summer
2018

Family Law News

this issue...

FROM THE CHAIR

ANNIE M. ROLFE

I have struggled with writing this article. Honestly, while I am honored at being selected as Chair of the Family Law Executive Council, I don't believe that I have any greater knowledge or wisdom than any of you reading this piece, so what is there for me to write about? And so, let me write about something that has been weighing on my heart.

Be kind to one another.

We are family law attorneys. Our practice puts us in the middle of high-conflict situations almost constantly. The decisions we make on a daily basis affect people's lives, and not in a metaphorical sense. We are the fall guys; opposing parties almost always hate us (whether it is warranted or not). We frequently deal with some form of vicarious trauma, and sometimes, we have to deal with true horror, like what befell the Scottsdale community only too recently.

The last thing that any of us so have to deal with is unnecessary conflict from our colleagues and peers. So, let me say it again...

Be kind to one another.

In my opinion, there are at least two very basic ways we can show each other kindness.

First, be aware of what is happening in the lives of those around you. If your colleague is a young parent, ask how the children are doing. Be aware that your colleague

STATE BAR OF ARIZONA

Published by the Family Law Section of The State Bar of Arizona. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the State Bar of Arizona, its officers, Board of Governors, Family Law Executive Council, the Editorial Board or Staff.

If we are honest, there are very few things in our line of work that truly have to be responded to *right now.*

may not have slept a full night, maybe for the last several months. Is their child sick? Are they rushing out of the door to go to the pediatrician's office?

Has your colleague recently been ill? Had a surgery? Need a mental health afternoon? Coping with the loss of a loved one?

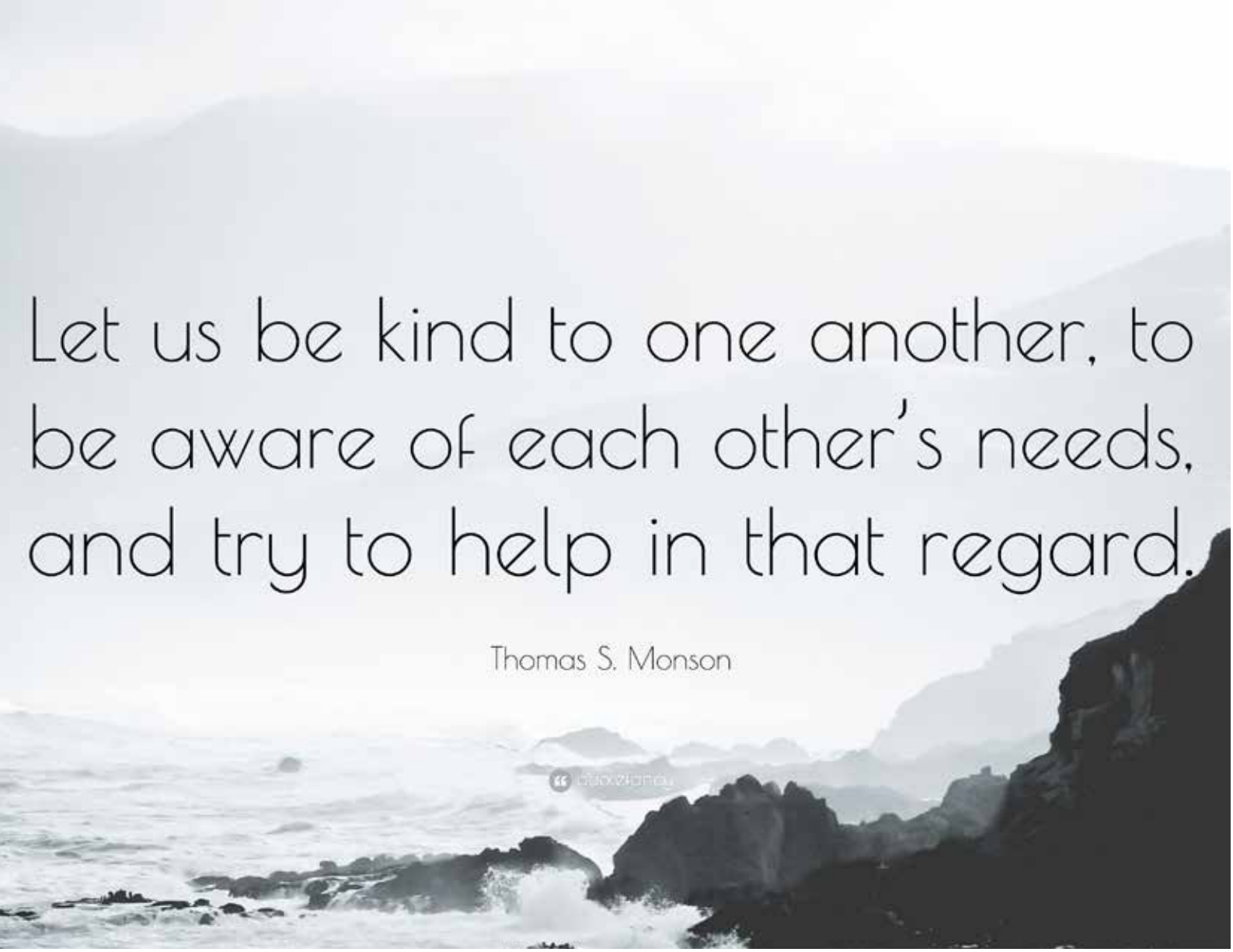
Is your colleague on vacation?

Most of the attorneys in our field work very hard. Most don't take the personal time that they probably should. So, if your colleague is asking for permission to step away for a week and go on vacation or for an afternoon to take care of a child or to heal personally, to leave the conflict behind, to release some of the pent-up anxiety and stress that we all feel, then let him.

Don't call his cell phone in hopes of hunting him down, particularly if you don't have permission.

Don't file an "emergency" motion and serve it the day he leaves for vacation.

