted in this manner do not satisfy the requirements of *China Doll* because they give the judge no means of assessing the reasonableness of the time incurred. *See, e.g., In re Las Vegas Monorail Co.* 458 B.R. 553, 558 (Bkrtcy.D.Nev. 2011) ("it is impossible to determine whether a billing entry is reasonable or necessary" when "the description is redacted") (citation and internal quotations omitted). After all, how can a judge make a finding that what you did was reasonable, if you won't tell the judge what you did?

But isn't redacting time entries necessary to avoid waiving the attorney-client privilege? Not necessarily. Although

I found no reported decision in Arizona directly on point, there is support in case law from other jurisdictions for the proposition that the identification on billing records of the general nature or purpose of the work performed does not effect a waiver of the attorney-client privilege. *See Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) ("Our decisions have recognized that the identity of the client, the amount of the fee…and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege."); *Schein v. Northern Rio Arriba Elec. Co-op., Inc.* 122 N.M. 800, 805, 932 P.2d 490, 495 (1997) ("Inquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information."). Careful practitioners should have no trouble drafting time entries that identify the general nature of the work performed without revealing sensitive client information or their own mental impressions, opinions, or legal theories. Such billing statements, when filed in support of a fee application, would satisfy the requirements of *China Doll* without effecting a waiver of the attorney-client privilege. Alternatively, if an attorney believes that he or she cannot file a fee application that simultaneously satisfies the requirements of *China Doll* and preserves the attorney-client privilege, the attorney should raise the issue with the judge, who might, for example, order that unredacted billing records be submitted for *in camera review*. Simply submitting redacted time entries, however, does not enable the judge to make the requisite determination that the time incurred was reasonable, and therefore does not satisfy the requirements of *China Doll*. FL

about the author

DANIEL J. KILEY has been a superior court judge in Maricopa County since June 2010, and is currently assigned to Family Court. Previously, he was a prosecutor with the Arizona Attorney General's Office for nine years and then a civil litigator with the Phoenix law firm now known as Sherman & Howard, L.L.C., for thirteen years.

to merge or not to merge?

THAT is the QUESTION with SEPARATION AGREEMENTS and DIVORCE DECREES

by Stanley David Murray

Quite often, parties to a dissolution of marriage proceeding will enter into a separation agreement to settle and determine their respective community property rights, children's issues and support obligations rather than submit determination of those issues for final resolution by trial before a Family Law judge. In fact, Arizona law encourages such agreements and provides that in order "[T]o promote amicable settlement of disputes between parties to a marriage attendant on their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody and parenting time of their children". A.R.S. §25-317(A). Such agreements are binding upon parties, however, the trial court is not bound by any such agreement and can, if it believes the agreement to be unfair or inequitable, unreasonable, or not in the child's best interests, reject or modify the agreement. A.R.S. §25-317(B) and (C), *Cone v. Righetti*, 73 Ariz. 271, 240 P.2d 541(1952), *Sharp v. Sharp*, 179 Ariz. 205, 877 P.2d 304 (App. 1994), and *Breitbart-Napp v. Napp*, 216 Ariz. 74, 163 P.3d 1024 (App. 2007) (If the court does not approve the parties' written separation agreement, it is not binding on the court and becomes unenforceable by the parties, whether or not it was previously binding upon them).

Once the parties have reached a property settlement agreement, and the Family Law court has approved the agreement by finding it to be fair and equitable, and/or in the best interests of the parties' minor children, the next step in the process is to make the agreement enforceable either by incorporation or merger into the decree of dissolution. *See* A.R.S. §25-317(D). The terms "merger" and "incorporation" are not synonymous and can have different results in terms of subsequent modification and enforcement. *Young v. Burkholder*, 142 Ariz. 415, 690 P.2d 134 (App. 1984), and *LaPrade v. LaPrade*, 189 Ariz. 243, 941 P.2d 1268 (1997).

The purpose of incorporation of the agreement by the trial court into the decree is only to identify the agreement so as to render its validity res judicata in any subsequent action based on it. *Ruhsam v. Ruhsam* , 110 Ariz. 426, 520 P.2d 298 (1974), *Young*, cited above, and *LaPrade*, cited above. When merger occurs, the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by the decree, and enforceable as such. *Glassford v. Glassford*, 76 Ariz. 220, 226, 262 P.2d 382, 386 (1953) and *LaPrade*, cited above. When a separation agreement is incorporated by reference in the divorce decree, the agreement retains its independent contractual status and is subject to rights and limitations of contract law. *Solomon v. Findley*, 167 Ariz. 409, 808 P.2d 294 (1991) and *LaPrade*, cited above.

Whether merger of a separation agreement and divorce decree occurs depends upon intention of parties and court.

Whether merger of a separation agreement and divorce decree occurs depends upon intention of parties and court. *LaPrade v. LaPrade*, 189 Ariz. 243, 941 P.2d 1268 (1997). That intention is usually discerned from the language used in the decree and property settlement agreement. *McNelis v. Bruce*, 90 Ariz. 261, 367 P.2d 625 (1961). Case law has held that a property settlement merges with a decree of dissolution unless the settlement agreement expressly provides otherwise. *LaPrade*, 189 Ariz. 243, 248, 941 P.2d 1268, 1273), *Appels-Meehan v. Appels*, 167 Ariz. 182, 184, 805 P.2d 415, 417 (App.1991) and *Young*, 142 Ariz. at 419, 690 P.2d at 138.

In a number of cases wherein the separation agreement has been incorporated, but not merged, into the decree of dissolution, the Arizona courts have held that a party may bring a separate action for enforcement of the contractual obligations that cannot be enforced in the dissolution of marriage proceedings. *See Savage v. Thompson*, 22 Ariz. App. 59, 523 P.2d 110 (1974), *Steiner v. Steiner*, 179 Ariz. 606, 880 P.2d 1152 (App. 1994), and *Solomon v. Findley*, 167 Ariz. 409, 808 P.2d 294 (1991). If the separation agreement or property settlement agreement does not merge into the divorce decree it may be enforced by an independent action. *Marshick v. Marshick*, 25 Ariz.App. 588, 545 P.2d 436 (App. 1976) and *LaPrade v. LaPrade*, 189 Ariz. 243, 941 P.2d 1268 (1997).

