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Family Law News

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William D. Bishop

Taking the High Road Continued ......

The former chair of the Family Law Section, Michael Aaron, authored an article in the December 2016 Family Law News titled "Taking the High Road ...". Michael addressed the fact that as the metropolitan areas have grown, many attorneys veer from cooperative litigation to more and more adversarial litigation. This is similar to driving a car on the freeway. If we do not know the other drivers, we become less inclined to take the high road, and instead adopt driving habits that ignore the pleasantries that drivers in small towns are more likely to share.

I would like to take the opportunity to expand on Michael's "Jerry McGuire" article, and to encourage family law practitioners to improve their professional demeanors in family law cases inside and outside of the Courtroom. Although the Arizona Rules of Professional Conduct provide numerous mandates regarding professionalism, it is important not to stop there. The second sentence of the Preamble to the Rules sets forth the language "[w]hether or not engaging in the practice of law, lawyers should conduct themselves honorably". The Preamble goes on to state that "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others". "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials". "These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

I reached out to several well-respected family law attorneys and judges to inquire about some of the more frustrating examples they have encountered over the last few years. The resounding message is that we,

as practitioners, will find much more personal satisfaction handling cases in which opposing counsel can address issues in a professional and diligent manner, as opposed to dealing with attorneys that address litigation, as well as conflict resolution, as a battle at every turn. Some of the major complaints include, but are not limited to the following:

1. Attorneys who refuse to respond to telephone calls or letters. It appears that some attorneys feel that they are sending an implied message that they are too important, or the other side's positions are so misplaced, that a response is beneath them. If you are unable to respond, let the other attorney know that you are unable to do so, and provide an anticipated time line that you can respond to them.

2. Attorneys who refuse to acknowledge any weakness in their cases. It is impossible to discuss resolution or to move toward a reasonable settlement when attorneys cannot have frank discussions regarding the strengths and weaknesses of their client's positions.

3. Attorneys who personalize their clients' positions. How many times do we receive letters that sound as though the attorney was in the room with the client, and that the client's rendition of the "facts" is beyond reasonable dispute?

4. Attorneys who exaggerate the facts. How many times upon cross-examination do we find that the opposing party's rendition of the facts is much different than what opposing counsel drafted in correspondence or Court pleadings?

5. Attorneys who take liberties with citing legal precedent.

6. Attorneys who treat trial as a battleground. An attorney can make his/her points, and examine witnesses and opposing parties in a manner that is efficient and persuasive without raising his/her voice, and being overly argumentative. Such attorneys lose the art of persuasion when they over personalize their trial presentation in such manner.

In my experience, the most persuasive attorneys address trial as an art form. They can present a very detrimental case regarding the other party's positions without hostilities, and while treating the parties and opposing counsel with respect and deference. My most enjoyable cases are with attorneys who are highly competent, and with whom you can professionally discuss issues off the record. You should be able to appreciate an artful and competent presentation by opposing counsel without feeling personally attacked. We do not create the factual disputes. Rather, it is our job to present the most persuasive case that we can within the confines of the law and our professional responsibilities. In the same regard, we are not personally responsible for the outcome. We can only do our best job within the limitations provided by the case. At the end of the day, the question you should ask yourself is whether you did the best you could under the circumstances, as opposed to whether your client won each and every issue.

A trial should be more like a dance than a battle. One in which the attorneys make their points through examination etc. in a civil and professional manner. It goes without saying that such type of trial is the most impressive to the finder of fact. We often forget who our audience is. We need to remove ourselves from the emotions of the case and think specifically about the trier of fact, and what he or she will likely find persuasive. Judges are humans and are turned off by grandstanding, exaggeration, and over dramatization of the facts and issues.

It is unhealthy to view your opposing counsel as the enemy. If there were not two sides to every case, we would not have jobs. Taking the "high road" will expand your professional life and the enjoyment of practicing in what can be a very emotionally draining area of the law. FL

about the author

BILL BISHOP is the current chair of the Family Law Section. Bill is a Certified Family Law Specialist and a Fellow of the American Academy of Matrimonial Lawyers.

Divorce After 50: The Increasing Importance of a Spouse Finding Employment

BRADFORD H. TAFT, MBA, CMF, SPHR, SHRM-SCP, CFLC
Managing Director of Taft Vocational Experts

With Americans 50 and older getting divorced at a higher rate than younger people and life expectancy increasing, more emphasis is being placed on the employment of dependent spouses to contribute to their income stream after a divorce. People 50 and older comprised 25% of all Americans who got divorced in 2014, up from 8% in 1990, according to the National Center for Family and Marriage Research. Those who quit their marriage late in life can substantially reduce their standard of living and sacrifice their retirement security due to a number of factors. It's a lot more expensive to live in separate households, and retirement savings must be divided. The sources of income for both spouses need to be maximized before and after retirement.

Traditional Role of Vocational Experts

The traditional role of a vocational expert in a divorce matter is to evaluate the talents and experience of a spouse, conduct a labor market analysis, and opine on their employability and earning capacity for consideration in determining spousal maintenance and/or child support.

By providing these analyses and conclusions, vocational experts play a valuable role in the divorce process. However, by following through and utilizing this information as a basis for assisting a spouse in securing a new job, vocational experts can play a more important role in supporting the well-being of the family moving forward.

Vocational evaluators, who have a strong understanding of the career transition Process, including how to plan and implement effective job search campaigns, can bring a high level of efficiency in helping a spouse find a new job. This is especially valuable to a spouse who has been out of the job market for an extended period of time and needs to locate employment as soon as possible.

Here are three steps to planning and implementing a Job Search Campaign that a vocational expert can assist with:

By following through to support a spouse in planning and developing an effective job search campaign, the vocational expert can assume an expanded role in ensuring a positive outcome to the divorce process.

1. Career Assessment and Objective Setting

During the vocational evaluation during divorce proceedings, an expert gathers information and then evaluates a spouse's education, interests, skills, knowledge, and experience to determine what career options are the best fit. Then they conduct a labor market analysis to assess the likelihood that an individual can get a job, and what they can expect to earn, both immediately and in the long term. By continuing to work with the individual to focus on career objectives that match their talents and interests, a vocational expert helps the individual to effectively concentrate on a realistic career direction.

2. Written and Verbal Communication

Once the career objective has been established, it's time to write a resume along with creating other communication tools to broadcast one's talents and interests to the job market. A vocational expert can help the job seeker create a strong message that shows how their talents can contribute to the success of organizations.

Verbal communications include brief (30 and 60 second) personal branding statements to effectively introduce themselves in networking situations. Preparing for job interviews includes anticipating what questions a prospective employer will ask as well as creating a list of questions that the candidate wants to ask the employer.

3. Effective Sources of Job Leads

After career objectives have been set and communications tools have been developed, the job seeker is ready to use a number of sources to identify job leads. Surveys show that networking to develop referrals into prospective employers is still the best way to find a new career opportunity, so specific emphasis is placed on how to identify referral sources, develop relationships and get introduced to hiring managers. The Internet has revolutionized the job search process, so learning how to use it effectively to research companies, support networking strategies, identify job postings, and submit applications is also important.

