CourtWatch

Daniel P. Schaack

Statutory presumption of parenthood

The August 2017 CourtWatch discussed two recent opinions testing the implications of the United States Supreme Court’s monumental decision in Obergefell v. Hodges. They contemplated whether women in same-sex marriages are entitled to the statutory presumption of parenthood that is granted to men in opposite-sex marriages. Division Two held the statute—A.R.S. § 25-814(A)(1)—unconstitutional because it denied to women in same-sex marriages a benefit that is available to men in their marriages. McLaughlin v. Jones, 240 Ariz. 560 (App. 2016). A split Division One panel later held the contrary, concluding that the statute merely reflects fundamental biology: the statute benefits only men because women generally do not need a presumption of parenthood. Turner v. Steiner, 242 Ariz. 494 (App. 2017).


Kimberly and Suzan McLaughlin got married in California in 2008. Kimberly became pregnant through artificial insemination from an anonymous donor. The couple then moved to Arizona. They signed joint wills and a joint-parenting agreement declaring Suzan a co-parent, and providing that “Kimberly McLaughlin intends for Suzan McLaughlin to be a second parent to her child, and providing that it is unfair to allow a her to force Suzan to pay child support while denying her parental rights. The court of appeals affirmed. The supreme court agreed with the lower courts. Although it unanimously found § 25-814(A)(1) unconstitutional, the decision comprised three separate opinions. Chief Justice Scott Bales wrote the main opinion, joined by Justices Ann A. Scott Timmer and Robert M. Brutinel, along with Court of Appeals Judge Kermit D. Jones, who sat for Justice Andrew W. Gould.

The statute provides that “[a] man is presumed to be the father of the child if . . . [h]e and the mother of the child were marrying any time in the ten months immediately preceding the birth or the child is born within
The how and why of “unplugging”

This month, because I have finally taken a vacation, I decided to write about unplugging and some of the obstacles professionals face when attempting to unplug.

In thinking about my own preparations to take some time off, I have concluded taking a break from lawyering is not easy.

You run the risk of getting penalized for taking time off or unplugging. Referrals go to the attorney who responds quickly and is in the office when the call comes in. The proliferation of email and texting allows us to stay connected and respond quickly to crises; but due to the ease of sending an email or text, it seems like things are more frequently labeled an “emergency.” When a more challenging client learns you are on vacation during what he or she perceives as an emergency and feels like you have prioritized your travel over the representation, that can impact the attorney-client relationship. (And, inevitably, the client who needs the most hand-holding has a sixth sense about calling when you are out of the office).

The actual logistics of unplugging are also complicated. Like many professions, work doesn’t end when you leave the office. When you check out for a week for a long overdue vacation, either someone has to mind your caseload in your absence, or you have to keep an eye on your cases, which defeats the spirit of unplugging.

For those attorneys who have staff, or associate attorneys, or law partners, the ability to unplug and take time off is made somewhat easier. I owe my sanity to the attorneys, paralegals, and staff who support me, and I know that I would not have any ability to unplug without knowing they are minding the store while I am out. For those attorneys who do everything in their practice, unplugging means finding coverage, leaning on others to triage, possibly even hiring a temp or answering service. Whether in a big practice or a solo practice, it’s not as easy as simply putting an away message on your email and telling callers to you voicemail that you will call them in a week or two.

Even if you manage to get all the obstacles and hurdles to unplugging covered, then you have the experience of attempting to be okay with being unplugged. Being unplugged means not being in control of everything that is happening at the office. Lawyers are known to be a little bit controlling and, at times, micro-manage. Inherent in unplugging is relinquishing some of that control, which poses its own set of problems and worries.

People joke frequently that they need a vacation from their vacation. Given how ubiquitous email has become, it can be exhausting to wake up while on vacation and, due to a time difference, see 20 or 30 emails already waiting. Even after almost 12 years of practice, I still feel guilt and anxiety for not working on my cases when I am on vacation. Realistically, I know that prior to taking time off, I have put my cases in order, met any deadlines, sent out discovery and subpoenas and other requests that will come due upon my return, and made sure I have another attorney or paralegal monitoring the cases for emergencies. But even with all of the planning and constant reassurance that everything is fine at the office, the anxiety still nags and can impact my enjoyment of my time away.

While I am by no means the expert on unplugging, I have tried a few things that have made my time away from practice less stressful. First, planning as far ahead as possible, and blocking the time out on my calendar has worked wonders. Yes, I would love to drop everything and go to Paris on a moment’s notice. But as someone who has a duty to clients, I recognize that’s not always possible. While I may not be able to go globetrotting on a moment’s notice, by blocking out time in advance, I can set boundaries more easily with clients, opposing counsel, and other professionals who have demands on my time. Also, by blocking out the time in advance, I can start planning before the day of travel. My vacation becomes more like any other all-day, out-of-office obligation, and

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Norma C. Izzo

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2018 Barrister's Ball continued from page 1
and fundraising opportunities. At the 2017 Barristers’ Ball, attendees selected Disabled American Veterans to be the beneficiary of the 2018 Ball, as well as partner with the Foundation throughout the past year. We are bringing back this exciting component for 2018 and have chosen the three charitable partners to be featured at the event!

The Young Lawyers Division Board considered 12 community agencies, nominated by the MCBA Membership through social media and other means, to select the three (3) charitable partners for the 2018 Barristers’ Ball. I am excited to announce that Arizona Justice Project, Community Legal Services and One Step Beyond have been selected as the featured charity raffle partners for the for the 2018 Barristers’ Ball!

