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Oregon Dissolution Jurisdiction: "Residency" vs. "Domicile" ORS 107.075

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The Statute

ORS 107.075 (2). When [irreconcilable differences are alleged as the ground for marital dissolution] * * * at least one party must be *a resident of* or *be domiciled in* this state at the time the suit is commenced and continuously for a period of six months prior thereto.

Introduction

Although the text of ORS 107.075 appears clear and unambiguous in providing two separate and alternative bases for jurisdiction in marital dissolution case (residency *or* domicile), Oregon case law tells us that the critical jurisdictional factor for marital dissolution purposes is "domicile," not "residency." In the context of ORS 107.075, being a "resident of" Oregon continuously for a period of six months prior to commencement of a proceeding for dissolution of marriage, in and of itself and without more, is not an independent basis for Oregon jurisdiction. Under ORS 107.075, as construed by our appellate courts, without "domicile" in this state there can be no Oregon jurisdiction for marital dissolution purposes, regardless of "residency." This article attempts to explain the reasons for this conclusion.

Historical Background

ORS 107.075(2) in its present form was originally enacted in 1971. Oregon Laws 1971, ch 280, § 5. However, the language requiring that one party be a resident of or be domiciled in the state was first enacted by Oregon Laws 1965, ch 603, § 3. Prior to that time the requirement was that the plaintiff be an inhabitant of the state at the time the suit is commenced and for one year prior thereto. *Former* ORS 107.060. The earlier language was construed in *Zimmerman v. Zimmerman*, 175 Or 585, 155 P2d 293 (1945), which held that the terms "resident" and "inhabitant" were used

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interchangeably and that both meant that the plaintiff must be domiciled in this state. As explained in *Pirouzkar and Pirouzkar*, 51 Or App 519, 521-522, 626 P2d 380 (1981), this conclusion was based on the belief that domicile was a constitutional requirement for a state court's exercise of jurisdiction for purposes of divorce.

Indeed, as the United States Supreme Court has stated, in *Williams v. North Carolina*, 325 US 226, 65 S Ct 1092, 89 L Ed 1577 (1945), "*Under our system of law, judicial power to grant a divorce - jurisdiction, strictly speaking - is founded on domicile.*" 325 US at 229.

> NOTE: Nonetheless, a divorce decree based on an unchallenged finding of requisite jurisdictional grounds rendered by a state court in a proceeding in which the defendant appeared and participated and was accorded full opportunity to contest the jurisdictional issues, and which is not susceptible to collateral attack in the courts of the state that rendered the decree, will be accorded full faith and credit by the courts of other states and will not be subject to collateral attack. *Sherrer v. Sherrer*, 334 US 343, 68 S Ct 1097, 92 L Ed 1429 (1948). In *Sherrer*, former husband, having appeared and participated in a Florida divorce proceeding, was barred from subsequently attacking the validity of the Florida divorce decree in an action brought in Massachusetts in which he alleged that wife had never established Florida as her state of domicile.

In construing and interpreting ORS 107.075(2) in *Pirouzkar and Pirouzkar,* the Court of Appeals looked to the legislative history of ORS 107.075 and prior appellate court decisions, noting that the courts of Oregon have uniformly held that the term "resident of" as used in a jurisdiction statute means "domiciled in." Consequently, the court concluded that the provision of ORS 107.075 that appears to allow a party to satisfy the jurisdictional requirement simply by being a "resident of" Oregon continuously for six months is not an independent basis for jurisdiction. Rather, what ORS 107.075 requires is *domicile*, with at least one party being <u>*domiciled*</u> in this state for six continuous months at the time of the filing of a marital dissolution petition. *Pirouzkar*, 51 Or App at 523.

"Domicile" Vs. "Residency"

Distinction needs to be made between "domicile" and "residency." While domicile requires residency in order to be established, residency does not require domicile. A person may be a "resident" of Oregon continuously for six or more months yet not be "domiciled" in this state. However, a person cannot be domiciled in Oregon without ever having been a resident of Oregon. To be domiciled in Oregon, the person must have resided here at some point in time that coincided with the intent to remain here permanently, to the exclusion of permanent residency in some other state.

> "Domicile" is a matter of individual choice and intent. A person becomes "domiciled in this state" by residing in Oregon, however briefly, with the concurrent intent to remain in Oregon permanently and with no intent to permanently live elsewhere. "To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place and an intention to remain there permanently or indefinitely." *Elwert v. Elwert*, 196 Or 256, 265, 248 P2d 847, 36 ALR2d 741 (1952).

