summer
2021

Family Law News

this issue...

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FROM THE CHAIR

DAVID N. HOROWITZ

Family Law Practice

NAVIGATING NEW WATERS AND HELPING OUR COMMUNITY

I AM EXCITED AND HONORED to serve as Chair of the Family Law Section Executive Council for the 2021 - 2022 year. We have just completed the council's annual retreat, and I am hopeful that this coming year will offer our membership many opportunities to participate and benefit from the council's activities.

I am pleased to share that we will continue to provide programming at the State Bar Convention and other continuing education seminars in Maricopa County and throughout the state. Please reach out with topics for CLE as well as alternative venues and delivery methods. We will also continue to follow legislative and rules changes and provide case law updates for our members. We will continue to publish this newsletter and do everything we can to assist family law practitioners. We intend to either produce or support a family law trial college in concert with superior court judges in both Pima and Maricopa counties.

...this coming year, the Family Law Section Executive Council, will offer our membership many opportunities to participate and benefit from the council's activities.

For the 2021-2022 year, we have created two new committees. We will have a Social Interaction Committee to plan events (both in-person and virtual) so that section members can choose to meet with and share experiences and activities with one another. We are also exploring opportunities to provide collaboration with other professions whose practices overlap and intertwine with ours - including medical, educational, child welfare and mental health communities. We are also pleased to continue to partner with organizations such as the American Academy of Matrimonial Lawyers and the Association of Family and Conciliation Courts to support the entire family law community. We are also very aware that new Arizona Child Support Guidelines have been approved and are set to take effect on January 1, 2022. We will do everything we can to provide programming and information to our members as educational information and the new child support calculator become available.

ARIZONA CHILD SUPPORT GUIDELINES HAVE BEEN APPROVED AND ARE SET TO TAKE EFFECT ON JANUARY 1, 2022

I am grateful for the opportunity to serve, and I welcome your input and ideas. Please reach out if you have any suggestions or ideas for new projects. Also, if you would like to volunteer in any way, please let us know.

Finally, a big thank you to all of the council members for volunteering their time. The practice of family law has changed dramatically over the last year, and we want all of our members to know that we'll continue to do everything we can to support you as we navigate these new waters. We don't yet know what the "new normal" will be, but we are happy to be here to help create it. 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**

By
Stephen R. Smith
FROMM SMITH & GADOW, PC

Part 2

Deciphering Executive Compensation[1]

Division Strategies and Tax Traps -

Once you have identified the scope of the benefits, you must address how to appropriately allocate them.

ONCE YOU HAVE IDENTIFIED the scope of the executive spouse's compensation benefits, you must then address how to appropriately divide or allocate them in the context of the divorce. In a marriage where one or both spouses are highly compensated individuals, the marital community usually has amassed a sizable estate consisting of readily

ascertainable liquid assets (cash, publicly traded securities, etc.), and illiquid assets (real estate, private equity investments/holdings, etc.) which can be used to offset employment benefits held in the name of the employee spouse.

For example, assume that the executive spouse has a compensation package which includes $3M in restricted stock, options, and deferred compensation. Also assume that the parties personally hold $10M of other assets, which include multiple homes, a stock portfolio, and interests in closely held LLC's. In such a situation, the employment assets can be assigned to the executive spouse with a like assignment of $3 million of comparable assets to the nonemployee spouse, with the remainder of the community estate divided between the parties. Of course, detailed analysis is required to ensure that you are trading apples for apples (considering tax implications and the like), but with publicly traded or long-established companies which are unlikely to have substantial short-term gains or losses in their stock value, such an arrangement is likely feasible and can be accomplished in an equitable manner.

But what if the executive spouse works for a startup company in which he has been awarded substantial stock, options, or other equity benefits that have substantial potential upside. In this situation, it may be more beneficial to the nonemployee spouse to receive her actual share in such equity assets rather than receive other offsetting assets. Equity positions in rapid growth or startup companies can often be like a lottery ticket - the shares could end up being worth a substantial sum, or they could end up being worth nothing. Awarding such equity assets to the employee spouse with an offset to the other could be remarkably unfair to the employee spouse (if the company tanks) or remarkably unfair to the nonemployee spouse (if the company ends up being the next Amazon, Google, or Tesla.) In these situations, the best result for the nonemployee spouse may be to actually receive a share of the options or stock, or at least receive the beneficial interest in the options or stock. Methods for such division are discussed below.

...it may be more beneficial to the nonemployee spouse to receive their actual share in such equity assets rather than receive other offsetting assets.

TAX TREATMENT OF INCENTIVE COMPENSATION

Internal Revenue Code § 1041 generally provides that divorce-related transfers of property are tax-free, and that the transferee spouse takes such property with a carryover basis from the transferor spouse. It applies to nearly all kinds of property commonly transferred in a divorce, such as houses, cars, investments, etc. Revenue Ruling 2002-22[2] provides that, if *vested options* are transferred in connection with a divorce, the transfer constitutes a transfer of property under Section 1041. The transfer of vested or unrestricted stock also falls under the umbrella of section 1041. Thus, transferring vested options or stock is not a taxable event, so

the transferee spouse receives the stock/options at the same basis as the employee spouse held them (which in the event of an un-exercised incentive stock option is a zero basis). When the transferee spouse exercises the option, he/she realizes income equal to the spread between the option strike price and exercise price. In other words, from a tax perspective, the nonemployee spouse who receives a vested option or a share of unrestricted stock simply steps into the employee spouse's shoes. For reporting and withholding purposes, the employer reports the income upon exercise by the non-employee spouse on a 1099-MISC and makes supplemental withholding at the appropriate rate.

Often, employees will exercise options and then immediately sell the underlying stock. This is frequently a cash free transaction whereby the employee "borrows" the strike price from the employer and then repays the borrowed funds out of the sales proceeds from the sale of the underlying stock. If the corporate option agreement allows for transfers of options to a non-employee former spouse, said transferee spouse can likewise execute a cashless exercise of the options. The end result is that the transferee/nonemployee spouse receives a check equal to the spread between the value of the stock and strike price reduced by supplemental withholding (at the appropriate flat rate), as well as a reduction for employment tax withholding (which is generally calculated on the transferor/employee's wages). For example, assume that employee X gets divorced and at the time, holds an option to buy 100 shares of Employer's stock for $50 a share. Assume also that the corporate stock plan allows the transfer of the options to a nonemployee spouse. Nonemployee spouse elects, one year later, to exercise her 50 shares at a sale price of $100. The cashless transaction results in a gross benefit to the nonemployee spouse of $2,500. (50 shares X the $50 spread between the strike price of $50 and the sale price of $100.) The Corporation issues a check to the nonemployee spouse, after appropriate withholdings.

While the income tax burden should always be borne by the transferee/non-employee spouse on their exercise of options, potential complications arise from the employment tax burden for such options.

While the *income tax burden* should always be borne by the transferee/non-employee spouse on her exercise of options, potential complications arise from the *employment tax burden* for such options. Normally, that tax is calculated by reference to the employee spouse's W-2 wages. Well drafted marital settlement agreements should make clear that, despite this problem, the transferee/nonemployee spouse bears the burden of *all taxes* resulting from exercise of an option.

"WELL DRAFTED MARITAL SETTLEMENT AGREEMENTS SHOULD MAKE CLEAR THAT, DESPITE THIS PROBLEM, THE TRANSFEREE/NONEMPLOYEE SPOUSE BEARS THE BURDEN OF ALL TAXES RESULTING FROM EXERCISE OF AN OPTION."