Arizona Justice Project (AJP)

AJP was established in 1998 and became the fifth organization in the United States created to help inmates overturn wrongful convictions. Exonerations have been on the rise with the work of innocence organizations across the nation. From 1989 to today, over 2,100 people have been exonerated for crimes they did not commit. Since AJP’s inception in 1998, it has processed claims from over 6,000 defendants, provided pro bono legal representation to over 200 individuals both in the courts (for post-conviction DNA testing, state post-conviction relief, and federal habeas corpus relief) and at the Board of Executive Clemency. AJP and its clients have won victories on many important legal issues, such as access to evidence for DNA testing in state court to the United States Supreme Court’s decision in Martinez v. Ryan and in individual cases, ultimately securing the freedom for over twenty individuals, to date. AJP has also teamed up with the ASU School of Social Work and provides transitional services for its clients to help them re-acclimate to society.

Community Legal Services (CLS)

CLS is a non-profit Arizona law firm that strives to assure fairness in the justice system by providing direct services to individuals falling below 125% of the federal poverty level. CLS was incorporated in 1952 as a legal aid program organized to promote “equal access to justice for all.” CLS is dedicated to providing legal assistance, advice or representation; self-help materials and legal education so individuals are aware of their rights. CLS focuses on helping survivors of domestic violence; assisting victims of consumer fraud and abuse; protecting tenants from unlawful/unfair practices by landlords; foreclosures; legal problems affecting agricultural workers, wage claims and other employment matters; and federal and state programs affecting peoples’ health and economic stability. CLS is committed to eliminating poverty-based inequities in the civil justice system by providing high-quality legal advice, advocacy and assistance to low-income Arizonans. In 2016, CLS helped over 17,000 unique clients in Arizona.

One Step Beyond, Inc. (OSBI)

OSBI provides comprehensive and dynamic person-centered programs to adults who have intellectual disability in northwest Maricopa County and San Mateo, California. The mission of OSBI is to provide dynamic, responsive programs that engage the goals, talents, and interests of individuals with intellectual disability and empower them to achieve their dreams of optimal independence, enriching social networks, and effective participation in our community. OSBI’s participants include individuals with Down syndrome, cerebral palsy, autism, and other disabilities. OSBI also offers programs to meet the needs of participants and their families, such as employment development, culinary training, life skills training, performing and fine arts, sports and fitness programs, and resources for families. All of these programs accomplish the clear goal of enhancing the quality of life for the individuals OSBI serves.

The Barristers’ Ball in March 2018, attendees will be able to “vote” for the agency they would like to see as the beneficiary of the 2019 Barristers’ Ball, as well as become the charitable partner to the Foundation throughout 2018. Attendees will “vote” by placing their raffle tickets into the box for the agency they want to vote for. The agency with the most raffle tickets in its box by the end of the raffle will be selected as the main beneficiary for the 2019 Barristers’ Ball. However, all the charitable agencies will receive the value of the raffle tickets in their boxes plus $1,000.00 each just for being chosen as a featured agency at the event (and for doing great work in the community!).

So, break out your best suit or tuxedo and ball gown and mark your calendars for March 10, 2018! We hope to see everyone at the event and appreciate your continued support of the MCBA and the Foundation!

YOUNG LAWYERS DIVISION CALENDAR

November 11, 2017
LLS Light the Night Walk Event – come join the YLD team!

November 15, 2017
YLD election ends for 2018 Board members

December 4, 2017
YLD Board retreat (no regular meeting)

December 14, 2017
MCBA Holiday Party Phoenix Country Club

March 10, 2018
2018 Barristers’ Ball at Chateau Luxe

Check our Facebook page for news and division events at www.facebook.com/YLDmcba or for more information you may email the YLD at yldmcba@gmail.com
In many respects, social media has altered how attorneys gather information on others. Intimate details that were once available only through direct or indirect contact are now public. The opposing party who is claiming lost wages because she cannot get out of bed just posted a photo of herself skiing in Aspen. Right click. Save. No private investigator needed. Changing technologies bring about new or differing ethical obligations and responsibilities for attorneys. ER 1.1 mandates that a lawyer keep up to date with the benefits and risks of advancing technology. While the rule thankfully does not require an attorney to maintain a certain Snapchat score (Google it – I had to) or to have a minimal amount of Facebook friends, or to see (or at least attempt to see) the information is publicly available without the need to contact the other party (i.e. follow, friend request, add), then Griffin v. the State of Maryland Appellate ct. determined “[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”

As a good practice, an attorney should be easy enough to identify – easy, reliable, and affordable information on everything from clients to adversaries to witnesses to potential jurors. That, however, highlights the risk that your client may be an oversharing target.

Several state bar opinions formally permit attorneys to use public social media information to investigate (aka Facebook stalker) adverse parties, witnesses, opposing counsel, regulatory boards, judges, and, even jurors. Some of these opinions, such as the D.C. Bar Legal Ethics Op. 371 published earlier this year, not only encourage but imply that competence and diligence may require such investigations.

Arizona does not have a formal opinion on the matter, however, looking to other states, if the information is publicly available without the need to contact the other party (i.e. follow, friend request, add), then Griffin v. the State of Maryland Appellate ct. determined “[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”

As a good practice, an attorney should investigate the dangers of Facebook spying.

You don’t need emojis to be creepy

The University of Michigan Law School had a listserve called LawOpen. LawOpen allowed students to send messages to all other law school students. Jesse was banned from LawOpen by the email account manager “for sending inappropriate messages to the student body using LawOpen.”