By following through to support a spouse in planning and developing an effective job search campaign, the vocational expert can assume an expanded role in ensuring a positive outcome to the divorce process. FL

about the author

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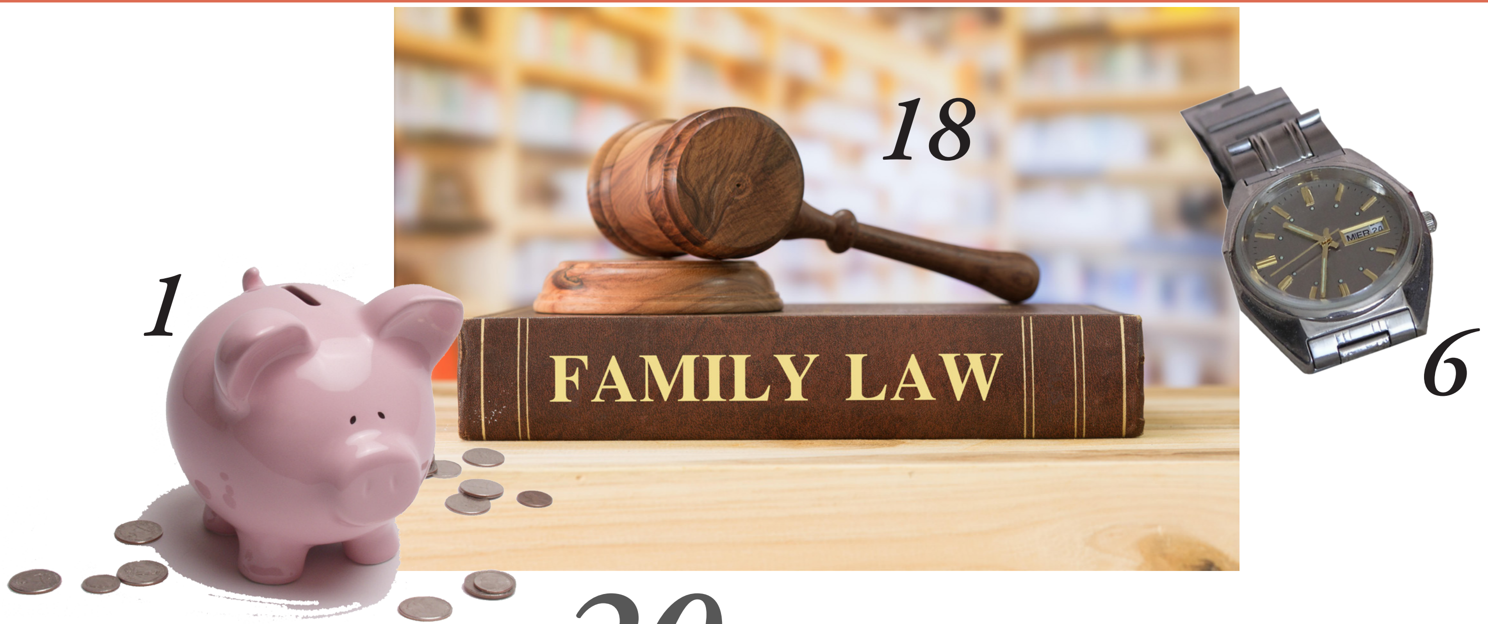

20 Tips from 20 Family Court Judges

1. We hear complaints about the cost of obtaining a relatively straight forward divorce where few, if any, issues are disputed. Please be conscious of the cost of divorce to litigants
2. When filing a Motion to Withdraw as Attorney of Record, include the date and time of any pending hearing within the body of your Motion. Stating, the client is aware of all pending dates isn't good enough.
3. In consent decrees involving children, please include the jurisdictional language required by A.R.S. § 25-1031(a) and § 25-402(A).
4. Always, treat the judicial staff with courtesy and respect. The staff is an extension of the Judge, and they are to be treated the same as you would treat the Judge.
5. Calling something expedited/accelerated or some other adjective does not move the pleading to the top of the pile. If it truly is an emergency then file the appropriate motion under Rule 48.
6. Manage your time. Get to the point. Too often attorneys spend too much time on information that is not relevant and run out of time to cover information that is. If the judge gives an indication as to what the judge finds important, start there. When the judge gives a two-minute warning, ask your last question and sit down. Do NOT keep going and going and going until the judge cuts you off.
7. Please do not use exclamation marks! Or, ALL CAPS in pleadings.
8. There is a duty to meet and confer before court appearances - please do so.
9. Respect the clerks and follow the rules regarding when exhibits are due. Please do not bring your 15 or 150 exhibits into court on the day of trial and ask they be marked.
10. Do not file a discovery motion without conferring with the opposing party or lawyer and then certifying this has been accomplished.
11. Please do not give us hundreds of pages of emails and texts, particularly without bates stamp numbering. If need be, provide a summary under the rules of evidence. We know your clients want us to read it all but please do not expect us to go through hundreds of pages of emails unless you are going through those pages with your client during testimony. We don't like to guess which part of the communications apply to your issues.

Thank You!

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12. If you request a continuance without complying with L.R. 2.14 (indicating whether

opposing counsel objects or not), your request is likely to be denied.

13. Not all "yes or no" questions are so simple. For important issues, if you interrupt the witness' explanation, I'll usually allow further testimony while your clock continues to run.

14. When there are two attorneys in the case, one for each side, please speak to each other before coming to court for an RMC or any other hearing, and please file a Joint Pretrial Statement for trial.

15. Write a good pretrial statement that includes citations to exhibits and anticipated testimony. Remember that evidence need not be presented as to any facts that are listed as undisputed in the joint pretrial statement. Thus, a well-written joint pretrial statement can save time at trial. For example, if the joint pretrial statement lists as undisputed certain child support and custody (§§25-403, 403.01, -403.03, -403.04, and -403.05) factors, you don't need to present any testimony or other evidence regarding those factors.

16. Please use your manners. Respectful dialogue bolsters credibility of you and your client.

17. Don't file motions to "dismiss" other parties' motions. Don't file motions to "strike" other parties' motions. A Rule 32(B) motion to dismiss is appropriate in limited circumstances. A Rule 32(E) motion to strike is appropriate in even more limited circumstances. There is a motion, response, and reply; briefing is complete at that point. If you believe that a sur-reply is necessary, seek leave to file it.

18. Check judicial profiles. Most of us have gone to the effort of including lots of information on how we run our courtrooms. They are full of tips. Please review those profiles on the website and even suggest to unrepresented litigants that they do the same.

19. Please review Rule 84 regarding motions for reconsideration. They should not be directed at final judgments. Lawyers sometimes improperly use this rule as a substitute for Rule 83 or Rule 85(C) motions. If you use that rule on a final judgment, where a Rule 83 or Rule 85 motion is appropriate, you should expect to have your motion denied.