An issue then arises in terms of the Family Law court's jurisdiction to enforce an agreement that is incorporated, but not merged, into the decree of dissolution because, as noted above, non-merged agreements retain their independent contractual status and are subject to the rights and limitations of contract law. After all, a Family Law court only has subject matter jurisdiction as is granted to it by statute and may not exceed its jurisdiction even when exercising its equitable powers. *Weaver v. Weaver*, 131 Ariz. 586, 643 P.2d 499 (1982) (trial court has no jurisdiction to grant a money judgment against one spouse for damage to the separate property of the other spouse in a dissolution proceeding), *Fenn v. Fenn*, 174 Ariz. 84, 847 P.2d 129 (App. 1993) ("Every power that the superior court exercises in a dissolution proceeding must find its source in the supporting statutory framework."), *Andrews v. Andrews*, 126 Ariz. 55, 612 P.2d 511 (App. 1980) (no statutory authority giving the trial court jurisdiction to enter judgment for a civil contract claim asserted as an affirmative defense in a post dissolution child support enforcement proceeding), *Danielson v. Evans*, 201 Ariz. 401, 36 P.3d 749 (App. 2001) (trial court lacked jurisdiction to hold party in contempt for his failure to make past due or future property settlement payments), *Savage v. Thompson*, 22 Ariz. App. 59, 523 P.2d 110 (1974) (trial court has no continuing jurisdiction in a domestic relations action to enforce a contract requiring payments of support for a minor child if the sole basis for invoking such jurisdiction is a claim for support payments accruing after the child reaches age of majority), and *Thomas v. Thomas*, 220 Ariz. 290, 205 P.3d 1137 (App. 2009) (the trial court, hearing a post-decree motion in the dissolution litigation, did not have the statutory authority and thus lacked jurisdiction to order Wife to convey a one-half interest in the condo the parties had intentionally omitted from Decree).

Based upon these authorities, it would appear that a Family Law judge does not have jurisdiction in a post-decree proceeding to enforce a non-merged separation agreement since the enforcement issue would be subject to the rights and defenses in contract law, rather than the contempt and other enforcement remedies available under the Family Law statutes. Instead, a party seeking such enforcement would have to initiate a separate civil lawsuit on that contract claim.

However, the issue of whether a Family Law judge has jurisdiction to enforce or modify the terms and obligations in a non-merged separation agreement has been answered, albeit indirectly, in the case of *Marvin Johnson, P.C. v. Myers*, 184 Ariz.

98, 907 P.2d 67 (1995). This case held that the Superior Court of Arizona is a single unified trial court of general jurisdiction, such that a probate court judge had the "jurisdiction" to hear a tort claim related to that probate proceeding. That Court noted that even though the Maricopa County Superior Court has different, administrative departments, such as a probate department, domestic relations department, civil department, and so on, such departmentalization does not affect the general jurisdiction of the superior court. 184 Ariz., at 102, 907 P.2d, at 71. A judge of the Maricopa County Superior Court is no different from a single judge in a small county who hears all types of cases. *Id.*

In *Roden v. Roden*, 190 Ariz. 407, 949 P.2d 67 (App. 1997), that Court held that the domestic relations court had jurisdiction in dissolution action to consider a wife's claim that an oral contract entered into before marriage, in which parties agreed to pool income and share assets, entitled her to a one-half interest in corporation formed by husband before marriage. The Court rejected husband's argument that the Family Law court was not empowered by any statute to decide a contract action that would impact his separate property interests by applying the *Marvin Johnson* rule. The *Roden* case would therefore seem to support the argument that a Family Law judge can hear and determine the issue of enforcement of a non-merged settlement agreement in a post-decree proceeding for the simple reason that regardless of judicial assignment, a Superior Court judge has the authority to decide any matter covered under the general jurisdiction of the Superior Court. *See Marvin Johnson*, cited above.

