

RECENT APPELLATE DECISIONS

FAMILY LAW CASE SUMMARIES

JULY 2012 _ - JULY 2013

HONORABLE REBECCA A. DUNCAN
OREGON COURT OF APPEALS

TABLE OF CONTENTS

CHILD CUSTODY	3
<i>Turner v. Muller</i> , 251 Or App 722, 284 P3d 1214 (2012).....	3
<i>Garner v. Taylor</i> , 254 Or App 635, 295 P3d 687, <i>rev den</i> , 353 Or 747 (2013), <i>rev den</i> , 353 Or 747 (2013).....	3
<i>Underwood v. Mallory</i> , 255 Or App 183, 297 P3d 508 (2013).....	4
PARENTING TIME	4
<i>Turner v. Muller</i> , 251 Or App 722, 284 P3d 1214 (2012).....	4
See Child Custody, <i>supra</i>	4
<i>Garner v. Taylor</i> , 254 Or App 635, 295 P3d 687, <i>rev den</i> , 353 Or 747 (2013).	4
<i>In re Marriage of Stewart</i> , 256 Or App 694, 302 P3d 818 (2013) (<i>per curiam</i>).....	5
CHILD SUPPORT	5
<i>In re Marriage of Matar & Harake</i> , 353 Or 446, 300 P3d 144 (2013).	5
<i>Turner v. Muller</i> , 251 Or App 722, 284 P3d 1214 (2012).....	6
<i>In re Marriage of Malpass</i> , 255 Or App 233, 296 P3d 653 (2013).....	6
<i>McMurchie v. McMurchie</i> , 256 Or App 712 (2013).....	6
<i>State ex rel. Div. of Child Support v. Baldwin</i> , 257 Or App 346 (2013).	7
PROPERTY DIVISION	8
<i>In re Marriage of Fay</i> , 251 Or App 430, 283 P3d 945 (2012).	8
<i>In re Marriage of Morton</i> , 252 Or App 525, 287 P3d 1227 (2012)	9
<i>In re Marriage of Christensen</i> , 253 Or App 634, 292 P3d 568 (2012)	10
<i>In re Marriage of Malpass</i> , 255 Or App 233, 296 P3d 653 (2013).....	11
<i>In re Marriage of Herald & Steadman</i> , 256 Or App 354, 303 P3d 341 (2013).	12
<i>In re Marriage of Kaptur</i> , 256 Or App 591, 302 P3d 819 (2013).	12
SPOUSAL SUPPORT	13
<i>In re Marriage of Steele</i> , 254 Or App 79, 293 P3d 1077 (2012).....	13
<i>In re Marriage of McKinnon</i> , 256 Or App 184, 300 P3d 257 (2013).....	14
<i>In re Marriage of Dow</i> , 256 Or App 454, 302 P3d 1188 (2013).....	14
<i>In re Marriage of Waid</i> , 0803798CV, 2013 WL 3475232 (Or Ct App July 10, 2013).	15
DISSOLUTION	16
<i>In re Marriage of Ewald v. Ewald</i> , 254 Or App 170, 294 P3d 511 (2012) (Claim Preclusion).	16
ATTORNEY FEES	17 16
<i>In re Marriage of Fay</i> , 251 Or App 430, 283 P3d 945 (2012).	17
<i>In re Marriage of Berry & Huffman</i> , 251 Or App 744, 284 P3d 1202 (2012).	17
PROTECTION ORDERS	17
<i>C.J.P. v. Lempea</i> , 251 Or App 656, 284 P3d 1212 (2012)	17
<i>State v. Nahimana</i> , 252 Or App 174, 285 P3d 763 (2012).	18 17
<i>E.O. v. Cowger</i> , 252 Or App 315, 287 P3d 1160 (2012).....	18
<i>V.A.N. v. Parsons</i> , 253 Or App 768, 296 P3d 522 (2012).	18

CHILD CUSTODY

Turner v. Muller, 251 Or App 722, 284 P3d 1214 (2012).

Mother appealed from a supplemental judgment of modification entered on remand following the Court of Appeals' decision in *Turner v. Muller*, 237 Or App 192, 238 P3d 1003 (2010), *rev den*, 350 Or 231 (2011) (*Turner I*), which reversed a judgment of the trial court changing custody of child from the mother to father. On remand for reconsideration of child support and parenting plan provisions, the trial court awarded sole legal and physical custody of child to mother and granted father parenting time and the right to claim child as a dependent for state and federal tax purposes. Mother appealed.

Because the parenting plan ordered by the trial court effectively changed custody of child during the school year from mother to father, in contravention of the court's decision in *Turner I* and in the absence of a substantiated request for change of custody, the trial court exceeded its discretion and *de novo* review was justified under the circumstances. Applying *de novo* review, the appellate court concluded that imposition of the standard parenting time schedule in the local rule was in the child's best interest. The Court of Appeals' imposition of a new parenting plan required the trial court, on remand, to recalculate father's child support obligation, and to adjust for the fact that mother, as the parent with primary physical custody, would not take the tax exemption for the child. OAR 137-050-0725, 137-050-0760.

Garner v. Taylor, 254 Or App 635, 295 P3d 687, *rev den*, 353 Or 747 (2013), *rev den*, 353 Or 747 (2013).