20. Please don't demonize the other parent. If the parent has some issues, such as drug abuse, you can make your point professionally. It does no good to embarrass the other parent or act like they should never get to see their kids. FL

ABOUT THE AUTHORS

FAMILY COURT JUDGES we would like to thank for their time and tips: Judges Barton, Beresky, Blair, Campagnolo, Cohen, Cooper, Culbertson, Fish, Green, Hopkins, Korbin Steiner, Lang, Minder, Moskowitz, Polk, Ryan-Touhill, Smith, Sukenic, Svoboda, and Thomason.

Proposed Changes to Title 25 in 2017-2018 Legislative Session[1]

By Timea R. Hargesheimer, Esq.

Two proposed bills have been submitted to make changes to Title 25 as follows:

1. HB 2006: Minimum Age For Marriage

The proposed change to A.R.S. § 25-102 would provide as follows:

A. A person who is under eighteen years of age shall not marry.
B. The clerk of the superior court shall not issue a license to a person who is under eighteen years of age.

The current statute allows a person under eighteen to marry with the consent of his or her parent and a person under 16 must also have the consent of a superior court judge.

2. HB 2031: Spousal Maintenance

The proposed changes to A.R.S. § 25-319(A) would change the criteria under which a spouse could qualify for spousal maintenance. The proposed change would delete the current A.R.S. § 25-319(A)(3), which states "Contributed to the educational opportunities of the other spouse," and would replace said language with the more detailed following language: "Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse." The requested change would also add a new subparagraph (5) stating as follows: "Has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse." FL

endnotes

[1] As of the writing of this article on January 11, 2018.

The New Uniform Family Law Arbitration Rule

BY BARBARA ATWOOD

F amily law arbitration has been happening in Arizona for years but without much in the way of legal guidance. The Arizona Supreme Court has finally filled the gap. The Court adopted the Uniform Family Law Arbitration Rule in September 2017, to become effective January 1, 2018, as new Rule 67.2, *ARFLP*. This article explains some of the background leading up to the new Rule's adoption and the key provisions of the Rule.

BACKGROUND

The practice of family law arbitration is on the increase nationwide and seems to be growing in popularity in Arizona. For those couples who are not realistic candidates for mediation or settlement through collaborative law or otherwise, voluntary arbitration offers an attractive alternative to litigation. When arbitration works well, the advantages are significant. Unlike court proceedings, arbitration hearings are not public, and parties can agree to their own terms of confidentiality. The arbitration process is flexible: the parties identify the precise disputes to be arbitrated and, in conjunction with the arbitrator, can structure the rules to be followed, the schedule for arbitration hearings, and the fees. Sometimes arbitration by agreement is used in combination with mediation in a "med-arb" structure. For couples who have experienced unpleasant and protracted litigation, arbitration may be a preferred method of resolving post-decree issues.

The parties' ability to select the decision-maker is a key attraction of arbitration over litigation. The choice of arbitrator is often shaped by the type of dispute. For example, a lawyer with experience in real estate appraisals might be optimal for couples arguing about real property. In contrast, a dispute over legal decision-making of an autistic child might best be arbitrated by an individual with expertise in child psychology.

In light of the inadequacy of existing arbitration law for family law disputes, the Arizona Uniform Law Commission proposed the adoption of the Uniform Family Law Arbitration Rule in January 2017.

Because arbitration can move forward without regard to judicial calendars, it usually reaches finality more quickly than litigation. For that reason, it also is touted as being less expensive than litigation, even taking into account the arbitrator's fee.

The trade-off with arbitration is the limited nature of judicial review. A voluntary agreement to arbitrate is a waiver of the right to go to court in the first instance, and the opportunity to challenge an award in court is limited. In commercial arbitration, awards typically are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. In family law arbitration, likewise, parties who agree to arbitrate relinquish judicial oversight to a significant degree. As discussed below, however, judicial review of awards determining legal decision-making or child support must be more rigorous. Notwithstanding limited judicial review, arbitration may be an appealing alternative for many people in light of the drawbacks associated with litigation.

Because of the growing interest in this mode of alternative dispute resolution and the inadequacy of commercial arbitration law for family disputes, the Uniform Law Commission took on the project of drafting a family law arbitration act in 2013. The drafting committee, which I chaired, included experienced family law arbitrators and family court judges. The ULC gave its final approval to the Uniform Family Law Arbitration Act (UFLAA) in 2016.

NEED FOR FAMILY LAW ARBITRATION GUIDELINES IN ARIZONA

While family law arbitration has been around for years in Arizona, there were no arbitration guidelines specifically applicable to family law disputes. Instead, Rule 67(C), *ARFLP,* directed parties to follow the Arizona Arbitration Act (AAA), codified at A.R.S. §§ 12-1501-1518. The AAA was largely displaced in 2010 by the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001-29 (RUAA). Both of these Acts are designed for the resolution of commercial disputes and neither Act provides an adequate framework for the family law context.

The shortcomings of commercial arbitration law derive, in part, from the State's non-waivable *parens patriae* duty to protect children and vulnerable family members. Here in Arizona that doctrine means that the court cannot delegate or abdicate its core responsibility to exercise independent judgment in disputes over legal decision-making or parenting time. *ee, e.g., Nold v. Nold*, 232 Ariz. 270, 304 P.3d 1093 (Ariz. Ct. App. 2013). In light of that *parens patriae* responsibility, an arbitration award determining child-related issues must be subject to close judicial review – a form of review not available under the commercial arbitration acts.

Family law arbitration procedure also needs to provide a means to protect vulnerable family members. In commercial arbitration law, the possibility of domestic violence or child abuse, for example, goes unmentioned. Family law arbitration must provide a quick route to the court for orders of protection and in some instances, to halt arbitration altogether. In addition, remedies that are uniquely necessary for families in dissolution, such as temporary support orders and post-decree modifications, need to be available. Arizona Case law Arizona suggests that the absence of clear guidelines for family law arbitration produced understandable confusion among practitioners. *See, e.g., Chang v. Siu,* 323 P.3d 725 (Ariz. Ct. app. 2014) (rejecting provision in family law arbitration agreement that purported to expand appellate court's jurisdiction); *In re Marriage of Yeatts,* 2014 WL 3731350 (Ariz. Ct. App. 2014) (unpublished decision) (dismissing for lack of jurisdiction and noting confusion among parties in marital dissolution as to distinction between settlement judge and arbitrator).

In light of the inadequacy of existing arbitration law for family law disputes, the Arizona Uniform Law Commission proposed the adoption of the Uniform Family Law Arbitration Rule in January 2017.

KEY PROVISIONS OF THE NEW RULE

Rule 67.2 provides guidelines for parties, arbitrators, and courts both during an arbitration and after an award has been issued. It incorporates by reference Arizona's RUAA but supplements that statutory framework to meet the needs of family law dispute resolution.

Under the Rule, parties may agree to arbitrate any "family law dispute," defined as any contested issue arising under Title 25 of the Arizona Revised Statutes and within the scope of the Arizona Rules of Family Law Procedure. The Rule, however, excludes certain status determinations, such as adoption and termination of parental rights, from arbitration.

