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2022

Family Law News

this issue...

STATE BAR OF ARIZONA

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FROM THE CHAIR

DAVID N. HOROWITZ

HAPPY NEW YEAR Section Members! I know that the first quarter can be a really busy time for family law practitioners, and I hope you are all finding time for self-care during your busy times.

A reminder that we have new Arizona Child Support Guidelines as of January 2022. There are all sorts of continuing legal education opportunities about the guidelines coming up including the family law track of CLE by the Sea in July in San Diego. The guidelines have gone through their most major overhaul in over 30 years, so please do check out the changes and the new child support calculator.

In addition, this issue of the newsletter includes information about e-filing and some proposed legislative updates that you need to be aware of.

Also, please plan on attending our Family Law Section annual meeting and our sponsored seminar at the annual State Bar Convention to be held in June at the Sheraton Wild Horse Pass Resort, just outside of Phoenix. Our full-day program includes speakers from across the country and will include a wide variety of subjects, from parenting difficulties to cryptocurrency and more.

The council is also actively working on improving out-reach to our members and increasing member participation. Toward that end, please contact us with your thoughts on both programming and the council's operations.

The new version of the Arizona Child Support Guidelines became effective on Jan. 1, 2022. The guidelines have been updated and reorganized; their most major overhaul in over 30 years.

JUNE 2022 STATE BAR CONVENTION - SHERATON WILD HORSE

We have a standing nominating committee, and we vote on new council members for three-year terms annually. If you or someone you know might be interested in participating, please express your interest when there is a call for nominations.

We are hopeful to be seeing more and more of you in the near future! FL

DAVID N. HOROWITZ, a Certified Family Law Specialist and a Fellow, American Academy of Matrimonial Lawyers with *Warner Angle Hallam Jackson & Formanek PLC*, began practicing in 1990. A summa cum laude graduate of the University of Arizona College of Law in 1990, David has focused his practice in all areas of family law for almost thirty years.

How can the FAMILY LAW EXECUTIVE COUNCIL help you?

The Family Law Executive Council of the State Bar of Arizona is **looking for ways to serve and support our Family Law community**. If you have any suggestions for how we can improve or meet a need within the community, please e-mail Chair **David N. Horowitz** or Newsletter Committee Chair **Annie M. Rolfe**.

Contact David Horowitz: **DHorowitz@WarnerAngle.com** or Newsletter Chair Annie Rolfe: **ARolfe@RolfeFamilyLaw.com**

PLANNING AND REFINANCING

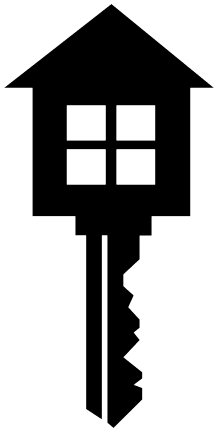
marital home

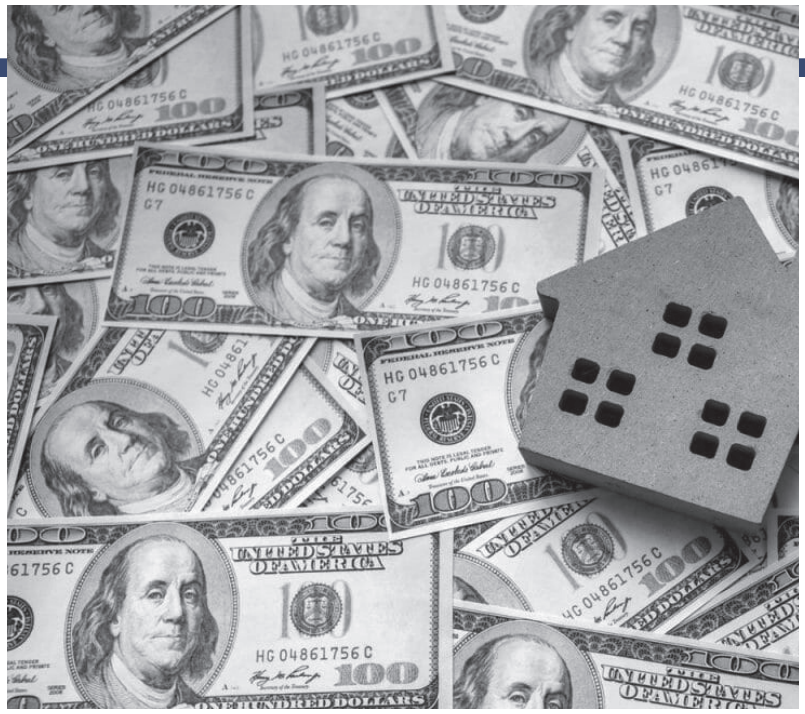
DIVORCE

By
Craig Turley
Realtor® with Brokers Only

Divorce Settlement Planning and Refinancing the Marital Home

Dealing with divorce can be very difficult. Add to that the dividing of marital property and now one is dealing with several stages of emotion as well.





DEALING WITH DIVORCE can be a very difficult time with several stages of emotion. Included in any divorce is the divison of the marital property and associated obligations. One of the challenges may be the disposition of the family home. If the home has a mortgage, the award of the family home may come with settlement agreement choices which include the qualification of a mortgage to refinance into the awarded party's name or to refinance and complete an equity buyout of the departing party.

While qualifying for a mortgage after the divorce is finalized may be more of a challenge than when married, it is not impossible. Understanding mortgage options post-divorce can help **contribute to a successful transition into the next phase of life, securing your new future.**

Let's look at a few things which may help get your clients on the right track during the settlement process and post-divorce.

Refinancing Current Family Home:

There are two motivations to refinance the existing family home. Depending on the divorce decree guidance, one party may be motivated (or obligated) to refinance the family home to remove the other party from the existing mortgage. The other motivation (or obligation) may be to complete an equity buyout of the existing home. An equity buyout would direct the equity awarded by the court or settlement agreement where the party refinancing the mortgage draws equity to pay off an ex-spouse/owner. Under both of these circumstances, the individual applying for the mortgage must qualify based on standard mortgage program rules. This would include qualifying based off the 4 C's of Qualifying for a mortgage.

One of the challenges of reorganization after a divorce may be the family home. If the home comes with a mortgage, the settlement agreement might include the qualification of a mortgage to refinance.

WHILE QUALIFYING FOR A MORTGAGE AFTER THE DIVORCE IS FINALIZED MAY BE MORE OF A CHALLENGE THAN WHEN MARRIED, IT IS NOT IMPOSSIBLE.

- ***Credit:*** This is your record of paying liabilities. Better credit score = better mortgage terms.
- ***Collateral:*** The value of your home. This is important in determining your loan to value, which is the amount of your mortgage you are refinancing vs. appraised value of home. (Example: If your home is worth $300,000 and you owe $240,000 on your mortgage, your loan to value will be 80%. $240,000/$300,000 = 80%)
- ***Capital:*** The money, savings, and investments you have on hand. Capital is more important when evaluating purchase transactions, however, capital/reserves may be considered an additional strength when evaluating mortgage refinance programs.
- ***Capacity:*** This is your current and future

ability to pay back the loan. Lenders look at your income, employment history, and monthly debt obligations such as your credit cards, auto payments, student loans, and other financial obligations to make sure you have the means to pay back the mortgage comfortably.

Capacity, generally, is the biggest qualification hurdle in a post-divorce mortgage. Many times, going from a two-income family to a one income family may be a qualification challenge.

Equity Buyout:

An equity buyout as a result of a divorce settlement or dissolution of domestic partnership is allowable and considered a limited (no) cash-out refinance. A few considerations include:

- The secured property must be jointly owned for at least 12 months preceding the disbursement date.
- All parties must sign a written agreement that states the terms of the property transfer and proposed disposition of proceeds from the refinance transaction.
- There can be no additional "cash out" received under the terms of a rate/term refinance transaction for an equity buyout. The equity buyout must be directed on the Settlement Statement at closing.
- All other terms of conditions, including the 4 C's of underwriting mentioned previously, must be met by the individual refinancing the mortgage.
- An individual may receive additional cash out under certain circumstances for things such as home improvement, debts - however, there must be sufficient equity after the equity buyout portion is accounted per the terms of the decree.

Appraisal Process on Equity Buyout:

One of the most common resistance points when the parties elect to have one of the spouses "buyout" the other is the appraisal issue. Often, the decree will indicate the parties agree and reach out to an independent appraiser to determine the value of the property for the equity split. Unfortunately, if one of the parties is required to refinance and get the cash out of the property for an equity buyout, this independent appraisal will not be accepted by the lending institution. Thus, you may have an independent appraisal lower or higher than the banks appraisal.

Why does this matter?

Eliminating conflict of value will help the process remain cordial. Setting expectations early in the process will set proper expectations of the involved parties. At the end of the day, the lending institutions will dictate the valuation process specific to a loan, and if all parties understand this initially, it may help influence a cordial process when negotiating the final equity buyout terms.

May I use Alimony or Child Support for income qualification?

Yes, you may use Alimony and/or Child Support for income qualification. The following rules and document requirements apply to conforming loans backed by Fannie Mae and Freddie Mac:

- Document that alimony and child support will continue for 3 years after the date of the mortgage application.
- A copy of the divorce decree or separation agreement indicating amount of the award and period of time which it will be received.
- Confirm any limitations such as age of children or duration of alimony arrangement. NOTE: 3 years continuance of such paymentsmust apply after the date of the mortgage application.
- Document no less than 6 months of the borrower's most recent receipt of full payments.
- Alimony or Child Support may be used as qualified income for a refinance or a purchase transaction assuming stability and continuance rules discussed are met.
- Maximum debt ratios will vary depending on lender and program.

Conforming loans are the most common type of mortgage, accounting for almost of all mortgages originated.

Did you know?

There are loan programs or instances where a lender may accept less than 6 months receipt of Alimony/Child Support and consider this stable. These specific loan programs (not conforming) are available with competitive market rates and may accept proof of Alimony or Child Support payments for a period of 3 months, assuming all other stability and limitation requirements are met.

Every lender or mortgage broker may not have access to these programs, so it is beneficial to ask this specific question. As with any loan program, other conditions for approval and/or terms may apply.

What Happens When YOU Pay Alimony or Child Support?

If you are obligated to pay your ex-spouse alimony, maintenance or child support this financial obligation must be considered as part of the borrower's recurring monthly obligation assuming those payments will continue for ten months or more. Once again, this must be verified by a divorce decree, separation agreement or other legal written guidance.

Voluntary payments are not required to be included in debt obligations.

Are You Responsible for Court Ordered Debt Assigned to your Ex-Spouse?

When a borrower has outstanding debt assigned to another party by court order, and the creditor does not release the borrower from liability, the borrower has a contingent liability. The lender is not required to count this contingent liability as part of the borrower's recurring monthly debt obligations.

