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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Raymond Parenteau and Jolene Parenteau,  
etc., et al,

No. CV-07-8072-PCT-NVW

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Plaintiffs,

**REPORT AND  
RECOMMENDATION**

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vs.

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Prescott Unified School District, etc., et al,

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Defendants.

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This case arises on the October 29, 2009 Motion for Protective Order by counsel for attorney Gary L. Lassen (“Lassen”) and the Law Office of Gary Lassen, P.L.C. (“Law Office”), requesting a protective order “forbidding the Defendants from inquiry into matters respecting the separate property of Mr. Lassen’s wife or the Lassen community property[.]” and “prohibit[ing] discovery about assets against which the Defendants cannot attach or execute.” (docket # 147 at 2, 8) Citing Rule 26(c),<sup>1</sup> Fed.R.Civ.P., Lassen and his Law Office argue “[t]here is ‘good cause’ for this court to [enter] such an order, since as a matter of Arizona law, the property about which Defendants seek discovery, is beyond its

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<sup>1</sup> Federal Rule of Civil Procedure 26(c) provides that when a party or other person from whom discovery is sought makes a motion asserting good cause for a protective order, “the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Rule 26(c), Fed.R.Civ.P.

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1 power to attach or execute.” (*Id.* at 2) Defendants timely responded in opposition on  
2 November 9, 2009, docket # 147, to which Lassen and his Law Office timely replied.  
3 (docket # 159) After consideration of the parties’ briefings, the undersigned Magistrate  
4 Judge recommends the Motion be granted in part and denied in part.

## 5 **BACKGROUND**

### 6 **I. The Groundless Lawsuit**

7 On August 10, 2007, Plaintiffs, represented by Lassen through his professional  
8 legal corporation, brought this action against Defendants Prescott Unified School District  
9 and Superintendent Kevin J. Kapp (collectively “Defendants”) under the Individuals with  
10 Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, Section 504 of the  
11 Rehabilitation Act of 1973, the Americans with Disabilities Act (“ADA”), and 42 U.S.C.  
12 § 1983. (docket # 1) Upon the parties’ request, a two-day bench trial was held before the  
13 assigned District Judge, the Honorable Neil V. Wake, on the IDEA claim before proceeding  
14 on the other claims. (docket ## 75, 76) Judge Wake affirmed the administrative rulings that  
15 IDEA’s two-year limitation period applied and found no IDEA violation for the 2003-04  
16 school year. (docket # 80) On March 4, 2009, judgment was entered affirming the  
17 administrative decision on the IDEA claim and dismissing with prejudice Plaintiffs’  
18 remaining claims. (docket ## 88, 89)

19 On March 18, 2009, Defendants moved for attorneys’ fees under 20 U.S.C.  
20 § 1415(i)(3)(B)(i)(II) and (III) on the IDEA claim; 42 U.S.C. § 12205 on the ADA claim;  
21 29 U.S.C. § 794a(b) on the Section 504 of the Rehabilitation Act claim; and 42 U.S.C.  
22 § 1988 on the § 1983 claim. On May 4, 2009, Defendants filed a memorandum supporting  
23 their fee motion and requested \$129,951.50 in attorneys’ fees and \$11,260.21 in related  
24 non-taxable expenses. On May 19, 2009, Plaintiffs filed their response to Defendants’ fees  
25 request and their own request for attorneys’ fees against Defendants. Both sides briefed the  
26 attorneys’ fees issues.

1                   Ultimately, on July 17, 2009 in a detailed 20-page Order, Judge Wake found  
2 “Plaintiffs’ IDEA claim was objectively without foundation from the onset of litigation,”  
3 Plaintiffs’ non-IDEA claims “were groundless,” Plaintiffs filed their Complaint and  
4 continued to litigate this action “for an improper purpose,” and granted Defendants’ fees  
5 motion. (docket # 112 at 14, 17, 19) Judgment was entered in favor of Defendant Prescott  
6 Unified School District and against Plaintiffs Raymond Parenteau and Jolene Parenteau and  
7 their counsel, Gary L. Lassen and the Law Office of Gary L. Lassen, PLC, jointly and  
8 severally, for \$129,951.50 in attorneys’ fees and for \$11,260.21 in non-taxable costs, plus  
9 interest at the federal rate from the date of judgment until paid. Fees were awarded under 20  
10 U.S.C. § 1415(i)(3)(B)(i)(II) and (III), 42 U.S.C. § 12205, 29 U.S.C. § 794a(b), and 42  
11 U.S.C. § 1988(b). (docket # 113)