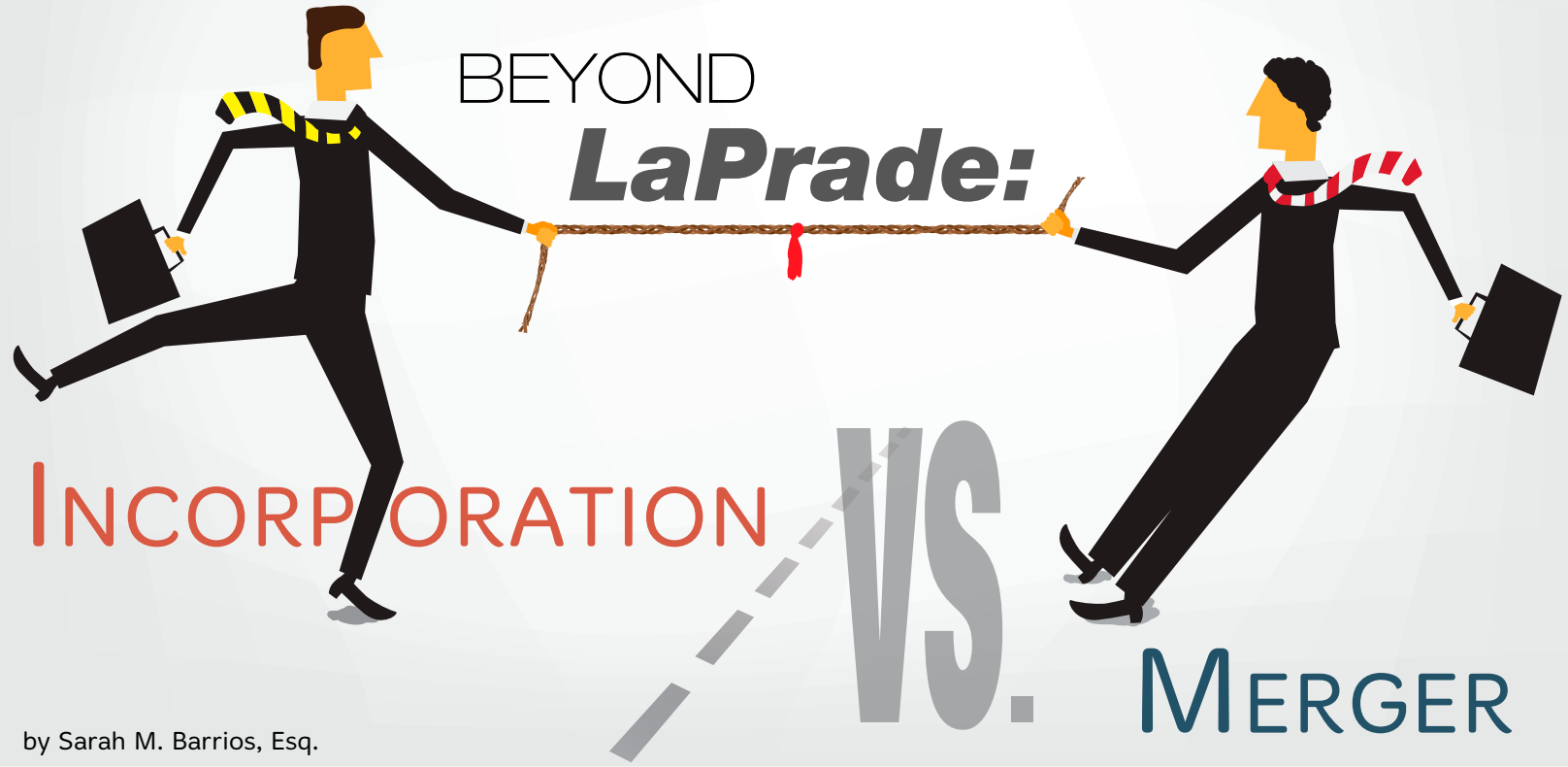
The distinction between merged and non-merged agreements was deemed irrelevant in *Breitbart-Napp v. Napp*, 216 Ariz. 74, 163 P.3d 1024 (App. 2007) in regard to the application of Rule 60(c), Arizona Rules of Civil Procedure (now Rule 85(C), Arizona Rules of Family Law Procedure), to set aside a property settlement provision in a non-merged agreement. Husband had argued that since the agreement had not been merged, the agreement was binding upon them and the property disposition could not be challenged under A.R.S. §25-327 as that statute only applied to divorce decrees. That Court noted that regardless of whether the agreement merged or not, it was still subject to the trial court's approval, and since it was the court's approval that was being re-opened, the statute applied and the property disposition was subject to rule 60(c) relief.

To date, there are no published opinions in Arizona on the specific issue of whether a Family Law judge has jurisdiction to enforce non-merged separation agreement in the post-decree enforcement proceedings. However, an unpublished Memorandum Decision, *Rayner v. Rayner* (Div. I, filed March 17, 2009), indicates an inclination by the appellate court that a request for enforcement of a property settlement agreement incorporated, but not merged, into the decree of dissolution could be heard by the Family Law judge because of the holding in *Marvin Johnson*. Specifically, that Court disagreed with the argument that the *LaPrade* and *Solomon* cases, cited above, require a separate civil action to be filed to enforce a non-merged separation agreement and instead noted that a separate civil action was not the exclusive method for enforcement. Relying on *Marvin Johnson*, the appellate court concluded that the trial judge assigned to the Family Law court had jurisdiction to hear the contract claim.

In conclusion, the attorney drafting the separation agreement and/or decree of dissolution will want to note the distinction to be made between incorporation and merger of that agreement with the decree of dissolution. If the subject matter of the agreement includes the payment of child support beyond the age of majority, for example an agreement to equally share the child's college expenses, then merger into the decree will prevent the enforcement of that obligation because the agreement will no longer exist and cannot be enforced as a contract. *See e.g. Savage v. Thompson*, 22 Ariz. App. 59, 523 P.2d 110 (1974), *Marshick v. Marshick*, 25 Ariz.App. 588, 545 P.2d 436 (App. 1976), *Steiner v. Steiner*, 179 Ariz. 606, 880 P.2d 1152 (App. 1994), and *Solomon v. Findley*, 167 Ariz. 409, 808 P.2d 294 (1991). In that instance, assuming the agreement has been incorporated but not merged, a party can seek enforcement in a post-decree Family Court proceeding because a Family Law judge does have jurisdiction to hear a post-decree enforcement matter involving a non-merged separation agreement by applying the rules of contract law in rendering its decision. A party is not required to "go down the hall" and file the claim for enforcement of the contract in a separate civil lawsuit because the Superior Court judge has general subject matter jurisdiction over the contract claim even though presently assigned to the Family Law department of that Court. *See Marvin Johnson*, cited above. FL

about the author

STANLEY DAVID MURRAY graduated from the University of Arizona College of Law in May of 1981 and has been a member of the State Bar of Arizona, United States District Court and the Ninth Circuit Court of Appeals since 1982. His law practice has primarily involved civil litigation and appeals, mostly in personal injury and family law. From 1987 to 2006, he also taught legal research to paralegal students and lectured extensively on legal research using the internet to attorneys throughout the United States. Most recently, he presented a seminar on Family Law post-trial procedures and appeals to the State Bar of Arizona CLE by the Sea program in San Diego, California. He continues to practice appellate law as a sole practitioner and on a consulting basis with other attorneys, using the latest internet and legal technologies. He is the author of *Time Limitations Applicable to Civil Actions and Procedures in the Arizona Superior Courts*, published by the State Bar of Arizona (2004-2010).



BEYOND LaPrade: INCORPORATION VS. MERGER

by Sarah M. Barrios, Esq.

