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*RULE 69 AND FAMILY LAW SETTLEMENT AGREEMENTS:
WHEN IS A DEAL A DEAL?*

Steven H. Everts^{*}

I. INTRODUCTION

Rule 69 of the Arizona Rules of Family Law Procedure (“ARFLP”) regarding binding settlement agreements is undoubtedly one of the most widely used rules in family law. Nearly every case involves some form of a settlement agreement. Most who enter into settlement agreements want them to be binding, while others want to get out of them and judges must review and approve them to be valid. Unfortunately, many have learned that litigating settlement agreements can cost more than the original action. Therefore, it is extremely important that both the court and parties to a case have a correct understanding of Rule 69 and its uses.

II. HISTORY

Rule 69 was originally adopted effective January 1, 2006, with very basic language.¹ The original language was an

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¹ ARIZ. FAM. LAW PROC. R. 69; “Agreements between the parties shall be valid and binding if the agreement is in writing, or the terms of the agreement are set forth on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Admin-

outgrowth of Rule 80(d) of the Arizona Rules of Civil Procedure (“ARCP”),² which was in force prior to the adoption of separate family law rules. The present version of Rule 69 became effective January 1, 2011. It added provisions concerning the three types of valid settlement agreements, a presumption of validity, the burden of proof on the party challenging the agreement, a reference to Arizona Revised Statutes (A.R.S.) § 25-317 regarding the court’s independent discretion, and confirmation that attorney’s fees and costs may be awarded in disputed proceedings. It states:

- A. An Agreement between the parties shall be valid and binding if
 - 1. the agreement is in writing, or
 - 2. the terms of the agreement are set forth on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Administrative Order to accept such agreements, or
 - 3. the terms of the agreement are set forth on any audio recording device before a mediator or settlement conference officer appointed by the court pursuant to Rule 67.
- B. Any agreement entered into by the parties under this rule shall be presumed to be valid and binding, and it shall be the burden of the party challenging the validity of the agreement to prove any defect in the

istrative Order to accept such agreements.”

² ARIZ. CIV. PROC. R. 80(d); “No agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes.”

agreement, except that nothing herein shall preclude the court from exercising its independent discretion pursuant to A.R.S. § 25-317. Pursuant to A.R.S. § 25-324, the court may award a party the cost and expenses of maintaining or defending a proceeding to challenge the validity of an agreement made in accordance with this rule.

There are no proposed amendments at this time, although there are definitely areas of the Rule that may need to be amended or clarified, as more thoroughly explained below.

Despite the fact that Rule 69 was only adopted in 2006, there have been a number of appellate cases that cite the Rule. However, few of them are reported decisions which may be used as authority. Most are memorandum decisions, which may not be cited as legal precedent.³ Nevertheless, they are referenced throughout this article for illustrative and educational purposes only. Also, the decision in *Reeder*⁴ was depublished and no longer a valid reference. Moreover, as stated in the Committee Comment to Rule 69,⁵ as well as several memorandum decisions⁶ and one published opinion,⁷ one can look to

³ ARIZ. SUP. CT. R. 111(c)(1)(C), as amended, allows citation to memorandum decisions issued on or after January 1, 2015, for persuasive value, but only if no opinion adequately addresses the issue before the court and if the citation is not to a depublished opinion or depublished portion of an opinion.

⁴ *Reeder v. Johnson*, No. 1 CA-CV 09-0247, 2010 Ariz. App. Unpub. LEXIS 1603, at ¶¶13-15 (Ct. App. Mar. 23, 2010) (depublished and cited for informational purposes only).

⁵ ARIZ. SUP. CT. R. 69 COMM. CMT. (Eff. Jan. 1, 2009).

⁶ *Connelly v. Connelly*, No. 1 CA-CV 15-0290 FC, 2016 WL 7156437, at *1-4 (Ariz. Ct. App. Dec. 8, 2016) (mem.); *Fowler v. Fowler*, 2015 WL 410594, at *1-4 (Ariz. Ct. App. Jan. 27, 2015) (mem.); *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *1-3 (Ariz. Ct. App. May 22, 2014) (Dec. order); *Doyle v. Doyle*, No. CA-CV 07-0734, 2008 WL 4966035, at

the case law under Rule 80(d), ARCP, to interpret Rule 69 to the extent it may be applicable.

III. SCOPE

Rule 69 states that it applies to an “Agreement.” The specific subject matter of the agreements covered are not identified. However, Rule 1, ARFLP, governs the procedure in “all family law cases” and “all other matters arising out of Title 25.” Title 25 includes marriages,⁸ covenant marriages,⁹ premarital agreements,¹⁰ property rights¹¹ and contract powers,¹²

*1-5 (Ariz. Ct. App. Nov. 18, 2008) (mem.).

⁷ Murray v. Murray, 367 P.3d 78 (Ariz. Ct. App. 2016).

⁸ ARIZ. REV. STAT. ANN. §§ 25-101-30 (2017).

⁹ ARIZ. REV. STAT. ANN. §§ 25-901-06 (2017).

¹⁰ ARIZ. REV. STAT. ANN. §§ 25-201-05 (2017).

¹¹ ARIZ. REV. STAT. ANN. §§ 25-211-17, 318; *In re Jones*, No. 1 CA-CV 15-0803 FC, 2016 WL 6871408, at *1-3 (Ariz. Ct. App. Nov. 22, 2016) (mem.); *In re Marriage of Fuller*, No. 1 CA-CV 15-0680 FC, 2016 WL 4435598, at *1 (Ariz. Ct. App. Aug. 23, 2016) (mem.); *Gadhok v. Nangia*, No. 1 CA-CV 11-0589, 2012 WL 2154194, at *1-4 (Ariz. Ct. App. June 14, 2012) (mem.); *Ghosoph v. Kottman*, No. 1 CA-CV 14-0356 FC, 2015 WL 3537142, at *1-3 (Ariz. Ct. App. June 2, 2015) (mem.); *MacLean v. Kappa*, No. 1 CA-CV 13-0512, 2014 WL 2895579, at *1-3 (Ariz. Ct. App. June 24, 2014) (mem.); *Bulos-Simpkins v. Simpkins*, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1-7 (Ariz. Ct. App. Mar. 27, 2014) (mem.); *Gadhok v. Nangia*, No. 1 CA-CV 12-0273, 2013 WL 1136604, at *1-3 (Ariz. Ct. App. Mar. 19, 2013) (mem.); *Quinn v. Fitzpatrick-Quinn*, No. 1 CA-CV 11-0241, 2012 WL 1861406, at *1-6 (Ariz. Ct. App. May 22, 2012) (mem.); *Armor Works Enterprises, LLC v. Cavanagh Law Firm, P.A.*, No. 1 CA-CV 11-0201, 2012 WL 952348, at *1-7 (Ariz. Ct. App. Mar. 20, 2012) (mem.); *Bellings v. Palma*, No. 1 CA-CV 10-0822, 2011 WL 5542413, at *1-3 (Ariz. Ct. App. Nov. 15, 2011) (mem.); *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *1-6 (Ariz. Ct. App. Mar. 10, 2011) (mem.); *Allan v. Allan*, No. 1 CA-CV 09-0556, 2010 WL 5030874, at *1-5 (Ariz. Ct. App. Nov. 12, 2010) (mem.); *Katz v. Siverling*, No. 1 CA-CV 08-0235, 2009 WL 1311066, at *1-4 (Ariz. Ct. App. May 12, 2009) (mem.); *Burton v. Burton*, No. 1 CA-CV 08-0433, 2009 WL 1066000, at *1-2 (Ariz. Ct. App. Apr. 21, 2009) (mem.); *Berg-Thaemert v. Thaemert*, No. 1 CA-CV 06-0767, 2007 WL 5462303, at *1-6 (Ariz. Ct.

assignment of debts,¹³ notice to creditors,¹⁴ credit reports,¹⁵ military retirement benefits,¹⁶ pre-decree proceedings (annulments,¹⁷ legal separations and dissolutions¹⁸), temporary orders,¹⁹ preliminary injunctions,²⁰ separation agreements,²¹ restoration of requested former name,²² post-decree modification²³ and enforcement actions,²⁴ contempt,²⁵ maternity or paternity,²⁶

App. Oct. 23, 2007) (mem.).

¹² ARIZ. REV. STAT. ANN. §§ 25-211-18 (2017).

¹³ ARIZ. REV. STAT. ANN. § 25-318(J)-(R); *Stephens v. Stephens*, No. 1-CA-CV 14-0608 FC, 2016 WL 74938, at *1-4 (Ariz. Ct. App. Jan. 7, 2016) (mem.); *Ledo v. Ledo*, No. 1 CA-CV 14-0331 FC, 2015 WL 2383843, at *1-3 (Ariz. Ct. App. May 7, 2015) (mem.); *Bulos-Simpkins*, 2014 WL 1266381, at *1-7.

¹⁴ ARIZ. REV. STAT. ANN. § 25-318(H) (2017).

¹⁵ ARIZ. REV. STAT. ANN. § 25-318(I) (2017).

¹⁶ ARIZ. REV. STAT. ANN. § 25-318.01 (2017); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999).

¹⁷ ARIZ. REV. STAT. ANN. §§ 25-301-02 (2017).

¹⁸ ARIZ. REV. STAT. ANN. §§ 25-311-13, 316 (2017).

¹⁹ ARIZ. REV. STAT. ANN. § 315 (2017).

²⁰ *Id.*

²¹ ARIZ. REV. STAT. ANN. § 25-317 (2017); *Johnston v. Johnston*, No. 1 CA-CV 14-0451 FC, 2015 WL 4372813, at *1-3 (Ariz. Ct. App. July 16, 2015) (mem.); *Fuller v. Fuller*, No. 1 CA-CV 11-0114, 2012 WL 2499671, at *1-4 (Ariz. Ct. App. June 26, 2012) (mem.); *Armor Works Enterprises, LLC v. Cavanagh Law Firm, P.A.*, No. 1 CA-CV 11-0201, 2012 WL 952348, at *1-7 (Ariz. Ct. App. Mar. 20, 2012) (mem.); *Archer v. Archer*, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *1-3 (Ariz. Ct. App. June 16, 2009) (mem.); *In re Marriage of Gallagher*, No. 1 CA-CV 07-0250, 2008 WL 4149665, at *1-3 (Ariz. Ct. App. Jan. 10, 2008) (mem.).

²² ARIZ. REV. STAT. ANN. § 25-325(C) (2017).

²³ ARIZ. REV. STAT. ANN. §§ 25-327(A), 403, 503 (2017); *McNeil v. Hoskyns*, 377 P.3d 46 (Ariz. Ct. App. 2014).

²⁴ ARIZ. REV. STAT. ANN. §§ 25-414; 518-26; 681-85 (2017).

²⁵ ARIZ. REV. STAT. ANN. §§ 25-317(E); 318(P) (2017).

²⁶ ARIZ. REV. STAT. ANN. §§ 25-801-18 (2017); *Barnes v. Fink*, No. 2 CA-CV 2015-0062, 2015 WL 6549582, at *1-4 (Ariz. Ct. App. Oct. 29, 2015) (mem.); *Coleman v. Robinson*, No. 1 CA-CV 11-0034, 2011 WL 6101825, at *1-4 (Ariz. Ct. App. Dec. 8, 2011) (mem.); *Montano v. Guiliano*, No. 1

courts of conciliation,²⁷ reconciliation agreements,²⁸ post-marital/post-nuptial agreements,²⁹ legal decision-making,³⁰ parenting time,³¹ parent information program classes,³² domestic violence,³³ substance abuse,³⁴ sexual offenders,³⁵ access to records,³⁶ relocation,³⁷ spousal maintenance,³⁸ child support,³⁹

CA-CV 10-0438, 2011 WL 2306617, at *1-8 (Ariz. Ct. App. June 2, 2011) (mem.); *Jackson v. Herrera*, No. 1 CA-CV 08-0049, 2009 WL 104661, at *1-2 (Ariz. Ct. App. Jan. 15, 2009) (mem.).

²⁷ ARIZ. REV. STAT. ANN. §§ 25-381.01-381.24 (2017).

²⁸ ARIZ. REV. STAT. ANN. § 25-381.17 (2017); *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *1-6 (Ariz. Ct. App. Mar. 10, 2011) (mem.).

²⁹ *Breitbart-Napp v. Napp*, 163 P.3d 1024 (Ariz. Ct. App. 2007).

³⁰ ARIZ. REV. STAT. ANN. § 25-401 (2017); *Burton-Anderson v. Anderson*, No. 1 CA-CV 15-0214 FC, 2016 WL 1332059, at *1-2 (Ariz. Ct. App. Apr. 5, 2016) (mem.); *Chandler v. Ellington*, No. 1 CA-CV 13-0648 FC, 2015 WL 3819094, at *1-4 (Ariz. Ct. App. June 18, 2015) (mem.); *Krieger v. Duick*, No. 1 CA-CV 14-0036, 2015 WL 246878, at *1-5 (Ariz. Ct. App. Jan. 20, 2015) (mem.); *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *1-3 (Ariz. Ct. App. May 22, 2014) (Dec. order); *Bulos-Simpkins v. Simpkins*, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1-7 (Ariz. Ct. App. Mar. 27, 2014) (mem.); *Montano*, 2011 WL 2306617, at *1-8; *Watson*, 2011 WL 846427, at *1-6; *Jackson*, 2009 WL 104661, at *1-2; *Berg-Thaemert v. Thaemert*, No. 1 CA-CV 06-0767, 2007 WL 5462303, at *1-6 (Ariz. Ct. App. Oct. 23, 2007) (mem.).

³¹ ARIZ. REV. STAT. ANN. § 25-40 (2017)1; *Burton-Anderson*, 2016 WL 1332059, at *1-2; *Haak v. Haak*, Nos. 1 CA-CV 13-0764 FC, 1 CA-CV 14-0183 FC, 2015 WL 1359392, at *1-4 (Ariz. Ct. App. Mar. 24, 2015) (mem.); *Krieger*, 2015 WL 246878, at *1-5; *Nunez*, 2014 WL 2159752, at *1-3; *Bulos-Simpkins*, 2014 WL 1266381, at *1-7; *Montano*, 2011 WL 2306617, at *1-8; *Watson*, 2011 WL 846427, at *1-6; *Jackson*, 2009 WL 104661, at *1-2; *Berg-Thaemert*, 2007 WL 5462303, at *1-6.