UNVESTED BENEFITS

While Revenue Ruling 2002-22 clarified the treatment of *vested* options, it explicitly exempted unvested rights. Therefore, it does not apply to transfers of nonstatutory stock options and other nonqualified compensation such as unfunded deferred comp rights or other future income rights (SARs, RSUs, Phantom Stock, etc.) Any employment benefits that are unvested at the time of transfer or

to which the transferor's rights are subject to substantial contingencies at the time of the transfer do not necessarily get the benefit of section 1041 protection. *See, e.g., Kochansky v. Commissioner,* 92 F.3d 957 (9th Cir. 1996).

This carve-out applies to unvested stock options (which are specifically mentioned in RR2002-22), and also to restricted stock because these "future income rights" are unvested at the time of transfer. This suggests that if unvested rights or nonqualified benefits are transferred in connection with a divorce, the transferor/employee spouse could remain liable for the tax upon the subsequent taxable event. For example, in *Kochansky*, a personal injury lawyer transferred half of an unmatured contingent fee to his spouse who later collected half of the fee when the case was settled. An issue arose as to whether WIFE was responsible for the taxes on her gross portion of the fee that she received. The Ninth Circuit held that the lawyer, not his transferee spouse, was liable for the tax on the transferee spouse's share. Care must be taken in crafting settlement documents to make sure the parties are acknowledging the potential tax implications. Language should always be included that requires indemnification of the employee spouse by the non-employee spouse in the event the taxing authority disavows the spouses' agreed-upon tax arrangement.

Further confusing the "vested v. unvested issue, a 2010 IRS private letter ruling (2010-16-031), held that restricted stock transferred pursuant to a divorce was taxable to the transferee spouse "upon vesting."[3] This appears totally inconsistent with *Kochansky*. The private letter ruling addresses Revenue Ruling 2002-22 but does not mention the ruling's carve-out for unvested rights. The Private Letter Ruling's conclusion was the result desired by the parties, and the divorce decree explicitly provided that (i) the parties intended "a result consistent with RR2002-22" and (ii) the transferee spouse was "responsible for paying all costs attributable to [the transferee's] allocation of restricted stock, including taxes other than [employment] taxes." The Private Letter Ruling seems to imply the RR2002-22 approach will apply all equity compensation items transferred in connection with a divorce whether vested or not. However, private letter rulings ***do not constitute binding precedent on the IRS*** except with regard to the particular taxpayers to whom they are issued.

The Private Letter Ruling seems to imply that the RR2002-22 approach will apply all equity compensation items transferred... HOWEVER they do not constitute binding precedent on the IRS...

DIVISION/ALLOCATION

There exists a lack of clarity regarding how the IRS will treat allocation of vested equity benefits as opposed to nonqualified and unvested equity benefits. So how does the careful practitioner best handle this problem?

The safest, most obvious approach would be to avoid transferring unvested and non-qualified assets altogether. If an equitable distribution can be accomplished by transferring only non-compensation items and vested assets, then the risk is avoided. Delaying the entry of the divorce settlement for a short period of time to allow pending benefits to vest could be beneficial in some cases.

You could seek a private letter ruling from the IRS, such as the one mentioned above. This will likely involve additional time and cost, but if the stakes are significant enough, it is likely well worth the trouble. If large amounts of unvested items need to be transferred and delay is not a significant concern, the private letter ruling should be considered.

If unvested and nonqualified compensation assets must be transferred and a private letter ruling request is not feasible, the most conservative approach would be for the parties to agree that the transferor spouse will report the income and employment tax resulting from the future taxable event, but that the transferee spouse will bear the economic burden of the tax To implement this structure, the parties would use a constructive trust whereby the employee spouse retains legal title to the unvested items for the benefit of the nonemployee spouse. This option may be the only option available with certain companies that absolutely prohibit any transfer of unvested benefits to a former spouse.

In the case of stock options, the employee spouse would agree to exercise the options and

sell the underlying stock at the direction of the non-employee spouse and then pay the after-tax proceeds to him/her. This approach has a number of attractive features. First, the tax treatment is most consistent with Revenue Ruling 2002-22's explicit carve-out of unvested assets. Second, as mentioned above, some employers preclude or discourage employees from transferring unvested compensation items in divorce making a constructive trust a necessity. Finally, because legal title to the items remains in the hands of its employee and the eventual tax consequences are reported on the employee's W-2, the employer's procedures for tax reporting are unaffected.

Constructive trust arrangements should always include some technical provisions to ensure that the parties receive the results that they expect. As mentioned above, the spouses must agree to indemnify one another in the event the IRS disallows the planned tax treatment anticipated by the parties' settlement. This will ensure neither spouse is double taxed on the item, and no one receives a windfall.

Second, to calculate the after-tax payments that go to the transferee spouse upon vesting or exercise, *the transferor's effective marginal tax rate* needs to be determined. Since the rate will be known with accuracy only after the end of a taxable year and because withholding rates may differ from a taxpayer's ultimate marginal tax rate, a stipulated or assumed rate can be used. For high-income wage earners, the highest effective marginal federal income and employment tax rate exceeds 40% (37% Federal, plus 1.45% Medicare, and anywhere from 2.59% to 4.5% Arizona state tax). There are two advantages to using a stipulated or assumed tax rate instead of determining the actual tax rate on an ex-post facto basis. First, it gives both parties clarity as to the amount of taxes to be withheld upon each transfer of money from the transferor spouse to the transferee spouse. Second, using a stipulated rate avoids the need for the transferor spouse to periodically share his or her post-dissolution tax returns with the former spouse for the purpose of determining the actual effective marginal tax rate. In the event that a stipulated tax rate cannot be negotiated, then the parties can agree to exchange tax documents and to make true up payments after the end of the year once the actual marginal tax rate is calculated.

CONCLUSION

Great care must be taken when representing highly compensated corporate executives or their spouses in a marital dissolution matter. The complexities of equity and incentive compensation, as well various potential forms of non-qualified benefits and deferred compensation, create a vast minefield of potential tricks and traps that must be understood and navigated. Moreover, potential concerns regarding tax treatment of unvested or deferred benefits must be carefully analyzed and addressed to ensure an equitable division of the community estate. FL

STEPHEN R. SMITH is a partner in the Phoenix firm of *Fromm Smith & Gadow, P.C.* His practice is limited to complex family law litigation, mediation, and appellate matters.

NOTES:

1. **This article is adapted from Materials presented by the author at the 2021 Family Law Institute Seminar.**
2. **https://www.irs.gov/pub/irs-drop/rr-02-22.pdf**
3. **IRS Private Letter Rulings are available to the public at: http://apps.irs.gov/app/picklist/list/writtenDeterminations.html**

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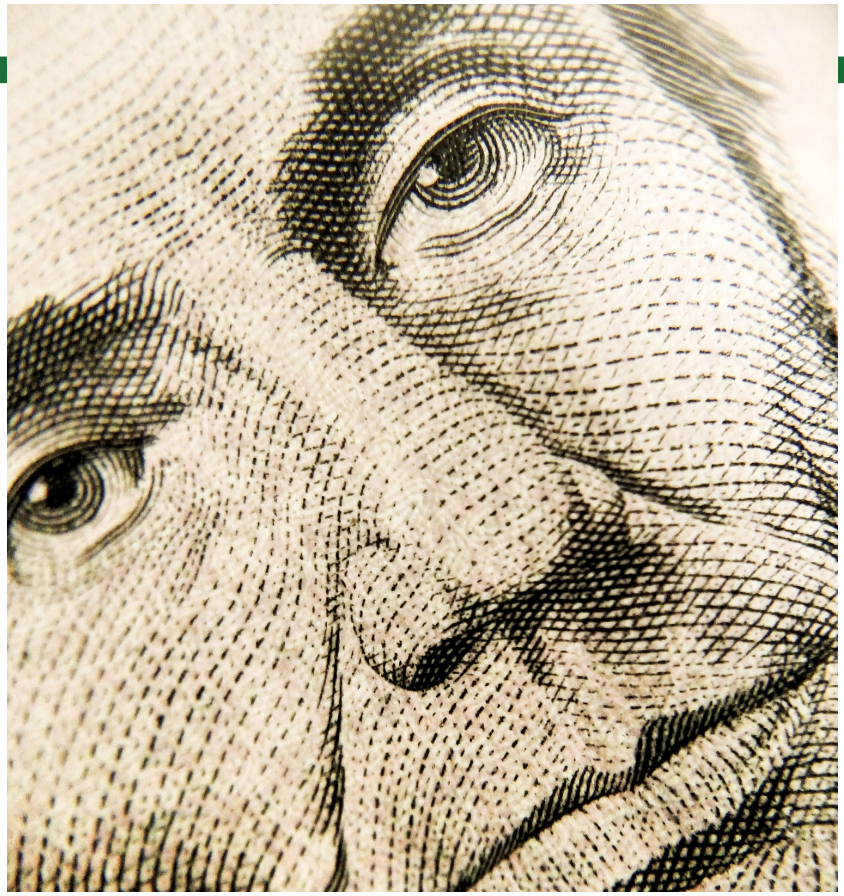
By
Frank G. Pankow, ASA, CPA/ABV/CFF, MCBA, CDFAn

