



FAMILY LAW SECTION NEWSLETTER

July 2014

In this edition:

"CONSIDERATIONS IN DETERMINING INCOME FROM SELF-EMPLOYMENT" BY LAURA LEOPARDI, CPA

EDITOR'S COMMENTS

If you would like to submit an article for the next newsletter, please contact Kellie Wells at kwells@padishwells.com.

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The views in this newsletter are those of the contributors and editors and do not reflect the official policy of either the Maricopa County Bar Association or the Maricopa County Superior Court.

ANNOUNCEMENTS



COMMITTEE ON THE REVIEW OF SUPREME COURT RULES GOVERNING PROFESSIONAL CONDUCT AND THE PRACTICE OF LAW ESTABLISHED BY ADMINISTRATIVE ORDER No. 2014 - 66

(portions of the order below, for complete text please refer to the order)

The changing practice of law poses new ethical questions and invites review of certain court rules governing the practice of law. Over the past decade, e-commerce and other developments have enabled businesses to deal with customers and suppliers globally. Lawyers similarly have expanded their practice beyond traditional geographical boundaries.

Supreme Court rules in Arizona and elsewhere regulating the practice law are largely based on a lawyer's physical location. This regulatory model should be examined and the rules updated to ensure that the public is protected and the rules do not impose unnecessary barriers to the delivery of legal services. Rules governing conflicts of interest, for both private and public lawyers, should also be reviewed and, if necessary, clarified.

Purpose. The Committee shall examine the Rules of the Supreme Court on professional conduct and the practice of law to determine if changes are desirable in light of

- a) changes proposed by the American Bar Association's Commission on Ethics 20/20;
- b) the changing nature of legal practice in a technologically-enabled and connected workplace; and
- c) the growing trend of multi-state and international practice of law.



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JUVENILE COURT NEWS



Proposed Parent Representation Standards

A committee of the Court Improvement Advisory Workgroup has developed and proposed standards for attorneys and guardians ad litem representing parents in juvenile dependency matters.

To read the proposed practice guidelines visit
<http://www.azcourts.gov/improve/Home.aspx>

**To provide comment on any/all of the nine proposed standards, go to
<https://www.surveymonkey.com/s/AttorneyStandards>.**

Comments should be submitted by close of business on **July 31, 2014**.



- **News from the Clerk (“The Brief”)**

The following articles are provided by Michael K. Jeanes, Clerk of the Maricopa County Superior Court. For additional information, contact: Chief Deputy Clerk, Chris Kelly: **602-506-2309**



June 2014

(602) 37-CLERK – The Clerk’s New Number Up and Running

Thank you for your patience and response to the Clerk’s new, all-purpose telephone number for the public. The 37-CLERK number (602-372-5375) went into effect May 19, 2014. The Interactive Voice Response (IVR) system allows the public to reach most areas of the Clerk’s Office by dialing one number. Menu choices route most customers to their destination within three button presses. The IVR system was planned with the dual purpose of improving customer service while keeping down the costs of managing over 1,600 phone calls each business day. Callers can now reach business units within the Clerk’s Office by calling the 37-CLERK main telephone number (602-372-5375). Thank you for your support of our new system.

Fees Reminder

When determining what fee applies to a filing, please check the Clerk’s website. When possible, the Clerk’s Office posts an updated list of fees before they take effect. Effective dates are referenced on the website, included as a topic in The Brief, and sent through the Clerk’s social media sites on Facebook and Twitter. Fees specific to e-filing through AZTurboCourt are maintained in the AZTurboCourt system.

The base filing fees listed in Arizona Revised Statute (A.R.S.) §12-284 have not been updated in many years. A.R.S. §12-284(L) authorizes the Supreme Court to increase the base fees using a Consumer Price Index formula. Fee modifications are implemented by Administrative Orders that amend the Arizona Code of Judicial Administration (ACJA). Superior Court fees are referenced in section 3-404 of the ACJA. Case-type fees, such as conciliation fees in family court cases, are added to the base fees. In addition, A.R.S. §11-251.08 authorizes each county to approve local fees after a public hearing. Maricopa County has done this in the past to improve several court functions, such as automation and electronic document management. The various fees from all sources are then posted on the Clerk’s website as a combined total amount. View the latest fees online at <http://www.clerkofcourt.maricopa.gov/fees.asp>.



LAW PRACTICE TIPS



If you have a law practice tip you would be willing to share, please send it to the Family Law Section newsletter, c/o Laurie Williams (MCBA Representative) at:

lwilliams@maricopabar.org

When submitting a law practice tip, please let us know if you would like your name included or not.



