MASTER LIST OF TOPICS & MATERIALS THAT GO WITH EACH TOPIC

1. **Oregon Family Courts-What the Future Holds: A Conversation With SFLAC**
   Oct. 14th 8:00 a.m. - 9:158 a.m.

   Presenters: William Howe III, Judge McKnight and Linda Scher

   Materials to attach : 1A - 1 F

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2. **Tax Returns 101 - How To Read a Tax Return**
   Oct. 14th 9:15 a.m. -10:15 a.m.

   Presenter: Paul Saucy

   Materials #2

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3. **Slater and Slater, Where Do We Go From Here? How Individual Goodwill Factors Into Business Valuation**
   Oct. 14th 10:30 a.m. -11:15 a.m.

   Presenters: Robert C. McCann, Jr. and Dean Allen

   Materials # 3A and #3B

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4. **Taking Your Paperless Office to the Next Level: Leveraging Technology to Improve Work Flow and Profits**
   Oct. 14th 11:15 a.m. - 12:00 p.m.

   Presenter: Kristin LaMont

   Materials # 4

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5. **Navigating Your Way Through the Administrative Hearing Process**
   Oct. 14th 1:30 p.m.-2:30 p.m.

   Presenters: Donna Moursund Brann and Monica Whitaker

   Materials #5

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6. **Separate But Not Equal: Current Insights Into the Criteria For Establishing and Modifying Spousal Support**
   Oct. 14th 2:30 p.m. - 3:15 p.m.
   Presenters: Saville Easley and Kimberly Quach

   Materials # 6

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7. **Questions and Answers with Professor Gorin**
   Oct. 14th 3:30 p.m. - 4:15 p.m.

   Presenter: Lawrence Gorin

   Materials #7A -7F

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8. **Trying Cases To The Bench**
   Oct. 14th 4:15 p.m. - 4:45 p.m.

   Presenter: William Barton

   Materials #8

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9. **Legislative Update**
   Oct. 14th 4:45 p.m. - 5:00 p.m.

   Presenter: Ryan Carty

   Materials #9

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10. **Paternity Law Today and New Issues for the Family Law Attorney**
    Oct. 15th 8:00 a.m. - 9:00 a.m.

    Presenter: Professor Leslie Harris

    Materials # 10A and 10B

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11. **Bankruptcy Issues for the Family Law Attorney**
    Oct. 15th 9:00 a.m. -10:00 a.m.

    Presenters: Lauren Saucy and Craig McMillin

    Materials #11

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12. **Ethics - Avoiding the Disciplinary Spotlight**
    Oct. 15th 10:15 a.m. - 11:15 a.m.

    Presenter: John Barlow

    Materials #12A - 12C

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13. **Appellate Review**
    Oct. 15th 11:15 a.m. - 12:15 a.m.
    Presenter: Hon. David V. Brewer
    Materials: #13

2011 OSB FAMILY LAW SECTION ANNUAL CONFERENCE

PRESENTERS/SPEAKERS:

Dean Allen
John Barlow
William Barton
Presiding A.L.J. Donna Moursund Brann
The Honorable David V. Brewer
Ryan Carty
Saville Easley
Lawrence Gorin
Leslie Harris
William Howe, III
Kristin LaMont
Robert C. McCann, Jr.
The Honorable Maureen McKnight
Craig McMillin
Kimberly Quach
Lauren Saucy
Paul Saucy
Andrew Schepard
Linda Scher
Senior A.L.J. Monica Whitaker

DEAN L. ALLEN, C.P.A., C.V.A., C.F.F.A

Curriculum Vitae

Professional Experience

- Court testimony related to various family law cases, business litigation and lost profits
- Certified in business valuations as a CVA since 2000
- Certified in forensic accounting as a CFFA in 2009
- Litigation valuations & related consulting
- Buy/sell business transaction consulting and analysis
- Advanced training in litigation support including forensic accounting
- Wide range of audit and attest experience for small to medium size closely-held businesses