A central question during the ULC drafting process was whether disputes about child custody or child support should be subject to arbitration. While states disagree about whether to include these matters in arbitration, most states now permit arbitration of child-related disputes with meaningful judicial review of the award.

Rule 67.2 permits the arbitration of child-related disputes but imposes safeguards to protect the children's best interest. The Rule requires that an arbitration agreement be in writing, and clearly identify both the dispute to be arbitrated and the arbitrator (or a way of selecting the arbitrator). Absolute clarity in describing the family law dispute will avoid time-consuming litigation down the road. Fundamentally, the agreement to arbitrate should be a voluntary and informed choice of each party, never the product of coercion. A lawyer advising a client whether to arbitrate should explain the advantages and limitations of arbitration so that the client can make a reasoned decision.

One of the challenges during the drafting process was the potential preemptive effect of the Federal Arbitration Act, 9 U.S.C. § 2. That federal law makes enforceable any agreement to arbitrate an existing or future dispute arising out of a contract affecting interstate commerce. A smattering of case law from around the country has recognized that the federal act would apply to arbitration agreements at divorce if the parties have assets in more than one state. *See, e.g.*, In re Provine, 312 S.W.3d 824, 828 (Tex. App. – Houston 2009). Also, totally apart from the FAA, courts for years have given effect to arbitration clauses in prenuptial agreements. *See, e.g.*, Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993) (upholding arbitration clause in prenuptial agreement governing spousal support). Accordingly, pre-dispute arbitration agreements, such as arbitration clauses in pre-marital agreements, are generally enforceable under the Rule.

Family law attorneys, however, should keep in mind that ordinary contract defenses (lack of voluntariness, fraud, duress, unconscionability, and the like) remain available as a basis to challenge the validity of any arbitration agreement. Among the factors a court might consider in determining if an agreement was voluntary would be whether the parties knew what they were waiving and understood the essential features of arbitration. Rule 67.2 (F), *ARFLP*, sets forth procedural guidelines for challenging the enforceability of an arbitration agreement in court.

While pre-dispute arbitration agreements are generally enforceable, the Rule takes a different approach to agreements to arbitrate child-related disputes. In light of the State's *parens patriae* duty to protect children, the Rule generally requires that an agreement to arbitrate child-related issues must be entered into or reaffirmed after the dispute has arisen. The one exception is when an arbitration agreement involving a child-related dispute has been incorporated in an earlier court decree - such as a marital settlement agreement or separation agreement.

As in commercial arbitration, the Rule gives maximum flexibility to the parties in choosing an arbitrator. While default requirements are that the arbitrator be an active or retired attorney or a retired judge and be trained in identifying domestic violence and child abuse, those requirements can be waived by agreement of the parties. One can't overstate the importance of the selection of the arbitrator. Since judicial review of the arbitrator's award is narrow and doesn't ordinarily include errors of law, parties must have confidence in the decision-maker. Parties should seek an experienced arbitrator with relevant expertise and a reputation for fairness and absolute integrity. If the parties cannot agree on an arbitrator, it is up to the court to appoint a qualified individual.

THE RULE GIVES MAXIMUM FLEXIBILITY TO THE PARTIES

The Rule recognizes the state's *parens patriae* responsibility for children and vulnerable family members in several non-waivable provisions. The Rule requires that arbitration proceedings involving child-related issues must be recorded, and any award regarding children must spicify the underlying reasons for the award,

Rule 67.2 R(1), *ARFLP*, provides the grounds for vacating arbitration awards in superior court. For financial disputes between the parties not involving child-related issues, awards may be vacated under the narrow grounds recognized by the RUAA: arbitrator bias, corruption, or other misconduct, lack of a valid arbitration agreement, or lack of proper notice. Significantly, Paragraph R(1)(g) provides that an award may be vacated if a party establishes an additional ground recognized under state law. In some states, for example, errors of law may be a ground for vacating an award if the parties have agreed to limit the arbitrator's authority by requiring the arbitrator to follow state law. *See, e.g.,* Cable Connection, Inc. v. DirecTV, Inc., 44 Cal. 4th 1334, 82 Cal. Rptr.3d 229, 190 P.3d 586 (2008). The Arizona Court of Appeal in *Chang* declined to determine whether Arizona law allows parties to contractually authorize judicial review of the merits of an arbitrator's award because the arbitration agreement there did not clearly expand judicial review. *See* 234 Ariz. at 446-47, 323 P.3d at 729-30. Rule 67.2 does not decide this policy question but provides flexibility in Paragraph R(1)(g) to accommodate future clarifications or changes in Arizona arbitration law.

Importantly, Rule 67.2 requires robust judicial scrutiny of child-related awards. Under Paragraphs O and R, a court cannot confirm an award determining legal decision-making, parenting time, child support, or other child-related dispute unless it finds that the award gives the underlying reasons for the decision, provides an adequate record for review, complies with applicable substantive law, and is in the child's best interests. In addition, a court at its discretion may exercise *de novo* review of a child-related award.

The Rule also includes special protections for children and family members if the arbitrator learns that abuse or family violence has occurred. If an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, the arbitrator <u>must</u> terminate the arbitration of any child-related disputes and report the findings to the Arizona Department of Child Safety. In addition, if the arbitrator believes violence or intimidation has placed a party at risk, the arbitrator <u>must</u> stay the arbitration and refer the parties to court. In order for arbitration to proceed, the affected party must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation.

Under the Rule, arbitrators have authority to enter temporary awards as needed under Arizona law pursuant to A.R.S. § 25-404 and Rules 47 and 48, *ARFLP.* Parties seeking modification of confirmed awards based on changed circumstances can follow a dispute-resolution method chosen by the parties, seek relief in superior court under Rule 91, or agree to further arbitration. Any award, whether temporary or final, is enforceable once confirmed by the court. The reviewing authority of Arizona's appellate courts is clearly set forth in Paragraph W, a provision that tracks Arizona's RUAA.

The Rule also provides a non-exclusive list of arbitrator powers, including the authority to interview children, appoint a representative for a child, and to impose a sanction for bad faith or misconduct during the arbitration. Rule 67.2 does <u>not</u> include a provision establishing the immunity of arbitrators, since a grant of immunity may be beyond the scope of rule-making. However, the strong immunity provision in Arizona's RUAA (see A.R.S. § 12-3014) applies to family law arbitrators by virtue of Rule 67.2(c).

CONCLUDING THOUGHTS

The delays and unpredictability of the family court system are leading many lawyers and their clients to think about alternatives to litigation. More couples seem to be turning to arbitration, either by itself or in combination with other ADR methods. While Rule 67.2, *ARFLP,* will operate against the backdrop of Arizona commercial arbitration law, it supplements that law to address the unique needs of family law arbitration. FL

JUAN PÉREZ-MEDRANO

Juan Perez-Medrano, a Tucson attorney who generously and unselfishly gave of his professional and personal time to those in need, in a community he loved, passed away on January 11th, 2018 in his hometown of Adrian, Michigan, due to complications associated with bilateral pneumonia.