If we are honest, there are very few things in our line of work that truly have to be responded to *right now.* A huge kindness that we can exercise for one another is recognizing what is truly an emergency and what is not and acting



appropriately. If it is not an emergency, then we should be extending one another the kindness and courtesy of time.

Second, be conscious of how we speak to one another. E-mail, in particular, has allowed us to write quickly, without giving much consideration to our tone. Moreover, email (and other correspondence) is often delivered without context, so something that you write as "matter of fact" can be interpreted as offensive. Be mindful of how we write to one another. Clients come and go, but chances are that we will all have to work with one another for years to come.

To that end, I hope that you didn't read this piece as me speaking from a pedestal. To the contrary, I am as guilty as anyone else and I wrote this piece to remind myself as much as anyone else that, particularly in this profession, we need to exercise kindness and patience with one another. The work that we do is hard. Many of our colleagues leave this area of the law because of the stress and trauma that we experience. Let's not add to one another's conflict. While we will undoubtedly war in the courtroom, let's be allies outside of it. FL

Let's not add to one another's conflict. While we will undoubtedly war in the courtroom, let's be allies outside of it.

by Neil Websdale

Public Mass and Spree Killings, Intimate Partner Violence, and Family Law Cases: Some Observations

Public mass and spree killings are extremely rare, constituting less than 0.2 percent of all US murders. Researchers refer to "mass murder" as the killing of four or more victims in one event, in one location. Spree murders involve two or more murder victims killed, in one possibly extended episode, in two or more locations, without the offender "cooling off" emotionally between murders.

Given the rarity of these offences it is impossible to predict them. The extant research into these killings remains in its infancy, with much missing data, and many possible factors to consider.

Domestic disputes comprise one of the precipitating factors in roughly a fifth (21.2%) of **public mass shootings** (1). These shootings tend to **fall into two groups of cases;** those where domestic conflict is one source among many of the **negative emotions that drive mass homicide** and those where **domestic strife** appears as the central source or principal generative milieu of the killings.

In cases where **domestic conflict forms one axis of negativity** among many, mass killers sometimes murder current or former spouses/intimate partners before killing a large number of persons unknown to them. Mass killers often **abuse these women** before killing them. One such example is that of Charles Whitman. On March 29, 1966, he told a psychiatrist that he had *"twice assaulted his wife and that she was afraid of him"* (2). Indeed, Kathy Whitman was in the process of leaving him and filing for divorce. On August 1, 1966, Charles **stabbed his wife to death** while she slept. Prior to doing so, he **murdered his mother**. Equipped with an array of weapons and ammunition, he then **climbed a tower at the University of Texas**. As a marine sharpshooter, he killed 14 and injured 31 people from his vantage point. Police killed him.

Other mass killers do not kill but nevertheless **terrorize current or former spouses**/intimate partners. Omar Mateen **terrorized his former wife**, Sitora Yusifiy, holding her hostage before her family rescued her. She claimed, *"He would just come home and start beating me up because the laundry wasn't finished"* (3). Mateen also terrorized his current wife, Noor Salman, before fatally shooting dead 49 and injuring a further 53 people at the Pulse nightclub in Orlando, Florida in the early morning hours of June 12, 2016. Federal court transcripts note Ms. Salman reported Mateen beat her while she was pregnant, threatened to kill her, and raped her (4).

Cases where domestic conflict appears as centrally important to understanding acts of mass or spree killing usually involve intimate partner violence (IPV), but may also evidence protracted and contentious child custody disputes, a bitter divorce, or some combination of these or other family court matters. Some of these shootings take place in professional locations like family law firms, courthouses, and personal residences. In a very small number of these extremely rare cases, perpetrators kill family law attorneys or allied professionals against whom they may have developed intense grudges (5). These killings compound any existing vicarious trauma among professionals working family law cases, providing a weighty reminder about what threats might have existed and could feature in future cases.

The recent (May 31-June 2, 2018) killing spree by Dwight Lamon Jones, 56, emerged out of an acrimonious divorce including a history of domestic violence and a child custody dispute, lasting at least nine years. The Jones case involved a number of family law and allied professionals, and sent shock waves through legal communities. Jones killed prominent Scottsdale forensic psychiatrist, Steven Pitt,

paralegals Veleria Sharp and Laura Anderson, and psychologist Marshall Levine. He also killed acquaintances, Bryon Thomas and Mary Simmons, in Fountain Hills, before taking his own life in his Extended Stay hotel room in Scottsdale.

Dr. Pitt had examined Jones under court order as part of Jones's divorce proceedings from his wife, Dr. Connie Jones. Pitt apparently testified that Dwight Jones suffered from anxiety, mood disorders, and paranoia. The paralegals worked at Burt, Feldman, and Grenier, Attorneys at Law, in Scottsdale, one partner of which, Elizabeth Feldman, Dr. Connie Jones retained as her divorce attorney. Feldman was the alleged target of Dwight Jones's homicidal rage but Jones seems to have redirected his rage toward the two paralegals. Marshall Levine had no connection to the Jones case but he rented space in the same office complex where the therapist who examined Jones's child used to work.

The Scottsdale Police Department had arrested Dwight Jones in May 2009 on charges of domestic violence and making threats. Media sources report court documents referencing Dwight attacking Connie in front of their son, *"Backing the mother into a wall, pushing and hitting her in the face with his forearm"* (6). Indeed, he had been accused multiple times of assaulting Dr. Jones during the course of their 20-year marriage, including a 2007 incident during which he allegedly fractured her sternum. In the aftermath of the killings, Dr. Jones described Dwight Jones as, *"A very emotionally disturbed person,"* adding, *"I have feared for my safety for the past nine years"* (7).