A person who has never resided in Oregon cannot become "domiciled in this state," regardless of the person's future intent to do so. Nor can a person become domiciled in this state simply by residing here, regardless of the length of stay, without the intent to remain here permanently to the exclusion of permanently residing elsewhere. In essence, the equation is as follows: **Residence + Intent = Domicile**.

> "Domicile, therefore, is made up of residence and intention. Neither, standing alone, is sufficient for the purpose. Residence is not enough, except as it is co-joined with intent, which determines whether its character is permanent or temporary; and clearly a mere intent cannot create a domicile." *Elwert*, 196 Or at 265, citing and quoting *Reed's Will (Pickering v. Winch)*, 48 Or 500, 503, 87 P 763 (1906).

A person can have only one domicile at any one time, and until a new domicile is established, the previous domicile continues. *Doyle v. Doyle*, 17 Or App 529, 522 P2d 906 (1974). Consequently, if a person who is domiciled in this state departs Oregon and resides elsewhere, Oregon remains the person's state of domicile so long as the absence from Oregon is not coupled with an intent to establish a new domicile elsewhere. Similarly, a person who is a domicile of some other state will continue to be a domicile of the other state even if the person moves to Oregon and commences to reside in this state, unless the residency in this state is coupled with the intent to abandon the former state of domicile and acquire Oregon as the person's new state of domicile.

For a change of domicile to occur, there must be (1) a change of residence from one place to another; (2) an intention to acquire a new domicile, and (3) an intention to abandon the old domicile. *Elwert*, 196 Or at 265.

In *Zimmerman v. Zimmerman*, 175 Or 585, 155 P2d 293 (1945), the Oregon Supreme Court explained that residence and domicile, for Oregon divorce purposes, are not concepts that are independent from one another. "To

acquire a domicil of choice, a person must establish a dwelling-place with the intention of making it his home. The fact of physical presence at a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicil takes place." 175 Or at 592.

Zimmerman also explains that a person cannot establish or change domicile without having the legal capacity to do so. In *Zimmerman*, the husband came to Oregon from Ohio due to military assignment and was stationed at the Swan Island naval shipyard in Portland. He resided on base for several years and then filed for divorce from wife, who remained in Ohio. Husband claimed Oregon as his state of domicile. Trial court and Supreme Court said no, explaining that, for military personnel, there is a further limitation:

> "To acquire a domicil of choice, one must have legal capacity so to do. Conversely, a person can not acquire a domicil of choice by any act done under legal or physical compulsion. * * * [A] soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, cannot acquire a domicil there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is allowed to live with his family where he pleases provided it is near enough to his post to enable him to perform his duty, he can acquire a domicil where he lives." 175 Or at 593.

Under Oregon law, residency, in the sense of physical presence at some point in time, however brief, is essential to domicile. To establish a domicile by choice, it is universally held that two elements must concur and combine: (1) residence (bodily presence) in the new locality, and (2) an intention there to remain, to the exclusion of a domicile elsewhere." *Smith v. Smith*, 205 Or 650, 655, 289 P2d 1086 (1955).

ORS 107.075 – Domicile Dominates

Pirouzkar and Pirouzkar, 51 Or App 519, 523, 626 P2d 380 (1981), perhaps best illustrates the Oregon rule that domicile rather than residency is the critical and essential jurisdictional element of ORS 107.075. In *Pirouzkar*, both parties were "nonimmigant aliens" from Iran. At the time wife filed her petition for marital dissolution in March, 1980, the parties had been residing in Eugene, Oregon, continuously for nearly three years. They owned a home, held jobs, paid taxes, and their children attended school. Nonetheless, in accord with case law interpretation, the trial court concluded that domicile, not residency, was the necessary element for Oregon jurisdiction under ORS 107.075. The trial court then held that wife, because of her nonimmigrant alien status, was not and could not be an Oregon domiciliary and on that basis dismissed wife's petition. Wife appealed. The Court of Appeals agreed that the critical and necessary element of ORS 107.075 is domicile, not residency, but then reversed the trial court's dismissal, concluding that wife had the legal capacity to establish herself as an Oregon domicile and that she had in fact done so. Further, "federal immigration law does not prevent the states from allowing a nonimmigrant alien such as wife to establish a domicile of choice for purposes of jurisdiction." 51 Or App at 525.