So, Jesse created a “parody of a law school administered student group,” that he called “LawClosed.” His first email to the student body included a hyperlink to a news article about the death of a woman who had been employed at Skadden Arps where Renée had previously been employed.

Renée told Officer Mundt that she felt “frightened and harassed by receiving two e-mail messages” from Jesse.

Creepy yes, but a search warrant!!!

Officer Mundt signed an affidavit for a search warrant for Jesse’s computer. The County Prosecutors Office reviewed the affidavit and Magistrate A. Thomas Treesdale signed the search warrant. The warrant was for “[a]ll computer equipment, information storage devices and cell phones as well as records or documents that are located at the above and [sic] contents.”

The search warrant allowed officers to send and seize passwords or encryption codes needed to access data on Jesse’s computer.

Officer Mundt and two other officers “executed the search warrant that night, and seized Enjaian’s laptop computer, cell phone, USB keychain drives, a USB drive, and an iPod Nano.”

One of the officers prepared a report on the search and sought charges “of Stalking, Posting, and Malicious Annoyance by Writ-
Rules, rules, rules

On August 31, 2017, the Supreme Court of Arizona approved changes to the Rule of Civil Procedure. Effective July 1, 2018, Civil Rules 5.2, 8, 8.1, 11, 16, 26, 26.1, 26.2, 29, 30, 33-37, 38.1, 45, and 84 will have minor and significant changes. According to the September 26, 2017 News Release (http://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Civil-Procedure, Supreme Court Number R-17-0010), the major changes are:

- Differentiated case-management providing for case tiering and lower discovery limits for less complicated cases.
- Expedited procedures for resolving discovery and disclosure disputes.
- Revised rules regarding preservation, disclosure and discovery of electronically stored information (ESI).
- Changes to better protect non-parties to unduly burdensome requests for information via civil subpoenas.
- New procedures to resolve disputes about the duties of parties to non-parties to preserve ESI.

What catches my attention is the new case tiering. The new Rule 8(b)(2) states “[a] party who claims damages but does not plead an amount must plead that their damages are such as to qualify for a specified tier defined by Rule 26.2(c)(3).”

The new Rule 26.2(b)(1) states “Tier 1:

Case Characteristics. These are simple cases that can be tried in one or two days. Automobile tort, intentional tort, premises liability, and insurance coverage claims arising from those types of claims are generally Tier 1 cases, absent unusual circumstances. Cases with minimal documentary evidence and few witnesses are likely Tier 1 cases. Tier 3 is reserved for cases that are logistically and legally complex. Cases that do not fit into either Tier 1 or 3, will be assigned to Tier 2.

According to the new rules, cases will be assigned to a tier either by stipulation of the parties, motion, by the court based on the characteristics of the case, or by sum sought in relief. The new rules also include a provision that allows the assignment of a tier based upon the monetary or nonmonetary relief requested. Tier 1 are cases claiming $50,000 or less; Tier 2, over $50,000 to less than $300,000; and Tier 3, $300,000 or more.

Discovery limits. This is where the main changes will occur. Tier 1 cases will be allowed “5 total hours of fact witness, depositions, 5 Rule 33 interrogatories, 5 Rule 34 requests for production, and 120 days in which to complete discovery.”

Tier 2 cases are allowed “15 total hours of fact witness deposition, 10 Rule 33 interrogatories, 10 Rule 34 requests for production, and 180 days in which to complete discovery.”

Tier 3 cases are allowed “30 total hours of fact witness depositions, 20 Rule 33 interrogatories, 10 Rule 34 requests for production, 20 Rule 36 requests for admission, and 240 days in which to complete discovery.”

As you can see, these are substantial changes in the management of civil litigation. The discovery limits will require the parties to narrow down the information they are seeking.

Division Meetings are held the second Monday of each month, unless the Monday is a holiday; then it will be held on Tuesday. All members are invited to attend the meeting. Our next Division meeting is November 13, 2017 at 5:30 p.m. at the MCBA offices. I look forward to seeing you there.

Joseph Beply is a partner with Jennings Haug Cunningham in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@JHC.law.
“Due to”

**LEGAL WRITING**

Tamara Herrera

A student in my upper-level writing class asked a question that stumped the entire class (including me, for a bit): Is it true that a careful writer should avoid starting a sentence with the phrase “due to”? To get to the right answer, we need to compare the phrases “due to” and “because of.” Most speakers and writers use the two phrases interchangeably. For informal settings, this usage is fine. But for a formal setting in which the audience is reading carefully and counts on the writer to get things right, we should care.

**Due to:** This phrase functions as an adjective, which means it modifies a noun or pronoun. The most common usage of the phrase has it following an intransitive or “linking” verb (is, was, were).

Example: His success was due to hard work.

Because of this usage, “due to” could not start a sentence because it would not have a noun to modify. Consider the following sentence:

Due to rain, the league cancelled the game.

Technically, this usage is incorrect. “Due to” is being used as an adverb to mean “because of.” My trick to spotting this is to consider the correct usage of “due to” is to replace it with “attributable to.” If the replacement makes sense, then “due to” is correct. If the replacement does not make sense, then you likely mean “because of.”

