IN THE COURT OF APPEALS
FOR THE STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: VALER C. AUSTIN, Petitioner/Appellee, and JOSIAH T. AUSTIN, Respondent/Appellant. _____ JOSIAH T. AUSTIN, Plaintiff/Appellant, vs. VALER C. AUSTIN, et al., Defendants/Appellees, _____ VALERIE A. GORDON, et al., Cross-Claimants/Appellees, vs. JOSIAH T. AUSTIN, Cross-Defendant/Appellant.	No. 2 CA-CV 2014-0134 Pima County Superior Court Nos. D20134007 C20140235 Consolidated

ANSWERING BRIEF OF APPELLEE VALER C. AUSTIN

DEPASQUALE & SCHMIDT, PLC
Paul G. Schmidt, Esq. - State Bar No. 012874
Mark DePasquale, Esq. - State Bar No. 012688
3300 North Central Avenue, Suite 2070
Phoenix, Arizona 85012
(602) 744-7777

THE McCARTHY LAW FIRM, P.L.L.C.
Kathleen A. McCarthy, J.D. - State Bar No. 004707
300 North Main Avenue, Suite 203
Tucson, Arizona 85701
(520) 623-0341
Attorneys for Appellee Valer C. Austin

TABLE OF CONTENTS

TABLE OF AUTHORITIES. . . . . vi-viii

INTRODUCTION. 1

STATEMENT OF THE CASE. 2

STATEMENT OF THE FACTS. 3

A. Objection to Appellant's Statement of Facts. 4

B. Early Years of the Austin Marriage. 5

C. Retention of Attorney Gregory Gadarian, the Austin's Assets and Early Estate Planning. 6

D. Formation of the Grantor Retained Income Trusts. 7

E. Josiah Takes Irrevocable Control of the Family Assets. 9

1. Josiah Takes Control of the Trusts. **10**

2. An Attempt is Made to Set up a Family Trust Where all Assets will be Transmuted to Community Property. **10**

3. El Coronado Holdings, LLC is Formed, Pursuant to Which Josiah Retains Unfettered Control of the GRIT Assets and Valer's Assets Transferred into the LLC. **11**

a. The Terms of the 1997 Operating Agreement. **11**

b. The communications regarding the formation of ECH and the drafting of the 1995 OA were among Josiah, Gadarian and Monroe—not Valer. **13**

c. Valer was not advised about the Operating Agreement, its arbitration clause, or its effect on her rights or property. 14

d. The funding of ECH—including funds subject to the OA and arbitration clause were not disclosed to Valer. . . . 15

4. The Austin Family Trust Agreement is Signed. 16

5. The Sporadic EHC Meetings. 16

6. The 2005 Amended ECH Operating Agreement. 17

a. The Members of the 2005 OA are the Trusts; Josiah is the sole Manager. 18

b. Inapplicability of the OA and arbitration provision in a divorce. 18

c. OA §11.13 limits the right to invoke arbitration to Members, who are defined as signatories, i.e. the Trusts and the Trusts require joint approval of the Trustees to invoke this provision. 19

d. The Manager's exclusion from the arbitration provision and Gadarian's intent 20

ISSUES ON APPEAL. 21

ARGUMENT. 22

I. Standard of Review. 22

II. Josiah Cannot Enforce the ECH Arbitration Provisions Against Valer Because he Failed to Demonstrate under *Harber* by Clear and Convincing Evidence that Valer was Aware of her Rights under the Agreement, her Property Affected, and that the Agreement was Fair and Free from the Taint of Fraud. 23

A. Under the Revised Uniform Arbitration Act, an Agreement to Arbitrate is Not Enforceable Where Grounds Exist for Revocation of a Contract. 24

B. Grounds Exist for Revocation of a Post-Marital Agreement Between Spouses where the Spouse against Whom Enforcement of the Contract is Sought was not Fully Advised of the Effect of the Agreement or her Rights or the Property Involved or where the Agreement is Unfair. 25

C. The Principles of *Harber* apply to Post-Nuptial Agreements between Spouses beyond Property Division Agreements. 27

1. The relationship of trust and confidence that led the *Harber* court to apply special protective measures in agreements between spouses is well recognized in Arizona. **27**

2. Generally, where a confidential/fiduciary relationship exists, the vigilance expected of a party in an arms-length transaction is neither expected nor required. **28**

3. Where a relationship of trust and confidence exists, full disclosure of all material facts is required and the burden shifts to the party seeking to enforce the agreement. **29**

4. The *Harber* principles apply to agreements between spouses in general, and are not limited to property division agreements. **29**

D. Under A.R.S. § 12-3006, the grounds for revoking post-nuptial agreements between spouses under *Harber* apply to post-nuptial arbitration agreements between spouses. 30

1. Under Arizona law, the relationship between the parties is considered in determining the enforceability of an arbitration provision. **31**

2. Other jurisdictions impose requirements similar to those in *Harber* on arbitration agreements between parties in a confidential/fiduciary relationship. 31

E. The Cases Cited by Josiah do not Demonstrate that *Harber* is Inapplicable to the Enforcement of Arbitration Provisions Between Spouses. 35

F. Even If *Harber* Only Applies to Post-nuptial Property Division Cases, Valer's Property Interests Are Sufficiently Similar to Those in a Property Division Case That the Same Standard Should Apply. 39

G. Josiah Failed to Meet His Burden That Valer Acted with Full Knowledge of the Property Involved and Her Rights Therein, That the Agreement Was Free from Any Taint of Fraud, Coercion or Undue Influence, and That it Was Fair and Equitable. 41

H. Because Josiah Failed to Meet the Harber Requirements, the Court's Denial of the Motion to Compel Arbitration Should Be Affirmed. 43

III. The Arbitration Provision §11.13 Was Never Intended to Apply in a Divorce, but if it Does Apply, Only Members Have the Right to Invoke It. 44

A. The Arbitration Provision was Never Intended to Apply in a Divorce. 44

B. The Arbitration Provision on its Face Applies Only to Members, Not Managers, less than Full Members, or Any One Else. 45

C. In the OA, There is no Such Thing as Someone Who is "Less than a Full Member". 46

D. §1.6(a)'S General Reference to 'Family Harmony' Does Not Vary the Arbitration Term, Which Is Specific. 47

E. A Manager May Not Invoke the Arbitration Provision **50**

F. The Court Admitted into Evidence All Extrinsic Evidence of the Parties' Intentions and Correctly Found That the Arbitration Provision Does Not Give Josiah the Right, Either Individually or as a Manager, to Invoke It **51**

G. Interpreting the Arbitration Provision as Written on its Face Pursuant to its Plain Meaning Does Not Make the Rest of the OA Meaningless **55**

H. Valer's Initial Demand for Arbitration as an Individual Was Ineffective under the Trust and Is Not Evidence That the Parties May Individually Demand Arbitration **56**

IV. The findings by the trial court relevant to the arbitration issue. 57

CONCLUSION/ATTORNEYS FEES. 59

TABLE OF AUTHORITIES

Cases

AZTAR Corporation v. U.S. Fire Insurance Company,
223 Ariz. 463 (App. 2010). 48, 50, 55

Bell-Kilbourn v. Bell-Kilbourn,
216 Ariz. 521 (App. 2007). 35, 36

Bender v. Bender,
123 Ariz. 90 (App. 1979). 35, 36

Biddle v. Johnsonbaugh
664 A.2d 159, 162 (Pa. Super. 1995). 34

Breitbart-Napp v. Napp,
216 Ariz. 74 (App. 2007). 38

Boyd v. Merrill Lynch,
611 F. Supp. 218 (S.D. Fla. 1985). 37

Chopin v. Chopin,
224 Ariz. 425 (App. 2010). 53

Clark v. Renaissance W., LLC,
232 Ariz. 510 (App. 2013). 22

Darner Motor Sales v. Universal Underwriters Ins.,
140 Ariz. 383 (1984). 36

Elliot v. Elliot,
165 Ariz. 128, 796 (App. 1990). . . . . 6 (fn 3)

Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.,
234 Ariz. 18 (App. 2014). 22

Flightways Corp. v. Keystone Helicopters, Corp.,
331 A.2d 184 (Pa. 1975). 32, 34, 35

Frowen v. Blank,
425 A.2d 412, 416 (Pa. 1981). 33, 34

Gerow v. Covill,
192 Ariz. 9 (App. 1998). 28

Harrington v. Pulte Home Corp.,
211 Ariz. 241(App. 2005). 4, 22

In re Guardianship of Chandos,
18 Ariz. App. 583 (1972). 29

In re Harber's Estate,
104 Ariz. 79 (1969). . . . . *passim*

In re Kassa,
231 Ariz. 592 (App. 2013). 59

In re McDonnell's Estate,
54 Ariz. 248 (1947). 28, 29

Keller v. Keller,
137 Ariz. 447 (App. 1983). 39

King v. Titsworth,
221 Ariz. 597 (App. 2009). 59

Kloss v. Edward D. Jones & Co.,
54 P.3d 1 (Mont. 2002). 32

Paone v. Dean Witter Reynolds, Inc.,
789 A.2d 221 (Pa. Super. 2001). 31, 32, 33, 34, 35

Rocz v. Drexel Burnham Lambert, Inc.,
154 Ariz. 462 (App. 1987). 36, 37, 38

Sande v. Sande,
360 P.2d 998 (Idaho, 1961). 26

Sharp v. Sharp,
179 Ariz. 205 (App. 1994). 38

Stevens/Leinweber/Sullens, Inc. v. *Holm Development and Management, Inc.,*
165 Ariz. 25 (App. 1990). 24

Stewart v. Phoenix Nat'l Bank,
49 Ariz. 34 (1937). 28, 29

Taylor v. State Farm Mut. Auto. Ins. Co.,
175 Ariz, 148 (1993). 48, 50, 53, 54, 55

WB, The Building Company, LLC v. *El Destino, LP,*
227 Ariz. 302 (App. 2011). 24, 31

Wick v. Wick,
107 Ariz. 382 (1971). 38

Rules

A.R.F.P. 82(A). 3

A.R.C.P. Rule 52(b). . . . . 6 (fn 3)

Statutes

A.R.S. § 12-3006. . . . . 24, 30, 35

A.R.S. § 12-341.01. 60

INTRODUCTION

This Appeal arises out of a divorce proceeding between wife, a wealthy heiress, and husband, in whom wife entrusted the management of her inheritance (as she had entrusted to her father and brother before the marriage). After years of marriage, husband told wife that a family limited liability company had been formed which would provide estate planning and asset protection. The LLC's operating agreement was presented to wife, but neither husband nor the attorney who drafted the document explained it to her. As had been her practice, wife signed the document without reviewing it, trusting that her husband and the attorney (who purported to represent both spouses) were acting in her best interest.

Husband took advantage of wife's complete reliance and trust in him and her practice of signing (without reading) documents he asked her to sign. The operating agreement gave husband sole and unfettered control of all assets transferred into the LLC to wife's exclusion. Wife could not remove husband without his consent. Withdrawal was a breach of the operating agreement. Wife was not informed that almost $60 million dollars in an account in her separate name was to be transferred into the LLC, nor was she informed that assets from two trusts set up for her children by a previous marriage would also be transferred into this LLC and subject to the

control of husband. She was also not informed about a provision that required that LLC disputes be arbitrated.

