spring
2018

Family Law News

this issue...

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.

William D. Bishop

Learning (and Teaching) Family Law for Rookies

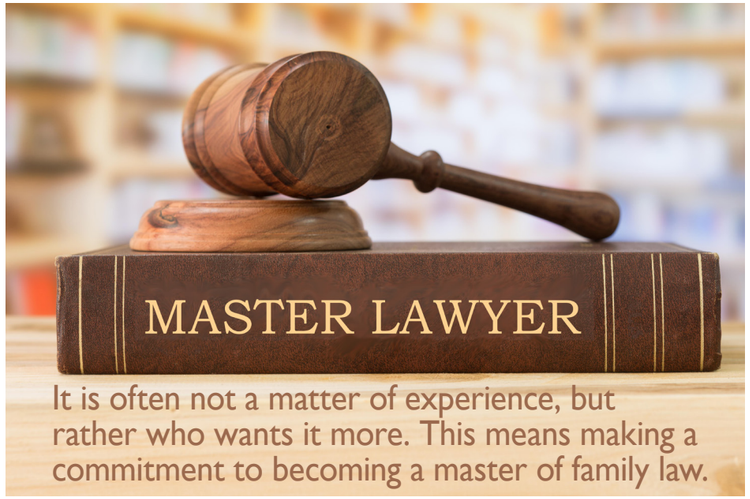
Slowly approaching 'Old Timer' status, I would like to share my trials and tribulations with training and preparing 'rookies' for a career in family law. Although this article is mostly meant for the newer attorneys to family law, I hope that I can provide some solid feedback for more veteran family law attorneys as well, especially if you are contemplating or training a newer attorney.

Through the years, I have had mixed success with training newer attorneys. In the end, the eventual success of the rookie attorney not only depends upon their intellectual capacity, but more importantly, how hard are they willing to work. Similar to a quarterback entering the NFL, you don't always know what you are going to get. Some attorneys have a natural gift, but limited desire to become the best they can be. Others may have to work extremely hard to become a good family law attorney. Some attorneys graduating from law school believe that family law is an easy road to take. However, if you want to be a top attorney in the field, you will quickly find out that family law is often more challenging than just about any other area of the law. In family law, you must learn to cram what would otherwise be a week-long trial into a few hours. You will soon find out that you not only need to know the rules of evidence, but applicable bankruptcy laws, tax laws, business law, and many other cross-over areas of the law.

Read the Family Law Statutes and Rules

The first thing that one should do as a rookie (or as an attorney with limited family law experience) is to read the family law statutes and rules cover-to-cover, and to read every good family law related CLE publication that you can get your hands on. This means many weekends and evenings of self-study. Some of the top family law CLE programs include (but are not limited to) For Better or For Worse, any seminars provided by the AAML (Arizona Chapter of the American Academy of Matrimonial Lawyers), state and

county bar seminars, the annual State Bar Convention, and CLE by the Sea. If you think that you can learn family law on the fly and by throwing yourself into the fray (i.e. the school of hard knocks), you will be frustrated and will find many of your clients frustrated as well. There is no such thing as "make it or fake it" in the NFL or Family Court.



DO NOT CONFINE YOURSELF TO THE MINIMUM 15 HOURS OF CLE CREDITS

Top attorneys spend many hours preparing excellent family law materials for CLE programs. They have thought through the most relevant issues faced by attorneys, and have summarized years of case law, as well as the ins-and-outs of the law as applied to specific issues. In most cases, the speakers only have time to present the highlights of their presentation during the CLE seminars, and rely upon their materials to provide substantially more content. If you toss your CLE materials on the shelf and do not actually read them, you are missing out on the product of many hours that the speakers have digested information which could make your job easier and help you become that much more competent. You will never adequately learn family law if you confine yourself to the minimum 15 hours of CLE credits. If you cannot afford to personally attend all the top CLE programs in person, keep in mind that it does not cost any money to borrow CLE materials from attorneys in your network.

REVIEW CLE MATERIALS BEFORE PREPARING PRE-TRIAL STATEMENT

At my firm, I keep a CLE index of all the CLE materials that we have in the firm by year and subject. This has the dual benefit of allowing the attorneys to learn by subject, but also provides a quick "go to" when specific issues arise in cases. To this day, I often pull out my index and review CLE materials before I began preparing my pre-trial statement or other important documents. Many of our judges have limited family law experience, especially early in their judicial assignments. If you are well versed in family law and can cite to the applicable cases, statutes and rules, your chances of success rise dramatically.

REMAIN ABREAST OF NEW CASES RECENTLY ISSUED

Some of the CLE programs also provide periodic case law updates so that attorneys can remain abreast of the new cases that have been issued. You can also check the county and state bar family law websites to view these case law updates. Although the case law summaries are wonderful, reading the summaries is not a substitute for reading important cases from beginning to end. You are cutting yourself and your clients short if you are not reading the cases as they are being issued. Also keep in mind that there is usually a time delay before the case law summaries are provided in CLE materials or on the state and local bar websites. If you have not already done so, sign up to receive case notices from the Supreme Court and Court of Appeals (both Divisions One and Two) so that you can review the published and unpublished cases as they are issued. Believe me, it is very impressive if you bring up a new case to your boss that was just issued before he/she is even aware of it. Just learning black letter family law is not enough. Reading the cases as they are issued will provide you with a "working knowledge" of how the trial and upper courts are applying real life fact situations. This is the difference between "static knowledge" and "dynamic knowledge", i.e. static knowledge means that you know the basics of the law, while dynamic knowledge means that you can identify and use statutes, rules and case law citations as the situation comes up in real time.

ASK MORE EXPERIENCED ATTORNEYS QUESTIONS

In addition, don't be afraid to ask questions to more experienced attorneys. I have no problem answering questions from newer family law attorneys IF I feel that they have made the effort to learn on their own. In fact, I am extremely impressed by well thought out questions that fall within the gray areas of the law, or questions regarding strategy when the attorney has clearly done his or her homework. As employers, we generally do not have time to provide a full family law course from A-to-Z to newer attorneys that do not take the time to learn as much as they can on their own time. Do not stop asking questions or running your case by a more experienced attorney. At the same time, be fair and educate yourself in advance.

