

# Enforcing Rule 69 Agreements

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## Rule 69

### **Rule 69. Binding Agreements**

Agreements between the parties shall be binding if they are in writing or if the agreements are made or confirmed 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.

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## Origin of Rule 69

### **ARCP 80D**

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.

### **ARFLP 69. Binding Agreements**

Agreements between the parties shall be binding if they are in writing or if the agreements are made or confirmed 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.

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## A.R.S. § 25-317

### 25-317. Separation agreement; effect

- A. To promote amicable settlement of disputes between parties to a marriage attendant on their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody and parenting time of their children. A separation agreement may provide that its maintenance terms shall not be modified.
- B. In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody and parenting time of children, are binding on the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unfair.
- C. If the court finds the separation agreement unfair as to disposition of property or maintenance, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property or maintenance.

## Origin of A.R.S. § 25-317

### Uniform Marriage and Divorce Act

#### § 306. [Separation Agreement].

- (a) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.
- (b) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.
- (c) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support.
- (d) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support:

## Sharp - Trial Court

*Sharp v. Sharp*, 179 Ariz. 205, 877 P.2d 304 (App. 1994).

Trial court procedural history:

Wife was represented

Husband's counsel withdrew

Wife was incarcerated

Parties settled without Wife's counsel reviewing settlement

Husband retained new counsel who proposed final documents based upon settlement

Wife's lawyer objected

Husband's counsel filed a Motion for Summary Judgment

Wife opposed motion, argued unfairness and duress.

Trial court granted summary judgment and upheld settlement, stating:

*Whether the agreement had the approval of counsel or whether it was "good" or "bad" should not be upset by this Court. The Court should encourage the settlement of litigation.*

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## Sharp - Appellate Court

Appellate Court reversed trial court, holding:

The trial court may approve a valid separation and property settlement agreement and incorporate it into the dissolution decree if the agreement is free from fraud or undue influence and if it is fair and equitable. Ariz.Rev.Stat. Ann. ("A.R.S.") § 25-317(A); *Wick v. Wick*, 107 Ariz. 382, 384, 489 P.2d 19, 21 (1971); *In re Estate of Henry*, 6 Ariz.App. 183, 185-86, 430 P.2d 937, 939-940 (1967)

The trial court must determine for itself whether a separation agreement is indeed satisfactory. A.R.S. § 25-317(B); see, e.g., *In re Estate of Harber*, 104 Ariz. 79, 88, 449 P.2d 7, 16 (1969).

Accordingly, the court need also determine what assets comprise the community estate and whether the party challenging the agreement had full knowledge of the property involved. *Harber*, 104 Ariz. at 88, 449 P.2d at 16. **It is the burden of the party asserting the validity of the agreement to prove by clear and convincing evidence that it is fair and equitable. *Id.***

While it is possible for the trial court to decide by summary judgment whether an agreement is equitable, in this case there were plainly disputed facts on the question of the fairness of the agreement, and the court was presented no evidence as to the extent of the community assets.

...the trial court incorrectly stated that the settlement should not be disturbed by a judicial determination of whether the settlement was "good" or "bad." To the contrary, pursuant to section 25-317(B), it is the court's duty to ensure that any separation and property settlement agreement reached by the parties is fair and equitable.

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## Why Sharp is wrong

Based on pre A.R.S. § 25-317(B) cases, *Wick v. Wick* and *In re Estate of Harber*

A.R.S. § 25-317(B) codified in 1973

*Wick* (1971)- "A.R.S. s 25-318, subsec. A provides that on entering a judgment of divorce the court shall order such division of the property of the parties 'as to the court seems just and right'.

Based on *In re Estate of Harber*, 104 Ariz. 79 at 88, 449 P.2d 7 at 16 (1969);

*Harber* (1969) - Probate Case regarding validity of postnuptial agreement

"Sec. 25-214, A.R.S., defines the rights of married women in Arizona:"

'Where a post-nuptial property settlement is attacked by the wife on the ground of fraud, coercion or undue influence, the burden is upon the husband to show not only that the transaction was free from any taint of fraud, coercion or undue influence on his part, but that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable.'

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## Recent Cases

*Hetherington v. Hetherington*, 220 Ariz. 16, 202 P.3d 481 (App. 2008)

Parties agreed to sell House at certain price.