> NOTE: *Author's Comment*. The text of ORS 107.075(2) plainly and unambiguously states that at least one party to the dissolution proceeding "*must be a resident of* ***OR*** *be domiciled in this state at the time the suit is commenced and continuously for a period of six months prior thereto*." In construing this language as not establishing two independent bases for jurisdiction (residency *OR* domicile), the court in *Pirouzkar* relied directly on legislature history and effectively disregarded the plain words of the statute. In the years since *Pirouzkar* was decided in 1981, the methodology employed by the courts for statutory interpretation, and the use of legislative history in doing so, has significantly changed. Under the methodology outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993), the text of a statute is the starting point for judicial interpretation and presents the best evidence of the legislature's intent. Legislative history will be considered by the court, as required by a 2001 amendment to ORS 174.020(3), but will be given only such weight, if any, as the court considers appropriate. Ultimately, as explained in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), "*When the text of a statute is truly capable of only one meaning, no weight can be given to legislative history that suggests -- or even confirms -- that legislators intended something different.*" 346 Or at 173. While the interpretation of ORS 107.075 as expressed in *Pirouzkar* remains as binding case law, it is the author's opinion that the current methodology for statutory construction, if applied to ORS 107.075, would result in a different conclusion.

Conclusion

In sum, notwithstanding the text of ORS 107.075, being a resident of Oregon continuously for six months prior to filing a petition for dissolution of marriage is by itself insufficient to establish Oregon jurisdiction for marital dissolution purposes. The Oregon residency must be accompanied by "domicile," *i.e.*, the intent to remain per-

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manently or indefinitely in Oregon to the exclusion of a domicile elsewhere. Further, while at least one party to a marital dissolution proceeding in Oregon must be *domiciled* in this state when the petition for dissolution is filed and must have been so domiciled continuously for six months prior thereto, it is not necessary for the party so domiciled to be physically present or residing in Oregon when the dissolution petition is filed, nor even at any time during the preceding six months. The concepts may be summarized as follows:

1. For purposes of jurisdiction of an Oregon court to render a valid judgment dissolving a marriage, Oregon must be the state of domicile of at least one party at the time the suit is commenced and must have been so continuously for a period of six months prior thereto.
2. A person is "*domiciled in this state*," as that phrase is used in ORS 107.075(2), if the person resided in Oregon at some point in time, however briefly, that coincided with the person's intent to remain in Oregon permanently, to the exclusion of a domicile elsewhere, and that intent continued intact and unabated for at least six continuous months prior to the filing of a petition for dissolution of marriage, notwithstanding the person's absence from Oregon and residency in some other state.
3. Once domicile is Oregon is established, such domicile continues even if the person leaves Oregon and resides elsewhere, so long as the absence from Oregon is not accompanied by an intent to abandon Oregon as the person's state of domicile.
4. If a person is a domicile of some other state, mere physical presence (residency) in Oregon, even though continuous for a period of six months, does not satisfy the jurisdictional "residency requirement" of ORS 107.075 unless such residency is accompanied by an intent or remain in Oregon permanently or indefinitely, to the exclusion of the person's former state of domicile.

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The Hague Convention in Oregon: Effective Remedy or Empty Promise?

How the Upcoming U.S. Supreme Court Decision on the "Rights of Custody" Issue Will Affect the Convention Rights of Oregon Noncustodial Parents

*By Bradley C. Lechman-Su**

The United States Supreme Court has granted *certiorari*1 in a case, the outcome of which will affect an Oregon noncustodial parent's right to bring a Hague Convention2 action if his or her child is abducted or retained outside the United States post-judgment. Oral argument was held January 12, 2010.

In Abbott v. Abbott, the Court will decide whether a *ne exeat*[3] order, which gives a court or noncustodial parent a veto power over the custodial parent's right to relocate a child outside the child's habitual residence, affords the noncustodial parent "rights of custody"[4] within the meaning of the Hague Convention.[5] "Rights of custody" is required to bring a Convention return action, which is a federal cause of action.[6] Currently the Ninth Circuit Court of Appeals[7] has held that a *ne exeat* order does not confer rights of custody.[8] A *ne exeat* order is described below.

This issue is very important to Oregon noncustodial parents, who have no "rights of custody" under the winner-take-all state statutory scheme of adjudicated custody.

To illustrate, assume an Oregon attorney represents a husband in a dissolution of marriage action where the wife - the primary caretaker spouse - is a foreign national, and the parties have young children. If the wife has threatened to return to her native country with the children, the husband's attorney may inform him that since the United States and his wife's native country are state parties[9] to the Hague Convention and the court has ordered that his wife cannot relocate without the court's or the husband's permission, that the husband is protected as a noncustodial parent, with, in essence, a veto power over the move, and a right of return under the Convention. Then assume that post-order or -judgment, the worst comes to pass, and the wife and children fail to return as scheduled from a vacation, albeit taken with permission, to her native country. The husband who has been advised he has grounds for a Hague Convention action, promptly files a Hague Convention return request with the State Department Office of Children's Issues. He eventually receives the bad news that the courts in the country where his children were wrongfully retained will not return his children under the Hague Convention, because as a noncustodial parent under Oregon law, even with a *ne exeat* order, he does not possess the necessary "rights of custody."