³² ARIZ. REV. STAT. ANN. § 25-413 (2017).

³³ ARIZ. REV. STAT. ANN. § 25-403.03; *Watson*, 2011 WL 846427, at *1-6.

³⁴ ARIZ. REV. STAT. ANN. § 25-403.04 (2017).

³⁵ ARIZ. REV. STAT. ANN. § 25-403.05 (2017).

³⁶ ARIZ. REV. STAT. ANN. § 25-403.06 (2017).

³⁷ ARIZ. REV. STAT. ANN. § 25-408; *Murray v. Murray*, 367 P.3d 78 (Ariz. Ct. App. 2016); *Fowler v. Fowler*, 2015 WL 410594, at *1-4 (Ariz. Ct. App. Jan. 27, 2015) (mem.).

³⁸ ARIZ. REV. STAT. ANN. § 25-319 and 327(B) (2017); *McNeil v. Hoskyns*,

dependency exemptions,⁴⁰ extracurricular and extra-education expenses,⁴¹ unreimbursed medical expenses,⁴² family support duties,⁴³ child medical support,⁴⁴ orders of assignment/income

377 P.3d 46 (Ariz. Ct. App. 2014); *Ames v. Ames*, 370 P.3d 115 (Ariz. Ct. App. 2016); *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *1-6 (Ariz. Ct. App. Mar. 10, 2011) (mem.); *Koons v. Koons*, No. 1 CA-CV 08-0073, 2009 WL 179805, at *1-6 (Ariz. Ct. App. Jan. 27, 2009) (mem.); *Berg-Thaemert v. Thaemert*, No. 1 CA-CV 06-0767, 2007 WL 5462303, at *1-6 (Ariz. Ct. App. Oct. 23, 2007) (mem.).

³⁹ ARIZ. REV. STAT. ANN. §§ 25-320, 327(C) (2017); *In re Marriage of D'Amours*, No. 1 CA-CV 15-0775 FC, 2016 WL 7209671, at *1-3 (Ariz. Ct. App. Dec. 13, 2016) (mem.); *Sharkey v. Sharkey*, No. 1 CA-CV 15-0386 FC, 2016 WL 3021979, at *1-3 (Ariz. Ct. App. May 24, 2016) (mem.); *Hamblen v. Hamblen*, 54 P.3d 371 (Ariz. Ct. App. 2002); *Barnes v. Fink*, No. 2 CA-CV 2015-0062, 2015 WL 6549582, at *1-4 (Ariz. Ct. App. Oct. 29, 2015) (mem.); *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *1-3 (Ariz. Ct. App. May 22, 2014) (Dec. order); *Bulos-Simpkins v. Simpkins*, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1-7 (Ariz. Ct. App. Mar. 27, 2014) (mem.); *Quinn v. Fitzpatrick-Quinn*, No. 1 CA-CV 11-0241, 2012 WL 1861406, at *1-6 (Ariz. Ct. App. May 22, 2012) (mem.); *Sarma v. Iyer*, Nos. 1 CA-CV 10-0473, 1 CA-CV 10-0839, 2011 WL 6292212, at *1-4 (Ariz. Ct. App. Dec. 15, 2011) (mem.); *Coleman v. Robinson*, No. 1 CA-CV 11-0034, 2011 WL 6101825, at *1-4 (Ariz. Ct. App. Dec. 8, 2011) (mem.); *Watson*, 2011 WL 846427, at *1-6; *Wehrung v. Kellam*, No. 1 CA-CV 09-0014, 2010 WL 845391, at *1-2 (Ariz. Ct. App. Mar. 11, 2010) (mem.); *In re Marriage of Kalos*, Nos. 1 CA-CV 07-0222, 1 CA-CV 07-0773, 2009 WL 415594, at *1-4 (Ariz. Ct. App. Feb. 19, 2009) (mem.); *Berg-Thaemert*, 2007 WL 5462303, at *1-6.

⁴⁰ ARIZ. REV. STAT. ANN. § 25-320, Guidelines ¶ 27 (2017); *Zaccaria v. Zaccaria*, No. 1 CA-CV 08-0524, 2009 WL 1097867, at *1-3 (Ariz. Ct. App. Apr. 23, 2009) (mem.).

⁴¹ ARIZ. REV. STAT. ANN. § 25-320, Guidelines ¶ 9(B)(2) (2017); *Gecha v. Gecha*, No. 1 CA-CV 11-0130, 2012 WL 1964566, at *1-5 (Ariz. Ct. App. May 31, 2012) (mem.); *Quinn*, 2012 WL 1861406, at *1-6.

⁴² ARIZ. REV. STAT. ANN. § 25-320, Guidelines ¶ 9(A) (2017); *Quinn*, 2012 WL 1861406, at *1-6; *Branigan v. Fredrickson*, No. 1 CA-CV 10-0552, 2011 WL 2462717, at *1-4 (Ariz. Ct. App. June 21, 2011) (mem.).

⁴³ ARIZ. REV. STAT. ANN. §§ 25-500-685 (2017).

⁴⁴ ARIZ. REV. STAT. ANN. §§ 25-531-35 (2017).

withholding orders,⁴⁵ the support payment clearinghouse,⁴⁶ child support arrest warrants,⁴⁷ IV-D cases,⁴⁸ third party rights⁴⁹ (stepparents, grandparents,⁵⁰ *in loco parentis*⁵¹), the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”),⁵² the Uniform Interstate Family Support Act (“UIFSA”),⁵³ and attorney fees.⁵⁴ Title 25 does not include orders of protection, injunctions against harassment, or Title 8 cases involving dependency, adoptions of children, and severances of parental rights. Nevertheless, the extensive breadth of the subject matter in Title 25 emphasizes the wide coverage of Rule 69.

IV. PURPOSE

The purpose of Rule 69 is to promote an amicable, timely, and less expensive method of resolving family law disputes. Rule 1 of ARFLP expressly states that ARFLP, including Rule 69, should be construed and enforced in a manner “to secure the just, prompt and inexpensive determination of every action and proceeding.” Consistent with prior case law under Rule 80(d), ARCP, a corollary purpose of the Rule is also to avoid the necessity of fact-intensive inquiries into the existence

⁴⁵ ARIZ. REV. STAT. ANN. §§ 25-504-07 (2017).

⁴⁶ ARIZ. REV. STAT. ANN. § 25-500 *et seq.* (2017).

⁴⁷ ARIZ. REV. STAT. ANN. §§ 25-681-85 (2017).

⁴⁸ ARIZ. REV. STAT. ANN. § 25-500 *et seq.* (2017).

⁴⁹ ARIZ. REV. STAT. ANN. § 25-409 (2017).

⁵⁰ *Haak v. Haak*, Nos. 1 CA-CV 13-0764 FC, 1 CA-CV 14-0183 FC, 2015 WL 1359392, at *1-4 (Ariz. Ct. App. Mar. 24, 2015) (mem.).

⁵¹ *Huston v. Sloan*, No. 1 CA-CV 11-0583, 2012 WL 2003495, at *1-3 (Ariz. Ct. App. June 5, 2012) (mem.).

⁵² ARIZ. REV. STAT. ANN. § 25-1001 (2017); *Barnes v. Fink*, No. 2 CA-CV 2015-0062, 2015 WL 6549582, at *1-4 (Ariz. Ct. App. Oct. 29, 2015) (mem.).

⁵³ ARIZ. REV. STAT. ANN. § 25-1201 (2017); *Barnes*, 2015 WL 6549582, at *1-4.

⁵⁴ ARIZ. REV. STAT. ANN. § 25-324 (2017); *Haak*, 2015 WL 1359392, at *1-4; *Lewis v. Rehkov*, No. 1 CA-CV 11-0091, 2012 WL 2154181, at *1-5 (Ariz. Ct. App. June 14, 2012) (mem.).

and terms of a settlement agreement.⁵⁵ Despite these laudable objectives, the plethora of trial court litigation and appellate case law arising under Rule 69 suggest that their achievement may be easier said than done.

V. THREE TYPES OF VALID AGREEMENTS

The three types of agreements that Rule 69 recognizes are those that are: (1) in writing; (2) on the record by a person authorized;⁵⁶ and (3) recorded on an audio recording device before a Rule 67 mediator or settlement conference officer appointed by the court.

A. In Writing. A written agreement is the first type of agreement recognized as valid under Rule 69. Oral agreements are not binding under Rule 69 or A.R.S. § 25-327.⁵⁷ Al-

⁵⁵ *Robertson v. Alling*, 351 P.3d 352, 355 (Ariz. 2015) (“Rule 80(d) serves to avoid collateral disputes between parties by requiring written evidence of any stipulations and agreements.”); *Canyon Contracting Co. v. Tohono-O’odham Housing Authority*, 837 P.2d 750, 754 (Ariz. Ct. App. 1992), holding disapproved in *Robertson* ([T]he policy behind Rule 80(d) is to relieve the trial court from having to resolve factual disputes as to the existence and terms of an alleged settlement agreement) (citation and internal quotations omitted); *Lyons Enterprises, Inc. v. Custer*, 814 P.2d 780, 782 (Ariz. Ct. App. 1991) (purposes of Rule 80(d) include “to relieve the court of the necessity of determining such disputes, which . . . are often more perplexing than the case itself. The time of the court should not be taken up on controversial matters of this character.”) (citation and internal quotations omitted); *cf. Hackin v. Rupp*, 452 P.2d 519, 520-21 (Ariz. 1969) (stating that most jurisdictions have adopted similar rules to “prevent fraudulent claims and oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes”) (quoting 83 C.J.S. Stipulations § 4 (1969)) (internal quotation marks omitted); *Doyle v. Doyle*, No. CA-CV 07-0734, 2008 WL 4966035, at *1-5 (Ariz. Ct. App. Nov. 18, 2008) (mem.).

⁵⁶ ARIZ. FAM. LAW PROC. R. 69 (An agreement is valid if in writing or on the record, it does not have to be both); *Fuller v. Fuller*, No. 1 CA-CV 11-0114, 2012 WL 2499671, at *1-4 (Ariz. Ct. App. June 26, 2012) (mem.).

⁵⁷ *Gecha v. Gecha*, No. 1 CA-CV 11-0130, 2012 WL 1964566, at *1-5

so, implied agreements are invalid.⁵⁸ To constitute a valid writing means that the material terms of the agreement have to be in writing.⁵⁹ And, no provision requires that a petition be pending before a written agreement becomes enforceable.⁶⁰

Notably, the Rule does not state that the agreement must be signed.⁶¹ Thus, one may appropriately ask how a decision-maker will know if there is a valid agreement or not if it is not signed. The answer is that if there are no signatures, one must resort to other methods to prove there has been a manifestation of mutual assent to the writing.⁶² Moreover, a manifestation of assent by the parties must also be in writing and based on objective evidence, not the hidden intent of the parties.⁶³

The lack of a signing under Rule 69 is inconsistent with Rule 6.5(e) of the Local Rules of Practice in Maricopa County for Family Court Cases, which states:

(Ariz. Ct. App. May 31, 2012) (mem.).

⁵⁸ *Doyle*, 2008 WL 4966035, at *1-5.

⁵⁹ *Canyon Contracting Co.*, 837 P.2d at 754; *Fowler v. Fowler*, 2015 WL 410594, at *1-4; *Doyle*, 2008 WL 4966035, at *1-5.

⁶⁰ *Ames v. Ames*, 370 P.3d 115 (Ariz. Ct. App. 2016); *In re Marriage of D'Amours*, No. 1 CA-CV 15-0775 FC, 2016 WL 7209671, at *1-3 (Ariz. Ct. App. Dec. 13, 2016) (mem.).

⁶¹ *In re Marriage of D'Amours*, 2016 WL 7209671, at *1-3; *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *1-3 (Ariz. Ct. App. May 22, 2014) (Dec. order).

⁶² *Robertson v. Alling*, 351 P.3d 352, 355 (Ariz. 2015); *Ames*, 370 P.3d at 115; *In re Marriage of D'Amours*, 2016 WL 7209671, at *1-3; *Canyon Contracting Co.*, 837 P.2d at 754; *Fowler*, 2015 WL 410594, at *1-4.

⁶³ *Ames*, 370 P.3d at 115; *Fowler*, 2015 WL 410594, at *1-4; *Nunez*, 2014 WL 2159752, at *1-3; *Doyle*, 2008 WL 4966035, at *1-5; *cf. Donahoe v. Arpaio*, 872 F.Supp.2d 900, 906 (D. Ariz. 2012).

Any agreements reached as a result of open negotiation must be placed in writing, signed by both parties pursuant to Rule 69 of the Arizona Rules of Family Law Procedure and presented to the court for approval.

(Emphasis added). Rule 6.5(e) is technically incorrect if it is meant to read that Rule 69 requires a signed agreement because it does not. Additionally, no explanation has been provided as to the reason requiring signatures in open negotiation and not under Rule 69.

Presumably, the drafters of Rule 69 will have to consider whether to amend it to include the requirement of signatures by both parties before the “writing” becomes binding. A typical example where this becomes important is the situation where a divorcing husband and wife bullet-point the terms of a settlement agreement on a napkin while meeting at a restaurant for dinner. The terms may constitute a writing, but, if left unsigned, the agreement remains open for litigation over whether the terms are sufficient and whether there has been mutual assent. One party may have written the terms according to what they believed was the agreement, but the writing differs from what the other party intended in the agreement. Or, one party may write what they want the agreement to be regardless of the other party’s desires. Additionally, in order to be valid and binding, the agreement must be sufficiently clear and complete for the court to make the findings required under A.R.S. § 25-317.⁶⁴ Without signatures and sufficient terms, the validity of the agreement may be left in serious doubt. Therefore, it is highly recommended that such agreements be signed.

⁶⁴ *Fowler*, 2015 WL 410594, at *1-4; *see also*, *In re Marriage of D’Amours*, 2016 WL 7209671, at *1-3 (Terms must be “reasonably certain”).