Although husband argues that the operating agreement was not intended to govern the couple's property interests in the event of a divorce, in this divorce proceeding, husband seeks to enforce the operating agreement, beginning with seeking to enforce its arbitration provisions against wife and her children.

The trial court properly denied husband's motion to compel arbitration. Enforcement against wife was precluded because husband had not met the standards for enforcement of post-nuptial agreements set forth in *In re Harber's Estate,* 104 Ariz. 79 (1969) which require a showing that wife was fully advised of her rights and property interests involved and that the agreement was fair and not fraudulent. Further, husband lacked standing under the operating agreement to demand arbitration because this right is reserved to members, and the family trust (which requires consent of both spouses), rather than husband, is the LLC member.

The trial court's ruling should be affirmed.

STATEMENT OF THE CASE

Appellee/Petitioner/Defendant Valer C. Austin ("Valer") filed a petition for dissolution of marriage from Appellant/Respondent/Plaintiff Josiah T. Austin ("Josiah") on November 26, 2013 in Pima County Superior Court ("Divorce Case").

(Index of Record on Appeal Case # D20134007, 3)("DR"). On December 19, 2013, Valer moved to join parties in the divorce, including, her children, Albert H. Gordon II ("Gordy"), Valerie Gordon ("Valerie"), El Coronado Holdings, LLC ("ECH"), Chisos Trust dated July 7, 2010, and Hanu Holdings LLC. (DR 7) Josiah opposed the motion. (CR 15) After oral argument, the trial court granted the joinder motion. (DR 39) On January 13, 2014 Josiah responded to the petition. (DR 17)[1]

On January 15, 2014, Josiah filed in Pima County Superior Court, as a separate action ("the Civil Case"), a Complaint Stating Motion for Arbitration ("Motion to Compel") (Index of Record on Appeal Case #C20140235, 7)("CR"), which Valer, Gordy and Valerie all moved to dismiss. (CR 11, CR 16, CR 18) Valer also moved that the Civil Case and Divorce Case be consolidated before one judge. (CR 10) Valer requested an evidentiary hearing on the Motion to Compel (CR 47) to which Josiah stipulated at oral argument and which the trial court granted. (DR 68) Valer later filed an initial response to the Motion to Compel. (CR 60)

At an April 15, 2014 status conference, the trial court scheduled an evidentiary hearing and a discovery schedule/briefing schedule were agreed upon. (DR 91) Findings of Fact and Conclusions of Law were timely requested under ARFLP 82(A)

[1] Simultaneously with the Answer to the Petition, Josiah filed a motion to strike claims by Valer for damages to her separate property (DR 16) which the trial court later denied. (DR 42)

(DR 20). In early August 2014, the parties filed pre-hearing memoranda (DR 104, 105). The evidentiary hearing occurred on August 7 and 8, 2014. (DR 115, 116) After written closing arguments (DR 119, 120, 121) and submission of proposed findings of fact and conclusions of law (DR 122, 123), the trial court denied the Motion to Compel on September 23, 2014 in an unsigned minute entry. [DR 129) (The Court's Findings of Fact as to Valer (DR 129 pp.2-13) are herein referred to "FINDINGS". The Court's Conclusions of Law as to Valer (DR 129 pp.13-15) are herein referred to as "CONCLUSIONS")]. A formal signed order incorporating the trial court findings was entered on October 19, 2014. (DR 136) Josiah filed a timely notice of this interlocutory appeal on October 23, 2014. (DR 146)

STATEMENT OF THE FACTS

A. Objection to Appellant's Statement of Facts

The trial court supported its denial of the Motion to Compel with extensive findings of fact and conclusions of law. (FINDINGS, generally) On reviewing a ruling on a motion to compel arbitration, this Court "must defer, absent clear error, to the factual findings upon which the trial court's conclusions are based." *Harrington v. Pulte Home Corp*., 211 Ariz. 241, 246-47, ¶¶16-17 (App. 2005). Rather than address the court's findings, Josiah's Statement of Facts (Opening Brief "OB", 5-23) ignores them and instead submits as "facts" selected evidence which the

trial court did not adopt in its findings or necessarily believe. Insofar as Josiah has not objected to any factual finding of the trial court except for finding #32 (OB, 49), Valer requests this Court adopt the factual findings of the trial court, and reject the extraneous evidence cited as fact by Josiah.

Valer will cite the trial court's findings in her Statement of Facts below. In the alternative, Valer addresses in footnotes Josiah's assertions of fact.

B. Early Years of the Austin Marriage

Josiah and Valer were married in 1982. (FINDINGS ¶1; DR 17 ¶2) Valer has two children by a previous marriage: Albert H. Gordon II ("Gordy") and Valerie Gordon ("Valerie"). (FINDINGS ¶1)

Valer—the descendant of a Dun & Bradstreet founder—had inherited substantial property before her marriage to Josiah. (FINDINGS ¶1; DR 86 ¶12; August 8, 2014 Hearing Transcript ("RT8"),[2] 171-173; Josiah, however, failed to provide evidence that he owned any substantial assets as of the date of marriage. (FINDINGS ¶1) Early in the marriage, but after the death of Valer's father, Valer agreed to permit Josiah to manage a portion of her assets with the understanding that the majority of the assets would continue to be managed by third parties and

[2] Appellant's abbreviations for the hearing transcripts: morning of August 7, 2014: "RT7am"; afternoon of August 7, 2014: "RT7pm"; August 8, 2014: "RT8" are used herein.

monitored by Josiah. (FINDINGS ¶2; RT8, 173)[3]

After the Austins' marriage they moved to Arizona where Valer purchased a ranch for $650,000. (FINDINGS ¶3; RT8, 173)

C. Retention of Attorney Gregory Gadarian, the Austin's Assets and Early Estate Planning

In November 1987, the Austins' accountant James Monroe referred Josiah Austin to Tucson attorney Gregory Gadarian ("Gadarian") to perform estate planning for the Austins. (FINDINGS ¶¶ 4,5; RT7pm, 12; RT7am, 81; RT8, 174)[4] Gadarian represented the Austins for over 20 years. (FINDINGS ¶5; RT8, 34). He has no letter signed by the Austins waiving any conflicts of interest. (FINDINGS ¶5; RT8, 35)

Notes in Gadarian's handwriting entitled "Josiah Austin" and dated November

[3] Notwithstanding Josiah's testimony cited in the OB (¶ 13) that Valer was a woman "of considerable competence" who could purportedly "read legal documents better than" Josiah could, Valer testified that she does not have a legal background or a business background. (RT8, 171-2) She further testified that she has never managed her financial holdings—her father, brother, people from Wellington and Jay Hughes did that for her, and later, at his request, Josiah did as well. *Id.*

[4] The OB references a March 7, 1988 meeting between Gadarian and the Austins (OB ¶¶ 20-21). The trial court made no factual finding regarding this meeting, and Josiah did not request any further findings pursuant to A.R.C.P. Rule 52(b), thereby waiving any argument that findings on this issue are required. *See Elliot v. Elliot,* 165 Ariz. 128, 134-35 (App. 1990). In the alternative, Gadarian's hearing testimony upon which the statement of facts is based is contradicted by Gadarian's deposition testimony that was admitted into evidence at trial where he testified that: 1) he did not remember the specific conversation of March 1988 referenced in the notes of March 7, 1988; (Ex. 182, 67:7-10); 2) there was no reference in the notes to an explanation of community property versus sole and separate property (*Id.* 68:14-15); 3) the notes reflect a discussion of the respective advantages of joint tenancy versus community property (*Id.* 17-23); 4) there is no record of Gadarian informing the Austins they could keep their property as separate property (*Id.* 69:11-14); and Gadarian has no memory of any other discussion with the Austins regarding this issue other than what is reflected in the notes (*Id.* 69:15-17).

3, 1987 (as Gadarian testified) detail the Austin's assets at the time Gadarian began to represent them as follows:

$1 million	Ranch in Valer's name as sole and separate property
$130,000	House in Josiah's name as sole and separate property
$500,000	Brokerage account (Joint Tenancy)
$20,000,000	Brokerage account—Valer's name sole and separate
$250,000	Real estate—tenants in common with Jo's father and sister Farm—in Ohio—Jo's [name]

(FINDINGS ¶6; Hearing Exhibit (Ex.) 4[5]; RT7pm, 41-43) Gadarian testified he was aware at the time he took these that Valer had a sole and separate brokerage account worth $20 million. (FINDINGS ¶6; RT7pm, 42).

D. Formation of the Grantor Retained Income Trusts

Valer, in her estate planning, wished to ensure that certain of her property would be transferred to Gordy and Valerie at specific future dates. (FINDINGS ¶6; RT8, 174-75; Exs. 6,7,8,9) Accordingly, in November 1987 (the same month the Austins

[5] The admitted exhibits have not been made part of the electronic docket on appeal, and therefore no electronic link for those exhibits has been included.

met Gadarian) Valer agreed to Gadarian preparing the paperwork to create two Grantor Retained Income Trusts ("GRITs") for the benefit of her children. (*Id.*)[6]

The Valer C. Austin Trust I dated November 19, 1987 ("the Valer GRIT") was created as an irrevocable trust, for a period of 15 years (or upon the earlier of Valer's death), with Gordy and Valerie designated as the remainder beneficiaries. (FINDINGS ¶7; Ex. 6) The Valer GRIT was initially funded with 56,045 shares of Valer's separate property common stock in Dun & Bradstreet derived from Valer's inheritance with a value of $2,959,876.00. (*Id.*; RT8, 63-64) Valer's brother, Sheldon Clark, was the Valer GRIT Trustee. (*Id.*)

The second GRIT, the Josiah Austin Trust I dated December 17, 1987 ("the Josiah GRIT"), was created as an irrevocable trust, for a period of 20 years (or upon the death of Josiah), with Gordy and Valerie designated as the remainder beneficiaries. (FINDINGS ¶8; Ex. 8) The Josiah GRIT was initially funded with 89,986 shares of Valer's separate property in Dun & Bradstreet stock valued at $4,803,002. (Id.) Although Josiah was shown as the grantor, all of the Dun & Bradstreet shares that funded the Josiah GRIT derived from Valer's separate property. (FINDINGS ¶8; Ex.

[6]Although not in the findings of fact, for purposes of explanation, it is undisputed that a GRIT is an irrevocable trust where the income from the trust assets is retained by the grantor during the term of the trust. At the time these GRITS were executed, if the amount contributed to the trust was less than the present value of the $600,000 estate tax exemption as of the date in the future the payment was to be made to the beneficiaries, the estate tax consequences could be avoided. (RT7am, 81-84).

8; RT8, 63-64) Sheldon Clark was the trustee of the Josiah GRIT. (FINDINGS ¶8; Ex. 8)[7]

E. Josiah Takes Irrevocable Control of the Family Assets

As demonstrated by the trial court's findings, beginning in early 1996, Josiah, with Gadarian's assistance, took multiple steps to consolidate his control over Valer's assets and the GRITs.