Bonus Advice:

An ex-spouse's failure to pay a contingent liability may impact your credit score, which in turn may make the other party ineligible for mortgage financing. It is recommended to reach out to the creditor of any debt assigned to the ex-spouse and request removal from all three reporting bureaus. The creditor is not required to remove the other spouse, so it is recommended the debt be paid as soon as possible and your client request closure of this account to prevent any surprises in the future. Remember, the original mortgage note will supersede any divorce decree agreement.

Every situation is unique, so planning and preparing your client for the next phase of home ownership is a valuable service that can enhance your practice. Strategizing with an experienced local mortgage professional will provide your client with the opportunity to move forward in their new post-divorce life. FL

The 4 C's

THE INDIVIDUAL APPLYING FOR THE MORTGAGE MUST QUALIFY BASED ON STANDARD MORTGAGE PROGRAM RULES.

CREDIT

RECORD OF PAYING LIABILITIES

Lenders check your credit score and history to assess your record of paying bills and other debts on time. Many mortgages have minimum credit score requirements. Your credit score could dictate your interest rate and how much money down will be required.

CAPITAL

MONEY, SAVINGS & INVESTMENTS ON HAND

Lenders consider your readily available money and savings plus investments, properties and other assets that you could access fairly quickly for cash.

COLLATERAL

VALUE OF THE HOME

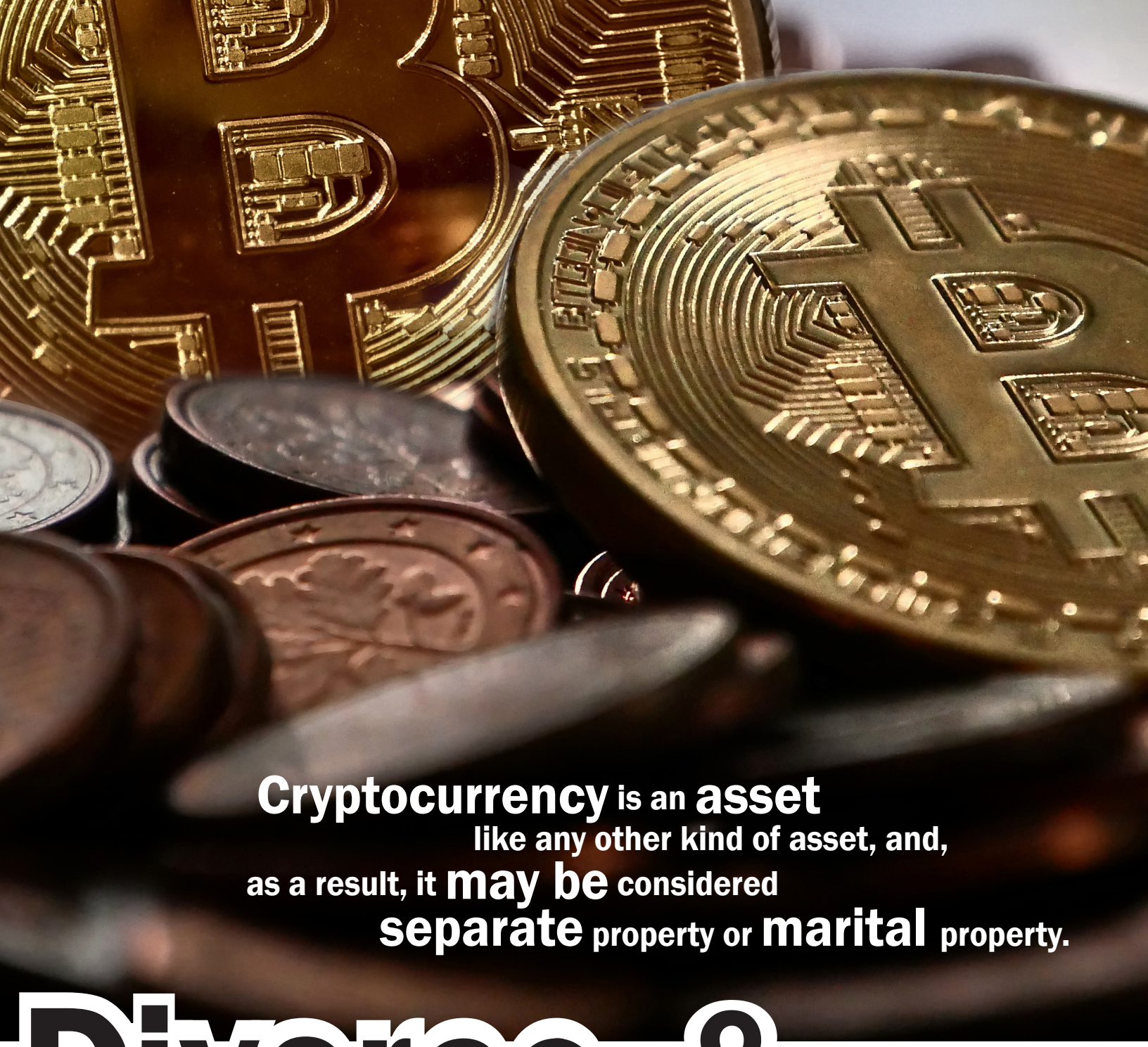
Lenders consider the value of the property and other assets that you're pledging as security against the loan. In the case of a mortgage, the collateral is the home you 're buying.

CAPACITY

CURRENT & FUREURE ABILITY TO PAY BACK THE LOAN

Lenders look at your income, employment history, savings and monthly debt payments, and other financial obligations to make sure you have the means to comfortably take on a mortgage.

About the author: **Craig Turley** has over 24 years of Arizona Mortgage and Real Estate expertise. He has directed over $2 Billion in mortgage originations throughout his career. Craig has been a speaker at local Real Estate Schools, Real Estate Companies, and Arizona Family Law Conferences. He has a B.S., Business Administration Degree, Finance emphasis from The University of Arizona and has earned the prestigious nationwide designation of Certified Mortgage Consultant®. He is also a licensed Realtor® (SA6282768000) with Brokers Only in Phoenix, AZ. NMLS 80917, AZ MB 1561316, CA CFL 60DB099210.



Cryptocurrency is an asset like any other kind of asset, and, as a result, it may be considered separate property or marital property.

Divorce & Cryptocurrency

A Basic Guide and Overview - Part 1

by Julie A. LaBenz
an Arizona Lawyer

Until 2021, I had not had a single case come across my desk that involved cryptocurrency. Although crypto was created following the 2008 financial crash, it has been a "fringe" investment that relatively few people knew about or were involved with.

Yet, in 2021, I worked with several clients who own cryptocurrency and have come across various legal issues and questions regarding their crypto assets. I've been a student of cryptocurrency since 2016 and in helping these particular clients, I found that relatively few of my professional colleagues had any understanding of this unique asset.

The incredible success of Bitcoin and other cryptocurrencies throughout 2021 brought significant media and social attention to crypto, thereby increasing the number of investors and helping cryptocurrency make significant strides in the quest for mass adoption. Certainly, if we ever see a revised Inventory of Assets and Debts form that includes a section for cryptocurrency, then I'll conclude that crypto is officially mainstream. For now, however, I anticipate that, as divorce lawyers, we will start to see more cases involving cryptocurrency come across our desks, and if you have not yet had a client mention their cryptocurrency investments during a consultation, you will likely have this experience sometime soon.

What, therefore, does it take for a lawyer to competently represent a client in a divorce case involving cryptocurrency?

First, I have good news. There is no absolute need for you to understand what the blockchain is or how it works. (*Yay!*) Instead, you simply need to grasp that cryptocurrency is an asset and that you will need to gather information that identifies the **types** (i.e., Bitcoin "BTC," Ethereum "ETH," etc.), **amounts** (i.e., 3.69 BTC), and **prices** of the cryptocurrency at issue.

To determine the current price of a cryptocurrency, visit CoinMarketCap.com. There you will find a plethora of information about the thousands of different cryptocurrencies that includes the current prices, graphs showing the historical prices, along with a description of what each cryptocurrency does and a list of the exchanges where each crypto can be purchased or sold. Thus, if 3.69 BTC is at issue in the case and coinmarketcap.com shows the current price of BTC is $50,000, then the approximate current value of the BTC in USD would be $184,500 (i.e., 3.69 x $50k).

ONE OF THE ***TRICKY ASPECTS*** OF SPLITTING UP CRYPTOCURRENCY IS ***NAILING DOWN THE VALUE***. THE DIGITAL CURRENCY ***MAY DROP OR RISE*** DURING THE ***DIVORCE PROCESS***.

The **price** of cryptocurrency is often highly volatile. This means that both divorce lawyers need to agree that the value of the crypto assets needs to be reevaluated before the asset division is final.

Bitcoin is considered the first cryptocurrency created, and everything else is collectively known as an "altcoin". A few different **types** of crypto's are Bitcoin, Ethereum, Ripple, Unicorn Coin, Cardano, Dogecoin, Chainlink blockchain, Litecoin and Theta blockchain.

The prices of cryptocurrencies fluctuate constantly, just like stocks, and the cryptocurrency market is quite volatile. As a result, the date of valuation could be very important and could be a highly litigated issue in certain cases. Yet, if the cryptocurrency at issue in the divorce is going to be liquidated, then taking time to litigate the date of valuation could be for naught if the value of the cryptocurrency decreases, for example, by 50% while you argue over what is the most favorable date for liquidation or otherwise delay the resolution of this issue off into the future.

Overall, from my perspective, having a basic understanding of how to buy, sell, and hold (i.e., "store") cryptocurrency provides the needed basic toolkit to establish a baseline for competent representation in a divorce case involving crypto. Understanding how to buy, sell and hold cryptocurrencies will help you know how to locate the type, amount and price information for the cryptocurrency subject to division. Let's, therefore, talk about the basics of how to buy, sell and hold cryptocurrency, in particular, in the context of understanding cryptocurrency as a divorce lawyer.

1. HOW TO TRANSACT IN CRYPTOCURRENCY

Investors purchase and sell cryptocurrency via a cryptocurrency exchange. There are numerous exchanges. The most common exchange, and the one you've likely heard of, is Coinbase. Other common exchanges (this is not an exhaustive list) include: Kraken, Gemini, Crypto.com, Gate.io, Binance, KuCoin, Bitstamp, Bittrex, bitFlyer, Cex.io.

