William D. Bishop
Bishop, Del Vecchio & Beeks Law Office, P.C.
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Post-Service Reimbursement Claims – Beyond Bobrow

Reimbursement claims for separate property payments toward community obligations after service of process (i.e., paid during the pendency of the proceeding) are commonly referred to as "Bobrow claims", albeit such claims were being made well before the 2017 Court of Appeals' decision in Bobrow v. Bobrow, 391 P.3d 646 (Ariz. App. 2017). In fact, such claims materialized when A.R.S. §§25-211 and 25-213 were modified in 1998 to provide for the termination of the community as of the date of service (as opposed to the entry of the decree of dissolution of marriage). However, it has taken some courts awhile to fully adapt, thus post-service reimbursement claims have not always been recognized. As such, spouses in dissolution proceeding have often been reluctant to pay community debts (such as the mortgage, credit card balances, etc.) from their post-service income during dissolution proceedings absent a stipulation or other confirmation they will receive credit for such payments pursuant to the final settlement or judicial determination. Such reimbursement is still not guaranteed but based upon the language of Bobrow and subsequent cases it appears to be the presumption absent countervailing offsets, or other equities.

In Bobrow, Husband paid certain community obligations during the pendency of the proceedings and requested that the Court order Wife to reimburse him for 50% of such payments. Wife argued that the "matrimonial presumption of a gift should apply" because the parties were still married during the pendency of the proceedings. The trial court agreed with Wife and denied Husband's claim for reimbursement / offset. The Bobrow Court overruled the trial court and held that there is no presumption of a gift applied to separate property payments of community obligations after a petition for dissolution is filed. Id. at ¶¶ 1-4, 8.

The Bobrow Court further explained that although cases such as Blaine v. Blaine, 63 Ariz. 100, 108 (1945) set forth the general rule that a gift presumption applies where a spouse voluntarily uses separate property to pay community expenses during the marriage, such presumption no longer applies post-petition as the parties are in the process of dissolving the marriage and the community has ended. Accordingly, the burden of proving that such post service payments constitute a gift is borne by the party claiming such by clear and convincing evidence. Id. at ¶¶ 12-15.

The Bobrow Court further explained that Husband made the payments to avoid adverse consequences, i.e., to preserve community assets, as opposed to an altruistic intent to make a post-petition git. Id. at ¶ 15 (It arguably follows that such analysis applies when a party has made such payments to preserve their credit).

Wife also argued in Bobrow that Husband did not make his claim for reimbursement until seven months in the proceedings, and that such delay evidenced Husband's intent that such payments were a gift to the community (i.e., that he did not intend to seek reimbursement at the time). The Court disagreed with Wife and explained:

> The termination of Husband's responsibility to pay for community expenses was clear from the (premarital) Agreement and AR.S.§ 25-211(A)(2). Husband was not required to notify Wife he would be seeking an offset for paying her share of community expenses.

Id. at ¶ 18. The Court further explained:

> A spouse who voluntarily services a community debt and maintains community assets with separate property should not be penalized when a mutual agreement cannot be reached. When such payments are made, they must be accounted for in an equitable property distribution.

Id. at 19.

As a side note, litigants often argue that such reimbursement claims should be offset against retroactive spousal maintenance during the proceedings (i.e., that the payor was effectively satisfying part or all of his or her spousal maintenance obligation by paying the other spouse's share of the community debt during the proceedings). The parties in Bobrow had a premarital agreement that precluded such spousal maintenance claim. Id. at ¶5. Although the Bobrow Court cited to the premarital agreement in support of its conclusion that the gift presumption does not apply to payments made post-service, the Bobrow Court also continuously cited to A.R.S. § 25-211(A)(2). It is thus clear from the decision (as well as the cases cited below) that one does not need a premarital agreement for purposes of making a claim for reimbursement or offset of funds paid toward community obligations post-service.