Buyers conducted inspection and found garage not to code

Buyers requested sellers fix or take \$20,000 reduction

Husband agreed to reduction

Realtor, selected by Wife, agreed that reduction was reasonable

Wife refused either

Husband agreed to reduce his share \$20,000

At trial Husband contested agreement and wanted to split \$20K reduction with Wife

Trial Court agreed with Husband finding agreement unfair to Husband

Court of Appeals affirmed holding:

The issue is not, as Wife contends, whether the parties entered a binding agreement; the question is whether the agreement was fair and equitable.

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## Are Rule 69 agreements Contracts?

“Construction and enforcement of settlement agreements, including determinations as to the validity and scope of release terms, are governed by general contract principles.” *Emmons v. Superior Court*, 192 Ariz. 509, 968 P. 2d 562 (App. 1998)

*Emad v. Emad*, Memorandum Decision, 2007

**Judge Thompson** wrote:

Initially, we note that Wife's common law unconscionability analysis is inapplicable in the context of this case. The trial court was obligated to review the parties' Irrevocable Settlement Agreement under A.R.S. § 25-317(B), as opposed to the common law. See *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 196 Ariz. 597, 599, ¶ 4, 2 P.3d 687, 689 (App.2000) (noting that enactment of a statute “changes our inquiry from whether the ... agreement is enforceable at common law to whether the ... agreement satisfies the statutory requirements”).

*Archer v. Archer*, Memorandum Decision, 2009

**Judge Thompson** conducts impracticability analysis under Restatement Second of Contracts, § 261.

## Is a Hearing Required?

- ◎ Question: Must the trial court hold a hearing if the agreement is contested?

Answer: Maybe

- ◎ *Katz v. Katz*, Memorandum Decision, 2009

“We recognize that *Sharp*, as well as § 25-317(B), places a duty on the trial court to evaluate the fairness of a separation agreement, but we reject Husband's contention that *Sharp* requires the trial court to conduct an evidentiary hearing. *Sharp* at 211, 877 P.2d at 310. Rather, a trial court can consider evidence without conducting an evidentiary hearing.”

- ◎ *Wilde v. Wilde*, Memorandum Decision, 2009

- ◎ Special Action where Court set aside Agreement without hearing

“Because the superior court failed to conduct any hearing or resolve this issue with explicit findings, we reverse the court's ruling granting Husband's Motion to Set Aside Memorandum of Understanding. We remand for further proceedings to determine whether the settlement agreement provides for an unfair property division.”

## Lodging Documents - Boilerplate Terms

### *Gallagher v. Gallagher*, Memorandum Decision 2008

Parties signed written settlement agreement  
 Filed notice of settlement  
 Agreed Judge Pro Tem would sign decree  
 Wife obtained new counsel, objected to settlement and filed motion to set for trial  
 Court denied request to set trial  
 Judge Pro Tem entered decree prepared by Husband  
 Decree contained "boilerplate terms"  
 "each parent would bear total financial responsibility for extracurricular activities chosen by that parent"

#### Court of Appeals remanded, holding:

We acknowledge that a dissolution decree may include neutral "boilerplate" terms that both parties could agree were desirable. For example, they might agree that setting a specific date each year for an exchange of financial information is useful. If counsel for Husband and Wife had jointly agreed on behalf of their clients to such boilerplate terms, the court could have approved a decree with that terminology. Here, however, Husband's attorney unilaterally provided many additional terms that were not agreed upon previously, which prompted Wife's objections.

Provisions in the decree that add to or vary the terms of the parties' agreements, even if arguably "fair," cannot be inserted by Husband's counsel and adopted by the court.

## Change in circumstance after signing agreement

### Sign agreement and circumstances change

#### *Archer v. Archer*, Memorandum decision, 2009

Parties signed Rule 69 agreement, Husband refused to sign decree alleging that circumstances had changed regarding his employment and financing for home. Requested Rule 85 C relief.

#### Court of Appeals held:

The contingency raised by husband, an economic downturn or the lack of financing, was not an unforeseen event. For these reasons, the trial court did not err in denying husband relief under either Rule 69 or Rule 85.

#### Restatement Second of Contracts, § 261 reads:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

#### Section 261, comment (b) states the Rule of Impracticability:

*The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section. (Emphasis added.)*

#### Comment (d) states:

A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

## Change in circumstance after signing agreement

317(B). In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody and parenting time of children, are binding on the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unfair.

*Shaffer v. Shaffer*, 733 P.2d 1013 (Wash.App. 1987)

Currently, the only question for a trial court reviewing a separation agreement is: was the agreement unfair when it was executed? If the agreement is not unfair, the parties will be held to have waived their right to have the court determine a "just and equitable" division of the property. See *In re: Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986).