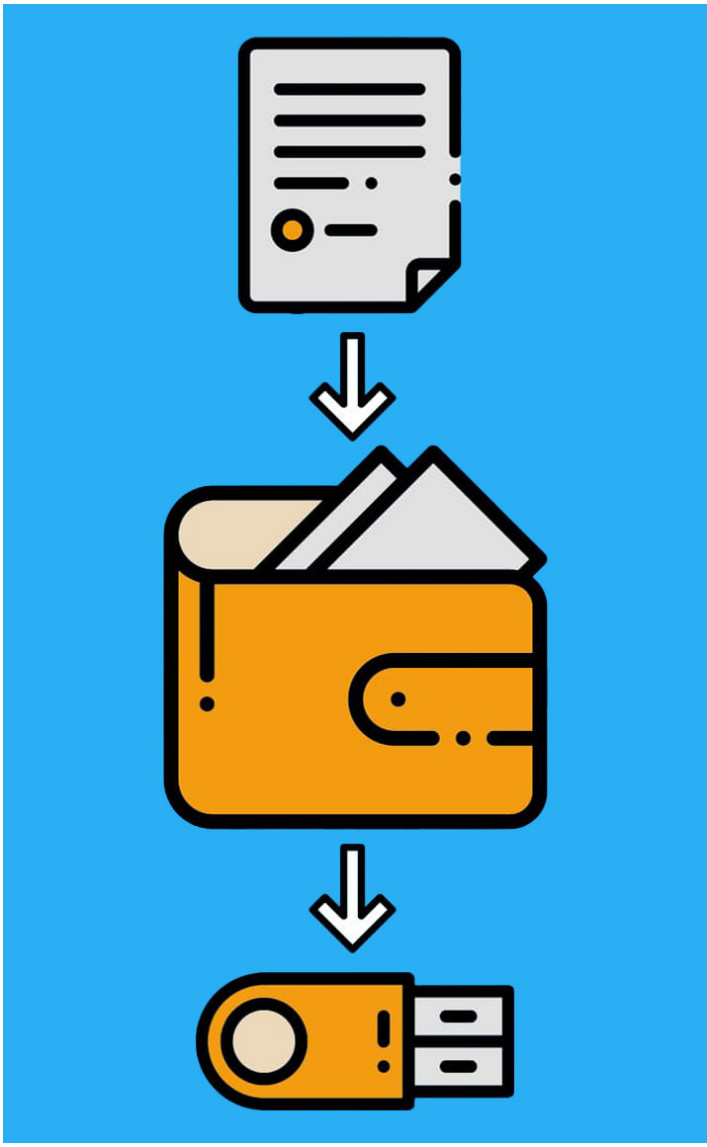
MOST ***CRYPTO CAN BE FOUND*** LIKE ANY OTHER ASSET IN A DIVORCE DURING THE ***DISCOVERY PROCESS***. A CRYPTOCURRENCY WALLET ***IS NO DIFFERENT*** THAN ***BANK RECORDS***, RETIREMENT FUNDS, OR ***TRADITIONAL INVESTMENTS***

The best way to understand how cryptocurrency transactions work is to try it out for yourself. I can explain it all to you in great detail, however, you will learn much more if you jump in and give it a try. Thus, I encourage you to open an account with Coinbase. In order to make a purchase, and if you do so, you'll find you must connect your new Coinbase account with one of your bank accounts. Bank records, therefore, can be useful tools to trace the source of funds used to purchase cryptocurrency. Once you've opened your Coinbase account and connected it to your bank account, complete a small transaction – for example, $5. Select a cryptocurrency and buy $5.00 worth. Again, the focus here is on familiarizing yourself with how this all works, not necessarily on the investment itself. After you've purchased your crypto, if you navigate the exchange website, you'll find that the exchange maintains records of each transaction you make – these records are maintained for tax purposes and are generally called "Transaction Reports." Learn how to navigate the exchange's website to locate and download a Transaction Report. In addition to using a cryptocurrency exchange to buy and sell cryptocurrency, investors also have the option of using a broker to buy and sell cryptocurrency on the investor's behalf.

2. HOW TO STORE CRYPTOCURRENCY

Now that you understand that investors buy and sell cryptocurrencies using an on-line cryptocurrency exchange or brokerage firm that maintains records of all transactions made for each account and that cryptocurrency exchanges are connected to the investor's bank account, another important concept to grasp is how cryptocurrencies are stored.

One option for storage is to keep the crypto on an exchange or with a brokerage. In other words, an investor can purchase Bitcoin on Coinbase and then leave their Bitcoin on the Coinbase exchange in the Coinbase Bitcoin wallet that the exchange provides.



Crypto wallets are a great option for keeping your private keys (passwords) safe. They come in many forms, from hard wallets which look like USB drives, to paper wallets, which are physical pieces of paper to online wallets, which are apps or other software.

A second option is for the investor to transfer their cryptocurrency from an exchange to a hard wallet or to a paper wallet. Trezor and Ledger are examples of hard wallets. Paper wallets are actual pieces of paper with the cryptocurrency information printed on it in the form of a QR code. Thus, as an example, an investor purchases Bitcoin on Coinbase and then sends their newly purchased Bitcoin to their Trezor hard wallet for storage.

Cryptocurrency, therefore, can be purchased via a cryptocurrency exchange or brokerage using funds from a bank account. Following the purchase, the cryptocurrency can be left on the exchange, kept with the brokerage house, or transferred off of the exchange and into a paper wallet or a hard wallet the owner personally possesses (i.e., no third-party custodian involved). The various types of hard wallets have an associated apps in which the owner can access the app on their computer or smart phone, connect their hard wallet to the app via a USB connection, and, once connected, can transfer a designated amount of cryptocurrency out of their hard wallet and to, for example, a cryptocurrency exchange in order to sell or convert the cryptocurrency to a different type of crypto (i.e., convert 1 BTC to the equivalent amount of ETH).

And that is your basic cryptocurrency toolkit. You now understand investors buy and sell cryptocurrency via on-line cryptocurrency exchanges or via a private broker in which their cryptocurrency investment accounts are connected to one of their bank accounts. To purchase cryptocurrency, the investor transfers money from their bank account to the exchange or brokerage and then converts their dollars into one or more cryptocurrencies. Following the purchase, the investor can leave their cryptocurrency on the exchange in a digital wallet provided by the exchange, leave it with the brokerage house, or can transfer it to a paper or hard wallet in their possession. When the investor is ready to sell (i.e., convert to a different cryptocurrency or to US Dollars), if their crypto is in a paper or hard wallet, then they transfer the cryptocurrency from their wallet to the exchange or to their private broker and initiate the sale.

3. DISCLOSURE REQUIREMENTS FOR CRYPTOCURRENCY ASSETS

If you have a divorce client in possession of the exchange, brokerage and/or wallet credentials for the marital community's cryptocurrency investments, then, pursuant to ARFLP Rule 49, your client must disclose such information and documents.

ARFLP Rule 49(g)(5) requires spouses to produce "... copies of all documents and electronically stored information that may assist in identifying or valuing any item of ... personal property in which the party has or had an interest for a period beginning 6 months before the petition's filing ...." Spouses, therefore, have a duty to disclose information that will assist in identifying or valuing cryptocurrency owned in the 6 months prior to filing. Disclosing a complete copy of a transaction report from each cryptocurrency exchange and hard wallet utilized by your client likely fulfills the disclosure requirements under ARFLP Rule 49(g)(5).

In order for your client to be in a position to download a transaction report from a cryptocurrency exchange and/or hard wallet app, your client must be in possession of the log-in information (i.e., username and password) and, if the account has been set up with third party authentication, then your client will also need access to the authenticator app associated with the account in order to successfully log-in. If your client cannot log-in to the cryptocurrency exchange account, but your client and/or their spouse has transacted in cryptocurrency for several years, then consider that cryptocurrency investors usually provide their CPAs with a copy of the cryptocurrency exchange transaction reports. Thus, if your client cannot log-in to the marital community's cryptocurrency exchange account(s) but the marital community provided copies of their cryptocurrency transaction reports to their CPA, then consider instructing your client to request their CPA provide them with copies of all cryptocurrency exchange transaction reports submitted to their CPA in conjunction with the preparation of previous year's tax returns.

SPOUSES, HAVE ***A DUTY TO DISCLOSE INFORMATION*** THAT WILL ASSIST IN ***IDENTIFYING OR VALUING CRYPTOCURRENCY*** OWNED IN THE ***6 MONTHS PRIOR TO FILING***.

In addition, Rule 49(g)(8) requires spouses to produce "... a list of all items of personal property ... in which any party has an interest, together with the party's estimate of current fair market value (not replacement value) for each item." Rule 49(g)(8), therefore, requires spouses to disclose a list naming the type and amount of each cryptocurrency the spouse has a current community or separate property interest in, along with an estimate of the current fair market value. Due to the fluctuating value of cryptocurrency, it will be difficult to provide an estimated current fair market value that will be accurate for the balance of the case. As a result, rather than include an actual estimated valuation in your disclosure, consider stating, "the value fluctuates, see coinmarketcap.com for current price" or similar language.

Rule 49(g)(8) requires spouses to produce "... a list of all items of personal property ... in which any party has an interest, together with the party's estimate of current fair market value (not replacement value) for each item." This means cryptocurrency as well.

4. POTENTIAL CRYPTOCURRENCY-RELATED CLAIMS

As you review all cryptocurrency-related disclosure, assess the information to determine any and all potential claims your client is in a position to make and whether you have all of the evidence needed to prove each claim.

If, for example, a transaction report and associated bank records show your client purchased certain cryptocurrency with separate funds, then, if needed, take steps to support this claim, confirm the supporting records have been disclosed, and organize the supporting records into a trial exhibit.

Additionally, if, for example, a transaction report shows unaccounted for sales of cryptocurrency, then you may have a waste claim and/or violation of the preliminary injunction claim to pursue.

Furthermore, while reviewing the disclosed documents, consider if the value of the community or separate property cryptocurrency should be incorporated into the financial resources aspects of a spousal maintenance and/or legal fees claim.

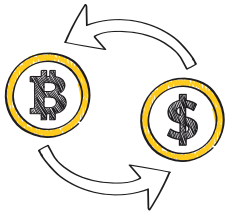
5. DISCOVERY IDEAS FOR CRYPTOCURRENCY

After you've evaluated your potential claims related to the cryptocurrency, you may find you need additional records to prove your claims.

If you are seeking cryptocurrency exchange transaction reports, then considering utilizing various discovery tools. For example, consider propounding an interrogatory asking the opposing party to name all cryptocurrency exchanges he/she has had accounts with during a certain time frame and then using that information to serve the named cryptocurrency exchanges with a subpoena for the transaction reports for the opposing party's account and/or serving the opposing party with a request for production requesting complete transaction reports from all cryptocurrency exchanges the spouse has accounts with.

Another potential issue that could arise is trying to determine *where* the cryptocurrency is currently located. In other words, if a transaction report shows the cryptocurrency was transferred off of the exchange, then you may need to determine where it was transferred to. One way to address this issue could be to propound an interrogatory asking the opposing party to name each hard or paper wallet in their possession or that they have completed transactions on during a specified amount of time. Additionally, you could propound a request for production asking the spouse to produce transaction logs for their hard and/or paper wallets. Moreover, you could propound a set of interrogatories in which you identify each transfer and ask the opposing party to trace the transfers.

Finally, if you are seeking a stipulation to your client's master list of the type and amount of cryptocurrency at issue in the case, consider propounding an interrogatory asking the opposing party whether they agree that your client's master list represents an accurate list of all of the cryptocurrency subject to division in the divorce. This stipulation can then be used in your pretrial statement, be made into a trial exhibit as well as be incorporated into the decree.