Bobrow does not address each and every fact scenario or potential claim or defense involving post-service payment of community liabilities. Some of the post-Bobrow published and memo decisions address additional factual scenarios and defenses that may come up.

In Pownall v. Pownall, 197 Ariz. 577 ¶¶ 24-25 (App. 2020) the wife's claim to the small increase in the value of the husband's separate residence during marriage (i.e., her Drahos claim) was offset by the benefits of her continuing to reside in the home post-service while the husband paid the mortgage. The Pownall Court explained that the trial court has broad equitable powers and did not abuse its discretion.

In Walsh v. Walsh (memo dec. 2014), the trial court offset each party's claim for reimbursement of mortgage payments against the benefits associated with the use of the residences. The Walsh Court again emphasized that the trial court has broad discretion in assessing such equities.

In Andrews v. Andrews, (memo dec. 2021), the husband paid the mortgages on the marital residence and rental property, various utilities and other community debts as ordered by the Court pursuant to its temporary orders. Id. at ¶17. The trial court denied the husbands' reimbursement claims following trial. Although

the husband did not submit proof of his specific payments during trial and relied entirely upon a written summary of such expenses, the wife admitted that he made at least the mortgage payments for the marital residence. Thus, while the Andrews Court agreed that the husband failed to meet his burden of proof to show the amounts he paid, some evidence was submitted which the wife acknowledged. Accordingly, the Court of Appeals reversed and remanded for the trial court to consider the expenses for the mortgage payments which wife acknowledged husband paid. Id. at ¶ 22.

In Johnson v. Malone, (memo dec. 2019), the Court of Appeals affirmed the trial court's determination that wife was entitled to reimbursement/offset for the portion of Wife's post-petition health insurance premium payments attributable to husband's coverage. The Court noted that wife would have been in violation of the preliminary injunction by not continuing such coverage. Id. at ¶ 38 (crediting wife with payment of the child's portion of the health insurance premiums pursuant to the child support order and crediting wife with payment of husband's portion of the insurance premiums pursuant to her *Bobrow* reimbursement claim).

In Rubens v. Rubens, (memo dec. 2019), Husband was denied reimbursement where Wife had also paid community debts with her post-service income and Husband had failed to make approximately 50% of the spousal maintenance payments pursuant to temporary orders. Husband was also denied reimbursement for mortgage payments made for their Colorado property which Wife had no access to during the proceedings. The Rubens Court held that the trial court did not abuse its discretion by declining to credit Husband for his post-service payments under the circumstances. Id. at ¶¶ 6-8.

Side note: The Rubens Court also upheld the trial court's determination that the post-service debt that Wife incurred to maintain the community business was a community debt even though incurred post-service. Id. at ¶ 11 (this would generally be netted out in a Schickner type profit distribution but could constitute a reimbursement claim if the profits were not sufficient).

In Lovejoy v. Lovejoy, (memo dec. 2018), Wife appealed the trial court's determination that she was liable to repay Husband ½ of the mortgage payments during the pendency of the proceedings. Wife argued she did not live at the residence during such period. Wife argued that Husband was essentially paying rent to the community by making the mortgage payments while he enjoyed the exclusive use of the residence. The Lovejoy Court noted that in some cases a spouse should be charged for the benefit of living rent-free in a residence, citing *In re Marriage of Pownall*, 197 Ariz. 577 (App. 2000), however, equity does not support such conclusion in every case. In this case, Wife had been arrested and pled guilty to an act of domestic violence against Husband and an order of protection excluded Wife from the marital residence. Thus, even though Wife did not have the use of the home, her actions did not support her equitable claim, and thus Wife was held responsible to pay 50% of the post-service mortgage payments. Id. at ¶¶ 12-15.

Stipulating to Expense Payment Credit.

In light of Bobrow and its progeny, it should be less difficult to obtain stipulations that the payor of community expenses will receive credit against any final division. This can become convoluted, however, if the other spouse is making an interim spousal maintenance claim that the payor party disputes. A possible solution is to stipulate to proven expense payments subject to the other party's claim for interim spousal maintenance if such is eventually ordered.