LEARN TO THINK OUTSIDE THE BOX

Often the outcome of a case is determined by how issues are presented and argued to the trial court. If a simple presentation of the facts was all it takes to be a competent family law attorney, there would be minimal need for us. In many cases, the final determination is not based upon some hard and fast law, but rather deference to the trial courts discretion. Attorneys need to learn to think outside the box. In many cases, the trial court can determine an issue one of several ways. By reading the cases, you will slowly obtain a working knowledge of how to present your own cases better, when you should have an expert, and what other attorneys have done wrong. Example - I have had cases where the opposing counsel argued that a child support deviation should be granted merely because my client makes more money than his/her client. A review of the case law (as well as the Child Support Guidelines) shows that much more is required to rebut the presumption that the guideline amount should apply. It is abundantly clear that many cases are won because one of the attorneys worked harder, is better prepared, and knows the ins-and-outs of family law better than the other attorney. It is often not a matter of experience, but rather who wants it more. This means making a commitment to becoming a master of family law. Such simply cannot be done during a regular work week.

EARLY ON, ESTABLISH GOOD LEARNING HABITS

For those attorneys who are hiring a rookie or attorney with limited experience, one of the things that I have started doing is giving the attorneys verbal examinations. This requires them to study CLE materials, and to have an intricate knowledge of the family law statutes, rules and important case law. Establishing good learning habits early on can help you avoid a great deal of self-frustration, not to mention frustrated clients.

REVIEW EVERYTHING AND KEEP LEARNING

One of my best learning experiences as an attorney included the first two of years that I practiced family law when I was scared to death. During that time, I spent many weekends and evenings reading everything I could get my hands on, as well as hours in the car driving to and from work while listening to CLE cassette tapes and CDs (Yes, I know I am dating myself). My other top learning experience was taking the certification examination. Again, I found myself reviewing everything I could get my hands on prior to the examination as I did not want to take the examination again.

BE READY TO ARTICULATE VALUABLE INFORMATION TO YOUR CLIENT

You will find that taking the time to 'master' family law will not only make your career more enjoyable and more successful but will also likely ensure your career is more profitable. Consumers are becoming more and more savvy and can spot the real deal from a pretender. You should be able to spot the issues during your initial consult and provide a game plan regarding how the case should proceed, and what steps you suggest for their case. If you are being asked questions to which you cannot provide an intelligent answer, a good consumer will look elsewhere for somebody that can. This means knowing the ins-and-outs of personal and child support jurisdiction as well as child custody / legal decision-making jurisdiction. You should know the basics of business valuations, the various methodologies, and the subjective factors involved. You should know the case law regarding the apportionment of an increase in the value of a sole and separate business during marriage and alternate methods that may apply to the case. You should be able to provide the client with all the alternatives regarding professional roles and assessments that may be applicable to their parenting case. If you cannot walk into a consultation with confidence that you can articulate valuable information regarding any aspect of their family law case, you need to dust off the CLE materials and get to work.

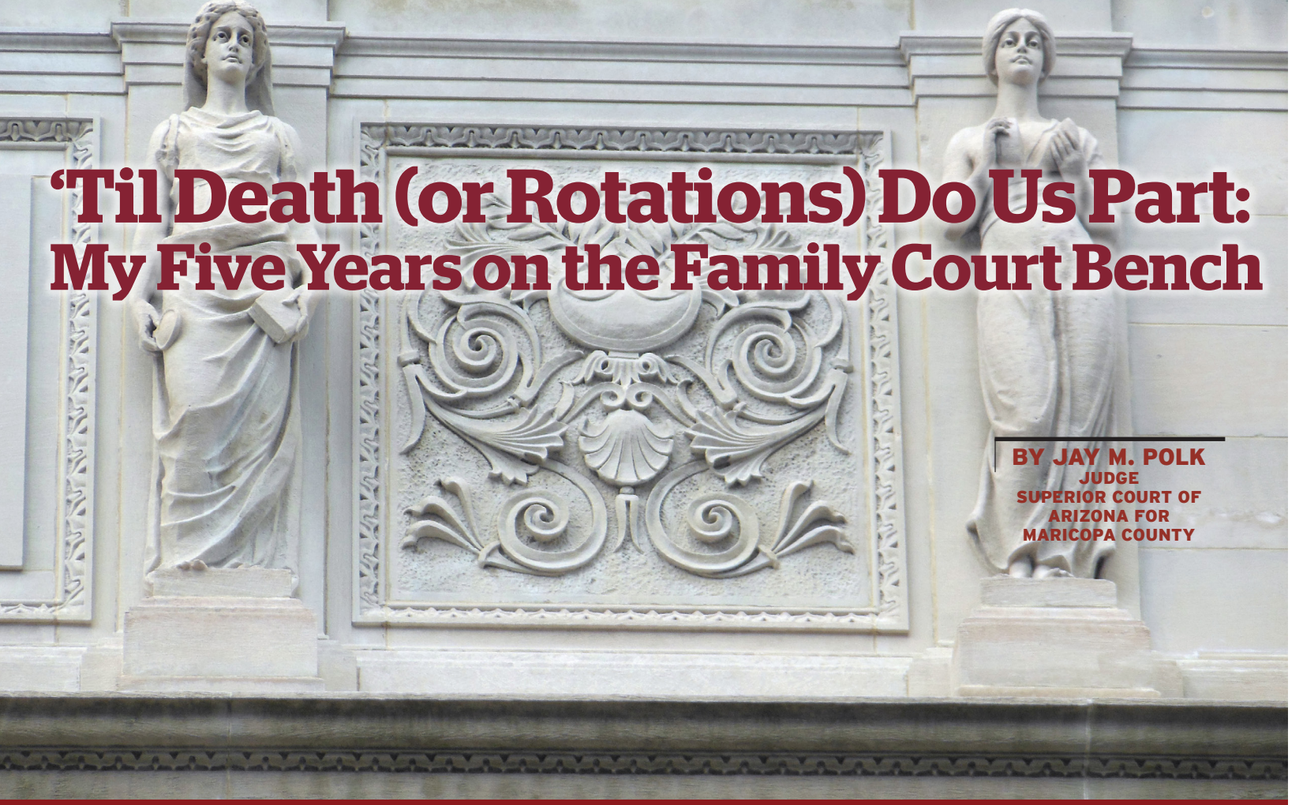
FINAL THOUGHTS

Finally, it amazes me how few newbies do not take advantage of the mentor programs offered by the State Bar and other organizations. This is a valuable opportunity to learn, ask questions, and obtain feedback from an expert in the area at no cost.