In the decree of dissolution of the Jones's marriage, dated November 15, 2010, the court found Dwight Jones committed domestic violence against Dr. Jones and she had obtained an order of protection against him. Connie Jones produced medical evidence indicating her husband had *"previously fractured her sternum"* (8). The custody evaluator provided evidence from a recording that Dwight was "yelling at" Connie and making comments such as, *"I'll knock your mother fucking head off,"* and, *"Well you're going to be a dead piece of shit if you keep fucking with me"* (9). Dr. Jones also provided evidence that Dwight *"possessed a 9mm., which he carried in a cloth pouch at all times"* (10). Notably, *"neighbors provided information that on a number of occasions father would answer the door with a weapon in his hand"* (11). The court found the *"Mother has not engaged in acts of domestic violence against Father or the minor child"* (12).

Tellingly, the court concluded that Dwight Jones's actions against Connie Jones were "*violent and verbally abusive,"* that she *"feared and continues to fear for her life,"* and that he *"threatened to kill Mother in the presence of the minor child"* (13). However, the court also

found that Dwight's actions, "in the spectrum of domestic violence, do not constitute significant domestic violence as contemplated by the statute" *[A.R.S. § 25-403.03(A)]*. The statute does not define "significant domestic violence."

Evocatively, before the shootings in Scottsdale, Dwight Jones posted a series of YouTube videos outlining what he saw as a conspiracy to deny him access to his son, a son in whose life the court acknowledged the father "played an important role" and a son the father loves "very deeply" (14). It is possible these videos were Dwight Jones's way of "signaling" or 'leaking' his intent to engage in an attack of some kind, a phenomenon reported in some studies of mass killing (15).

The possible "signaling" of an extremely rare act of spree killing, Dwight Jones's prior threats to kill his wife, his seeming preoccupation with firearms, and her description of him as *"a very emotionally disturbed person,"* ought not detract from the fact that just as we cannot predict intimate partner homicide, we most certainly cannot predict the much rarer act of spree or mass killing. The extreme rarity of spree killings like those committed by Dwight Jones is not necessarily reassuring. Those working family law cases see similar themes of abuse, tyranny, and emotional distress on a regular basis. It is therefore understandable spree killings shock family lawyers and allied professionals. Such tremors compound any chronic sense of ongoing vulnerability and vigilance perhaps associated with years of slights, tensions, threats, or assaults they, their families, or their colleagues have suffered as a result of doing their jobs.

...trauma in the lives of family lawyers does not just arise out of the white heat of direct threats or assaults or as a disturbing reminder from cases involving men like Dwight Jones. It also emerges chronically out of what some refer to as vicarious trauma.

A State Bar of Arizona survey (2013; N=1,992) found that 42.3 percent of respondents (N=843) report they had been threatened and/or physically assaulted at least once (16). Family/divorce lawyers report greater percentages of threats or acts of violence (56 percent), surpassed only by criminal defense attorneys and general litigators (17). However, trauma in the lives of family lawyers does not just arise out of the white heat of direct threats or assaults or as a disturbing reminder from cases involving men like Dwight Jones. It also emerges chronically out of what some refer to as vicarious trauma.

Vicarious trauma, sometimes referred to as compassion fatigue or secondary trauma, is a negative reaction to trauma exposure such as listening to clients' narratives of victimization, watching videos of exploited children, and viewing autopsy reports, crime scene photographs, and graphic injuries. Symptoms might include: Difficulty managing emotions and/or feeling numb; physical problems such as fatigue, poor sleep patterns, or vulnerability to illness; growing hopelessness or a loss of meaning; withdrawal from friends, family, or an avoidance or growing inability to maintain close or intimate human relationships. Over time, vicarious trauma contributes to cumulative stress and burnout.

Notably, only a small percentage of those with trauma histories evince symptoms that meet the criteria for trauma-related stress disorders. Professionals such as family lawyers who derive great satisfaction from their work and help their clients navigate stressful and sometimes dangerous situations, will likely counteract vicarious trauma with what some refer to as vicarious resilience (18). Indeed, cultivating an awareness of vicarious resilience and actively reflecting on the aspects of family law cases that strengthen it, might add to the meaning of family law work.

Knowledge about what to look for in potentially dangerous family law cases might also help empower lawyers and allied professionals, assuage fears, improve vigilance, assess and manage risks, assist clients and/or their families, and further inform safety planning and security arrangements. Acquiring that knowledge through documentary sources and thorough interviews with clients requires care and attention to detail. The goal is not to alarm or to paralyze clients who might be victimized but rather to educate all parties about possible dangers and threats. If the family law client is a perpetrator of intimate partner violence (IPV), a more subtle kind of data gathering might prove prudent. Cross checking perpetrator or suspected perpetrator reports or indeed denials of IPV requires an awareness that classic batterers tend to minimize their violence and its impact on victims, just as victims tend to underreport their victimization.

It is very important to bear in mind that IPV is not one phenomenon. Much IPV assumes the form of what researchers refer to as "situational couple violence," mostly minor acts such as shoving, pushing, and slapping,

often committed during times of high stress, perhaps under the influence of excessive alcohol, and absent patterns of coercively controlling behavior (19). This dysfunctional form of human communication may result in an arrest but does not usually become part of a longer-term pattern of dominating, degrading, and subordinating a partner in a tyrannical and emotionally controlling way.

Situational couple violence is "stress-release violence." It is usually not the violence that leads to severe re-assaults, near deaths, or intimate partner homicide. In contrast, intimate terrorism and coercive control reflect a different and much more dangerous form of long-term abuse, intimidation, and subjugation. Such abuse is sometimes difficult to uncover in either official documentation or from victims themselves. Among many other reasons, victims may be too afraid to report the full extent of what they face. Additionally, what little detailed research we have on the nature of any IPV mass and spree killers might have committed, suggests that IPV assumes the form of intimate terrorism not situational couple violence.