On January 23, 1996, Josiah was elected to the board of directors of New York Bancorp, (FINDINGS ¶11; Ex. 28) a company in which Valer's separate account with IBJ Schroeder and the GRITs had large holdings. (Exs. 116,119)

On February 21, 1996, Roger Patterson, a Washington D.C. attorney, sent Josiah a document entitled "Memorandum for Joe Austin and Joan Kane" which, among other things, included a draft of a statement on Schedule 13D relating to ownership of shares in Monterey Bay Bancorp and New York Bancorp. (FINDINGS ¶11; Ex. 26) This document identified Sheldon Clark as having shared power to vote and dispose of shares held by certain trusts with Josiah. (*Id.*) The memorandum requested clarification of Josiah's control. (*Id.*) On February 21, 1996, the date of Patterson's

[7] The OB misleadingly states "the Josiah GRIT was funded with securities that had been unconditionally gifted to Josiah by Valer, which he had no legal obligation to use to fund the GRIT." (OB, 19). However, the record is clear that the funds were Valer's and the purpose of any transfer to Josiah was to fund the GRITs for the benefit of Valer's children. (RT8, 63-64; 131-32) That Josiah chooses to emphasize the testimony that he technically owned Valer's Dun & Bradstreet stock before funding the Josiah GRIT for Valer's children simply accentuates the absence of any of Josiah's own assets.

communication, Gadarian's invoice reflects an entry for 1.10 hours described as "Conference re: trustee of GRIT and limited liability company holding company". (FINDINGS ¶11; Ex. 30 W017407).

1. Josiah Takes Control of the Trusts.

Thereafter, numerous steps were taken allowing Josiah to gain control of the GRIT assets. On February 22, 1996, Gadarian's paralegal's time reflects the preparation of numerous resignation of trust documents. *(Id.)* Resignation documents were prepared for Sheldon Clark for the GRITs and the Austin-Clark Irrevocable Family Life Insurance Trust. (*Id.*; Ex. 31) Finally, documents were prepared pursuant to which Josiah accepted the appointment as trustee of each of the trusts. (*Id.*; Ex. 34). Josiah also became trustee of additional trusts as reflected in a memo prepared by Gadarian's paralegal at Josiah's request on May 3, 1996, listing the various trusts of which he had become trustee (FINDINGS ¶13).

2. An Attempt is Made to Set up a Family Trust Where all Assets will be Transmuted to Community Property.

Having gained control of multiple trusts, Josiah and Gadarian undertook actions that would give Josiah permanent control over Valer's sole and separate assets. In May of 1996, Gadarian prepared a draft family trust agreement, which, among other things, included language indicating that all assets transferred into the trust and listed

on Schedule "A" was "their community property" and further declared that such property "shall retain its character as community property during their joint lifetime." (FINDINGS ¶15; Ex. 4 ¶1.02) The 1996 draft, however, was not signed by Valer (Id.; Ex. 4)

Josiah and Valer testified that Valer did not advise Josiah she intended to make a gift to Josiah of her separate property. (FINDINGS ¶24; RT8, 135,178)

3. El Coronado Holdings, LLC is Formed, Pursuant to Which Josiah Retains Unfettered Control of the GRIT Assets and Valer's Assets Transferred into the LLC.

In early 1997, as shown by entries in Gadarian's invoices, Gadarian's office began forming El Coronado Holdings, LLC ("ECH"). (FINDINGS ¶16; Ex. 30 W017420-21) Gadarian's invoices show that he and his staff logged entries over the next several months for drafting and revising the ECH operating agreement and documents related to incorporating ECH. (*Id.*; Ex. 30 W017420-26)

a. The Terms of the 1997 Operating Agreement.

The 1997 Operating Agreement ("1997 OA") shows the initial members as Josiah, Valer, the Josiah GRIT, and the Valer GRIT. (Ex. 52, p. 24) Among the provisions of the 1997 OA were:

i. Josiah was designated as the sole manager with absolute, exclusive authority and discretion to act on behalf of ECH, which provided

Valer no authority or control over the assets transferred into ECH. (FINDINGS ¶30(a); (Ex. 52, §§3:1; 3.2; RT8, 180)

ii. Removal of Josiah as the manager required the affirmative vote of members holding two-thirds of the ownership interests, which, given the size of holding attributable to Josiah under the agreement, made it impossible for Valer or any other member to remove Josiah without his consent. [FINDINGS ¶30(b); RT8, p. 12-13; Ex. 52, §3.2(d)]

iii. Withdrawal by a member constituted a breach of the 1997 OA, permitting ECH to recover damages as an offset against any amount distributable to the withdrawing member. (FINDINGS ¶30.c; Ex. 52 §8.2) The amount of damages was determined in the Manager's sole discretion. (Id.§8.4) Valer, therefore, had no power to withdraw without consent of Josiah.

iv. Josiah had the sole power to determine the amount of and any distributions to any members, and could make distributions on a basis other than pro-rata. (FINDINGS ¶30(d); Ex. 52; §6.4(a)]

v. The investment by Josiah and Valer was characterized as "community property". Schedule "A" to the 1997 OA was to set forth the assets to be transferred to ECH. No assets were ever identified on Schedule A, (RT8, 125-28; Exs. 52, 85) which Gadarian and Josiah acknowledged made it impossible to

determine what assets were transferred or to be transferred to ECH by reviewing the Operating Agreements. (FINDINGS ¶32.e.; RT8, 28-29, 125-128)

vi. All disputes among Members were to be arbitrated. [Ex. 52, §11.13(2)]

b. The communications regarding the formation of ECH and the drafting of the 1995 OA were among Josiah, Gadarian and Monroe—not Valer.

Gadarian's records show that communications from his firm concerning the 1997 OA were sent to Josiah's attention, sometimes James Monroe, but that Gadarian did not copy Valer with any of these drafts. (FINDINGS ¶17; Ex. 43 (May 8, 1997 fax from Gadarian to Josiah only with management provisions of ECH); Ex. 46 (June 6, 1997 fax from Gadarian/Kohl to Josiah only with redline of full agreement including change of removal of manager from majority in interest to two-thirds percentage interest.)

On August 6, 1997, Gadarian's legal assistant, sent a letter enclosing a draft of the 1997 OA and stating that if it met with Josiah's approval "please sign it, have Mrs. Austin sign it and return it to me." (FINDINGS ¶18; Ex. 47)

Josiah and Valer signed the 1997 OA on August 14, 1997. (FINDINGS ¶20; Ex. 52) Valer testified that in August 1997, she was given either the signature page or the entire 1997 OA and signed it without reading it and without knowing that it

contained an arbitration provision. (*Id.* ¶28; RT8, 180, 186) Josiah acknowledges it is possible he gave only the signature page of the 1997 OA to Valer, told her to sign it, and that Josiah returned it to Gadarian. (*Id.* ¶19, ¶30; RT8, 126, 128, 130). Valer testified she had not seen the 1997 OA before she signed it (RT8, 180), and that it was her practice to trust her husband to sign what he put in front of her. (RT8, 205).

c. Valer was not advised about the Operating Agreement, its arbitration clause, or its effect on her rights or property.

Although Gadarian represented both Josiah and Valer, he admits he has no recollection of providing any legal advice to Valer about the formation of ECH or its operating agreements and his file contains no notes of any discussions about the operating agreements. (FINDINGS ¶¶22, 25; Ex. 182, 30-31; RT7pm, 36) He testified any discussions with Valer about ECH would have been reflected in his notes and billing statements and that there are no references to any such conversations in his notes or billing statements. (*Id.*; RT8, 17-19) Valer was not advised that she had the right to have the 1997 OA reviewed by her own attorney. (FINDINGS ¶21; RT8, 41)

Valer testified she had no discussions with Gadarian or any other legal counsel about the ECH Operating Agreements or any provision therein. (*Id.* ¶27; RT8, 178) Josiah did not explain to Valer than once he became manager of ECH and transferred assets she would have no control over those assets. (FINDINGS ¶31; RT8, 133)

Contrary to Josiah's assertion in the OB, there was no evidence that Gadarian informed Valer about the arbitration clause. (OB, 12) Gadarian also had no specific discussions with Valer about the *arbitratio*n provisions in the ECH Operating Agreements. (FINDINGS ¶26; RT8, 45) Valer testified that neither Gadarian nor Josiah explained the arbitration provisions to her. (RT8, 180-81) Valer testified that Josiah told her ECH was formed for tax reasons and as protection if they or the children were sued. (RT8, 178).

d. The funding of ECH—including funds subject to the OA and arbitration clause were not disclosed to Valer.

The source of the bulk of the funding of the capital account in Josiah and Valer's name was Valer's sole and separate account with IBJ Schroeder. (FINDINGS ¶32–second one) (See, *infra,* at pp. 7-8) Josiah acknowledged that an IBJ Schroeder account in Valer's name alone was transferred to ECH. (FINDINGS ¶32; RT8, 150-153)

Valer was not advised by either counsel or Josiah of the effect on her rights of transferring her sole and separate assets into ECH. (FINDINGS ¶32 (second one); RT8, 177-80) Valer testified she had no discussions with anyone about assets to be transferred to ECH. (FINDINGS ¶23; RT8, 178)

Exhibit 116 (PD007935) establishes that the value of the assets as of 8/31/97 held in the Josiah GRIT (two weeks after Josiah and Valer signed the 1997 ECH OA) was $14,870,364.84, the value of the assets in the Valer GRIT was $8,734,481.01 (PD 007436) and that the value of Valer's separate property IBJ Schroeder account was $57,899,628.60 (Ex. 116 PD007438; FINDINGS ¶33).

4. The Austin Family Trust Agreement is Signed.

At a New Year's weekend gathering at the El Coronado Ranch on January 2, 2000, where Gadarian, Valer, and several other guests were in attendance, Gadarian presented a version of the family trust document (Ex. 64) for the Austins to sign and told Valer that this document had been in existence for a long time, and that it was time it was signed. (FINDINGS ¶34; RT8, 188-89) Valer signed that document dated January 2, 2000. (Ex. 64)

5. The Sporadic ECH Meetings.

Both at the hearing and in his OB, Josiah relies heavily upon the attendance of Valer and her children at ECH meetings in 2002, 2003 and possibly 2004 to support his contention that Valer was fully informed about ECH financial affairs. (FINDINGS ¶40; OB, 17-21). However, by the time of the first meeting in 2002, five years had elapsed since Josiah transferred the GRITs and Valer's separate property assets to ECH. (FINDINGS ¶40; RT8, 104) Josiah had transferred both the GRITs and

Valer's IBJ Schroeder account worth approximately $58 million to ECH several years prior to the first meeting. (*Id.* RT8, 104). There have been no ECH meetings in the past ten years. (*Id.*) Further, although Valer attended the above referenced ECH meetings, the parties did not discuss any terms of the 1997 OA (FINDINGS ¶41; RT8, 187-88).