Nonparent, who had obtained a default judgment providing her with visitation rights with respect to minor child, filed a motion to modify the judgment, seeking sole custody of the child or, alternatively, temporary custody of the child or extended periods of visitation. The trial court entered judgment, which denied all relief sought and, additionally, set aside the default judgment. Nonparent appealed, contending that the trial court erred when it, *sua sponte*, set aside the default judgment. In addition, nonparent argued that the court erred in the legal standard it applied in considering the modification and in its determination that visitation was not in the child's best interest.

Trial court abused its discretion in *sua sponte* setting aside default judgment. The trial court did not identify any extraordinary circumstances, as required by relief from judgment rule, but, rather, supported its decision on mere ground that the original court did not apply correct statutory analysis and constitutional rights of child's mother when it denied her prior motion to set aside the default judgment. ORCP 71.

Otherwise, the trial court's decision was proper based on its conclusion, which was supported by the record, that visitation was not in the child's best interest. Even if nonparent did have an ongoing relationship with child and even if she had rebutted presumption that the child's parent acted in the child's best interest, the Court of Appeals would still have denied visitation she sought because of its evaluation of child's best interest, which was determinative.

Underwood v. Mallory, 255 Or App 183, 297 P3d 508 (2013).

Mother appealed from trial court's denial of her motion to modify child custody agreement, which gave custody of child to maternal grandparents, asserting that the trial court erroneously applied ORS 109.119(2)(c) or, alternatively, that ORS 109.119(2)(c) is unconstitutional as applied in these circumstances. She also argued that the trial court erred in determining that she had not demonstrated a change in circumstances or that a change of custody was in the child's best interests.

Mother asked the Court of Appeals to exercise *de novo* review, asserting that the trial court did not make sufficient findings of fact on the pertinent legal issues. The Court of Appeals held that the trial court did make sufficient factual findings on those issues that were raised on appeal; thus, rather than conduct *de novo* review, the appellate court reviewed the trial court's determination regarding whether the requirements for modification had been met for errors of law, ORS 19.415(3)(b); ORAP 5.40(8), and the trial court's determination of the best interests of the child for abuse of discretion.

Mother failed to preserve any argument concerning ORS 109.119. She based her motion to modify on ORS 109.103 (pertaining to custody disputes between unmarried parents) and ORS 107.135 (pertaining to changes in custody after marital dissolution). Under those statutes, a change in custody is based on a determination of whether there has been a change in circumstances and whether the change is in the child's best interests. Both parties and the trial court conducted the proceeding with the assumption that those were the legal issues, and there was no mention of ORS 109.119 in the proceeding. Thus, any purported error in applying ORS 107.135 without reference to ORS 109.119, including the presumption and rebuttal provisions of ORS 109.119(2)(a), (3)(a) and (4)(a), was invited—and hence unreviewable—and any purported error in applying ORS 109.119 was nonexistent.

Additionally, evidence supported finding that it was not in child's best interest to modify child custody and award mother custody of child: Mother had a history of unstable living arrangements, she had an on-again off-again relationship with an abusive partner, she had a history of problems abiding by orders of the courts concerning her children, and grandparents had been child's primary caretakers since his birth. ORS 107.135; ORS 107.137(1).

PARENTING TIME

Turner v. Muller, 251 Or App 722, 284 P3d 1214 (2012).

See Child Custody, *supra*.

Garner v. Taylor, 254 Or App 635, 295 P3d 687, *rev den*, 353 Or 747 (2013).

See Child Custody, *supra*.

In re Marriage of Stewart, 256 Or App 694, 302 P3d 818 (2013) (*per curiam*).

Trial court erred in denying all parenting time to incarcerated mother without engaging in the necessary inquiry as to whether parenting time with mother would endanger the health and safety of the children. ORS 107.105(1)(b). In determining whether to deny parenting time to an incarcerated parent, each case must be decided on its own merits and not on the basis of a policy not to allow children to visit their parents at the penitentiary. In a dissolution proceeding it is the court's task, not the custodial parent's, to develop a parenting plan, including appropriate quality parenting time, in the best interests of the children. ORS 107.105(1)(b).

CHILD SUPPORT

In re Marriage of Matar & Harake, 353 Or 446, 300 P3d 144 (2013).

The parties stipulated to a judgment dissolving their marriage that required father to pay child support in an amount that exceeded by \$8 the presumptively correct amount indicated by application of the Oregon Child Support Formula. The judgment provided that neither party would seek modification of that support obligation.

Father moved to modify child support due to a reduction in income and his support of additional children. Father argued that public policy prohibits parties from contracting around the requirements of the Child Support Formula, and that the terms of a marital settlement agreement may not deprive a court of its authority to modify child support when a substantial change in circumstances has occurred. The trial court found that father had demonstrated a substantial change in circumstances through reduction in his income, but that the parties' nonmodification agreement was nonetheless enforceable because it neither divested the court of jurisdiction nor violated public policy. The Court of Appeals, 246 Or App 317, 270 P3d 257, affirmed. Father sought review, which was granted.

The Supreme Court first held that ORS 107.104 and ORS 107.135(15)—which announce a policy of encouraging settlement agreements in suits for marital dissolution and modification, and which provide for the enforcement of the terms of those agreements—are applicable to settlement terms pertaining to child support. The Court then held that child support nonmodification agreements do not categorically contravene public policy, because such agreements (1) do not deprive the court of its authority to modify child support, but rather waive a party's right to seek the court's exercise of its authority, and (2) do not otherwise interfere with the state's role in protecting children.