In cases of intimate terrorism we often find: violence that increases in frequency and/or severity; ongoing, violent, and extreme sexual jealousy; a sense from victims the abuser is capable of killing her or much more rarely, him; a victim who has been beaten while pregnant; a perpetrator who has used a gun, object, or other weapon against the victim; a perpetrator who has previously tried to kill the victim; a perpetrator who has strangled, choked, or suffocated the victim, more dangerously still, on multiple occasions. We might also want to ascertain whether: perpetrators appear to try to control a victim's daily activities; the perpetrator is known to carry a gun or have a fascination or affinity with weapons, particularly firearms; a victim has been forced to have sex; perpetrators have threatened to harm others; the relationship is ending and emotional estrangement between the parties has increased; the perpetrator is abusing drugs and alcohol; and, the abuser has threatened to kill the victim or take his own life (20).

Seeing intimate terrorism unidimensionally in terms of one partner, usually a man, exerting power and control over the other (usually a woman), limits our grasp of the case. Intimate terrorists who end up killing their partners or committing multiple killings may bully and intimidate those

partners and others, appearing powerful and controlling. However, their power is contingent and undermined by their own human weaknesses. The control they may appear to have is often ebbing, especially as the episode of killing approaches. Put differently, their power is more like pseudo-power. As Hannah Arendt once observed, *"Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its course it ends in power's disappearance"* (21). Psychiatrist James Gilligan makes a related point, "*I can only conclude that their desire for omnipotence is in direct proportion to their feeling of impotence"* (22).

In cases of intimate terrorism herein lies the great paradox of making sense of cases. Perpetrators are simultaneously powerful and powerless, perhaps directly and/or consciously trying to control their partners and families but somehow ultimately feeling as if their control is ebbing. It is their eroding sense of control, their relative and perhaps growing powerlessness, and the deepening yet unacknowledged or bypassed shame about who they are or have become, that renders them dangerous. These complex and paradoxical dynamics often float amid turbulent currents of rage, vengeance, paranoia, and narcissism all of which have a tendency to mask the vulnerability, dependency, and abandonment anxieties of many, but not, all dangerous intimate partner terrorists. We may have been taught the key to understanding the threat posed by these intimate terrorists, and, that small number among them who become mass or spree killers, lies in understanding their power and control over victims. My suggestion is we need to go much further than this and get a sense of their powerlessness, their ebbing control, what I refer to as their "humiliated fury" (23). It is this fury, not their power or control, that feeds their homicidal tendencies. We need much more research on whether and how such humiliated fury and its oft-accompaniment, a deeply flawed or compromised sense of hyper-masculinity, feed mass or spree killing.

Detailed case studies of mass and spree killing suggest paranoia often figures prominently, although not necessarily manifesting as psychosis. There is no solid evidence to suggest that psychosis causes, drives, or triggers mass killing. Indeed, recent commentary suggests *"few perpetrators of mass shootings have had verified histories of being in psychiatric treatment for serious mental illness"* (24). One study of 28 mass attacks resulting in a total of 147 deaths and 700 injured, found that 32 percent of attackers had previously displayed psychotic symptoms. Nevertheless, authorities identified mental health or psychosis as the

principal motive in only 14 percent of these attacks (25). Importantly, mere associations between psychotic symptoms and mass killing do not mean that psychoses cause, drive, or trigger mass killing. In the same small study, 36 percent of mass killers evinced prior signs of either suicidal thoughts or depression. Meaningfully, all 28 attackers had one significant stressor (e.g. divorce, physical illness, unstable living conditions, fired from work) within the preceding five years and over half had experienced financial instability.

The research literature suggests severe depression and perhaps a history of institutionalization for suicidal ideations, plans, threats and suicide attempts are more prominent themes than severe mental illness such as psychosis or schizophrenia (25). As with Dwight Jones, mass and spree killers often feel persecuted, ostracized, and alienated. They struggle to be close to others, to be truly intimate with partners, often living increasingly isolated lives. If we are to believe media reports, Jones had lived in Extended Stay hotels for nine years. Untethered from social and legal moorings these loners frequently buy into the illusion of their own omnipotence, blaming others for their plight. Their growing revenge fantasies and endless ruminations seem to also play an important part in their highly destructive acts of often carefully planned killing.

The aggressive narcissism of some mass killers is merely the front stage of their presentation of self, leaving intense, unbearable, and unacknowledged shame backstage, fueling an increasingly vengeful rage. In a sense the acts of killing serve as the ultimate protection against the destruction of the killer's own increasingly fragile ego and soiled identity, regardless of whether they eventually commit suicide. Put differently, some killers reach such a remote emotional location that the shoring up of their fragile egos trumps the need to preserve the very existence of their bodies. In other cases, it is possible that the acts of killing feed or gratify feelings of grandiosity and omnipotence, perhaps evident in the macabre laughter of killers like Omar Mateen or the fleeting suicidal aerial supremacy of sharpshooter Charles Whitman.

Interviewing clients carefully with the signs of intimate terrorism in mind seems worthwhile. Also remaining cognizant of some of the characteristics of some mass and spree killers such as their compromised masculinity; extreme hatred and anger; social isolation and dearth of pro-social influences; their possible fascination and facility with weaponry, especially firearms; threatening changes in their life circumstances such as the looming specter of homelessness; severe depression, suicidal ideations and plans, previous suicide attempts, and malign hopelessness; acute paranoia and strong feelings of persecution; and, any organic impairments stemming from severe head injuries and debilitating diseases. Gathering information about "signaling" violent behavior or other acts of revenge might also prove useful.

Remaining mindful of the slow creep of vicarious trauma and the direct harms caused by threats and assaults upon family law attorneys and allied professionals might also help. Finally, realizing one's own vicarious resilience developed through helping clients might comprise a source of hope in the face of the threat of rare events such as intimate partner homicides, and extremely rare mass and spree killings. FL

About the Author

Neil Websdale directs the National Domestic Violence Fatality Review Initiative, a grant funded project supported by the U.S. Depart. of Justice, Office on Violence Against Women. He also directs the Family Violence Institute at NAU.