And
Rachel E. Biro, Valuation Analyst

Using QuickBooks in Divorce Cases to Find Missing Income and Assets

QuickBooks is simply an electronic accounting program used by more than 80% of all small businesses... there is a very good chance that your client uses this software. This is a good thing, because QuickBooks has some pretty cool features that aid the forensic accountant. Requesting QuickBooks files should be part of your document request whenever a small business is involved in a case. It can be used to find hidden income and/or assets when the divorcing couple owns a company or professional practice.



JUST KNOW MY SPOUSE IS HIDING MONEY from me!" Divorce attorneys hear this a lot, especially when the couple owns a small business. This article will provide a general overview as to how QuickBooks can be used to find hidden income and/or assets when the divorcing couple own a closely held company or professional practice.

QuickBooks is simply an electronic accounting program used by more than 80% of all small businesses. Therefore, there is a very good (80%) chance that the company owned by your client uses this software. This is a good thing, because QuickBooks has some pretty cool features that aid the forensic accountant. Therefore, the company's QuickBooks file should be part of your document request whenever a small business is involved in one of your cases (more on what to ask for later).

Let's assume that Joy and Jack own a small restaurant/bar called the "Dew Drop Inn." Joy is your client and thinks that Jack has been having an affair with a company employee named Lola LaMore. Joy also believes that Lola's two teenage children (names unknown) from a prior marriage work at the company. Jack's ner-de-well brother Sam is also on the payroll, but Joy suspects he doesn't actually work there. Joy knows that Jack and Lola went to Hawaii on a business trip last August, but thinks it was just a disguised vacation. Jack recently changed the combination on the floor safe in the marital home. He has also complained about how bad current business is and that Joy needs to significantly reduce her spending. We realize these are bizarre facts that you would never see in your Family Law practice, but let's roll with them for now.

QuickBooks can be used to find hidden income and/or assets when the divorcing couple own a closely held company or professional practice.

ONE OF THE BEST FORENSIC FEATURES OF QUICKBOOKS IS THE AUDIT REPORT. EVEN THOUGH SOMETHING MIGHT BE DELETED OR CHANGED, QUICKBOOKS RECORDS ANY CHANGE (OR DELETION) TO A TRANSACTION IN A SECRET FILE CALLED THE AUDIT REPORT...

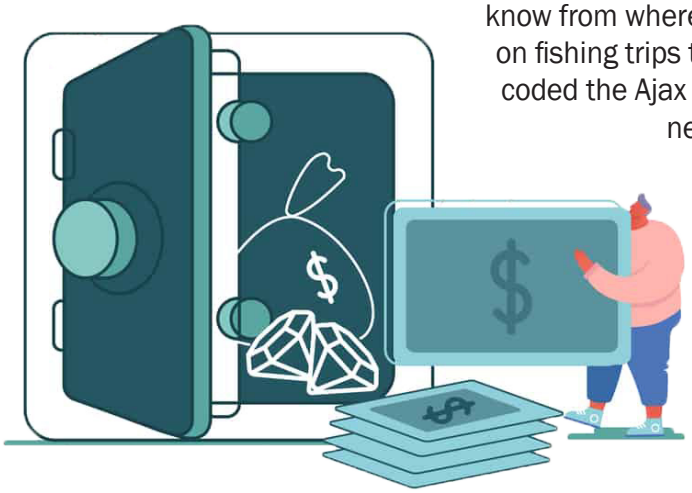
You decide the QuickBooks file should be part of your discovery in order to help Joy get a fair deal in property division and spousal maintenance. But what exactly do you ask for?

There are two main interfaces with QuickBooks – Desktop and Online (the Cloud). The only difference between the two is that gaining access to the Online version is slightly more complicated than the Desktop.

Each QuickBooks program has an "Administrator." This person has a specific

username and password that provides complete access to every area of the QuickBooks file. Other users may be restricted in which areas of the program they can access. Therefore, it is critical that you ask for the *administrator's* username and password.

Certain QuickBooks files on the Desktop version have time limits on the data. For example, you may only get the last six months of records when you need the last five years. Therefore, it's important to request a current QuickBooks "back-up file." These files have a "QBB" extension (i.e. "dewdropinn.qbb"). Also specify the time period you're looking for. For example: "We need the company's QuickBooks back up file with a QBB extension that contains data from at least January 1, 2017 through a current date."



Never, ever, accept a paper copy of a QuickBooks file – that is a total waste of time and trees. You must get an electronic file on a flash drive (or access to the Online version). A paper copy will not have all the descriptions shown and does not allow the forensic accountant to "drill down" on a given transaction. Just say "no" to paper copies.

QuickBooks data can be downloaded into an Excel file. While this is much better than a paper copy, it has significant limitations that create unnecessary additional work. It should only be accepted as a last resort.

Now that we have the company's QBB file and administrator's username and password, let's see what we can find out about the mysteries surrounding the Dew Drop Inn.

QuickBooks allows us to quickly run certain reports. For example, we can find the payroll records of the two teenage children by looking for anyone named "LaMore." Same thing with brother Sam. QuickBooks doesn't know if they're actually working, but we do know they're getting paid by the company. Another report can be run by date range. This would allow us to see the expenses associated with that Hawaiian "business trip" last August. We can also run reports by company name. Jack also had replaced the air conditioning unit on their home, and Joy knew the work was done by the Ajax company. We simply run a report to see if Ajax was paid by the Dew Drop Inn for what is obviously a personal expense. Reports can also be run based on dollar amount ("He bought Lola a $2,000 diamond necklace but I don't know from where or when.") and address ("He goes on fishing trips to Seward, Alaska."). Jack would have coded the Ajax air conditioner under "repairs," the necklace under "office supplies" and the Alaska trip to "seminars." By having Joy provide just one piece of the event (name, amount, date, etc.), QuickBooks allows us to quickly find the actual transaction.

By changing the combination on the floor safe, Jack has something in there he wants to keep from Joy. What could that be? First, it has to be small in size. Second, it must be valuable. This limits it to items such as cash, rare coins, gold or collectibles (baseball cards, etc.). If these items were purchased by the company, then QuickBooks may be used to find when and at what price they were purchased. Obviously, these are assets of the marital community subject to division.

One of the best forensic features of QuickBooks is the Audit Report. Because Jack doubled Lola's salary when they started having an affair, he decided to go into the QuickBooks file and lower the amounts he paid her on each check to keep Joy from finding out. He also deleted all the checks paid to Sam. What Jack didn't know is that QuickBooks records any change (or deletion) to a transaction in a secret file called the Audit Report. Only the QuickBooks administrator has access to this file (see now why it's important to get that person's username and password?). Therefore, we can see each time Jack changed one of Lola's payroll checks or deleted one to Sam. Even if Jack knew about the Audit Report, he can't turn it off – it's always running in the background. Not even the administrator can turn it off. How cool is that?