Example: Attributable to rain, the league cancelled the game. (YES) Because of rain, the league cancelled the game. (NO)

Because of: As mentioned above, this phrase functions as an adverb. Based on my experience, most writers should be using “because of” when faced with the choice because their sentences need an adverb to indicate cause. However, I see many writers making this choice much harder than it should be by altering the phrase in a misguided effort to be clearer: due to the fact that, owing to the fact that, the reason is that, on the grounds that.

My suggestion is to keep it simple and use “because of.” Your reader will thank you!

**CLERK’S CORNER**

Michael K. jeanses
Clerk of the Superior Court

Reflecting on our lives and being thankful for what our successes and failures have taught us is valuable in business and at home. This Thanksgiving is bittersweet because it is the last time I will be able to put these thoughts in a Clerk’s Corner article. After reflecting on more than 30 years of work in the clerk’s office, I am most thankful for the following three things.

Incredible staff. It has been a pleasure coming to work each day knowing I am surrounded by hardworking, dedicated, and amazing people. Many have retired, moved, or just moved on during my tenure and the ranks have always refilled with equally caring and diligent, wonderful individuals. People want to be part of a successful organization, have a fulfilling experience, and make a difference in exchange for the hours they commit to their work. The clerk's office has recruited great people by developing a great reputation and maintaining it over time.

The individuals who make up the team have consistently shined over the years and I am thankful for the glowing comments I have received while traveling around the state. Whether it’s sharing knowledge with other clerks’ offices or being the place that could answer a question that no one else could, I have always felt that if our office and the individuals within it could be recognized as great customer service agents, other people would want to join us.

Support from judicial leadership. The need for and benefit of having the support of court leaders has been most evident in technology over three decades of increasing change. Technology as a broad term has resulted in efficiency, reduced tax burdens, and better services to the bench, litigants, legal support staff, employees, and everyone our work touches. The leadership of several Chief Justices of the Supreme Court was key to the success of moving technology forward in our court and in all of Arizona’s courts.

Without consistent support over different administrations, the technology would have stalled or been delayed. When this office had ideas or proposals it was vital for the presiding judge and chief justice to support the ideas or they would have withered on the vine. One thing I know from decades of experience is that consistent, forward-thinking support from the highest levels of court leadership doesn’t happen everywhere. Arizona is truly a national leader in courts and the interstate collaboration, support, and joint commitment toward improvement that we enjoy is not only necessary for effective action, but requires a welcome absence of turf wars and need for credit.

Improved relationships and association with the legal community. I have purposefully not mentioned names for fear of anyone feeling left out or underappreciated for their many contributions, but I have to make an exception for Dan McAuliffe. He played an important role decades ago bringing the Clerks of Superior Court into so many conversations and raising their visibility within the legal community and court system. It was Dan who lobbied for including a clerk’s representative on the State Bar’s Civil Practice and Procedure Committee—a position in which I served for more than 25 years. Dan was vocal about recognizing the benefits of working with the Clerks and inviting them to discussions that would ultimately have a direct impact on court and court operations. Thankfully, it is common now for a clerk’s representative to sit on local and statewide committees, task forces, educational development, the MCBA’s Bench/Bar Committee, and other groups giving input on how courts can best function. The court system benefits from having a Clerk’s input during the process of considering change, and the Clerks deeply appreciate having a seat at the table.

Like many of you, I will be enjoying the company of my family this Thanksgiving. I am also thankful for the chance to write about a few professional highlights over the course of my career. Looking back, it is the people who stand with you against seemingly impossible odds that make the tough days manageable and the good days great. I hope you join me in celebrating those people in your personal and professional lives this Thanksgiving.

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**Write A Review**

Write a CLE review and get the CLE on the house (up to 1.5 hours max)! Contact Marcy Morales at mmorales@maricopabar.org for more information.

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**SUBMISSIONS POLICY:**

Members and non-members are encouraged to submit articles for publication. The editorial deadline for each issue is generally the 8th of the month preceding the month of issue.
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Tell us a little bit about your experience when you were president of the MCBA—what year was it and what kind of issues or events were going on?

I was President in 2007 and it was literally a rebuilding year due to a fire at the MCBA offices. The Board and officers crowded into a small conference room in temporary offices across from Park Central Mall. The silver lining to the fire was that we redesigned the MCBA floor plan and created the front side larger CLE conference room and the entryway conference meeting room.

How do you currently support the MCBA as a past president of the organization?

I participate in the past presidents breakfasts where we receive updates and offer our input. Like many MCBA functions, the breakfast is a time for personal interaction and camaraderie directed to improve the quality of practice and life for local attorneys.

What areas did you practice before you became a judge?

I practiced primarily criminal defense, both federal and state, with some commercial and employment law in between. As a brand new attorney, I was fortunate to practice in Federal District Court as an Assistant Federal Public Defender. Under the tutelage of Tom O’Toole and some fine trial attorneys, I tried my own cases and wrote my own appeals to the 9th Circuit.

If you hadn’t been an attorney, what career path would you have chosen?

Since high school, I wanted to be an attorney. In elementary school, I briefly thought about being a veterinarian due to my love of dogs, or a priest due to Catholic school influence. Realistically, I may have followed in the family Mexican food business, El Zarape Mexican foods in Tucson. The factory made tortillas for local supermarkets and we had a restaurant and deli. However, the 1960s dinner discussions with my parents and watching news about the civil rights movement and Martin Luther King Jr. influenced me to be an attorney.

What is the strangest job you’ve held, outside the legal field?

During the middle of first-year law school, I accepted a classmate’s offer to work as a summer camp counselor for inner city kids. It was not strange, but unusual for a law student. I spent the summer teaching kids to fish in the Trinity Alps of Northern California. My healthiest job ever—I hiked and ate trout which the kids liked to catch but not eat.