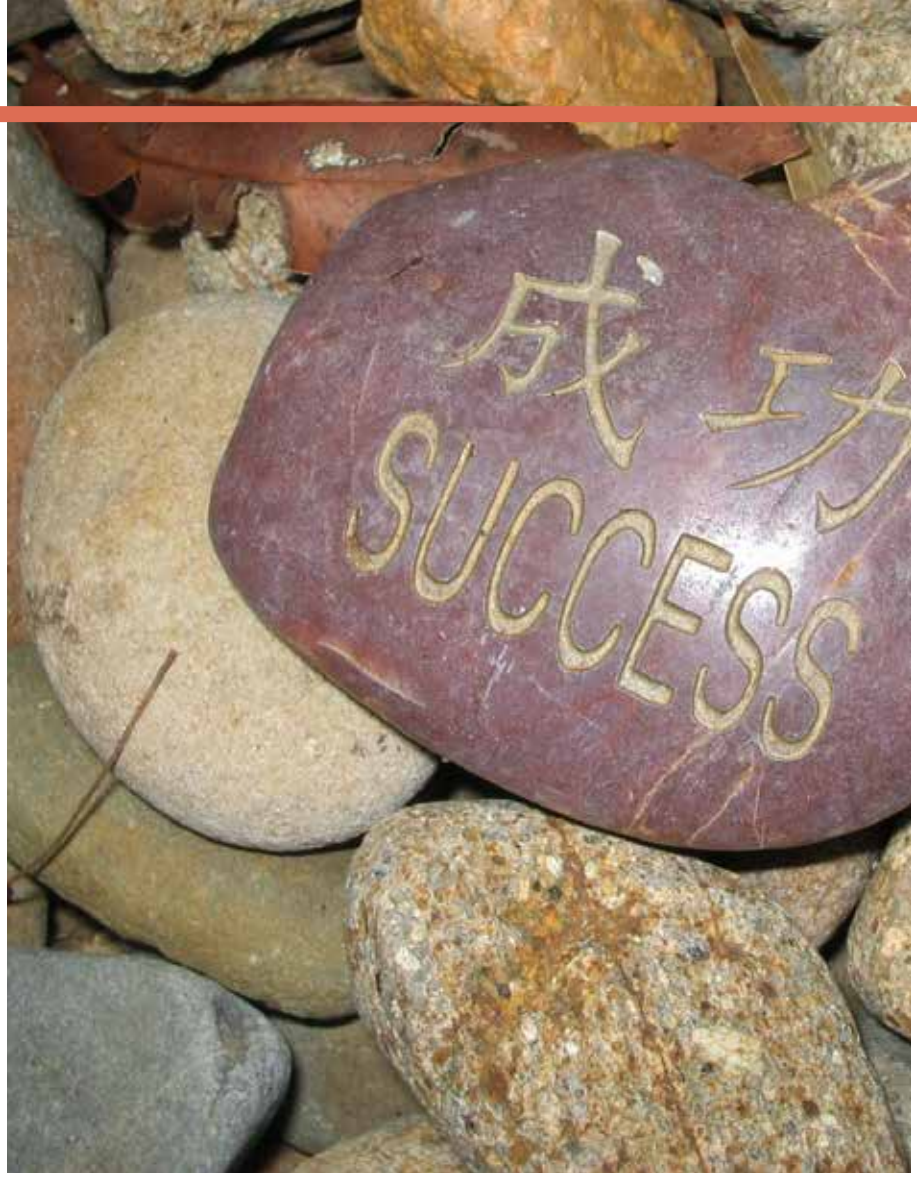
endnotes

1) Krouse, W.J., & Richardson, D.J., 2015, Mass murder with firearms: Incidents and victims, 1999-2013. Congressional Research Service. Retrieved from: https://fas.org/sgp/crs/misc/R44126.pdf
2) Burgess, A.W., 2006, "Mass, spree and serial homicide," in Crime Classification Manual, 2006, 437-470, at page 442.
3) The Washington Post, 'He was not a stable person': Orlando shooter showed signs of emotional trouble. http://wapo.st/2ljMvy1. Published June 12, 2016.
4) The Huffington Post, Tuesday, April 3, 2018, Noor Salman's trial gave us the best glimpse of what actually led to the Pulse shooting, Monivette Cordeiro on Apr 3, 2018
5) See, for example, the spree killing committed by Carey Hal Dyess, 73, in Wellton and Yuma on the morning of June 2, 2011. Dyess killed his former wife, Theresa Sigurdson, 61, her business partner, James Simpson, 75, two other friends who supported her through the acrimonious divorce, Henry Scott Finney, 79, and Cindy Wilborn, 81, and her divorce attorney, Jerrold Shelley, 62, before committing suicide. Reported in J.J. Hensley and Yvonne Wingett Sanchez, 'Yuma shooting: Slain ex-wife voiced fears about husband for years," Arizona Republic, June 4, 2011.
6) CBS/AP Crimesider Staff, June 5, 2018, "Arizona killing spree suspect ranted about divorce in YouTube videos".
7) Catharine Holland, "PD: We knew he was our suspect and murderer," azfamily.com, June 5, 2018.
8) Superior Court of Arizona, Maricopa County, FC 2009-001948, November 15, 2010, Docket, page 4.
9) Docket, page 4-5.
10) Docket page 5.
11) Docket page 5.
12) Docket pages 5-6.
13) Docket page 8.
14) Docket page 9.
15) Paul Gill et al., 2016, "Shooting Alone: The Pre-Attack Experiences and Behaviors of U.S. Solo Mass Murderers," Unpublished research report.
16) Stephen Kelson, Arizona Attorney, November 2013, pages 18-27.
17) See Kelson, Table 8, page 26.
18) Hernandez, Pilar et al., 2007, "Vicarious resilience: A new concept in work with those who survive trauma," Family Process, 46, 2: 229-241.
19) Michael Johnson, 2008, A Typology of Domestic Violence, Boston, MA, Northeastern University Press.
20) The formulation of specific questions regarding danger in IPV cases stems from the pioneering work of Dr. Jacqueline Campbell and associates. See for example, Jacqueline Campbell et al., "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study," American Journal of Public Health 93, no. 7 (2003): 1089–1097.
21) Hannah Arendt, 1970, On Violence, London, Allen Lane, page 56.
22) James Gilligan, 1997, Violence: Reflections on a National Epidemic, New York, Vintage Books, page 132.
23) Neil Websdale, 2010, Familicidal Hearts: The Emotional Styles of 211 Killers, Oxford University Press.
24) James L. Knoll & George D. Annas, 2016, "Mass shootings and mental illness," chapter 4 in Gun Violence and Mental Illness, edited by Liza H. Gold & Robert Simon, American Psychiatric Publishing, page 91.
25) Mass attacks in public spaces – 2017. United States Secret Service, National Threat Assessment Center, March 2018.
26) Jillian Peterson et al., "How Often and How Consistently do Symptoms Directly Precede Criminal Behavior Among Offenders With Mental Illness?" Law and Human Behavior 2014, 38, 5: 439-449.