A veteran of the Vietnam conflict, Juan was drafted and served with the U.S. Army. He came to Tucson to attend the University of Arizona and earned a bachelor's degree in business and a master's before receiving a juris doctorate degree in 1982. He began his legal career in 1983 handling plaintiff's personal injury cases at Jacoby & Meyers, eventually leaving to hang out his own shingle, where he spent the next 33 years representing clients either in his own firm or with law partners, but consistently helping individuals with disputes in areas ranging from family law to probate to personal injury and criminal – and often for minimum pay.

A skilled Spanish speaker with a knack for connecting with others, Juan was widely sought as a Pro Tempore judge with the Arizona Superior Court of Pima County, where he settled countless cases while volunteering his time often and without complaint. He also invested his time on the boards of Southern Arizona Legal Aid and Step Up to Justice. And, he was the longest-tenured president of the Arizona Minority Bar Association, which through its annual fundraising dinner since 1994, provides scholarships and grants to qualifying law students at the James E. Rogers College of Law. In addition, he was a regular presenter at Court Night, an annual free legal information session put on by the Pima County Bar Association and superior court. He was also a former Disciplinary Hearing Officer for the State Bar of Arizona, a former member of the Peer Review Committee for the State Bar of Arizona, former member and Chair of the Committee on Character and Fitness for the State Bar of Arizona, and a former member of the Pima County Bar Association and the Volunteer Lawyers Program Advisory Board.

A skilled Spanish speaker with a knack for connecting with others, Juan was widely sought as a Pro Tempore judge with the Arizona Superior Court of Pima County...

Self-proclaimed as "Juan in a Million" – and long before the movie so entitled -- he exhibited a genuine interest in people and showed his earnest zeal for life by living each day to the fullest. He rarely missed his noon visit to the YMCA, where he easily broke up a serious moment in the locker room amongst friends or acquaintances, and played hoops or

racketball, or rode the lifecycle to the tunes of classic rock artists like The Traveling Wilburys. But, back in the day, he was a strength and conditioning weightlifter who squatted up to 350 pounds and played on competitive city league teams ranging from 50 and Over Fastpitch Baseball, to men's or coed slowpitch softball, to coed volleyball. His passion on the diamond or hardwood oftentimes surprised opponents who under-estimated his athletic prowess.

Self-proclaimed as "Juan in a Million" – and long before the movie so entitled -- he exhibited a genuine interest in people and showed his earnest zeal for life by living each day to the fullest.

Yet, Juan's passion for competition and his fascination with people were surpassed only by his commitment to his family, including his brother, Prof. Emer. Albino Perez Jr. and his wife, Janet, of New Haven, IN..; five sisters: Grace M. Weidaw and her husband, Dr. Clark D. Weidaw, of Toledo, OH.; Ernestine "Teena" Perez of Adrian, MI.; Andrea Morin Perez and her husband, Rudy Morin, of Adrian Township, MI; Josefa Egginton and her husband, Mark, and son, Alexander, from Invercargill, New Zealand; and Maria Perez of Toledo, plus scores of adoring aunts, uncles, nephews, nieces, as well as great nieces and nephews. He is predeceased by his father and mother. His generous spirit extended to those here in Tucson, including his long-time partner, Sharon; his godson, Michael, along with the latter's sister, Selena, and their parents; and friends and supporters in and out of the legal community who are too numerous to list without overlooking someone inadvertently. Aside from those in the legal community, his athletic teammates and friends from the "Y," Juan's loss is felt deeply by his Karaoke aficionados at various local watering holes, including Famous Sam's on the northwest side. FL

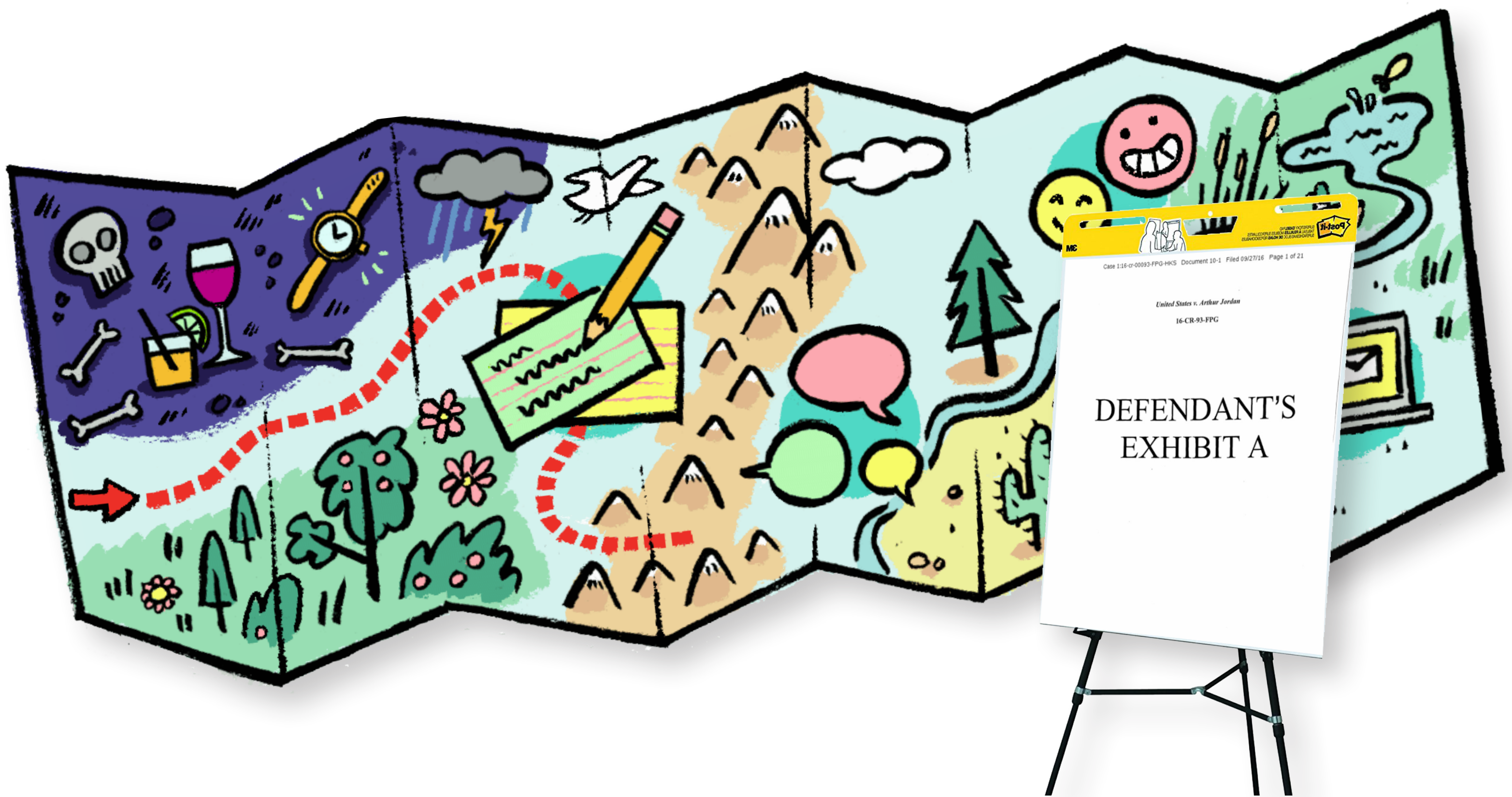
A *Celebration of Life* to honor Juan's passing and legacy will be held on President's Day, February 19th, 2018 at 1:00 p.m. at the Tucson Chinese Cultural Center, 1288 W. River Rd.