A “writing” may be an E-mail,⁶⁵ a series of writings,⁶⁶ a joint stipulation or motion submitted by both parties,⁶⁷ and it may be between lawyers.⁶⁸ Also, the use of such communications does not violate Rule 408, Arizona Rules of Evidence (“ARE”), regarding offers of compromise.⁶⁹ However, a written spreadsheet dividing accounts may not be sufficient to prevent offsets without a written manifestation of assent.⁷⁰ Moreover, a Notice of Settlement filed under Rule 70, ARFLP, is not by itself, a “writing” with sufficient terms to satisfy the requirement.⁷¹ Also, a Notice of Settlement signed by only one attorney will not be sufficient because it raises additional questions as to mutual assent.⁷² An attorney cannot bind a client to a settlement without the client’s express consent.⁷³ An attorney does not have implied or apparent authority to settle a claim without the client’s express authorization.⁷⁴ Furthermore, failure to file the settlement agreement after filing a Notice of Set-

⁶⁵ *Robertson*, 351 P.3d 352, 355; *In re Marriage of D’Amours*, 2016 WL 7209671, at *2; *Murray v. Murray*, 367 P.3d 78, 81-82 (Ariz. Ct. App. 2016) ; *Vasquez-Araiza v. Gurrola*, No. 1 CA-CV 13-0716 FC, 2015 WL 4623329, at *1-2 (Ariz. Ct. App. Aug. 4, 2015) (mem.); *Fowler*, 2015 WL 410594, at *2; *Nunez*, 2014 WL 2159752, at *1.

⁶⁶ *Hays v. Fischer*, 777 P.2d 222 (Ariz. Ct. App. 1989); *Donahoe*, 872 F.Supp.2d 900, 902; *Doyle*, 2008 WL 4966035, at *3.

⁶⁷ *Coleman v. Robinson*, No. 1 CA-CV 11-0034, 2011 WL 6101825, at *2 (Ariz. Ct. App. Dec. 8, 2011) (mem.) (joint motion or stipulation was binding Rule 69 agreement, but was subject to modification proceeding).

⁶⁸ *Robertson*, 351 P.3d 352, 353; *Canyon Contracting Co. v. Tohono-O’Odham Housing Authority*, 837 P.2d 750, 753 (Ariz. Ct. App. 1992); *Hays*, 777 P.2d at 225; *Donahoe*, 872 F.Supp.2d at 911; *Vasquez-Araiza*, 2015 WL 4623329, at *2; *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *2 (Ariz. Ct. App. May 22, 2014) (Dec. order).

⁶⁹ *Murray v. Murray*, 367 P.3d 78, 82 (Ariz. Ct. App. 2016).

⁷⁰ *Doyle*, 2008 WL 4966035, at *3.

⁷¹ *Lyons Enterprises, Inc. v. Custer*, 814 P.2d 780, 782 (Ariz. Ct. App. 1991); *Vasquez-Araiza*, 2015 WL 4623329, at *2.

⁷² *Lyons Enterprises Inc.*, 814 P.2d 780, 782; *Vasquez-Araiza*, 2015 WL 4623329, at *2; *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *1 (Ariz. Ct. App. Mar. 10, 2011) (mem.).

⁷³ *United Liquor Co. v. Stephenson*, 322 P.2d 886, 886 (Ariz. 1958).

⁷⁴ *Garn v. Garn*, 745 P.2d 604, 608-09 (Ariz. Ct. App. 1987).

tlement leaves the record without a writing or agreement.⁷⁵ Therefore, a Notice of Settlement should only confirm an otherwise valid agreement and will not bind the parties by itself.

One other question is also left unanswered regarding the content of the “writing” necessary to satisfy the requirements of Rule 69. Rule 69 does not state the substantive or procedural terms necessary to satisfy the Rule, other than by brief implication in the reference to A.R.S. § 25-317. Under that statute, the court is to consider whether an agreement is unfair, particularly with regard to a disposition of property or maintenance, and that it is reasonable as to support, custody,⁷⁶ and parenting time of children.⁷⁷ By contrast, however, Rules 67(B) and (D), ARFLP, provide that binding agreements reached in private mediation and settlement conferences must not only comply with Rule 69, but must also state that agreements are: (1) voluntary without threat or undue influence; (2) after full disclosure of all relevant facts and information; (3) intended to be final and binding;⁷⁸ (4) fair and equitable; and (5) in the best interests of the children (if applicable).⁷⁹ These additional requirements are not expressly stated in Rule 69. An obvious question arises as to why settlement agreements reached in private mediation and other settlement conferences

⁷⁵ *Vasquez-Araiza*, 2015 WL 4623329, at *2.

⁷⁶ ARIZ. REV. STAT. ANN. § 25-401(3) (2017) (known in Arizona as “legal decision-making”).

⁷⁷ ARIZ. REV. STAT. ANN. § 25-317(B)-(D) (2017).

⁷⁸ *Trkula v. Trkula*, No. 1 CA-CV 15-0598 FC, 2016 WL 1696603, at *1-3 (Ariz. Ct. App. Apr. 28, 2016) (mem.).

⁷⁹ ARIZ. FAM. LAW PROC. R. 67(B)(1)(a), (B)(7), (D)(5) (there is a slight difference between 67(B) and (D) in that the word “final” is used under subsections 67(B)(7) and (D), whereas it is not used in subsection (B)(1)(a). Originally, 67(B)(7) only applied to court-ordered mediation, not private mediation.) See *In re Marriage of Morton*, No. 2 CA-CV 2007-0056, 2008 WL 4615002, at *1-3 (Ariz. Ct. App. Jan. 18, 2008) (mem.). However, Rule 67 was amended so the requirements now apply to all forms of mediation.

require these additional terms to be in the writing, but settlement agreements in other settings do not. Nonetheless, the drafter of any settlement agreement would be well-advised to include the additional requirements from Rule 67 in order to ensure enforceability.

B. On the Record by a Person Authorized. Rule 69 provides that an agreement is also valid and binding if the terms of the agreement are set forth on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Administrative Order to accept such agreements.⁸⁰ A proceeding or agreement is also “on the record” if it is conducted or memorialized by a court reporter in accordance with A.R.S. §§ 12-221 to 12-225 or at the time a deposition is conducted if both parties are present or represented by counsel, and the agreement is recited on the record.⁸¹ However, there must be a clear and firm agreement. A mere request by a wife during trial testimony that she wanted spousal maintenance for at least one year in a 23-year marriage was not a waiver of a longer claim or a binding Rule 69 agreement and the trial court had discretion to award \$3,500 per

⁸⁰ *Bellings v. Palma*, No. 1 CA-CV 10-0822, 2011 WL 5542413, at *3 (Ariz. Ct. App. Nov. 15, 2011) (mem.) (holding agreement orally made on the record at Resolution Management Conference was binding without fairness hearing); *Branigan v. Fredrickson*, No. 1 CA-CV 10-0552, 2011 WL 2462717, at *5 (Ariz. Ct. App. June 21, 2011) (mem.) (holding oral Rule 69 agreement on unreimbursed medical expenses binding (citing *Goodman v. Newzona Inv. Co.*, 421 P.2d 318, 320 (Ariz. 1966) *Montano v. Guiliano*, No. 1 CA-CV 10-0438, 2011 WL 2306617, at *8-9 (Ariz. Ct. App. June 2, 2011) (mem.) (holding Rule 69 agreement regarding joint custody and holiday parenting schedule binding on parties and father’s judgment remanded to conform to the agreement); *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *4-5 (Ariz. Ct. App. Mar. 10, 2011) (mem.) (oral agreement on record at hearing); *In re Marriage of Kalos*, Nos. 1 CA-CV 07-0222, 1 CA-CV 07-0773, 2009 WL 415594, at *4 (Ariz. Ct. App. Feb. 19, 2009) (mem.) (holding oral agreement made on record at Resolution Management Conference was binding).

⁸¹ ARIZ. FAM. LAW PROC. R. 69 COMM. CMT. (Eff. Jan. 1, 2009).

month for life.⁸² Even a statement by counsel during trial stating there was a stipulation as to the visitation adjustment on a child support worksheet calculation was not enough under Rule 80(d) if not entered in the minutes.⁸³ Nonetheless, omission from a decree of a valid and binding settlement agreement made on the record during trial is reversible error.⁸⁴

The Presiding Judge's Office of the Family Court in Maricopa County has issued a script to the bench for use in such cases. It recommends that the court ask the following questions:

1. Have you heard the agreement that was stated here today?
2. Did you understand the agreement?
3. Does it in fact reflect your full agreement? – or – Did it describe everything you have agreed to?
4. **Attorney Represented:** Are you voluntarily entering in that agreement today with the advice of your attorney?
Self-Represented Litigant: Are you voluntarily entering in that agreement today without the advice of an attorney but recognizing that if you had wanted to have an attorney

⁸² Koons v. Koons, No. 1 CA-CV 08-0073, 2009 WL 179805, at *6 (Ariz. Ct. App. Jan. 27, 2009) (mem.).

⁸³ Hamblen v. Hamblen, 54 P.3d 371 (Ariz. Ct. App. 2002).

⁸⁴ Stephens v. Stephens, No. 1-CA-CV 14-0608 FC, 2016 WL 74938, at *5 (Ariz. Ct. App. Jan. 7, 2016) (mem.) (failing to make any findings or set forth terms of written agreement regarding property and debts in decree); Quinn v. Fitzpatrick-Quinn, No. 1 CA-CV 11-0241, 2012 WL 1861406, at *7 (Ariz. Ct. App. May 22, 2012) (mem.) (holding decree failed to include agreement giving wife \$132,000 of husband's bonuses); *Montano*, 2011 WL 2306617, at *6-7; Allan v. Allan, No. 1 CA-CV 09-0556, 2010 WL 5030874, at *5 (Ariz. Ct. App. Nov. 12, 2010) (mem.) (holding trial court failed to determine community interest in pension).

- represent you here today, you could have hired one to do so?
5. Has anyone made you feel coerced or forced to enter into the agreement?
 6. Under the circumstances, do you believe that the agreement is fair and reasonable?
 7. **If the parties have children and the agreement impacts the children:** Under the circumstances, do you believe that the agreement is in the children's best interest?
 8. Do you understand that if I approve the agreement, the agreement will be enforceable as a court order as of today's date?

In summary, the court script determines whether the parties have "heard" and "understand" the agreement, it is their "full agreement," they have "voluntarily" entered into the agreement without counsel, or it is made with the "advise" of counsel, they were not "coerced or forced," it is "fair and reasonable," it is "enforceable as of today's date," and it is in the "best interests of children" (if applicable).

There are at least two aspects of Rule 69 and the other Rules mentioned above that are omitted from the script. First, the script does not ask about full disclosure. Full disclosure is required for any binding agreements reached in private mediation and settlement conferences under Rule 67. Moreover, at least one appellate authority has found that a disclosure violation may constitute misconduct by an adverse party under Rule 60(c)(3), ARCP, the predecessor of present Rule 85(C)(1)(c), ARFLP.⁸⁵ Under Rules 60(c)(3), ARCP, and 85(C)(1)(c), ARFLP, a party is allowed to reopen a judgment for fraud, misrepresentation, or other misconduct of an adverse party. Therefore, in order to ensure the validity of a settlement agreement made on the record before an authorized judicial officer, both

⁸⁵ Breitbart-Napp v. Napp, 163 P.3d 1024 (Ariz. Ct. App. 2007).

the parties and the court would be well-advised to confirm that there has been a full and complete disclosure of all relevant facts and information between the parties.

Second, the script uses the terms “fair and reasonable” to apparently confirm the terms of the agreement under A.R.S. § 25-317, but omits the term “equitable” regarding a division of community, joint tenancy and other property held in common under A.R.S. § 25-318(A). In actuality, the conflict arises from the difference in language between the two statutes. A.R.S. §§ 25-317(B), (C) and (D) use the term “fair” regarding a disposition of property, while A.R.S. § 25-318(A) and Rule 67 use the term “equitable.” Standard usage among practitioners is to use the terms together and confirm that an agreement is both “fair and equitable” regarding a disposition of property and debts to comply with both statutes. Similarly, a recitation of both criteria might be suggested regarding an oral agreement set forth on the record.

Some litigation has involved the question of the appropriate “person authorized” to receive the agreement on the record. In *Reeder* (now depublished),⁸⁶ a private mediator, although a judge pro tempore, but not assigned to that particular case, was not authorized to accept the agreement. But in *Johns*,⁸⁷ a special master, having been appointed by the court, was authorized to accept the settlement agreement. In making agreements before a judge pro tempore, it is recommended that the parties request that the judge pro tempore be officially appointed to the case for that purpose. The parties’ agreement, without court appointment, is not sufficient according to *Reeder*. In other words, even though Rule 69(A)(2), as amended, allows a judge pro tempore to receive the terms of the agree-

⁸⁶ *Supra* note 4.

⁸⁷ *Johns v. Johns*, No. 1 CA-CV 09-0524, 2010 WL 2889557, at *1-4 (Ariz. Ct. App. July 22, 2010) (mem.).

ment, it is best to have the judge pro tempore actually appointed for the specific case in order to avoid challenge.

C. Audio Recording. Rule 69 provides that an agreement is valid and binding if the terms of the agreement are set forth on any audio recording device before a mediator or settlement conference officer appointed by the court pursuant to Rule 67.⁸⁸ If a private mediator is used, it is best practice to request that the court confirm, approve and appoint the mediator under Rule 67.

The specific type of recording device or methods of transmission are not stated and probably should not have to be stated in the main text of Rule 69. However, the Committee Comment to Rule 69 notes that A.R.S. § 38-424 currently authorizes the use of “tape recorders or other recording devices in lieu of reporters or stenographers.”⁸⁹ Current practice in Maricopa County generally requires a court-appointed mediator to submit the recording to the Family Court where it is later officially dispensed to the court and parties, if necessary. Some mediators also send the recording directly to counsel. Either way, the audio recording constitutes a valid and binding agreement as long as the material terms of the agreement are set forth and they are sufficiently clear and complete. Presumably, the material terms that are not clear and complete are not binding on the parties and may render the entire agreement invalid.

What about audio recordings that are made between unrepresented litigants or counsel of represented litigants in private mediation and not before a Rule 67 mediator or settlement conference officer appointed by the court? Technically, they do not comply with Rule 69. To make them valid and

⁸⁸ Katz v. Siverling, No. 1 CA-CV 08-0235, 2009 WL 1311066, at *1-4 (Ariz. Ct. App. May 12, 2009) (mem.).