Preparing Your Client for Success in Mediati

It is well worth putting in the extra effort to make sure that your client is well prepared to take advantage of the opportunity in a family mediation case. It is clear that the more prepared that parties can be for a mediation, the greater the likelihood that the parties will reach a workable, realistic settlement.

by Glenn Davis
of Glenn Davis Mediation



Providing your client with an understanding of the mediation process - The mediator will certainly review the basics of the process at the beginning of the mediation, but it is important to discuss the process itself in advance of the mediation. This way the mediator is primarily providing a review and reinforcement of points that you have already discussed with your client.

Explain to your client how the mediation process differs from the litigation process. Point out that in a mediation a party has the ability to control and construct an outcome that will be something workable versus an outcome that is handed down by a court that could be much more unacceptable or a complete disaster. Make sure that your client understands the downside to litigation including the cost, delay, stress, uncertainty and risk. These will all be eliminated by a successful settlement of the case.

Your client should be aware that mediation is an informal process. They can and should engage and communicate directly with the mediator to help the mediator understand their needs opinions and positions. That will not be the case with the judge at trial who receives information in a very formal procedural manner.

Remind your client that mediation is not a win-lose process but rather a collaborative and cooperative process, designed to allow the parties to work together to come up with solutions that meet each parties' interests and resolve the case through mutual agreement.

Your client should be aware that the mediation is a confidential process and that what is discussed and proposed at the mediation is not admissible in court. This knowledge encourages the parties to be candid and to make offers without fear that it will be used against them if the case is tried.

Preparing Your Client for a Successful Mediation has a Number of Steps:

- Provide your client with an understanding of the mediation process,
- Educate your client with an accurate understanding of the facts and law related to the issues in the case,
- Assist your client in formulating realistic goals and expectations for the mediation, and
- Work with your client to develop a negotiation strategy.

It important that the client understands that even though they may believe in their case, there is a real possibility that the judge, who will have limited time to engage with the facts, may not see things the client's way. As I tell parties, the trial process is not one of feeding data into the 'Justice Computer' to get a predictable and correct result. It is far from that – judges are human, each one is different in perspective and experience and they are given great discretion to determine the facts and apply the law as they see fit. The mediation process is much

The more information the clients have about the pertinent facts and law the more they will be able to make persuasive arguments, negotiate effectively and make informed and realistic compromises necessary to resolve their case.

more informal, flexible and capable of producing an outcome that parties will be able to live with, even if it is not their ideal scenario.

Advise the client about how the mediation will be conducted. To do this you must be familiar with how the particular mediator proceeds with a mediation. Does the mediator meet with the parties separately or together or both? How long does a typical mediation session last? Is the mediator's style more directive and focused on getting to settlement or is the mediator more facilitative with a focus on relationships and neutrally assisting the parties to come up with their own resolution in their own time? Does the mediator offer opinions or evaluation regarding the issues in the case to provide the parties perspective they use to make decisions in the case, which is my approach. Or is the mediator silent as to how they see the issues and facts in the case?

Educating your client with an accurate understanding of the facts and law related to their case - It is critical that the parties have accurate knowledge about the facts of their case and the law that applies to the facts.

Clients need to be advised about how community property law applies to their case and be equipped with basic facts, such as how much was in the bank accounts and what debts were owed on the date of service. If spousal maintenance is an issue they need to be understand the basic factors considered in determining that issue and how their own financial situation would be considered in light of those tenets. They need to understand the de facto 'presumption' that applies to decision-making authority and the preferences in the law regarding parenting time.

The client should also have a handle on the facts that pertain to the other party's positions and claims and how the law applies from that perspective. A good understanding of the other side's case can assist greatly in negotiation.

Assisting your client in formulating realistic goals and expectations for the mediation - This is an important part of the process. Often, parties do not really have a clear view of exactly what they want out of the mediation. By defining and narrowing priorities and goals both the client and the attorney become more capable of advocating and negotiating for what is most important to the client.

To do this, ask open-ended questions that you may follow up with more direct, closed-ended questions. Make sure you ask questions that get at the underlying motivation and reasons for why the client wants what they want. This understanding often makes it easier to come up with creative solutions to meet the needs and interests of the client and get the case settled.

Ask about what they feel are non-negotiable points versus issues on which they will compromise. It is critical at this point to make sure your client has realistic expectations, which will be easier to do if you have prepared your client with an accurate understanding of the facts and law in the case. Those expectations should be developed with an understanding of what the best alternative to a negotiated agreement (aka BATNA) would be as to each issue. Determining the BATNA often consists of considering what the court would likely do if the case is litigated. It is crucial to keep the client in touch with reality as they set their goals. To do otherwise will set the mediation up for failure.

Working with your client to develop a negotiation strategy - This involves making sure the client has a basic understanding of the negotiation process. Most attorneys have an understanding of the negotiation 'dance' so I will just touch on a few key points.