The Origin of Ne Exeat Rights | under Oregon Law

A *ne exeat* right arises only after a state court action has commenced in which custody will be determined.[10] In *Abbott*, the *ne exeat* order arose out of Chilean court custody litigation, where an order was issued which "prohibit[ed] the child's removal from Chile by *either* the father or the mother without their mutual consent."[11]

In Oregon, the term *"ne exeat"* is seldom if ever used. The analogous provision under Oregon law is the Temporary Protective Order of Restraint, *status quo* order, or a ruling of the court or agreement of the parties in the general judgment or *pendente lite* order .[12]

State Law and Procedure Regarding the Ne Exeat Right

Married parents, pre-petition, have equal rights of custody.[13] Similarly, unmarried parents, pre-petition, may have equal rights of custody depending on the circumstances and facts pursuant to applicable Oregon statutory and administrative law.[14] This article is specifically concerned with rights of custody under Oregon law after the petition for dissolution of marriage or child custody has been filed and an order has been signed by the court and entered, possibly altering the pre-petition status.[15]

The court need not alter the pre-petition status, and judges in Oregon commonly do not award temporary legal custody as a matter of course *pendente lite.*[16] This has the effect of maintaining joint legal custody and equal "rights of custody," which in turn preserves both parents' Hague Convention standing. However, the general judgment will contain a final determination of rights of custody.[17] In a judicial determination, only one parent[18] may be awarded legal custody.[19] By stipulation to joint legal custody both parents may have legal custodial rights.[20] The judicial determination strips the parent of Hague Convention return rights,[21] the stipulation to joint legal custody maintains those rights. It is in the former situation that the meaning of *ne exeat* rights has become a battleground.

What Led to the Conflict in the Federal Circuits and the Grant of Certiorari

The Ninth Circuit follows the majority view[22] established by the Second Circuit, which granted the initial federal appellate determination.[23] The Eleventh Circuit has handed down the only contrary ruling.[24] It was the Fifth

Circuit's following of the majority rule that prompted the U.S. Supreme Court to hear *Abbot* and finally align the circuits on this critical issue.

After the most recent line of Oregon relocation cases,[25] there is an argument to be made that the pivotal aspect of the legal custodial right at issue, and the aspect that separates it in the federal majority rules' analysis, in all cases, is whether the parent with legal custody has a right to determine or fix the child's residence to the exclusion of the noncustodial parent.[26] For example, if an Oregon parent wrongfully removed a child to Hong Kong, and the Hong Kong court referred to the habitual residence law of Oregon for the rights of custody issue (which it must), a good argument can be made that beside any *ne exeat* order, Oregon relocation law affords the noncustodial parent [27] a right close to a right of custody in determining the child's residence. This would be a strong argument, which the Hong Kong judge would have to decide after hearing from an Oregon court or expert.[28]

What the Oregon Lawyer Can Do Now

For a noncustodial parent, under existing law, the Oregon lawyer attempting to protect his client's right to file the Hague Convention return action should: 1) attempt to not have the legal custody issue decided until the general judgment, 2) then attempt to be awarded legal custody if the merits so dictate, or 3) agree on joint legal custody, or 4) agree on at least the residence determination right aspect of legal custody. A court cannot award that right against the wishes of the other parent under existing law.[29]

Conclusion

Until we hear from the U.S. Supreme Court, perhaps as late as June of 2010, under Oregon's winner-take-all legal custody statutory scheme, the post-judgment noncustodial parent still lacks rights of custody under this federal circuit's law,[30] and cannot bring an action to return his or her abducted child.[31]

If the U.S. Supreme Court finds a right of custody in a *ne exeat* order, then the Oregon legal custody statute need not be changed for that reason, and practitioners will have to read the decision carefully to correctly craft the *ne exeat* order. If the Court finds the veto right of a *ne exeat* order does not confer rights of custody, then a number of opportunities exist to empower Oregon noncustodial parents to recover their children if taken abroad without their permission. The first opportunity is for the legislature to create a shared parental responsibility right when it comes to determining a child's residence. This would require a statute modifying the joint custody statutes to state that both of the parents share responsibility when it comes to deciding the residence of a child if the child moves outside of Oregon. Given the history of Oregon court's application of relocation law, in which it must be shown a move is in the best interests of the child, and the relative difficulty in achieving judicial approval of a relocation, this would not be much of a change in practical outcomes, just a change in the form of the law, which is necessary for consistent Convention adjudication.