Whether you are a newbie or an old timer, the learning never stops. New case law decisions are issued every month. The statutes and rules continue to change. If you are hungry to know it all, chances are you will be a great family law attorney. If you want to learn on the fly and make it a 9-5 job, all I can say is good luck. FL

about the author

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



'Til Death (or Rotations) Do Us Part: My Five Years on the Family Court Bench

BY JAY M. POLK
JUDGE
SUPERIOR COURT OF
ARIZONA FOR
MARICOPA COUNTY

Family Law Cases are Complex and have Many Moving Parts

I was fortunate to serve as a judge, in the Family Court Department in the Superior Court of Arizona for Maricopa County for five years, four months, and eighteen days.[1] I say - and do sincerely mean - "fortunate" because I very much enjoyed my tenure on the family court bench and would not trade that experience for any other.

Prior to my appointment to the bench, my private practice focused on the area of law generally referred to as "probate," which includes matters relating to guardianships and conservatorships for incapacitated adults, decedents' estates, trusts, cases involving financial exploitation or physical abuse or neglect of vulnerable adults, and estate planning. Within a week or so after I was appointed as a judge, then-Presiding Judge Norman Davis called and told me that my first assignment would be on the family court bench. I responded by telling Judge Davis that, in light of my probate practice, I thought the family court assignment would be a relatively easy transition for me. Little did I know how right I was, but also little did I have any idea of the adventure that lay ahead of me for the next five and a half years.

Through nearly 20 years of a probate practice, I had become quite accustomed to dealing with people who are in the midst of emotional crisis, usually due to the incapacity or death of a loved one. I also acquired plenty of experience dealing with community property issues and with seemingly petty property disputes, such as the two sisters who were willing to spend thousands of dollars fighting over a baby spoon collection that had nominal, if any, pecuniary value (but, apparently, endless sentimental value). Moreover, the countless guardianship and conservatorship cases in which I had been involved taught me all the nuances of what "best interests" can mean and how ugly people can be when fighting for control over another person. Of course, a critical aspect of estate planning is trying to anticipate all the potential contingencies and areas of dispute that may arise after the client dies. In family court, I easily found parallels to all these concepts:

• Marital separation and dissolution proceedings and child custody[2] disputes typically are emotionally charged. As a result, the parties often are inclined to make decisions based on passions rather than reason.

• Marital separation and dissolution proceedings often involve disputes over the disposition of property and, at times, those disputes can seem petty to those who have no legal interest in the property in question.

• Child custody and guardianship/conservatorship disputes are two sides of the same coin: Child custody disputes involve parents fighting for control over their minor child whereas guardianship/conservatorship disputes typically involve children fighting for control over their incapacitated parent.

• Similar to drafting an estate plan, drafting a separation or dissolution decree or a parenting plan requires the writer to anticipate the myriad avenues of possible disputes between the parties and draft the decree or plan in a way so as, hopefully, to avoid those disputes.[3]

I found my private practice rewarding because I was able to help everyday people cope with some of the most emotional experiences in their lives. Similarly, during my time on the family court bench, I was able to help those same everyday people cope with extraordinarily stressful times in their lives.

All of what I have just told you came as no big surprise to me. As already mentioned, I had told Judge Davis that I thought the transition from a private probate practice to being a family court judge would be fairly easy. What was a tremendous surprise to me was the crushing family court caseload in Maricopa County. I went from being a lawyer responsible for about **40 cases** at any given time with only about 20 to 30 of those being truly active to being a judge responsible for **22,000 cases**, of which approximately 800 were active at any given time.[4] Neither three years of law school nor 18 years in private practice had prepared, let alone taught, me how to manage so many cases. I was stunned when, at my first day of family court training, someone mentioned that the standard time allotted for a dissolution trial in Maricopa County is three hours. The restricted trial times are a direct result of the massive number of contested cases and the limited number of judicial officers able to hear those cases.

That leads me to another surprise about family law, and one that I did not become consciously aware of until my twilight on the assignment: Family law cases can be quite complex, not only in terms of the legal issues but also the number of moving parts involved. A couple of weeks after my appointment to the bench but prior to my start, retired Judge Bob Budoff, before whom I frequently appeared when he was a probate court commissioner, called to congratulate me on my appointment. When I told him that my first assignment was going to be on family court, he replied something to the effect of, *"The nice thing about family court is that within your first 30 days on the bench, you'll end up seeing 90% of the issues that you'll deal with for the remainder of your time on family court. The other 10% of the issues are ones that you will see only one time each."* Although Judge Budoff's comment proved to be fairly accurate,[5] that did not mean that I did not encounter intellectually challenging legal issues. To the contrary, I had my share of them, including whether a purported common law marriage from another state should be recognized in Arizona, several jurisdictional issues, issues involving same-sex relationships, and how restricted stock units and dividend equivalent units granted, but not fully vested, during the marriage should be divided. Moreover, I suspect most non-family law lawyers and judges do not appreciate how challenging dealing with a family court case can be, particularly when all the issues are "in play": division of property and debt (including real property, financial accounts, retirement accounts and life insurance, business interests, vehicles, and other tangible personal property), spousal maintenance, legal decision-making and parenting time, child support, and attorney fees.