Separately, AMBA plans to celebrate Juan's contributions at its fundraising banquet at the J.W. Marriott Starr Pass Resort on February 16th, 2018, which will include awarding future scholarships in his honor.

In lieu of flowers, the family requests that donations be made to the charity of your choice or to the Lohse YMCA.

Celebration of Life

JUAN PEREZ-MEDRANO



ILLUSTRATIVE AND SUMMARY EXHIBITS

BY MEGAN HILL

You haven't lived until you've attempted to complete a spousal maintenance trial in 90 minutes. The court calendars are crowded. The judges have under-advisement rulings ticking away. Your client wants his day in court, and it will be three months until the next 90-minute opening if you do not finish during the original trial setting. Opposing counsel will not stipulate to admission of anything, including the financial affidavits, and you invoked the Rules of Evidence because, after all, why WOULDN'T you?

There are times when DR trial practice can be extremely frustrating. It is guaranteed that any time there is a case with subtleties, it will be almost impossible to get the trial time you need to complete a trial or temporary order hearing during the first setting. Moreover, DR practitioners have triers of fact who have hundreds of different cases in their heads and may have to make hundreds of decisions before being able to devote attention to the result in your case. Civil and criminal practitioners have juries who are focused solely on one case, one set of decisions, and seemingly (to those of us with our noses pressed against the glass, anyway) adequate time to fully present their cases.

Fortunately, there are several argument and evidentiary tools that will help reduce trial time and link the evidence together into a cohesive whole.

1. Written Opening Arguments

Many of us have used written closings, but those can be costly for the client because of the FTR and/or transcript review that is required to do them well. Quite frankly, most clients can't afford extensive written closing arguments. Further, when we do written closings, we lose the opportunity for the judges to clarify our arguments. A brief written opening, however, can give the Court a roadmap to your case before you actually appear in the courtroom. You can ask at the pretrial conference that the Court permit written openings.

2. Use Your Pretrial Conference Effectively

Prepare for the pretrial conference as you would any other hearing. Know what discovery or disclosure is still outstanding and be prepared to resolve those issues. Further, use the time to ask if opposing counsel will stipulate to admission of basic documents required by Rule 49. You will be better able to plan your case if you know how much time you will have to spend laying foundation, and the pretrial conference is a good time to find extra trial time if you discover you need it.

3. Prepare Your Client's Testimony

This may appear to be a no-brainer, but there should be no surprise questions for your client on direct examination. Precious time is lost with clients fumbling through the basis for the expenses on their financial affidavits. Similarly, you should prepare your client for the weaknesses in his or her case and what to expect on cross-examination. If your client is unprepared to go two or three questions deep about why he or she should not be expected to work full-time, it does not bode well for quick, effective witness testimony.

4. Use Illustrative and Summary Exhibits

Illustrative and demonstrative exhibits may be admitted at the discretion of the trial court. *E.g., Wait v. Scottsdale*, 127 Ariz. 107, 109-10, 618 P.2d 601, 603-04 (1980). Generally, the rule regarding admission of illustrative exhibits follows the rules for the admissibility of photographs of the scene of an accident: the photograph must be a substantially correct reproduction of the scene and it should be admitted if it will aid the jury in understanding the testimony. *Slow Dev. Co. v. Coulter,* 88 Ariz. 122, 129, 353 P.2d 890, 894-95 (1960) *citing Humphrey v. Atchison, T. & S. F. Ry. Co.,* 50 Ariz. 167, 70 P.2d 319, 321 (1932).

Indeed the Arizona Supreme Court has expressed firm support for the use of illustrative exhibits, stating:

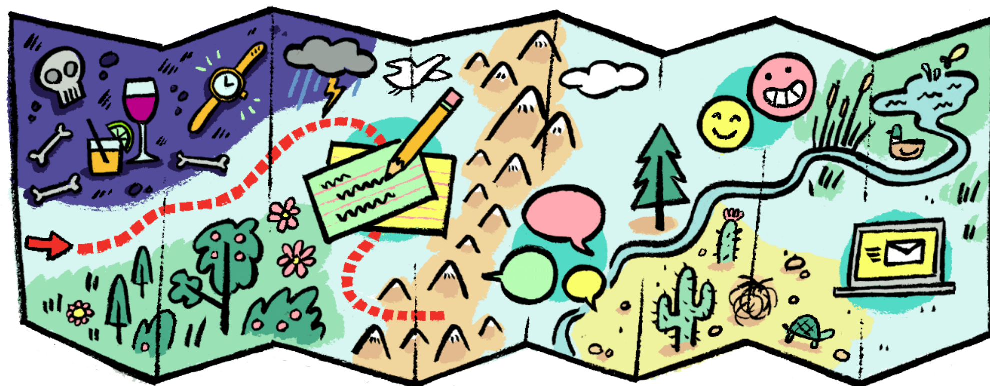
"We see no error in allowing witnesses to use colored drawings where they accurately portray anything which is competent for such witness to describe in words, or where they are helpful as an aid to a verbal description of objects and conditions, provided they are relevant to some material issue and there is preliminary proof that it is a correct representation of its subject. We believe that the practice of admitting colored drawings such as involved in the instant case, where a proper foundation has been made, is to be encouraged as an aid to the better understanding of the facts by the jury and such graphic exhibits in most instances gives the jury a clearer picture of the facts than can be obtained from the testimony of witnesses."

Slow Dev. Co. v. Coulter, 88 Ariz. at 129, 353 P.2d at 894-95); *See also State v. LaGrand*, 153 Ariz. 21, 31, 734 P.2d 563, 573 (1987) (holding that demonstrative and illustrative exhibits "may be admitted for many reasons, including to illustrate and explain testimony"). Bear in mind, however, that illustrative exhibits (like all evidence) are subject to the limitations of Rule 403.

Further, Rule 1006 of the Arizona Rules of Evidence allows admission of summary exhibits, which are different than demonstrative or illustrative exhibits, to **prove content** of voluminous exhibits.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writing, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Visual aids are incredibly valuable in the presentation of detailed evidence. While you may know the last four digits and the purpose of your client's 15 bank accounts by heart, no judge will be able to keep track with a single presentation of oral testimony. Further, in spousal maintenance cases where the standard of living during the marriage is something the court must consider, a pie chart summarizing expenditures by expense category with the raw data spreadsheet behind it will provide a much clearer picture than handing the judge 3,000 pages of bank and credit card statements with ads and payment coupons and generally having your client go through each and every number that you think is important.