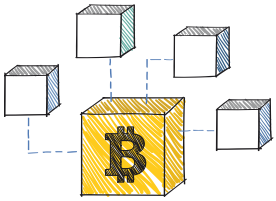


BUY/SALE IN CRYPTOCURRENCY

In addition to using a cryptocurrency exchange to buy and sell cryptocurrency, investors also have the option of using a broker to buy and/or sell cryptocurrency on the investor's behalf.

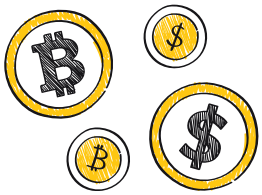
STORE/SAVE CRYPTOCURRENCY

After purchasing cryptocurrency, the investor can leave their cryptocurrency on the exchange in a digital wallet (provided by the exchange), leave it with the brokerage house, or they can transfer it to a paper or hard wallet in their possession.



DISCLOSURE FOR ALL CRYPTOCURRENCY ASSETS

Rule 49(g)(8) requires spouses to produce "... a list of all items of personal property ... in which any party has an interest, together with the party's estimate of current fair market value (not replacement value) for each item."



CRYPTOCURRENCY-RELATED CLAIMS

While reviewing the disclosed documents, consider if the value of the community or separate property cryptocurrency should be incorporated into the financial resources aspects of a spousal maintenance and/or legal fees claim.

IDEAS FOR DISCOVERING CRYPTOCURRENCY

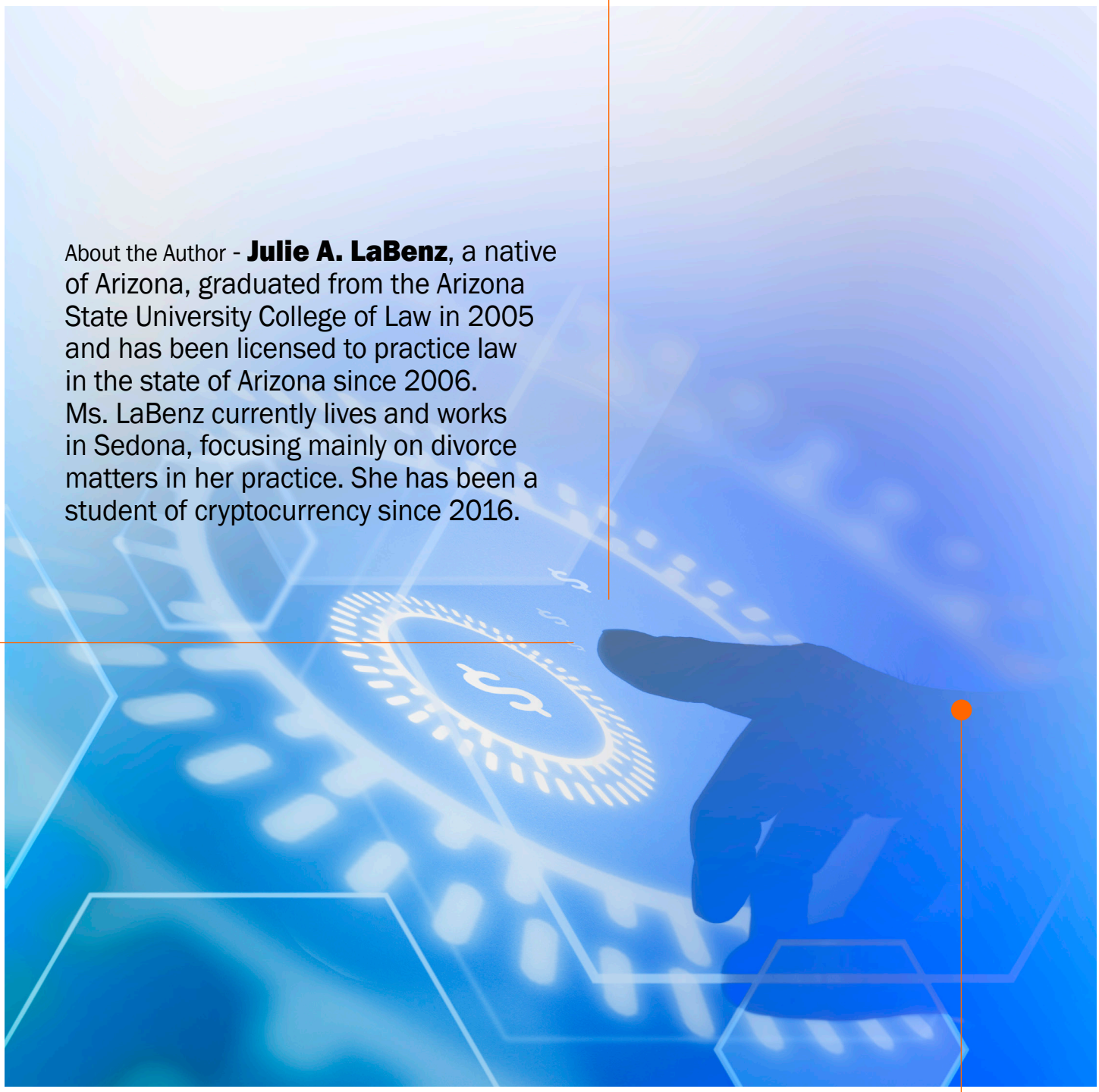
If seeking cryptocurrency exchange transaction reports, request the names of all cryptocurrency exchanges he/she has had accounts with during a certain time frame, then serve a subpoena to the exchanges for the transaction reports.

DISCOVERY TOOLS PLACE YOU IN A POSITION TO ***GATHER*** ALL OF THE ***INFORMATION & DOCUMENTATION*** NEEDED TO PROVE YOUR CLIENT'S ***CRYPTO-RELATED CLAIMS***.

The discovery tools should place you in a position to gather all of the information and documentation needed to prove your client's cryptocurrency-related claims. Knowing how cryptocurrency transactions are performed, the types of records available and how cryptocurrencies are stored allows you to combat various excuses the opposing party may assert in an effort to obfuscate the extent of their cryptocurrency investments.

Please see our upcoming Spring 2022 Newsletter for the continuation of this article, including preparing for trial in cases involving cryptocurrency. FL

About the Author - **Julie A. LaBenz**, a native of Arizona, graduated from the Arizona State University College of Law in 2005 and has been licensed to practice law in the state of Arizona since 2006. Ms. LaBenz currently lives and works in Sedona, focusing mainly on divorce matters in her practice. She has been a student of cryptocurrency since 2016.



REMINDER

Mandatory e-filing of non-case initiating family law documents

REMINDER:
Mandatory e-filing of non-case initiating family law documents begins Tuesday, March 1, 2022, under the rules outlined in Supreme Court Administrative Order AO 2021-183. Mandatory e-filing of case-initiating documents will begin June 1, 2022.

eFileAZ offers efiling in the in courts and case types such as Superior Court - all locations for Civil cases; Superior Court - Non-initiating criminal, plus more...

THE COURT IS CURRENTLY ACCEPTING non-case initiating family law documents by way of eFileAZ an Arizona judicial branch statewide e-filing service provider (EFSP). eFileAZ offers a no-fee online Family Law eFiling Training for attorneys. The two-hour sessions provide an opportunity for practitioners to learn the A to Z of creating and managing an eFileAZ account as well as the nuts and bolts of generating submissions, retrieving conformed copies, eserving other parties, and more.

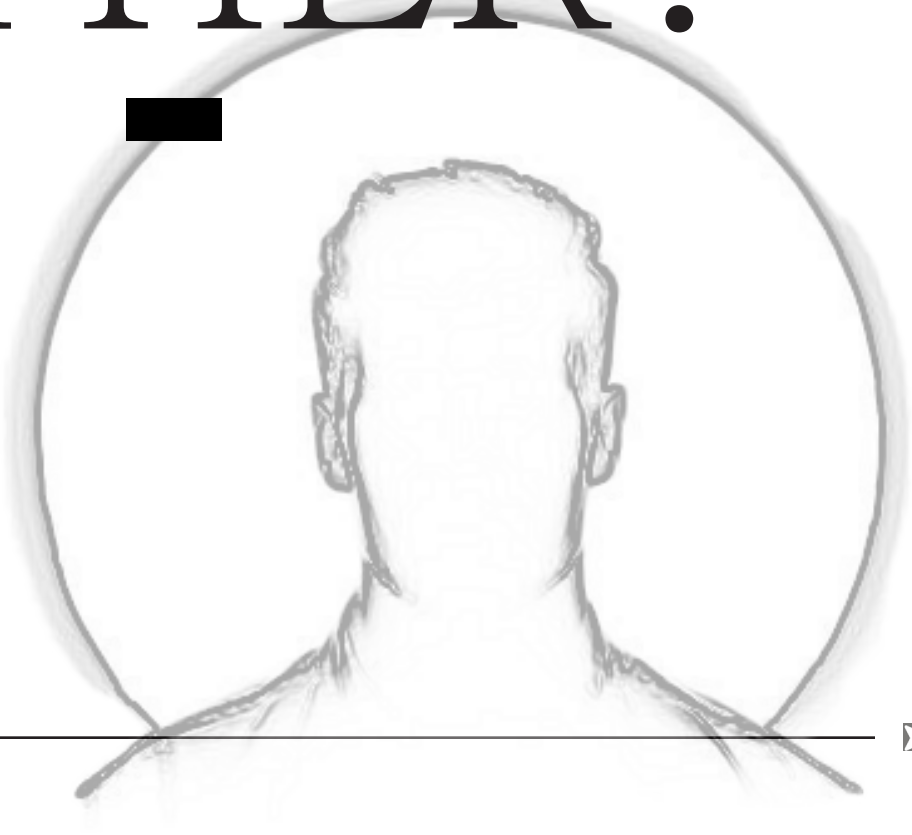
Self-represented litigants may, but are not required to, file family case documents through eFileAZ.

Please consult the administrative order for further details, including fees, exclusions, applicability, and procedures. FL

Generally, adoption requires the consent of both parents, provided they meet certain requirements. But for the requested relief to be granted, the petitioner must first prove the father's due process rights were fulfilled and parental rights adjudicated.

by **JESSICA GRAVES, ESQ.**

WHO'S the FATHER?



IN VARIOUS TYPES OF FAMILY LAW CASES, for the requested relief to be granted, the petitioner must first prove the father's due process rights were fulfilled and parental rights adjudicated.

Although "father" commonly means the male parent of a child, it is not always that straight-forward.

Instead, in the legal world, there are different definitions of "fathers" that practitioners should know: Birth/Biological Father; Legal Father; Potential Father; Presumed Father; Putative Father; and John Doe. Understanding the different types of "fathers" is especially important in terms of dependency, termination, and the steps to take to finalize adoptions.