Three other reasons why I very much enjoyed my time on family court deserve mentioning. First, my judicial colleagues truly are inspiring. Despite their own heavy caseloads, every family court judicial officer with whom I worked never hesitated to help out a fellow family court judicial officer. Second, I liked the challenge of making difficult decisions and not having a jury make them for me.[6] As a result of being the decision-maker, I constantly was engaged in each case before me. Last, but definitely not least, I met, and worked with, some truly wonderful family law attorneys. Although I know the family law bar often is maligned, my overall experience with that bar was quite positive. Most of the family law lawyers who appeared before me are hard-working and genuinely want to do the right thing, frequently under very difficult circumstances.[7]

Perhaps ironically, being a family court judge has taught me how to be a better lawyer. Here are just a few tips, some of which I have learned from my view from the bench and others of which merely have been reinforced by my time on the bench:

• Be a counselor first and an advocate second. Remember that your family court client is going through emotional turmoil and oftentimes will just need a shoulder

I liked the challenge of making difficult decisions and not having a jury make them for me. As a result of being the decision-maker, I constantly was engaged in each case before me.

to cry on or a sounding board. Further, most would agree that decisions based on emotions are often misguided. By validating your client's emotions but also providing well-reasons options, you can guide your emotionally-burdened client to sound decision-making. A corollary to this is do not become so enmeshed in your client's problems that they become your problems. A good advocate is one who can remain objective and does not personalize the case. The best advocates appear in court only when legitimate and well-developed disputed issues of law or fact exist, not just because the parties did not settle.

• File "emergency" motions and petitions sparingly. As one of my colleagues says, *"Don't file anything that begins with a vowel in the document's title, such as Emergency, Accelerated, Urgent, Expedited, or Immediate."* Remember that A.R.S. sections 25-315(B) and -404(A), and Rules 47 and 48, Arizona Rules of Family Law Procedure, refer to "temporary order[s]"; they do not refer to "emergencies." Even Rule 48, which allows for temporary orders without notice, only discusses "irreparable harm" and does not use the words emergency, accelerated, urgent, expedited, or immediate. In addition, keep in mind that, as I am told Judge Penny Gaines used to say, *"your failure to plan is not my emergency"* For example, filing a temporary order motion on December 23 because your client just realized that December 25 is Christmas Day will not result in prompt attention from the Court. I understand that, for this very reason, at the beginning of each year one of my colleagues who is a former family law lawyer used to send his clients a memo stating something such as, *"I just reviewed the calendar for the upcoming year and found the following: The IRS scheduled tax returns to be filed this year by April 15, Mother's Day is the second Sunday of May this year, Father's Day is the third Sunday of June this year, and Christmas is scheduled for December 25 this year. Prepare or plan accordingly."*

> "Choose a job you love, and you will never have to work a day in your life."
>
> **Confucius**

• Do not file a motion or petition simply because you can; make sure the document will advance your client's case. This is particularly true with requests for temporary orders, which I personally believe are overused and unnecessarily contribute to the Court's volume of cases. The best example of this is post-decree motions for temporary custody orders when the child's health, safety, and welfare are not in jeopardy.

• Spend time preparing your case and work with the opposing counsel or party on drafting a joint pretrial statement that lists as many undisputed facts as you and your opponent reasonably can agree. For example, if child support is a contested issue, the joint pretrial statement should clearly list all relevant factors that are undisputed and all relevant factors that are disputed. The same applies for contested custody cases and the factors set forth in A.R.S. sections 25-403 and -403.01. With family court trials being time-limited, a well-written pretrial statement that contains detailed statements of undisputed facts can be a tremendous time-saver because you do not need to present any evidence on any of the facts listed in the joint pretrial statement as being undisputed. Also anticipated trial testimony or provide citations to any exhibits that will support your statement of the disputed issues of fact.

• During your questioning, use transitional statements to help both the witness and the judicial officer follow along (e.g, *"Now, let's discuss child support"* or *"Now that we've discussed how you arrived at the fair value, let's address your opinion as to fair market value."*).

• Consider stipulating to the admission of certain key exhibits (e.g., valuation reports) prior to the trial and asking the Court to review them ahead of the trial. If you do this, though, be sure the exhibits are on the judge's radar more than the night before trial.

• Avoid asking argumentative questions and arguing with the witness. Just elicit the facts from the witness; you make the arguments in your closing.

Family law, like so many other things, is what you make of it. For me, it was an opportunity to help countless people through difficult times in their lives. It also was an opportunity to explore new legal issues and make challenging decisions. I hope that those of you who continue to practice and adjudicate cases in this area of law find it as rewarding as I have. FL

endnotes

1. From November 21, 2011, through April 7, 2017. But who's counting?
2. Effective January 1, 2013, Arizona abandoned the term custody in favor of two more descriptive terms: legal decision-making and parenting time. See Ariz. Rev. Stat. § 25-401. For the sake of brevity, I will use the word custody to encompass both those concepts.
3. For example, drafting a parenting to plan to state that one parent will have parenting time with the child "every other weekend" without precisely defining the days and times the "weekend" begins and ends usually is a recipe for future litigation.
4. In April 2012, my family court calendar had 350 pending pre-decree petitions and 470 pending post-decree petitions. As of March 31, 2017, my family court calendar had 473 pending pre-decree petitions and 338 pending post-decree petitions. The last I heard, which was in early 2013 when a new family court division was created, each family court judge was assigned approximately 22,000 cases. Of course, most of those cases are inactive.
5. In my case, I did not end up seeing the 90% until I had been on the bench for about 60 days.
6. The irony about this statement is that I, like many family court judicial officers I know, detest making mundane decisions, such as where to go for lunch. If you ever see a group of family court judicial officers standing around looking like they have having nothing to do, it is probably because none of them wants to decide where the group is going for lunch.
7. Such difficult circumstances include trying to counsel clients who are under extreme stress due to the emotionally-charged issues in family law cases, representing clients who financially cannot afford the lawyer's services, and dealing with *pro se* opposing parties.