## 12 **II. Judgment Debtor Examinations**

13                   Upon Defendants’ Motions for Order Requiring Judgment Debtors Gary L.  
14 Lassen, Esq. and the Law Office of Gary Lassen, P.L.C. to Appear for judgment/debtor  
15 examinations, the assigned District Judge referred these post-judgment matters to the  
16 undersigned Magistrate Judge on August 31, 2009. (docket ## 116-118) On October 16,  
17 2009, judgment-debtors’ examinations of Lassen and his Law Office were conducted  
18 pursuant to court order. (docket ## 120, 122) Lassen and his Law Office were ordered to  
19 produce at the judgment-debtors’ examinations all items listed in Exhibit 1 attached to each  
20 Order. (*Id.*) After several hours of oral examination before a court reporter, the undersigned  
21 was informed that counsel were at an impasse and requested his assistance. In meeting with  
22 counsel and Lassen, the Court was informed that neither Lassen nor his Law Office brought  
23 the documents ordered to be produced. Counsel for Lassen and the Law Office argue that  
24 all requested documents ordered to be produced are privileged or otherwise protected from  
25 discovery under Arizona’s community property laws. Counsel for the Defendants/judgment  
26 -creditors disagree. The Court ordered Lassen and his Law Office to file a motion for  
27 protective order pursuant to Rule 26(c), Fed.R.Civ.P. Resolution of the two disputed issues  
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1 (Ariz.Ct.App.1989)). There is no indication in the briefs that Lassen and Mrs. Lassen are or  
2 were domiciled in any state other than Arizona.

3           The legal issue whether a defendant may lawfully execute a judgment for  
4 sanctions upon an adverse lawyer’s community property despite the absence of the adverse  
5 lawyer’s spouse as a formal party to the judgment awarding sanctions appears to be an issue  
6 of first impression in Arizona. Counsel have not provided, nor has the undersigned’s  
7 independent research discovered, any Arizona decisions that specifically address this issue.  
8 As an issue of first impression, this Court must predict how the Arizona Supreme Court  
9 would answer this question. *Evans v. Singer*, 518 F.Supp.2d 1134, 1140 (D.Ariz. 2007)  
10 (citing *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir.2001); *Dimidowich*  
11 *v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *modified at* 810 F.2d 1517 (9th Cir.  
12 1987) (“Where the state’s highest court has not decided an issue, the task of the federal  
13 courts is to predict how the state high court would resolve it.”).

14           Under Arizona law, a debt or obligation incurred by one spouse while acting  
15 for the benefit of the marital community is a community debt or obligation whether or not  
16 the other spouse approved the debt or the conduct giving rise to the obligation, irrespective  
17 of any pecuniary benefit to the marital community. Arizona Revised Statutes (“A.R.S.”) §§  
18 25-214(B) (“*The spouses have equal management, control and disposition rights over their*  
19 *community property and have equal power to bind the community.*”) (emphasis added);  
20 25-214(C) (“*Either spouse separately may acquire, manage, control or dispose of community*  
21 *property or bind the community . . .*” with two exceptions, neither of which apply here.)  
22 (emphasis added); *Ellsworth v. Ellsworth*, 5 Ariz. App. 89, 423 P.2d 364, 367  
23 (Ariz.Ct.App.1967) (“If the husband acts with the object of benefiting (sic) the community  
24 . . . the obligations so incurred by him are community in nature, whether or not the wife  
25 approved thereof.”) (citation omitted). “A debt incurred during a marriage for the benefit  
26 of the marital community is presumed to be a community obligation unless clear and  
27 convincing evidence exists to the contrary.” *Arab Monetary Fund v. Hashim*, 219 Ariz. 108,  
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1 111, 193 P.3d 802, 805 (Ariz.Ct.App. 2008) (community property not responsible for  
2 husband’s premarital obligation) (citing *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 198,  
3 805 P.2d 1012, 1019 (Ariz.Ct.App.1990)).