If you could be a character in a movie or TV show, who would it be?

Probably Horace Rumpole of the Bailey from the old PBS series. The character was a wise and seasoned barrister who could see through the bluster of opposing counsel, the contradictions of witnesses, and the pomposity (sometimes) of judges.

What do you like to do, now that you’re retired?

I enjoyed being a Maricopa County Superior Court judge for 20 years and the diversity of people there. Now, I have returned to fishing, only this time in Arizona, and I have taken beginner golf lessons. My wife Monica and I travel to Northern California to visit our two daughters, their husbands, and three granddaughters all three years or younger. Life in and outside the law has been good.
The firm has changed its name from Berk & Moskowitz, P.C. in light of the departure of Frank W. Moskowitz to become a Maricopa County Superior Court Judge.

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Archival Project

Calling all loyal readers and history buffs!

The Maricopa Lawyer is trying to assemble a complete archive of all MCBA monthly newsletters published since 1956 (or earlier if they exist) and all editions of the Maricopa Lawyer published since October 1982.

If you have historic copies of either and are willing to share your collection with us, contact Stan Watts at watts@dwlaw.net or 602-279-7488.

Thank you!
The Maricopa County Justice Museum and Learning Center proudly announces our first Founder Appreciation Breakfast. Your ongoing support has helped us to further our mission to educate our community about our local legal history, with an emphasis on highlighting key cases from Maricopa County and encouraging awareness of people who have made a significant contribution to our legal system and our community.

The Founder Appreciation Breakfast will be held at the Phoenix Country Club, located on the northeast corner of 7th Street and Thomas in Phoenix. Please plan to arrive no later than 7:30 a.m. We will have a short program from 7:45-8:45 a.m. to honor the many founders and donors who enable us to provide tours and interactive learning experiences for students, jurors, tourists, and county employees.

We also recognize the children who participated in the Justice Museum’s inaugural calendar art contest by submitting artwork depicting “What Justice Means” to them. Calendars will be available for purchase at the Breakfast.

Our keynote speaker for the event is Senior Circuit Judge Michael Daly Hawkins of the United States Court of Appeals for the Ninth Circuit.

Cost for the Appreciation Breakfast and Fundraiser:
- Youth who submitted art for the Museum calendar, plus a parent or caregiver—Free (plus one free calendar)
- $35 for early bird registration - by November 1st
- $40 for registration - after November 1st
- Reserve a table of ten - $300 by November 1st
- Reserve a table of ten - $350 after November 1st

You can register online at www.maricopabar.org
Awards

On July 27 in Cincinnati, Ohio, Judge Carol Scott Berry received the National Association of Blacks in Criminal Justice (NABCJ) 2017 Medgar Evers Award for demonstrated unselfish ideals of fair play by developing policies of equal treatment in criminal justice.

New Hires

Sanders & Parks, P.C. is pleased to announce that Anne Orcutt has joined the Firm as an associate. Ms. Orcutt will focus her practice on corrections defense, public entity and municipal liability, products liability, premises liability, and wrongful death/catastrophic injury defense. Ms. Orcutt earned her Juris Doctor from the Arizona State University Sandra Day O'Connor College of Law. During law school, Ms. Orcutt clerked for Judge Michael Brown on the Arizona Court of Appeals. Ms. Orcutt is admitted to practice in Arizona and the United States District Courts for the District of Arizona, District of Columbia, and Western District of Oklahoma.

Sanders & Parks, P.C. is pleased to announce that Brianna M. Jagelski has joined the Firm as an associate. Ms. Jagelski will focus her practice on medical malpractice defense. Ms. Jagelski earned her Juris Doctor from the University of New Mexico School of Law. During law school, Ms. Jagelski was manuscript editor for the Natural Resources Journal and participated in the Southwest Indian Law Clinic, assisting indigent native peoples in New Mexico.

SANDERS & PARKS, PC is pleased to announce that Vincent Miner has joined the Firm as an associate. Mr. Miner will focus his practice on civil litigation. Mr. Miner earned his Juris Doctor from the Sandra Day O'Connor College of Law. During law school, Mr. Miner was Summa Cum Laude and Or- der of the Coif, and he received the Justice Sandra Day O'Connor Award. Mr. Miner is admitted to practice in Arizona and the United States District Court for the District of Arizona. Mr. Miner externed for Judge Thompson of the Arizona Court of Appeals and for Judge Teil-borg of the District Court for Arizona. He also clerked with Justice Timmer of the Arizona Su- preme Court.

Special Awards/Accomplishments: Magna Cum Laude, Order of the Coif, Justice Sandra Day O'Connor Award, Rebecca and Michael Berch Scholarship, Frederick Berry Scholarship, Pedrick Scholarship, CALI Award Recipient, and Managing Editor of the Arizona State Law Journal.

Thorpe Shwer is proud to announce the addition of André H. Merrett as a partner. André practices in the areas of complex civil, commercial, real estate, business, trust and estate, product liability, personal tort, and franchise litiga- tion. André is an experienced trial lawyer and litigator with over 20 years of experience and dozens of bench and jury trials in numerous state and federal courts under his belt. He has represented some of the largest companies in the country in matters of critical importance and also has significant experience helping smaller entities and individuals navigate the litigation and trial process. Additionally, André has extensive appellate court experience, having briefed and argued numerous cases in several appellate courts.