Visual aids are incredibly valuable in the presentation of detailed evidence.

If you bring your own summary exhibits, you must be able to lay the proper foundation for them to be admitted into evidence. If opposing counsel will not stipulate to admission, you need to have the person who created the exhibit available to testify and lay foundation for the content of it. I generally also have the backup documentation as a separate exhibit for the Court and opposing counsel to refer to in order to determine whether to admit the summary exhibit. Your foundation witness will have to identify the documents and records that they used to create the exhibit and explain his or her process, so there is no reason to not have those documents available. If you have thousands and thousands of pages of records and the court and opposing counsel do not object, your foundation witness can make digital copies of the voluminous exhibits onto a flash drive or CD and then have the ability to demonstrate the media if the Court or counsel requests. I recommend that the person who creates the exhibit also creates the digital copy for the court and counsel in order to streamline the foundation testimony.

For those who have budget-strapped clients who cannot quite afford for you to prepare illustrative or summary exhibits before trial, then you have to assess whether your client is competent to review the records and prepare the summary exhibits himself or herself. If he or she is, then the next question is whether he or she has time to review the records and produce the exhibits. If they do, this is by far the most effective way to make sure your client can discuss the records fluently on the witness stand. You, however, must also know what is in those records so that your client doesn't accidentally go astray in representing what the exhibit shows.

When your client has no money AND cannot produce a summary exhibit himself or herself, you should use a portion your witness preparation time showing your client how you will ask them to testify to the content of whatever records you wish to illustrate. Use the big presentation notepads in every courtroom to illustrate your client's testimony as he or she is actually testifying. If you are in a courtroom that allows digital presentations, then input the date from your client's testimony into an illustrative exhibit that is projected up on a screen. If you have properly prepared your client for direct examination, this is a great way to memorialize your client's testimony for the judge without having to rely on FTR or transcripts. Be sure to mark and admit these notes at the end of the case. Also, take a photo of them for your case file, particularly if you must do written closings or if you anticipate an appeal.

Below are some suggestions of illustrative or summary exhibits that the judge can refer to at a glance when he or she is writing the under advisement ruling:

a. Side-by-side comparisons of the expenses on the parties' financial affidavits;
b. Spreadsheet of requested reimbursements with the receipts backing them up;
c. Spreadsheet of requested equalization calculation;
d. Spreadsheet of expenditures by party and/or category from bank and credit card records;
e. A chart explaining the tax effects of spousal maintenance or pre-tax/post-tax equalizations;
f. A single calendar showing parenting time;
g. A flow chart showing the movement of money between accounts or entities;
h. A graphic showing the ownership of business entities; and,
i. A calendar showing a child's homework completion, school tardies or absences, or school behavioral problems as they correspond to parenting time.

With effective use of illustrative and summary exhibits, you can both cut down on your trial time and ensure that the judge sees your presentation of the evidence long after the trial itself is concluded. FL

ABOUT THE AUTHOR

MEGAN HILL is a Family Law attorney at Waterfall, Economidis, Caldwell, Hanshaw & Villamana, P.C., in Tucson. Megan is also a board member for Child and Family Resources. When she isn't saving the world, Megan enjoys spending time with her family and vegan cooking.

HOW *HOWELL* IMPACTS THE DIVISION OF MILITARY PENSIONS IN DIVORCES

by Daniel R. Huff

In May 2017, the U.S. Supreme Court issued an opinion in *Howell v. Howell*, 137 S. Ct. 1400 (2017), reversing and remanding the judgment of the Arizona Supreme Court. In effect, the decision places important limitations on a trial court's ability to ensure that a military retirement pay award to a former spouse is protected in the event that the military veteran accepts a disability benefit that diminishes his or her retirement pay and consequently that of the former spouse.

BACKGROUND

The case involved John Howell (Husband) and Sandra Howell (Wife), who divorced in 1991, while Husband was completing military service. The divorce decree treated Husband's future military retirement pay (MRP) as community property and awarded Wife fifty percent of Husband's MRP upon its commencement. Husband retired in 1992 and Wife began receiving fifty percent of the MRP. About thirteen years later, the

Specifically, the Arizona Supreme Court held that the trial court had merely ordered Husband to "reimburse" Wife for her reduced share of the MRP.

V.A. deemed Husband to be twenty percent disabled because of service-related injuries. Husband elected to receive corresponding disability benefits and thus had to waive a portion of his MRP. This waiver reduced Wife's award of the MRP.

DEVELOPMENTS IN STATE COURT

Wife asked the Pima County Superior Court to enforce the original divorce decree and restore her value of her share of Husband's total MRP. The trial court found that Wife had a vested interest in Husband's pre-waiver amount of the MRP and that Husband was required to ensure that Wife received her full fifty-percent award. Husband appealed. Ultimately, the Arizona Supreme agreed with the trial court. See 238 Ariz. 407. Specifically, the Arizona Supreme Court held that the trial court had merely ordered Husband to "reimburse" Wife for her reduced share of the MRP.

U.S. SUPREME COURT DECISION

The case eventually made its way to the U.S. Supreme Court. There, the Court reversed the decision of the Arizona Supreme Court and sent the case back to state court for further orders consistent with the decision. Importantly, the Court noted that state courts cannot order a military veteran to indemnify or reimburse a divorced spouse's lost portion of retirement pay due to the veteran's waiver of retirement pay to receive disability benefits. Further, the Court held that the timing of a veteran's waiver is immaterial. Specifically, the Court held that a conflict existed between the federal government's interest in attracting and retaining military personnel and various states' conferred community-property rights. The Court noted that Congress had enacted a law that a state court may treat as community property a veteran's disposable retirement pay—but the state court may not include the portion of the retirement pay that was deducted as a result of "waiver" that the veteran made in order to receive disability benefits. See 10 U.S.C. § 1408(a)(4)(B). Additionally, the Court found that a state court could not vest that which it lacked authority to give. Finally, the Court held that a state court is free to account for the contingency of possible waiver or to account for reductions in value when determining or recalculating the need for spousal maintenance.