6. The 2005 Amended ECH Operating Agreement.

In early 2005, Valer told Josiah that she was going to have funds that she had been historically receiving from her father's trust transferred to the children. (FINDINGS ¶36; RT8, 137) Subsequently, Valer was presented with the signature page for an *Amended and Restated Operating Agreement for ECH* effective April 16, 2005 ("2005 OA"). (FINDINGS ¶37; RT8, 185) [Because this Operating Agreement amended and restated in its entirety the 1997 OA (Ex. 85, Recital B), it will hereafter be referred to as "the OA" as distinguished from the "1997 OA".]

Valer asked Josiah whether this document pertained to the children. He told her it was her trust and his trust, but did not disclose that these were the GRITs that were the children's own funds. (*Id.*; RT8, 185-86; Ex. 85). As with the 1997 OA, neither Gadarian nor Josiah informed Valer of the effect of the agreement on her rights or the consequences of the arbitration provision. (FINDINGS ¶25; RT7pm, 36; FINDINGS ¶27; RT8, 178, 180-81)

a. The Members of the 2005 OA are the Trusts; Josiah is the sole Manager.

Unlike the 1997 OA, where Josiah and Valer held their interests individually, this time, the Members were the *trusts*: (1) the Austin Family Revocable Trust ("Trust"); (2) the Josiah Austin Trust (GRIT); and (3) the Valer C. Austin Trust (GRIT). (FINDINGS ¶38) Valer and Josiah each executed the OA as Trustee of their Trust. (*Id.*) Josiah also executed the OA as Trustee of the Josiah Austin Trust and the Valer C. Austin Trust (GRITs). (*Id.*)

Josiah again was designated the sole Manager. (*Id.*) However, this time, a 90% vote of the Members was required to remove him. *(Id.*)

b. Inapplicability of the OA and arbitration provision in a divorce

In his OB, Josiah admits that neither OA nor the arbitration provision would have any application in a divorce (OB 22 ¶66) and the Court so found (FINDINGS ¶32) Josiah also conceded (and the Court found, CONCLUSIONS ¶8) that even if arbitration is ordered, as to Valer, it is the trial court, *not* the arbitrator, who will decide the character of the property as to separate or community, divide it or otherwise make orders at the time of trial with respect to the ownership, management and disposition of the LLC. (RT7am, 27-31; DR 115, p.2) Josiah conceded that he will "not have any choice once it gets to the divorce court". RT7am, 30) Given that

the family law trial is scheduled to start on May 11, 2015 (DR 132), it is a puzzle as to why Josiah is pursuing arbitration against Valer at all.

c. OA §11.13 limits the right to invoke arbitration to Members, who are defined as signatories, i.e. the Trusts and the Trusts require joint approval of the Trustees to invoke this provision.

OA§11.13 states that "within ten (10) days after a *Member* requests arbitration in writing, the parties shall mutually select a single arbitrator." (Ex. 85, §11.13.c.) (Emphasis Supplied). OA §1.10(m) defines the term "Member" explicitly as "each party who executes a counterpart of this Operating Agreement as a Member and each party who may *hereafter* become Additional or Substituted Members". [Ex. 85 §1.10(m)] Member is not defined as someone who was 'once a Member' or someone who is 'less than full member', (Ex. 85, FINDINGS ¶49) Rather, it only applies to Members. (Ex. 85, FINDINGS ¶¶46-47)

This time, the Members were listed as the Trust and the GRITS, not the individual parties. (FINDINGS ¶50) The parties' Trust was amended and all prior versions superseded in their entirety in 2009. (Ex.134, p.2, the penultimate Recital) Article 35.4, p. 67 of the Trust provides:

> The right from time to time to approve of the Trustee's conduct (whether in connection with an accounting by the Trustee or without an accounting), and the Grantor's approval shall bind all other beneficiaries. This right shall be exercisable by the Grantors jointly

while both are alive.

(Ex. 134; FINDINGS ¶52.b.)

Other subsections of the Trust, Article 35, (Ex. 134, p. 66) require that both parties must act jointly while they are both alive to exercise virtually every power listed therein, with the sole exception of any life insurance policies owned by the Grantor (Ex. 134, Articles 35.1, 35.2,35.3, 35.5, FINDINGS ¶52.c.).

Josiah does not dispute that the Trust, which he signed, requires agreement of both Valer and Josiah to invoke arbitration. (FINDINGS ¶¶52.a.-d., CONCLUSIONS ¶¶1,2,3; Ex. 134, p. 66, Articles 35, 35.1, 35.2 and 35.3) The Court additionally found that Valer did not give her consent to invoke arbitration either in her individual capacity or her capacity as trustee of the Trust. (FINDINGS ¶53)

d. The Manager's exclusion from the arbitration provision and Gadarian's intent.

The OA does not provide that a Manager may invoke the arbitration provision. (Ex. 85, FINDINGS ¶54. p.14¶7) Nevertheless, Gadarian testified that his intention when he drafted the OA was that the Manager could invoke it. However, the Court did not find such testimony to be probative or relevant. (CONCLUSIONS ¶4). It further found that Valer could not have been fully informed that disputes with the ECH Manager were subject to arbitration and that Gadarian had no specific discussions

with Valer about the OA or arbitration provision; (FINDINGS ¶26; ¶54.e.) Neither his file nor billing statements contain any references to any such discussions; (FINDINGS ¶25) Valer did not have any discussions with any other legal counsel about the OA; (FINDINGS ¶27) and Valer, who has no legal or business training, could not be expected to guess what an attorney drafting the OA intended. (FINDINGS ¶54.e)

Additionally, Gadarian admitted that, although he included in the OA detailed rights of the Manager, he omitted any right of the Manager to invoke the arbitration provision. (RT8 33, FINDINGS ¶54.b.) The Court also found that Gadarian's testimony, nine years after the fact, was not relevant, and inconsistent with the fact that he failed to provide that the Manager could invoke the arbitration provision in any of the other four Operating Agreements he prepared for the parties. (FINDINGS ¶¶54.c.d.)

ISSUES ON APPEAL

I. What is the standard of review for determining the enforceability of an arbitration provision where the Court has made factual findings?

II. Did the trial court correctly determine that under the evidence presented, the arbitration provision is unenforceable under *In re Harber's Estate*?

III. Did the trial court correctly determine that the arbitration provision did

not apply in a divorce, but even if it did apply, that Josiah individually had no right to invoke it?

IV. Were the findings by the trial court relevant to the arbitration issue?

ARGUMENT

I. Standard of Review

On a motion to compel arbitration, the trial court is limited to deciding whether an arbitration agreement exists. *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.*, 234 Ariz. 18, 20, ¶8 (App. 2014). This Court "must defer, absent clear error, to the factual findings upon which the trial court's conclusions are based." *Id.,* quoting *Harrington v. Pulte Home Corp*., 211 Ariz. 241, 246-47, ¶16 (App. 2005). Such deference is given because the trial court is in the better position to evaluate witness credibility and demeanor. *Clark v. Renaissance W., LLC*, 232 Ariz. 510, 514 ¶19 (App. 2013). This Court reviews *de novo* issues requiring the interpretation of statutes and legal principles. *Estate of Decamacho*, 234 Ariz. at 20, ¶8 (citations omitted).

/ / /

/ / /

/ / /

II. Josiah Cannot Enforce the ECH Arbitration Provisions Against Valer Because he Failed to Demonstrate under *Harber* by Clear and Convincing Evidence that Valer was Aware of her Rights under the Agreement, her Property Affected, and That the Agreement was Fair and Free from the Taint of Fraud.

The court denied Josiah's Motion to Compel as to Valer in part because Josiah failed to meet the requirements of *In re Harber's Estate*, 104 Ariz. 79, 88 (1969). (FINDINGS ¶16) Under *Harber*, a post-nuptial agreement one spouse seeks to enforce against another, "must be free from any taint of fraud, coercion or undue influence." *Id.* Further, it must be shown that the spouse "acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable." *Id.*

The trial court found that Josiah failed to prove by clear and convincing evidence that Valer was advised of the effect of the arbitration provision, or her rights therein (CONCLUSIONS ¶22), that Valer was aware of the property subject to the arbitration provision (*Id.* ¶21), and that, therefore, Josiah failed to meet his burden of showing the enforceability of the arbitration provision. (*Id.* ¶23).

As discussed below, the trial court correctly applied the *Harber* principles and its ruling should be affirmed on this basis.

/ / /

/ / /

A. Under the Revised Uniform Arbitration Act, an Agreement to Arbitrate is Not Enforceable Where Grounds Exist for Revocation of a Contract.

Although public policy supports arbitration agreements, "[o]nly when the arbitration provision is enforceable will the court compel arbitration." *WB, The Building Company, LLC* v. *El Destino, LP,* 227 Ariz. 302, 306, ¶11 (App. 2011); *Stevens/Leinweber/Sullens, Inc.* v. *Holm Development and Management, Inc.,* 165 Ariz. 25, 30 (App. 1990). An arbitration provision is not valid or enforceable where "a ground exists at law or in equity for the revocation of a contract." A.R.S. § 12-3006. Generally, "[l]egal or equitable grounds for revoking any contract include allegations that 'the contract is void for lack of mutual consent, consideration or capacity or voidable for fraud, duress, lack of capacity, mistake, or violation of a public purpose.'" *WB,* 227 Ariz. at 308, ¶14. "The same grounds may be used to challenge both an arbitration agreement and the underlying contract so long as an arbitration agreement itself is separately and distinctly challenged on those grounds." *WB*, 227 Ariz. at 307, ¶13.

/ / /

/ / /

/ / /

/ / /

B. Grounds Exist for Revocation of a Post-Marital Agreement between Spouses where the Spouse against Whom Enforcement of the Contract is Sought was not Fully Advised of the Effect of the Agreement or her Rights or the Property Involved or where the Agreement is Unfair.

Grounds for revocation over and above those applicable to arms-length transactions exist where post-nuptial agreements between spouses are at issue. *See, Harber*, 104 Ariz. 79. In *Harber,* the Arizona Supreme Court imposed higher obligations of disclosure and fairness upon spouses contracting with each other over rights related to their property. *Id.* at 88. There, the court considered the enforceability of a post-nuptial agreement between spouses that adjusted the parties' property rights. (*Id*. at 84) The agreement was not made in contemplation of separation or divorce. (*Id.* at 80-82)

In analyzing the enforceability of the post-nuptial agreement, the court in *Harber* recognized the special relationship between spouses which it characterized as "a confidential relationship" analogous to a trust relationship. *Id.* at 88 It held that while post-nuptial agreements involving spouses' property rights are enforceable— even if not incident to a contemplated separation or divorce—they are subject to a higher degree of scrutiny. *Id.* Specifically, the court held, if the agreement is challenged by the spouse against whom enforcement of the agreement is sought, the burden shifts to the spouse seeking to enforce the agreement to show by clear and

convincing evidence that the agreement is "free from any taint of fraud, coercion or undue influence; that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable." *Id.*

In reaching its conclusion, the *Harber* court quoted extensively from *Sande v. Sande*, 360 P.2d 998 (Idaho 1961), an Idaho case interpreting New Mexico law:

> 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.