Oregon law authorizes both a child and the state to seek modification of parents' child support obligations, regardless of parents' willingness to do so. Oregon's child support statutes are carefully crafted to ensure that child support is awarded in an amount that will provide for a child's needs, and those statutes permit courts and agencies to adjust that amount when circumstances change. ORS 107.104; ORS 107.105(1)(c); ORS 107.135(1)(a), (15)(a).

Additionally, if a parent can establish that enforcement of a nonmodification agreement would contravene public policy, the parent may seek, and a court may order, modification of a

parent's child support obligation. Courts must make that determination on a case-by-case basis. Evidence that a stipulated child support award is insufficient to meet a child's needs may demonstrate that enforcement of an agreement not to seek an increase in the stipulated award contravenes public policy. ORS 109.010.

In this case, where father did not demonstrate that the stipulated child support award was insufficient to meet his children's needs or that enforcement of the agreement would otherwise violate public policy, the trial court did not err in enforcing the parties' nonmodification agreement in accordance with ORS 107.104 and ORS 107.135(15).

Turner v. Muller, 251 Or App 722, 284 P3d 1214 (2012).

Evidence was sufficient to support trial court's finding that father had overpaid child support in the amount of \$17,338.16; mother stipulated to father's exhibits, and the court relied on the exhibits, which indicated that \$17,338.16 was the amount of overpayment father was due. Therefore, trial court did not err in determining that father was entitled to an offset against his future child support obligation and a money award against mother, as a result of his past overpayment.

In re Marriage of Malpass, 255 Or App 233, 296 P3d 653 (2013).

Wife contended that the trial court erred in awarding husband, the noncustodial parent, the right to claim dependent child tax exemption or, alternatively, that the court erred in failing to consider and make findings regarding the effect of that award on husband's child support obligation.

Wife failed to preserve her argument that federal law precluded trial court from awarding a dependent child tax exemption to a noncustodial parent; wife did not argue that federal law precluded the court from ordering a custodial parent to sign an Internal Revenue Service (IRS) form permitting a custodial parent to release his or her claim to an exemption for a dependent child, or that existing case law was contrary to federal law.

Any error in trial court's failure to consider effect of husband's dependent child tax exemption award when it continued husband's temporary child support obligation until information regarding husband's monthly income became available was invited error by wife; wife stated during argument on the issue that court's plan to continue temporary order was a good idea, she acknowledged that there was no evidence on what husband's tax liability would be, and she remained silent while the court and husband explicitly agreed that the court could order child support without doing calculations. OAR 137-050-0760.

McMurchie v. McMurchie, 256 Or App 712 (2013).

Mother appealed the trial court's supplemental judgment modifying child support, asserting that the amount of child support that the trial court ordered the father to pay was too low. Father cross-appealed, asserting that the amount was too high. Both parties contended that the trial court erred in calculating father's presumed income, which the trial court accomplished by

adding father's potential income and his actual income. In addition, mother contended that, even if the trial court did not err in calculating father's presumed income, it erred in failing to consider father's other available resources—specifically, his portion of a \$3.3 million lottery prize—when determining whether the presumed child support obligation based on father's presumed income was "unjust or inappropriate," OAR 137–050–0760(1).

The trial court erred in calculating father's presumed income because the Oregon Child Support Guidelines require a court to use either a parent's potential income or a parent's actual income. A parent's presumed income, for purposes of calculating a child support obligation, is either the parent's actual income or the parent's potential income, not a combination of the two. OAR 137–050–0715. In provision of child support guidelines defining "income" as "the actual or potential gross income of a parent," the term "or" is used in the exclusive sense, meaning that income can mean actual gross income of a parent or potential gross income of a parent, but not both. OAR 137–050–0715(1).

Father's presumed income, for purposes of calculating his child support obligation, was potential income that he could earn working full-time at a minimum wage job, rather than the actual income of interest from lottery winnings.

Remand was required to allow the trial court to apply "rebuttal factors" set forth in child support guidelines to determine whether presumed child support obligation was unjust or inappropriate. OAR 137–050–0760(1). On remand, trial court could consider: (1) father's lottery prize principal to be "other available resources" of father; and (2) yearly interest generated from investment of lottery principal as "other available resources" of father. OAR 137–050–0760(1)(a).

Note: *McMurchie* was decided under the now former Child Support Guidelines.

State ex rel. Div. of Child Support v. Baldwin, 257 Or App 346 (2013).

Father appealed two supplemental judgments, assigning error to the trial court's denial of his motions seeking to compel entry of proof in the trial court record that he had satisfied a child-support judgment. Father contended that the trial court administrator was obligated under ORS 18.235(9) and (10) to enter proof in the record that he had satisfied his support payments through June 2011 and that it was error for the trial court to conclude otherwise. He also contended that the Division of Child Support (DCS) was required under both ORS 18.232 and ORS 18.228 to submit proof to the trial court that he had satisfied his child-support payments. Finally, he challenged the trial court's denial of his request for damages, costs, and attorney fees arising from the state's refusal to enter such proof in the court record.

In light of the trial court's first supplemental judgment, the trial court administrator was not required to enter proof that father had paid his money award in full; father's support payments would continue to accrue until his child reached age 18. ORS 18.005(14); ORS 18.235(9).

DCS was not required to provide father relief under ORS 18.232 because the "money award" owed by father had not been satisfied in full. Father still had several years of payments left to

make under divorce decree, and DCS was only compelled to enter satisfaction documents with the trial court when a judgment was fully satisfied. ORS 18.005(14); ORS 18.235(9).