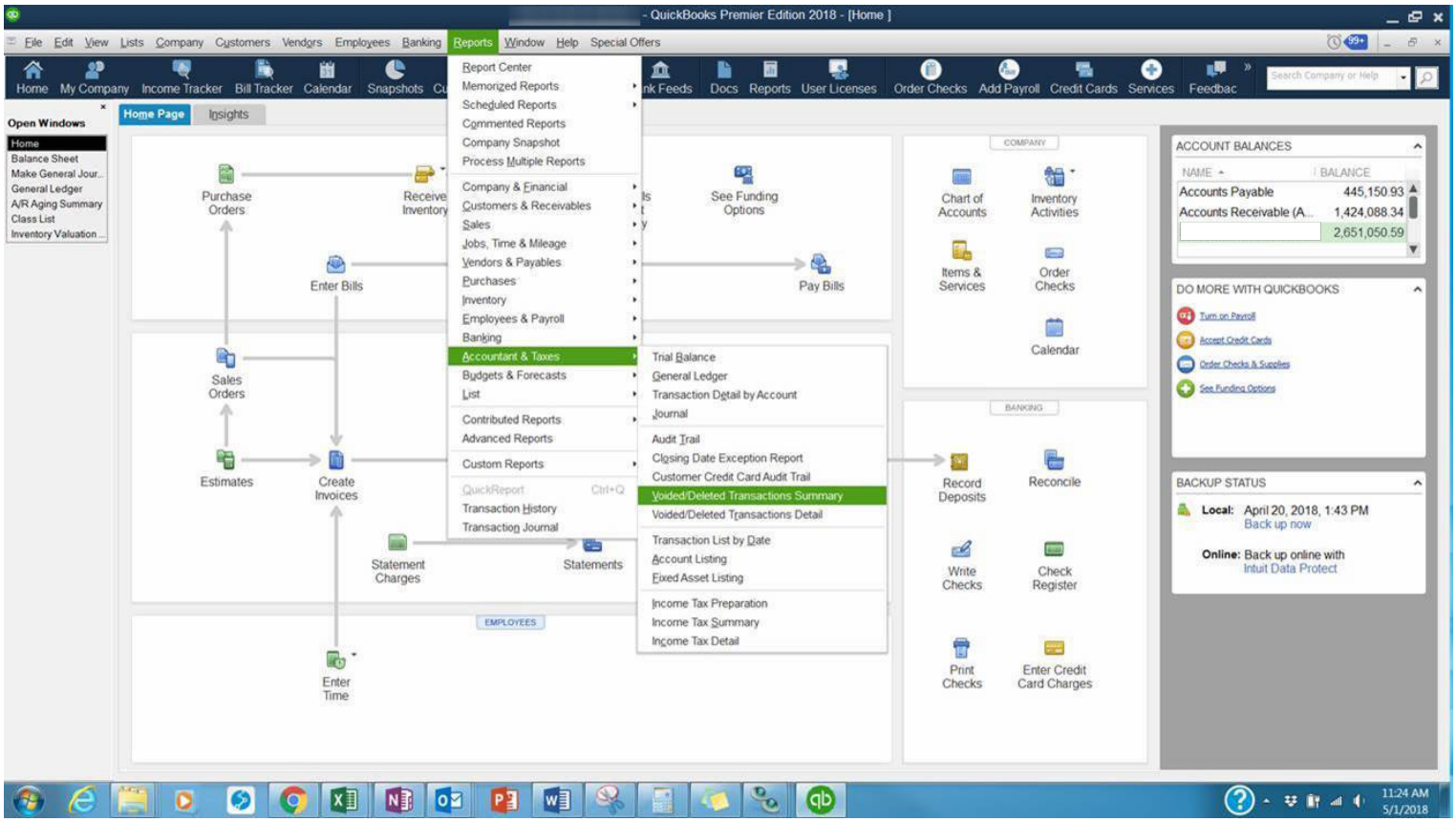
While this article just scratches the surface of what can be done with QuickBooks, at least now you know to:

A STEP 1 Request an *electronic file* with a *QBB extension* (no paper copies!) or access to the Online version.

B STEP 2 Specify *the date range* of the data you wish to review.

C STEP 3 Request the QuickBooks *administrator's* username and password.

By the way, Jack and Lola must have had a great time in Hawaii judging by what we found in QuickBooks file! FL



QuickBooks records any change to a transaction in the Audit Report.

THE RULE AGAINST PERPETUITIES AND THERAPEUTIC INTERVENTIONS - LEGAL PROCESSES THAT SEEM TO GO ON FOREVER -

WELCOME TO THE COBI!

Typically, the Court had little involvement, appointing a professional with little expectation for ongoing oversight. Ultimately, litigants, attorneys and judges complained about exorbitant costs and years long processes.

by **DAVID WEINSTOCK, J.D., PH.D.**

and **JUDGE BRUCE R.COHEN,**
Maricopa County Superior Court

Family Courts and professionals *have been challenged for years* as to *how best to address disruption issues* in the parent-child relationship... the Arizona *Courts have appointed Therapeutic Interventionists ("TI")* to serve the Court *in repairing such disruptions.*

As part of a pending parenting-related action, the mental health professional's role is primarily to advise the Court as to obstacles in implementing the parenting plan. An additional goal is to create a parenting environment that will be beneficial to the child.

1. INTRODUCTION:

Family Courts and professionals have been challenged for years as to how best to address disruption issues in the parent-child relationship. These issues are difficult to resolve. Making this worse is the fact that there is frequently a polarized view as to the source or cause for the disruption. The aligned parent routinely claims that the cause is the inappropriate parenting style or behavior by the estranged parent. Conversely, the estranged parent routinely claims that the disruption has been created by the aligned parent sabotaging the relationship. And with this "he said/she said" backdrop,

the Court is asked to enter orders that would both normalize the parent-child relationship and protect the child from the potential perceived inadequacies of the estranged parent.

For over a decade, the Arizona Courts have appointed Therapeutic Interventionists ("TI") to serve the Court in repairing such disruptions. The TI assisted the Court with families who did not or were anticipated not to follow Court orders. Slowly, this role morphed into more than was originally contemplated. Unintentionally, an additional forum was created that allowed the disputing parents to play out their dispute and remain rooted in their respective beliefs as to the underlying cause. In many cases, the appointment of the TI was made without the court having first addressed whether there was a factually supported parental fitness issue. Clearly, the approach in remediating a disrupted parent-child relationship is quite different when there is a parental fitness issue versus those situations in which both parents are capable of meeting the reasonable needs of the child. Yet it was left to the TI to determine fitness along with fashioning a remedy to the fractured relationship.

Clearly, the approach in remediating a disrupted parent-child relationship is quite different when there is a parental fitness issue versus those situations in which both parents are capable of meeting the reasonable needs of the child. Yet it was left to the TI to determine fitness along with fashioning a remedy to the fractured relationship.

Judges, attorneys, and litigants questioned the efficacy of the TI process. When professionals were given significant leeway with no clear expectation of what would be "success," the course was long and expensive. It became almost commonplace for the TI appointment to remain in place until the parties could no longer afford it or for cases to have serial TIs appointed.

2. THERAPEUTIC INTERVENTIONIST (TI) VS. COURT ORDERED BEHAVIORAL INTERVENTION (COBI):

While the Therapeutic Intervention role was well-intentioned, it has been misapplied. There is often confusion as to the method of "treatment" that should be provided. Mental health providers are trained to employ a therapeutic model, while the court was more focused on causing parties to comply with the court-ordered parenting plan, which is far more of a behavioral focus. Additionally, litigants and attorneys sought for the Therapeutic Interventionist to make legal determinations, such as developing the appropriate parenting schedule. Uncooperative parents were not held accountable, or there was an inadequate process for securing accountability (short of seeking modification of the existing parenting plan). Often the litigants utilized the TI process to argue fitness. Typically, the Court had little involvement, appointing a professional with little expectation for ongoing oversight. Ultimately, litigants, attorneys and judges complained about exorbitant costs and years long processes.