FATHERS DEFINED:

Birth/Biological Father:

- A biological father whose "paternity is established under Title 25, chapter 6, article 1 [of the Arizona Revised Statutes] or section 36-334." A.R.S. § 8-106(A)(2)(c).
- Presumed legal fathers are excluded.
- Yet, a birth/biological father could be a "presumed father" under A.R.S. § 25-814(A)(2) if "[g]enetic testing affirms at least a ninety-five per cent probability of paternity."

Legal Father:

- Not defined statutorily.
- A father who "was married to the child's mother at the time of conception or at any time between conception and the child's birth." A.R.S. § 8-106(A)(2)(a).
- Includes a man who adopted a child. A.R.S. § 8-106(A)(2)(b).
- Includes a man who was "married at any time in the ten

...a birth/biological father could be a "presumed father" under A.R.S. § 25-814(A)(2) if "[g]enetic testing affirms at least a ninety-five per cent probability of paternity."

It is possible to have both a legal father and a birth father in the event the mother was married during conception/ birth, but another man's paternity is established...

months immediately preceding the birth or the child is born within ten months after the marriage is terminated by death, annulment, declaration of invalidity or dissolution of marriage or after the court enters a decree of legal separation." A.R.S. § 25-814(A)(1).

- Legal father is a presumed father if he and mother were married at conception or at birth, he signed the birth certificate if child was born out of wedlock, or he and mother signed an Acknowledgment of Paternity. A.R.S. §§ 25-814(A)(1), (3), & (4).

Be aware that it is possible to have both a legal father and a birth father in the event the mother was married during conception/birth, but another man's paternity is established under A.R.S. Title 25. In that situation, a legal father's parental rights would also need to be terminated "unless his paternity is excluded or another man's paternity is established pursuant to title 25, chapter 6, article 1." A.R.S. § 8-106(A)(2)(a).

Potential Father:

- "Potential father" typically appears only in relation to an adoption.
- A.R.S. § 8-106(F) requires a mother placing a child for adoption to sign and file an affidavit listing all men who could be a potential father of the child she is placing for adoption.

A putative father could be a potential father if the mother identifies the putative father as the potential father.

Every potential father identified in the affidavit must be served with a Potential Father Notice ("Notice"). A.R.S. § 8-106(G). Each potential father then has 30 days to file and serve a paternity action against the mother, and proceed to judgment if he wishes to contest the adoption. A father who is not listed on the potential father notice can still timely serve a mother once Notice is given. For

example, if the birth mother falsely states the father of the child is unknown, then the Notice will be published as to John Doe only. If Alex Doe learns about the pregnancy and upcoming adoption of the child and decides, on his own initiative without having been served with a Notice, to file, serve, and proceed to judgment on a paternity action against the mother, his consent to the adoption would be required or his parental rights would need to be terminated to proceed with the adoption. See *David C. v. Alexis S.*, 240 Ariz. 53, 375 P.3d 945 (Ariz. 2016). A potential father could be John Doe if the mother does not know the identity of the father.

The legislature and Arizona Supreme Court are very clear that a putative father must file with the Putative Father Registry within 30 days of the child's birth...

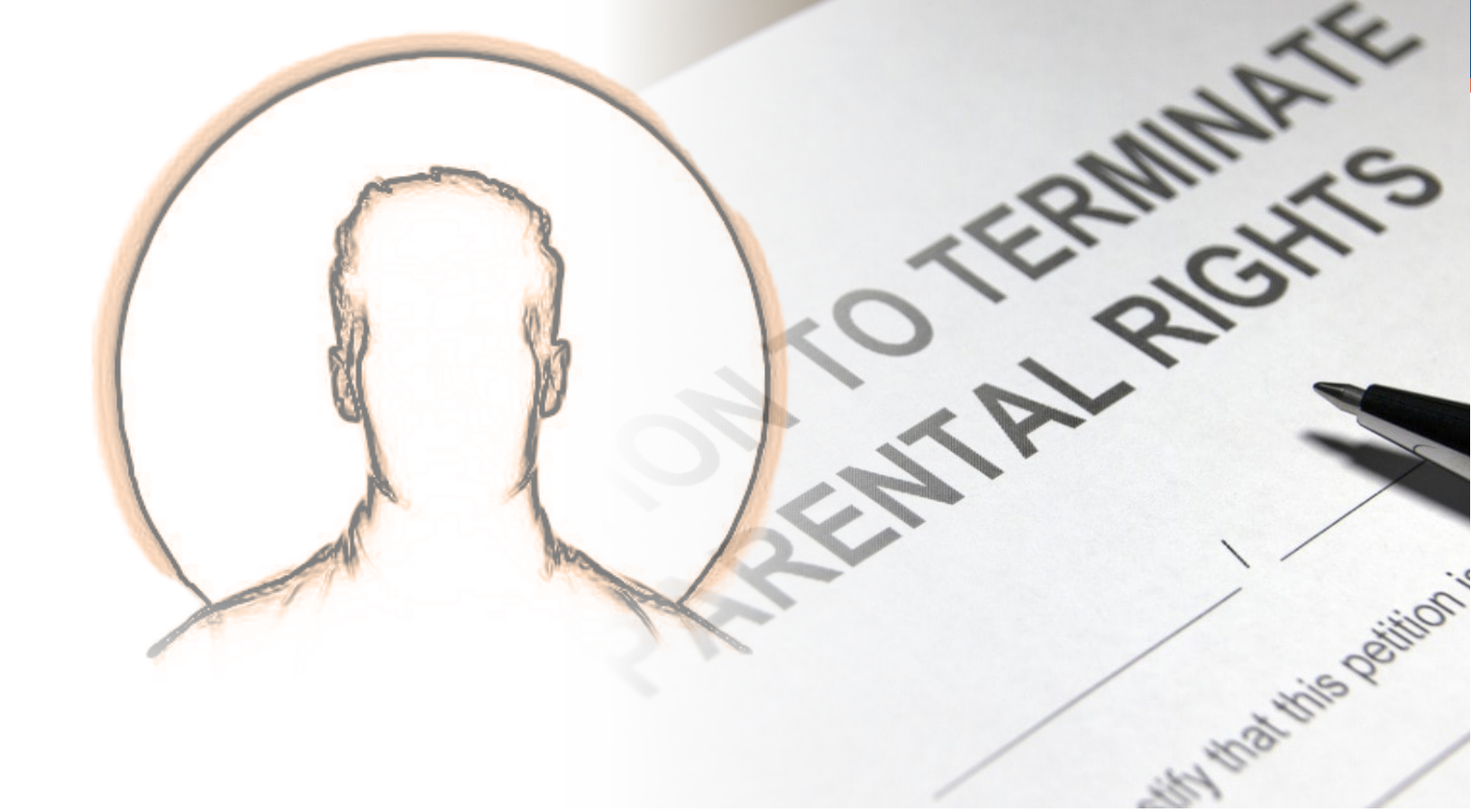
Putative Father:

- A father not listed as a potential father. However, a putative father could be a potential father if the mother identifies the putative father as the potential father (confusing, right?).
- The Putative Father's Registry ("Registry") exists for putative fathers. The Registry affords every other man who could be the father of the child the opportunity to register with the Arizona Putative Father's Registry in order to receive notice of the proposed adoption.

A putative father who timely files... is entitled to notice of the proposed adoption, would have the opportunity to establish paternity, and his consent to the adoption may be required.

The legislature and Arizona Supreme Court are very clear that a putative father must file with the Putative Father Registry within 30 days of the child's birth or, if he can show by clear and convincing evidence that it was not possible for him to file a notice within 30 days after the child's birth, he must have filed a notice of claim of paternity within 30 days after it was possible for him to file. *Marco C. v. Sean C.*, 218 Ariz. 216 (Ariz. App. 2008); *Frank R. v. Adoptions*, 402 P.3d 996 (Ariz. 2017). A.R.S. § 8-106.01(E). A putative father who timely files under these circumstances is entitled to notice of the proposed adoption, would have the opportunity to establish paternity, and his consent to the adoption may be required.

A potential father could be John Doe if the mother does not know the identity of the father.



John Doe:

- "A fictitious name used to designate any male who might be [a child's] biological father." *Guardian Ad Litem for A.S. v. Dep't of Child Safety,* No. 1 CA-JV 19-0141 (Ariz. Ct. App. Dec. 24, 2019 - not a published opinion).
- "A fictitious name used when the identity of the father is unknown." *Diana R. v. Ariz. Dep't of Child Safety,* No. 1 CA-JV 11-0176 (Ariz. Ct. App. Mar. 13, 2012 - not a published opinion).
- A "fictitious father who [fails] to establish paternity or a parental relationship." *Derrell P. v. Ariz. Dep't of Econ. Sec.,* No. 2 CA-JV 2013-0110 (Ariz. Ct. App. Mar. 3, 2014).
- "A fictitious name used to designate any other male individual claiming to be the father of the child and whose true identity and whereabouts are unknown." *Christina H. v. Ariz. Dep't of Econ. Sec.,* No. 1 CA-JV 11-0145 (Ariz. Ct. App., Jan. 10, 2012).

TERMINATING A FATHER'S PARENTAL RIGHTS:

In dependency proceedings under Title 8, if paternity is not established by birth certificate, DNA evidence, or orders of paternity, a dependency can be found as to John Doe.

In termination proceedings, John Doe's parental rights are typically terminated on the ground of abandonment. Termination of his parental rights can be done in either the termination proceeding or in the adoption by virtue of the Order of Adoption (A.R.S. § 8-117(B)).

In termination proceedings, John Doe's parental rights are typically terminated on the ground of abandonment (A.R.S. § 8-533(B)(1)).

In an adoption proceeding (where a termination of parental rights did not occur prior to the Petition to Adopt being filed), if a birth mother does not know the identity of the birth father and files her required affidavit under A.R.S. § 8-106(f) identifying John Doe as the potential father, John Doe is served with a potential father notice. If he fails to respond under the requirements of A.R.S. § 8-106(J), grounds exist to terminate his parental rights under A.R.S. § 8-533(B)(5). Termination of his parental rights can be done in either the termination proceeding or in the adoption by virtue of the Order of Adoption (A.R.S. § 8-117(B)).

According to A.R.S. § 8-106.01(H), if, in an adoption proceeding, "there is not a showing that a putative father has consented to the adoption or has waived his rights regarding the proposed adoption," the petitioner must check the Putative Father's Registry and file the certificate of results in the adoption proceeding. A putative father's rights can be terminated

under A.R.S. § 8-533(B)(6). There is, of course, the impossibility clause from A.R.S. § 8-106.01(E)(1) and (2). *See also Frank R. v. Adoptions*. Again, if the Registry is checked in the adoption and there were no files found, the putative father's rights would be terminated by virtue of the Order of Adoption under A.R.S. § 8-117(B). A separate termination action would not be required to terminate a putative father's parental rights.