DCS was not required to submit proof to the trial court that father had satisfied his judgment under ORS 18.228 because the requests father made to DCS did not meet the statutory definition of "satisfaction documents." Neither mother nor her attorney signed documents, and no evidence indicated that mother refused to provide an appropriate satisfaction of judgment. ORS 18.225; ORS 18.228.

The Court of Appeals rejected father's argument that the trial court erred in denying his request for damages, costs, and attorney fees, and would not consider father's argument that alleged child support arrearage liens encumbering his property were an unconstitutional taking, where he raised the issue for the first time on appeal in his reply brief. US Const, Amend V; Or Const, Art I, § 18; ORAP 5.45(1).

PROPERTY DIVISION

In re Marriage of Fay, 251 Or App 430, 283 P3d 945 (2012).

Husband appealed a dissolution judgment, challenging, *inter alia*, the trial court's property division, contending that the trial court unjustly required him to pay certain debts without giving him a balancing award of other property.

Husband failed to preserve for appellate review his claim that the trial court erred when it made husband responsible for the parties' tax debt. Husband did not identify any point in the record where he alerted the trial court that the debt should not be attributed to his business and should, instead, be included in an equal division of marital assets. ORAP 5.45(4)(a)(i).

Husband adequately preserved his claim that the trial court erred when it failed to divide the debt associated with the parties' home equity line of credit (HELOC) equally between the parties. During trial, husband claimed that the HELOC was a lien on the property that diminished the equity in the property. In context, husband's statements sufficiently notified the trial court of husband's position that the HELOC should be considered in balancing the property awards. ORS 107.105(1)(f).

The trial court did not abuse its discretion in assigning to husband the outstanding balance on a HELOC that was used in part to support husband's business and in part to finance improvement to the parties' marital residence. The record did not include any evidence establishing what portion of the HELOC funds was used for each of those two purposes; husband came forward with no credible evidence on that point even though he was in a better position than wife to do so. Given the dearth of evidence, the Court of Appeals saw no way to improve on the trial court's implicit decision to include the HELOC in the conglomeration of business assets and debts that it assigned to husband at zero net value.

In re Marriage of Morton, 252 Or App 525, 287 P3d 1227 (2012)

Husband appealed a judgment of dissolution, challenging the trial court's spousal support award to wife and its division of the parties' property and debts.

The Court of Appeals held that (1) wife rebutted the presumption of equal contribution with respect to the inheritance from her father; (2) trial court's "just and proper" analysis with respect to wife's inheritance was not procedurally flawed; (3) trial court acted within its discretion in determining that it was equitable to award what remained of inheritance to wife; and (4) trial court acted within its discretion in making husband solely responsible for the debt to his employer.

Wife rebutted the presumption of equal contribution with respect to the inheritance from her father. Evidence in the record supported the trial court's finding that wife's father did not intend to benefit husband, and husband did not influence her father to leave wife a portion of his estate. ORS 107.105(1)(f). In the context of an inheritance, the presumption of equal contribution in a marital dissolution action may be overcome by showing that the inheritance was uninfluenced by the other spouse; if one spouse can establish that the marital asset was acquired by gift and that the other spouse neither contributed to its acquisition nor was the object of the donative intent, then the statutory presumption is rebutted. ORS 107.105(1)(f). Wife met the "donative intent" aspect of her burden in overcoming the presumption of equal contribution with respect to the inheritance from her father. ORS 107.105(1)(f).

When one party has separately acquired property, the court in a marital dissolution action must consider commingling both in analyzing the presumption of equal contribution and in determining a "just and proper" distribution of all of the parties' property. ORS 107.105(1)(f). Commingling bears on the outcome of the analysis of the presumption of equal contribution in marital dissolution action only when an act of commingling may preclude the court from identifying that spouse's separate contribution with sufficient reliability to rebut the statutory presumption. ORS 107.105(1)(f).

As part of the "just and proper" analysis in a marital dissolution action, commingling turns on the intent of the spouse who inherited or otherwise acquired disputed property, which courts discern by considering factors including: (1) whether the disputed property was jointly or separately held; (2) whether the parties shared control over the disputed property; and (3) the degree of reliance upon the disputed property as a joint asset. Acts of commingling do not mandate in all marital dissolution cases the inclusion of separately acquired property in the property division. Instead, the court must evaluate the extent to which a spouse has integrated a separately acquired asset into the joint finances of the marital partnership and also evaluate whether any inequity would result from the award of that asset to that spouse as separate property.

Notwithstanding that substantial portions of wife's inheritance from her father may have been commingled with the parties' other assets, the trial court acted within its discretion in determining that it was equitable to award what remained of the inheritance to wife. Wife undoubtedly needed those assets for her financial support, as she had essentially no income-

earning capacity and was many years away from retirement, whereas husband was capable of earning money and was reasonably close to retirement age, at which point he would have access to retirement income.

Although the trial court did not explicitly state that it was conducting the "just and proper" analysis, the trial court noted factors in that analysis, including the age and employment disparities between the parties and the fact that wife would need to rely on the inheritance, as part of its oral rulings at the close of trial. The trial court's finding that the parties agreed that wife would rely on the inheritance indicated that the trial court considered commingling as part of its analysis. ORS 107.105(1)(f). Thus, the trial court's treatment of the inheritance fell within the range of permissible outcomes.

