MCBA

MARICOPA COUNTY BAR ASSOCIATION

FAMILY LAW SECTION NEWSLETTER

October 2015

In this edition:

An Interview with Judge Ryan-Touhill

EDITOR'S COMMENTS

The family law section is looking for new and not so new lawyers to participate in the MCBA mentoring program. See page 8 for more details.

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Editors: Sylvina Cotto, Jennifer Kupiszewski, Annette Cox, Dori Eden, Kristi Morley, and Sara Swiren.

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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

Trying to keep up with the new family court judges . . .

At the Southeast facility in Mesa:

The Hon. Laura Reckart will be taking over the family court division currently covered by Comm. Justin Beresky at SEF. Judge Reckart is a twenty year veteran Deputy County Attorney and is currently assigned to their Capital Litigation Bureau.

The Hon. Ted Campagnolo has assumed the family court calendar formerly assigned to the Hon. Bethany Hicks. Prior to his appointment, he was Senior Litigation Counsel in the Fraud and Special Prosecutions Section of the Arizona Attorney General's Office. He was a Deputy Maricopa County Attorney before joining the AG. Before he became a prosecutor, Judge Campagnolo spent several years in the private sector, practicing in Texas in the areas of civil litigation, business law, family law, and probate law. Judge Campagnolo earned both a Bachelor of Arts with Honors and a Juris Doctorate from Southern Methodist University.

The Hon. Jeffrey Rueter has assumed the calendar formerly assigned to Judge Dunn. Prior to his appointment, Judge Rueter served as a Superior Court Commissioner for seven years. Before Judge Reuter became a commissioner, he was an Assistant Attorney General; he was a Deputy Maricopa County Attorney before then. Judge Rueter earned a Bachelor of Science in Business

Administration from the University of Nebraska and earned his Juris Doctorate from Arizona State University.

The Hon. Stephen Hopkins will assume the calendar being temporarily covered by retired Judge Penny Willrich (previously Judge McMurdie's calendar). Judge Hopkins spent thirty years in civil practice. Before opening his own law firm in 1995, Mr. Hopkins was a trial lawyer at Snell & Wilmer, L.L.P. for 10 years. He has practiced in the areas of construction, real estate, commercial, corporate and tort litigation. He is licensed to practice both in Arizona as well as Nevada. He received his Bachelor of Arts in Political Science from Knox College and his Juris Doctorate from the University of Kansas, School of Law.

Downtown:

The Hon. Ronee Korbin Steiner has assumed the family law calendar formerly covered by Comm. Jackie Ireland. She is in the Central Court Building. Judge Korbin Steiner has been a long-time family law practitioner and was a founding partner at Korbin Steiner & Marquis. She has served as an adjunct faculty member at the Phoenix School of Law, a parenting coordinator, and Judge *Pro Tempore* for Maricopa County. She is a member of numerous professional organizations, including the Maricopa County Bar Association, the Women's Law Association, the Scottsdale Bar Association, and the Board of Family Law Specialization. She has been published in the Family Law Newsletter and has spoken at numerous CLE events. Judge Korbin Steiner graduated *cum laude* from the Ohio State University and received her Juris Doctorate from Temple University.

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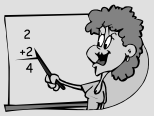
MCBA FAMILY LAW CLE



What Every Family Lawyer Should Know About the Service Member Civil Relief Act (SCRA)

Program Summary:

This CLE will navigate the family law practitioner with regard to the Service Member Civil Relief Act. The course will provide information on who can invoke the Act, when it is proper for a military member to invoke this Act and the proper procedure for invoking the same. With the large population of active duty military members in the Maricopa County area it is good practice to know this Federal Act and how to properly use it.

Presenters: **Rebecca L. Owen, Esq. – Rebecca L. Owen, PLLC**

Date: November 12, 2015
Program: Noon to 1:30 pm.
Location: Maricopa County Bar Association
303 E. Palm Lane
Phoenix, Arizona 85004

MCBA Family Law Section 2015 Annual Judges and Commissioners Reception

Date: December 2, 2015
Program: 5:30 pm -7:30 pm
Location: Maricopa County Bar Association
304 E. Palm Lane
Phoenix, Arizona 85004

Please RSVP if plan to attend rsvp@maricopabar.org

SAVE THE DATE: December 9, 2015

"Help Me Help You:" Tips and Advice from Family Law JAs (CLE to be presented at the MCBA)

News from the clerk of the Maricopa County Superior Court

Michael K. Jeanes, Clerk of the Superior Court for Maricopa County

THE BRIEF

An electronic update for the legal community providing a brief look at news in the Clerk of the Superior Court's Office

Vol. 11, No. 6 **July 2015**

Marriage licenses

The U.S. Supreme Court's decision regarding marriage resulted in no change to the Clerks' processes for issuing marriage licenses. Since a federal Circuit Court of Appeals decision in October of 2014, the Clerks of Superior Court modified their application forms and licenses and have issued licenses without regard to the applicants' gender. The Clerk in Maricopa County does not track the number of same-sex versus opposite-sex applications for marriage licenses.