Services Provided

- Forensic accounting: various litigation support engagements, including lost profits, family law & business valuation matters
- Small business tax planning and compliance
- Business valuations
- General business consulting
- Certified public accountant since 1992

Employment

Fischer, Hayes & Associates, P.C.
Certified Public Accountants
3295 Triangle Drive S.E., Suite 200
Salem, Oregon 97302
Shareholder

Professional Credentials and Education

- Certified Public Accountant (CPA)
- Certified Valuation Analyst (CVA)
- Certified Forensic Financial Analyst (CFFA)
- Bachelor of Science in Accounting, Linfield College

Professional Organizations

- American Institute of CPA's
- Oregon Society of CPA's
- National Association of Certified Valuation Analysts (NACVA)
- Toastmasters International

DEAN L. ALLEN, C.P.A., C.V.A., C.F.F.A

Testimony & Deposition Case History

- Judge Casebeer, Marion Co., 2011*
- Elaine Smith-Koop, Polk Co., 2010*
- Thomas E. Elliott, Benton Co., 2010*
- John Case, Marion Co., 2010*
- Glenn Kimm, Marion Co., 2010
- Paul Connolly, Federal Court, Eugene, OR, 2010
- Eric Yandell, Marion Co., 2009*
- Tammy Dentinger, Marion Co., 2009*
- Gilbert Feibleman, Coos Co., 2009*
- Tammy Dentinger, Marion Co., 2008*
- Gilbert Feibleman, Benton Co., 2008*
- Robert McCann, Linn Co., 2008*
- Tammy Dentinger, Benton Co., 2007*
- Laura Rackner, Clackamas Co., 2006*
- Thomas Potter, Klamath Co., 2006
- Paul Connolly, Marion Co., 2006
- John Hemann, Polk Co., 2005*
- Laura Rackner, Marion Co., 2005*

Expert Witness Compensation

- Hourly rate of $225 per hour (subject to change)

**Qualified by Court as a Business Valuation Expert and/or a Business Income Expert*

JOHN L. BARLOW

EDUCATION

University of Oregon, B.A. (English), 1978; Phi Beta Kappa, 1978.

Stanford Law School, J.D., 1981.

PROFESSIONAL EXPERIENCE

Law clerk, National Labor Relations Board, Region 20 (San Francisco), September, 1980-January, 1981.

Associate attorney - Miller, Nash, Wiener, Hager & Carlsen (Labor Law department), Portland, Oregon, August 1981-December, 1983.

Attorney and partner - Fenner, Barnhisel, Willis & Barlow, Corvallis, Oregon, January 1, 1984-2001. Barnhisel, Willis, Barlow & Stephens, 2001-to date.

Court-Appointed Arbitrator in Benton and Linn County Courts since 1995.

Admitted to practice in all Oregon courts and in United States District Court, Oregon. AV rated by Martindale Hubbell legal directory.

General civil practice, with emphasis on employer-employee relations including: proceedings before the National Labor Relations Board; state and federal court litigation of employee claims; contested wage and employment discrimination complaints before Wage and Hour, and Civil Rights Divisions of Oregon Bureau of Labor and Industries; preparation of employee manuals, handbooks, contracts, noncompetition and nondisclosure agreements.

LABOR & EMPLOYMENT SECTION ACTIVITIES

Member Management Advisory Committee to National Labor Relations Board, 1994-1998; member, Labor and Employment Section of the American Bar Association; member Labor Law Section of the Oregon State Bar (Executive Committee, 1984-86; 2002-2004); author, Oregon State Bar CLE publication, Private Sector Labor & Employment Law, "Employer Record-Keeping Responsibilities," 1993, 1997 revision; "Independent Contractors under State Law," Oregon State Bar CLE, 1993.

BAR ASSOCIATION ACTIVITIES

Oregon State Bar Disciplinary Board, 2006–present; State Professional Responsibility Board, 1994-1997. Oregon State Board of Bar Examiners, 1988-1991 (Chairman, 1990-91); Uniform Civil Jury Instructions Committee, 1986-1989.