Overpayment of support: How do you get your client's money back?

Pursuant to A.R.S. § 25-527:

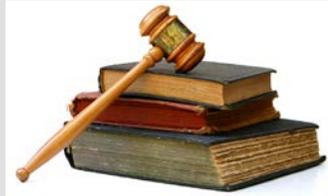
- A.** An obligor whose obligation to pay support has terminated may file a request for reimbursement against the obligee for support payments made in excess of the amount ordered. The obligor must file the request with the clerk of the superior court within twenty-four months after the termination of the obligation.
- B.** The court may enter a judgment for reimbursement against the obligee if the court finds that the obligor's obligation to pay support has terminated and that all arrearages and interest on arrearages have been satisfied. The court shall send a copy of the judgment to the department or its agent for title IV-D cases.
- C.** The obligee must pay the judgment directly to the obligor and not through the clerk of the superior court or the support payment clearinghouse.

D. A judgment entered pursuant to this section does not constitute a support judgment and is enforceable only in the same manner as a civil judgment.

Sylvina Cotto



ARTICLES & CONTRIBUTIONS



CONSIDERATIONS IN DETERMINING INCOME FROM SELF-EMPLOYMENT

By Laura S. Leopardi, CPA/ABV/CFF, MBA

An important point to recognize between publicly-traded and private businesses is their bottom line objective. One key financial objective of publicly-traded companies is to *maximize* year-to-year net earnings, which drives up stock prices. Investors see companies with strong, consistent historical profitability track records as attractive and less risky investment opportunities. Conversely, a key financial objective of private businesses is to *minimize* taxable net income with deductions permissible by the Internal Revenue Service in order to reduce income tax liabilities.

Reasonable Compensation

Private business owners may compensate themselves in various ways depending upon the corporate structure they elect. Officers of a corporation are generally employees with W-2 wages subject to FICA, Medicare, Federal, State, and possibly City income tax withholdings. The question of what is *reasonable compensation* inevitably arises. The I.R.S. can adjust taxpayer's tax liabilities if an officer is *substantially underpaid* for services provided. The I.R.S. uses a two-prong test for deducting pay—the pay must be reasonable and it must be for services performed. *I.R.S. Publication 535 (2013), Business Expenses*, states “*To be deductible, your employees' pay must be an ordinary and necessary business expense and you must pay or incur it.*”

Considerations in determining the level of reasonable compensation include the efforts contributed to conducting the trade or business, the level of wages *commensurate* with duties performed, and industry standards and benchmarks of average compensation paid for various types of services. Efforts can be assessed by the volume of business handled, the character and amount of responsibility, the complexities of the trade or business, and the amount of time required. Finance professionals providing litigation support services

typically subscribe to several independent sources of compensation upon which to rely on when forming their conclusions and opinions. Other considerations include cost of living, the ability and achievements of the individual performing the services, the pay compared with the gross and net income of the business as well as with corporate dividends or distributions to shareholders, corporate policies, and historical practices. The second test requires proof of payment for services performed.

Dividends/Distributions

Earnings may be paid to business owners, either annually or more frequently, in the form of dividends (to corporate shareholders of record) or distributions (to partners in a partnership or shareholders of S Corporations). Typically, there is a corporate resolution documenting the date and amount the dividend is declared and paid. *Undistributed earnings* should be reviewed and analyzed to assess the viability of being considered as a component of compensation, especially in businesses *solely owned* by the community or they are truly retained as working capital to fund day-to-day business operations.

Deferred Compensation

Some companies elect to have an employee benefit plan enabling employees to defer part of their compensation until retirement age. Non-qualified deferred compensation plans are an employer's unsecured contractual commitment to pay employee compensation in future tax years to a select management group or highly compensated employees. Certain plans have both a salary deferral and profit sharing portion to deferred compensation. According to plan documents and as allowable by law, employers may match part of employee contributions. Investment practices in pension plans have allowed funds to be invested in private company stock, referred to as *nontraditional investments*. Some plans allow loans against deferred assets. Other forms of non-qualified deferred compensation include incentive stock options, restricted stock, stock appreciation rights, and phantom stock.

Shareholder Loans

Some business owners tend to *borrow* money from the company on a short- or long-term basis. A key consideration here is the *intent to repay*. The I.R.S. looks for a fully executed formal promissory note with the principal amount borrowed and terms of repayment, including a stated rate of interest, payment schedule, and maturity date. The I.R.S. publishes Applicable Federal Rates, referred to as *AFRs*, on a monthly basis. <http://apps.irs.gov/app/picklist/list/federalRates.html> AFRs are required minimum interest rates for related party transactions such as loans to shareholders. Often, there is no note, no interest rate, no historical payments, and...no intent to repay. Annual increases in shareholder loans may be construed to be business owner compensation.