For information on how to apply for a marriage license, including fees, forms of payment, locations, and a video overview, see "Marriage Licenses" on the main page of the Clerk's website at http://www.clerkofcourt.maricopa.gov/.

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.

An interview with Judge Ryan-Touhill

1. What is your policy on resolving discovery issues? Can the attorneys call your JA and request a telephonic status conference or does a motion to compel need to be filed?

A Motion to Compel after good faith efforts to resolve the dispute sets out the issues and then neither side is surprised. In most cases a telephonic appearance is sufficient.

2. What is your policy on your JA returning calls/emails?

Email is fine: Eileen Clevenger eclevenger@superiorcourt.maricopa.com

3. Do you want a bench copy of exhibits?

Prefer a bench copy of exhibits because it helps to follow along. It's important to contact the division ahead of time get exhibit worksheet so that numbering on the bench copy matches the clerk's exhibit.

4. What can we, as attorneys, do to make your job easier?

- Case citations should be limited to case law important on narrow, unique, unsettled and specific issues. A whole string of general cases is not helpful.
- Use plain language.
- Use bullets points and other devices that make the position of the party clearer.
- When there is a case with lots of moving parts demonstrative exhibits are very helpful.
- Motions for reconsideration need to simply lay out the issue without being inflammatory or pejorative.

5. How important is the pretrial statement for you? Should that include arguments or do you only want position statements?

Preferably argument is limited similar to the case citations. A good clear and concise statement of the contested issues and each sides' positions is most important.

Set out clearly areas of disagreement bullet points and if it's a non-issue say so in the pretrial statement.

6. If a case is settled is a stipulated notice of settlement sufficient to vacate the trial or do want the signed completed agreement?

Must have notice of settlement filed before the hearing. The settlement itself doesn't have to be signed by the parties and submitted prior to the hearing.

7. If a hearing is being reset does your JA to contact the parties via email, do a telephonic conference or just issue an ME?

Once a motion to continue is filed the Judicial Assistant calls by phone or email and she coordinates the new date. The parties then must submit an order.

8. Do you automatically set an RMC or does a party have to request one?

It is set automatically once a response is filed. No request is needed.

Petitions to modify are automatically set for a return hearing.

9. Do you want counsel to email documents in Word format such as pre-trial statements to be used to draft ruling?

No only submit a Word file when the court requests it.

10. Do you expect the parties to attempt ADR before trial?

I expect the attorneys to do some settlement discussion but it doesn't have to be formal ADR.
Attorneys should attempt to narrow the focus for trial.
The parenting conference is probably the most common ADR used in this division.
Special Masters are also used in complex cases.

Mentoring Program in the works . . .

Because we recognize the value of fellowship with our esteemed colleagues, the Family Law Section of the MCBA Board is in the beginning stages of developing a mentoring program for current law students with an interest in family law, and lawyers in their first three years of practice. We are looking for experienced family law attorneys who may be interested in acting as mentors for this potential program. Although the specific details of the program have not yet been determined, if you might be interested in participating as a mentor in this program, please email Jennika McKusick at Jennika@ComplexDivorceLaw.com or Ashley Rahaman at Ashley.Rahaman@DeShonPullenLaw.com. Thank you!

ARTICLES & CONTRIBUTIONS

Occupational Reentrants in Marriage Dissolution

By Robert D. Dorney, MHS, CRC, LPC

America is a mobile society, and the mobility is evident in the jobs people hold. Adults born in the early 1980s held an average of 6.2 jobs from age 18 through age 26, according to the U.S. Department of Labor. At age 27 years of age, 54% of young adults are married or unmarried and living with a partner.

An economist with the U.S. Department of Labor's Bureau of Labor Statistics (BLS) once defined occupational entrants as persons who entered their current occupation from a different occupation. These entrants are the majority. The remainder, as measured by the Current Population Survey or CPS, were either unemployed or outside the labor force. Today, the BLS Glossary identifies "reentrants" as unemployed persons who previously worked but were out of the labor force prior to beginning their job search. A person outside the labor force would include individuals involved in a divorce proceeding and who had relied on a spouse for earnings and income.