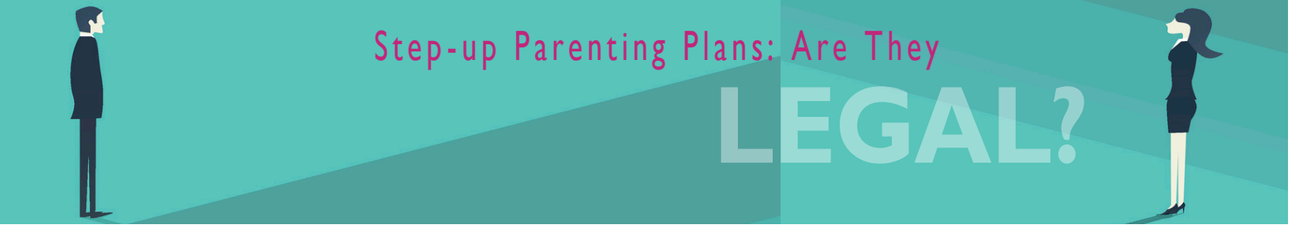
Step-Up Parenting Plans: Are They LEGAL?[1]

by Helen R. Davis, The Cavanagh Law Firm

Step-up parenting plans or orders automatically change parenting time or legal decision-making without a hearing or any other type of action through the court. The orders are usually based on the occurrence of pre-determined events, such as a relocation, re-introduction of a parent to a child, the aging up of a child, the child changing grade years, or a parent's treatment for substance abuse or mental health issues. In my experience, this type of order was usually used by litigants as a means to settle a case. That said, more recently I have encountered "staging orders" or "stage orders" imposed by courts.

FOR EXAMPLE

In a representative case, one of the parents had substance abuse issues. After trial, the court indicated that the parent needed treatment and used the children as the proverbial carrot to induce the parent to get help. To carry out that goal, the court granted the other parent sole legal decision-making and entered orders that resulted in the automatic modification of parenting time based on the achievement of certain milestones; with an ultimate restoration of equal parenting time and joint legal decision-making. In addition, the trial court tasked FACT Court not only with assessment and monitoring, but with overseeing the parent's progression and implementing the modifications automatically - including with respect to legal decision-making. As for the decision-making, this automatic



Step-up Parenting Plans: Are They LEGAL?

... litigants & courts continue to use step-up plans or staging orders. The question is, are the orders legal? The short answer is, no.

modification provision was also put into place despite that the court made findings that the presumption against joint legal decision-making under A.R.S. § 25-403.04 due to the parent's substance abuse applied.

The decision was appealed; however, the appeal (on this issue) was ultimately moot due to the actions of a different judge over the course of the (extremely heavy) post-decision litigation that ensued. Notably, the case was eventually removed from FACT Court (which no longer exists in any event) and the new judicial officer refused to follow the automatic modification provisions of the stage orders - indicating an intent to hold a hearing pursuant to which he could analyze any change after applying Arizona's statutory factors. Despite the result in that case, litigants and courts continue to use step-up plans or staging orders. The question is, are the orders legal? The short answer is, no.

The reasons cited to discredit self-executing orders include that modification occurs without compliance with statutory requirements, no best interests of the child analysis occurs at the time of the modification, the monitoring provisions are frequently placed in the hands of agencies or therapeutic professionals, and decisions about modification are impermissibly delegated to someone other than a judge. Rather, standard statutory process is available to the parents who want to modify their parenting orders, which is consistent with Arizona's public policy as dictated by the Legislature. Specifically, Arizona statutes applicable to the modification of legal decision-making and parenting time include A.R.S. § 25-411(A), which provides that no motion to modify legal decision-making or parenting time can be filed sooner than one year from the last order absent an emergent situation. The statute also directs that the parent seeking modification file an affidavit or verified petition that includes *"detailed facts supporting the requested modification ..."* A.R.S. § 25-411(L). Rule 91(D)(6) of the Arizona Rules of Family Law Procedure, then requires that the trial court *"determine whether a custody hearing should be granted"* in accordance with A.R.S. § 25-411.

While our statutes do not require a showing of a substantial and continuing change of circumstances, the case law requires this standard be met. *See Hendricks v. Mortensen*, 153 Ariz. 241, 244,735 P.2d 851, 853 (App. 1987). The trial court also must examine the best interests of the child when considering a modification of legal decision-making or parenting time, including based on the 11 factors included in A.R.S. § 25-403(A).

While the orders in the case referenced above were overseen by FACT Court, the trial court's order implemented modifications without any compliance with these statutory prerequisites that are intended to protect the child. As such, the provisions of the trial court's ruling are considered self-effectuating and, I would argue, improper as a matter of law.

No Arizona decisions have been

found that directly address the legality of self-executing modification provisions; however, the majority of states do not favor such provisions and consider them ineffective and even void.[2] The Supreme Court of Vermont, in *Knutsen v. Cegalis*, 989 A.2d 1010, 1011, ¶1 (Vt. 2009), considered facts by which the trial court entered orders automatically shifting custody from the mother to the father when the child entered kindergarten and held such a provision was "unlawful." In rendering its decision, the court surveyed the case law across the nation and stated that *"an overwhelming majority of courts that have considered the question take the view that automatic change provisions in custody orders are impermissible." Id.* at 1014, ¶9. The *Knutsen* court instructs that trial courts must analyze custody arrangements based on the child's best interests as evidenced by "the circumstances that exist *at that time." Id.* at 1015, ¶10 (emphasis in original). The court reflected that changes of custody are "significant and confusing" for children and changes impact *"every aspect of a child's life . . ., including everything from how much television the child watches to what school the child attends." Id.,* ¶12. As such, *"automatic change provisions . . . build instability into a child's life, and this is so whether the automatic change is premised on an anticipated or unanticipated event." Id.* The court also considered whether such terms are acceptable based on the certainty of the triggering event and found that it made no difference to the analysis. *Id.* at 1016, ¶14.

The Supreme Court of Alaska invalidated a trial court's order that automatically changed supervised visitation to unsupervised visitation on the occurrence of a compliance event. *See Parks v. Parks,* 214 P.3d 295, 298 (Alaska 2009). In that case, the trial court implemented a supervised visitation plan that automatically changed to an unsupervised visitation plan when the father completed a domestic violence treatment program. *Id.* at 299. The father was also ordered to attend AA meetings and report to the mother about his attendance at those meetings and allow his sponsor to report to mother about his AA participation. *Id.* at 302. The Alaska Supreme Court reflected that the mother *"has no way to know whether (father's) reports or those of his AA sponsor are accurate and honest." Id.* The court interpreted such a provision as placing the burden of proof of compliance on mother versus father, which meant that father's parenting time could transition without actual compliance. *Id.* at 303. While the father challenged this conclusion by arguing that the court supervised the program completion, the supreme court disagreed and stated that *"the court merely questioned (father's) participation in the program, recommended that he make the records of his enrollment available to the court, heard testimony that he was on his way to graduating from the program, and concluded that he was eight weeks from finishing." Id.*