The trial court also acted within its discretion in making husband solely responsible for the debt to his employer. The trial court expressed concern that the property award to wife would not be enough for her to survive without spousal support. Given that the support award was tied to husband's income, which was very low at the time of trial, the amount of support was also likely to be relatively low at the outset, prompting the trial court to observe that, in the short term, wife "may need to use more of the [property] award for her present expenses."

As part of the undertaking to divide the parties' property in marital dissolution action, a court may divide the debts that the parties incurred during their marriage. For purposes of division in marital dissolution action, there is a distinction between marital debts and debts owed by only one of the parties. In determining the nature of a debt in a marital dissolution action, courts focus not on the person in whose name the debt was incurred, but on the use to which it was put. If a debt was incurred to pay family expenses, equal division of the debt is generally appropriate in marital dissolution action; if, on the other hand, the debt is properly attributed to only one of the parties, the debt should generally remain that party's responsibility. As with assets acquired during the marriage, the debts must be divided equitably in marital dissolution action, and the parties' circumstances may require a division of debts that departs from what is generally appropriate. In a marital dissolution action, one party's spending habits may be taken into account if the spending amounts to waste or misappropriation of marital assets.

In re Marriage of Christensen, 253 Or App 634, 292 P3d 568 (2012)

Husband appealed from a judgment dissolving the parties' marriage, challenging the trial court's property and debt division.

Because the trial court's findings of fact were supported by evidence in the record, the Court of Appeals would not disturb them. The trial court found and concluded that wife had rebutted the presumption of equal contribution with respect to her separately owned assets. Moreover, as pertinent to the "just and proper" analysis, the trial court found and concluded that each party should receive her and his separate assets free of any claim by the other: The parties' assets had not been commingled, both parties were professionals with their own business enterprises, husband was fully compensated for any work that he had performed on wife's investment projects, and husband's poor economic choices had, if anything, dampened wife's investment efforts.

Husband failed to establish that unequal division of marital assets was inequitable. At time of dissolution, parties were relatively young and in good health, there were no joint children of the marriage, and both parties were capable of self-support, parties carefully avoided commingling their finances. In absence of countervailing circumstances, the trial court's division of assets and liabilities was consistent with expectations that would reasonably flow from such an arrangement.

Marital assets are subject to a rebuttable presumption of equal contribution. ORS 107.105(1)(f)(C). If one spouse rebuts the presumption of equal contribution to a marital asset, absent other considerations, it is just and proper to award that marital asset separately to the party who has overcome the statutory presumption; if the presumption has not been rebutted, the property ordinarily will be divided equally between the parties, again absent other considerations. ORS 107.105(1)(f). Timing of, and relative contributions to, the acquisition of property deemed a marital asset are two significant considerations in determining a just and proper division upon divorce, but they are not the only relevant factors; rather, courts also must consider equitable factors, including the preservation of assets, the achievement of economic self-sufficiency for both spouses, the particular needs of the parties and their children, and the extent to which a party has integrated a separately acquired asset into the common financial affairs of the marital partnership through commingling. ORS 107.105(1)(f).

As part of determining a just and proper division of the parties' property upon divorce, a court may divide the debts that the parties incurred during their marriage. In determining the nature of a debt for purposes of equitable division upon divorce, courts focus not on the person in whose name the debt was incurred, but on the use to which it was put; if the debt was incurred to pay family expenses, equal division of the debt is generally appropriate, but if the debt is properly attributed to only one of the parties, the debt should generally remain that party's responsibility. Determination of what is just and proper in all the circumstances is a matter of discretion for the trial court, and an appellate court will disturb the trial court's decision only if it misapplied the statutory and equitable considerations required by statute. ORS 107.105(1)(f).

In re Marriage of Malpass, 255 Or App 233, 296 P3d 653 (2013).

Wife contended that the court erred in its division of husband's military pension. Generally, a spouse is entitled to one-half of that portion of a pension that was accumulated during the marriage. ORS 107.105(1)(f)(A). Under the "time rule," which is typically used to calculate the marital portion of a defined benefit plan that has not yet matured, the marital portion is determined by multiplying the total actual pension benefit by a fraction, the numerator of which is the number of years (or months) of service during the marriage and the denominator of which is the total years, or months, of employment. ORS 107.105(1)(f)(A).

Trial court was required to use the actual value of husband's military pension at retirement in its division of pension, instead of a hypothetical pension amount based on husband's pay grade at the time of dissolution, where the pension was in the form of a defined benefit plan that had not yet matured. ORS 107.105(1)(f)(A).

In re Marriage of Herald & Steadman, 256 Or App 354, 303 P3d 341 (2013).

Husband appealed from a judgment of dissolution of marriage, arguing that the court erred in dividing the parties' retirement benefits, and, specifically, in its treatment of wife's federal Civil Service Retirement System (CSRS) benefits. In particular, husband asserted that the trial court's apportionment methodology violated 42 USC § 407(a), as construed and applied in *Swan and Swan*, 301 Or 167, 720 P2d 747 (1986).

Trial court's method of dividing marital property, by reducing the value of wife's federal Civil Service Retirement System (CSRS) benefits by the value of the social security benefit wife would have earned had she paid into social security during the marriage and including the balance for distribution purposes, was not precluded by the Social Security Act's anti-assignment provision, and manifestly comported with the statutory direction to achieve a division that was "just and proper in all the circumstances." Social Security Act § 207(a), 42 USC § 407(a); ORS 107.105(1)(f). It would have been manifestly unjust for husband to receive his full social security benefits and to share in wife's CSRS benefits, while wife was prohibited from sharing in husband's social security benefits while being entitled to no social security benefits of her own.