PUBLIC SERVICE

Member, Advisory Council to University of Oregon College of Arts & Sciences, 1999-2006 ; Member, Board of Trustees, Oregon Trail Council, Boy Scouts of

America, 1988-1998; Board Member, United Way of Benton County, 1987-1992 (President, 1989-90; Campaign Chairman, 1988); Oregon United Way Volunteer of the Year, 1989; American Red Cross, Benton County Chapter, 1984-1988 (President 1986-87); Benton County Community Corrections Advisory Committee, 1985-1989.

William A. Barton
THE BARTON LAW FIRM, P.C.
214 S.W. Coast Highway
Newport, Oregon 97365
Telephone: (541) 265-5377 **Facsimile: (541) 265-5614**

SUMMARY CURRICULUM VITAE

Graduated from Willamette University Law School in 1972; admitted to Oregon State Bar in same year.

Author of ***Recovering for Psychological Injuries***, ***3nd Edition*** (published by TrialGuides) and various continuing legal education video tapes.

2005 Oregon Trial Lawyers Distinguished Trial Lawyer of the Year. Have tried in excess of 500 jury trials.

Named in three areas of ***The Best Lawyers in America***: plaintiffs' personal injury, plaintiffs' medical negligence and non-white-collar criminal defense.

Guest Instructor for Harvard Law School's Trial Advocacy Workshop, 2004, 2005.

Certified by the Oregon Supreme Court as a Judge pro-tem in Oregon trial courts.

Guest lecturer on Trial Advocacy in over 35 states, England, Canada, and the former Soviet Union.

American College of Trial Lawyers	Fellow	
International Society of Barristers	Fellow	
International Academy of Trial Lawyers	Fellow	
American Board of Trial Advocates	President of Oregon Chapter 1998-2000	
Western Trial Lawyers Association	President:	1985
Oregon Trial Lawyers Association	President:	1983
Oregon State Bar	Vice-President:	1986
American Association for Justice	Board of Governors:	1988-1990
	Chairman of the Child Abuse Litigation Group:	1990
American Bar Association	House of Delegates	2005-2007
Ninth Circuit Lawyer Representative		2010-

SIGNIFICANT RULINGS:

John V. Doe v. Holy See, et al.: Ruling that plaintiff had stated a claim under the Foreign Sovereign Immunities Act against the Vatican for the sexual abuse of a minor in Oregon. The matter was certified for an interlocutory appeal, which is now pending. 434 F.Supp.2d 925 (D.Or. 2006).

SIGNIFICANT VERDICTS:

Goddard v. Farmers Ins. Co.: $20.7 million verdict in an insurance bad faith claim, 202 Or App 79, 120 P3d 1260 (2005). The third party claim arose in 1987, has generated six appellate court decisions, and is ongoing.
Hastings v. Hayton, et al.: An $8.455 million verdict obtained as lead counsel in an obstetrical negligence claim. Settled for $8 million 30 days after verdict.
Wilson vs. Tobiassen, Oregon Trail Council, Inc. and Boy Scouts of America, Inc: A $3.7 million composite verdict against various individual and corporate Scouting defendants on behalf of a Boy Scout molested by his Scoutmaster. 97 Or App 527, 777 P2d 1379 (1989).
Hinkle vs. Petroske: A $3 million verdict in a psychiatric negligence claim by a patient who was sexually exploited by her psychiatrist.
***Horne vs. Emerald Valley Day Care*:** A $1.5 million verdict on behalf of a child against a daycare facility for damages resulting from sexual exploitation by an employee.
***Shin v. Sunriver Preparatory School*:** A $2.23 million verdict against a private school for wrongful expulsion of a Korean student because she had been raped by her father, 199 Or App 352, 111 P3d 762 (2005).
Doe v. Oregon Conference of Seventh-Day Adventists: A $2 million verdict on behalf of a five-year-old girl who was sexually exploited by the son of a minister, 199 Or App 319, 111 P3d 791 (2005).
Albassrei v. Safari Motor Coaches: A $1.1 million verdict in a race discrimination claim against a motor home manufacturing company in Lane County, January 2001.