Arizona law favors settlement, and sometimes parties to a marital dissolution (or other matters) favor them as well. Settlement agreements are often memorialized in a Property Settlement Agreement ("PSA"), Joint Custody Agreement ("JCA"), or other contract. But when a dispute arises with respect to the contract, an interesting question arises: how should the terms of the contract be enforced – by civil action or through an enforcement action in the family court? The answer to that question requires the analysis of what *kind* of incorporation applies to the contract, and looking solely to the language of the related agreement and decree is no guarantee of clarity.[1] To determine whether an action to enforce the terms of a decree is properly before the family court, one must read *beyond* the seminal case on the issue of incorporation versus merger, *LaPrade v. LaPrade*, 189 Ariz. 243, 941 P.2d 1268 (1997)("*Laprade*").

In *LaPrade*, the parties' decree incorporated a court-approved PSA ordering the parties to comply with the agreements contained therein.[2] The issue arose as to whether subsequent stipulations modifying the PSA's spousal maintenance provisions were valid.[3] Thus, the *LaPrade* court analyzed whether the PSA was incorporated for identification purposes or if the incorporation merged the PSA into the decree.[4] That analysis properly began with the language of the agreement and the decree, both which contained "elements of merger and non-merger."[5] This was the reason for the Arizona Supreme Court's inquiry into the parties' and the trial court's intention: "***when*** *the written language of the agreement and the decree itself does not resolve the issue* [of merger] as a matter of law, *the intent of the parties and the court* considered in light of the agreement and the surrounding facts and circumstances *must be resolved*."[6] Reconciliation of *Young* and *McNelis* with *LaPrade* supports the position that elements of merger and non-merger must be present in the agreement and decree before any intentions are relevant to a determination.[7]

In *LaPrade*, the Arizona Supreme Court determined that because language in the PSA and the decree ordered the parties to comply, merger was *indicated*.[8] Those seeking enforcement in the family court (as opposed to a separate civil action outside of the family courts) may argue that the agreement at issue is merged based on this determination. But the *LaPrade* opinion provides an often overlooked caveat which clarifies that: "'merger' is not dispositively determined by whether the court ordered the parties to comply."[9] Thus, a true determination of whether an agreement is merged or incorporated should begin with the following questions: (1) are there elements of merger and non-merger present such that the intentions of the parties

and the trial court are relevant? and (2) if so, is merger indicated by factors in addition to an order that the parties comply with the agreement?

Once the question of incorporation versus merger is resolved, the related inquiry of jurisdiction can be addressed. The Arizona Supreme Court has held that where provisions of an agreement or the agreement itself was not merged, retaining its status as a separately enforceable contract, "the parties are left to a suit in contract"[10] and "rights arising out of the [ ] agreement can only be enforced by bringing a separate action on the contract, by obtaining a judgment thereon and then enforcing it as a civil judgment."[11] Based on these holdings and the foregoing authorities, an enforcement action on an agreement incorporated by reference (i.e., for identification only) is not properly presented before the family court. But there exist differing opinions as to that conclusion. Accordingly, until authority beyond *LaPrade* provides clarity, it may be prudent to consider including in settlement agreements express statements as to the parties' intention regarding merger, and stating where the parties expect to enforce the agreement if such an action is necessary. FL

endnotes

1. There are two kinds of incorporation under Arizona law, "incorporation which merges the agreement into the decree and incorporation which merely identifies the agreement to give it res judicata affect and does not merge the agreement into the decree." *LaPrade v. LaPrade*, 189 Ariz. 243, 247, 941 P.2d 1268, 1272 (1997)("*LaPrade*").
2. *Laprade* at 244. The Court found that the PSA was not unfair. *Id.* Under A.R.S. § 25-317, where an agreement is not specifically merged into and becomes part of the decree, it must be identified or "incorporated by reference."
3. *LaPrade* at 246, 1271. The modifications would not be valid if the PSA was merged into, and became part of, the decree because merger mean the PSA no longer existed as an independent contract. *Id.* at 246-47, 1270-71). Rather, a substantial and continuing change of circumstances would have to be present in order for the Court to modify the decree if the PSA was merged unless some other circumstance justified reopening the judgment. *Id.* at 246, 1271; *see also* A.R.S. § 25-327.
4. *Id.* at 247, 1272. Where an agreement is incorporated merely for identification purposes, "the agreement retains its independent contractual status and is subject to the rights and limitations of contract law." *Id.* (citing *Helber v. Frazelle*, 118 Ariz. 217, 219, 575 P.2d 1243, 1245 (1978) (stating that where merger has not occurred, "rights arising out of the separation agreement can only be enforced by bringing a separate action on the contract, by obtaining a judgment thereon and then enforcing it as any other civil judgment"), *overruled on other grounds*, *Solomon v. Findley*, 167 Ariz. 409, 808 P.2d 294 (1991)); *see also Savage v. Thompson*, 22 Ariz. App. 59, 62, 523 P.2d 110, 113 (1974).
5. *Id.* at 249, 1274.
6. *Id.* (citing *Young v. Burkholder*, 142 Ariz. 415, 420, 690 P.2d 134, 139 (App. 1984)).
7. *Compare Young, supra* note [6], with *McNelis v. Bruce*, 90 Ariz. 261, 271-72, 367 P.2d 625, 632 (1961)("The question as to what extent, if any, a merger has occurred, when a separation agreement has been presented to a court in a divorce action, arises in various situations. Thus, *it may be necessary* to determine whether or not contempt will lie to enforce the agreement, whether or not other judgment remedies, such as execution or a suit on the judgment, are available, whether or not an action may still be maintained on the agreement itself, and whether or not there is an order of the court that may be modified . . .")(Emphasis added).
8. *LaPrade* at 248, 1273.
9. *Id.*
10. *Solomon v. Findley*, 167 Ariz. 409, 412, 808 P.2d 294, 297 (1991)(*en banc*) (addressing the validity of a separate claim for breach of contract).
11. *Helber v. Frazelle*, 118 Ariz. 217, 219, 575 P.2d 1243, 1245 (1978), *overruled on other grounds by Solomon v. Findley, supra* note [10]; *Accord Savage v. Thompson*, 22 Ariz. App. 59, 62, 523 P.2d 110, 112 (App. 1974).

about the author

SARAH M. BARRIOS practices primarily in domestic relations and has a strong interest in educational law and policy. An alum of ASU's College of Law, Sarah set the all-time record for pro bono service (over 1,500 hours), receiving the W.P. Carey/Armstrong Prize for Achievement in Public Service before graduating in 2010 and joining the firm Mariscal, Weeks, McIntyre, & Friedlander, PA. Sarah is an active member of Los Abogados, volunteers for the LAWS program, and is Adjunct Faculty at the Barrett Honors College, where she teaches "Legal Studies in Advocacy." Sarah is blessed to have loving family and friends throughout the Valley and the State, and was honored to be nominated for the 2012 *Southwest Super Lawyers* Rising Star award.