⁸⁹ *Supra* note 5.

binding, however, one may choose to transcribe the recording so it constitutes a “writing” under Rule 69.⁹⁰ Again, best practice is to exchange the transcription and have it signed. That is at least one way to convert an otherwise invalid audio recording into a valid and binding settlement agreement under Rule 69.

VI. PRESUMPTION/BURDEN OF PROOF/STANDARD OF PROOF

Rule 69(B) specifically states that an agreement which complies with one of the three types of agreements under subsection (A) shall be presumed to be valid and binding and the burden of proof is on the party challenging the validity of the agreement.⁹¹ The Rule goes on to state that nothing stated in the Rule shall preclude the court from exercising its independent discretion pursuant to A.R.S. § 25-317. As stated above, the statute authorizes the court to review the agreement to determine whether it is “fair” and “reasonable.” However, appellate case law under the statute, rendered prior to adoption of Rule 69, holds that it is the burden of the party asserting the validity of a separation agreement to prove by clear and convincing evidence that it is fair and equitable.⁹² In other words,

⁹⁰ *Gadhok v. Nangia*, No. 1 CA-CV 11-0589, 2012 WL 2154194, at *1-4 (Ariz. Ct. App. June 14, 2012) (mem.); *In re Marriage of Morton*, No. 2 CA-CV 2007-0056, 2008 WL 4615002, at *1-3 (Ariz. Ct. App. Jan. 18, 2008) (mem.) (recorded agreement in private mediation was binding and not unfair when reduced to writing in a mediation memorandum).

⁹¹ *Montano v. Guiliano*, No. 1 CA-CV 10-0438, 2011 WL 2306617, at *1-8 (Ariz. Ct. App. June 2, 2011) (mem.) (judgment remanded where father failed to accurately set forth agreements for joint custody and holiday schedule); *Archer v. Archer*, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *1-3 (Ariz. Ct. App. June 16, 2009) (mem.) (Rule 69 agreement binding unless unfair); *Zaccaria v. Zaccaria*, No. 1 CA-CV 08-0524, 2009 WL 1097867, at *1-3 (Ariz. Ct. App. Apr. 23, 2009) (mem.) (ADR agreement on dependency exemption binding on trial court and not against public policy under Guidelines).

⁹² *Sharp v. Sharp*, 877 P.2d 304 (Ariz. Ct. App. 1994) (relying on *In re Har-*

there presently appears to be a conflict between Rule 69 and the prior case law under A.R.S. § 25-317 regarding the burden of proof to be applied. Rule 69 states the burden is on the party challenging the agreement. The *Sharp*⁹³ case under A.R.S. § 25-317, on the other hand, states the burden is on the party asserting the validity of the agreement.

Moreover, Rule 69 does not state the standard of proof to be applied. In the absence thereof, it is presumed to be a preponderance of the evidence.⁹⁴ By contrast, however, *Sharp* states that the standard to be met by the person asserting the validity of the agreement is “clear and convincing evidence.”⁹⁵ And, at least one court has held that the moving party in family law matters must prove “extraordinary circumstances” to qualify for relief from a property settlement agreement.⁹⁶ A resolution regarding the presumptions of validity, burdens of proof, and standards of proof is yet to be determined and depends, at present, upon the specific facts and skill of the advocate before the trial court in each individual case.

One possible reason for the difference in the presumptions, burden of proof, and standard of proof under Rule 69, as opposed to A.R.S. § 25-317, is that the Rule applies to “all family law cases,” whereas the statute applies only to “separa-

bor’s Estate, 449 P.2d 7, 16 (1969)); *cf.* *Emmons v. Superior Court in and for Maricopa County*, 968 P.2d 582, 586 (Ariz. Ct. App. 1998) (defense of mutual mistake to settlement agreement must be shown by clear and convincing evidence).

⁹³ *Sharp*, 877 P.2d at 304.

⁹⁴ *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1087 (Ariz. 1987) (proof by a preponderance of the evidence is the traditional measure of proof for most civil cases) (citing *Schwalbach v. Jones*, 232 P. 558 (Ariz. 1925) and *Edward W. Cleary, McCormick on Evidence*, Third Edition § 339 (Edward W. Cleary ed., West Publishing 1984)).

⁹⁵ *Sharp*, 877 P.2d at 309.

⁹⁶ *Fuller v. Fuller*, No. 1 CA-CV 11-0114, 2012 WL 2499671, at *1-4 (Ariz. Ct. App. June 26, 2012) (mem.) (citing *DeGryse v. DeGryse*, 661 P.2d 185 (Ariz. 1983)); *see also*, ARIZ. REV. STAT. ANN. § 25-317(F) (2017).

tion agreements.” In other words, the Rule extends to all cases under Title 25, while the statute applies only to pre-decree separation agreements. However, such a distinction makes little practical sense and may lead to significant confusion in future factual settings. Separation agreements are actually a subcategory of one of the many types of settlement agreements. The only difference is the timing of the agreement, one being before the divorce and the others being at any time in the family court proceedings. But, the mere timing of the agreement should not alter such important legal concepts as presumptions, burdens of proof and standards of proof. There is no logical or legal justification for treating pre-decree settlement agreements any differently than post-decree settlement agreements, parenting plans, paternity agreements,⁹⁷ third-party caregiver agreements, spousal maintenance agreements, child support agreements or any other family law agreements, particularly where many of the same issues remain before the court and are subject to modification for many years even after a decree is entered. Thus, confusion is created because both the Rule, which is comprehensive, and the statute, which is specific, may apply to the same settlement agreement where different standards may be applied.

The procedural timing and methods for enforcing or challenging a settlement agreement are also not expressly stated in Rule 69. Presumably, a party may file a motion to enforce an agreement directly under A.R.S. § 25-317 or Rule 69.⁹⁸ Similarly, a party may choose to file a motion challenging the agreement under Rule 69(B). In at least one instance a party has used a motion for summary judgment to challenge a settlement agreement. However, the appellate court lacked jurisdiction to consider the ruling after a final judgment had been

⁹⁷ *Jackson v. Herrera*, No. 1 CA-CV 08-0049, 2009 WL 104661, at *1-2 (Ariz. Ct. App. Jan. 15, 2009) (mem.).

⁹⁸ *Burton*, 2009 WL 1066000, at *1-2.

entered.⁹⁹ Additionally, one may choose to set aside the agreement under one of the appropriate subdivisions of Rule 85(C), ARFLP.¹⁰⁰ Under that Rule, “the motion shall be filed within a reasonable time,” and for subsections “(1)(a), (b) and (c), not more than six months after the judgment or order was entered or proceeding was taken.” It should be noted that a “reasonable” time, for purposes of Rule 85(C), as well as its predecessor, Rule 60(c), ARCP, is *not automatically* extended the full six months.¹⁰¹ Thus, timely filing is critical!¹⁰² Moreover, a party may not challenge an agreement under Rule 85 based on information that could have been communicated to the court before the decree was signed (e.g. intimidation, domestic abuse).¹⁰³ Therefore, a person challenging the agreement, under any of the procedures stated above, would be well-advised to do so as quickly as possible after that determination has been made. Otherwise, the party enforcing the agreement may raise the defense of untimeliness.

VII. RIGHT OF OBJECTION/RESCISSION

The subject of challenging a Rule 69 agreement raises collateral questions regarding the appropriateness of a right of objection or rescission with regard to family law settlement agreements. In other words, should the Rule or the law allow parties to lawfully object to or rescind their agreements within

⁹⁹ Bulos-Simpkins v. Simpkins, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1-7 (Ariz. Ct. App. Mar. 27, 2014) (mem.).

¹⁰⁰ Ghosop v. Kottman, No. 1 CA-CV 14-0356 FC, 2015 WL 3537142, at *1-2 (Ariz. Ct. App. June 2, 2015) (mem.).

¹⁰¹ United Imps. & Exports v. Superior Court, 653 P.2d 691, 693 (Ariz. 1982); Richas v. Superior Court, 652 P.2d 1035, 1037-38 (Ariz. 1982); Martin v. Martin, 893 P.2d 11, 16 (Ariz. Ct. App. 1994); Brooks v. Consol. Freightways Corp., 839 P.2d 1111, 1116 (Ariz. Ct. App. 1992); Goglia v. Bodnar, 749 P.2d 921, 923, 929 (Ariz. Ct. App. 1987).

¹⁰² Campbell v. Frazer Constr. Co., 459 P.2d 300, 301 (Ariz. 1969).

¹⁰³ Craig v. Superior Court, 687 P.2d 395, 397 (Ariz. Ct. App. 1984); Fuller v. Fuller, No. 1 CA-CV 11-0114, 2012 WL 2499671, at *1-4 (Ariz. Ct. App. June 26, 2012) (mem.).

a stated time? While there are many advantages and disadvantages, which can be hotly debated regarding this subject, it is not an unfair question.

Other areas of the law allow a right of objection and/or rescission to certain agreements. For example, even in the family law area, Rule 68(B)(6)(b), ARFLP, provides that agreements reached in mediation by conciliation services are subject to a 30-day Notice of Objection, after which “there is no agreement in the matter.” Nevertheless, subsection (c) of the same Rule allows the court to retain final authority to “accept, modify or reject or set further hearing on the agreement.” Similarly, prior to December 31, 2015, a parenting coordinator’s report and recommendations were subject to objection within 10 days after the date of the court order approving, modifying or rejecting them.¹⁰⁴ In the non-family law area, agreements regarding foreclosure consulting contracts,¹⁰⁵ dating referral services,¹⁰⁶ consumer credit transactions under the Truth-in-Lending Act,¹⁰⁷ and home solicitation sales¹⁰⁸ are subject to a three-day right of rescission or cancellation.

There is good cause for the law to consider a right of revocation or rescission, or at a minimum a definite period of objection, with regard to family law settlement agreements under Rule 69, at least in areas not involving prior judicial approval. Family law settlement agreements are unique. Public policy recognizes this in A.R.S. § 25-317 where the court is

¹⁰⁴ ARIZ. FAM. LAW PROC. R. 74(I)-(J); ARIZ. FAM. LAW PROC. FORM 10; Note, Rule 74 has been amended, effective January 1, 2016, eliminating the automatic right of objection, except with regard to actions exceeding the scope of the parenting coordinator’s authority. An objection must be filed within 20 days. Otherwise, the parenting coordinator’s decision is binding.

¹⁰⁵ ARIZ. REV. STAT. ANN. § 44-1378.04 (2010).

¹⁰⁶ ARIZ. REV. STAT. ANN. § 44-7153 (2010).

¹⁰⁷ 15 U.S.C. § 1635 (2011).

¹⁰⁸ ARIZ. REV. STAT. ANN. § 44-5002 (2010).

expressly mandated with the task of finding that separation agreements are not unfair and reasonable. The public policy is also recognized in Rule 69(B) where it is provided that challenges may be made to settlement agreements.

While general contract principles and the right to make binding agreements are recognized as significant in Arizona,¹⁰⁹ so, too, are the unique circumstances regarding agreements between spouses, former spouses, and other parties in family law matters. Due to the nature of the relationships that have transpired, not all negotiations may be at arm's length. Arizona law expressly states there is a fiduciary relationship between spouses.¹¹⁰ Moreover, marriages and other family and similar relationships allow for the disclosure of very personal and sensitive information that may well be appropriate during the relationship, but become lethal weapons when the relationship fails and legal proceedings ensue. Personal relationships may involve extremely delicate revelations, personal intimacies, sex, weaknesses, frailties, sensitivities, soft-spots, and hot-buttons which would never be known in arms-length business contract negotiations. One would have to be blind or naïve to believe that these would not be at the very heart of many settlement negotiations. Even the dynamics of the way in which the parties communicated or problem-solved during the relationship, or the level of control, anger, dominion, or even domestic violence, are likely to play a part in settlement negotiations. In other words, family law settlement agreements do not conveniently fit into the strict contract principles applied in other contexts. Therefore, while there must be some observance of traditional contract principles in order to ensure finality with re-

¹⁰⁹ Schrey v. Allison Steel Mfg. Co., 255 P.2d 604, 607 (Ariz. 1953) (right to contract is entitled to constitutional protection, but is a qualified right); Verma v. Stuhr, 221 P.3d 23, 24, 31 (Ariz. Ct. App. 2009); Samaritan Health Sys. v. Superior Court, 981 P.2d 584, 593 (Ariz. Ct. App. 1998).

¹¹⁰ Austin v. Austin, 348 P.3d 897, fn. 4 (Ariz. Ct. App. 2015) (citing *In re Harbor's Estate*, 449 P.2d 7, 16 (1969) and *Gerow v. Covill*, 960 P.2d 55, 64 (Ariz. Ct. App. 1998)).

gard to litigation in the family law arena, there must similarly be a recognition and realization that family law agreements are subject to exceptional and unique circumstances.

VIII. DEFECT

Rule 69(B) provides that a party challenging the validity of a family law settlement agreement must prove “any defect in the agreement.” The term “defect” is not defined. Thus, the meaning of the term is completely left open for interpretation. Moreover, the term “defect” with regard to contractual agreements is probably a poor choice of words. In the tort area, the term “defect” is often used in products liability litigation with regard to the design and manufacture of defective products. Defects may not only occur in the product itself, but also in the language associated with the product in instruction manuals, labels, warnings, and other printed material. But the term “defect” is not traditionally used with written contracts. As a result, the term is not only not defined, but is unfortunate in the family law area because there is little or no authority from which to gain guidance. Therefore, the meaning of the term is left to the advocacy and skill of the litigants in each situation.

One would assume that the term “defect” includes typical contract defenses.¹¹¹ In other words, illegality, incapacity, misrepresentation/fraud,¹¹² mistake,¹¹³ duress,¹¹⁴ undue influ-

¹¹¹ *Id.* at 902; *Zaccaria v. Zaccaria*, No. 1 CA-CV 08-0524, 2009 WL 1097867, at *1-3 (Ariz. Ct. App. Apr. 23, 2009) (mem.).