The Supreme Court of Georgia in *Scott v. Scott*, 576 S.E.2d 876 (2003), struck down an automatic change of custody provision based on a parent's relocation. In that case, the court reflected that *"children are not immutable objects but living beings who mature and develop in unforeseeable directions . . ."* and, as such, the award of custody at one point is not necessarily in the best interests of the child at another point in time. *Id.* at 878. Importantly, *"the best interests of the child are controlling as to custody changes." Id.* The *Scott* court referenced automatic changes of custody provisions as "draconian" and reflected that the provisions apply automatically to uproot the children *"without any regard to the circumstances existing at that time." Id.* Per *Scott,* the purpose of such provisions *"is to provide a speedy and convenient short-cut for the non-custodial parent to obtain custody of a child by bypassing the objective judicial scrutiny into the child's best interests that a modification action . . . requires." Id.* at 879. However, it *"operates at the expense of the child . . .." Id.* Importantly, *"[n]either the convenience of the parents nor the clogged calendars of the courts can justify automatically uprooting a child from his or her home absent evidence that the change is in the child's best interests. The paramount concern in any change of custody must be the best interests of the minor child." Id.* at 880 (emphasis in original).

A later Georgia Supreme Court decision, *Dellinger v. Dellinger,* 609 S.E.2d 331, 332 (Ga. 2004), considered a self-executing visitation provision that set out two parenting plans: one that contemplated equal time and one that automatically went into effect if the mother moved more than 35 miles away from the existing county. The *Dellinger* court cited favorably to *Scott* and held that:

self-executing material changes in visitation violate this State's public policy founded on the best interests of a child unless there is evidence before the court that one or both parties have committed to a given course of action that will be implemented at a given time; the court has heard evidence how that course of action will impact upon the best interests of the child or children involved; and the provision is carefully crafted to address the effects on the offspring of that given course of action. Such provisions should be the exception, not the rule, and should be narrowly drafted to ensure that they will not impact adversely upon any child's best interests.

Id. at 333. The court went on to invalidate the provision at issue in that case. *Id.*

The Georgia courts have been active

on this issue in recent years subsequent to *Scott* and *Dellinger*. *See Durden v. Anderson*, 790 S.E.2d 818 (Ga. App. 2016); see also Hardin v. Hardin, 790 S.E.2d 546 (Ga. App. 2016). Both cases bear discussion to understand Georgia's perspective on the subject issue.

Durden concerned an admittedly "self-executing automatic future modification" provision. 790 S.E.2d at 819. Specifically, the order implemented an automatic modification that ***reduced*** the father's parenting time when the child entered school. *Id.* at 820. The *Durden* court held that such a provision "may be permissible if the provision gives paramount importance to the child's best interests" citing *Scott. Id.* at 820-21. The court then found that this provision was acceptable because *"it is not an open-ended provision conditioned upon the occurrence of some future event that may never take place; rather, it is a custody change coinciding with a planned event that will occur at a readily identifiable time." Id.* at 821.

The court in *Hardin* addressed a trial court order that permitted the mother *"to resume visitation with her youngest son in the form of weekly therapeutic sessions..."* 790 S.E.2d at 547. In that case the court considered the report of a custody evaluator who *"noted significant concerns about the mother's mental health." Id.* After hearing, and despite that no evidence in the record of the mother's improved condition, an order was entered "*permitting the mother to resume visitation with her youngest son in the form of weekly therapeutic sessions after she completed eight weeks of counseling on her*

own" for two months. *Id.* at 548. The trial court's order included the following provisions:

The mental health professional shall be provided the report of the professional evaluator, and at the conclusion of the two months shall make certain recommendations as to any further treatment and other terms and conditions regarding mental health which shall be followed by the mother. Upon a good faith completion of eight weeks, and a report to this Court which evidences completion of this therapy and the mother's progress, the mother shall be entitled to initiate visitation with the younger child by engaging a child psychologist to supervise and assist in weekly therapeutic sessions with the younger child. This shall continue until the child reaches the age of majority.

Id. (quotations omitted). The trial court *"believed it to be in the 'long term best interest of the child' to attempt to repair the child's relationship with the mother." Id.* The Georgia Court of Appeals determined that the foregoing was an "impermissibly self-executing order" that carried out the automatic modification of visitation. *Id.* The *Hardin* court noted that Georgia does not forbid all self-executing orders; however, *"it is the trial court's responsibility to determine whether the evidence is such that a modification or suspension of custody/visitation privileges is warranted, and the responsibility for making that decision cannot be delegated to another, no matter the degree of the delegatee's expertise or familiarity with the case." Id.* at 549. The court also observed that impermissible orders contain two flaws - the order relies on a third party's expertise or direction, thereby, delegating the court's authority; and the timing at which the provision goes into place is not certain. *Id.* Importantly, the court stated as follows:

Under the terms of the order at issue, the counselor is to 'make certain recommendations as to any further treatment and other terms and conditions regarding mental health which shall be followed by the mother.' Upon a 'good faith completion of eight weeks' of therapy, a report is to be made to the trial court (it is unclear by whom) evidencing completion of this therapy and the mother's progress. Once these events have occurred, the mother is entitled to initiate visitation with the child in the form of weekly therapy sessions. Under the trial court's order, this transition in custody is automatic, and although it is unclear precisely who has the ultimate responsibility for reviewing the report to determine whether it sufficiently evidences the mother's 'progress' and completion of the required therapy, it is clear that it is not the court. This is troubling for precisely the reason the father argues in his appeal – the mother may not actually have made 'progress' in her therapy in the sense that the trial court intended, or she may not be complying with the counselor's additional treatment recommendations or the rest of the court's order. Indeed, the mother attempted to resume visitation almost immediately following entry of the order, despite not having complied with its instruction that she complete eight weeks of therapy 'for the following two moths.' This makes the event triggering the automatic change in visitation arbitrary, with 'only a tangential connection' to the child's best interests. Thus, the order lacks 'the flexibility needed to adapt to the unique variables that must be assessed in order to determine what serves the best interests and welfare of a child.