Prior to joining Thorpe Shwer, André practiced at Squire Sanders & Dempsey, Quarles & Brady, Aiken Schenck, and Sacks Tierney. His skills have earned him an AV Preeminent® Rating by Martindale-Hubbell® and selection as a Southwest Super Lawyer (Commercial Litiga- tion) since 2013.

André’s community involvement has in- cluded terms on the boards of the Recreation- al Association of Madison Meadows – Simis (RAMMS), Childsplay Arizona, Free Arts Ar- izona, and Camp Fire Boys & Girls of Greater Phoenix. Additionally, André has served as a member of the State Bar of Arizona’s Fee Arbitration Committee.

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NOVEMBER 8 • 9 A.M. - 12:15 P.M. (Breakfast Included)
Sex, Drugs, & Ethics: Employment Litigation Trends & Developments
3 CLE Credit Available
(1 Hour Ethics)
SPONSORED BY: Employment Law Section
Join us for a discussion of these hot topics!
From Title VII sexual harassment and discrimination to the medicinal marijuana, this CLE will satisfy an hour of ethics specifically geared towards potential traps for the employment law practitioner.

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Managing Partner of Blythe Grace PLLC
Christopher Houk
Counsel at Gillespie, Shields, Durrant & Goldfarb
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Of Counsel at Carpenter, Hazlewood, Delgado & Bolen
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NOVEMBER 8 • 12:30 P.M. - 3 P.M.
Paralegal & Public Lawyers: $90/$105
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NOVEMBER 9 • 7:30 - 9 AM
(Breakfast will be available)
Practical and Ethical Issues in Representing Clients with Diminished Capacity
1.5 Ethics CLE Credit Available
SPONSORED BY: EPPT section
All lawyers regardless of their area of practice need to understand the challenges and strategies related to representing a client whose disability diminishes their capacity to evaluate information and make informed decisions.

- How do you determine whether and to what extent a client has diminished capacity?
- What is the impact of the client’s disability on the lawyer’s representation?
- What are the lawyer’s ethical duties and considerations in representing a client with diminished capacity?

PRESENTERS:
Stacey Johnson
Of Counsel, Fennemore Craig
Hillary P. Gagnon
Attorney, Jennings Haug Cunningham

COST: (Early Bird Pricing/Regular Rate):
Early Bird ends November 7, 2017
MCBA Members: $90/$105
MCBA Family Law Section Members: $120/$130
EPPT Section members: $65/$80
Non-Members: $125/$140
MCBA Student members: $15/$15
MCBA Sustaining members: Free
Please email: CLE@maricopabar.org to register your paralegal for $30 (early bird rate) or $45 (regular rate)

NOVEMBER 9 • 9 A.M. - 12:15 P.M.
Sex, Drugs, & Ethics: Employment Litigation Trends & Developments
3 CLE Credit Available
(1 Hour Ethics)
SPONSORED BY: Employment Law Section
Join us for a discussion of these hot topics!
From Title VII sexual harassment and discrimination to the medicinal marijuana, this CLE will satisfy an hour of ethics specifically geared towards potential traps for the employment law practitioner.

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Shayna Fernandez Watts
Associate Attorney at Ballard Spahr LLP

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Paralegal & Public Lawyers: $90/$105
Division members: $90/$105
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DECEMBER 8 • 8 - 10:30 AM
Breakfast will be available
Understanding Safe Harbor and the Alphabet Soup of Family Court Resources
2.5 CLE Credit Available
SPONSORED BY: Family Law Section
Have you ever had a therapist refuse to provide sevices because they were afraid to “get involved” in Family Court? How do you balance the interests of parents’ rights/due process against a child’s right to have his own safe harbor therapist? Are you lost in the sea of FCA (Family Court A renown)? Have you wondered the difference between CFE and FA, BIA and CAAR or are you confused if a PC means a Parent Conference or Parenting Coordinator? Understanding Safe Harbor counseling and the alphabet soup of family court resources - can make or break a case.

PRESENTERS:
Diana Vigil, PPC, R.P.T., Child Therapy AZ
David Weinstock, J.D., Ph.D., Forensic Counseling & Evaluations
Gregg R. Woodnick, Esp.
Woodnick Law PLLC

COST: (Early Bird Pricing/Regular Rate):
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MCBA Student members: $15/xxx
MCBA Sustaining members: Free
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Arizona Supreme Court Approves Rewriting of Rules of Criminal Procedure

PHOENIX – As part of its annual review of proposed changes to court rules, the Arizona Supreme Court has approved a comprehensive restyling of the Arizona Rules of Criminal Procedure. These rules govern criminal cases filed in courts throughout Arizona.

The amendments reflect the first comprehensive revision of Arizona’s criminal rules since 1973. They are largely based on recommendations made by the Criminal Rules Task Force, which Chief Justice Scott Bales established at the end of 2015 with the charge of identifying possible changes that would help clarify and simplify the rules.

The 20-person committee, chaired by Judge Joseph Welty, Associate Presiding Judge of the Maricopa County Superior Court, included lawyers, judges, and court personnel from throughout Arizona. Working extensively over nearly eighteen months, the Task Force sought input from various stakeholders and the Commission on Victims in the Courts before submitting its final recommendations to the Arizona Supreme Court this past summer.

Chief Justice Bales praised the Task Force’s work, noting, “Arizona’s court rules should promote the just resolution of cases without unnecessary delay or complexity. Rewriting the rules to achieve these goals is tremendously difficult, and the Task Force members and court staff did an extraordinary job that will improve justice across our state.”