¹¹² *Trkula v. Trkula*, No. 1 CA-CV 15-0598 FC, 2016 WL 1696603, at *2 (Ariz. Ct. App. Apr. 28, 2016) (mem.) (lack of fraud or mistake rendered agreement binding); *Bulos-Simpkins v. Simpkins*, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1-7 (Ariz. Ct. App. Mar. 27, 2014) (mem.) (trial court’s finding that wife materially misrepresented value of certain assets upheld with remand for additional findings on other issues); *In re Marriage of Kalos*, Nos. 1 CA-CV 07-0222, 1 CA-CV 07-0773, 2009 WL 415594, at *1-4 (Ariz. Ct. App. Feb. 19, 2009) (mem.).

¹¹³ *Connelly v. Connelly*, No. 1 CA-CV 15-0290 FC, 2016 WL 7156437, at

ence,¹¹⁵ unconscionability, impossibility, impracticability,¹¹⁶ ambiguity,¹¹⁷ lack of mutual assent,¹¹⁸ etc., would undoubtedly be considered as valid bases for setting aside a settlement agreement.¹¹⁹ Some of these defenses, as well as others, are recognized as grounds for setting aside a judgment or an order based on a Rule 69 agreement under Rule 85(C), ARFLP.¹²⁰ Also, a disclosure violation, as misconduct of an adverse party,¹²¹ or fraud upon the court,¹²² may be a valid defense to an agreement. Defects might also include the omission of a relevant asset or debt,¹²³ the miscalculation of child support,¹²⁴ an

*1-4 (Ariz. Ct. App. Dec. 8, 2016) (mem.) (mutual mistake, not unilateral mistake, may be a defense); *Emmons v. Superior Court in and for Maricopa County*, 968 P.2d 582, 586 (Ariz. Ct. App. 1998).

¹¹⁴ *In re Marriage of Gallagher*, No. 1 CA-CV 07-0250, 2008 WL 4149665, at *1-3 (Ariz. Ct. App. Jan. 10, 2008) (mem.) (wife claimed duress by mediator and her own counsel).

¹¹⁵ *Trkula*, 2016 WL 1696603, at *1-3.

¹¹⁶ *Archer v. Archer*, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *2 (Ariz. Ct. App. June 16, 2009) (mem.).

¹¹⁷ *In re Marriage of Morton*, No. 2 CA-CV 2007-0056, 2008 WL 4615002, at *1-3 (Ariz. Ct. App. Jan. 18, 2008) (mem.) (ambiguity would not be addressed on appeal without transcript).

¹¹⁸ *Connelly*, 2016 WL 7156437, at *1-4.

¹¹⁹ *Breitbart-Napp v. Napp*, 163 P.3d 1024, 1031 (Ariz. Ct. App. 2007).

¹²⁰ *In re Jones*, No. 1 CA-CV 15-0803 FC, 2016 WL 6871408, at *3 (Ariz. Ct. App. Nov. 22, 2016) (mem.); *Fuller v. Fuller*, No. 1 CA-CV 11-0114, 2012 WL 2499671, at *1-4 (Ariz. Ct. App. June 26, 2012) (mem.).

¹²¹ *Fuller*, 2012 WL 2499671, at *1-4.

¹²² *McNeil v. Hoskyns*, 377 P.3d 46, 48-50 (Ariz. Ct. App. 2014) (non-modifiable and non-terminable agreement regarding spousal maintenance properly set aside where wife failed to disclose in open court over-payments of \$85,000).

¹²³ *Stephens v. Stephens*, No. 1-CA-CV 14-0608 FC, 2016 WL 74938, at *3 (Ariz. Ct. App. Jan. 7, 2016) (mem.) (trial court omitted agreed-upon assets and debts in decree); *Quinn v. Fitzpatrick-Quinn*, No. 1 CA-CV 11-0241, 2012 WL 1861406, at *1, *3 (Ariz. Ct. App. May 22, 2012) (mem.) (husband omitted from decree agreement to pay wife \$132,000 in bonuses); *Allan v. Allan*, No. 1 CA-CV 09-0556, 2010 WL 5030874, at *1, *5 (Ariz. Ct. App. Nov. 12, 2010) (mem.).

¹²⁴ *Coleman v. Robinson*, No. 1 CA-CV 11-0034, 2011 WL 6101825, at *1-

inconsistency between the decree and property settlement agreement¹²⁵ or other document filed with the decree,¹²⁶ omitted or inaccurate findings or agreements requisite to entry of any order,¹²⁷ improprieties in the signing, notarization or other procedural aspects of the documents, failure to timely file the settlement agreement,¹²⁸ inclusion of an unenforceable penalty,¹²⁹ etc. Another defect found in an agreement is the improper attempt to confer subject matter jurisdiction on the court.¹³⁰

Yet another defense to a Rule 69 agreement may relate to attorneys' fees. "[A] client may, without the consent of his [counsel], settle and compromise with [the] adversary all matters in litigation in such manner and upon such terms as he may

5 (Ariz. Ct. App. Dec. 8, 2011) (mem.).

¹²⁵ *In re Marriage of Kalos*, Nos. 1 CA-CV 07-0222, 1 CA-CV 07-0773, 2009 WL 415594, at *1-4 (Ariz. Ct. App. Feb. 19, 2009) (mem.) (agreement on record different from Rule 69 agreement); *Berg-Thaemert v. Thaemert*, No. 1 CA-CV 06-0767, 2007 WL 5462303, at *6 (Ariz. Ct. App. Oct. 23, 2007) (mem.) (valid Rule 69 agreement regarding personal property upheld where wife failed to identify the specified property that made the division inequitable).

¹²⁶ *In re Marriage of Gallagher*, No. 1 CA-CV 07-0250, 2008 WL 4149665, at *2-3 (Ariz. Ct. App. Jan. 10, 2008) (mem.) (decree, even if arguably fair, must not add to or vary terms of settlement agreement).

¹²⁷ *Gadhok v. Nangia*, No. 1 CA-CV 11-0589, 2012 WL 2154194, at *1 (Ariz. Ct. App. June 14, 2012) (mem.) (although parties agreed house was worth \$1.2 million, they did not agree either party had to purchase it at that price); *Armor Works Enterprises, LLC v. Cavanagh Law Firm, P.A.*, No. 1 CA-CV 11-0201, 2012 WL 952348, at *1-7 (Ariz. Ct. App. Mar. 20, 2012) (mem.).

¹²⁸ *Vasquez-Araiza v. Gurrola*, No. 1 CA-CV 13-0716 FC, 2015 WL 4623329, at *2 (Ariz. Ct. App. Aug. 4, 2015) (mem.); *ArmorWorks*, 2012 WL 952348, at *1-7.

¹²⁹ *Wehrung v. Kellam*, No. 1 CA-CV 09-0014, 2010 WL 845391, at *2 (Ariz. Ct. App. Mar. 11, 2010) (mem.).

¹³⁰ *Barnes v. Fink*, No. 2 CA-CV 2015-0062, 2015 WL 6549582, at *1, *3 (Ariz. Ct. App. Oct. 29, 2015) (mem.) (parties to an action cannot stipulate to UCCJEA jurisdiction which court does not otherwise have).

deem necessary for the protection of his interests.”¹³¹ “Such a settlement must, however, be made in good faith, and without a purpose to defeat an attorneys’ lien.”¹³² In such cases, “the court will protect the attorney of a party to an action against a collusive settlement of the litigation in fraud of his lien.”¹³³ It is also noteworthy that the lien must be perfected in order to make this claim.¹³⁴

Similarly, statutory defenses may be valid grounds for challenging a settlement agreement. These include that the agreement is “unfair” or “unreasonable” under A.R.S. § 25-317¹³⁵ or inequitable under § 25-318(A). Again, however, these sections’ terms of “unfair,” “unreasonable,” and “equitably,” like “defect,” are similarly not defined.

In addition, a valid Rule 69 agreement does not preclude its modification, even if a substantial and continuing change of circumstances under A.R.S. § 25-327(A) occurs before the final decree is actually entered.¹³⁶ As a result, one

¹³¹ *Millsap v. Sparks*, 188 P. 135, 136 (Ariz. 1920); *Siner v. Stewart*, 449 P.2d 635, 636 (Ariz. Ct. App. 1969) (quoting *Millsap* at 136).

¹³² *Millsap*, 188 P. at 136.

¹³³ *Id.*

¹³⁴ *See id.* (“As a general rule, [an attorney’s judgment] lien is not perfected until notice has been given to the obligor against whom it is asserted . . .”); *see also* *Burk v. Teufel*, No. 1 CA-CV 11-0317, 2012 WL 2798622, at *1 (Ariz. Ct. App. Jul 3, 2012) (mem.) (affirming the superior court’s rejection of a lien that had not attached).

¹³⁵ *Vasquez-Araiza*, 2015 WL 4623329, at *2 (citing ARIZ. REV. STAT. ANN. § 25-317 (2017)); *see also* *Wehrung v. Kellam*, No. 1 CA-CV 09-0014, 2010 WL 845391, at *1 (Ariz. Ct. App. Mar. 11, 2010) (mem.) (citing ARIZ. REV. STAT. ANN. § 25-317 (2017)); *Archer v. Archer*, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *2-3 (Ariz. Ct. App. June 16, 2009) (mem.); *see also* *Jackson v. Herrera*, No. 1 CA-CV 08-0049, 2009 WL 104661, at *1 (Ariz. Ct. App. Jan. 15, 2009) (mem.) (applying equitable factors in reviewing parenting agreement terms); *In re Marriage of Gallagher*, No. 1 CA-CV 07-0250, 2008 WL 4149665, at *1 (Ariz. Ct. App. Jan. 10, 2008) (mem.).

¹³⁶ *Huston v. Sloan*, No. 1 CA-CV 11-0583, 2012 WL 2003495, at *2-3 (Ariz. Ct. App. June 5, 2012) (mem.) (affirming the family court’s modifi-

should be careful to consider whether a court would characterize a Rule 69 agreement challenge as a modification rather than a defect.

Failure to timely object to an otherwise valid settlement agreement before entry of the decree may constitute waiver.¹³⁷ The parties may also waive an otherwise valid Rule 69 agreement memorialized on the record by conduct during an attempted pretrial reconciliation before trial and by both conduct and statements during trial.¹³⁸ Similarly, the parties may also confirm an allegedly invalid agreement by their testimony at trial.¹³⁹ However, one does not waive one's right to claim offsets and credits against a Rule 69 agreement by participating in an equal division of accounts without a clear showing of one's intent to do so.¹⁴⁰ Therefore, when challenging a Rule 69 settlement agreement, it becomes necessary to examine it from every angle so as to enumerate as many "defects" as possible.

cation); *Sarma v. Iyer*, Nos. 1 CA-CV 10-0473, 1 CA-CV 10-0839, 2011 WL 6292212, at *3 (Ariz. Ct. App. Dec. 15, 2011) (mem.); *Coleman v. Robinson*, No. 1 CA-CV 11-0034, 2011 WL 6101825, at *3, *5 (Ariz. Ct. App. Dec. 8, 2011) (mem.) (reversing and remanding superior court's denial of modification petition).

¹³⁷ *Trkula v. Trkula*, No. 1 CA-CV 15-0598 FC, 2016 WL 1696603, at *1-3 (Ariz. Ct. App. Apr. 28, 2016) (mem.).

¹³⁸ *Watson v. Watson*, No. 1 CA-CV 10-0094, 2011 WL 846427, at *3 (Ariz. Ct. App. Mar. 10, 2011) (mem.) (affirming family court's finding of waiver).

¹³⁹ *In re Marriage of Morton*, No. 2 CA-CV 2007-0056, 2008 WL 4615002, at *1-2 (Ariz. Ct. App. Jan. 18, 2008) (mem.) (husband confirmed settlement agreement at trial despite private mediator's alleged lack of authority to write mediation memorandum).

¹⁴⁰ *Doyle v. Doyle*, No. CA-CV 07-0734, 2008 WL 4966035, at *4-5 (Ariz. Ct. App. Nov. 18, 2008) (mem.).

IX. INDEPENDENT DISCRETION UNDER A.R.S. § 25-317

Rule 69(B) further provides that in reviewing a separation agreement, nothing shall preclude the court from exercising its independent discretion under A.R.S. § 25-317. The Rule makes no reference to the specific subsection of the statute. It is clear that A.R.S. § 25-317 subsection (B) provides the agreement is binding on the court unless it finds the agreement unfair, after considering the parties' economic circumstances and any other relevant evidence. Subsection (C) of the statute further provides that if the court deems the separation agreement unfair as to disposition of property or maintenance, the court may request that the parties submit a revised separation agreement or may make orders for the disposition of property or maintenance. Finally, subsection (D) states that if the court finds that the separation agreement is not unfair as to disposition of property or maintenance and that it is reasonable as to support, custody, and parenting time of children, the separation agreement shall be either set forth or incorporated by reference in the decree. The parties shall be ordered to comply with the agreement's terms. If, on the other hand, the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement as incorporated by reference and state that the court has found the terms as to property disposition and maintenance not unfair and the terms as to support, custody, and parenting time of children reasonable.

Thus, in summary, at least with regard to a separation agreement, A.R.S. § 25-317 requires the court find that the separation agreement is not unfair as to property and maintenance and is reasonable as to support, custody, and parenting time of children. Lacking such a finding, the separation agreement would not be binding on the court. In that event, the court may request that the parties submit a revised separation agreement or make other orders for the disposition of property, maintenance, support, legal decision-making and parenting

time as deemed necessary.