4           Usually, a creditor must join both spouses in a lawsuit as defendants before  
5 such creditor may obtain and execute a judgment against community property. A.R.S. §  
6 25-215(D) (“Except as prohibited in § 25-214, either spouse may contract debts and  
7 otherwise act for the benefit of the community. *In an action on such a debt or obligation*  
8 *the spouses shall be sued jointly . . .*”) (emphasis added) ; *Flexmaster Aluminum Awning*  
9 *Co., Inc. v. Hirschberg*, 173 Ariz. 83, 88, 839 P.2d 1128, 1133 (Ariz.Ct.App. 1992). “A  
10 judgment against one spouse does not bind the community.” *Spudnuts, Inc. v. Lane*, 139  
11 Ariz. 35, 36, 676 P.2d 669, 670 (Ariz.Ct.App. 1984) (where creditor made no attempt to  
12 serve wife and wife’s liability was not adjudicated by trial court, neither wife nor the  
13 community property could be subjected to liability by adding her as a party-defendant after  
14 the case had been decided on appeal) (citing *Eng v. Stein*, 123 Ariz. 343, 599 P.2d 796 (Ariz.  
15 1979)). In *Flexmaster*, the husband incurred the debt before he married his wife. *Id.* at 1131.  
16 The Arizona court held that “a nondebtor spouse is a necessary and proper party in a suit to  
17 establish the limited liability of the community under A.R.S. section 25-215(B) . . . because  
18 the wife’s joint interest in the community necessarily includes the right to litigate both the  
19 premarital debt and the value of the husband’s contribution to the community that may be  
20 subject to the premarital debt.” *Id.* at 1132.

21           There are exceptions, however, to the joinder requirement of both spouses. For  
22 example, in a case concerning the execution in Arizona of a judgment obtained in a common  
23 law state, the Ninth Circuit held “that, consistent with Arizona law, a federal judgment . . .  
24 in which only one spouse was named in the underlying action, may nevertheless be executed  
25 on the community property of both spouses, in Arizona, if the judgment is for a community  
26 obligation, despite failure to name the other spouse in the action filed outside Arizona.”  
27 *Gagan v. Sharar*, 376 F.3d 987, 992 (9th Cir. 2004). The judgment-debtor’s (James Monroe)

1 wife (LaJunta Monroe), who was not sued in the District Court for the Northern District of  
2 Indiana, argued that the judgment-creditor (James Gagan) could not lawfully execute on the  
3 Monroes' community property in Arizona because A.R.S. § 25-215(D) requires that where  
4 a spouse has acted for the benefit of the community and thereby incurred a debt or  
5 obligation, "the spouses shall be sued jointly." In rejecting this argument, the Ninth Circuit  
6 stated:

7           This argument, if successful, would create a "Catch-22" for Gagan. Without  
8           some basis for accusing LaJunta of the racketeering and other wrongs for  
9           which Gagan sued her husband, all Gagan could get from naming her in the  
10          Indiana case would be a Rule 11 sanction. But if he failed to join her, then,  
11          under her theory, when Gagan registered his judgment in federal court in  
12          Arizona, he would be barred from collecting on the wealth James had  
13          wrongfully appropriated and enriched the community with, because he had not  
14          named LaJunta in the Indiana suit.