** Mr. Lechman-Su is a shareholder at Johnson & Lechman-Su, PC, and Co-Chair of the Family Law Committee of the International Law Section of the American Bar Association, and an Officer of the Family Law Committee of the International Bar Association. The views expressed herein are his alone.* *The author expresses thanks to Jessica Flint, Northwestern School of Law for her invaluable assistance in producing this article, and members of both Family Law Committees for their feedback.*

ENDNOTES

1 *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008), *cert. granted* 129 S. Ct. 2859 (2009). The Questions Presented:

"The Hague Convention on International Child Abduction requires a country to return a child who has been 'wrongfully removed' from his country of habitual residence.

Hague Convention art. 12. A 'wrongful removal' is one that occurs 'in breach of rights of custody.' Id. art. 3. The question presented is:

Whether a *ne exeat* clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a 'right of custody' within the meaning of the Hague Convention on International Child Abduction."

Available at: http://www.supremecourtus.gov/qp/08-00645qp.pdf

2 The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980; codified as the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* (2006).

3 "An equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction and sometimes from leaving the jurisdiction.". BLACK'S LAW DICTIONARY (8th ed. 2004).

4 "Rights of custody" are determined by the law of the child's habitual residence prior to the removal or retention. It is defined and contrasted to "rights of access" under Article 5 of the Hague Convention, 19 I.L.M. 1501 (1980):

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

5 Article 3 of the Convention, 19 I.L.M. 1501, states:

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

6 Federal and state courts have concurrent jurisdiction under ICARA, the federal implementing legislation of the Convention treaty. 42 U.S.C. §11603(a). Convention actions initiated in state courts are routinely removed to federal court. 28 U.S.C. §§1441 and 1446.

7 Oregon is within the Ninth Circuit, and since the treaty is federal law, the Ninth's Circuit interpretation of federal law is followed within the state and federal courts of the Ninth Circuit.

8 *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).

9 "State party" means a treaty has been ratified by the responsible bodies and entered into force between two countries. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining ratification as the "final establishment of consent by the parties to a treaty to be bound by it, usu. including the exchange or deposit of instruments of ratification"). Merely signing, or being a "signatory" does not create a treaty relationship. *See id.* (defining signatory as a "party that signs a document, personally or through an agent, and thereby becomes a party to an agreement including the exchange or deposit of instruments of ratification").

10 However, prior to a court order or administrative determination, "rights of custody" arise *ex lege,* from ORS 109.030 (2007).

11 *Abbott v. Abbott*, 542 F.3d 1081, 1082 (5th Cir. 2008), *cert. granted* 129 S. Ct. 2859 (2009).

12 This may arise either in a prejudgment order under ORS 107.095(1)(b), ORS 107.097(2) or (3), ORS 107.159, or in the general judgment pursuant to ORS 107.105(1)(b), ORS 107.159, and post judgment ORS 107.138 or ORS 107.139.

13 Equal rights of custody arise out of ORS 109.030, entitled Rights and Responsibilities of Parents Equal, which states:

> The rights and responsibilities of the parents, in the absence of misconduct, are equal, and the mother is as fully entitled to the custody and control of the children and their earnings as the father. In case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death."

Cited in *State v. Edmiston*, 43 Or. App. 13, 602 P.2d 282 (1979) (defense to kidnapping), *Mota and Mota*, 66 Or. App. 439, 441, 674 P.2d 90 (1984) (child support); *Hruby and Hruby*, 304 Or. 500, 506, 748 P.2d 57 (1987) (holding ORS 109.030 created a ". . . parental custodial right"); *Doherty v. Wizner*, 210 Or. App. 315, 150 P.3d 456 (2006) (rejecting the notion of superior naming rights to a biological father); and *State v Fitouri*, 133 Or. App. 672, 893 P2d 556 (1995)(where the Court of Appeals affirmed the defendant's conviction by a jury for first-degree custodial interference based on ORS 109.030).

14 ORS 109.175 relates to the determination of legal custody after paternity has been established and states, in part:

> If paternity of a child born out of wedlock is established pursuant to a petition filed under ORS 109.125 or an order or judgment entered pursuant to ORS 109.124 to 109.230 or ORS 416.400 to 416.465, or if paternity is established by the filing of a voluntary acknowledgment of paternity as provided by ORS 109.070 (1)(e), the parent with physical custody at the time of filing of the petition or the notice under ORS 416.415, or the parent with physical custody at the time of the filing of the voluntary acknowledgment of paternity, has sole legal custody until a court specifically orders otherwise. The first time the court determines who should have legal custody, neither parent shall have the burden of proving a change of circumstances. The court shall give primary consideration to the best interests and welfare of the child and shall consider all the standards set out in ORS 107.137.
>
> In addition to the statutes cited immediately above, ORS 107.718, part of the Family Abuse Prevention Act, allows the Petitioner to request that ". . . temporary custody of the children of the parties be awarded to the petitioner or, at the request of the petitioner, to the respondent, subject to reasonable parenting time rights of the noncustodial parent. . . ".