Military Divorce:

Returning Warriors and "The Home Front"

by Mark E. Sullivan

RETURN OF THE WARRIORS

Empty outposts overseas mean full billets and bedrooms back at home. In view of the "new phase of relations" between the U.S. and Iraq, using Vice-President Joe Biden's language, many service members (SMs) are returning home. The redeployment of military personnel back to their stateside assignments and their homes is the result of significant drawdowns in Iraq and Afghanistan. SMs who are returning from the Middle East are not only from the active-duty forces (Army, Navy, Air Force and Marines); they are also from the Reserve Component, namely, the National Guard and the Reserves. Thus the homecoming impact will be felt nationwide, not just in communities near military bases. While reuniting with one's family will be a joyous experience for SMs, it may create significant stresses for some. And these stresses may lead to legal consequences.

STRESSES AND RELATIONSHIPS

Stresses may arise due to one party's having been solely in charge of the home for the entire deployment, without any help and with heavy responsibilities for running the home, managing the budget, taking care of children and – quite often – holding down a job as well. Having been away for a year in most cases, the returning SM has his or her own issues. These SMs need time to decompress and to adjust to new responsibilities, routines and duties – both at home and at work.

Sometimes there is an "interim relationship" which was formed while one spouse was gone. If this is so, it will have to be dissolved so that the marriage may continue. When this doesn't happen, then the marriage will be in trouble and a separation is definitely on the radar screen. The impacts on the parties include separation, interim support, domestic violence, temporary custody and many more issues.

The result for the family law attorney is a confusing welter of rules, laws, cases and problems. When does state law govern? When should the injured party seek redress through the military? How does federal law affect the conflict? Where can one locate co-counsel who is familiar with these matters, a consultant who can give quick and accurate advice, or an expert witness who is available in person or by phone or Skype to assist the court?

RULES AND RESOURCES

Where to find the resources for a military divorce case will depend on the issue involved. The usual matters involved are custody and visitation for minor children, support for the spouse and children, the role of the Service members Civil Relief Act in default rulings and motions to stay proceedings, and division of the military pension. Domestic violence may also be involved in some family law cases involving military personnel. The well-read attorney is the one best armed to defend or prosecute in these areas. They are complex and often counter-intuitive. A mentor, consultant or expert will often be useful as a guide through the wilderness.

There are several sources of information for the attorney caught up in these problem areas. For the following scenarios, assume that the parties are Army Sergeant Fred Wilson and his wife, Maria Wilson, the mother of their two minor children.

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

Formerly known as the Soldiers' and Sailors' Civil Relief Act, the SCRA is found at 50 U.S.C. App. § 501 *et seq*. The two most important areas in civil litigation are the rules for default judgments (when the SM has not entered an appearance) and the motion for stay of proceedings. The former requires an affidavit as to the Fred's military status and the appointment of an attorney for Fred by the judge. The duties of the attorney are not specified, and there are no provisions for payment. The default section of the SCRA is at 50 U.S.C. App. § 521.

At 50 U.S.C. App. § 522 are the requirements for Fred's obtaining a continuance (called a "stay of proceedings" in the Act) for 90 days or more. Here are the requirements:

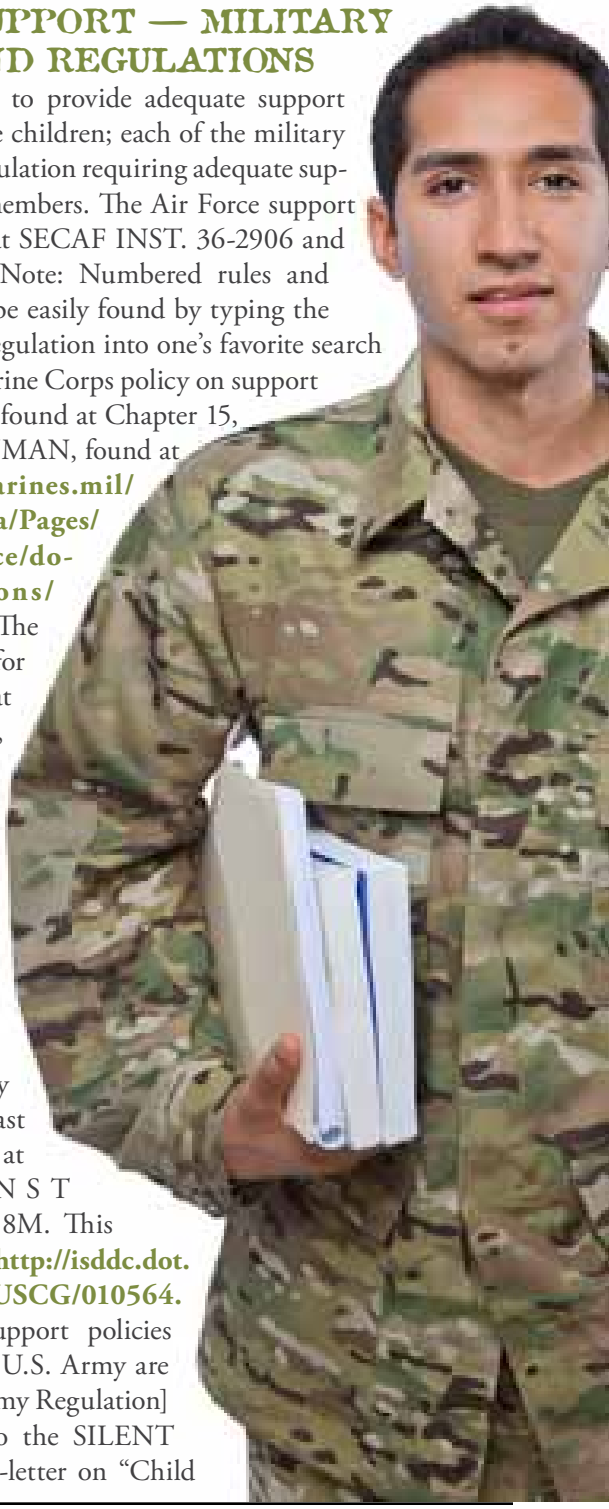
Elements of a Valid 90-Day Stay Request

Does the request contain…

- ✔ A statement as to how the SM's current military duties materially affect his ability to appear…
- ✔ and stating a date when the SM will be available to appear?
- ✔ A statement from the SM's commanding officer stating that the SM's current military duty prevents appearance…
- ✔ and stating that military leave is not authorized for the SM at the time of the statement?

An overview of the Act is found at *A Judge's Guide to the Service members Civil Relief Act*, located at **www.nclamp.gov** > Resources (the website of the military committee, North Carolina State Bar). You can also get this info-letter at **www.abanet.org/family/military** (the website of the ABA Family Law Section's Military Committee). The Guide tells about the requirements and protections of the SCRA and the steps one should take to comply with the Act's requirements. It contains a sample motion for stay of proceedings and what the appointed attorney needs to do to protect his or her *newest client*.

FAMILY SUPPORT — MILITARY RULES AND REGULATIONS



Fred is required to provide adequate support to Maria and the children; each of the military services has a regulation requiring adequate support of family members. The Air Force support policy is found at SECAF INST. 36-2906 and AFI 36-2906. [Note: Numbered rules and regulations can be easily found by typing the number of the regulation into one's favorite search engine]. The Marine Corps policy on support of dependents is found at Chapter 15, LEGALADMINMAN, found at **http://www.marines.mil/unit/mcieast/sja/Pages/legal-assistance/domestic-relations/default.aspx**. The Navy Policy for support issues is at MILPERSMAN, arts. 1754-030 and 5800-10 (paternity). Go to **http://www.public.navy.mil/bupers-npc/reference/milpersman/Pages/default.aspx**. The policy of the U.S. Coast Guard is located at COMDTINST M1000.6A, ch. 8M. This may be found at **http://isddc.dot.gov/OLPFiles/USCG/010564.pdf**. The nonsupport policies and rules of the U.S. Army are found at AR [Army Regulation] 608-99. See also the SILENT PARTNER info-letter on "Child

Support Options" at the N.C. State Bar and ABA websites shown above.

Knowing Fred's pay and allowances is a key factor in determining support. All SMs receive a twice-monthly LES (leave-and-earnings statement). To learn how to decipher one of these, just type into any search engine "read an LES" to find a guide explaining the various entries on the form.

There are numerous garnishment resources at the website for the Defense Finance and Accounting Service (DFAS), located at **www.dfas.mil**. The statutory basis for garnishment is at 42 U.S.C. §§ 659-662 and the administrative basis is at 5 C.F.R. Part 581. A list of designated agents (and addresses) for military garnishment is found at 5 C.F.R. Part 581, Appendix A. Military finance offices will honor a garnishment order that is "regular on its face." 42 U.S.C. § 659 (f). *See also United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction). Limits on garnishment are found in the Consumer Credit Protection Act, 15 U.S.C. § 1673.

CUSTODY AND VISITATION

The best source for information on military custody and visitation issues is usually your own state custody statutes. There are 43 states with specific provisions covering visitation and custody issues which arise when one or both parents are in the military. These include delegated visitation rights when a parent is absent due to military orders, visitation during leave, mandatory contact information, rules on not using Fred's military absence against him in a custody determination and the use of expedited hearings and electronic testimony. *Counseling on Custody and Visitation Issues* is a SILENT PARTNER info-letter found at the websites in the second paragraph of Section 2 above.

If Fred is retaining the children beyond the date of return in the custody order or keeping the children, and a custody order requires their return, then Maria can use Department of Defense (DoD) Instruction 5525.09, 32 C.F.R. Part 146 (February 10, 2006), to obtain the return of children from a foreign country. In general, this Instruction requires SMs, employees, and family members outside the United States to comply with court orders requiring the return of minor children who are subject to court orders regarding custody or visitation.

MILITARY PENSION DIVISION

Rules on retired pay garnishment are at **www.dfas.mil** > "Find Garnishment Information" > "Former Spouses' Protection Act." In addition to a legal overview, there is a section on what the maximum allowable payments are and an attorney instruction guide on how to prepare pension division orders. Information on the Survivor Benefit Plan (SBP) is at the "Retired Military and Annuitants" tab (under "Survivors and Beneficiaries") and at the "Provide for Loved Ones" link at this tab. Military pension division is set out at 10 U.S.C. § 1408, and the Survivor Benefit Plan is located at 10 U.S.C. § 1447 *et seq*. The Defense Department rules for both are in the DODFMR (Department of Defense Financial Management Regulation), **http://comptroller.defense.gov/fmr/**.

There are seven SILENT PARTNER info-letters on dividing military retired pay and SBP coverage. All of these are found at the websites shown above at Section 2, second paragraph.