Id. at 549-50 (emphasis in original).

Other states also forbid self-executing

orders. The Alabama Court of Appeals in *Cleveland v. Cleveland,* 18 So.3d 950, 952 (App. Ala. 2009), considered a trial court's order that modified parenting time automatically when the younger child reached one year of age and held that such provisions that modify custody based on "future contingencies" are forbidden by Alabama law. Moreover, a prior Alabama decision held such provisions are actually void. *Id., citing Daugherty v. Daugherty,* 993 So.2d 8, 13 (App. Ala. 2008) (holding that clause divesting mother of custody of children in the event mother relocated from the children's school district "was of no effect"). Indiana has also held that an automatic change of custody on a parent's decision to relocate is *"inconsistent with the requirements of the custody modification statute." See Myers v. Myers,* 13 N.E.3d 478 (App. Ind. 2014).

While Arizona courts have not spoken to the issue directly, a very recent case was published that might support a conclusion that the Arizona Court of Appeals would strike down an automatic modification order. *See Engstrom v. McCarthy,* 2018 WL 327181 (Jan. 9, 2018). In *Engstrom*, before trial the parents entered into a Rule 69 agreement regarding legal decision-making and parenting time. The trial court adopted the parties' agreement finding it reasonable, but then modified the agreement after trial. The court of appeals found that the legal basis to modify the agreed and accepted parenting provisions is statutory (*see* A.R.S. § 25-411) and that the court *"must initially determine whether a change of circumstances has occurred since the last custody order"* before it can modify parenting orders. *(Citing Pridgeon v. Superior Court (LaMarca),* 134 Ariz. 177, 179 (1982). The result in Engstrom supports a conclusion that automatic modification provisions cannot be adopted by the trial court because, by their very nature, they allow modification without following the statutory and legal requirements guiding modifications.

The majority of courts across the nation disapprove of step-up parenting plans, especially when oversight of the conditions for modification are outsourced to a person, professional or agency. The *Engstrom* decision is indicative of the manner in which Arizona's court of appeals might come down on the issue of automatic modifications - if a judge cannot modify a Rule 69 agreement without complying with statutory and case law, how can the court allow automatic modifications?

Given the weight of the law, along with the policy reasons, courts should not impose automatic modification provisions as a method to resolve parenting disputes. Instead, the court should enter the orders that are appropriate at the time the order is entered and the parent seeking modification should then be required to follow the legal process for modification provided under Arizona law. If the court wishes to monitor or allow a modification action prior to one year, the court has the power to set a series of review hearings to be followed by the filing of a petition and the setting of an evidentiary hearing. The filing of the petition can be discussed at the review hearing and can be accomplished at any time before the evidentiary hearing. In this manner, the best interests of Arizona children will remain the paramount focus of the court. FL

special thanks

A special thanks goes out to our law clerk, Nicholas Brown, a 3L law student at Arizona State University, who will be clerking for Chief Justice Bales in the fall, for his hard work and assistance with these materials.

endnotes

1. This article was previously provided as part of the Arizona Judicial Spring Refresher Training.

2. States that disapprove of automatic modifications include: Alabama, Alaska, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana; Louisiana, Minnesota, Missouri, New York, North Dakota, Ohio, Oregon, Vermont, Virginia and Wyoming.

about the author

Helen R. Davis is a Senior Member and Managing Partner of The Cavanagh Law Firm; is certified as a specialist in family law by the Arizona State Bar; is a Fellow of The American Academy of Matrimonial Lawyers; is an adjunct professor at the Arizona State University Sandra Day O'Connor College of Law; and frequently writes and lectures about all manner of family law topics.

by Michael Aaron

Spring has sprung and so has the news in family law.

❑ The *Nicaise v. Sundaram*, No. 1 CA-CV 17-0069FC (Filed March 1, 2018), and *Paul E. v. Courtney F.*, No. 1 CA-CV 17-0048 FC (Filed April 3, 2018), decisions have everyone's heads turning. If you have not read them yet, you should. The way in which we advise clients regarding joint legal decision-making, the court's role in making specific decisions on "parental choices," and the potential necessity of sole legal decision-making authority may significantly change. Stay posted for seminars.

❑ Beginning April 1, 2018, the child support guidelines were modified and you will need to use updated calculator to determine child support.

❑ The Arizona Rules of Family Law Procedures are being modified and the process is coming to an end. Final comments are due with an anticipated effective date of January 1, 2019.

❑ Locally, Pima County will have totally new Local Rules of Practice to follow beginning July 1, 2018.

❑ There are some bills pending in government regarding spousal maintenance, marriage and powers to remove children from their homes. FL

ABOUT THE AUTHOR

MICHAEL AARON is the Past Chair of the Executive Council for the Family Law Section for the State Bar of Arizona, Past President of AZAFCC and President Elect of the PCBA.

Adoptions: Same-Sex Couple Sues Government Over Placement Denial

by Daniel R. Huff

An interesting case out of Texas has attorneys who practice in the area of adoptions taking particular note. On February 20th, a same-sex couple filed suit against the federal government claiming that a child welfare agency that is federally funded declined to place a child with them because they do not "mirror the Holy Family."

An interesting case out of Texas has attorneys who practice in the area of adoptions taking particular note. On February 20th, a same-sex couple filed suit against the federal government claiming that a child welfare agency that is federally funded declined to place a child with them because they do not "mirror the Holy Family." Lambda Legal, a group that defends the rights of the LGBTQ community, filed the complaint in Washington's U.S. District Court requesting declaratory and injunctive relief, in addition to monetary damages.

The couple desired to adopt a refugee child - at least in part because they said they could not afford the expensive private-adoption process. The only organization in their geographic area that places refugee foster children is Catholic Charities of Fort Worth. Catholic Charities is a faith-based organization contracted by the Department of Health and Human Resources (HHS) to place children with prospective adoptive families. Here, Catholic Charities advised the couple that they were ineligible for consideration for placement because they are a same-sex couple.