In providing for a division of property, the trial court first determines what portion of the parties' property is marital property subject to distribution upon dissolution of the parties' marriage; the court then determines the value of the marital property and, finally, the court determines in what manner the marital property ought to be divided to achieve an equitable division. ORS 107.105(1)(f). The trial court's ultimate determination in a divorce action as to what property division is just and proper in all the circumstances is a matter of discretion. ORS 107.105(1)(f). An appellate court will not disturb the trial court's determination as to what property division in a divorce action is just and proper in all circumstances unless it concludes that the trial court misapplied the statutory and equitable considerations required. ORS 107.105(1)(f).

In re Marriage of Kaptur, 256 Or App 591, 302 P3d 819 (2013).

In a dissolution proceeding, the trial court determined that the appreciation in the house during the marriage should be divided between the parties and determined that the marital portion of the funds would be equalized through a Qualified Domestic Relations Order (QDRO). Wife appealed, arguing that (1) the equalizing payment included in the judgment was too large based on the trial court's incorrect finding that the parties had a \$33,600 debt on their home, and (2) the court erred in ordering a [Qualified Domestic Relations Order (QDRO)] giving to husband \$21,500 from wife's retirement accounts.

Wife adequately preserved argument—that the trial court's equalizing award was too large because the trial court relied on the wrong dollar amount for the mortgage on the parties' home—by setting forth the correct dollar amount of debt on the house in her post-trial submissions to the trial court, even though neither party specifically informed the court after trial that its finding regarding the debt on the house was incorrect. No evidence supported trial court's finding that the amount of debt on the parties' house was only \$33,600 at the time of trial in dissolution proceeding, as required to support the size of the equalizing payment the trial court ordered for husband in making the property division. ORS 107.105(1)(f).

The determination of whether a particular issue was preserved for appeal is a practical one; it will depend on whether the policies behind the preservation requirement of judicial efficiency, full development of the record, and procedural fairness to the parties and the trial court are met in an individual case. ORAP 5.45(1). The Court of Appeals will consider an issue advanced by a party on appeal as long as that party raised the issue below with enough particularity to assure that the trial court was able to identify its alleged error so as to consider and correct the error immediately, if correction is warranted. ORAP 5.45(1). To preserve issues for appeal, parties are not required to repeat their objections after the trial court has ruled against them. ORAP 5.45(1).

SPOUSAL SUPPORT

In re Marriage of Steele, 254 Or App 79, 293 P3d 1077 (2012).

Husband appealed a general judgment of dissolution, contending that, given the totality of the circumstances, the amount and duration of the trial court's award of indefinite spousal support was not just and equitable. He also asserted that the court impermissibly awarded compensatory spousal support as a punitive measure for husband's mismanagement of the parties' marital estate.

The Court of Appeals denied husband's request for *de novo* review. When the appellate court declines to review the facts *de novo*, the court is bound by the trial court's findings of historical fact if there is any evidence in the record to support them, and the trial court's award will be upheld if, given the findings of the trial court that are supported by the record, the court's determination that an award of support is just and equitable represents a choice among legally correct alternatives.

Husband's bare assertion that alimony award left him with insufficient funds to meet his own expenses, without more, was insufficient to establish that amount of spousal support awarded was unreasonable. Evidence supported trial court's finding, in support of its award of spousal support to wife, that wife was essentially unemployable. Wife suffered from permanent disabilities related to two auto accidents and complications from diabetes, had limited training and employment skills, and, while she was two years away from obtaining master's degree in accounting, she would be unlikely to be able to work in that field because of parties' history of bankruptcy and foreclosure. Award of indefinite unallocated compensatory and maintenance spousal support of \$4,200 per month was within range of legally correct alternatives, given 24-year duration of marriage, wife's poor health and unemployability, wife's contribution to husband's advancement in his career and earning capacity, wife's custody of parties' younger child, tax consequences of award, and limited marital estate.

Trial court did not impermissibly award compensatory spousal support as punitive measure for husband's financial mismanagement. The trial court's references to husband's financial misconduct and mismanagement related to effect of husband's actions on the marital estate and on wife's employment prospects.

In determining the amount and duration of an award of compensatory spousal support, the court considers the amount, duration, and nature of the contribution by the spouse, the duration of the marriage, the relative earning capacity of the parties, the extent to which the marital estate has already benefited from the contribution, the tax consequences to each party, and any other factors the court deems just and equitable. ORS 107.105(1)(d)(B). "Maintenance spousal support" generally allows one financially able spouse to contribute to the support of the other, depending on the financial needs and resources of each party. In determining the amount and duration of spousal support, the goal of self-sufficiency is an important consideration. In long-term marriages, the parties should be separated on as equal a footing as possible, and the primary goal of spousal support is to provide a standard of living to both spouses that is roughly comparable to the one enjoyed during the marriage.

In re Marriage of McKinnon, 256 Or App 184, 300 P3d 257 (2013).

Wife appealed from a supplemental judgment modifying husband's spousal support obligation and relieving husband of the obligation to submit to a physical examination so that wife could purchase insurance on his life.