Id. at 88 (quoting *Sande,* 360 P.2d at 1001).

The *Harber* court held that the trial court had properly adopted the rule in the *Sande* case, or one similar to it, and described that rule as "supported by the best reasoned decisions in community property states." *Id.* The court rejected the argument that the rule set forth in *Sande* should be limited to cases in contemplation of divorce, finding more justification for the rule where a divorce was not contemplated: "Married women during the marriage relationship are less likely to realize the necessity for investigating the bona fides of the husband's actions than those who face the actuality of a termination of their marriage." *Id.* The court further stated its holding in the broad following terms:

> We do not hold that all contracts or agreements between husband and wife in Arizona are presumptively void or fraudulent. We merely hold that when attacked by a wife on the grounds that the transaction was fraudulent or coerced, or is inequitable and unfair, the wife may have a judicial determination at that time whether the agreement is invalid as to her, and that it is the husband's burden to prove by clear and convincing evidence that the agreement was not fraudulent or coerced, or that it was not unfair or inequitable.

Id.

C. The principles of *Harber* apply to Post-Nuptial Agreements between Spouses beyond Property Division Agreements.

While *Harber* was decided in the context of a post-nuptial agreement that specifically divided property, contrary to Josiah's contention (OB, 27-29), nothing in that opinion precludes its application to other agreements between spouses. Indeed, the holding of *Harber* is broadly stated in terms of "all agreements between husband and wife." 104 Ariz. at 88. As discussed below, the principles that caused the *Harber* court to apply special protection are present in agreements between spouses that extend beyond those specifically related to the division of property.

1. The relationship of trust and confidence that led the *Harber* court to apply special protective measures in agreements between spouses is well recognized in Arizona.

The marital relationship of trust and confidence that led the Arizona Supreme Court in *Harber* to apply special protective measures is well-recognized under Arizona law. In *Harber*, the court identified the spousal relationship as

"confidential" and in the nature of a trust relationship. 104 Ariz. at 88. At the time *Harber* was issued, Arizona courts had long recognized that marriage was a relationship of trust and confidence. *See, Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 44 (1937)(Noting application of doctrine of confidential relations to "husband and wife"). Since *Harber,* it has been recognized that spouses owe each other fiduciary duties. *Gerow v. Covill*, 192 Ariz. 9, 18, ¶40 (App. 1998).

The fiduciary/confidential nature of the marital relationship has not been seriously disputed in the present case. Citing *Harber* and *Gerow,* the trial court concluded that "[t]he relationship between spouses is confidential and fiduciary in nature." (CONCLUSIONS p.14 §10) On appeal, Josiah has not disputed this legal conclusion, nor provided any authority demonstrating the contrary.

2. Generally, where a confidential/fiduciary relationship exists, the vigilance expected of a party in an arms-length transaction is neither expected nor required.

It is also well-established Arizona law that in a fiduciary relationship the party to whom the fiduciary duty is owed is not expected to exercise the vigilance and diligence expected of a party in an arms-length transaction. *See In re McDonnell's Estate*, 54 Ariz. 248, 252-53 (1947): "A fiduciary relationship has been described as 'something approximating business agency, professional relationship, or family tie

impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise'." *Id.* (citations omitted).

3. Where a relationship of trust and confidence exists, full disclosure of all material facts is required and the burden shifts to the party seeking to enforce the agreement.

The characteristics of trust and confidence inherent in a confidential/fiduciary relationship affect the enforcement of agreements between parties to such a relationship. It has long been established "that, where a relation of trust or confidence exists between two parties so that one of them places peculiar reliance on the trustworthiness of another, the latter is under a duty to make a full and truthful disclosure of all material facts, and is liable for misrepresentation or concealment…." *Stewart*, 49 Ariz. at 44. To enforce an agreement against one to whom a party owes a fiduciary duty, the agreement must not only be fully explained, but it must be found to be fair under the circumstances. *In re Guardianship of Chandos*, 18 Ariz. App. 583, 585 (1972).

4. The *Harber* principles apply to agreements between spouses in general, and are not limited to property division agreements.

Viewed in the context of the general case law regarding the enforcement of agreements where fiduciary/confidential relationships are involved, *Harber* is merely a straightforward application of these principles, not the aberration of law portrayed

by Josiah in his OB. These principles that require full disclosure of the other parties' rights and the property to which the agreement applies are not limited to property division agreements.

Although Josiah advocates for limiting *Harber* to property division agreements, he provides no reason why the confidential/fiduciary nature of the marital relationship should be recognized where the parties are dividing property, but not for other agreements between the parties. The same trust and reliance is present between spouses in other agreements as well; the same protections should also be available to the spouse against whom enforcement of the agreement is sought.

D. Under A.R.S. § 12-3006, the grounds for revoking post-nuptial agreements between spouses under *Harber* apply to post-nuptial arbitration agreements between spouses.

An arbitration provision is not valid or enforceable where "a ground exists at law or equity for the revocation of a contract." A.R.S. § 12-3006. As discussed above, under Arizona law, the general grounds for revoking contracts between spouses include the requirements found in *Harber*, to-wit, the enforcing party must show by clear and convincing evidence that the agreement is "free from any taint of fraud, coercion or undue influence; that the wife acted with full knowledge of the property involved and her rights therein, and that the settlement was fair and equitable." 104 Ariz. at 88.

1. Under Arizona law, the relationship between the parties is considered in determining the enforceability of an arbitration provision.

Analysis of the enforceability of arbitration agreements does not take place in a vacuum, but takes into consideration the relationship between the parties. *WB, The Building Company, LLC* v. *El Destino, LP,* 227 Ariz. 302, 306, ¶11 (App. 2011). In *WB,* the court held an arbitration agreement unenforceable because it was an agreement between an unlicensed contractor and a customer. *Id.* at 308 "WB lacked the capacity to validly enter any agreements, including the arbitration agreement, while acting as a contractor." *Id.* Thus, while the enforceability of the arbitration provision was separately analyzed, the law relating to the relationship between the parties—i.e., that one of them was an unlicensed contractor formed the basis for denying enforcement. Likewise, the arbitration provision here must be reviewed in the context of the marital relationship between the parties.

2. Other jurisdictions impose requirements similar to those in *Harber* on arbitration agreements between parties in a confidential/fiduciary relationship.

Other jurisdictions have imposed requirements similar to those in *Harber* when determining the enforceability of arbitration agreements between parties in a confidential/fiduciary relationship. *See, e.g., Paone v. Dean Witter Reynolds, Inc.*,

789 A.2d 221 (Pa. Super. 2001); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002).

In *Paone,* the Pennsylvania Superior Court (Pennsylvania's intermediate appellate court) thoroughly analyzed enforcement of an arbitration clause in a confidential relationship under law similar to Arizona. In *Paone,* a brokerage house sought to enforce an arbitration provision in an agreement with one of its existing clients. *Id.* at 22-23. The brokerage house argued the client signed the arbitration agreement which made it enforceable. *Id.* at 225. The client argued he had a confidential relationship with the brokerage house which made the provision voidable. *Id*.

The appellate court began its analysis by noting the general rule that arbitration provisions are severable and, under Pennsylvania law, ordinarily can only be challenged where fraud in the inducement goes directly to the arbitration provision. *Id.*, citing *Flightways Corp. v. Keystone Helicopters, Corp.,* 331 A.2d 184 (Pa. 1975). However, the court stated, "[e]ntirely different presumptions come into play when a confidential relationship is at issue." *Id.* at 226.

Under Pennsylvania law, the court noted, a party seeking enforcement of a contract against another in a confidential relationship must demonstrate that the contract was fair, beyond the reach of suspicion and must prove by clear and

convincing evidence that it was "free, voluntary and an independent act of the other party, entered into with an understanding and knowledge of its nature, terms and consequences." *Id.* at 226 (citations omitted). The confidential relationship, the court explained, "negates the assumption that each party is acting in his own best interest," that "the normal arm's length bargaining is not assumed," and that "overreaching by the dominant party for his benefit permits the aggrieved party to rescind the transaction." *Id.*, quoting *Frowen v. Blank,* 425 A.2d 412, 416 (Pa. 1981).

The court rejected the brokerage house's attempt to enforce the arbitration provision where it had not met its burden to show that it "was entered into with an understanding and knowledge of its nature, terms and consequences." *Id.* at 226 (citations omitted) While recognizing that its examination is limited to "whether an agreement to arbitrate was entered into and whether the dispute involved falls within the scope of the arbitration provision," the court held that "in the context of a confidential relationship, the fact that the party against whom an agreement is to be enforced signed the agreement is insufficient for its enforceability." *Id.* (citations omitted) Rather, it must be shown that the party had an "understanding and knowledge of its nature, terms and consequences," before the agreement may be enforced against him. *Id.* at 227 (citations omitted) "In the context of a confidential relationship" the court stated, "an assessment of whether the contract was "entered

into" vis-à-vis an arbitration provision must, therefore, be more demanding than simply assessing whether a party signed the agreement." *Id.* "Otherwise," the court noted, "the presumption dictated by *Frowen* would be flouted and the mandate to gauge the understanding and knowledge of the weaker party regarding specific terms ignored." *Id.*

The court concluded as follows:

> Therefore, we hold that the presumptions and burden-shifting prescribed in *Frowen* and related cases must take precedence over the general principle articulated in *Flightways* that an arbitration provision is enforceable absent an allegation of fraud going specifically to the arbitration provision. In reviewing an application to enforce an arbitration provision in an agreement that is alleged to be the product of a confidential relationship, the trial court must first determine, by way of a hearing or otherwise, whether the evidence supports a finding that there is a confidential relationship. If so, the trial court must determine whether the proponent of the arbitration provision (presumably the stronger party) has met its burden of showing that the provision is fair under all the circumstances, *Frowen*, 493 Pa. at 145, 425 A.2d at 416, that it was entered into with knowledge of its nature and consequences, *Biddle,* 664 A.2d at 162, and thus that the provision was not itself a result of a violation of the trust reposed in the confidential relationship. If this burden is not met, then the arbitration provision is unenforceable.

Id. at 227.

The law governing special relationships and the law governing enforceability of arbitration provisions under Pennsylvania and Arizona law are in all material respects the same. Pennsylvania law regarding the heightened requirements for

enforcing agreements and Arizona law regarding the heightened requirements for enforcing post-nuptial agreements are virtually identical. Both require that the party seeking to enforce an agreement prove by clear and convincing evidence that the agreement is fair, not tainted by fraud, and that the other party is fully advised as to the effect of the agreement. (*Paone,* 789 A.2d at 226; *Harber,* 104 Ariz. at 88) Both Arizona and Pennsylvania law limit the ability to challenge arbitration provisions in similar ways. Compare *Flightways, 331 A.2d* at 185 (review of enforceability limited to whether arbitration agreement was entered into) with A.R.S. § 12-3006 (not enforceable where "ground exists at law or in equity for the revocation of a contract").