So, in a private adoption, a petitioner would be terminating the parental rights of a *potential father* (which could be John Doe) and a *putative father.*

In a termination action (usually involving the Department of Child Safety, but can be through a private termination petition), a petitioner would be terminating the parental rights of a *potential father* (if the mother identifies a father of the child) and John Doe. In current practice, a *putative father's* rights might not be terminated, though the grounds may exist in a termination action under A.R.S. § 8-533(B)(6).

Adoptions:

A child cannot be adopted until the child is legally free for adoption - meaning, both mother's and father's parental rights are terminated. As mentioned, parental rights can be terminated in a private termination petition (A.R.S. § 8-533(A)) or by motion if there the child has been deemed dependent (Rule 64, Ariz. R. Juv. Ct. P.).

It is generally easier to determine the identity of the mother of a child, though this can become questioned when assisted reproductive technology has been used. It is the father whose identity is more unknown, just due to the number of possible fathers. In some cases, there could be a few different fathers involved in the case whose rights need to be terminated or the presumption of paternity needs to be rebutted. Confused yet?

Here's an example. There is a birth father listed on the birth certificate because he was married to the mother within 10 months of the child's birth or she was married to him at the time of birth. He's the legal father. However, DNA evidence excludes him as the father of the child. His presumption of paternity has now been rebutted and he is no longer a legal father whose parental rights need to be addressed.

The mother then identifies a man who she believes is the father. What if he refuses genetic testing or he cannot be located? He would be considered a potential father, right? Is he still a potential father under A.R.S. § 8-106(F)-(J)? Probably, since typically, his rights would be terminated in the dependency action. If the case then proceeds to adoption after the termination of parental rights, would petitioner still need to serve him with a Potential Father Notice? Probably not since his parental rights would have already been terminated.

Let's go through what would happen if he was still served with a Notice to Potential Father. The potential father is served with notice of the proposed adoption and given 30 days to file a paternity action and serve it on the mother. If he timely serves and proceeds to judgment, obtaining an Order of Paternity, then his consent to the adoption would be required or his parental rights would need to be terminated to proceed with the adoption. Well, his parental rights were *already* terminated. So, it almost seems silly to have taken the steps to serve him with the Notice if it did not actually matter at the end.

In that same example, since there are no orders of paternity and no DNA evidence for a father, John Doe is usually also listed, typically to cover any other man who may claim to be the father of the child. So, both the potential father and John Doe's parental rights would be terminated in the dependency. But, what about the putative father under A.R.S. § 8-106.01?

The question then becomes: is John Doe the same as a putative father? If John Doe is equivalent to a putative father, then when John Doe's parental rights are terminated based on abandonment, would a check of the Putative Father's Registry still be necessary? It might be. To comply with A.R.S. § 8-106.01(H), the Petitioner would need to show that the putative father

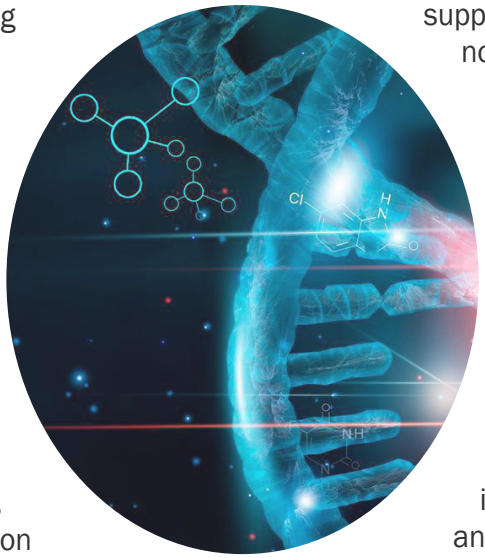
In some cases, there could be a few different fathers involved in the case whose rights need to be terminated or the presumption of paternity needs to be rebutted.

(John Doe?) waived his rights regarding the proposed adoption. If Petitioner cannot show a waiver, the results of the check would need to be filed.

If John Doe is NOT the same as a Putative Father, then in current practice, the Putative Father's parental rights are addressed during the adoption matter and not the termination matter. At first glance, this makes sense. After all, the Putative Father Registry check requirement is found under the adoption statutes and rules, not in dependency and termination (though the ground exists to terminate based on a putative father's failure to timely file with the Registry). But, the question then becomes: does it makes more sense to terminate the putative father's rights in the dependency proceeding if an agency (like the Department of Child Safety) is moving to terminate parental rights?

Here's a scenario: the Department of Child Safety has legal custody of an 8-year-old child and has grounds to terminate parental rights. There is no father listed on the birth certificate. Mother identifies a possible father, but there is no legal father or birth father of the child. During the dependency, the DCS moves to terminate the birth mother's, birth father's, and John Doe's parental rights - all based on abandonment. The judge orders that all parental rights be terminated making the child legally free for adoption. The Putative Father's Registry is never checked.

Now, the case has progressed to an adoption and the adoptive parents file a Petition to Adopt the child. At this point, the Putative Father Registry is checked and finds there *is* a father who timely registered a notice with Vital Records indicating his request to seek paternity of a child, his intent to support the child, and his request to be notified of any adoption proceedings.



If the putative father intervenes in the adoption and through DNA testing finds out he is the biological father of the child, would his rights then need to be terminated? What would the ground for termination be?

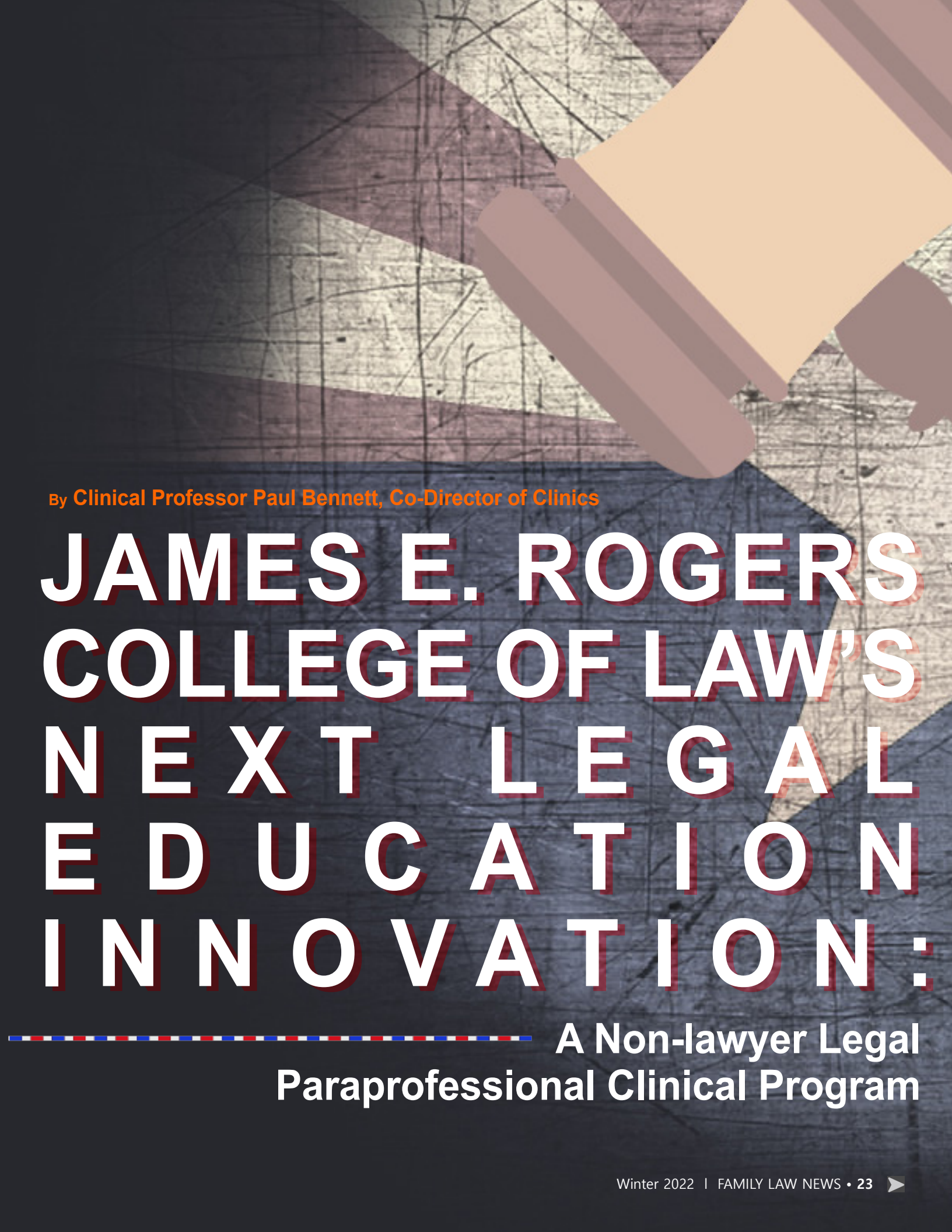
What are the next steps? It seems that Petitioner would need to provide the putative father with notice of the adoption proceeding. What happens if the putative father intervenes in the adoption and through DNA testing finds out he is the biological father of the child? Would his rights then need to be terminated? Would the ground for termination be abandonment even if he wasn't aware of the child's birth and he did what he could to establish his intent and willingness to support a child he may have fathered through filing with the Putative Father's Registry? At that point, would Petitioners then need to file to terminate his parental rights, even though the DCS still has legal custody of the child? Do his parental rights need to be addressed in the dependency?

Although this situation has likely never occurred in Arizona, it isn't inconceivable which begs the question posed earlier: are John Doe and a putative father different "fathers" whose parental rights need to be addressed in the dependency or at the termination stage to eliminate the possibility of the above scenario?

CONCLUSION:

Given all of the requirements and challenges of fulfilling a father's due process rights and completing an adjudication of a father's parental rights, practitioners addressing these issues would be well-served by taking the time to understand the differences and nuances regarding the different legal definitions of "father" as well as creating checklists to make sure all the necessary steps are completed. FL

About the Author - **Jessica Graves** is an adoption attorney practicing in Tucson. She grew up in Phoenix, but made Tucson her home after graduating from the James E. Rogers College of Law. Since graduation, she has been representing prospective adoptive parents and birth parents in their adoptions. As a new mother, Jessica loves spending her time with her family, but remains active in the community sitting on many non-profit Boards geared towards helping children.



By Clinical Professor Paul Bennett, Co-Director of Clinics

JAMES E. ROGERS COLLEGE OF LAW'S NEXT LEGAL EDUCATION INNOVATION:

A Non-lawyer Legal Paraprofessional Clinical Program

Every year, many try to navigate US courts without a lawyer. According to a recent article in the Arizona Republic, that number is as high as 90% in Arizona.

IT IS NOT EXACTLY BREAKING NEWS that the vast majority of litigants in family law matters enter the court system without a lawyer. According to a recent article in the Arizona Republic, that number is as high as 90% in our State. I am sure that every family lawyer has had to deal with someone who is unrepresented – confused, frustrated, sometimes inappropriate. No representation is rarely, if ever, a good thing.