A trial court has the power to approve and adopt the agreement, reject it entirely, or modify it as the facts and circumstances warrant.¹⁴¹ To do so, the court may elect not to

¹⁴¹ ARIZ. SUPER. CT. MARICOPA CO. R. 6.5(e); *Murray v. Murray*, 367 P.3d 78, 80 (Ariz. Ct. App. 2016). (trial court on remand to take evidence and make findings on best interests of children in relocation case); *Wick v. Wick*, 489 P.2d 19, 21-22 (Ariz. 1971); *In re Harbor's Estate*, 449 P.2d 7, 16 (1969); *In re Estate of Henry*, 430 P.2d 937, 940 (Ariz. Ct. App. 1967); *Breitbart-Napp v. Napp*, 163 P.3d 1024, 1032 (Ariz. Ct. App. 2007); *see also Vasquez-Araiza v. Gurrola*, No. 1 CA-CV 13-0716 FC, 2015 WL 4623329, at *2 (Ariz. Ct. App. Aug. 4, 2015) (mem.) (court could find E-mail agreement and Notice of Settlement not binding and unfair where agreement not filed as ordered); *Johnston v. Johnston*, No. 1 CA-CV 14-0451 FC, 2015 WL 4372813, at *2 (Ariz. Ct. App. July 16, 2015) (mem.) (trial court did not abuse its discretion in accepting husband's Rule 69 property settlement agreement after mediation where wife's failure to conduct adequate discovery did not constitute fraud or excusable neglect); *Chandler v. Ellington*, No. 1 CA-CV 13-0648 FC, 2015 WL 3819094, at *1-2 (Ariz. Ct. App. June 18, 2015) (mem.) (trial court did not abuse its discretion in adopting best interest attorney recommendation that mother have final legal decision-making authority despite parties' Rule 69 agreement otherwise); *Ghosh v. Kottman*, No. 1 CA-CV 14-0356 FC, 2015 WL 3537142, at *1-2 (Ariz. Ct. App. June 2, 2015) (mem.) (trial court did not abuse its discretion in denying motion to enforce property settlement agreement without necessary newly discovered evidence); *Ledo v. Ledo*, No. 1 CA-CV 14-0331 FC, 2015 WL 2383843, at *1 (Ariz. Ct. App. May 7, 2015) (mem.) (trial court did not err in agreeing with Special Master's recommendation that husband not receive any further credits from home proceeds divided under Rule 69 agreement); *Fowler v. Fowler*, 2015 WL 410594, at *2 (absent a trial, affirming family court's entry of a voluntary modification); *Bulos-Simpkins v. Simpkins*, No. 1 CA-CV 13-0124, 2014 WL 1266381, at *1, *5 (Ariz. Ct. App. Mar. 27, 2014) (mem.) (trial court not bound to divide assets as agreed where wife had materially misrepresented values); *Gadhok v. Nangia*, No. 1 CA-CV 11-0589, 2012 WL 2154194, at *2-4 (Ariz. Ct. App. June 14, 2012) (mem.) (court not bound to accept transcribed settlement agreement regarding value of residence when it decreased in value and there was no agreement required either party had to purchase it at the higher price); *Burton*, 2009 WL 1066000, at *2-4 (court not bound to accept settlement agreement and properly appointed real estate

hold a hearing¹⁴² or hold a hearing as it deems fit.¹⁴³ A hearing would be required in at least several scenarios, such as when prior emails between counsel suggested that the parties assented to the agreement's material terms,¹⁴⁴ when the court finds evidence of undue influence, duress and illegality before a decree and property settlement agreement were entered,¹⁴⁵ and to determine fairness in a valid settlement agreement.¹⁴⁶ Proceedings are further required when a disclosure violation is discovered after negotiating a settlement agreement¹⁴⁷ and when a

commissioner to sell residence where difference between agreed value and actual value prevented husband from completing refinance of property).

¹⁴² *Robertson v. Alling*, 351 P.3d 352, 355 (Ariz. 2015); *Sharp v. Sharp*, 877 P.2d 304 (Ariz. Ct. App. 1994); *In re Marriage of D'Amours*, No. 1 CA-CV 15-0775 FC, 2016 WL 7209671, at *1-3 (Ariz. Ct. App. Dec. 13, 2016) (mem.); *Johnston*, 2015 WL 4372813, at *2; *Gadhok v. Nangia*, 2012 WL 2154194, at *2-4 (trial court within its discretion to deny request for post-decree hearing where wife waited two years, where wife did not allege specific assets, where no transcript was provided, and where wife had a history of making unfounded assertions); *Huston v. Sloan*, No. 1 CA-CV 11-0583, 2012 WL 2003495, at *1-3 (Ariz. Ct. App. June 5, 2012) (mem.); *Bellings v. Palma*, No. 1 CA-CV 10-0822, 2011 WL 5542413, at *1-3 (Ariz. Ct. App. Nov. 15, 2011) (mem.) (oral agreement made at Resolution Management Conference regarding sale of residence was binding and trial court was not required to conduct a *Sharp* hearing where agreement was made in open court); *Katz v. Siverling*, No. 1 CA-CV 08-0235, 2009 WL 1311066, at *1-4 (Ariz. Ct. App. May 12, 2009) (mem.) (citing *Herberman v. Bergstrom*, 816 P.2d 244 (Ariz. 1991) (*Sharp* does not require a full evidentiary hearing; trial court can conduct limited hearing on certain issues it deems appropriate).

¹⁴³ *Robertson*, 351 P.3d at 355; *Breitbart-Napp*, 163 P.3d at 1032; *Chandler*, 2015 WL 3819094, at *1-2; *Ledo*, 2015 WL 2383843, at *1; *Bulos-Simpkins*, 2014 WL 1266381, at *1, *5; *Johns v. Johns*, No. 1 CA-CV 09-0524, 2010 WL 2889557, at *1-4 (Ariz. Ct. App. July 22, 2010) (mem.) (citing *Sharp*, 877 P.2d at 304).

¹⁴⁴ *Nunez v. Porter*, No. CA-SA 14-0067, 2014 WL 2159752, at *1-3 (Ariz. Ct. App. May 22, 2014) (Dec. order).

¹⁴⁵ *Wick*, 489 P.2d at 21-22.

¹⁴⁶ *Sharp*, 877 P.2d at 304; *Archer v. Archer*, No. 1 CA-CV 08-0543, 2009 WL 1682146, at *1-3 (Ariz. Ct. App. June 16, 2009) (mem.) (Rule 69 agreement binding except to the extent it was unfair).

¹⁴⁷ *Bulos-Simpkins*, 2014 WL 1266381, at *1, *5.

valid postnuptial agreement is challenged for lack of disclosure.¹⁴⁸ Moreover, undue influence, coercion, and duress require a *Sharp* hearing.¹⁴⁹

Alternatively, there are scenarios in which a hearing would not be necessary, such as when letters between counsel with authority compromised a personal injury claim,¹⁵⁰ when a settlement agreement is binding because the risks of an economic downturn or lack of financing are foreseeable,¹⁵¹ or when a settlement offer is not timely accepted, thus barring its admission.¹⁵² Further, a hearing would not be required when a property settlement agreement shows no evidence of fraud or mistake,¹⁵³ when emails and spreadsheets between the parties adequately showed no consent and lacked terms sufficient to constitute an agreement,¹⁵⁴ and when a request to offset sole and separate property interests against community interests was not stated in the agreement and the issue was not raised at trial.¹⁵⁵

As further evidence of the court's independent discretion as to settlements and related decrees, Rules 67(B) and (D)

¹⁴⁸ *Breitbart-Napp*, 163 P.3d at 1024.

¹⁴⁹ *Johns v. Johns*, No. 1 CA-CV 09-0524, 2010 WL 2889557, at *1-4 (Ariz. Ct. App. July 22, 2010) (mem.).

¹⁵⁰ *Hays v. Fischer*, 777 P.2d 222 (Ariz. Ct. App. 1989).

¹⁵¹ *Archer*, 2009 WL 1682146, at *1-3.

¹⁵² *Cf. Perry v. Ronan*, 233 P.3d 617 (Ariz. Ct. App. 2010) (finding a valid contract; applying Rest. 2d of Contracts to conclude that known delays can bar acceptance, unless the acceptance falls within the permissible duration).

¹⁵³ *In re Jones*, No. 1 CA-CV 15-0803 FC, 2016 WL 6871408, at *1-3 (Ariz. Ct. App. Nov. 22, 2016) (mem.); *Trkula v. Trkula*, No. 1 CA-CV 15-0598 FC, 2016 WL 1696603, at *1-3 (Ariz. Ct. App. Apr. 28, 2016) (mem.); *Johnston v. Johnston*, No. 1 CA-CV 14-0451 FC, 2015 WL 4372813, at *1-3 (Ariz. Ct. App. July 16, 2015) (mem.).

¹⁵⁴ *Doyle v. Doyle*, No. CA-CV 07-0734, 2008 WL 4966035, at *1-5 (Ariz. Ct. App. Nov. 18, 2008) (mem.).

¹⁵⁵ See discussion *supra* note 135; *Allan v. Allan*, No. 1 CA-CV 09-0556, 2010 WL 5030874, at *1-5 (Ariz. Ct. App. Nov. 12, 2010) (mem.).

provide that the court may allow mediators and settlement conference officers, including pro-tem judges assigned to the case, to make the findings under A.R.S. § 25-317, and sign the decree. A decree entered under these circumstances has the same force and effect as any other decree entered by the judge or commissioner to whom the case is assigned.

Apparently, the trial court can ignore a severability clause in the agreement, which provides that if the court deems invalid any of the terms and conditions of the agreement, then the court shall limit the invalid section to the least extent possible and allow the rest of the agreement to stand. Case law and local rules do not bind the court to such a provision and the court may find that any “defect” in the agreement renders the entire agreement invalid.¹⁵⁶ Or, on the other hand, the court may find that the severability clause is valid and either modify or reject the offending parts.

As noted above, the term “unfair” under A.R.S. § 25-317 is also not defined.¹⁵⁷ Case law already indicates that it does not always mean “equal.”¹⁵⁸ However, how far from “equal” is “fair” is left to the litigants and the court. Interestingly, § 25-317 also does not use the word “equitable” as required under A.R.S. § 25-318(A). But, case law requires that to be enforced, the agreement must not only be fair, but equitable.¹⁵⁹ Traditionally, the term equitable under A.R.S. § 25-

¹⁵⁶ See generally, Rule 6.5(e) Local Rules of Practice for Maricopa County (Family Court); *Wick v. Wick*, 489 P.2d 19, 21-22 (Ariz. 1971); *In re Harbor's Estate*, 449 P.2d 7, 16 (1969); *In re Estate of Henry*, 430 P.2d 937, 940 (Ariz. Ct. App. 1967); *Breitbart-Napp v. Napp*, 163 P.3d 1024 (Ariz. Ct. App. 2007).

¹⁵⁷ The term “grossly unfair” was recognized in *Hays v. Fischer*, 777 P.2d 222 (Ariz. Ct. App. 1989) as justification for setting aside an agreement where an attorney may not be authorized by his client to compromise a lawsuit (citing *Allen v. Fewel*, 87 S.W.2d 142 (1935)).

¹⁵⁸ ARIZ. REV. STAT. ANN. § 318(A) (2017); see also, *Toth v. Toth*, 946 P.2d 900 (Ariz. 1997).

¹⁵⁹ *Wick*, 489 P.2d at 21-22; *In re Harbor's Estate*, 449 P.2d at 16; *Breit-*

318(A) means “substantially equal.”¹⁶⁰ Conversely, at least two cases use the term “fair” only, and make no reference to the term “equitable.”¹⁶¹ It is clear that a mere recitation by the parties that the agreement is fair and equitable is not enough and the court must make its own finding regardless of the parties’ statements.¹⁶² Thus, it is best practice to articulate the reasons why the settlement agreement is both “fair” and “equitable” in the text of the document so that the court or settlement conference officer can make the requisite findings.

X. PRE-DECREE VERSUS POST-DECREE AGREEMENTS

As stated above, another legal question arises regarding agreements presented to the court under Rule 69 and those presented under A.R.S. § 25-317. Rule 69 is not limited concerning the type of “agreement” presented. The rule appears to apply to both pre- and post-decree settlement agreements, such as modification agreements, enforcement agreements, asset/debt redistribution, and all other relevant matters. However, A.R.S. § 25-317 appears to limit the court’s consideration of a “separation agreement” submitted simultaneously with the decree. Even the title of the statute references only “separation” agreements. This distinction is further amplified by the fact that entry of a decree precludes modification of a decree and property settlement agreement incorporated by reference under

bart-Napp, 163 P.3d at 1024; *Sharp v. Sharp*, 877 P.2d 304 (Ariz. Ct. App. 1994).

¹⁶⁰ *Hatch v. Hatch*, 547 P.2d 1044 (Ariz. 1976); *In re Marriage of Inboden*, 225 P.3d 599 (Ariz. Ct. App. 2010); *Lincoln v. Lincoln*, 746 P.2d 13 (Ariz. Ct. App. 1987).

¹⁶¹ *In re Harbor’s Estate*, 449 P.2d at 16 (finding a failure to meet the burden of showing a fair and equitable transaction); *Johns v. Johns*, No. 1 CA-CV 09-0524, 2010 WL 2889557, at *1-4 (Ariz. Ct. App. July 22, 2010) (mem.).

¹⁶² *Johns*, 2010 WL 2889557, at *1-4.

A.R.S. § 25-317(F), unless the court finds that conditions have been met for reopening a judgment under Rule 85(C), A.R.F.L.P.¹⁶³

A natural question arises as to whether the incorporation of A.R.S. § 25-317 into Rule 69 permits and/or obligates the trial court to make the same analysis as to fairness and reasonableness for all agreements and not just pre-decree separation agreements. The express language of Rule 69 suggests that the court may review all agreements under § 25-317. In other words, an agreement made after the entry of the decree is subject to the same review by the trial court for fairness and reasonableness as an agreement made at the time the decree is entered. Also, as stated previously, in family law, there is really no legal or logical reason for differentiating between pre-decree agreements and other agreements, including pre-decree, post-decree and non-dissolution matters, in the family law field.

At least one authority has cited *Sharp* (under A.R.S. § 25-317) as authority for the trial court's approval of a post-decree agreement under Rule 69 regarding the relocation of a child.¹⁶⁴ Another case has cited Rule 69(B) as authority for applying an "unfairness" standard to a pre-decree agreement regarding a division of assets.¹⁶⁵ Another has cited A.R.S. § 25-317 in support of the trial court's review of a post-decree agreement regarding extracurricular and continuing education expenses in the child support context.¹⁶⁶ Still another has ap-

¹⁶³ *In re Jones*, No. 1 CA-CV 15-0803 FC, 2016 WL 6871408, at *1-3 (Ariz. Ct. App. Nov. 22, 2016) (mem.).