The revised rules generally become effective on January 1, 2018. In addition to restyling prior rules, the revisions also make certain substantive changes, including:

- Rule 6.3 regarding a lawyer’s withdrawal from a case;
- New Rule 6.7 regarding the appointment of investigators and expert witnesses;
- Rule 15.1 regarding disclosure of expected expert testimony;
- Rule 16.3 regarding pretrial conferences; and,
- Rule 39 regarding the rights of victims to be heard and to be represented by counsel.

The restyling of the Arizona Criminal Rules of Procedure furthers one of the goals of the Arizona Supreme Court’s Strategic Agenda. Similar restyling projects have been completed for the Arizona Rules of Civil Procedure, the Rules of Civil Appellate Procedure, the Rules of Protective Order Procedure, and the Justice Court Rules of Civil Procedure. A Family Law Rules Task Force is now reviewing the family law rules with the goal of submitting proposed amendments in January 2018.

To learn more about Arizona’s judiciary, visit www.azcourts.gov. Follow us on Twitter @AZCourts or on Facebook at https://www.facebook.com/ArizonaSupremeCourt.
Statutory presumption

CourtWatch, continued from page 1
ten months after the marriage is terminated...” Bales concluded that its presumption of paternity “refers to a father’s legal parental rights and responsibilities rather than biological paternity.” He noted that, other than a statute establishing financial obligations, “Arizona does not have any statutes addressing parental rights... in cases of artificial insemination.”

In a case of artificial insemination by an anonymous donor, Bales noted, the Arizona statute presumes a male spouse in an opposite-sex marriage to be the legal parent of a child born to a marital partner—namely, adoption whereas a male spouse in an opposite-sex marriage can either adopt or rely on the marital presumption to establish his legal parentage.” As written, then, the statute “excludes same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”

Concurring, Bales wrote, “inherently concluded that `biology—the biological difference between men and women—is the very reason the `[paternity] presumption` statute exists.” Rather, “the marital presumption requirement does more than just identify biological fathers.” And Arizona could not deny that statutory benefit to women in same-sex marriages.

So, what to do with the unconstitutional statute? “When a statute grants benefits but violates equal protection,” Bales wrote, there are two alternatives. The court may either nullify the statute, thus depriving its benefit “to the class that the legislature intended to benefit.” Alternatively, the court “may extend the coverage of the statute to include those who are aggrieved by exclusion. The choice depends on legislative intent, the court noted and concluded that the Legislature would have chosen to extend the benefits.

One of the statute’s primary purposes, he wrote, was “to ensure that children have financial support from two parents.” Nullifying it “would only undermine this important governmental objective,” he concluded. “Because men in opposite-sex marriages are presumed to be legal parents through the marital presumption, eliminating this presumption would increase the likelihood that children born to opposite-sex parents lack financial support from two parents.”

“Extending the presumption, on the other hand, would better ensure that all children—whether born to same-sex or opposite-sex spouses—are not impoverished.” Bales also concluded that extending the statutory benefits would further another statutory objective: promoting the family unit.

He noted that “the marital presumption seeks to ensure a child has meaningful parental time and participation from both parents.” Extending its benefits would allow children born to same-sex spouses to “know that both will have a legal parental relationship with both parents even in the event of a dissolution of marriage.” Nullifying the statute, by contrast, “would only impose these harms on children of opposite-sex spouses.”

Bales also noted that Bales’s opinion “favored” the presumption of paternity. Kimberly had “rebutted” Suzan’s presumption of paternity. “[T]he undisputed facts unequivocally demonstrate that Kimberly intended for Suzan to be E's parent, that Kimberly conceived and gave birth to E, while married to Suzan, and that Suzan relied on this agreement when she formed a mother–son bond with E, and parented him from birth,” he wrote. Holding otherwise “would be patently unfair.”

Justice Clint Bolick agreed that the Supreme Court “unequivocally forbids states from denying parenting rights to members of same-sex couples on an equal basis with opposite-sex couples,” and that “the facts and equitable considerations make a compelling case for Suzan to have parenting rights.” He nonetheless declined to join in rewriting the statute, which he called “unnecessary, unwise, and beyond the proper scope of judicial power.”

“It is not the presumption that statute that is unconstitutional,” he wrote, “rather the absence of a mechanism to provide parenthood opportunities to single-sex couples on equal terms appropriate to their circumstances.” Thus, “the `paternity statute does not offend the Constitution,” and “no basis exists for the Court to `extend’ the marital presumption ‘benefit,’ which has the necessary consequence of transforming the nature of the statute and rendering it incoherent.”

“It is the legislature, not this or any court,” Bolick wrote, “that should determine how best to write or rewrite family law statutes in a constitutionally compliant manner that makes sense of the entire scheme.” “The State should be made a party to the lawsuit to enable the Court to properly evaluate and determine appropriate remedies,” he concluded.

Bales disagreed. Bolick—he wrote—“acknowledges that, under Obergefell and Pavan, a state must afford `parenting rights to members of same-sex couples on an equal basis with opposite-sex couples.” Honoring that constitutional requirement required “holding that Suzan must enjoy the same presumption of parenthood under § 25:814(A)(I) as would a husband in an opposite-sex marriage.” Quoting the Supreme Court, he wrote that “when the `right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.”

“[T]he courts must make such a choice does not reflect impermissible judicial `re-writing’ of a statute,” he wrote. “[I]ndeed, having invoked a statute that speaks to a single-party Protection Clause would abridge the court’s responsibility to uphold the Constitution.”