The need for representation did not go unnoticed. The Arizona Supreme Court created a Commission on Access to Justice and a Task Force on the Delivery of Legal Services to address the need for greater access to legal services. As a result of their recommendations, the Supreme Court authorized a new level of legal services – the Legal Paraprofessional (LP). Perhaps they will be the nurse practitioners of legal services.

Of course, someone has to educate and train the new LPs. Our feeling was the James E. Rogers College of Law was well positioned to take on that challenge.

The good news is that the College of Law is no stranger to innovation in the delivery of legal services – especially legal services by non-lawyers. Two years ago,

the Arizona Supreme Court authorized a pilot project between the Law College's *Innovations for Justice Program* (I4J) and *Emerge!* to train "Licensed Legal Advocates" who would be permitted to advise victims of Domestic Violence. On an experimental basis, the high Court authorized our I4J program, directed by Stacy Butler and with the assistance of Hon. Karen Adam, to design a curriculum and train LLAs to provide advice and assistance to help survivors navigate Orders of Protection and other specifically-identified legal needs of people experiencing domestic violence.

The College of Law was also the first law school in the country to create an undergraduate legal clinic. Under the supervision Professors Diana Newmark and Kristy Clairmont, students are, among other things, assisting litigants in preparing their default divorce paperwork. We call that program the Family Law Default Project.

As to LPs, just recently, the Supreme Court approved the Law College's educational program for undergraduate students as a pathway to a legal paraprofessional license. There are also options for UA graduate students. Those who receive a license may practice in family law, limited civil cases, limited criminal cases and administrative law after completing their state mandated curriculum and passing state exams in those areas. The Law College was fortunate to add Kristy Clairmont, a family law attorney, as Professor of Practice and to be the Program Coordinator for the Legal Paraprofessional Program.

The Supreme Court has mandated a core curriculum. However, in our experience, some hands-on clinical experience is an important educational add-on. Learning beyond the classroom is essential – just as it is for our JD students. Professor Clairmont is working with Academic Advisor Catherine Monro, Professor Newmark, and Linus Kafka, the Deputy Director of our Undergraduate and Masters in Law Program,

The Arizona Supreme Court recognized the need for greater access to legal services and representation. They created a Commission on Access to Justice and a Task Force on the Delivery of Legal Services to address the needs.

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to create a first of its kind non-lawyer Legal Paraprofessional clinical program.

We may likely be approaching some of you to assist in mentoring those students about to practice family law as the nurse practitioners of legal services. Obviously, we all have much to learn as we roll out this program. We welcome any ideas or suggestions you may have. FL

THE UNIVERSITY OF ARIZONA
James E. Rogers College of Law

About the Author - **Clinical Professor Paul Bennett** is the Co-Director of Clinics and Director of the Child and Family Law Clinic. He joined the College of Law in 1996 as the first Director of the Child Advocacy Clinic which later became the multi-disciplinary Child and Family Law Clinic. From 2012 - 2013, Professor Bennett also co-directed the Law College's Veteran's Advocacy Law Clinic.

In addition to Clinical Legal Education, Professor Bennett teaches classes in Professional Responsibility, Law and Humanities and Juvenile Law.

In 2010, along with Professor Tom Mauet, Professor Bennett was chosen by Arizona Law students to receive the John Strong Teaching Award. In 2020, Professor Bennett was selected Attorney of the Year at the Pima County Juvenile Court by the Court Appointed Special Advocates.

Last, and most important, Professor Bennett is the grandfather of four, who, like all children have minds of their own.

Legislative Update

The Family Law Executive Council, Keeping You Informed (Jan. 23, 2022)

AS YOU ALL KNOW, the Arizona Legislature is back in session. In an effort to keep you informed, the Family Law Executive Council would like to provide updates regarding pending legislation that may affect your clients. Remember that the status of proposed legislation can change quickly, so we encourage you to inquire on the current status of these bills using the resources below.

In order to track these and other bills as they progress through the legislature go to: https://www.azleg.gov/bills/

To contact your Representative or Senator go to: https://www.azleg.gov/MemberRoster/

THE FOLLOWING BILLS HAVE BEEN PROPOSED:

HB2418 – Reference title "Parenting time; child preference; advocate"

Introduced by Representative Parker Amends 25-403 and 25-405

Proposed amendment language:

25-403 Legal decision-making; best interests of child

4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time. IF THE CHILD IS AT LEAST TWELVE YEARS OF AGE, THE WISHES OF THE CHILD SHALL BE PRESUMPTIVE, UNLESS THE COURT DETERMINES THAT THE CHILD'S WISHES ARE NOT IN THE BEST INTEREST OF THE CHILD.

25-405 Interviews by court; professional assistance; advocate

A. 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.

B. IN ALL CASES IN WHICH A CHILD IS AT LEAST TWELVE YEARS OF AGE, THE JUDGE SHALL STRONGLY CONSIDER THE WISHES OF THE

CHILD IN DETERMINING CUSTODY AND PARENTING TIME. THE CHILD'S WISHES FOR PURPOSES OF CUSTODY AND PARENTING TIME SHALL BE PRESUMPTIVE UNLESS THE COURT DETERMINES THAT THE CHILD'S WISHES ARE NOT IN THE BEST INTERESTS OF THE CHILD.

B. C. The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and shall be made available by the court to counsel, on request, under such terms as the court determines. AT THE COURT'S DISCRETION, THE COURT MAY APPOINT AN ADVOCATE TO REPRESENT THE BEST INTERESTS OF THE CHILD IN DETERMINING CUSTODY AND PARENTING TIME. Counsel may examine as a witness any professional personnel OR ADVOCATE consulted by the court, unless that right is waived.

SB1216 - Reference Title "Orders of protection; duration"

Introduced by Senator Steele The bill's second reading occurred on 1/20/22

Proposed amendment language for 13-3602

N. An order of protection that is not served on the defendant within one year after the date that the order is issued expires. An order is effective on the defendant on service of a copy of the order and petition. An order expires ~~one year~~ TWO YEARS after service on the defendant. A modified order is effective on service and expires one year after service of the initial order and petition.

Q. The supreme court shall maintain a central repository for orders of protection. Within twenty-four hours after the affidavit, declaration, acceptance or return of service has been filed, excluding weekends and holidays, the court from which the order or any modified order was issued shall enter the order and proof of service into the supreme court's central repository for orders of protection. The supreme court shall register the order with the national crime information center. The effectiveness of an order does not depend on its registration, and for enforcement purposes pursuant to section 13-2810, a copy of an order of the court, whether or not registered, is presumed to be a valid existing order of the court for a period of ~~one year~~ TWO YEARS from the date of service of the order on the defendant.

SB1217 - Reference Title "Duration; Emergency orders of protection"

Introduced by Senator Steele The bill's second reading occurred on 1/20/22

Proposed amendment language for 13-3624

E. An emergency order of protection expires ~~at the close of the next day of judicial business following the day of issue or seventy-two hours~~ FIVE CALENDAR DAYS after issuance, ~~whichever is longer,~~ unless otherwise continued by the court. FL

Community Property: Accrued Vacation Pay is Community Property if Reimbursable; Post Date of Service Payment of Community Obligations May Be Reimbursable and Not Gift

Andrews v. Andrews, No. 1 CA-CV 20-0605 FC, 12/14/2021

FACTS: Wife files for divorce. Wife sought temporary spousal maintenance on the basis that she was injured and temporarily not working. The trial court ordered Husband to pay to Wife $2,200 per month, plus Husband was responsible for many community expenses. The Court noted that the payment of expenses might be subject to an equalization at a later date. The trial court later reduced the temporary spousal maintenance to $1,200 per month after Wife returned to work and by virtue of the parties' Rule 69 agreements that allowed Wife to access her half of $1.3 million in retirement assets without penalty. The matter proceeded to trial. The trial court awarded Wife $5,000 per month as and for spousal maintenance for an indefinite term. Regarding vacation pay, the trial court found that such pay accumulated during the marriage was community property, and found that Husband willfully failed to disclose information necessary to value the same. Regarding Husband's claim for reimbursement of post service expenses, the court concluded that Husband failed to provide evidence supporting his claim.

Husband appealed the trial court's characterization of Husband's accumulated vacation pay as community property to be divided equally; its denial of his claim for reimbursement for home loan and other expenses he paid after date of service; and the spousal maintenance award of $5,000 a month to Wife.

Division One reversed and remanded in part, holding as follows:

1. **Accrued vacation pay hinges on whether or not it is reimbursable or otherwise constitutes deferred compensation.** If it is, then it is community. If the reimbursement is conditional (it constitutes an alternative form of wages, then it would be separate property because it would be speculative).

    a. The court distinguished the *Helland* case which classified disability payments received after date of service as separate property even though the community had maintained the policy prior to date of service. A disability policy is not an annuity or other investment with an expected rate of return as disability benefits are paid only under certain conditions and are contingent upon the insured's ongoing disability– and so the community did not acquire a right to future disability benefit payments when it purchased the policy.

By **Kathleen McCarthy** *Edited by* **Annie M. Rolfe**

[A NOTE FROM MS. McCARTHY: *Of interest is that even though Husband had willfully failed to disclose the documents related to his vacation pay, Division One nevertheless remanded to the trial court to determine if it was reimbursable or not.*]

[A NOTE FROM MS. McCARTHY (2): *The trial court held that Husband's sick pay was his separate property, but this issue was not appealed, so the issue of sick pay has not been decided.*]

2. **The trial court has wide discretion over the issue of spousal maintenance.** The appellate court upheld the spousal maintenance award. Husband had argued that Wife's conduct contributed to her health problems and inability to work full-time. Wife had admitted to having dogs, vaping and occasionally smoking; but Wife's medical expert testified that eliminating these issues does not always alleviate significant asthma.

3. The trial court abused its discretion by denying Husband's reimbursement claim as to loan payments he made on the marital residence. **When a divorcing spouse pays community obligations after a petition for dissolution is filed, the matrimonial presumption of a gift does not apply.** *Bobrow v. Bobrow*, 241 Ariz. 592 (2017). The payor has the burden of proof to show the amount of his claim. The trial court concluded Husband had failed to disclose credible evidence to support his claim; but Husband contended that Wife had admitted his claim. In fact, Wife had testified that Husband had made various payments on the debt after date of service. Based on the record, Division One concluded that Husband failed to meet his burden of proof to show the exact amounts. But in view of Wife's testimony regarding the mortgages, Division One found that a preponderance of the evidence established that Husband made payments somewhere within the range of the amounts identified by Wife. The trial court abused its discretion by disregarding that evidence. Division remanded so the trial court could consider Husband's reimbursement claim regarding the mortgage residence payments only.

The trial court abused its discretion by disregarding that evidence. Division remanded so the trial court could consider Husband's reimbursement claim regarding the mortgage residence payments only.