15 The author is not arguing for acceptance of either parent's position of what is a "right of custody". In *Abbott v. Abbott*, amici curiae brief supporting Respondent, Carol S. Bruch, argues that the father's view of custody in *Abbott* is " a mere bundling of separate individual rights that can be severed asunder and conferred in varying directions and assortments...", in contrast to what she argues is the Convention context where residence is only part of the overall concept of custody which is ". . . a unified concept, pertaining to care of the child." Brief of Eleven Law Professors as *Amici Curiae* in Support of Respondent, Carol S. Bruch, *Abbott v. Abbott*, 542 F. 3d 1081 (5th Cir. 2008), *cert. granted* 129 S. Ct 2859 (2009) (No. 08645) Counsel of Record at p. 11. This is an example of what is discussed further in endnote 31, where the federal treaty terms are not the same as used in the Oregon state statutes, and may not be in other state statutes, thus, foreign courts struggle to ascertain the meaning of "rights of custody" in the jurisdiction of the child's habitual residence. For example, in contrast to Dr. Bruch's argument, ORS 107.169(1) does allow parents by stipulation to severe legal custody rights: "An order providing for joint custody may specify one home as the primary residence of the child and designate one parent to have sole power to make decisions about specific matters while both parents retain equal rights and responsibilities for other decisions." *See also Mozes v. Mozes,* 239 F.3d 1067, 1076 (9th Cir., 2001) where in setting forth the Hague

Convention legal standard for determining habitual residence, one looks to settled purpose or intention, and the ". . . intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence."

16 Judicial practice varies, and many attorneys ask for an award of temporary custody in actions under ORS 107.095. There may be good reasons to grant legal custody to one parent or the other, such as incidence of domestic violence or high conflict situations where the parties should not or cannot work together. But unless there is a good reason, this decision, at least in the context of international child abduction, should be deferred, in the author's opinion.

17 ORS 18.005(7).

18 ORS 107.169(3).

19 ORS 107.169(1) states the definition of joint custody as:

[A]n arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training. An order providing for joint custody may specify one home as the primary residence of the child and designate one parent to have sole power to make decisions about specific matters while both parents retain equal rights and responsibilities for other decisions.

20 ORS 107.169(1) and (4).

21 However, this is not entirely true under the Convention regarding rights of access in the abducted-to country, which could include travel back to the abducted-from country. But see: *Cantor v. Cohen,* 442 F.3d 196 (4th Cir. 2006), where court ruled access claims under ICARA, 42 U.S.C. § 11603(b) and Article 21, are not cognizable in federal court in the U.S. This may not be true in another country to where a child has been wrongfully removed. In other words, for the Oregon noncustodial parent, the return action might fail due to no "rights of custody" but the court of first instance may grant access rights under Article 21. The foreign left-behind parent seeking return from the US, if denied in a federal first instance proceeding, cannot be granted access rights, under *Cantor v. Cohen* in federal court; the left-behind parent must go to a state court.

22 *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133, 138-39 (2d Cir. 2000).

23 *Croll*, 229 F.3d at 143-154 (Sotomayor, J., dissenting).

24 *Furnes v. Reeves*, 362 F.3d 702,719 (11th Cir. 2004). There may be other Federal District Court Cases which follow the minority rule, as well.

25 *See: Hamilton-Waller and Waller*, 202 Or. App. 498, 123 P.3d 310 (2005); *Cooksey and Cooksey*, 203 Or. App. 157, 165 (2005); *Fedorov and Fedorov*, 228 Or.App. 50, 61-65 (2009); and most recently, *Herinckx and Matejsek*, 231 Or.App. 50, 56-58, 218 P.3d 137 (2009).

26. See endnote 4 for definition of "rights of custody." See endnote 15 for a brief discussion of the scope of "rights of custody".

27 *Fedorov and Fedorov*, 228 Or.App. 50, 61-62 (2009). "In Oregon, unlike in some states, the custodial parent does not enjoy a presumptive right to relocate with the child.

28 Rights of custody determinations are made in the country of habitual residence pursuant to Article 15 of the convention. See 19 I.L.M. 1501. Some countries produce the Article 15 declaration by opinion of the state's attorney general, some by a court's determination, and some by expert testimony. Most state parties supply legal aid under Article 36; the U.S. opted out of this article, and the petitioning party is financially on their own. 42 U.S.C. § 11607. However, financed, the petitioner's counsel would have to initiate a declaratory judgment action or other cause of action within an existing domestic relations case.