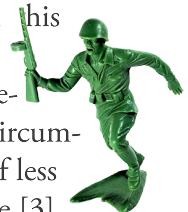
THE LAW BEFORE *HOWELL*

In 1989, the U.S. Supreme Court held in *Mansell* that MRP waived by a veteran for receipt of disability benefits is not community property divisible upon divorce. 109 U.S. 2023 (1989). Additionally, Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA), under 10 U.S.C. § 1408, which defined "disposable retired pay" as community property but also excluded any amounts of MRP waived for receipt of disability benefits under § 1408(a)(4)(B).[1]

Soon thereafter, Congress enacted the Concurrent Retirement and Disability Pay Act (CRDP), under 10 U.S.C. § 1414, directing a ten-year phase-out of the reduction in the spouse's share of the retirement pay. Therefore, the CRDP enables the veteran (with at least twenty years of military service) to receive MRP and disability pay without a benefit reduction. The phase-out requires a veteran to have a disability rating of fifty percent or greater. As of 2014, the CRDP provides that a veteran with a disability rating of fifty percent or higher is permitted to receive both MRP and disability pay simultaneously without any diminished MRP. However, a veteran with a disability rating of less than fifty percent can still cause a reduction in his or her spouse's share of the MRP by waiving a portion of the MRP for receipt of disability benefits. [2]

It was within this federal framework that Arizona law developed to address the issues affecting spouses and former spouses of military veterans. In 2001, the Arizona Court of Appeals held in *Danielson v. Evans* that a spouse of a veteran receives an unconditional vested interest in the veteran's MRP when the decree is entered. 201 Ariz. 401 (App. 2001). The Court of Appeals also held that requiring a veteran to compensate a spouse for any reduction in MRP resulting from a waiver was consistent with the *Mansell* decision because the veteran is able to pay from any source. *Id.*

In 2010, the Arizona Legislature enacted A.R.S. § 25-318.01 which expressly prohibits courts from "making up" for reduction in MRP because of disability benefits - including indemnification of a veteran's spouse or former spouse for any waiver or reduction in MRP related to the receipt of disability benefits. Further, the statute prevents courts from awarding "any other income or property" of a veteran to the veteran's spouse or former spouse for any such waiver or reduction when making a disposition of property under § 25-318 (general disposition of property) or § 25-327 (modification and termination of spousal maintenance, child support, and property disposition). In response, two years later, the Arizona Court of Appeals held that an indemnification clause was not required to allow a former spouse to claim a community interest in a veteran's disability pay. See *Merrill* v. *Merrill*, 230 Ariz. 369 (Ct. App. 2012). The Court of Appeals further held in *Merrill* - in an effort to take equitable action to compensate former spouses when their shares were reduced—that A.R.S. § 25-318.01 only applied to veterans' waivers made pre-decree and not post-decree. Therefore, the inclusion of indemnification language in a decree ensured that a veteran's spouse or former spouse was secure in his or her receipt of MRP in the event that the veteran waived a portion of MRP in order to receive disability benefits-excepting the narrow circumstance where a veteran had a disability rating of less than fifty percent and made a waiver pre-decree.[3]



endnotes

[1]. As an aside, in order to receive a disability benefit, a veteran must give up equivalent retirement pay and this reduces the spouse's share of the retirement pay. Veterans prefer to receive as much disability pay as possible because MRP is taxable whereas disability benefits are not.

[2]. Congress also enacted the Combat-Related Special Compensation (CRSC), under 10 U.S.C. § 1413(a), that permits veterans with a disability rating of at least ten percent directly related to the award of the Purple Heart decoration or other combat-related disability (i.e. hazardous duty or training for combat) to receive both MRP and disability benefits without reduction. Importantly, a veteran cannot receive both CRDP and CRSC, so the Defense Financing and Accounting Service (DFAS) elects whichever is more financially advantageous (i.e. yields the highest net cash flow). Also, CRSC is non-taxable.

[3]. Prior to *Howell*, practice tips advised practitioners to ensure the inclusion of "indemnification language" in divorce decrees involving veterans with disability ratings less than fifty percent given that former spouses remained vulnerable to reductions in awards upon waivers of MRP. In Arizona, this was a workable solution.

PRACTICAL EFFECTS OF *HOWELL*

The U.S. Supreme Court's decision in *Howell* alters much of this preexisting legal framework in Arizona. The Court reaffirmed *Mansell's* holding that an MRP waiver amount is not community property. Next, the Court held that state courts could not indemnify or reimburse a spouse or former spouse due to a reduction caused by a veteran's waiver of MRP. Further, the Court determined that the timing of a veteran's waiver (i.e. pre- or post-decree) is immaterial. Finally, the Court held that state courts could account for the contingency of a waiver or of reductions in value when determining or recalculating spousal maintenance.

Additionally, all clarity provided by *Merrill* is in flux as a direct result of *Howell*. After rendering its decision in *Howell* on May 15, 2017, just one week later, the U.S. Supreme Court vacated the Arizona Supreme Court's judgment in *Merrill* and remanded the case for further consideration in light of *Howell*. The Arizona Supreme Court held in *Merrill* that A.R.S. § 25-318.01 could not prohibit indemnification of a spouse/former spouse when that spouse's/former spouse's share awarded in the decree pre-dated the statute's effective date. Because *Howell* prohibits any indemnification, *Merrill* is problematic. Because A.R.S. § 25-318.01 is protective of a veteran's receipt of pay, it appears that the statute remains constitutional under *Howell*.

Given the CRDP, a spouse/former spouse of a veteran with a disability rating of fifty percent or greater is not affected by *Howell*. However, the CRDP does not pertain to veterans with disability ratings below fifty percent. This means that under *Howell*, a spouse/former spouse of such a veteran cannot be reimbursed for a reduction in his or her share of the MRP resulting from a veteran's waiver for receipt of disability benefits. And although the Court in *Howell* noted that state courts could still account for the contingency or reduction, Arizona courts are limited by A.R.S. § 25-318.01.

CONCLUSION

In summary, the CRDP makes *Howell* a non-issue in cases where a veteran has a disability rating of fifty percent or greater because the veteran will not experience a reduction in MRP when receiving a disability benefit. However, if a veteran has a disability rating below fifty percent, *Howell* prohibits any reimbursement to the spouse/former spouse for any resulting reduction in MRP due to receipt of disability benefits. And although the Court stated in *Howell* that state courts could still consider the possibility of a waiver or a reduction when calculating/recalculating spousal support, A.R.S. § 25-318.01 restricts that consideration. And because the U.S. Supreme Court has vacated the Arizona Supreme Court's decision in *Merrill*, it can safely be assumed at this point (with several relevant issues still pending in state court) that A.R.S. § 25-318.01 protects veteran pay/benefits whether a veteran waives MRP pre- or post-decree. That said, in the aftermath of the decision, some practitioners have recommended calculating and awarding a present cash value of the reduction in MRP in order to compensate the spouse/former spouse. Alternatively, some practitioners are including the compensation for any resulting reduction in MRP as non-merged indemnification clauses in marital settlement agreements in an effort to address the issue. But because the courts have not had sufficient opportunity to evaluate these approaches, their enforceability remains unclear. FL

ABOUT THE AUTHOR

DAN HUFF is a Family Law associate at Waterfall, Economidis in Tucson, and a member of the executive councils of the State Bar's Family Law Section (as a Co-YLD representative) and Public Lawyers Section..

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

June 29th	**Family Law Section Presentation at the State Bar Convention**
November 16th	**State Bar of Arizona's Advanced Family Law**

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… If so, the deadline for submissions is March 23, 2018.

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- Provide a practice tip related to recent case law or statutory changes?
- Tell us about a humorous, family court-related proceeding?

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Contact Us!

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