Justice John R. Lopez IV wrote a separate concurring—joined by Vice Chief Justice John Pelander—specifically to address the dissent. “Contrary to Justice Bolick’s concern,” he wrote, “the Court neither rewrites the statute nor improperly assumes the legislative prerogative. Instead, faced with a statute that [... no longer can be constitutionally applied to only opposite-sex marriages, the Court necessarily and reasonably extends the statute to the same-sex couple here.”

Lopez’s separate concurrence raises a peculiar procedural issue. All seven justices agree that the basic premise; their only disagreement was in the remedy. Lopez’s concurring opinion expressed his and Pelander’s disagreement with Bolick’s dissent on that point. But Bales’s opinion did so, too. And while Lopez expressed no explicit disagreement with Bales’s opinion, neither did he expressly join it. Why not?

A possible answer lies in sub silentio differences. Lopez saw Pavan as extending the Obergefell holding: “We have not extended Obergefell; rather, the United States Supreme Court did so in Pavan, the recent opinion that not only expands on Obergefell, but also forecloses debate on the breadth of that decision and dictates the outcome here.” Hence, Lopez seems to suggest that but for Pavan, the outcome might have been different.

Bales, on the other hand, evidently did not need Pavan: Obergefell sufficed on its own because it already spoke in expansive terms. “Pavan,” he wrote, merely “confirms our interpretation of Obergefell.”

This might read too much into the situation. On the other hand, the two opinions seem comparably enough that one must wonder: why these justices—who seemed to pretty much agree with each other—could not unite on a single opinion.
Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following 19 attorneys and firms for agreeing to provide pro bono representation on cases referred by VLP to help people with low incomes. VLP supports pro bono service of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, donated services from professionals, training, materials, mentors and consultants. Each attorney receives a certificate from MCBA for a CLE discount. For information about ways to help, please contact Pat Gerrich at VLP at 602-254-4714 or pgerrich@clsaz.org.

Maricopa County Bar Association

By Peggi Cornelius

VLP Programs Coordinator

Even for those whose income is at or below 125% of poverty level, difficulties associated with federal income taxes can pose a problem. In efforts to assist them, Community Legal Services (CLS) offers a Low Income Taxpayer Clinic (LITC), directed by staff attorney Bree Stamper-Gimbar. As CLS celebrated its 65th anniversary on October 19, 2017, LITC volunteers were among honored recipients of the Volunteer Lawyers Program (VLP) “For Love of Justice” pro bono awards.

Explaining free services she and LITC volunteers may offer to those who are eligible for assistance from CLS/VLP, Stamper-Gimbar says, “The LITC acts as a navigator between the Internal Revenue Service (IRS) and the taxpayer. In some cases, we represent individuals in disputes that include audits, appeals, collection matters, and federal tax litigation. We also help taxpayers respond to IRS notices, correct account problems, and learn about their rights and responsibilities. Our role is to advocate on behalf of low income taxpayers, especially those for whom English is a second language. Although the LITC receives 90% of its funding from the IRS, LITC employees and volunteers are completely independent of the IRS.”

Stamper-Gimbar notes the LITC depends largely on volunteers, including attorneys, CPAs, enrolled agents, and law students and externs she mentors. The volunteers who received “For Love of Justice” awards for their outstanding contributions to the LITC were attorney Mathew Sorensen; Thomas Rex, CPA; Don Jensen, Director of Financial Stability at Mesa United Way, and the Mesa VITA Program.

Attorney Mat Sorensen, of Kyler Kohler Ostermiller & Sorensen, LLP, became an LITC volunteer as a law student at the University of Maryland. He credits Stamper-Gimbar for making it easy and pleasurable to volunteer in the LITCA here, saying, “I’ve been working on a tax court case with Bree and Tom Rex. This important case involving the possible taxation of settlement proceeds has broad application to many persons who were put into a difficult financial position after losing a home to an improper foreclosure.”

CPA and certified tax court practitioner Thomas Rex lives and works in Tucson, Arizona. He became an LITC volunteer in Tucson a year before the events that engaged him in Phoenix in 2014. He recalls, “I was attending a Tax Court Calendar Call, and at one point the Judge said to the petitioner that he really needed counsel, and looked at me sitting there all dressed in a suit. I shook my head ‘no’, but later went to talk with IRS counsel. They referred me to Bree. Among many appreciative people I’ve been able to assist through the LITC, I remember a retired artist who sent me a small watercolor painting as a thank you card.”

Don Jensen is an enrolled tax agent who serves as a liaison between the LITC and the Mesa VITA (Volunteer Income Tax Assistance) Program at United Way Mesa. He emphasizes that he shares the honor of recognition with nearly 100 volunteers who prepare tax returns year-round. In one recent case, he reports, “We corrected six years of improperly filed tax returns for a single, hard-working, mother. She had received very poor advice and tax preparation service from multiple preparers. We were able to save her over $10k in tax payments plus associated penalties and interest.”

The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association.

**PRO BONO SPOTLIGHT ON CURRENT NEED**

Volunteer lawyers and law students are needed to assist working poor families who need to file Chapter 7 bankruptcy to stop loss of their limited wages. If you can help or recommend someone, please contact Pat Gerrich at pgerrich@clsaz.org.

The Volunteer Lawyers Program provided $3,285,147 in economic benefit to families through cases completed during 2016. Thanks to all who participated and supported VLP!
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