29. *See: Zipper v. Zipper*, 235 P.2d 866, 868, 192 Or. 568 (Or., 1951): "A divorce court is a court of limited jurisdiction, and it enjoys no power whatever except that expressly conferred upon it by statute."

30 *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).

31 Convention Article 3(a), stated in endnote 5, defines a "right of custody" as arising "under the law of the State in which the child was habitually resident immediately before the removal or retention". Thus the question the court of first instance (the court of the abducted-to or retained-in country) will be asking is Oregon or the United States the relevant "State" for defining a right of custody? That can only be answered by reference to the enabling statute or decisional law of the country of the court of first instance - the Convention itself does not contain the answer. Short of that, other Hague Convention state parties thus find it difficult to know to which law to look - federal or state.

This is one reason why is the Supreme Court's ruling is important. *See: Holmes v. Laird*, 459 F.2d 1211, 1220, 1222 (D.C. Cir., 1972) which held "Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. "In the United States of America, applicable treaties, [are] binding upon federal courts to the same extent as are domestic statutes." Thus, the Supreme Court's interpretation of the treaty will likely become the law the foreign court of first instance would be most likely to follow.

Another reason is uniformity in application at both the state and federal level of United States courts.

A third is summarized in this article.

This problem is one of the many reasons why it has been advocated by relevant institutions, scholars and practitioners that the United States sign and ratify the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded Oct. 19, 1996 ("The 1996 Convention"). The U.S.State Department hopes to have the authority to sign The 1996 Convention soon, and to then send it on to the U.S. Senate for ratification. See: Robert G. Spector & Bradley C. Lechman-Su, International Family Law, The Int'l Lawyer, Summer 2009, at 1. Available at: http://meetings.abanet.org/webupload/commupload/IC942000/relatedresources/YIR2009.pdf

Tech Tips for Lawyers: Working with PDF Documents

By Kristin LaMont, Esq

We all use PDF files regularly in our practice and most of us use Adobe products to work with this format. Originally developed by Adobe, Portable Document Format "PDF" was officially released as an open standard in 2008, making the code available to anyone who wants to develop software utilities for managing, creating and viewing PDF files. We now have all kinds of interesting new tools for PDF files and Adobe has competition for their PDF product line. A few great tools you that might like to explore:

Working with Word, Excel, WordPerfect and PDF. I often want to transfer a file from one format to another so that I can edit it or send it as an email attachment.

WordPerfect to PDF: WordPerfect will allow you to publish a document to PDF easily. From your open document, just go to the File menu, scroll down to "Publish" and select "PDF". The PDF is created, you name it and save it and you're done.

Word/Excel to PDF: Microsoft Word and Excel 2003 (and earlier versions) don't offer this feature directly. However, simple tools exist that make the conversion easy to do. ExpressPDF and doc2pdf offer Word/Excel to PDF conversion using an online utility. You can upload your file and the online utility converts your document and delivers the PDF to you. *However*, you may not want to use this service for confidential documents. A better solution is to use a document converter. Adobe offers a PDF print driver or you can download the free utility, such as doPDF or PrimoPDF. To convert your document, simply go to the File menu, scroll down to "Print" and select Adobe Printer, doPDF or PrimoPDF as your printer. These drivers will convert the document to PDF and save it to your computer. In fact, these PDF print drivers can convert just about anything you might otherwise print on paper to a PDF. I use them to quickly capture web pages and research in PDF format. If you have Microsoft Word or Excel 2007, you should be able to save your document as a PDF directly. The Microsoft website offers a quick tutorial.

PDF to Word/Excel: I've tried a number of programs for this task and none compare to NitroPDF. This product is able to capture the formatting (headers, footers, footnotes, captions) correctly, which can be very helpful when you are converting pleadings. The company offers a 14 day free trial and the program is relatively inexpensive ($69.99). The NitroPDF website also allows you to upload your document for an online conversion at no cost.

WordPerfect to Word: Converting from WordPerfect to Word is probably the most troublesome task for you office. Converting pleadings and preserving all of the formatting is difficult. I use a two step process. First, convert the WordPerfect document to PDF. Second, use NitroPDF to convert the PDF to Word. All of the formatting should be preserved. NitroPDF can batch convert several documents at once. If you are converting office forms from WordPerfect to Word, this program does a great job.