Based on the similarity of legal principles involved, and the thorough analysis of the court in *Paone*, the *Paone* decision should be considered persuasive as to the application of the *Harber* requirements to an arbitration agreement between spouses.

E. The Cases Cited by Josiah do not Demonstrate that *Harber* is Inapplicable to the Enforcement of Arbitration Provisions Between Spouses.

Josiah, citing *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521 (App. 2007) and *Bender v. Bender*, 123 Ariz. 90 (App. 1979), asserts that certain agreements between spouses are not subject to Harbe; (OB at 29, ¶83) However, neither *Bell-Kilbourn* nor *Bender* stands for this proposition. Appellants in neither case asserted that one

of the parties was not fully advised as to her rights or the property affected. In fact, in both cases, the court pointed out that the issue of mistake or fraud had not been raised. (*Bell-Kilbourn*, 216 Ariz. at 524; *Bender*, 123 Ariz. at 94) These cases do not support Josiah's contention.

Rocz v. Drexel Burnham Lambert, Inc., 154 Ariz. 462 (App. 1987), cited by Josiah (OB, 31-33) is also distinguishable. In that case, Division One, applying the Federal Arbitration Act, reversed the trial court's denial of a motion to compel arbitration brought by a securities brokerage house in a dispute with one of its clients.[8] Under a section entitled "The Applicability of *Darner*", the court stated that "the gravamen of Rocz's argument under § 2 is that she was not given the opportunity to bargain for the arbitration clause." *Id.* at 466. The court further stated "She also argues that the arbitration clauses are invalid and unenforceable as violative of both legal and equitable principles because they were obtained by Drexel, an agent which had a fiduciary duty to Rocz, its principal." *Id.*

Although the court noted Rocz's fiduciary argument, it analyzed the issue under the principles in *Darner Motor Sales v. Universal Underwriters Ins*. 140 Ariz. 383 (1984). In *Darner*, however, the court specifically noted that there was *no fiduciary duty* between the parties, (*Id*. at 399) and so the special obligations attendant to those

[8] Josiah incorrectly identifies this case as one between a homeowner and a home purchase contract. (OB, 31).

relationships did not apply. The court also cited to *Boyd v. Merrill Lynch,* 611 F. Supp. 218, 221 (S.D. Fla. 1985), another case where the outcome did not turn on an application of fiduciary duties. Thus, although the court in *Rocz* noted the fiduciary argument made by the appellee, it did not directly address it.

In the absence of analysis in the *Rocz* opinion on the effect of a fiduciary duty, whether the court believed there was a fiduciary relationship, or whether the facts of the case affected the analysis of the fiduciary relationship cannot be ascertained. Nevertheless, there are certain factors that distinguish the facts of *Rocz* from the present case which make such speculation unnecessary.

First, *Rocz* did not involve a relationship between spouses, and so the issues involved in *Harber* do not directly apply.

Second, the factual recitation in *Rocz* shows that the agreement which contained the arbitration provision was entered into at the beginning of the relationship, *before* a fiduciary or confidential relationship had been established. Here, at the time either OA had been provided to Valer for signature, she and Josiah had been married for many years, and Gadarian had held himself out as their joint counsel for many years.

Third, the Rocz court specifically noted that the plaintiff should have reasonably expected to sign an arbitration clause. *Rocz*, 154 Ariz. at 467. Josiah

failed to show there was any such expectation here, nor logically could there have been.

Fourth, the agreement in *Rocz* was a true agreement, intended for the purpose of governing the relationship between the parties and which was governed by the Federal Arbitration Act (FAA). The *Rocz* court noted that the FAA is applicable to both federal and state's courts' consideration of arbitration provisions in contracts evidencing *transactions involving commerce*. (*Rocz*, 154 Ariz. 467, F.N. 1) The context here is entirely different, this is clearly not a commercial transaction. Here, it is undisputed that ECH and its OA were estate planning tools, purportedly designed for asset protection for the family. [(Ex. 85, §9.1(b) (the Company was formed by the parties as part of their estate plan]. Further, Josiah, Valer and Gadarian all agree that neither OA had any application in a divorce. In addition to the trust Valer placed in her husband (which under the law she has a right to do), the nature of the purpose of this OA created far less reason for Valer to read its terms and question its application.

For at least these reasons, *Rocz* does not apply to the present case.

Josiah also argues that *Harber* is limited to marital property division agreements because all subsequent Arizona cases applying *Harber* concern marital property division agreements. [OB, 28, citing *Wick v. Wick*, 107 Ariz. 382 (1971); *Breitbart-Napp v. Napp*, 216 Ariz. 74 (App. 2007); *Sharp v. Sharp*, 179 Ariz. 205

(App. 1994); *Keller v. Keller*, 137 Ariz. 447 (App. 1983)]. This argument is meritless. None of those cases holds that *Harber* is limited in this manner.

Further, it is a fallacy to argue that because all reported cases to date citing *Harber* are of one type means that it cannot have broader application. Courts only issue opinions on cases that are brought before them. That an issue has not been decided by a court is not indicative of its merit. Otherwise, all matters of first impression would be denied.

F. Even If *Harber* Only Applies to Post-nuptial Property Division Cases, Valer's Property Interests Are Sufficiently Similar to Those in a Property Division Case That the Same Standard Should Apply.

Regardless of whether *Harber* is applied to all post-nuptial agreements between spouses, the agreement at issue here—the OA—affects Valer's property rights as (or more) significantly as would a post-nuptial agreement that divided the couple's property, and should, therefore, be subject to the *Harber* protections. The OA granted sole control of the assets transferred into that entity to Josiah as Manager, leaving Valer with no say, and no ability to regain control those assets without Josiah's consent. If anything, the OA is more onerous than the property-division agreement in *Harber* where, at least, the wife was left with some separate property over which she had complete control.

/ / /

As stated by the trial court:

> The significant limitation of property rights the operating agreements placed on Valer's property rights, and the significant transfer of power of property rights to Josiah, affect Valer's property rights to the same or greater extent than would a post-nuptial property settlement agreement, because of the severe and permanent limitations these agreements place on Valer's rights in the property in question, regardless of whether she maintains title. *Harber's Estate* also applies to the provisions of these agreements (including the arbitration provisions) for this reason as well." (CONCLUSIONS ¶20)

There is no material distinction between the ECH operating agreement and the property-division agreement in *Harber* that supports the imposition of the equitable safeguards on the property-division agreement, but leaves Valer and the OA in the world of arms-length transactions. Both involve understandings between spouses, where trust of the other spouse is not only presumed but encouraged. Both involve agreements that change the spouses' respective rights related to property *vis-à-vis* the other spouse. No distinction between these two situations supports different treatment of one from the other. Josiah's OB is devoid of any analysis that would merit a distinction between these two situations.

The most Josiah can muster, without any explanation, is that the OA is not a property-division agreement and *Harber* is, therefore, inapplicable. But the superficial difference between the OA and the Harber's property division agreement does not negate the similarity of the situations, specifically, the relationship of trust

in the marriage that brings with it an increased duty to show that a spouse whose property rights are to be affected has been fully informed and equitably treated.

G. Josiah Failed to Meet His Burden That Valer Acted with Full Knowledge of the Property Involved and Her Rights Therein, That the Agreement Was Free from Any Taint of Fraud, Coercion or Undue Influence, and That it Was Fair and Equitable.

The trial court found that Josiah had failed to demonstrate by clear and convincing evidence that: (a) Valer was aware of the property subject to the arbitration provision (CONCLUSIONS ¶21); and (b) that Valer was advised of the effect of the arbitration provision, or her rights therein; (CONCLUSIONS ¶22). The court concluded that Josiah failed to make the required showing that the arbitration provision was enforceable against Valer. (CONCLUSIONS ¶23)

The trial court's conclusions were supported by substantial evidence including the following:

- Gadarian admits he has no recollection of providing any legal advice to Valer concerning the formation of ECH. (FINDINGS ¶22; EX. 182, pp.30-31)
- Valer was not advised that she had the right to have the ECH Operating Agreement reviewed by her own attorney. (FINDINGS ¶21; RT8, 41)
- Gadarian had no discussions with Valer about either OA, and his file

contains no notes of any discussions regarding either the OA or the arbitration provisions. (FINDINGS ¶25; (RT7pm, 36) Gadarian testified any discussions with Valer about ECH would have been reflected in his notes and billing statements and that there are no references to any such conversations therein. (*Id.*; RT8, 17-19).

- Valer testified she had no discussions with Gadarian or any other legal counsel about either OA or any provision therein. (*Id.* ¶27; RT8, 178)
- Josiah did not explain to Valer than once he became manager of ECH and transferred assets she would have no control over those assets. (FINDINGS ¶31; RT8, 133)
- Gadarian had no specific discussions with Valer about the *arbitration* provisions in the ECH Operating Agreements. (FINDINGS ¶26; RT8, 48, 180-81)
- Valer testified that neither Gadarian nor Josiah explained the arbitration provisions to her. (RT8, 180-81)
- Valer was not specifically advised by either counsel or Josiah of the effect on her rights of transferring her sole and separate assets into ECH. (FINDINGS ¶32 second; RT8, 177-80)

- Valer testified she had no discussions with anyone about assets to be transferred to ECH, nor could she have known as no asset schedule was attached. (FINDINGS ¶23; RT8, 178)

The trial court's findings are well-supported by substantial evidence in the record.

H. Because Josiah Failed to Meet the *Harber* Requirements, the Court's Denial of the Motion to Compel Arbitration Should Be Affirmed.

Arizona law recognizes that spouses do (and should be able to) rely upon and trust each other. The relationship of spouses is the most intimate recognized by law. Agreements between spouses are enforceable, but only where the agreements are fair, and completely understood, and no advantage of the relationship has been taken.

Josiah would subject Valer to the same standards as apply between strangers. By taking advantage of her trust in him, he now seeks to assert against her provisions of agreements he knew she did not read. He further seeks to enforce in the divorce context agreements against her that he admits were drafted for estate planning purposes , and not for purposes of determining rights upon divorce. This "gotcha" type argument may well have application in a situation where a party does not rightfully expect that the other party will be acting in her best interest. It has no application here.

Arizona law recognizes the right of a spouse not to be bound by interspousal agreements that are not fair or fully explained. The law does not require a spouse to sleep with one eye open. Josiah and Gadarian failed to explain to Valer the effect of the OA on her rights, including the impact of the arbitration provision. The trial court's denial the Motion to Compel should be affirmed.

III. The Arbitration Provision §11.13 Was Never Intended to Apply in a Divorce, but If it Does Apply, Only Members Have the Right to Invoke It.

A. The Arbitration Provision Was Never Intended to Apply in a Divorce.

Josiah and Gadarian admitted that they did not intend that either OA would have *any application* in a divorce. (OB, 22) Because the arbitration provision (OA §11.13) was a term in the OA, it also does not apply in a divorce. Not only is this the logical conclusion, it does not take much imagination to believe that Valer would never have signed the OA had she known, been advised of or understood that it was intended to apply in a divorce. This is especially true if Josiah is to be believed when he states that "Valer was a woman of considerable competence".