Payments From Affiliate Entities

A typical scenario in Arizona is an owner-occupied community business paying rent (which may or may not reflect market value) to an affiliate entity, such as a real estate holding company. This reduces the taxable net income of the community business while also mitigating business liability from real property ownership. Owners of real estate holding companies are normally compensated for their administrative and property management services in the form of a management fee.

Wages To A Nonworking Spouse

Wages paid to spouses of business owners *not actually working* in the business but intended to earn social security and medicare credit are *disallowed by law* and can be construed as compensation of the working spouse.

Perquisites

Travel, meals, entertainment, health insurance, vehicle loan or lease payments, and other vehicle related expenses are all categories of expenses that can be material and construed to reduce personal living expenses.

Child Support Guidelines

The *Arizona Child Support Guidelines Adopted By the Arizona Supreme Court Amended By Administrative Order No. 2011-46 Effective June 1, 2011* is an excellent resource when analyzing Gross Income From Self-Employment. Specifically, §5.C. and §5.D. *Determination of the Gross Income of the Parents* delineates components of income from self-employment including income from rents, royalties, proprietorship of a business or joint ownership of a partnership or closely held corporation. Regarding perquisites, expense reimbursements or benefits received by a parent in the course of employment or self-employment or operation of a business shall be counted as income if they are significant and reduce personal living expenses. Permissible deductions from Gross Income include *ordinary and necessary* expenses required to produce income, which include one-half of self-employment taxes *actually paid*. The concepts of unemployment or underemployment are addressed in §5.E. and are also pertinent considerations as is a productivity adjustment to business owners in relation to their industry counterparts.

Laura S. Leopardi, CPA/ABV/CFF, MBA is Managing Member of LAURA S. LEOPARDI, CPA, PLLC and serves private business owners and their professional advisors. Laura is a testifying expert witness in family law cases including business valuation, income from self-employment, lifestyle analysis, and commingling issues. Laura can be reached at 602.595.3962 or lleopardi@leopardivaluation.com.

LEGISLATIVE UPDATE



There are no legislative updates to provide in this edition, as the legislature is currently adjourned. The last major issues that arose before adjournment were those related to what was then Child Protective Services. The department is now called the Division of Child Safety & Family Services. On April 7, 2024 the governor passed her 9.2 billion dollar budget for the new division. While this is intended to restructure and improve the manner in which child safety and welfare cases are handled, there has been little done by way of departmental changes and/or mandated report or investigation changes. Please keep an eye on www.azgovernor.gov/CPS/ and www.azleg.gov for any press releases or additional information during this adjournment period. We will provide legislative updates as usual once our legislators reconvene.

Andrea Mouser



NEW ARIZONA CASES



■ Abbreviations Used

Please note the following abbreviations commonly used in the analysis of the cases that follow:

| | | | | | |
|------|-----------------|-----|---------------------|-----|---------------------|
| C/A | Court of Appeal | H | Husband | P/T | Parenting Time |
| T/CT | Trial Court | W | Wife | ARS | AZ Revised Statutes |
| S/C | Supreme Court | S/M | Spousal Maintenance | C/P | Community Property |
| F | Father | C/S | Child Support | S/P | Separate Property |
| M | Mother | C/C | Child Custody | | |

Case reviews are provided by members of the Board of Directors of the Family Law Section.



Basic Information

Case/Cite Smith v. Smith, 1 CA-CV13-0330

Procedural History/Facts

Mother filed for divorce and in the petition alleged the parties had agreed to spousal maintenance of \$4,000 per month until remarried. Father signed an acceptance of service, but failed to respond and after a default hearing a decree was entered dissolving the parties' marriage.

At a default hearing, Mother awarded \$3,500 per month in spousal maintenance. Father paid some of the money; however, Mother later filed a Petition for Contempt claiming Father was \$80,000 in arrears. Father filed a Petition to Terminate spousal maintenance asserting a change in circumstances and a Motion for Relief from the Decree stating that Mother has falsely declared she had mailed the Application for Default to Father making her award void and that it should be terminated.

After an evidentiary hearing, the court found Mother had not properly mailed the Application for Default to Father and found the judgment establishing spousal maintenance void and denied Mother's Petition for Contempt.