Husband failed to establish substantial change in economic circumstances warranting downward modification of spousal support. A modification of spousal support requires an unanticipated substantial change in the economic circumstances of a party. ORS 107.135(3)(a). The slight increase in wife's income did not constitute a substantial change in circumstances.

Additionally, trial court lacked statutory authority to relieve husband of his obligation to submit to physical examination to permit wife to purchase insurance on his life, where judgment of dissolution expressly provided that wife was entitled to purchase insurance on husband's life to insure his support obligation. ORS 107.820(3).

In re Marriage of Dow, 256 Or App 454, 302 P3d 1188 (2013)

Wife filed motion to modify parties' stipulated judgment of dissolution of marriage, seeking to increase former husband's spousal support obligation. Husband filed cross-motion, requesting that the court award him a share of wife's Oregon Savings Growth Plan (OSGP) retirement account and terminate his spousal support obligation. The trial court entered supplemental judgment of dissolution awarding husband half of then-current value of wife's OSGP account, and lowering husband's spousal maintenance obligation by eliminating "overage provision" of stipulated dissolution judgment, which awarded wife additional spousal maintenance if husband's annual income exceeded \$160,000. Wife appealed, challenging both the trial court's modification of husband's spousal support obligation and the trial court's decision to award husband a share of wife's Oregon Savings Growth Plan (OSGP) account, the existence of which she had not disclosed at the time of the parties' divorce.

The Court of Appeals found no support for wife's argument that stipulated support provisions can be modified only if they violate the law or contravene public policy. Legislative policy of enforcing stipulated dissolution judgments to fullest extent possible did not limit trial court's authority to modify spousal maintenance where parties' economic circumstances had changed substantially. ORS 107.135 authorizes trial courts to modify the spousal support provisions of

any dissolution judgment if there is a substantial change in the economic circumstances of a party.

Wife herself alleged and proved a "substantial change in economic circumstances," which was sufficient to trigger the court's authority to determine what was just and equitable under the totality of the circumstances. Even though only wife pled and proved substantial change in circumstances, husband was not required to separately plead and prove substantial change in circumstances for trial court to have statutory authority to modify spousal maintenance in husband's favor. ORS 107.135(3)(a). Husband repeatedly put wife on notice that he wanted the court to eliminate or reduce his support obligation if a substantial change in circumstances was proved.

Thus, the trial court's reduction of husband's spousal maintenance obligation by eliminating "overage provision" of stipulated dissolution judgment was just and equitable under the circumstances. The trial court fully considered parties' financial circumstances. Wife's failure to disclose income and assets earlier in dissolution proceedings enabled her to make significant contributions to her retirement accounts, giving her more opportunities to generate income than contemplated by the stipulated dissolution judgment. Husband had substantially less saved for retirement than wife, and court's elimination of overage provision was based on assessment of parties' economic circumstances and desire to disentangle parties' financial affairs, rather than desire to punish wife for failing to disclose income. Courts generally should not use spousal support awards as vehicles by which a spouse may be punished for unrelated opprobrious conduct. The trial court's desire not to further financially entangle the parties was just one factor in the court's determination of what spousal support obligation husband should continue to have, and the record justified the trial court's decision to remove a provision that made the parties' obligations dependant on periodic mutual disclosure of their financial situations.

In re Marriage of Waid, 0803798CV, 2013 WL 3475232 (Or Ct App July 10, 2013).

Wife appealed from dissolution judgment, assigning error to the award of indefinite maintenance spousal support to her in the amount of \$250 per month. She contended that the award was too low to allow her to have a standard of living in relative parity to husband's or, to the extent possible, to let her enjoy a standard of living similar to what she had during the parties' marriage.

Trial courts have a range of discretion to decide what amount and duration of spousal support is just and equitable. The Court of Appeals will not disturb the trial court's discretionary decision regarding the amount and duration of an award of spousal support unless the trial court misapplied the required statutory factors. ORS 107.105(1)(d).

Trial court did not abuse its discretion by not considering wife's retirement plans in setting indefinite spousal support in dissolution action. The trial court based its decision on the circumstances as it found them. At the time of trial, wife (64) planned to continue working for a year or two, and her annual income was within several thousand dollars of that of husband (69), who was retired. Wife's ultimate retirement from working would provide a sufficient legal basis

for the trial court to consider modification of spousal support at that time. ORS 107.105(1)(d); ORS 107.135(4).

DISSOLUTION

In re Marriage of Ewald v. Ewald, 254 Or App 170, 294 P3d 511 (2012) (Claim Preclusion).

Wife successfully moved under ORCP 71 B(1)(d) to set aside a default judgment of dissolution on the ground that it was void because the trial court lacked subject matter jurisdiction. Husband appealed from the resulting order of the trial court vacating the dissolution judgment and dismissing the case. First, he contended wife's motion was barred by claim preclusion. Alternatively, he argued that the trial court erred in concluding that it lacked jurisdiction, because the evidence demonstrated that wife was domiciled in Oregon for the requisite time period. While husband's appeal was pending, wife obtained a decree of divorce from husband in Alaska Superior Court.

Alaska court's entry of judgment of divorce did not render moot the issue on appeal of whether trial court had subject matter jurisdiction to enter prior dissolution judgment; if, on appeal, it was determined that trial court erred in vacating the default dissolution judgment entered in Oregon, that decision would have the effect of reinstating the Oregon judgment, which would have antedated the Alaska judgment, implicating principles of comity under the Full Faith and Credit Clause, and the Oregon judgment differed from the Alaska judgment in several respects, including, not insignificantly, the division of the parties' real property. US Const, Art IV, § 1. A case is not moot when the interests of the parties are adverse and the court's decision in the matter will have some practical effect on the rights of the parties to the controversy.