15 *Id.* at 990. In this case, the wife, LaJunta Monroe, did not contend that her husband's actions  
16 giving rise to his liability were not committed for the benefit of the community and she  
17 offered no other reason why the debt was not a community obligation. Her challenge was  
18 based entirely on the argument, which the Ninth Circuit rejected, that the community  
19 property was not subject to an Indiana federal judgment to which the wife was not a party.<sup>3</sup>

### 20 **POST-JUDGMENT DISCOVERY**

21           Federal Rule of Civil Procedure 69(a)(2) governs execution proceedings in the  
22 federal courts and provides that "[i]n aid of the judgment or execution, the judgment creditor  
23 . . . may obtain discovery from any person - including the judgment debtor - as provided in  
24 these rules or by the procedure of the state where the court is located. " Rule 69(a)(2),  
25 Fed.R.Civ.P. "[T]hese rules" mentioned in Rule 69(a)(2) are, of course, the Federal Rules  
26 of Civil Procedure which govern pre-trial discovery. *Rubin v. Islamic Republic of Iran*, 2008  
27 WL 192321, at \*4 (N.D.Ill. 2008) (citing, among others, *Natural Gas Pipeline Co. v. Energy*

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28           <sup>3</sup> The Ninth Circuit indicated, however, that "as a matter of due process, the  
non-joined spouse must be given notice and an opportunity to be heard before she can be  
deprived of her interest in community property, and the time for that notice and hearing is  
during execution in Arizona." *Gagan*, 376 F.3d at 991 n. 16 (citing both federal and state  
constitutional provisions and cases regarding the right to due process).

1 *Gathering Inc.*, 2 F.3d 1397, 1405 (5th Cir.1993)). One of “the purpose[s] of post-judgment  
2 discovery under Rule 69(a) is to discover ‘concealed or fraudulently transferred assets.’ ”  
3 *Fidelity Nat. Financial, Inc. v. Friedman*, 2007 WL 446134 (D.Ariz. 2007) (citing with  
4 approval *Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559, 561 (S.D.N.Y. 1977)).

5 In federal courts, pre-trial discovery is governed by Rule 26(b), Fed.R.Civ.P.  
6 Rule 26(b)(1) allows the parties to “obtain discovery regarding any nonprivileged matter that  
7 is relevant to any party’s claim or defense. . . Relevant information need not be admissible  
8 at the trial if the discovery appears reasonably calculated to lead to the discovery of  
9 admissible evidence. . . .” Rule 26(b)(1), Fed.R.Civ.P. District courts enjoy broad discretion  
10 both to determine relevancy for discovery purposes, see *Hallett v. Morgan*, 296 F.3d 732,  
11 751 (9th Cir. 2002), and to limit discovery to prevent its abuse, see Rule 26(b)(2)(C)  
12 (instructing district courts to limit discovery if it determines it is “unreasonably cumulative  
13 or duplicative,” “obtainable from some other source that is more convenient, less  
14 burdensome, or less expensive,” or where its burden or expense “outweighs its likely  
15 benefit[.]”). Rule 26(b)(2)(C), Fed.R.Civ.P.

### 16 DISCUSSION

17 The undersigned concludes that Lassen’s arguments that Defendants may not  
18 execute against the Lassen community property to collect on the attorneys’ fees’ and costs’  
19 sanction or that Defendants may not discover the nature and extent of Mrs. Lassen’s  
20 community property because “Mrs. Lassen was not named in or sued by Defendants” lack  
21 merit. (docket # 147 at 5). Assuming, *arguendo*, that Lassen’s lawsuit, through his Law  
22 Office, against Defendants was filed and prosecuted to its conclusion for the benefit of the  
23 Lassen marital community, and Lassen does not contend otherwise, his filing a groundless  
24 and frivolous action, and the resulting adverse monetary consequences, are binding on the  
25 Lassen marital community under Arizona law. See, e.g., A.R.S. § 25-214(B) (“The spouses  
26 . . . have equal power to bind the community.); 25-214(C) (“Either spouse separately may  
27 . . . bind the community . . . .” with two exceptions, neither of which apply here.).  
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1           The judgment entered herein pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(II) and  
2 (III); 42 U.S.C. § 12205; 29 U.S.C. § 794a(b); and 42 U.S.C. § 1988(b), docket # 113, was  
3 not the result of “a debt or obligation” of Lassen. Rather, it was entered as a sanction for  
4 improper lawyering by a lawyer engaged in his profession and motivated to benefit himself  
5 and his marital community. This unusual circumstance is another example of the exception  
6 expressly recognized in A.R.S. § 25-215(D) (“*Except as prohibited in § 25-214, . . . [i]n an*  
7 *action on such a debt or obligation the spouses shall be sued jointly . . .*”) (emphasis added)  
8 and by the Ninth Circuit in *Gagan*. As Defendants point out, “[l]awyers and their spouses  
9 are never parties to the litigation in which the lawyer is only representing a party.” (docket  
10 # 158 at 3) Defense counsel here faced a similar “Catch-22” situation that the plaintiff faced  
11 in *Gagan*. Without some factual or legal basis for accusing Mrs. Lassen, likely a non-lawyer,  
12 of actively participating in, or aiding and abetting, the filing and continued prosecution of  
13 the groundless lawsuit against Defendants, all defense counsel could expect for naming Mrs.  
14 Lassen in a counterclaim, third-party complaint or separate lawsuit for abuse of process or  
15 other tort would be allegations of a Rule 11, FED.R.CIV.P., violation and request for  
16 sanctions. Moreover, Lassen’s erroneous interpretation of Arizona’s community property  
17 laws would result in unnecessary litigation and is inconsistent with Rule 1, FED.R.CIV.P.  
18 (“These rules . . . shall be construed and administered to secure the just, speedy, and  
19 inexpensive determination of every action.”)