¹⁶⁴ See generally *Fowler v. Fowler*, 2015 WL 410594, at *1-4 (Ariz. Ct. App. Jan. 27, 2015) (mem.); but see, *Zaccaria v. Zaccaria*, No. 1 CA-CV 08-0524, 2009 WL 1097867, at *1-3 (Ariz. Ct. App. Apr. 23, 2009) (mem.) (holding settlement agreements are governed by general contract principles).

¹⁶⁵ *Vasquez-Araiza v. Gurrola*, No. 1 CA-CV 13-0716 FC, 2015 WL 4623329, at *1-2 (Ariz. Ct. App. Aug. 4, 2015) (mem.).

¹⁶⁶ *Gecha v. Gecha*, No. 1 CA-CV 11-0130, 2012 WL 1964566, at *1-5

plied general contract principles to uphold a post-decree agreement regarding unreimbursed medical expenses (e.g. child support).¹⁶⁷ This conflict raises a number of questions that are yet to be answered.

Questions remain where traditional contract principles stand in relation to pre-decree and post-decree agreements.¹⁶⁸ Are all family law agreements subject to court approval under Rule 69? Does that mean that all agreements, even post-decree agreements, are subject to the fairness and reasonableness requirements of A.R.S. § 25-317? In post-decree cases, are parties free to reach any agreements that are not subject to court scrutiny? After a decree, is there such a thing as a traditional binding contract between the parties that is not subject to court approval? These, and other similar questions, are subject to further direction from the legislature as well as Arizona's trial and appellate courts. But, if one acknowledges that family law agreements are unique, then a strong argument exists that all family law agreements are subject to the same court scrutiny and approval regardless of whenever made.

XI. ATTORNEYS' FEES/SANCTIONS

Rule 69 confirms the court's discretion in awarding attorneys' fees and costs under A.R.S. § 25-324 whenever a par-

(Ariz. Ct. App. May 31, 2012) (mem.).

¹⁶⁷ *Branigan v. Fredrickson*, No. 1 CA-CV 10-0552, 2011 WL 2462717, at *1-4 (Ariz. Ct. App. June 21, 2011) (mem.).

¹⁶⁸ *In re Estate of Lamparella*, 109 P.3d 959 (Ariz. Ct. App. 2005); *see generally*, *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999); *Emmons v. Superior Court in and for Maricopa County*, 968 P.2d 582, 586 (Ariz. Ct. App. 1998); *Branigan*, 2011 WL 2462717, at *1-4 (general contract principles govern post-decree settlement agreement) (citing *Emmons*, 968 P.2d at 586); *Zaccaria*, 2009 WL 1097867, at *1-3 .

ty challenges a settlement agreement's validity.¹⁶⁹ The statutory factors to be considered under A.R.S. § 25-324(A) are: (1) the respective financial resources of the parties; and (2) the reasonableness of their positions. The financial information must be current enough for the court to make the requisite findings under the statute.¹⁷⁰

Fees can be awarded against both the challenging party and the challenging attorney.¹⁷¹ The trial court has discretion on whether to award attorney's fees for the actual negotiation and for the preparation of a Rule 69 Agreement.¹⁷² Attorney fees can be awarded, plus sanctions, for committing a fraud upon the court as part of the settlement agreement.¹⁷³ A non-controlling factor includes a mandatory contractual provision awarding fees and costs to the prevailing party.¹⁷⁴ Also not controlling is the prevailing party standard without contractual provision.¹⁷⁵ Additionally, courts have found valid and binding post-decree Rule 69 agreements regarding payments on prior awards of attorneys' fees and costs.¹⁷⁶ Moreover, a finding of contempt is a valid sanction for violating a Rule 69 agreement

¹⁶⁹ *Haak v. Haak*, Nos. 1 CA-CV 13-0764 FC, 1 CA-CV 14-0183 FC, 2015 WL 1359392, at *1-4 (Ariz. Ct. App. Mar. 24, 2015) (mem.); *MacLean v. Kappa*, No. 1 CA-CV 13-0512, 2014 WL 2895579, at *1-3 (Ariz. Ct. App. June 24, 2014) (mem.).

¹⁷⁰ *MacLean*, 2014 WL 2895579, at *1-3; *Breitbart-Napp v. Napp*, 163 P.3d 1024, 1031 (Ariz. Ct. App. 2007).

¹⁷¹ *Id.*

¹⁷² *Sharkey v. Sharkey*, No. 1 CA-CV 15-0386 FC, 2016 WL 3021979, at *1-3 (Ariz. Ct. App. May 24, 2016) (mem.).

¹⁷³ *McNeil v. Hoskyns*, 377 P.3d 46, 48-50 (Ariz. Ct. App. 2014).

¹⁷⁴ *Edsall v. Superior Court*, 693 P.2d 895 (Ariz. 1984); *In re Gubser*, 614 P.2d 845 (Ariz. 1980); *MacLean*, 2014 WL 2895579, at *1-3; *see also*, *Large v. Large*, No. 1 CA-CV 11-0073, 2012 WL 1057598, at *1-5 (Ariz. App. Mar. 27, 2012) (mem.) (prevailing party attorneys' fees provision in pre-marital agreement was procedurally unconscionable, not binding, and severable despite validity of remainder of agreement).

¹⁷⁵ *Breitbart-Napp*, 163 P.3d at 1031; *Burnette v. Bender*, 908 P.2d 1086, 1091 (Ariz. Ct. App. 1995).

¹⁷⁶ *Lewis v. Rehkow*, No. 1 CA-CV 11-0091, 2012 WL 2154181, at *1-5 (Ariz. Ct. App. June 14, 2012) (mem.).

requiring attorneys' fees.¹⁷⁷ And, in at least one case, an alleged deviation from a Rule 69 agreement has led to a separate tort lawsuit.¹⁷⁸

XII. SUMMARY

As is evident from the significant number of trial court proceedings and appellate authority, Rule 69 is used extensively in family law cases. There is much more to it than appears on the surface. There are clearly some unanswered questions that will require amendments by the drafters and/or clarifications by the courts. However, if the goal of Rule 69 is to promote settlements and help families, parents and others resolve their cases amicably, quickly and inexpensively, then a thorough and clear understanding of the Rule for all who work in this field is essential to the successful outcome of any case.

¹⁷⁷ *Id.*

¹⁷⁸ *Armor Works Enterprises, LLC v. Cavanagh Law Firm, P.A.*, No. 1 CA-CV 11-0201, 2012 WL 952348, at *1-7 (Ariz. Ct. App. Mar. 20, 2012) (mem.).

*H.B. 2188: INSURERS RISK CONFIDENTIAL INFORMATION IN
ORDER TO MANAGE RISK*

Steven D. Crocchi*

I. INTRODUCTION

The reason individuals purchase insurance is to manage risk.¹ Insurers purchase reinsurance for the purpose of spreading their risk of loss, which could otherwise bankrupt them.² “[R]einsurance enables an original insurer to accept risks that would otherwise be beyond its capacity by allowing [the insurer] to transfer a portion of that risk to reinsurers.”³ So how do insurers determine if they are capable of managing risks while avoiding the danger of becoming insolvent? As part of the initiative to ensure that insurers are not managing risks beyond their capacity, Arizona House Bill 2188 (“H.B. 2188”) will require insurers to maintain a risk management framework and conduct an Own Risk and Solvency Assessment (“ORSA”). This comment provides background on H.B. 2188 and demonstrates that while the Bill is designed to help insurers

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¹ Roberta M. Berry, *The Human Genome Project and the End of Insurance*, 7 U. FLA. J.L. & PUB. POL’Y 205, 216 (1996).

² Steven W. Thomas, *Utmost Good Faith in Reinsurance: A Tradition in Need of Adjustment*, 41 DUKE L.J. 1548, 1549 (1992).

³ *Id.*

manage their risks, it puts insurers' confidential and privileged information at risk.

II. BACKGROUND

Part of what led to the 2008 financial crisis, was American International Group's failure to adequately monitor their risk management framework.⁴ In response to the financial crisis, the National Association of Insurance Commissioners ("NAIC") and the International Association of Insurance Supervisors ("IAIS") moved toward the adoption of enterprise risk management programs, which included an ORSA requirement.⁵ "The prime purpose of the ORSA is to assess whether the insurer's risk management and solvency position is currently adequate and is likely to remain so in the future."⁶ The ORSA requires an insurer or insurance group to "analyze all reasonably foreseeable and relevant material risks (i.e., underwriting, credit, market, operational, liquidity risks, etc.) that could have an impact on an insurer's ability to meet its policyholder obligations."⁷ In 2015, the NAIC Own Risk and Solvency Assessment Model Act went into effect, requiring medium and large U.S. insurers to assess the adequacy of their risk management.⁸ In January 2016, Arizona proposed H.B. 2188, which would adopt the NAIC's ORSA Model Act.

⁴ Carrick Mollenkamp, *Behind AIG's Fall, Risk Models Failed to Pass Real-World Test*, WALL ST. J. (Oct. 31, 2008), <http://www.wsj.com/articles/SB122538449722784635>.

⁵ Duane Morris, *NAIC Summer 2015 Meeting: ORSA and Confidentiality*, LEXISNEXIS LEGAL NEWSROOM: INSURANCE LAW, (Sept. 23, 2015, 3:43pm), http://www.duanemorris.com/alerts/naic_summer_2015_meeting_orsa_and_confidentiality_0815.html.

⁶ Morris, *supra* note 5.

⁷ *Id.*

⁸ *Own Risk and Solvency Assessment*, NAT'L ASS'N OF INS. COMMISSIONERS, http://www.naic.org/cipr_topics/topic_own_risk_solvency_assessment.htm, (last visited Oct. 1, 2016).

Effective January 1, 2017, H.B. 2188 will require insurers to maintain a risk management framework, conduct an annual ORSA, and file an ORSA Summary Report to the lead state director or commissioner of the insurance group to which the insurer belongs.⁹ Included in the ORSA Summary Report should be a description of the insurer's risk management framework, an assessment of the insurer's risk exposure, a group assessment of risk capital, and a prospective solvency assessment.¹⁰

In order to be exempt from the ORSA requirements set forth in H.B. 2188, two requirements must be met: (1) the insurer must have an annual direct written and assumed premium less than \$500 million; and (2) the insurance group must have an annual direct written and assumed premium less than \$1 billion.¹¹ "If an insurer qualifies for the exemption and the insurance group does not qualify, the summary report must include every insurer within the insurance group."¹² In contrast, "if an insurer does not qualify for the exemption, but the insurance group qualifies, the only summary report to be submitted must be applicable to that insurer."¹³ If an insurer no longer meets the exemption requirements, the insurer will have one year to comply with the ORSA requirements set forth in H.B. 2188.¹⁴

If an insurer fails to provide an annual ORSA Summary Report, he or she will be subjected to a \$500 fine per day, with a penalty cap of \$100,000, until a summary report has been

⁹ H.B. 2188, 52d Leg. 2d Reg. Sess. (Ariz. 2016).

¹⁰ NAT'L ASS'N OF INS. COMM'RS, NAIC OWN RISK AND SOLVENCY ASSESSMENT (ORSA) GUIDANCE MANUAL.

¹¹ H.B. 2188, *supra* note 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

filed.¹⁵ However, the director of the Department of Insurance has discretion to reduce the penalty if the insurer can demonstrate a financial hardship.¹⁶

III. ANALYSIS

The NAIC stated the uniform adoption of the Model Act “[would] provide that the legal framework exists in all states to require the ORSA so that this coordinated regulatory effort can be effective.”¹⁷ The ORSA is a continuous process that is meant to encourage insurers to anticipate capital needs before it is too late.¹⁸ According to the NAIC, the ORSA summary report requirement will improve the NAIC’s understanding of the material risks insurers and insurance groups are exposed to and allow for improved solvency regulation.¹⁹ In addition, “[t]he ORSA is beneficial for a firm’s decision[-]making process”²⁰ and instead of relying on outside regulation, the ORSA puts the responsibility on the insurer to provide self-supervision and governance.²¹ Essentially, this would lead to a more efficient use of the company’s capital.²² “By developing and using a

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Memorandum from Dir. John M. Huff and Danny Saenz, Co-Chairs of Grp. Solvency Issues Working Grp., to Comm’r Eleanor Kitzman, Chair of Fin. Regulation Standards and Accreditation Comm. 52 (Apr. 7, 2013), http://www.naic.org/meetings1508/committees_f_2015_summer_nm_materials.pdf#page=52.

¹⁸ Shanique Hall & Kris DeFrain, *Insurers, Are You Ready? The Own Risk and Solvency Assessment (ORSA) Is On Its Way*, NAT’L ASS’N OF INS. COMMISSIONERS, http://www.naic.org/cipr_newsletter_archive/vol5_orsa.pdf [https://perma.cc/5RTZ-WE4S].

¹⁹ Morris, *supra* note 5.

²⁰ David Hayes, *Utilizing Solvency II to Improve Insurer Solvency Regulation in the United States*, 21 J. TRANSNAT’L L. & POL’Y 243, 261 (2011).

²¹ *Id.*

²² Oliver Gillespie, Dominic Clark, Henny Verheugen, & Gary Wells, *Benefits and Challenges of Using an Internal Model for Solvency II*,

robust and sophisticated model, companies can move towards an improved understanding of the benefits of risk mitigation, diversification, and management actions.”²³ An effective risk management framework is also important because it: (1) drives a positive risk culture; (2) enables an understanding of key risk drivers; (3) helps in the planning processes; (4) requires insurers to assess their current risk profile; and (5) aids in forward looking risk management.²⁴

However, the insurance industry has a major concern regarding the confidentiality of the information the annual ORSA Summary Report will provide.²⁵ Specifically, those in opposition to the ORSA requirement argue that they are required to provide sensitive, strategic, organizational, and financial information, which may be exposed to third-party litigants.²⁶

In response to these concerns, H.B. 2188 contains a confidentiality provision which provides that documents received as part of the ORSA Summary Report are not subject to public record, subpoena, or discovery, and are not admissible in any private civil actions.²⁷ Additionally, the state director who receives the ORSA Summary Report is “not allowed or required to testify in any private civil action concerning any confidential ORSA-related documents.”²⁸ Moreover, “the Director may use documents relating to an ORSA for the

MILLIMAN WHITE PAPER (Nov. 2008), <http://www.milliman.com/insight/Periodicals/st/pdfs/Benefits-and-challenges-of-using-an-internal-model-for-Solvency-II>.