After identifying the relatively low "success" rate for the TI appointments (however that is measured), the significant out-of-pocket expenses for the litigants, and the length of the TI process, there needed to be a reassessment of what approach should be employed and why. The following touchstone points were identified: (a) judges needed to determine the plan that is in the best interests of the child; (b) judges should be able to expect that the plan developed will be complied with by both parties and the child; (c) parent-child relationship issues (whether organic or parent-caused) interfered with the likelihood of compliance; (d) utilizing a therapeutic approach with deep dynamic investigation to address the parent-child relationship issues is time-consuming and difficult to be successfully employed because it typically required parents to alter their thinking as to the other parent and an understanding of motivations for behaviors; (e) assuming no parental fitness issues, there was no basis for the parenting plan ordered by the court not to be implemented; (f) implementation may nonetheless present challenges so there is a need for or benefit from having a professional appointed to facilitate the behavioral changes needed to implement the parenting-plan.

This led to the creation of the Court-Ordered Behavioral Intervention, or "COBI" for short. Unlike the Therapeutic Intervention role, the judge first must find that parents are fit to carry out the court-ordered parenting plan and there is an expectation that a particular schedule will be followed in the long-term, with intervention offered in the short-term to address obstacles involving the child. The process requires that the Court will have a more-involved oversight role than what was historically contemplated in the TI process, including periodic review hearings.

As part of a pending parenting-related action, the mental health professional's role is primarily to advise the Court as to obstacles in implementing the parenting plan. An additional goal is to create a parenting environment that will be beneficial to the child. In part, this is to be achieved by altering behaviors that impact the child negatively, not by altering the feelings of the parents relative toward one another.

Importantly, unlike what became commonplace in the TI process, the COBI is **not** intended to be a deep-rooted psychological examination of individual

family members. Rather, the focus is on a more surface and quantifiable process; what behaviors are preventing the pursuit of the parenting plan and what behaviors must occur for all family members to ensure the plan is followed. While the TI process focused on individual family members exploring the cause of their unhealthy behaviors, the COBI process simply focuses on identifying the expected positive behaviors. The individual is tasked with changing behaviors in-line with expectations and if the individual is incapable of making those behavioral changes, the individual can choose, or the COBI can recommend, that the individual participate in individual therapy outside of the COBI process to identify how to make the necessary changes as anticipated by the COBI (or the Court). The COBI essentially creates the path to stabilization and compliance with the parenting plan. The COBI advises the Court if the plan is being followed and if not, whose behaviors are preventing such. Ultimately, it is the responsibility of the individual (and not the Court) to determine why expected behaviors are not being followed should that be the case.

The COBI essentially *creates the path to stabilization and compliance* with the parenting plan. The COBI advises the Court if the plan is being followed and if not, *whose behaviors are preventing such.*

3. THE COBI CHECKLIST

When COBI was first introduced, there was an accompanying checklist. Through this checklist, the court can ensure that the case is properly postured for the COBI process. That list is as follows:

____ 1. Both parents are fit or the court-ordered parent access schedule accounts for any established or alleged parental fitness issues.

____ 2. There are no safety issues impacting the implementation of the parenting plan.

_____ 3. The parties have the financial resources to fund the COBI process

_____ 4. The court has inserted the parenting schedule provisions required under the "Fitness" section of the COBI order

_____ 5. The Court has inserted the summary of concerns of each parent in the "Basis for Referral' section of the COBI order

The COBI Checklist

ENSURING PROPER POSTURE

It was then and remains now critical that all items on the checklist apply for a COBI appointment to be made. By doing so, the COBI process can focus on the assigned task rather than being used for or perceived as an additional forum for parents to "litigate" their differences.

√ 1. Both parents are fit or the court-ordered parent access schedule accounts for any established or alleged parental fitness issues.

√ 2.There are no safety issues impacting the implementation of the parenting plan.

√ 3. The parties have the financial resources to fund the COBI process

√ 4. The court has inserted the parenting schedule provisions required under the "Fitness" section of the COBI order

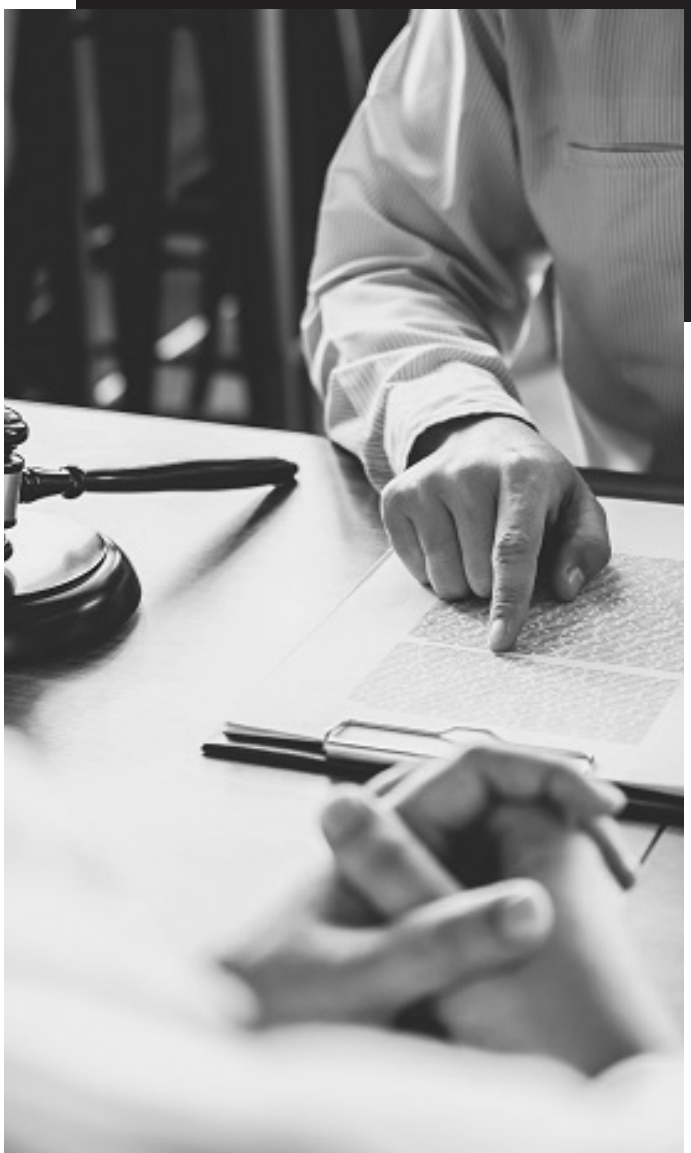
√ 5. The Court has inserted the summary of concerns of each parent in the "Basis for Referral' section of the COBI order

√ 6. The Court has set the length of the appointment in the "appointment and Term" section of the order.

√ 7. The Court has designated the fee allocation in the "Fee" section

√ 8. The Court has set the 30-day procedural review hearing date

√ 9. The Court has set the 90-day substantive review hearing date



When COBI was first introduced, there was an accompanying checklist. Through this checklist, the court can ensure that the case is properly postured for the COBI process.

_____ 6. The Court has set the length of the appointment in the "appointment and Term" section of the order.

_____ 7. The Court has designated the fee allocation in the "Fee" section

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It was then and remains now critical that all items on the checklist apply for a COBI appointment to be made. By doing so, the COBI process can focus on the assigned task rather than being used for or perceived as an additional forum for parents

to "litigate" their differences. Ultimately, the COBI is reserved for cases in which families are not following or are anticipated not to implement the parenting plan set by the court.