[A NOTE FROM MS. McCARTHY: *When making a reimbursement claim, make sure you submit documentation of the types and amounts of all expenses paid.*]

Community Property: A Valuation Date Must Yield to Overarching Principles of Equity

Meister v. Meister, No. 1 CA-CV 19-0618 FC, 12/2/2021

FACTS: Husband and Wife are divorcing. During the marriage, Husband and Wife acquired a business ("PBS"). Husband ran the day-to-day operations of PBS and worked full-time at ADB. Wife handled the accounting and bookkeeping of PBS. After date of service, Wife continued working for the business and the parties contemplated that Husband would buy out Wife's interest in the business. Wife later alleged that she was unable to continue performing her duties at PBS because Husband harassed her and excluded her from the business.

ADB DID BUSINESS WITH PBS. During the marriage, ADB entered into agreements with PBS that PBS could perform services at a 5% to 8% markup. While the divorce was pending, ADB discovered that Husband, through PBS, was charging a 30% to 40% markup. ADB fired Husband personally and cancelled the contract with PBS. ADB was PBS's largest client and the loss financially harmed PBS. As the business declined, Husband sold business assets without Wife's consent and contrary to a court order.

Wife's financial expert valued PBS as of the date of service and before the loss of ADB. The value was approximately $2.6 million. Husband's financial expert valued PBS *after* the loss of ADB (December 2017) at $1.1 million and at $120,000 by the end of 2018.

The trial court awarded PBS to Husband as a value of $2.6 million.

Division One held as follows:

1. **The Trial Court Must Establish an Equitable Valuation date.** Community property must be divided equitably, though not necessarily in kind, and without regard to marital misconduct. The court also has wide discretion in apportioning community property.

The court's discretion in apportioning community property includes the ability to choose a valuation date for community assets. Invoking *Sample*, the court recognized that the equitableness of property distribution is the very touchstone of a property apportionment. Accordingly, the trial court must be allowed to utilize alternative valuation dates. On appeal the court must assess whether the superior court's choice of a valuation date reached an equitable result that "stands the test of fairness on review".

a. There is no Arizona authority mandating or even suggesting a community asset must be valued at or near the date of service. Rather, the trial court is to choose a date that is just and equitable.

b. The choice of a valuation date *in a divorce* should be dictated by pragmatic considerations and must comport with principles of fairness and equity. This is the touchstone of A.R.S. §25-318(A). The trial court erred by not considering that the conduct resulting in the loss of the primary contract was attributable to Husband's conduct *before* the date of service. Additionally, Wife benefitted from the fruits of Husband's over-billing (that led to the loss of the customer) and was working for the business when the over-billing occurred. The court expressed no opinion on whether the valuation of a business for any other purpose should turn on whether a specific event is foreseeable as of the date of valuation. *But when a court is valuing a community asset in a dissolution proceeding, it triggers different considerations, and otherwise "standard" valuation approaches must yield to the overarching principles of equity. There is no authority suggesting that foreseeability should control the court's choice of a valuation date.* Because the trial court did not make specific findings about the equitableness of the valuation date, the court abused its discretion to the extent it selected the valuation date based on Wife's expert's opinion that the loss of the contract was not foreseeable.

The trial court erred by not considering that the conduct resulting in the loss of the primary contract was attributable to Husband's conduct before the date of service. Additionally, Wife benefitted from the fruits of Husband's over-billing (that led to the loss of the customer) and was working for the business when the over-billing occurred.

2. **Waste.** If a court finds a party committed waste that reduced the value of a community business, it may consider such waste in selecting a valuation date for the business. On the other hand, if a court finds that waste did not affect the value of the business, but did impact other marital assets, the court may take that into account when apportioning that property. However, the trial court conflated Wife's claims of Husband's post date of service financial mismanagement with the selection of Wife's expert's proposed valuation date based on whether the subsequent events were knowable. As such, neither the record nor the court's ruling showed how Husband's poor management or wasteful spending impacted the value of the business such that it was decimated by 95%.

3. **Sufficient findings of fact are required.** Absent a proper request from a party that triggers *mandatory* separate findings of fact and conclusion of law, no bright-line rule exists as to what a court must include in addressing whether a selected valuation date is equitable. However, the court must provide enough analysis, however labeled, to allow the appellate court to decide whether the ruling withstands the test of equity and fairness. When the court's ruling lacks such analysis, the appellate court cannot merely presume that the valuation date complies with *Sample*.

Business Valuations: A "Calculation of Value" is Admissible

Larchick v. Pollock, No. 1 CA-CV 19-0649 FC, 12/9/2021

FACTS: Wife owned a business prior to marriage. After marriage, Wife formed a new LLC to purchase an office building for the use of her premarital business. Wife testified (but did not produce independent evidence verifying) that all funds used to acquire the office building were her sole and separate property. The community signed a guarantee for the mortgage on the office building.

The trial court decided some issues, entered the decree, and deferred the business valuation and lien issues for a separate trial.

In anticipation of the second trial, Husband disclosed a Calculation of Value report prepared by his expert.

Husband's expert noted in his engagement letter that he would not testify as to a Calculation of Value at trial; and that if it went to trial, he required that the calculation schedules be upgraded to a formal summary valuation report. Wife's expert produced a full appraisal, and determined that there was an increase in the business' value during the marriage, but that the increase was significantly less than the value opined by Husband's expert. Both experts were present during trial.

THE TRIAL COURT SUSTAINED WIFE'S OBJECTION TO THE CALCULATION OF VALUE and to Husband's expert testifying. Husband then attempted to call Wife's expert, who was present in the courtroom. The court sustained Wife's objection to this based on the fact that Husband had not subpoenaed Wife's expert. Without producing further evidence, Wife moved for a directed verdict on the issue of a community interest in an increase in value of her pre-marital business, which the Court sustained.

The trial court also held that the building was Wife's separate property based on Wife's assertion that she had paid the remainder of the price with her separate funds; that no default on the mortgage had occurred; and that the building had been sold.

Husband appealed. Division One vacated and remanded in part holding as follows:

1. **Brown Decrees are wrong but will be tolerated here.** Under A.R.S. §25-312(4), the court can enter a decree of dissolution only if it has made provision for the disposition of property. The Court erred by bifurcating its ruling, but this did not void the dissolution, which neither party appealed. Nor does the error deprive the appellate court of jurisdiction.

2. **Rule 702 and Admissibility of Expert Testimony.** The trial court erred by excluding Husband's expert's testimony and the Calculation of Value. "Under Rule 702, a witness 'who is qualified as an expert' by knowledge or experience may render opinion testimony if the witness' 'specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The court serves as a gatekeeper to ensure expert evidence is reliable and helpful to the finder of fact, however it is not intended to replace the adversary system. "Rather, 'cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible evidence.'* Id. (citation omitted) (emphasis added)." Nothing in Rule 702 requires an expert to account for all possible methods of assessment. In excluding Husband's expert's report, the court erred because it deferred to the expert's understanding of what evidence would be admissible. This is the expert's personal view; the expert is not qualified to offer a legal opinion. Even though a "calculation of value" opinion may be short of the gold standard, it is not *per se* unacceptable or inadmissible. The court is free to give the opinion little or no weight, but not to exclude it altogether. All that is necessary is for the court to make sure the evidence clears the reliability threshold.

3. **Granting a Directed Verdict was error because even Wife admitted it had increased some in her Pretrial Statement.** "The opinion of Wife's expert, as recounted in her pretrial statement, was admissible as a statement by an opposing party under Rule 801(d)(2)(D). See *Ryan v. San Francisco Peaks Trucking Co.,* 228 Ariz. 42, 47, ¶ 16 (App. 2011). Wife argues that her disclosure of her expert's opinion that the Business increased in value was 'irrelevant' because Husband had the burden to prove any increase. See *Hefner v. Hefner,* 248 Ariz. 54, 60, ¶ 17 (App. 2019)." The appellate court disagreed. Once Husband cited to the opinion as set forth in Wife's pretrial statement, "the opinion constituted some evidence that the Business had increased in value. See *Ryan,* 228 Ariz. at 47, ¶ 16; Ariz. R. Fam. Law 76.1(f)(7) (pretrial statement must contain a party's 'position on each contested issue')."

4. **Wife failed to prove her separate property claim to the building by clear and convincing evidence.** This case contains a good description of the historic case law surrounding community versus separate property, and that the party alleging that an asset is sole and separate property has the burden of proof by clear and convincing evidence. The trial court erred by dismissing Husband's community claim to the property. "When a claim is made that 'property

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purchased during the existence of a marriage is the separate property of one of the spouses, *the funds* with which such property was acquired *must be clearly shown* to have been the separate property of such spouse.' *Blaine v. Blaine,* 63 Ariz. 100, 109-10 (1945) (emphasis added). Wife, however, did not prove the source of the funds used to purchase the Office, nor did she establish those funds were her separate property." While Wife asserted that the monies paid were her "sole and separate property," the actual source of the funds was never entered into evidence. FL

IMPORTANT DATES

February 2022	**Pima County Pro Tem Applications Due**
March 1, 2022	**E-filing of non-case initiating family law documents begin**
June 1, 2022	**E-filing of case-initiating documents begin**
June 27-29, 2022	**The State Bar of Arizona Annual Convention**
July 13-16, 2022	**The State Bar of Arizona's CLE by the Sea**

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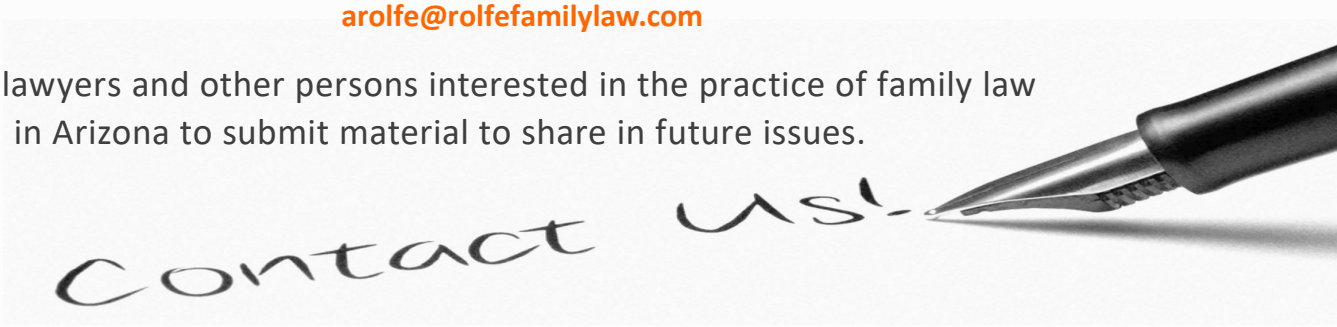
PLEASE SEND YOUR SUBMISSIONS TO:

ANNIE M. ROLFE, FAMILY LAW ATTORNEY
Rolfe Family Law, PLLC
2500 N. Tucson Blvd., Suite 120
Tucson, Arizona 85716 | (520) 209-2550
arolfe@rolfefamilylaw.com

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



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