In 1995-96, the leading occupations of occupational entrants (and reentrants) age 55 and older included cashiers at number one. Cashiering is often a first job for young persons.

Little has changed in the last 20 years (cashier has slipped to number 2) although the Bureau of Labor Statistics has recently refined its education and training classification system to include three categories of information to each detailed occupation (in the Standard Occupational Classification or SOC). The categories are:

- Typical education needed for entry
- Commonly required work experience in a related occupation, and
- Typical on-the-job training needed to obtain competency in the occupation.

Work experience in a related occupation is not required for most entry-level jobs, of course. Short-term on-the-job training (one month or less) and moderate-term on-the-job training (more than one

month and up to 12 months) make up 74% of occupations that typically require only a high school diploma or equivalent.

When occupational projections are updated every two years, BLS typically charts the 20 occupations that top various criteria. For example, the Winter 2013-14 Occupational Outlook Quarterly presents ready-reference charts for projections to the year 2022:

- Fastest growing occupations (percent growth in employment)
- Most new jobs (numeric growth in employment)
- Most job openings (due to growth and replacement needs)
- Occupations that have high growth and that typically require a high school diploma or equivalent to enter the occupation
- Bachelor's degree (occupations that have the most growth or job openings and have a bachelor's degree as the typical level of education needed to enter the occupation)
- Graduate degree (occupations that have the most growth or job openings and master's and above as the typical education needed to enter the occupation)

The BLS system is somewhat different from the Job Zones, developed by the Employment and Training Administration (ETA), for O*NET Online. The BLS system, however, adheres more closely to the skill level of occupations (unskilled, semi-skilled, skilled) as detailed in the Vocational Expert Handbook (1990), Office of Hearings and Appeals, Social Security Administration.

Here are the BLS education and training categories that can be matched to all occupations and wages in the Occupational Employment Statistics (OES) program that includes employment and wage estimates:

Typical education needed for entry—represents the typical education level most workers need to enter an occupation. The assignments for this category are the following:

- Doctoral or professional degree
- Master's degree
- Bachelor's degree
- Associate's degree
- Postsecondary non-degree award
- Some college, no degree
- High school diploma or equivalent
- Less than high school

Work experience in a related occupation—indicates if work experience in a related occupation is commonly considered necessary by employers for entry into the occupation, or is a commonly accepted substitute for formal types of training. The assignments for this category are the following:

- 5 years or more
- Less than 5 years
- None

Typical on-the-job training—indicates the typical on-the-job training needed to attain competency in the skills needed in the occupation. The assignments for this category are the following:

- Internship/residency
- Apprenticeship
- Long-term on-the-job training: more than 12 months
- Moderate-term on the job training: more than 1 month and up to 12 months
- Short-term on-the-job training: 1 month or less
- None

A Realtor's Fiduciary Duty to Your Client

By Chris Carter Kent

"We are divorcing and selling our jointly-owned marital residence. My husband is calling all of the shots, insisting on using the Realtor that he chose, and won't listen to what I want. What can I do?"

Many decisions need to be made regarding the sale of the marital residence. The decision process can be complicated by divorce. Odds are that the parties are in conflict about everything from wanting to sell, the list price, what repairs need to be made and who will pay, and which Realtor to use.

Once hired, the Realtor may feel caught in the middle, and gravitate toward one party to avoid the conflict. Usually the party that is easiest to get along with, or is calling the shots is the one that gets the attention, leaving the other party in the cold. Sometimes one party goes silent intentionally. Under all circumstances, both parties should be part of the entire process.

A Realtor has a fiduciary responsibility to both parties. Technically, only one party is required to sign the listing agreement, but it will take two signatures to close the deal on a home that is community property (assuming both names are on title). Some Realtors go the easy route and only have one party sign the listing agreement. The imperative first step, in my opinion, is to have both parties come to a mutually agreed upon Realtor, and jointly sign the listing agreement.

The listing agreement is an employment contract. It creates the Realtor's fiduciary duty to treat both parties fairly and equally. The parties should have trust and confidence that their Realtor is working in the best interest of both. Each party's legal rights when it comes to making decisions about listing, marketing and selling the property, must be protected.

It is always best-advised that the parties work together to resolve issues, and jointly interview and agree on a Realtor. Hopefully, they can come to an agreement based on the tips below. If not, meeting with their attorneys may be required to bring about resolution.

Tips to finding a Realtor during divorce. Does the Realtor:

*Have experience in divorce and conflict resolution?
*Have experience in the geographical area and price range?
*Have a solid marketing plan?
*Have a plan that will give both parties a voice?
*Have a neutral relationship with both parties?