Tech Tips for Lawyers is a regular feature highlighting practical technology tips for family law practice. Kristin LaMont is a solo practitioner in Salem who spends far too much time on the web and enjoys integrating technology into her practice.

CASENOTES

OREGON COURT OF APPEALS

There were no Supreme Court decisions during this period in Family Law.

DOMESTIC PARTNERSHIP

(not a same gender partnership under HB 2839)

***In the Matter of the Domestic Partnership of Cglinda G. Baker, Appellant, and Robert Lee Andrews, Respondent,* 232 Or App 646 (2009) Trial Judge: P. Kurshner, Multnomah County Circuit Court.**

Opinion: Sercombe, J.

In this equitable proceeding for dissolution of a domestic partnership, plaintiff appeals a judgment determining that no domestic partnership existed and a supplemental judgment ordering plaintiff and her attorney to each pay

sanctions equal one-half of defendant's attorney fees. Plaintiff argues that her petition for equitable dissolution of a domestic partnership should have been granted because the evidence establishes that the parties intended to have a domestic partnership and that the trial court lacked authority to enter the supplemental judgment because a notice of appeal had already been filed and sanctions were not appropriate.

Held: Where the parties have not comingled finances and the only evidence of intent to share property is plaintiff's testimony and the length of partnership, and the trial court has made findings that plaintiff has "virtually zero" credibility, the trial court did not err in finding that no domestic partnership existed. Sanctions granted in an amount equal to a party's attorney fees are not "attorney fees" for the purposes of ORS 19.270(1)(a), and therefore the trial court erred in entering the supplemental judgment after the notice of appeal had been filed. General judgment affirmed, supplemental judgment reversed and remanded.

CA 12.23.09

FAMILY ABUSE PREVENTION ACT

***Francesca Pavon, Petitioner-Respondent, v. Richard Miano, Respondent-Appellant,* 232 Or App 533 (2009) Trial Judge J. Waco, Marion County Circuit Court.**

Opinion: Wollheim, J.

Respondent appeals from the trial court's issuance of a Family Abuse Prevention Act (FAPA) restraining order and argues that the trial court lacked authority to award petitioner custody of respondent's children.

Held: A respondent does not preserve for appellate review a contest to the custody provisions of a Family Abuse Prevention Act order where the respondent's request-for-hearing form indicates a contest only to the portion of the order barring the respondent from contacting the petitioner and where the respondent does not contest the custody provisions at the trial court. Affirmed.

CA 12.16.09

PARENTING TIME – MODIFICATION

***In the Matter of the Marriage of Peggy Ann Polacek, Petitioner-Respondent, and Gary Michael Polacek, Respondent-Appellant,* 232 Or App 499 (2009) Trial Judge: J. Billings, Lane County Circuit Court.**

Opinion: Landau, P. J.

In this domestic relations case, father moved for a modification of the portion of the stipulated dissolution judgment that specifies the conditions under which he is permitted parenting time with his children. Father argued that the provision is unlawful and should be deleted from the judgment. The trial court denied father's motion, and father appeals. On appeal, father contends that the court erred in denying his motion. He also asserts an unpreserved challenge to the court's refusal to establish a parenting plan for father without first making a finding that the parenting time would endanger the health or safety of the children as required by ORS 107.105(1)(b).

Held: The parenting time provision in the stipulated dissolution judgment is not unlawful; accordingly, the trial court did not err in denying father's motion to modify on that basis. Regarding father's unpreserved contention, even assuming that the trial court erred in failing to make the finding, the Court of Appeals declined to exercise its discretion to review it in this case. Affirmed.

CA 12.16.09

PSYCHOLOGICAL CHILD-PARENT RELATIONSHIP

***In the Matter of the Marriage of Liana Martha Hanson-Parmer, nka Liana Martha West, Appellant, and James Michael Parmer, Respondent,* 233 Or App 187 (2010) Trial Judge: D. Murphy, Linn County Circuit Court.**

Opinion: Haselton, P. J.

Wife appeals a dissolution judgment, assigning error to the trial court's determination that husband is the psychological parent of her youngest son, D, and is entitled to visitation with him pursuant to ORS 109.119(3)(a). Husband is not D's biological father. On appeal, the dispositive legal issue was whether husband had a "child-parent relationship," ORS 109.119(10)(a), with D that is a necessary statutory prerequisite to husband's right to visitation in this case.

Held: Husband's two days of "parenting time" each week is insufficient to establish that husband "resid[ed] in the same household" with D "on a day-to-day basis" pursuant to ORS 109.119(10)(a). Reversed and remanded with instructions to enter judgment including a finding that husband is not the psychological parent of D and is not entitled to parenting time or visitation with D; otherwise affirmed.

CA 01.06.10