Josiah should be foreclosed from simultaneously taking two diametrically opposing positions: that the OA is inapplicable in a divorce, when it helps his *Harber* defense; but is applicable, when it helps to compel arbitration.

Josiah concedes that it is the trial court, not an arbitrator, who must enter orders regarding the character of the property, its disposition and management, (*infra,* pp.18-19) leaving one to question why we are here at all.

B. The Arbitration Provision on its Face Applies Only to Members, Not Managers, less than Full Members, or Any One Else.

Josiah argues that the OA is silent regarding who may invoke the arbitration provision. It most emphatically is not. §11.13 specifically gives that right only to a *Member:*

> Within ten (10) days after a *Member* requests arbitration in writing, the parties shall mutually select a single arbitrator." *Ex. 85 §11.13. C.* (Emphasis Supplied).[9]

There is no language anywhere else in the entirety of the OA that grants this right to anyone other than a Member. (Ex. 85, FINDINGS ¶¶46-47)

§1.10(m) defines and capitalizes the term "Member" explicitly as "each party who executes a counterpart of this Operating Agreement as a Member and each party who may *hereafter* become Additional or Substituted Members". (Ex. 85, Emphasis supplied) Throughout the OA, wherever the term "Member" is used, it is capitalized. The only Members are the Trust and the GRITS. Josiah does not dispute that the Trust, which he signed, requires agreement of both parties to invoke arbitration.

[9] §11.13 mentions the term "Member" in no less than ten places and does not once mention, let alone give, either the Manager or anyone other than a Member any rights in the mediation/arbitration process.

C. In the OA, There Is No Such Thing as Someone Who Is "Less than a Full Member".

Conversely, there is no provision in the OA for a non-Member to invoke arbitration. In fact, there is no reference anywhere to someone who is 'less than a full member'. (Ex. 85, FINDINGS ¶¶46-47,49) OA §1.10 contains not fewer than fourteen defined terms, yet the term 'less than a full member' is never used, adopted or defined. Josiah failed to offer any evidence that the parties intended that a fictitious and undefined entity could invoke arbitration. Under the OA you are either a Member or not. No amount of linguistic elasticity can change this.

Josiah claims that because he signed the *1997* OA as an *individual*, that somehow bootstraps his claim that he can invoke the 2005 OA arbitration provision as an *individual*. It does not. The 2005 OA restated the 1997 OA *in its entirety* (Ex. 85, Recital B). OA §1.10(m) limits the definition of Members to current signatories and any party who may *"hereafter"* become an Additional or Substituted Member; there is no reference to former Members, nor would it have been logical to define a former member as a current Member.

Josiah submits that the preamble in OA §11.13.a. states that it is the intention of the "*parties* to have an early, efficient and final resolution...". From the use of this one word in one paragraph, he tries to extrapolate that the OA must use the

uncapitalized and undefined generic term "parties" and the capitalized and defined term "Members" interchangeably. In an even more attenuated stretch, Josiah claims that, ergo, Josiah, as an individual, can invoke arbitration. If Josiah is correct (which he is not), he fails to explain under what theory he individually is a party. Josiah, the individual, was never a signatory to the OA, so how could he possibly be a party?

The natural and plain meaning of the term "parties", when used in a contract, is the signatories to the contract and the OA defines "Members" as being the signatories. Josiah, individually or as a Manager, is not a Member or even a signatory.

D. §1.6(a)'s General Reference to Family Harmony Does Not Vary the Arbitration Term, Which Is Specific.

Citing OA §1.6(a), which is a *general* statement reciting that the purpose of the Company is to "provide resolution of any disputes which may arise among the Family", Josiah argues that, as part of the *Family,* he can invoke the *specific* arbitration provision granting such a right only to *Members*. Effectively, Josiah is arguing that the Family has rights under the OA independent of their interest as Members, specifically a right to invoke arbitration. They do not.

First, had the parties intended that the Family be defined as a Member, it would have been very simple to state this in OA§1.10(m). Not only did this not occur, but the term "Family" is defined independently in OA§1.10(h) and is not defined as a

"Member". Josiah offered no testimony or extrinsic evidence that the parties intended to treat Family the same as Members or that the terms were to be used interchangeably.

Second, this *general* preamble regarding the *purpose of the Company* does not tie in any way to the very *specific* Arbitration provision. All it states is that *the Company* will provide resolution of any disputes arising among the Family. The OA in and of itself does exactly that. It spells out, among other things, who in the Family is a Member (their Trusts), when a Member can withdraw, the restrictions on transferability, how assets can be invested, powers of the Manager, the circumstances for dissolution and amendments to the OA and the rights of the Members if they personally divorce. It conspicuously does not state that the Family must submit all disputes arising among them to binding arbitration. By contrast, the arbitration provision is very specific in stating that disputes among Members are to be submitted to mediation first and then arbitration and that only *Members* can invoke the arbitration provision.

Josiah admits that the Court must interpret and give effect to all provisions of a contract. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175, Ariz, 148,152 (1993). In doing so, the Court must also apply the cardinal rule of construction that a specific provision qualifies the meaning of a general one. *AZTAR Corporation v. U.S. Fire*

Insurance Company, 223 Ariz. 463, 475 at ¶¶ 6, 7 (App. 2010). Josiah's proposed interpretation of this general provision would effectively eviscerate the very specific Arbitration provision.

Third, such an interpretation would render meaningless the rest of the OA. Throughout the OA, it is the Members, a defined term, who have rights and obligations, not the "Family". Indeed, after article 1, the term "family" is never mentioned again. By contrast, the term "members" is used, sometimes multiple times in virtually every provision, including 2.1;2.2;2.3;2.4;3.1; 3.2; 3.5; 3.6; 3.7; 3.8;3.12; 3.13;3.14;4.1;4.2;4.3;4.4;4.5;4.6;4.7;5.1;5.2;5.3;5.4;6.1;6.2;6.5;6.6; 6.7;7.3;7.5;8.1, 8.2;8.3;9.1;9.2;9.3;9.4;9.5;9.6;9.7;10.1;103;10.4;10.5;11.1;11.3;11.4;11.5;11.12; 11.13.[10]. (Ex.85).

Under Josiah's theory, the Members would have all of the rights and obligations, while the Family would have no rights or obligations, except inexplicably, the right to invoke an arbitration provision reserved only to members. Such a result is nonsensical.

/ / /

/ / /

[10] In fact, the only paragraphs in which the term "Members" are not included are those where only the Manager's powers are defined; tax and accounting procedures are described; or where generic boilerplate typical in most contracts is used.

E. A Manager May Not Invoke the Arbitration Provision.

The OA does not provide anywhere that Manager may invoke arbitration. Nor would there be any rational purpose for this. The Manager held all the power and its scope was breathtaking. These powers have been broadly listed in Valer's Statement of Facts *supra,* and the 2005 OA. (SOF E.3.a. and 6); (Ex. 85, Article 3. 6.5.a., 8.2)

The only extrinsic evidence offered by Josiah that a Manager could invoke arbitration was the Gadarian testimony, nine years after the fact, that he, as the *drafter*, intended for the Manager to have this privilege. The drafter's intent is not relevant. He is not a party. It is the parties' intent that controls. *Taylor, supra,* at 152 ("Court will attempt to enforce a contract according to the *parties'* intent).

In construing a contract, the Court must give words their "ordinary, common sense meaning." *Aztar Corp.,* 223 Ariz. 463, 475 ¶¶41. The Court found in its sound discretion that Valer, who has no legal or business training, could not be expected to guess what an attorney drafting the OA intended. (FINDINGS ¶54.e.) The ordinary and common sense meaning of the OA can easily be found within its four corners and it would have been error for the Court to rely on a *non-party's* testimony of *non-existent terms* to vary the plain meaning of contract terms that *do exist.*

Additionally, Gadarian failed to explain why the Manager would need this power; why, if the omission was inadvertent, he failed to include this power in the

four other arbitration provisions he had written for the parties; why the Manager had been granted such far reaching powers in the OA, but not this power; why both the Manager and Members were accorded joint rights and responsibilities in other areas (for example, OA §8.1 requires both the Manager and Members to approve future Members), but not this one; and, why he failed to communicate his intention as the drafter to anyone during the nine years prior to his testimony at trial.

Given the extensive factual findings made by the Court in its Findings, this extrinsic evidence was obviously considered by the Court, but the Court just as clearly rejected it in its sound discretion as not being probative.

F. The Court Admitted into Evidence All Extrinsic Evidence of the Parties' Intentions and Correctly Found That the Arbitration Provision Does Not Give Josiah the Right, Either Individually or as a Manager, to Invoke It.

After hearing *all* of the evidence, including *all* extrinsic evidence Josiah offered, the Court, as the *finder of fact,* made extensive findings including that: (1) Gadarian had no discussions with Valer about the OA or the arbitration provision and neither his file nor billing statements contains any references to any such discussions (FINDINGS ¶¶25-26); (2) Valer had no discussions with any other legal counsel about the OA or the provision; (FINDINGS ¶27) (3) Valer had no legal or business training; and that she could not be expected to guess what Gadarian intended.

(FINDINGS ¶¶54.a-e (4) Neither Josiah, Valer nor Gadarian intended the OA to have any application in a divorce (FINDINGS ¶32); (5) the Arbitration Provision applies only to Members and not anyone who is not a Member;(FINDINGS ¶47) (6) it does not apply to a Manager; (FINDINGS ¶¶54.a.-e (7) it does not apply to someone who "once was" a Member or someone who is "less than a full member"; (FINDINGS ¶49) (8) the parties' Trust is the Member, *not* the individual parties; (FINDINGS ¶52) (9) neither Josiah nor Valer could invoke the Arbitration Provision individually; *Id.* (10) the parties' Trust requires the consent of both Valer and Josiah to invoke the provision; *Id.* and (11) Valer, as co-Trustee of the parties' Trust did not consent to the arbitration. (FINDINGS ¶53)

The unavoidable conclusion is that Josiah does not have the right, either individually or as a Manager, to invoke arbitration. Nevertheless, Josiah contends that the Court somehow erred because it allegedly failed to attempt to "ascertain and give effect to the intention of the parties at the time the contract was made". Yet none of Josiah's proffered evidence on this issue was objected to by Valer and in no instance did the Court refuse to admit such evidence.

Indeed, the Court made specific findings with respect to the issue of whether a Manager has the requisite authority, which took into account Mr. Gadarian's testimony as to his intention in drafting the Agreement. (FINDINGS ¶¶54a-e)

As to the parties' intentions, which are all that matters, Josiah never testified as to his intention *at the time of the formation of the OA* regarding the arbitration provision. The children never testified as to their intentions. That would have been impossible, they did not even sign the Agreement, nor were they aware of it until years later. Valer did not testify and could not possibly have testified as to her intention as to the arbitration provision insofar as even Josiah concedes she did not read the document, it was never intended to apply in a divorce and Mr. Gadarian never had any specific discussions with her about the arbitration provision. The parties **were** united, however, in their intention that the OA would have absolutely no application in the event of a divorce. All of the Court's findings on this issue are within its sound discretion, *Chopin v. Chopin*, 224 Ariz. 425, 428 at ¶4 (App. 2010) (intention of the parties is a question of fact left to the fact finder).