You should work with your client to develop at least a general negotiating strategy that will arise from a clear understanding of the facts, the law and the goals and priorities of the client. The strategy should be should to be prepared with items that can be conceded without affecting any of their important bottom line issues so that there can be evidence of willingness to compromise. In order to make negotiation decisions your client should be prepared with an understanding of what the alternative outcomes could be, including what the result of no agreement on the issue would be, which is where the consideration of the BATNA applies.

The strategy should involve developing arguments that emphasize the strengths of your case and with a plan to address weaknesses. Prior to the mediation try to anticipate the arguments that will be offered by the other side. Discuss and practice how you and your client will counter those arguments to turn the negotiation in your direction.

In many if not most family law cases, preservation of the relationship between the parties is a crucial consideration since the parties must continue in a co-parenting relationship. **In order to maintain at least a somewhat civil and positive relationship the negotiation will need to be tailored and conducted in a manner that will minimize harm to that relationship.** This approach will change the dynamic and strategy in the mediation. Prepare your client to try to bargain and negotiate in a way that will, to the greatest degree possible, avoid offending or antagonizing the other party.

Openness and willingness to disclose information fosters trust, which in turn increases the odds of reaching agreement and resolution.

Advise your client that it is important focus on the interests of both parties underlying their positions, to look for possible trade-offs and win-win solutions that meet the needs of the parties. I often tell parties that it feels like I am operating in parallel universes as I move between them and try to explain the other side's perception of the case, because their perceptions of the situation are so divergent. But it is crucial that each side stand in the shoes of the other side and try to understand their emotions and perceptions as this will reveal where there may be leverage and/or opportunity for creative solutions.

Let your client know that sharing of information and educating the other side is a key part of persuading the other side to see things your way. Openness and willingness to disclose information fosters trust, which in turn increases the odds of reaching agreement and resolution.

Finally, your client should understand that hard-nosed, *'my way or the highway'* negotiation often leads to impasse and failure of the mediation. **The parties must be flexible and look for opportunities for compromise to get past hard positions**.

Conclusion - In sum, preparation of your client as to the process, pertinent facts and law, goals and negotiation strategy will enhance the likelihood of a successful outcome in your mediation. Approach that preparation as thoroughly as you would approach preparing the client for a hearing or trial in the case. FL

About the Author

GLENN DAVIS is a retired Maricopa County Superior Court Judge and now practices exclusively in family law mediation. He is the immediate Past-President of the Maricopa County Association of Family Mediators and former Maricopa County Bar President.

The Ever-Evolving Landscape of Grandparents' Rights in Arizona

by Patrick P. Lacroix, Esq.

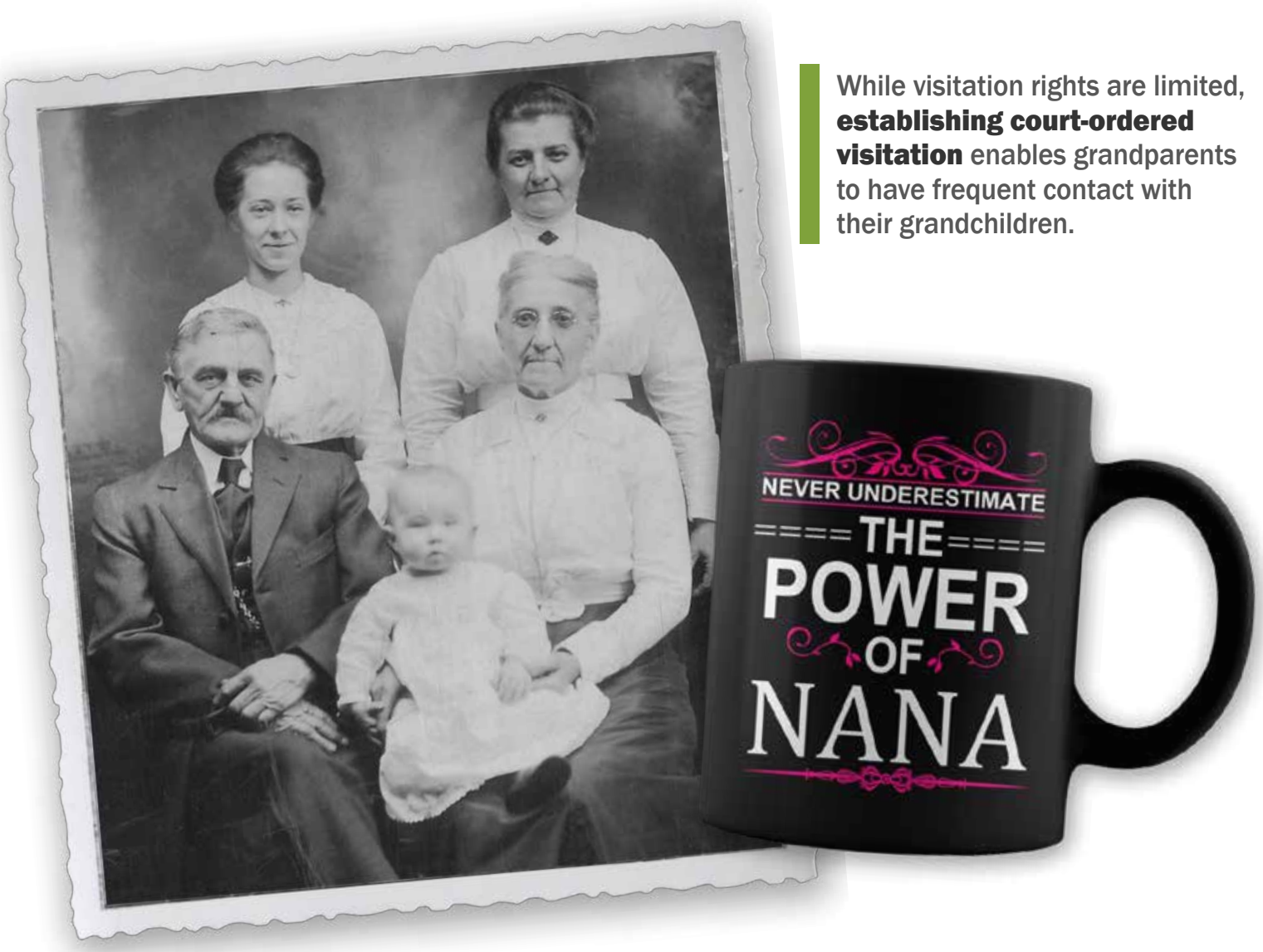
Unless there are serious concerns of abuse or neglect, ... grandparents in Arizona are **limited to** filing for visitation through the Family Division.