In the complaint, the couple argues that while the government can contract with religious organizations to perform government functions, such organizations cannot use federal funds for religious purposes. At its core, the lawsuit claims that HHS and its subsidiary agency are impermissibly funding a faith-based organization that discriminates on the basis of sexual orientation. The suit claims that the government is using Catholic doctrine to determine placement eligibility for foster children - a decision that runs afoul of constitutional protections. The lawsuit's aim is to prevent organizations under contract by the government from using "religious criteria" to determine placement eligibility.

Many legal analysts are not optimistic that the couple will prevail. The challenge is that the couple's claim is grounded in a constitutional violation and not one of statute. Generally, the U.S. Supreme Court has held that under the Constitution, private organizations maintain their right to follow their beliefs regardless of their receipt of government funding. FL

about the author

Dan Huff is a family law and juvenile law attorney at The Huff Law Firm, PLLC in Tucson. He is also a member of the executive councils of the State Bar's Family Law Section (Co-YLD representative) and Public Lawyers Section.

Preview of 2018 State Bar Convention Program

June 29, 2018

by Mitch Reichman

Our Section's program for this year's State Bar Convention offers a learning opportunity well worth your time and money. The morning session programming begins with nationally recognized expert Marshal Willick addressing division of retirement benefits, including military benefits, in divorce. Mr. Willick will provide a detailed review of the recent changes and new decisions that have altered the landscape of dividing these benefits, as well as the implications of *Davidson* to pension divisions.

The balance of the morning session is divided into two tracks: one focused on financial issues and the other on child-related issues, with a conference room dedicated to each.

With respect to child-related issues, Bill Eddy, a lawyer, therapist, mediator, and co-founder of the High Conflict Institute will provide thoughtful insights to help you manage high-conflict personality disorders in divorce. Following his presentation, Stasy Click will provide information and guidance to help practitioners deal with family law cases when there is a criminal case simultaneously pending.

In the financial track component of the morning program, we will examine the impact of the new changes in our tax laws, as well as trial skills presentations on rebutting presumptions and the often-confusing issues of the impact of merged and non-merged terms of a property settlement agreement on available remedies.

Following lunch and the presentation of achievement awards, the afternoon session revs up with our Judges' panel, highlighted by presiding Maricopa County Superior Court Judge Suzanne Cohen and Assistant Presiding Judge Ronee Korbin Steiner, as well as at least three distinguished jurists from the Pima County Superior Court - Judges Christoffel, Sakall, and Ferlan. Relatively new to the family law bench, Judge Scott Minder will offer his insights, and now-veteran Judge Jennifer Ryan Touhill will complete the panel.

State Bar Convention Program

As we all know, the new Rules are coming! The new Rules of Family Law Procedure will be in effect not too long after our Convention concludes. A comprehensive and detailed review of all of the significant changes will be presented by Judge Mark W. Armstrong (Ret.), who served as Vice-Chair on the Task Force rewriting the Rules, as well as Task Force members, the Honorable Suzanne Cohen, the Honorable Dean Christoffel, Steve Wolfson, and Gregg Woodnick. Because of their involvement in the committees that have drafted the new Rules, this group has particular insight to share to give you a leg up on learning the changes as well as the rationale behind those changes.

The final programming in the afternoon session is especially important and should compel you to stay for the entire day. Our ethical obligations relating to electronic communications and storage of data have changed dramatically in the past few years. We are honored to have Linda Shely presenting for a full hour on those vitally important issues.

Our day concludes with a Section-sponsored Happy Hour that offers you the opportunity to build more meaningful personal relationships with lawyers in the Family Law Section and the judges and experts presenting during the day, and also enjoy a free adult beverage. FL

See you there!

ABOUT THE AUTHOR

MITCHELL REICHMAN is a shareholder at Jaburg Wilk where he chairs the family law department. He is a State Bar certified Family Law Specialist. Now in his thirty fourth year of practice, the majority of his work is in high conflict, complex domestic relations cases involving substantial assets. He is the current Vice Chair of the Executive Council of the Family Law Section of the State Bar of Arizona and has been Co-Chair of the Family Law Section presentation at the State Bar Convention for the past three years. Mr. Reichman is listed in *Best Lawyers in America 2013* through 2017; Martindale Hubbell's *Bar Register of Preeminent Lawyers* and has been recognized as a Southwest Super Lawyer every year since 2009.

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**

NEWSLETTER COMMITTEE

Committee Chair: Annie M. Rolfe, Rolfe Family Law, PLLC
Committee Members: William D. Bishop, Bishop Law Offices, PC
Timea R. Hargesheimer, The Cavanagh Law Firm, PA
Daniel R. Huff, The Huff Law Firm, PLLC
Russell F. Wenk, Lincoln & Wenk, PLLC

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

… If so, the deadline for submissions is June 22, 2018.

Would you like to...

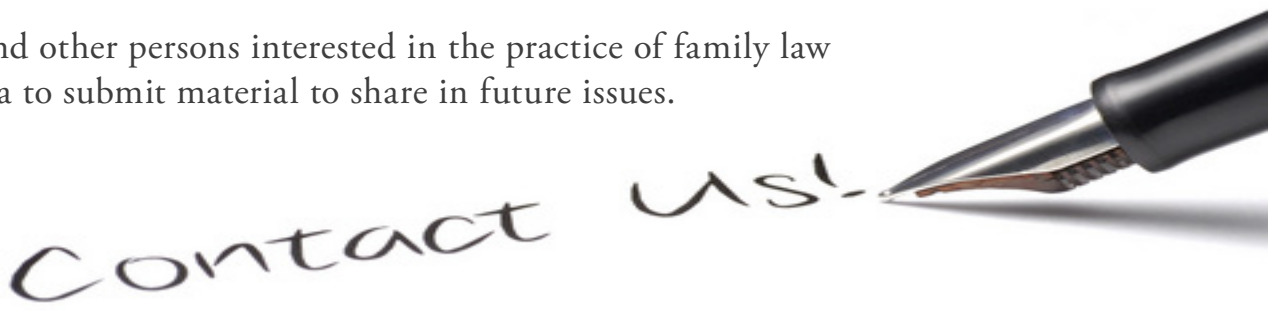
- Express yourself on family law matters?
- Offer a counterpoint to an article we published?
- Provide a practice tip related to recent case law or statutory changes?

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.