Proving Your Reimbursement Claim.

The suggestion that you should always request findings of fact and conclusions of law is readily apparent in post-service reimbursement claims and defenses. If such are not requested, the Court of Appeals may uphold the trial court's ruling if there is "any" evidence of record that could support the trial court's equitable findings.

One of the common mistakes that takes place is where a litigant makes a claim for reimbursement but fails to provide ample supporting evidence that he or she paid such expenses post-petition (See Andrews memo decision addressed infra). Thus,

it is important to make such claim early in the case and to properly disclose all documents throughout the litigation that support such claim as required by Rule 49, A.R.F.L.P.

Also, while a demonstrative summary of expenses may be valuable in establishing the totality of a claim, it is important to submit the supporting documents during trial both to establish your claim at the trial level, as well as to preserve such claims if an appeal is necessary.

Offsetting Claims and Defenses.

The simplest offsetting claim is where the other party has also paid some of the community expenses from their post-service income. Such should be a simple accounting and equalization so long as both parties provide proof of their expenditures.

An additional offsetting claim may be for retroactive spousal maintenance (back to the filing of the petition) so long as the party is eligible for such award pursuant to A.R.S. § 25-319. A reimbursement claim by one spouse and a retroactive spousal maintenance claim by the other spouse should be addressed by the court separately as distinct claims, however, it is not uncommon for a trial court to essentially offset the claims in its overall equitable analysis without a specific accounting of each claim. Such treatment by the trial court was reversed and remanded in the memo decision El-Sharkawy v. El-Sharkawy, No. 1 CA-CV 17-0425 FC (7/19/2018), which held that the court cannot offset spousal maintenance against property and debt equalizations and remanded the husband's reimbursement claim for consideration separate and distinct from the spousal maintenance analysis. Id. at ¶¶ 11-15. But see Barron v. Barron, 246 Ariz. 580, paras. 40-44 (Ariz. App. 2018) (finding Wife's claim for spousal maintenance during the proceedings offset Husbands claim for reimbursement and that the denial of Husband's claim was proper).

Although payment of community debts post-service is not presumed to be a gift, Courts have discretion to deny reimbursement claims so long as the reason for

doing so is supported by the record and equitable. For example, a party may be denied their request for reimbursement of his or her mortgage and/or utilities payments where the other party had cause to vacate the premises. As noted above, such has been recognized in domestic violence cases.

Whether a party residing in the residence post-service desires to purchase the other spouse's interests is an interesting issue that no Arizona case opinion has yet addressed. If the party seeking reimbursement desires to purchase the other interests, is it equitable to order the other party to share in the mortgage payments if they are not residing in the residence post-service? Does this depend in part upon the date of the appraisal applied by the court? Should the payor / resident spouse be entitled to credit for just the principle pay-down on the mortgage or the entire principle, interest, taxes, and insurance (PITI)?

The caselaw cited to above suggests that whether a party has the opportunity to use the asset to which a debt attaches is relevant. For example, whether a party moves out of a residence voluntarily as opposed to moving out for good cause appears to have a bearing on how the court may treat a post-service reimbursement claim.

Such analysis is also appliable to other community debt that provides a coinciding benefit. If the payor of an automobile loan post-service is enjoying the exclusive benefit of such vehicle, should the other party be responsible to share the cost of the same post-petition? Should it matter if the payor desires to be awarded the vehicle? What if the other party does not object to the payor being the sole user of the vehicle or other asset? Should post-service payments for a debt that benefitted (or still benefits) both parties equally (for example post-petition payment of pre-petition credit card debts) be treated the same for reimbursement purposes as a debt that only benefits one of the parties during the proceedings? In the same regard, should there be a distinction if a party is for all practical purpose excluded by the other party from equal access to a community asset during the proceedings?