It is best to use a neutral third-party Realtor, one that does not have a bias towards either party. For example, a friend or relative, while perhaps offering to save them money, may, in the long run, create problems due to an inherent bias.

Listing the marital home for sale and negotiating the sale is challenging in-and-of itself. Your client will have peace of mind if they have the right agent. They should use due diligence when choosing a Realtor. Remember, this person is working for them, and all parties need to trust in what the Realtor is doing.

Chris Carter-Kent
Your Transition Concierge
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Chris Kent is a trained Mediator and Realtor at Coldwell Banker Previews International Realty. She is experienced in all forms of ADR including Special Commissions and Special Master assignments and hearings. She is experienced in high-end, high-conflict real estate transactions. For additional tips on conflict resolution of real and personal property during divorce, please call Chris.

NEW ARIZONA CASES

Abbreviations (that might be) 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	K.D. v. State of AZ, Arizona Court of Appeals, Division 1. Filed: 9/24/2015. Case no: 1 CA-SA 15-0186

Procedural History

Appeal from Cause No: JD28153, JS17676, heard by the Honorable Kristin C. Hoffman

The minor child, Petitioner, appealed the T/Ct's ruling that she is not permitted to testify on the basis that the child in foster care has an absolute right to attend and testify in court in spite of what is in the child's best interests.

Case Summary

Facts: Parents of Petitioner were involved in dependency and termination adjudication hearings. On the

second day, Petitioner (a child) through her attorney requested to attend the proceedings and testify. Two mental health professionals advised the T/Ct that attending and testifying at the hearings would be contrary to Petitioner's best interest. T/Ct ruled, based on the child's best interests, it would not allow her to be present or testify at the hearings although it would reconsider her request at future hearings.

Reviewing the T/CT's decision on special action review and de novo, C/A upheld T/Ct's decision based on the following:

Petitioner argued she had an absolute right to attend and testify, and the T/Ct was not entitled to consider her best interests in denying her request pursuant to A.R.S. § 8-529. The Petitioner did not argue that the T/Ct abused its discretion in finding it was not in her best interest to attend or testify. C/A found that while Rule 41(B) of the Rules of Procedure for the Juvenile Court authorizes a child in foster care to attend and speak to the judge, Rule 36 directs that "all juvenile rules of procedure 'should be interpreted in a manner designed to protect the best interests of the child, giving paramount consideration to the health and safety of the child.'" C/A interpreted that to mean that Rule 36 requires the T/Ct to consider the child's best interests in permitting her to attend and/or testify during hearings. C/A also found that the legislative history revealed no intent to establish a new legally enforceable right by permitting a child in foster care to attend hearings and/or testify.

Petitioner was denied relief. T/Ct's rulings were upheld.

Basic Information

Vincent v. Nelson, 1 CA-CV 14-0541-FC (Ariz. Ct. App. 2015)

Procedural History

This is a family court relocation case considering how the 100-mile distance provision in Arizona Revised Statutes ("A.R.S.") section 25-408(A)(2) should be calculated. The issue is at what point in time the statutory radius should be measured—at entry of the decree or each time one of the parties seeks to relocate.

At the time Mother filed her petition for dissolution in November of 2008, both Mother and Father resided in Phoenix. Id. at ¶3. During a Resolution Management Conference in January of 2009, Mother informed the T/Ct she intended to relocate to Payson or Heber. Id. The T/Ct informed Mother she could not relocate the children more than 100 miles from her address in Phoenix without Father's consent or approval. Id. At the time of trial in May of 2009, Mother informed the T/Ct she intended to move to Payson—she had acquired a job and an apartment there, the distance to Payson was within the statutory radius of 100 miles from Mother's current zip code in Phoenix, and the children's quality of life would improve in Payson. The T/Ct allowed Mother's relocation to Payson with the children. Id. at ¶4. However, at the time the decree was entered, the decree was silent regarding relocation. Id. at ¶5.

After entry of the decree, from 2009 until 2013, Mother moved several times. Id. at ¶6. In 2013, after Mother moved to Lakeside, Father filed a modification petition and argued that A.R.S. § 25-408 should be invoked to disallow Mother's move to Lakeside. Id. After an evidentiary hearing, the T/Ct held Lakeside

was less than 100 miles from Payson and therefore, A.R.S. 25-408(A)(2) did not apply. Id. at ¶7.

Father appeals and argues "the court should have measured the mileage from Phoenix, where Mother resided when the May 2009 decree was issued, to Lakeside, where Mother now lives, resulting in a distance substantially exceeding 100 miles and triggering the provisions of A.R.S. § 25-408." Id. at § 8.