Wife's motion to set aside default dissolution judgment on grounds of lack of subject matter jurisdiction was not precluded by operation of claim preclusion, or res judicata, as wife did not attempt to collaterally attack the court's judgment in a separate proceeding but, instead, moved for the court to set its judgment aside in the same case.

The doctrine of "claim preclusion," formerly known as res judicata, generally prohibits a party from relitigating the same claim or splitting a claim into multiple actions against the same opponent. A plaintiff who has prosecuted one action against a defendant through to a final judgment binding on the parties is barred on res judicata grounds from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action. Although the doctrines of claim preclusion, issue preclusion, and law of the case have the shared purposes of preventing harassment by successive proceedings, preventing inconsistent adjudications, and promoting economy of resources in the adjudicative process, claim preclusion is the pertinent doctrine when the question of relitigation arises in the context of separate actions.

ATTORNEY FEES

In re Marriage of Fay, 251 Or App 430, 283 P3d 945 (2012).

Husband appealed a dissolution judgment, challenging the trial court's property division and decision to award wife a portion of her attorney fees. Husband argued that the court improperly awarded attorney fees without giving him an adequate opportunity to object to the amount of fees that wife requested.

Husband preserved the issue with respect to challenging award of attorney fees to wife, even though he did not object to award, file motion to reconsider, or attempt to contact court regarding fee award. ORCP 68(4)(b). After wife served husband with her attorney-fee request, he had 17 days to file objections. The trial court entered the judgment awarding fees three days before that deadline had passed. The Court of Appeals agreed with husband that the trial court erred in doing so. On remand, husband was entitled to file objections under ORCP 68 C(4)(b).

In re Marriage of Berry & Huffman, 251 Or App 744, 284 P3d 1202 (2012).

Husband appealed a supplemental judgment awarding attorney fees to wife under ORS 107.104, arguing that the trial court erred in awarding attorney fees because ORS 107.104 and the parties' stipulated general judgment do not authorize attorney fees.

The Court of Appeals concluded that ORS 107.104 does not include attorney fees as "any remedy available." Although ORS 107.104 allows the court to impose remedies in general, it does not specifically authorize an award of attorney fees or state that an attorney fee award is a remedy, and it does not itself create a right to fees. ORS 107.104(2)(b).

The stipulated judgment did not contain a provision for attorney fees and specified that parties were to bear their own fees; thus, wife was not entitled to attorney fees. ORS 107.105(1)(j).

PROTECTION ORDERS

C.J.P. v. Lempea, 251 Or App 656, 284 P3d 1212 (2012)

Evidence was insufficient to establish male roommate posed an imminent danger of further abuse to female roommate or represented a credible threat to her physical safety, as required to support Family Abuse Prevention Act (FAPA) restraining order. The only evidence set forth by female roommate was that male roommate went to female roommate's house to retrieve his property, but when he saw female roommate he left. ORS 107.705(1); 107.718(1). Even if a petitioner makes subjective assertions of fear, a Family Abuse Prevention Act (FAPA) restraining order will not be upheld when there is insufficient evidence that the alleged conduct creates an imminent danger of further abuse and a credible threat to the physical safety of the petitioner. ORS 107.700.

State v. Nahimana, 252 Or App 174, 285 P3d 763 (2012).

Evidence that defendant sent communications from his social network account to complainant's account was insufficient to support conviction of stalking, absent evidence that communications constituted threats. Or Const, Art I, § 8; ORS 163.732. But, evidence was sufficient to support conviction of violating a final stalking protective order (SPO), even absent evidence that such communications constituted threats, where such communications were prohibited by SPO. Or Const, Art I, § 8; ORS 163.750.

E.O. v. Cowger, 252 Or App 315, 287 P3d 1160 (2012).

Trial court's entry of permanent stalking protective order (SPO) violated state constitutional guarantee of free speech, where all of respondent's underlying contacts involved expression, and none of those contacts involved threats that instilled a fear of imminent and serious personal violence from the speaker, were unequivocal, and were objectively likely to be followed by unlawful acts. Or Const, Art I, § 8; ORS 30.866. Even though single e-mail missing from exhibits included in the record on appeal would be assumed to qualify as a predicate contact supporting trial court's entry of permanent stalking protective order (SPO), evidence did not support issuance of SPO, where there was no legally sufficient evidence to prove "repeated" actionable unwanted contacts. ORS 30.866.

V.A.N. v. Parsons, 253 Or App 768, 296 P3d 522 (2012).

Text messages sent from to worker by coworker were not "threats" that could support entry of stalking protective order (SPO), despite fact that worker genuinely experienced fear and felt threatened by messages. Nothing in the record supported objective determination that coworker intended to carry out any threat implicit in his messages; even if escalating text messages would have made it objectively reasonable to believe that coworker likely would follow through on his threat to "confront" worker, no evidence suggested that confrontation would have involved violence or other unlawful acts, and implicit threats of aggression were nothing more than impotent expressions of anger or frustration. Or Const, Art I, § 8; ORS 30.866. Text messages were contacts involving "speech," subject to requirement of state constitutional article protecting freedom of speech. Or Const, Art I, § 8; ORS 30.866.