4. THE FUTURE OF THE TI

There remains a question as to whether the Court should ever be in the business of "creating change." Treatment is intended to create changes in families. One wonders if the Family Court is responsible for making change or is that a task reserved only for those cases that fall within the jurisdiction of the Juvenile Court system. While improving parenting capacity and skills is always consistent with a child's best interests, when both parents are adequately fit, is it the responsibility of the Family Court to improve parenting or is to the role of the court to set a parenting plan and expect that it will be followed?

This begs the question of what role is there for a Therapeutic Interventionist. The authors encourage re-visiting the purpose of the role, with an expectation that judges will only appoint professionals in cases in which there is something to which the professional can advise the court. Certainly, if there are pre-decree issues and the court seeks guidance from the Therapeutic Interventionist regarding issues to be addressed during an evidentiary hearing, there is a role for the Therapeutic Interventionist. For example, the Therapeutic Interventionist can act as a "quarterback" for involved therapists to collaborate and advise the Court regarding ongoing therapeutic issues. It is also proposed that the court could appoint a professional as a TI for other purposes.

5. CONCLUSION

The COBI and TI can assist the Court under the right circumstances. The purpose for any appointment must be to advise the Court in an effort to assist in the creation of final orders or in addressing predicted obstacles to the implementation of the final orders. While the TI can serve to address inadequacies or obstacles to effective parenting, the COBI is intended to ensure that parenting orders are fully implemented. It is anticipated that with a clear understanding from early in the process as to the COBI's marching orders and Court expectations, that we will be redefining what is "success" for these processes.

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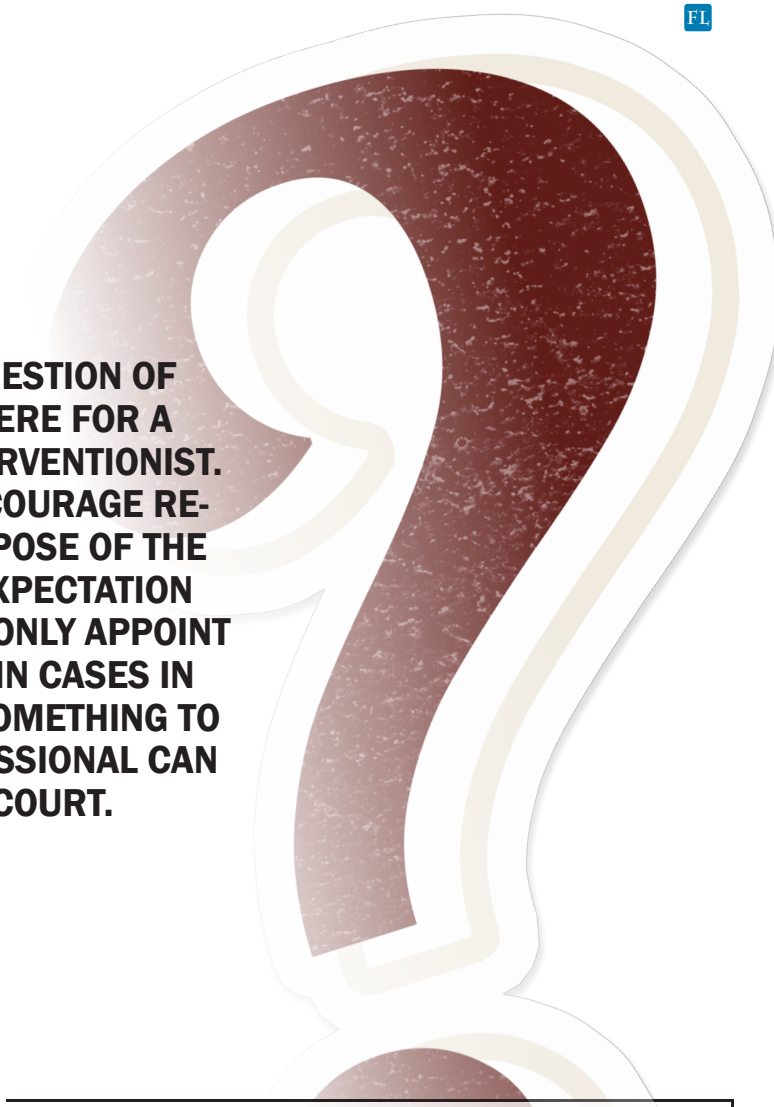
THIS BEGS THE QUESTION OF WHAT ROLE IS THERE FOR A THERAPEUTIC INTERVENTIONIST. THE AUTHORS ENCOURAGE RE-VISITING THE PURPOSE OF THE ROLE, WITH AN EXPECTATION THAT JUDGES WILL ONLY APPOINT PROFESSIONALS IN CASES IN WHICH THERE IS SOMETHING TO WHICH THE PROFESSIONAL CAN ADVISE THE COURT.



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THERAPEUTIC INTERVENTIONIST ("TI") AND
COURT ORDERED BEHAVIORAL INTERVENTIONIST ("COBI")

Leading up to the landmark decision, *there was a great deal of latitude taken by judicial officers in appointing mental health professionals* to serve in a variety of advisory, expert, and oversight roles.

by **JUDGE BRUCE R. COHEN,**
Maricopa County Superior Court

and **DAVID WEINSTOCK, J.D., PH.D.**

WHAT MIGHT THE COURT OF APPEALS CONCLUDE about THE TI & COBI PROCESSES?

There are cases involving a serious disruption to the relationship between a parent and his or her children. At times, it may be the parent's own fault because of his or her actions against the other parent or the children themselves. At other times, it could be the result of a child taking on a parent's anger. A Therapeutic Interventionist (TI) is a mental health professional who provides counseling to the parents and their children to resolve these problems in an effort to normalize each parent's time spent with the children.

THE MODEL HISTORICALLY employed when a Therapeutic Interventionist ("TI") was appointed sought a therapeutic approach to addressing "resistant child" issues. In 2020, a new model was introduced using a Court Ordered Behavioral Interventionist ("COBI"), which called for a behavioral approach in dealing with the "resistant child."

Both models were designed to be implemented before or after final orders were entered by the court regarding parenting-related issues. But, as has been seen in recent years, there have been issues raised regarding the scope of the court's jurisdiction when ordering adjunct services or mandating certain plans following entry of the final orders.

Leading up to the Arizona Supreme Court landmark decision in *Paul E,* there was a great deal of latitude taken by judicial officers in appointing mental health professionals to serve in a variety of advisory, expert, and oversight roles. Seemingly, *Paul E* established the parameters for judicial intervention into parenting-related issues. But despite the clarity of Paul E, there has continued to be appellate review of various court-appointments as well as questions regarding the scope of the trial court's authority.

One such example was in a Special Action ruling in the case of *Smith v LaBianca*, 1 CA-CV 19-0279 (January 8, 2020). Following the final divorce trial, a Decree of Dissolution of Marriage was issued. While all other aspects of the divorce decree were made final, appealable orders, the trial court reserved the parenting-related issues as temporary, pending engagement of a TI "to determine when it is therapeutically appropriate for Father and the child to have parenting time pursuant to an escalating parenting time schedule."

The Court of Appeals took issue with this approach. In the Special Action Order, the COA found

that, having conducted the final trial, "...the superior court erred by addressing issues concerning the parties' minor child in modified Temporary Orders rather than doing so in the Decree." It went to state that the trial court "...had the power in its final decree to order the parties to undergo certain services, see Rule 95, and to appoint a Therapeutic Interventionist to advise the court on those matters, see ARS Section 25-405, ..." The approach frowned upon under Smith was the bifurcation of temporary orders on parenting-related issues and final orders on all other pending issues.