Ruling

The Court of Appeals affirmed the trial judge's decision and rejected Father's challenge.

The Court of Appeals considered and applied subsections (A) and (D) of A.R.S. §25-408:

> A. If by written agreement or court order both parents are entitled to joint legal decision-making or parenting time and both parents reside in the state, at least forty-five days' advance written notice shall be provided to the other parent before a parent may do either of the following:
>
> 1. Relocate the child outside the state.
> *2. Relocate the child more than one hundred miles within the state.*
> . . .
>
> D. Subsection A of this section does not apply if provision for relocation of a child has been made by a court order or a written agreement of the parties that is dated within one year of the proposed relocation of the child.

(Emphasis in original.) In a similar case, Thompson v. Thompson, 217 Ariz. 524, 176 P.3d 722 (Ct. App. 2008), the court held that "when subsection (D) renders subsection (A) inapplicable, the miles of the court-authorized relocation are exempt from future calculations under subsection (A). Id. at 526, ¶ 11. Here, "at the time Mother moved to Payson and later to Lakeside, there was a court order in place entitling both parents to custody or parenting time, thereby satisfying the initial requirement for application of § 25-408(A)." Id. at ¶ 10. "Under A.R.S. § 25-408 and Thompson, the family court correctly determined that the mileage from Phoenix to Payson is exempted from future calculations under § 25-408. In essence, the 'starting point' for application of § 25-408(A)(2) in the future became Mother's address in Payson." Id. at ¶ 14.

Practice Tips:

- A.R.S. § 25-408 applies when both parents are residents of Arizona and are entitled joint decision-making or parenting time.
- Serial non-court approved relocations were not addressed in this opinion. See footnote 5.

Basic Information

Case name/Cite: Robertson v. Alling, 351 P.3d 352 (2015)

Procedural History

The trial court enforced a settlement offer, made by the Alling Group's attorney (who lacked actual authority to make the offer), but that was timely accepted by the Robertson Group's counsel. The trial court held that Ariz. R. Civ. P. 80(d) did not apply, but if it did, the emails exchanged between counsel constituted a valid and binding Rule 80(d) Agreement. The Court of Appeals reversed the trial court's ruling (*Robertson v. Alling,* 235 Ariz. 329 (Ct. App. 2014)) finding that the requirements of Rule 80(d) were not met and remanded the case to the trial court to determine whether the Alling Group is equitably estopped from opposing enforcement of the settlement agreement.

The Supreme Court Reversed the Court of Appeals holding and affirmed the trial court's enforcement of the settlement agreement.

Ruling

The Supreme Court based its ruling on two issues: (1) The inapplicability of Rule 80(d) when the terms of an agreement are not in dispute; and (2) Reliance on an attorney's apparent authority to bind his or her clients to an agreement.

1. **Rule 80(d):** Rule 80(d) "serves to avoid collateral disputes between parties by requiring written evidence of any stipulations and agreements." *Robertson v. Alling*, 351 P.3d 352, 355 (2015)(*citing to Hackin v. Rupp*, 9 Ariz. App. 354, 355-56(1969). "If parties do not dispute the existence or terms of an agreement, no purpose is served by applying Rule 80(d)." *Id.* Here, the parties did not dispute the terms of the Agreement, they simply disputed whether their attorney had the authority to bind them. Therefore, Rule 80(d) was inapplicable. However, the Court found that "even if Rule 80(d) applies, the attorneys' exchange of emails satisfies the rule. Nothing requires clients to separately assent in writing to a written agreement brokered by their attorney." *Id.*
2. **Apparent Authority:** "An attorney without actual authority to settle a dispute can nevertheless do so if the other party to the agreement 'reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestation of such authorization." *Id.* (*citing to* Restatement (Third) of Law Governing Lawyers § 27; Restatement). However, retention of an attorney, alone, does not establish apparent authority to settle a dispute. The client must manifest its intention that the attorney is empowered to conclude settlement on terms approved by the client. Here, the Supreme Court found that the Alling Group manifested its intention that their attorney conclude the settlement agreement by extending a settlement offer and then leaving the attorney to finalize the timing and terms. Therefore, the Court found that the Robertson Group reasonably relied on the Alling Group's attorney's apparent authority to settle. Thus, the settlement agreement was binding.

Practice Tips:

- Rule 80(d) only applies when the terms of an Agreement are in dispute.
- Rule 80(d) does not require clients to separately assent in writing to a written agreement brokered by their attorney.
- The party seeking to enforce the settlement bears the burden of showing reasonable reliance on the attorneys' apparent authority to bind his or her client.