One may consider looking to California caselaw for persuasive citations regarding some of these questions. California not only renders many more caselaw decisions in light of its comparative population and number of divisions, but has been addressing these issues for many more years as the community terminates in such state upon physical separation so long as a decree of dissolution or legal separation is subsequently entered.

California ultimately adopted what is commonly referred to as "use charges" and "payment credits" stemming from the California Supreme Court decision Epstein v. Epstein, 154 Cal.Rptr. 413 (1979) and the subsequent Court of Appeals decision Watts v. Watts, 217 Cal.Rptr. 301 (App. 1985). Numerous subsequent California decisions have continuously cited to such charges and credits as applied to a variety of fact scenarios. Arizona has not specifically adopted such verbiage, however, the Arizona cases cited to above are trending toward similar principles.

In Epstein, the California Supreme Court faced similar arguments regarding reimbursement claims that the Arizona courts would face years later in Bobrow. Similar to Bobrow, the Epstein Court held that the basic rule that separate property payments toward community debts are presumed to constitute a gift does not apply once the parties separate, and thus payments made as such should as a general rule be reimbursable. Id. at 416.

Similar to Arizona's later cases, the Epstein Court recognized that certain exceptions to such reimbursement rule may apply including where such payments were part of or in lieu of the payor's duty of support to the children and/or spouse. In the Epstein case, however, the parties and minor child continued to reside in the home during the period of separation, and in addition the husband was voluntarily paying the wife monthly support while both parties resided in the home. The Epstein Court explained that "Husband is entitled to reimbursement for separate funds utilized to preserve and maintain the family residence unless paid to discharge his duty of support." Id. at 416-417. The court's ultimate spousal maintenance award was close to what husband already had been paying. Accordingly, the Epstein Court found that the husband had already met his interim

support obligation and was entitled to reimbursement or offset for the expenditures he made to maintain the family home after the parties separated. Id. at 417.

For our purposes, the more important language in Epstein is its explanation that reimbursement is not "automatic", and that there may be some circumstances that reimbursement is not appropriate. Id. at 418. Such includes where parties previously agreed that a party would pay debts as part of an overall support obligation of the spouse and/or children, where a paying spouse truly intended the payment to constitute a gift, or where the paying spouse was using the assets at issue and the **"amount paid was not substantially in excess of the value of the use."** Id. at 418-419 (emphasis added).

In Watts v. Watts, 217 Cal.Rptr. 301, 171 Cal.App.3d 366 (1985), the California Court of Appeals held that the trial court erred by not ordering Husband to reimburse the community for the reasonable value of his use of community property from separation to the time of trial. Id. at 305. The Watts Court reiterated the general rule that a spouse who uses separate funds after separation to pay community debts should be reimbursed from community property upon dissolution, however, there are situations where such would be inappropriate (i.e., citing the reasons set forth in Epstein above). Id. at 305.

The Watts case, however, extended such reasoning to require payment to the community for Husband's use of the marital home and the marital business, thus not limiting such analysis to just an offset. Id.

The Watts analysis supports the conclusion that where a party uses an asset that is not subject to a corresponding debt of equal measure, a reimbursement claim may be appropriate. This suggests that the parties should submit evidence of what the "use value" or rental value of the asset at issue.

- As noted above, Arizona would not apply such analysis as of the date of separation, but rather as of service of process.

- Arizona caselaw has not recognized a reimbursement analysis for the post-service "use" of the community business, but instead recognizes a community lien regarding post-petition profits after deducting normalized income of the operating spouse for their post-service efforts. Schickner v. Schickner, 237 Ariz. 194 (App. 2015).

Conclusion.

As noted above Bobrow is not limited to its facts. In general, a party that uses separate funds to pay community liabilities is entitled to reimbursement. However, the trial court has broad discretion in making equitable decisions regarding whether such payment of post-service community liabilities is subject to offsets or other equitable adjustments.