20           If Lassen’s argument that the Lassen community property is exempt from  
21 execution because Mrs. Lassen was not joined before Judgment was entered succeeded,  
22 every litigation-related monetary sanction imposed by a federal or state trial judge upon a  
23 married Arizona lawyer for frivolous or other wrongful litigation actions would be  
24 uncollectible against such lawyer’s community property and would not deter lawyers from  
25 filing groundless or frivolous litigation. Lassen has failed to demonstrate by clear and  
26 convincing evidence that the Lassen community property is exempt from execution on the  
27 judgment for fees and costs entered in this case as a sanction.

1           On the issue of discovery of Mrs. Lassen’s alleged separate property,  
2 Defendants are authorized by Rule 69(a)(2) to use all of the discovery tools provided by the  
3 federal procedural rules to seek information that meets Rule 26(b)’s relevancy standard.  
4 Discovery of this private information is authorized if it is “reasonably calculated” to lead to  
5 the discovery of admissible evidence regarding whether the property claimed to be Mrs.  
6 Lassen’s separate property is not, in fact, community property. Defendants’ Response offers  
7 various suggestions to keep the Lassen’s private information confidential, e.g., “[t]he  
8 Lassens are protected by Rule 5.2, Fed.R.Civ.P. (preventing the publication of financial  
9 information in any pleadings filed with the Court) [and] Defendants are also willing to  
10 execute a confidentiality agreement.” (docket # 158 at 5). Except for execution on Mrs.  
11 Lassen’s sole and separate property, good cause does not exist to grant a protective order.

12                           **IT IS RECOMMENDED** as follows:

13           1. Plaintiffs’ Motion for Protective Order, docket # 147, be **GRANTED** in  
14 part and **DENIED** in part. Defendants having agreed in writing they do not intend to execute  
15 the judgment on Mrs. Lassen’s sole and separate property, Defendants should be ordered to  
16 refrain from executing upon Mrs. Lassen’s sole and separate property. All other requested  
17 relief by Lassen and his Law Office should be denied.

18           2. If Mrs. Lassen refuses to voluntarily join this litigation as a party,  
19 Defendants should, at a minimum, be ordered to provide her written notice and an  
20 opportunity to be heard before Mrs. Lassen is deprived of her interest in the Lassen  
21 community property, and the time for that notice and hearing should be before or during any  
22 execution on the Lassen community property. *Gagan*, 376 F.3d at 991 n. 16.

23           3. An order be entered that Lassen and his Law Office shall promptly provide  
24 to defense counsel all items listed in Exhibit 1 attached to each of Defendants’ Motion for  
25 Order Requiring Judgment Debtors Gary L. Lassen, Esq. and the Law Office of Gary Lassen,  
26 P.L.C. to Appear, docket ## 116-118, which Lassen failed to produce at the October 16,  
27 2009 judgment-debtors’ examinations of Lassen and his Law Office.