In Arizona, grandparents have the right to be involved in their grandchildren's lives—at least, to a degree. Although these rights are not yet necessarily "perfected," they continue to evolve to this day, with a potentially groundbreaking case having been decided just a few weeks ago.

Unless there are serious concerns of abuse or neglect, in which case a concerned grandparent might consider contacting the Department of Child Safety or filing a private dependency, grandparents in Arizona are limited to filing for visitation through the Family Division. There are a number of caveats in applying for visitation, for example, the child or children's parents cannot be married, and up until recently the opposition of a "fit" parent to grandparent visitation created a presumption that such visitation was not in the children's best interests.

Here is where the newest twist to grandparent rights comes into play, though. Under subsection (C) of A.R.S. § 25-409, a grandparent may petition for visitation rights. In such cases, the Court can issue visitation orders if they are in the best interests of the child. It is a well-established principle that the Court must give "special weight" to the legal parent's opinion of what serves the child's best interests. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000). However, on June 8, 2018, the Arizona Supreme Court shed some extra light on how "special weight" is to be applied. In its decision in *In re Marriage of Friedman and Roels*, — P.3d — (2018), the Court made several significant findings. First, the Court held that the opinion of a "legal parent" is entitled to special weight. The Court clearly set forth that how the parents hold legal decision-making authority or how they share parenting time is irrelevant to the question of visitation. So long as a parent's legal rights have not been terminated, that

... a grandparent may petition for visitation rights. In such cases, the Court can issue visitation orders if they are in the best interests of the child.



While visitation rights are limited, **establishing court-ordered visitation** enables grandparents to have frequent contact with their grandchildren.

parent's opinion is entitled to special weight. Second, the weight of each parent's opinion is equal; neither parent is entitled to a presumption in his or her favor, regardless of legal decision-making and parenting time. Thus, if one parent objects to a grandparent having visitation and one parent does not or in fact supports such visits, then the opinions offset one another and the Court is tasked with determining whether or not visitation is in the children's best interests. These changes may seem small, but they can make a great deal of difference for grandparents who have spent years caring for their grandchildren, only to be cut out of their lives once their own child loses legal decision-making authority or parenting time.

While visitation rights are limited, establishing court-ordered visitation enables grandparents to have frequent contact with their grandchildren. They are able to remain a part of their grandchildren's lives and to ensure they are safe, happy, and well cared-for. Also, at the very least, a grandparent with ongoing contact is well positioned to act, if necessary, to protect their grandchildren by reporting suspected abuse or neglect. As ever, if a grandparent, or anyone else, believes a child is being abused or neglected, there are other remedies which may be available, including filing an *in loco parentis petition* or filing a private dependency action. FL

About the Author

Patrick P. Lacroix, Esq. is a partner in Arizona Child & Family Law and a Fellow in the American Academy of Adoption and Assisted Reproduction Attorneys.

CASE LAW UPDATE

The Family Law Section regularly prepares a summary of recent Arizona family law decisions. Summaries are located on the Section's web page at:
www.azbar.org/sectionsandcommittees/sections/familylaw/familylawcaselawupdates/

IMPORTANT CLE DATES

July 1st - August 1st	**Deadline to Apply for Specialization Application**
August 2nd - October 1st	**Application for Specialization Accepted with Late Fee**
September 15th	**MCLE Affidavit Filing Deadline**
September 21st	**Family Law Trial College**
October 17th	**Parting Shots (Beginner/ Intermediate Level CLE)**
November 16th	**State Bar of Arizona's Advanced Family Law**
January 17th-18, 2019	**Family Law Institute**
June 26th - 28th	**State Bar Convention**

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

… If so, the deadline for submissions is October 10, 2018.

Would you like to...

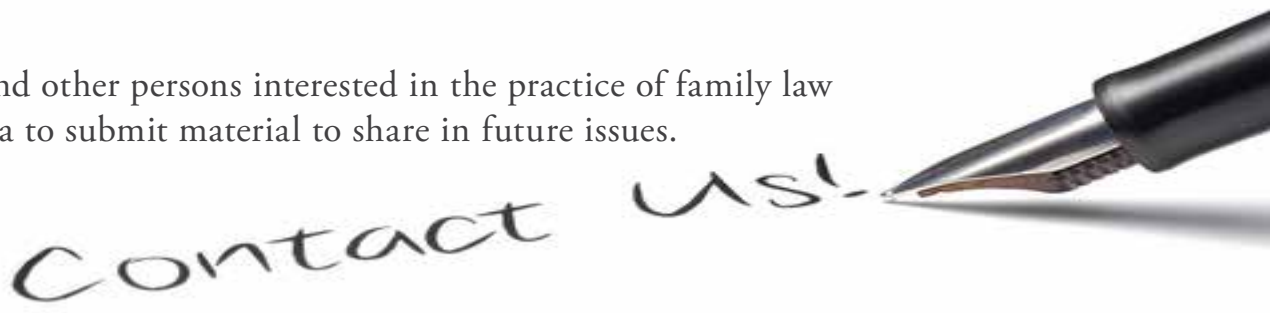
- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

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.