After considering this ruling, one may legitimately conclude that as part of comprehensive final orders entered by the trial court, there is authority under both Rule 95, ARFLP, and ARS Section 25-405, to order the appointment of a TI or, under the newer approach, a COBI. But then came the memorandum decision in the case of *Jorgenson v Giannecchini*, 1 CA-CV 20-0009 FC (May 6, 2021).

At trial, there was evidence to support findings that Mother would need additional long-term psychotherapy to address her mental health issues. The trial court found that Mother's failure to "regularly and consistently participate in appropriate mental health treatment is contrary to the best interests of the parties' minor child." As part of its final, appealable orders, the trial court detailed the process for selecting a therapist for Mother and made Mother's court-ordered parenting time conditional on her participation in therapy.

Mother appealed, asserting that "the court exceeded its authority by conditioning her parenting time on participation in long-term psychotherapy." Division One of the Court of Appeals agreed with Mother. The COA commented that while Rule 95, ARFLP, authorizes the imposition of counseling and therapeutic interventions, the Rule itself "cannot enlarge the court's authority beyond that granted by statute." Referencing *Paul E*, they further stated that ARS Section 25-405(B) "does not authorize the court to order a parent to undergo

Preservation of a child's best interests, as well as the respective rights of each parent, mandate that the court *does not take "no" for an answer* when a child resists court-ordered parenting time.

treatment, including treatment with a specific provider, as a condition of parenting time." Still quoting from *Paul E*, the Court of Appeals concluded that ARS Section 25-405(B) applies only when parenting-related issues are "**pending** before the court."

So, let us compare *Smith* with *Jorgenson*. In *Smith*, the Court of Appeals took issue with the trial court having delayed entry of final orders on parenting issues, noting that the trial court should have entered final orders and concurrently ordered therapeutic intervention under Rule 95 and ARS Section 25-405. In *Jorgenson*, wherein comprehensive, final, appealable orders were entered, the Court of Appeals noted that Rule 95 could not be enlarged beyond whatever authority is granted by statute and that appointments under ARS Section 25-405 are limited to issues that *remain pending* before the court.

So how will these two rulings be reconciled? Ultimately, that question will be answered by the appellate courts.

Until such time that the most legally supported procedural pathway is identified for these appointments by the COA, the best approach calls for earlier intervention in the litigation. Whether as part of a pending divorce or post-decree action, including an enforcement of parenting time action, the dynamic of the resistant child, if one exists, is likely evident. Once identified and then as part of the pending proceedings, the court should conduct hearings necessary to determine whether there are any parental fitness issues causing the resistance or opposition to parenting time. If a determination is made that the parent against whom parenting time is being resisted is fit to exercise the contemplated parenting time, appointment of a COBI may be appropriate for work to be done while the matter remains pending before the court.

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IN ANY EVENT, PROCESS SHOULD NOT BE AT THE EXPENSE OF SUBSTANCE. Parenting orders, whether temporary or final, often do not solve the problem of the "resistant child." Whether that child has been improperly influenced by the "aligned" parent against the "estranged" parent, whether the "estranged" parent has caused or worsened the fracture in the relationship, or whether there are dynamics personal to the "resistant

child" contributing to the fracture, the problems are not necessarily solved by entering a detailed final order. Even with the final order, the child may continue to "resist," regardless of the cause(s).

Preservation of a child's best interests, as well as the respective rights of each parent, mandate that the court does not take "no" for an answer when a child resists court-ordered parenting time. As has been argued in support of the COBI process, the TI approach may not be the answer. There are promising anecdotes to suggest that the COBI process is far more effective and will prove to be far less costly.

But regardless of the approach implemented, these issues will continue to demand more from the court than entry of final, appealable orders. For so long as the court has jurisdiction over a child, the court must remain focused on preserving best interests and, once decided, committed to ensuring that its orders are fully implemented. FL

...the problems are not necessarily solved by entering a detailed final order. Even with the final order, the child may continue to "resist," regardless of the cause(s).As the court has jurisdiction over a child, the court must remain focused on preserving best interests and committed to ensuring that its orders are fully implemented.

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Child Support

Gelin v. Murray, No. 1 CA-CV 20-0487 FC, 6/22/2021

Under A.R.S. § 25-809(A)-(B), the trial court must award retroactive child support dating back to the petition filing date, but whether to award support for any period of time prior to the petition filing date lies within the court's discretion.

FACT: In February 2019, Father filed a petition to establish paternity, et al. Mother filed a response, seeking three years of pre-petition retroactive child support. The trial court awarded Mother judgment for past care and support dating back to the petition filing date, but denied Mother's request for pre-petition past care and support, finding "Mother chose to deliberately keep Father out of the child's life… and therefore an award of child support dating back three years [was] not warranted in this matter." The record noted that Mother moved multiple times without informing Father of her new addresses, and that another man was listed on the child's birth certificate. Mother appealed, arguing that the trial court erred in denying her request for pre-petition support and that such award was mandatory absent a valid showing or an equitable defense. Division I affirmed the trial court's ruling.

REASONING:
In its discussion, the appellate court acknowledges that recent memorandum decisions on this issue have been inconsistent. It refers to *Petro v. Gianini* and *Montano v. Guiliano*. This opinion is intended to clarify any discrepancies.

The Court further notes that this interpretation of 25-809 makes it consistent with the Court's reading of 25-320(C).

The Court distinguishes this case from *ADES v. Valentine*, 190 Ariz. 107 (App. 1997), as the current ARS 25-809(B), which delineates the constraints on the Court's authority to exercise retroactive support, was not added by the Legislature until 1997 and did not become effective until after *Valentine* was decided. In addition, the Legislature added the words "if any" to subsection A, clarifying that the court shall direct "the amount, *if any*" the payor shall pay towards retroactive support.

HOLDINGS:

- **Subsection A of 25-809 grants the Court** general authority in paternity actions to award past child support. Subsection B clarifies the constraints of that authority and requires that, subject only to applicable equitable defenses, the court shall enter an order for support due from the petition filing date to the date current support is ordered to begin.

- **ARS 25-809(A)-(B) grants the Court discretion** to order retroactive child support for up to 3 years before the petition filing date. The court is not required to make specific, written findings in support of its decision (although the appellate court notes that some written explanation of the trial court's reasoning would be helpful on review).

- **Subsection B grants the Court *discretion*** to order past support dating back more than 3 years prior to the petition filing date, but in that instance requires a written good cause explanation after considering "all relevant circumstances," including the express factors in ARS 25-809(B)(1)-(3).

- **If the Court orders a retroactive award**, subsection A requires the Court to identify the amount the parties must pay and the manner of payment. Further, any retroactive support payment must be calculated using a retroactive application of the current child support guidelines and is subject to applicable equitable defenses.

UCCJEA

Hubert v. Carmony, No. 1 CA-CV 20-0362 FC, 6/22/2021

Before declining to exercise jurisdiction, a trial court *must* (1) expressly consider all relevant factors, including the factors listed in ARS 25-1037(B), and make the necessary factual findings; and (2) conduct an evidentiary hearing to resolve relevant factual disputes.

The parties agreed that Arizona is the child's home state, and that Arizona may exercise jurisdiction under the UCCJEA. The question before the trial court is whether or not it should decline jurisdiction.

FACT: In May 2019, Father petitioned in Arizona to establish paternity, et al. In November 2019, Father sought permission to use alternate service, alleging that Mother had moved to Texas with the child and was avoiding service. Father served Mother in November 2019 by alternate service.

BEFORE THE TEMPORARY ORDERS HEARING IN FEBRUARY 2020, Mother filed a petition in Texas and moved to dismiss the Arizona petition, alleging a significant history of domestic violence and that Father violated an Order of Protection held by Mother against Father.