The only other "extrinsic evidence" that Josiah alleges should have been considered is not extrinsic at all; rather it consists of allusions to two other provisions contained in the OA [§1.6(a) as to the one time use of the word "parties" and §11.13.a. and its reference to Family]. As explained in Sections III. C,D, this does not impact the plain meaning of the arbitration provision whatsoever.

Under *Taylor* the Court is to "consider' all proffered evidence to determine its relevance to the parties' intent, but it must apply the parol evidence rule to exclude

it from consideration *if it contradicts or varies the meaning of the Agreement* . Even under the first step, the Court may properly decide not to consider certain evidence because it does not aid the Court in its interpretation. The Court is not required to park its common sense at the door. It need not waste time if the asserted interpretation is unreasonable or not persuasive. *Taylor,* 175 Ariz. 148, 153. Josiah has cherry picked isolated concepts from *Taylor*, but the exact language is revealing:

> According to Corbin, the proper analysis has two steps. First, the court *considers* the evidence that is alleged to determine the extent of integration, illuminate the meaning of the contract language or demonstrate the parties' intent (See 3 CORBIN §542, at 100-01 (1992 Supp.) The court's function at this stage is to eliminate the evidence that has no probative value in determining the parties' intent. *Id.* The second step involves "finalizing" the court's understanding of the contract. *Id.* at 100 . Here, the parol evidence rule applies and *precludes admission* of the extrinsic evidence that would vary or contradict the meaning of the written words. *Id.*
>
> Even during the first step, the judge may properly decide not to consider certain offered evidence because it does not aid in interpretation, but, instead, varies or contradicts the written words *See id.* at 101. This might occur when the court decides the asserted meaning of the contract language is so unreasonable or extraordinary that it is improbable that the parties actually subscribed to the interpretation asserted by the proponent of the extrinsic evidence. See *id.* 'The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it'. 3 CORBIN §579, at 420), At what point a judge stops 'listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense'. *Id*. (Emphasis in the original).

The extrinsic evidence offered (and admitted) was not probative of the issue and the Court would have been well within its rights to refuse to admit it under

Taylor and *AZTAR*. It not only admitted the evidence, but then made factual findings in its sound discretion as to what was probative.

G. Interpreting the Arbitration Provision as Written on its Face Pursuant to its Plain Meaning Does Not Make the Rest of the OA Meaningless.

Josiah claims that the trial court's interpretation of the OA means that Valerie or Gordy would be entitled to invoke arbitration as individuals, but Josiah and Valer would have to invoke the arbitration provision jointly in their capacities as co-Trustees. But this is precisely the net result as well as the fair one. Josiah knew or should have known that this was the net result. After all, unlike the 1997 OA, he signed the OA on behalf of the parties' *Trust,* not *individually.*

Further, Josiah took advantage of this fact in the case of the children. He knew that eventually the children could invoke the arbitration provision individually once they were free of his control as Trustee, all the while reserving for himself as Trustee of the GRITS any right to invoke the arbitration provision on behalf of the children until they were so liberated.

/ / /

/ / /

/ / /

/ / /

Josiah does not dispute any of this, but nevertheless argues[11], that the result is "unfair". Josiah fails to explain why it is unfair, or for that matter why it makes the rest of the OA meaningless, or even why such alleged "unfairness" to him is a relevant consideration.

The only circumstance under which Josiah could possibly want to exercise such an unfettered right, without Valer's consent, would be to sue her own children This would be really unfair. It is difficult to imagine any circumstance under which Valer, had she been properly informed and had independent counsel, would have ever allowed such a result.

H. Valer's Initial Demand for Arbitration as an Individual Was Ineffective under the Trust and Is Not Evidence That the Parties May Individually Demand Arbitration.

Josiah argues that Valer's filing of a demand for arbitration in her individual capacity (which she later withdrew [CR 7, p.2]) is somehow evidence that trustees as individuals have the right to file for arbitration. But therein lies the problem. Valer's demand was ineffective. The Trust simply does not permit an individual invocation of the arbitration provision and she was bereft of any authority to assert such a

[11] It is supremely ironic that Josiah would argue unfairness when the entire OA gave him virtually all of the power except to invoke arbitration, while Valer and the children had none. The unfairness is compounded by the fact that the GRITS (also Trusts) were the Members, but while Josiah controlled the GRITS as the Trustee, the children did not even have the limited power to sue, let alone invoke the arbitration provision.

demand. Consistent with the provisions of the Trust, she withdrew it a short time later. (CR7, p2) The Court made a specific finding that Valer had not given her consent to invocation of the arbitration provision, either *individually* or as co-trustee. (FINDINGS ¶53)

IV. The Findings by the Trial Court Are Relevant to the Arbitration Issue.

Josiah claims that the court erred by finding that the "source of securities that funded the GRITs and ECH was Valer Austin's sole and separate property". (OB, ¶49) Actually, the trial court's finding was:

> The source of the bulk of the funding of the capital account in Josiah and Valer's name was Valer's sole and separate account with IBJ Schroeder. Josiah has acknowledged that an IBJ Schroeder account in Valer's name alone was transferred to ECH. Valer was not specifically advised by either counsel or Josiah of the effect on her rights of transferring her sole and separate assets into ECH. (FINDINGS ¶32; RT8, pp.177-180)

Josiah asserts that this finding was irrelevant. However, one of his own proposed findings (before the Court ruled) went to this precise issue: "The property transferred to ECH was mainly acquired-during-marriage securities." (DR 122¶65) Having proposed such a finding on this very issue, Josiah should be foreclosed from complaining about it.

Indeed, the finding is relevant. Under *Harber*, whether a spouse acted "with full knowledge of the property involved and her rights therein" is relevant to whether

the agreement is enforceable. 104 Ariz. at 79. Valer was not advised of the arbitration provision, its effect, and the property to which it applied. Evidence of the source of funds is relevant to the issue of Valer's knowledge.

Moreover, Josiah failed to provide *any* specifics corroborating his general assertion that there was no support in the record. (OB, 49 ¶122) In fact, there is ample support. Josiah admits that he started managing Valer's finances during the marriage; Gadarian's 1987 notes show that Valer had a sole and separate account valued at $20,000,000; Josiah submitted evidence showing the assets transferred into ECH; Exhibit116(G) shows funds from an IBJ Schroeder account of $57,899,628.60, with a cost basis of $5,677,854.94. Josiah testified that this account was "very likely" in Valer's name and indeed the 1997 IBJ Schroeder 1099 shows that the accounts are solely in Valer C. Austin's name. The remainder of the investment accounts show contributions from the GRITs. (Statement of Facts, *supra*, p.15) See also DR 86, ¶14; RT8,173; FINDINGS ¶6; Ex. 4; RT7pm, 41-43; RT8 102-104, 153,158; Exs. 116, 119) Clearly the finding that the bulk of the investment in ECH was from Valer's sole and separate account is supported by the record.[12]

[12] All property acquired by a spouse prior to marriage, and the increase, rents, issues and profits therefrom is the separate property of that spouse. §25-318.A.

In addition, regardless of the relevance of Finding 32 and support in the record, there was ample other justification supporting the trial court's denial of the arbitration demand.

Finally, Josiah, citing no authority, asserts that this finding will have a "profound effect" on the merits at trial and he has been denied due process (OB 49,50). This assertion is sheer speculation and not ripe for decision by this Court. The effect at trial of any arbitration findings has not been addressed by the trial court and it should be permitted to resolve such issue after proper briefing. If Josiah is dissatisfied with the trial court's decision, he can appeal it then.

Josiah has made clear his disappointment with losing the Motion to Compel. Indeed, he is suggesting a renewed opportunity for change of judge (OB 27), for which there is no basis. Disappointment by a losing party may be understandable, but it does not provide the grounds for relief for which there is no legal basis.

CONCLUSION/FEES

For the foregoing reasons, the trial court's denial of the Motion to Compel should be affirmed. Josiah's fee request is untimely. *King v. Titsworth*, 221 Ariz. 597 (App. 2009)*; In re Kassa*, 231 Ariz. 592 (App. 2013). But, if granted, the Court

/ / /

/ / /

should grant fees to Valer under A.R.S. §12-341.01. Further, the parties stipulated each party will pay their own fees, with all claims reserved for trial. (DR 132 ¶13)

RESPECTFULLY SUBMITTED this 12th day of January, 2015.

THE McCARTHY LAW FIRM	**DePASQUALE & SCHMIDT, PLC**
/s/ Kathleen A. McCarthy, J.D.	/s/ Mark J. DePasquale, Esq.
Attorney for Appellee,	Attorney for Appellee,
Valer C. Austin	Valer C. Austin

CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns a brief and is submitted under Rule 14(a)(5).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 13,812 words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14, Rule 22, rule 23, or Rule 29, as applicable.

DATED this 12th day of January, 2015.

THE MCCARTHY LAW FIRM

/s/ Kathleen A. McCarthy, J.D.
Attorney for Appellee,
Valer C. Austin

DEPASQUALE & SCHMIDT, PLC

/s/ Mark J. DePasquale, Esq.
Attorney for Appellee,
Valer C. Austin

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015 Valer C. Austin's Answering Brief was electronically filed with:

Clerk of the Court
Arizona Court of Appeals
Division Two
400 West Congress, Suite 200
Tucson, Arizona 85701

and two copies of the foregoing Valer C. Austin's Answering Brief were mailed, first class postage prepaid and electronically mailed, on January 12, 2015 to the following:

Leonard Karp
Laura Belleau, Esq.
KARP & WEISS, P.C.
3060 N. Swan Road
Tucson, AZ 85712-1225
Attorney for Respondent/Appellant Josiah Austin

Russell B. Stowers, Esq.
RUSSELL B. STOWERS, PLLC
La Paloma Corporate Center
3573 E. Sunrise Drive, #215
Tucson, Arizona 85718-3206
Attorney for Defendant/Appellee Albert H. Gordon, III

Cassandra G. Jones, Esq.
HOUGHTON JONES, APC
1625 Highway 88, Suite 304
Minden, Nevada 89423
Attorney for Defendant/Appellee Valerie Gordon

Kevin J. Parker, Esq.
Cory L. Braddock, Esq.
SNELL & WILMER, L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, Arizona 85004-2202
Attorney for Defendant/Appellee Valerie Gordon and
Hanu Holdings, LLC

Katherine V. Foss, Esq.
SNELL & WILMER, LLP.
One South Church Avenue, Suite 1500
Tucson, Arizona 85701-1630
Attorney for Defendant/Appellee Valerie Gordon and
Hanu Holdings, LLC

Richard M. Rollman, Esq.
GABROY ROLLMAN & BOSSE, PC
3507 North Campbell Avenue, Suite 111
Tucson, Arizona 85719
Attorneys for Defendant/Appellant Josiah Austin

/s/ Kathleen A. McCarthy, J.D.