"the choice of a valuation date should be 'dictated by largely pragmatic considerations,'...." *Sample v. Sample*, 152 Ariz. 239, 731 P.2d 604(App. 1986).

\*\*\*Tip – Include statement that fairness of agreement to be determined at execution.

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## Drafting Tips - Generally

The parties agree to be bound by the agreement pursuant to Rule 69 of the Arizona Rule of Family Law Procedure

The parties have had the opportunity to consult their respective legal counsel regarding the agreement, or have had the opportunity to retain counsel, whether they exercised this opportunity or not;

The parties agree that the following agreement was entered into voluntarily and without coercion or duress;

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## Drafting Tips - Discovery

- The parties have had the opportunity to conduct discovery, whether they have taken that opportunity or not, and are satisfied with the information received;
- The parties have chosen not to pursue any further discovery or analysis of the community or separate assets;
- The parties agree that a decision to value an asset after the signing of this agreement will not constitute grounds to set aside this agreement;

## Drafting Tips - Custody and Parenting Time

### Issue - A.R.S. § 25-317(D):

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 set forth or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them.

### Proposed language:

The parties acknowledge that they have reached a full agreement regarding custody and parenting time. By signing this agreement the parties acknowledge that their signature represents clear and convincing evidence that the custody and parenting time provisions listed below are reasonable and in the children's best interest.

## Drafting Tips - Property

### Issue - Burden of proof: *Sharp* “Clear and Convincing”

#### Tips:

##### Proposed Language –

The parties agree that the following property distribution is not unfair and is specifically fair and equitable;

The parties agree that signing this agreement meets the “clear and convincing” evidence standard in *Sharp*.

##### List agreed to asset values

Why - *Sharp* - “While it is possible for the trial court to decide by summary judgment whether an agreement is equitable, in this case there were plainly disputed facts on the question of the fairness of the agreement, and the court was presented no evidence as to the extent of the community assets.”

## Drafting Tips - ADR Agreements

**Question:** Can a Judge Pro Tempore make the sufficient findings under A.R.S. § 25-317 and *Sharp*?

**Answer:** Maybe

### *Messenger v. Rea*, Special Action, Memo Decision, 2009.

Parties settled at ADR with Judge Pro Tem

Pro Tem made findings in accordance with A.R.S. § 25-317

Trial Court concluded that Pro Tem could not make findings under A.R.S. § 25-317

Appellate Court overturned stating that Pro Tem had authority to make findings, even regarding the best interests of the children.

### Why maybe?

Court also stated that:

IT IS FURTHER ORDERED that the superior court may schedule such further proceedings as it deems necessary to determine whether the real party in interest will be permitted to withdraw from the settlement agreement. See *Emmons v. Superior Court*, 192 Ariz. 509, 512, ¶ 14, 968 P.2d 582, 585 (App. 1998) (stating that enforcement of settlement agreements is governed by general contract principles).

## Drafting Tips - Burden of Proof

The parties agree to waive any right to a hearing on whether the agreement listed below is fair and equitable in accordance with A.R.S. § 25-317 and the *Sharp/Wick* line of cases.

Should a hearing occur, despite this provision, the parties agree that the settlement shall be examined at the time of signing the agreement with the burden on the party attempting to set aside the agreement in accordance with ARFLP 85.

## Drafting Tips - Mediation Agreements

**Problem** - A.R.S. § 12-2238 states:

B. The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless:

1. All of the parties to the mediation agree to the disclosure.

**Solution-**

The parties agree that this agreement is not confidential as a settlement negotiation or covered under Rule 408 of the Rules of Evidence or A.R.S. § 12-2238.

The parties agree that all events, communications, and materials prepared during or for mediation are no longer confidential, in accordance with A.R.S. § 12-2238(B)(1). Additionally, the parties agree that the mediator may be subpoenaed to provide testimony regarding the mediation.

## Drafting Tips - Attorney's Fees

The parties agree that if either party is forced to enforce this agreement, prior to the entry of a consent decree, the enforcing party shall be entitled to attorney's fees and both parties waive any defense of public policy in accordance with *Edsall v. Superior Court*;

The parties agree that any challenge to the fairness of the terms listed below shall be construed as an unreasonable act under A.R.S. § 25-324 and shall entitle the enforcing party to attorney's fees;