DOMESTIC VIOLENCE

The DoD Instruction on domestic violence is DoDI 6400.6 *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (August 21, 2007). Other websites containing useful information about the rules and procedures in this area are:

www.vawnet.org
(National Online Resource Center on Violence Against Women)

www.ncdsv.org/ncd_militaryresponse.html
(National Center on Domestic and Sexual Violence)

www.bwjp.org
(Battered Women's Justice Project)

An excellent summary of the remedies and responses is found in the *Domestic Violence Report*, April/May 2001, by Christine Hansen, Executive Director of The Miles Foundation, which is at **www.civicresearchinstitute.com/dvr-military.pdf**. FL

about the author

MARK SULLIVAN, a retired Army Reserve JAG colonel, practices family law in Raleigh, NC and is the author of *The Military Divorce Handbook* (Am. Bar Assn., 2nd Ed. 2011), from which portions of this article are adapted. He is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at (919) 832-8507 and **mark.sullivan@ncfamilylaw.com**.

CASE LAW UPDATE

This update contains summaries of reported Arizona decisions.

This update has been prepared by the Case Law Update sub-committee of the Executive Council of the Family Law Section. The current members of the committee are Keith Berkshire, Kiilu Davis, Hon. Sharon Douglas, Scott Lieberman, Alyce Pennington, Annie Rolfe, Bernadette A. Ruiz and Janet Metcalf. The committee's goal is to publish updates at least every other month. The committee welcomes your comments, suggestions, feedback or questions. You may contact any committee member.

You may review published opinions in their entirety, or review Memoranda Decisions at the following websites: for Division One www.cofadl.state.az.us and for Division Two www.apltwo.ct.state.az.us.

REPORTED CASES

TIMING OF APPEAL

Williams vs. Williams
1 CA-CV 09-0305/0403

FACTS

Father filed multiple post-decree pleadings and Mother filed a post-decree petition to modify spousal maintenance. The court set a trial on Father's requests to modify custody, parenting time, prospective child support, and reconsideration of past child support amounts along with Mother's petition to modify maintenance.

A January 2009 order set forth findings necessary to make spousal and child support orders. The order modified spousal maintenance to a sum certain but did not set forth an amount of past support or prospective child support. Father filed a timely appeal of the January 2009 order.

A September 2009 order set out Father's prospective child support obligation. A November 2009 order set forth Father's past support during the disputed period of time. The September and November 2009 orders were the first orders obligating Father to pay any particular amount of child support. Father did not file an appeal as to the September and November 2009 orders.

ISSUE

1. **Can Father appeal the child support orders issued in September and November 2009 and the spousal maintenance order issued in January 2009?**

HOLDING

1. **Father could not appeal the September and November 2009 child support orders as he failed to appeal the September and November 2009 judgments, but could appeal the January 2009 order modifying spousal maintenance.**

DISCUSSION

The January 2009 order set out only findings of fact for child support and was only preparatory in nature. The January 2009 order did not alter the legal rights or responsibilities of Father. No amount of child support was specified. Not until September and November 2009 were specific amounts of child support determined, thus clearly defining Father's obligation. Father failed to appeal from these orders and as such, the appellate court lacked jurisdiction to hear Father's appeal.

The January 2009 order modifying Father's spousal maintenance set out clearly a modified amount. As Father timely appealed from the January 2009 order, the appellate court had jurisdiction to hear the appeal as Father's rights were immediately affected. The appellate court rejected Mother's contention that the January 2009 order was only preparatory as to spousal maintenance and as such, Father could not appeal it and had to appeal from the September and November 2009 orders.

TIP

To avoid jurisdictional issues in the appellate court and/or multiple appeals, when consolidating post-decree petitions, be sure to have the trial court specify whether the consolidation is "for hearing" or for all purposes. If the consolidation is "for hearing" only, the resulting orders disposing of each petition are separately appealable. If the consolidation is for all purposes, the issues cannot be appealed separately.

SPOUSAL MAITENANCE / MILITARY DISABILITY / ARS §25-530

Priessman v. Priessman,
2 CA-CV 2011-0071, Division 2

FACTS

A Decree was entered in 2005. Under the Decree, Wife was awarded spousal maintenance in the amount of $1,750 per month for an indefinite period of time. In 2010, Husband filed his third Petition to Modify Spousal Maintenance, seeking a reduction based on a determination by the Department of Veteran's Affairs ("VA") that he was disabled. The court determined that Husband's income included: $1,865 per month in social security disability, $1,607 per month in Combat Related Special Compensation (awarded by the VA), and $645 per month in civil service retirement pay.

The trial court reduced Husband's spousal maintenance obligation to $1,100 per month due to Husband no longer being employed, but the trial court declined to exclude Husband's Combat-Related Special Compensation ("CRSC") disability income upon the reasoning that ARS 25-530 did not apply. In addition, the trial court refused to retroactively apply the reduction in Husband's obligation. Husband appealed.

ISSUE

1. **Section 25-530 provides that "[i] determining whether to award spousal maintenance or the amount of any award of spousal maintenance, the court shall not consider any federal disability benefits awarded to the other spouse for service-connected disabilities pursuant to 38 United States Code chapter 11." Does section 25-530 apply to CRSC when it is a "service connected disability" benefit *but not* included in 28 USC chapter 11?**
2. **Can the Court retroactively modify spousal maintenance?**

HOLDING

1. **No. The plain language of the statute precludes the court from considering "federal disability benefits awarded … for service-connected disabilities pursuant to 38 United States Code chapter 11." CRSC benefits are not awarded pursuant to chapter 11, but rather they are awarded pursuant to chapter 10. As such, the court is not precluded from considering CRSC benefits when determining spousal maintenance.**
2. **No. Section 25-327(A) states that maintenance provisions may be modified "except as to any amount that may have accrued as an arrearage before the date of notice of the motion … to modify or terminate." As such, spousal maintenance payments become vested and non-modifiable when they are due.**

TIP

Title 38 and Title 10 of the United States Code differ in how they treat benefits. To that extent, it is important to pay attention as to which benefits are being received and which agency administers the policies, procedures and criteria for said title; Department of Veteran Affairs (Title 38) vs. Secretary of Defense (Title 10). FL

from the editor

I echo my esteemed Chair, Dean Christoffel's comments about Kiilu Davis and so appreciate Kiilu's help when I could not work on the Newsletter this past Fall. Thank you also to Michael Peel, our Bar liaison. He works long hours not only on Sections' Newsletters, but also on the ARIZONA ATTORNEY magazine and other Bar publications. He does a brilliant job and we are grateful that our Newsletter always has a professional layout.