²³ *Id.*

²⁴ *Own Risk and Solvency Assessment (ORSA) Framework*, GCCAPITALIDEAS.COM (Jan. 28, 2016 1:00 AM), <http://www.gccapitalideas.com/2016/01/28/own-risk-and-solvency-assessment-orsa-framework/> (last visited Oct. 30, 2016).

²⁵ Morris, *supra* note 5.

²⁶ *Id.*

²⁷ H.B. 2188, *supra* note 9.

²⁸ *Id.*

furtherance of any regulatory or legal action as a part of the Director's official duties and may not make the document public without the written consent of the insurer.”²⁹

Despite H.B. 2188 implementing a confidentiality provision, the Arizona statute relating to confidentiality provides certain exceptions in order to assist in the performance of the director's regulatory duties.³⁰ These exceptions would allow the director to share confidential and privileged information, including trade secrets, with other state, federal, and international regulatory agencies, including members of supervisory colleges, as defined in A.R.S. § 20-4919, as well as with the NAIC, and third-party consultants.³¹ However, in order for third-party consultants to be involved, the director of the Department of Insurance must obtain the written consent of the insurer.³² Also, the director may receive confidential or privileged information from regulatory officials, the NAIC, and members of any supervisory colleges.³³ “With this allowance for sharing, the NAIC is likely predicting scenarios where the ORSA Report becomes a substantial part of the Commissioner's evaluative and investigatory process when evaluating an insurance company that is within its jurisdiction.”³⁴

There is also a concern among insurers that there will be an abuse of the confidential information given to members of supervisory colleges.³⁵ “[M]embers of a supervisory college may become privy to sensitive information that could alter their personal opinions as to whether they would choose to do

²⁹ *Id.*

³⁰ ARIZ. REV. STAT. ANN. § 20-491.06(C) (2016).

³¹ ARIZ. REV. STAT. ANN. § 20-491.06(C)(1) (2016).

³² ARIZ. REV. STAT. ANN. § 20-491.06(C)(3)(f) (2016).

³³ ARIZ. REV. STAT. ANN. § 20-491.06(C)(2) (2016).

³⁴ Kelly Kirby, *Supervisory Colleges: Improving International Supervisory Coordination*, 19 CONN. INS. L.J. 149, 170-71 (2012).

³⁵ *Id.* at 171.

business with a particular insurer in the future after gaining access to a report that literally outlines the company's greatest risks."³⁶ It is argued that no matter how many provisions regarding confidentiality are put in place, it would be impossible to control how this confidential information might influence those who gain access to an insurer's confidential information and trade secrets.³⁷

IV. CONCLUSION

H.B. 2188 is an attempt to ensure that insurers are managing their risks and taking the necessary steps to maintain their solvency. While H.B. 2188 contains provisions designed to protect the confidentiality of the information provided by insurers, it fails to adequately address concerns regarding how the information might influence those who gain access to the confidential information. Before the legislature can show its support for H.B. 2188, the issue regarding confidentiality of the ORSA must be addressed more thoroughly.

³⁶ *Id.*

³⁷ *Id.*

*HOUSE BILL 2273—AMENDING A.R.S. § 36-2152
PROVIDING PREGNANCY INFORMATION TO A MINOR: A LEGISLA-
TIVE INTENT TO EDUCATE MINORS SEEKING AN ABORTION*

Vanessa Silva*

I. INTRODUCTION

American shows like “Teen Mom” and “16 & Pregnant” depict the hardships that “pregnant teens face [such as]: marriage, adoption, religion, gossip, finances, [being the center of] rumors among the community, graduating [or not graduating] high school, [and even] getting (or losing) a job.”¹ Interestingly enough, both “Teen Mom” and “16 & Pregnant” have continued for numerous seasons, however neither show has thoroughly explored the story of young teen mothers seeking an abortion. It is worth noting that MTV did release a thirty-minute special called “No Easy Decision” that follows a former “16 & Pregnant” teen named Markai and her partner, which shares “their difficult journey as they decide how to proceed with a second

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¹ 16 AND PREGNANT ABOUT THE SHOW, MTV.COM, <http://www.mtv.com/shows/16-and-pregnant> (last visited Nov. 4, 2016).

unplanned pregnancy, and must make the toughest decision of their lives.”² Additionally, Janelle Evans, a teen mom who gained celebrity status after being featured on both of these shows, with the help of MTV, shared her feelings about her decision in choosing abortion.³ While watching both of these segments, viewers may have been wondering whether or not these two moms had consulted or seen a physician prior to their abortions. More importantly, if they had conferred with a doctor, what information or education had the physician given them about “the alternative choices available for managing the pregnancy including . . . carrying the pregnancy to term and placing the child with a relative or with another family through foster care or adoption, [what about] prenatal and postnatal care, [how about actually] having an abortion?”⁴

II. BRIEF DESCRIPTION OF THE BILL

Juan Mendez, the 2016 Democratic representative for District 26, along with eight other representatives, sponsored Arizona House Bill 2273 (hereafter H.B. 2273). H.B. 2273 was introduced and first read on May 5, 2016, and was thereafter referred to the Committee on Rules.⁵ H.B. 2273 seeks to add two additional requirements to Arizona Revised Statute § 36-2152 of “a physician or counselor who provides pregnancy information and counseling . . . to a minor.”⁶ The first requirement involves a laundry list of information to be given to the minor “in a manner that [would] be understood by the minor.” The second requires either the physician or counselor to have the minor sign

² NO EASY DECISION, MTV.COM, <http://www.mtv.com/videos/misc/609573/no-easy-decision-special.jhtml> (last visited Nov. 2, 2016).

³ MTV, TEEN MOM 2 (SEASON 5) JENELLE: FEATURED MOMENT #2, YOUTUBE (Jan. 23, 2014), <https://www.youtube.com/watch?v=pGdN3POTqZ8>.

⁴ H.B. 2273, 52d Leg., 2nd Reg. Sess. (Ariz. 2016).

⁵ *Id.*

⁶ *Id.*

and date a form stating that they have received that list of information and what should be done with that form.

III. THE LEGAL AFFECT OF THE BILL

Arizona is one of thirty-eight states that require some form of parental involvement if their minor child wishes to have an abortion.⁷ However, of those thirty-eight states, only thirty-six, including Arizona, provide a minor with another avenue to avoid parental notification via judicial bypass.⁸ Moreover, Arizona currently has two exceptions imbedded in A.R.S. § 36-2152 that do not require either “parental consent or judicial authorization,” including a certification from the minor “that the pregnancy resulted from sexual conduct with [a family member, including an] adoptive parent, legal guardian, or foster parent or by [someone] who lives in the same household [as] the minor and the[ir] mother.”⁹

H.B. 2273 seeks to add an additional exception by allowing the minor to receive what seems like an impromptu informational session about their alternatives to abortion. Subsection N of H.B. 2273 provides that

a physician or counselor who provides pregnancy information and counseling . . . shall [explain] in a manner that will be understood by the minor: 1) that the information being given [to them] is objective [] and . . . not intended to coerce, persuade or induce the[m] to choose either abortion or carry the pregnancy to term, 2) [they] may withdraw [their decision to abort] at any time before

⁷ *Parental Involvement in Minors’ Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortion>s (last visited Nov. 2, 2016).

⁸ *Id.*

⁹ ARIZ. REV. STAT. ANN. § 36-2152.

the abortion is performed or [they] may reconsider [the] decision . . . to have an abortion at any time within the time period [where] an abortion may [be] legally performed, 3) clearly and fully explore with the[m] the alternative choices available for managing the pregnancy, including: A) carrying . . . to term and keeping the child, B) carrying . . . to term and placing the child with a relative or with another family through foster care or adoption, C) the elements of prenatal and postnatal care, D) having an abortion, 4) explain that agencies are available to provide birth control information and that a list of th[ose] agencies and services . . . will be provided [to them] if the[y] request [it], 5) discuss the possibility of involving the[ir] parent, guardian or other adult family member in [their] decision making concerning the pregnancy and explore whether the[y] believe that involvement would be in the[ir] best interest[], and 6) provide adequate opportunity for the minor to ask any questions concerning the pregnancy, abortion, child care and adoption, and provide the information the[y] seek or, if the person cannot provide the information, indicate where the minor can receive [that] information.¹⁰

Second, subsection O requires that:

the physician or counselor shall: 1) have the minor sign and date the form stating [they received all of the information required by subsection N] and 2) [include the following on that form: their signature, date, address, and telephone number] . . . keep a copy for [their] files and shall give the

¹⁰ *Supra* note 3.

form to the minor or, if the minor requests and if the [physician or counselor] providing the information is not the attending physician, transmit the form to the minor's attending physician.¹¹

A. The Pros

First, although the proposed addition to A.R.S. § 36-2152 provides an extensive list of information that the physician or counselor is required to provide to the minor seeking an abortion, there would have been an equally extensive list of benefits provided by H.B. 2273, had it passed. Some of the possible benefits include: encouraging minors to take medical independence over their body; avoiding delays that would have been encountered, had minors sought judicial relief; relieving the minor of the possible embarrassment, shame, fear, and anxiety related to informing their parents of their pregnancy; reducing, if not eliminating entirely, the responsibility of the minor having to tell their parents of the pregnancy; decreasing the possible physical harm or manipulation by the parents after being notified of the pregnancy;¹² allowing the minor to feel a sense of privacy and control over this portion of their life; avoiding a delay of medical care; and encouraging physicians or counselors to have patience or rediscover their bedside manner. In addition, the proposed additions closely resemble an opinion published by the American Medical Association (“AMA”) in Chapter 2.2 of the Code of Medical Ethics on entitled “Decisions for Minors.”¹³ Finally, and perhaps most importantly, H.B. 2273 thoroughly provides the minor with their options regarding their pregnancy.¹⁴

¹¹ *Id.*

¹² *Ensuring Minors' Access to Confidential Abortion Services*, AM. PUB. HEALTH ASS'N, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/03/11/14/ensuring-minors-access-to-confidential-abortion-services> (last visited Nov. 2, 2016).

¹³ 2.2.3 *Mandatory Parental Consent to Abortion*, AMA (2016), <https://www.ama-assn.org/sites/default/files/media-browser/code-2016-ch2.pdf> [<https://perma.cc/SL2H-RQG8>].

¹⁴ *Supra* note 12.

B. The Cons

Despite the benefits minors would have experienced had H.B. 2273 passed, the burden placed on physicians, counselors, and minors would have substantially outweighed its benefits. First, the added exception mentioned in subsections N and O of H.B. 2273 presumes that all minors are competent enough to understand what is being discussed with them relating to the topic of abortion as a whole. Second, although not overtly mentioned, this exception encourages secrecy, lack of communication, betrayal, and distrust amongst families.¹⁵ Third, by encouraging the feelings mentioned above, the exception may discourage, cause fear, or even prevent minors from communicating to their parent or guardian that they need medical attention due to complications after having an abortion. Some of the burdens created by this exception include: presuming that physicians and counselors have the amount of time and resources to sit down and discuss all of the options “in a manner understood by the minor;”¹⁶ assuming that all physicians have the ability to communicate effectively or have the social intelligence to communicate to minors; presuming that all physicians or counselors provide quality treatment and are qualified to provide this information; and burdening physicians with providing the guidance and information more suited to a social worker. Finally, H.B. 2273 increases the likelihood that minors will feel frustration, anger, self-consciousness, distrust, and anxiety by having to tell someone else their personal information all over again after having gone through this educational session on pregnancy with the physician or counselor who then refers them to someone else because they do not have the answer to one of their questions.

¹⁵ *Id.*

¹⁶ *Supra* note 3.

C. Comparison to Other States

In comparison to other states, Arizona seems to be rather unique with this proposed additional exception and requirement for physicians or counselors regarding minors who seek abortion. For example, the laws of Wyoming¹⁷, Illinois¹⁸, California¹⁹, South Dakota²⁰, Virginia²¹, Michigan²², Colorado²³, and Alabama²⁴ make no mention of anything even similar to what H.B. 2273 proposes. On the contrary, both Texas²⁵ and Arkansas²⁶ requires the minor to receive similar information—as detailed in subsection N of H.B. 2273—and then sign an informed consent form similar to the one mentioned in subsection O of H.B. 2273. The disparity of laws found within the different circuits alone may make Arizonans wonder if H.B. 2273 is legislative intent to educate and inform minors seeking an abortion.

¹⁷ WYO. STAT. ANN. § 35-6-118 (2016).

¹⁸ 750 ILL. COMP. STAT. 70/30 (2016); 750 ILL. COMP. STAT. 70/40 (2016).

¹⁹ CAL. HEALTH & SAFETY CODE § 123450 (WEST 2016).

²⁰ S.D. CODIFIED LAWS § 34-23A-7 (2016).

²¹ VA. CODE ANN. § 16.1-241 (WEST 2016).

²² MICH. COMP. LAWS SERV. § 722.903 (LEXISNEXIS 2016).

²³ COLO. REV. STAT. § 12-37.5-104 (2016).

²⁴ ALA. CODE § 26-23E-10 (2016).

²⁵ TEX. HEALTH & SAFETY CODE 171.012 (WEST 2015).

²⁶ ARK. CODE ANN. § 20-16-810 (WEST 2016).

IV. CONCLUSION

While providing pregnancy information to a minor increases the likelihood that they will make a more informed decision regarding their pregnancy, H.B. 2273 is an overreaching proposal that creates barriers amongst families by encouraging distrust and a lack of communication regarding vital information such as pregnancy that could have a lasting impact on both the minor and the family unit. Furthermore, while H.B. 2273 encourages physicians to find within themselves essential characteristics such as patience and care, H.B. 2273 presumes that physicians have the time and resources to provide thorough pregnancy and abortion, information to a minor “in a manner that [they] will understand.”²⁷ Perhaps the complexity and possible implications for the medical community were the reasons this House Bill was referred to and remained with the Committee on Rules.²⁸ Until this Bill is either rewritten or proposed again, pregnant minors in Arizona will have to either seek parental consent, judicial bypass, or satisfy one of the legally recognized exceptions contained in A.R.S. § 36-2152.

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²⁷ *Supra* note 3.

²⁸ *Id.*