Father later filed a Petition to Enforce the Decree and sought to recover spousal maintenance previously paid to Mother. The court denied Father's request because he had only requested

spousal maintenance be terminated in his previous petition and not set aside and that he has now waived his right to seek such relief.

Father timely appealed.

Ruling

A key issue was whether the Decree containing the spousal maintenance requirement was void or merely voidable. The superior court cited Rule 29 in finding that Father waived any right to seek recovery of spousal maintenance by failing to raise the issue in his Motion for Relief. The motion is not a pleading and should have been governed by Rule 35. Rule 29 does not support a finding that Father waived his right to seek recovery of spousal maintenance from Mother.

Ruling:

The Decree was voidable (not void) and the parties have now waived any challenges they had to the validity of the Decree. But, the ruling finding Father waived his right to recovery of spousal maintenance under Rule 29 is vacated and the matter is remanded for further consideration of Father's Petition for Enforcement and issues relating to spousal maintenance.

Basic Information

Donna J. Peace

Edward D. Peace, Sr.

Case/Cite

2014 WL1884868 (Ariz.App.Div.1)

Procedural History

F appeals from T/CT's order modifying parenting time and finding him in contempt of court for unpaid costs, attorneys' fees and child support.

Ruling

Affirmed in part, reversed in part.

T/C modified parenting time to reflect the changed habits of the parties and because of F's housing instability. The modification required the parties to alternate Christmas day every year. F argued that the modification of the Christmas holiday parenting time violated the Establishment Clause of the First Amendment by listing Christmas as a visitation day to the exclusion of the holy days of F's professed Baha'a' Faith. F' argument, however, was belied by the mediation agreement he had previously signed in which the parties specifically agreed to a Christmas schedule and F did not express any concerns about Christmas in the mediation agreement. F also argued that the Order violated the Arizona Free Exercise of Religion Act because it did not grant him visitation during the holy days of the Baha'a' Faith. The C/A disagreed. Though the Order did not guarantee that F would be able to celebrate

the Baha'a' holy days with his children, it also did not bar him from doing so.

F argued that the children's social security benefits should have off-set the child support arrearage owed and therefore should have mitigated any claim of contempt. However, the arrearage accrued in 2009 and the benefits were not received until 2010. The C/A disagreed with F.

F argued that the T/C failed to consider his PTSD when finding that he was voluntarily under-employed. However, the T/C expressed doubt that F suffered from PTSD and, as such, the C/A deferred to the T/C's determination as to credibility of F.

In a contemporaneously published opinion, the C/A separately addressed F's argument related to the T/C's order and judgment for \$13,000 of social security benefits paid to F as a representative payee on behalf of the minor children.

Basic Information

Due Date 7/3/2014

Case/Cite Michaelson v. Garr, (Ariz. App. 2014). Filed: 5/6/2014. Case no: 1-CA-CV 13-0302

Procedural History

Appeal from Cause No: FN2012-003403, heard by the Honorable Lisa M. Roberts, Judge Pro Tempore

Defendant appealed T/Ct's continuance of an Order of Protection.

Case Summary

Facts: Plaintiff ended her engagement with Defendant, and a month later, she sought and was awarded an ex parte order of protection. Five months later, Defendant requested and received a hearing. Defendant argued that the T/Ct erred by continuing the OOP because there was "no specific allegation of domestic abuse." He also claims the order preventing him from possessing firearms violates federal law.

Reviewing the T/CT's decision for an abuse of discretion, the C/A affirmed the OOP based on the following:

An OOP must be supported by a preponderance of the evidence that there is reasonable cause to believe the Defendant may commit an act of domestic violence. A.R.S. § 13-3602(E)(1), Ariz. R. Prot. Ord. P. 8(F). The T/Ct reviewed text messages sent to Plaintiff by Defendant and found that the text messages as well as his conduct by calling Plaintiff's employer and telling her later he knew when she was at work and at home was harassing. Plaintiff did not claim Defendant committed physical domestic violence. Because Defendant did not object to the printed out text messages, C/A found he could not object later. Defendant also objected to the T/Ct's exclusion of evidence that he was getting married in a few months, and C/A upheld

T/Ct's exclusion of that evidence as irrelevant to the OOP obtained months earlier. Defendant's argument that the order preventing him from possessing firearms violated federal law because he did not qualify as an "intimate" partner was not enough. C/A found that a T/Ct can prohibit weapons' possession via state law if the Defendant is a credible threat to the safety of the plaintiff. A.R.S. § 13-3602(G)(4).