This is an issue chock full of interesting subjects and some that may cause controversy. If you wish to comment about any of the subjects or take a contrary position about drug testing, interviewing children, merger or any other topic reported herein, we welcome articles from the Bar.

It is often difficult for the Newsletter Committee to find professionals willing to take the time to write an article, but I am happy to say, we received unsolicited articles for this issue from Helen Davis, Gregg Woodnick and Brad TenBook and Michael Shew. We are happy to publish them. Last, thank you to Judge Kiley who stepped up with a "From the Chair" article at the last minute and to Janet Sell who always makes an important contribution about child support issues.

–Leah Pallin-Hill

FRIDAY ALL DAY

PRESIDENT'S AWARD

F-44

Friday, June 22
8:45 A.M. TO 5:15 P.M.

Celebrating Arizona's Centennial:

Family Law in the Past, Present and Beyond

This year the Family Law Section seminar will include an interactive program intended to balance custody and parenting issues with practical and financial presentations. On the custody and parenting front, attendees can expect to learn about cutting-edge theories of coercive control and interesting programs that focus on children as witnesses and children's roles in the litigation process. The seminar attendees will listen to experts explore tax issues that impact our practices and refresh their practical evidence knowledge and deposition skills. The program will be rounded out by a panel of judges educating attendees about how to hone their litigation skills to have the most impact on the finder of fact, with Kathleen McCarthy's tried-and-true case law update and an ethics presentation by Lynda Shely that will focus on professionalism.

In addition to the live presentation, the seminar materials will include Jeff Pollitt's "100 Seminal Arizona cases" for the centennial.

Finally, in light of the Arizona Centennial, the Family Law Section is planning a reception following the program to honor some of our distinguished members throughout the state. Details of this celebration will follow.

Sponsored By: Family Law Section

Seminar Chairs: Helen R. Davis,
The Cavanagh Law Firm PA
Steven M. Serrano,
Burch and Cracchiolo PA

CLE CREDIT HOURS 6 ETHICS HOUR 1

– save the date –

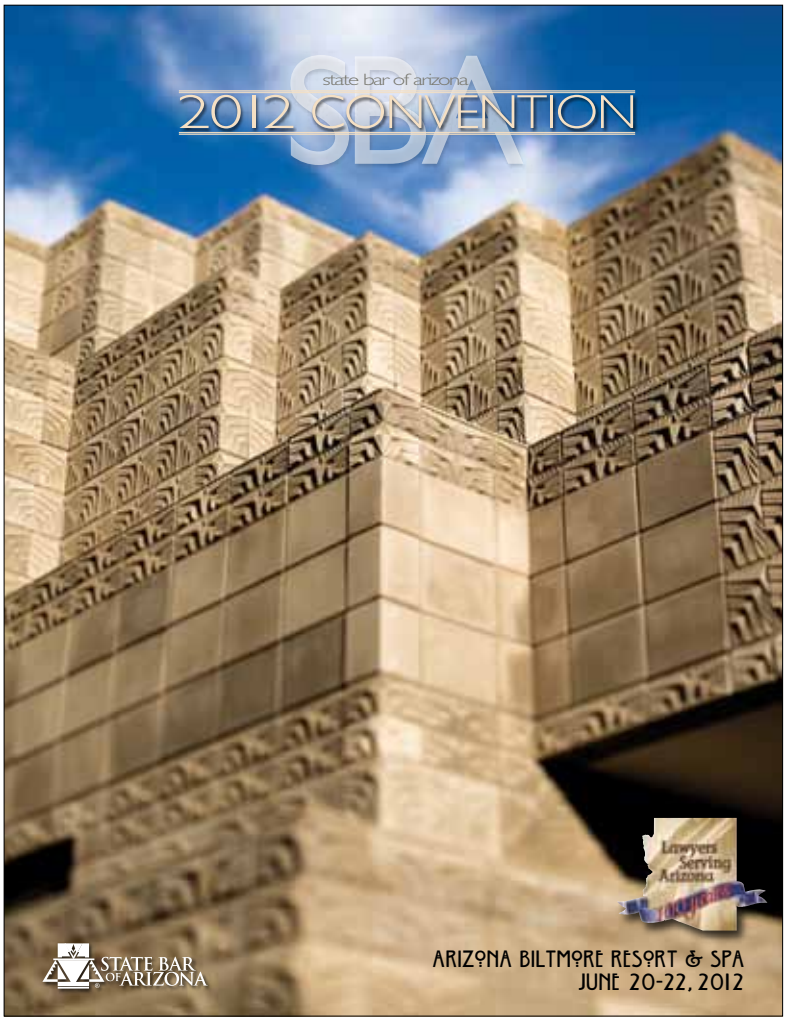
friday, june 22, 2012

8:45 AM – 5:15 PM

THE STATE BAR OF ARIZONA 2012 CONVENTION IS JUNE 20 – 22 AT THE ARIZONA BILTMORE RESORT & SPA IN PHOENIX.

The Family Law Section will be sponsoring a single, one-day seminar entitled ***CELEBRATING ARIZONA'S CENTENNIAL: Family Law in the Past, Present and Beyond***. This seminar, described at right, will include a live presentation as well as an interactive program. Following the seminar, the Family Law Section will hold a reception to honor fellow members from around the state. Please join us!

click on the cover for more information



WE WANT YOUR OPINIONS!

- *Would you like to express yourself on family law matters?*
- *Offer a counterpoint to an article we published?*
- *Provide a practice tip related to recent case law or statutory changes?*
- *Or, tell us about a humorous, family court-related proceeding?*

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

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

PLEASE SEND YOUR SUBMISSIONS TO:

LEAH PALLIN-HILL
MEDIATION & ARBITRATION SVCS, PLLC
2375 E. Camelback Road, Suite 600
Phoenix, Arizona 85016 | 602/387-5323
leahpallinhill@aol.com