The Arizona court determined that it had jurisdiction, appointed a BIA for the child, and set a May 2020 trial date, as well as temporary orders granting Father equal parenting time.

In April 2020, Father moved to hold Mother in contempt. Before trial, Moher moved to continue the trial and to change jurisdiction under the UCCJEA, claiming Father lied in pleadings and that Texas is a more convenient forum. While Father opposed Mother's motion, he did not oppose Mother's request that the two courts confer.

The parties agreed that Arizona is the child's home state, and that Arizona may exercise jurisdiction under the UCCJEA. The question before the trial court is whether or not it should decline jurisdiction.

Thereafter, the trial court ruled that it held a UCCJEA conference with the Texas judge, and declined Arizona's jurisdiction over the case. On this basis, the court vacated trial and temporary orders and dismissed Father's petition.

Father appealed.

The appellate court vacated the trial court's ruling and remanded for an evidentiary hearing.

HOLDINGS:

• **Before Arizona can decline jurisdiction,** it must determine whether another state's exercise of jurisdiction is appropriate. ARS 25-1037(B). To do this, the trial court *shall* allow the parties to submit information and the court *shall* consider all relevant factors. The appellate court refers to the Comment to the UCCJEA Section 207. The court is *required* to make findings sufficient to show that the court balanced the factors of convenience; in this case, the trial court must balance *at least* the eight factors listed in ARS 25-1037(B). Failure to make findings as to each relevant factor in declining jurisdiction is an abuse of discretion. In addition, the court *may* communicate with the court in the other state. ARS 25-1010(A). The court may, but is not required to, allow the parties to participate in that communication. ARS 25-1010(B). If the court does not allow the parties to participate in the communication with the other state, then the court *must* give the parties an opportunity to present facts and legal arguments before a decision on jurisdiction is made. ARS 25-1010(B). The court *must* make a record of any substantive communication with the court in the other state, promptly inform the parties of the communication, and grant access to the record. Procedural matters between courts (e.g. scheduling) do not need to be recorded. ARS 25-1010(C), (D).

...in this case, the trial court must balance at least the eight factors listed in ARS 25-1037(B). Failure to make findings as to each relevant factor in declining jurisdiction is an abuse of discretion.

AMERICAN RESCUE PLAN ACT of 2021

What you need to know about your Child Support Order and Advance Payments under the American Rescue Plan's (Expanded) Child Tax Credit

Courtesy of Marc Fleischman CPA/ABV/CFF, CGMA

THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA) made temporary changes that increase the Child Tax Credit and also provide for advance payments in 2021. The tax credit that you might receive in 2022 when you file your 2021 tax return may now be sent to you as advance monthly payments in 2021.

- Payments will be distributed between July 1 and December 31, 2021.
- If you have a Child Support Order, contact the IRS to find out if the advance payments will cause a tax problem for you.
- **IMPORTANT:** Because the IRS will be using 2019 or 2020 income tax data, the IRS may make payments to the parent not entitled to the 2021 credit under the Child Support Order.

Will I get the Child Tax Credit?

- Most people with kids 17 years old and younger are eligible for the tax credit.
- Higher income earners may not receive the Child Tax Credit.
- If you don't want the advance payments, contact the IRS immediately and tell them.

For the full article, click on *this link* for the pdf.

HOT TIPS : COVID UPDATE

The Maricopa County Superior Court has been actively engaged in the development of the "new normal" protocols - that being, what will the court look like when we get back to business as usual. There are many exciting options being considered, such as the use of Court Connect (Microsoft Teams) for procedural matters so as to avoid the time and expense for parties to appear personally in court. But as we plan for this new normal, the Delta Variant of Covid has been kicking butt.

For clarity purposes only, there are no set dates for the implementation of the new normal. As we have all grown accustomed to, we continue to perform based upon what exists at the moment and continue to plan for what may occur down the road, whether positive or negative. When we are able to return closer to whatever "normal" looks like, significant efforts will be made to spread the word. Until then, please understand that there are lots of rumors floating around and any that suggest a date certain for a "post-Covid" change in court procedures are not accurate.

Courtesy of **Judge Bruce R. Cohen,** Maricopa County Superior Court, Family Department Presiding Judge

Judge Greg Sakall, the Presiding Family Law Judge of the Pima County Superior Court, reports that the Family Law Division of Pima County Superior Court is following AO 2021-77's orders. The current AO presumes that hearings will occur by phone or Microsoft Teams, but gives discretion to permit in-person hearings. It removed the limitation of one in-person hearing per morning and afternoon per division. If you have not reviewed the AO, you can find it here. As to family law, the AO states:

Hearing and trials will presumptively be conducted by teleconference or video conference unless the Court orders otherwise. If a party wishes to have a hearing converted to an in-person hearing, a motion must be filed at least two (2) court days in advance of the time of hearing, and not at the time of hearing. Unless there is a current order prohibiting contact between the parties or a history of domestic violence between self-represented patties, the motion must set forth the other party's position on an in-person hearing.

The Court expects that all hearings scheduled while this Administrative Order is in effect will be necessary and productive. Parties and counsel must confer in good faith in an attempt to resolve any issue set for hearing unless consultation is excused as set forth in Rule 9(c)(2), ARFLP. For any party or counsel that fails to comply with this good faith consultation requirement, the Court may enter sanctions consistent with Rule 76.2.

Courtesy of **Judge Greg Sakall,** Presiding Family Law Judge of the Pima County Superior Court

IMPORTANT CLE DATES

September, 1 2021	Family Law Firsts Series Part 2: **Spousal Maintenance & Child Support (virtual)** 2:00 PM - 1:30 PM (AZ)
October 1, 2021	**Late Legal Specialization Applications accepted**
October 26, 2021	Not necessarily Family Law specific, but may be of interest: **Mastering Word, PDF Files & Outlook + How To Discuss Security with Clients**
November 1, 2021	Family Law Firsts Series Part 3: **Legal Decision-Making & Parenting Time (virtual)** 2:00 PM - 1:30 PM (AZ)
Nov. 19, 2021	**Advance Family Law CLE (virtual program)**
Jan. 21-23, 2022	**AzAFCC Annual Conference**
February 2022	**Pima County Pro Tem Applications Due**

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

… If so, the deadline for submissions is Oct. 8, 2021.

Would you like to...

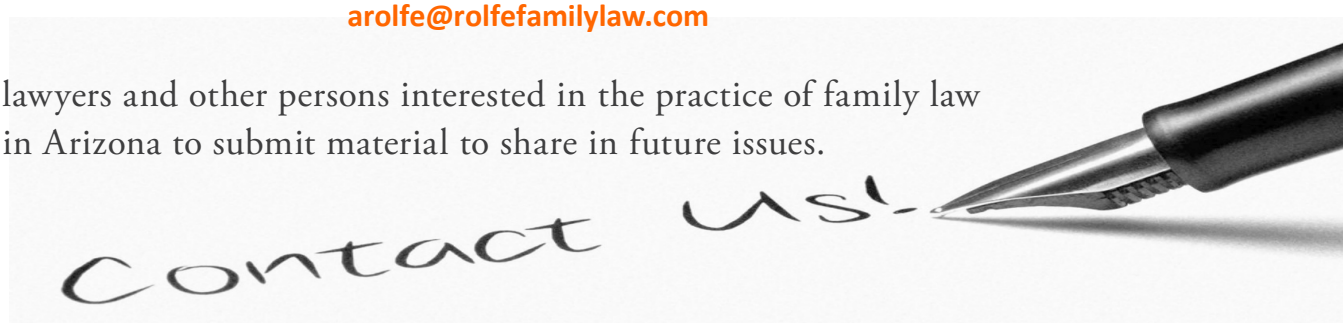
- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

WE WANT TO HEAR FROM YOU!

PLEASE SEND YOUR SUBMISSIONS TO:

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.



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