William A. Barton

SUMMARY BIOGRAPHY

Since 1972, William Barton has tried over 500 cases to verdict, including numerous million-dollar verdicts for medical negligence, child abuse and insurance bad faith. He lectures extensively on trial advocacy.

Barton is a past president of the Oregon Trial Lawyers Association and Western Trial Lawyers Association, and a recipient of the Oregon Trial Lawyers “Distinguished Trial Lawyer Award.” He is a fellow of the International Academy of Trial Lawyers, the American College of Trial Lawyers, and the International Society of Barristers. Barton is a member of the American Board of Trial Advocates and served as president of the state chapter. He has served on the board of governors of the Association of Trial Lawyers of America, now the American Association for Justice.

DONNA MOURSUND BRANN

SUMMARY BIOGRAPHY

Presiding Administrative Law Judge Donna Moursund Brann received her B.S. in Political Science with a minor in Planning, Public Policy and Management, from the University of Oregon in 1989. She received her J.D. from the University of Oregon School of Law in 1993. She was commissioned as a Judge Advocate General in the United States Army in 1994. She concluded her military service in April 2007 holding the rank of Major serving as the Staff Judge Advocate for the 82nd Brigade for the Oregon Army National Guard. She spent several years in private practice handling criminal defense and family law cases until becoming a Deputy District Attorney for the Lane County District Attorney's Office, Family Law Division, in 1997. She joined the Office of Administrative hearings in January 2004. She became the Presiding ALJ in January 2008. As an ALJ she covered a variety of cases for the OAH including child support, unemployment, licensing cases (ranging for driving privileges to professional licenses and business licenses) and the Klamath Basin Adjudication cases. As the Presiding ALJ she is responsible for the oversight and administration of the Child Support Program, Oregon Employment Department Tax Program and the Klamath Basin Adjudication (Water) Program for the OAH.

David V. Brewer
SUMMARY BIOGRAPHY

The Honorable David Brewer has been a Judge of the Oregon Court of Appeals since 1999. Before joining the Court of Appeals, he served as a circuit judge for the Lane County Circuit Court (1993 - 1999) where he presided over many civil and criminal trials and settled many more cases through the court's settlement conference program.

Judge Brewer has actively served the Lane County Bar Association and Oregon State Bar as

- president of the Lane County Bar Association (1991 - 1992)
- member of the Lane County Domestic Violence Council (1996- 1999)
- member of the state Council on Court Procedures (1995 - 1999)
- member of Oregon State Bar committees and task forces, including the Practice and Procedure Committee (1988 - 1991), Indigent Defense Task Force (2001-02), and Legal Services Task Force (1995 and 2002 - present)

Judge Brewer graduated from California State University at Sonoma (B.A. in Economics, 1974) and the University of Oregon School of Law (J.D. 1977). After law school, he remained in Eugene to practice civil litigation, family, commercial, probate, and real property law (1977 - 1993).

RYAN CARTY
SUMMARY BIOGRAPHY

Ryan Carty, Associate, Saucy and Saucy, P.C., Salem; B.A., Willamette University (2004); J.D. Willamette University College of Law (2009); member of the Oregon State Bar since (2009); Oregon State Bar, Family Law Section Legislative Liaison, 2010 until current); Oregon State Bar, Family Law Section, Legislative Subcommittee (Co-Chair, 2010 until current);Oregon Academy of Family Law Practitioners (Member, 2009 until current). Awards: Marion/Pok Legal Aid: New Lawyer of the Year (2010); practice focuses on Family Law, Estate Planning and Wills and Trusts.

SAVILLE W. EASLEY
SUMMARY BIOGRAPHY

Saville W. Easley, Shareholder, Gevurtz, Menashe, Larson & Howe, LLP, Portland; B.A., University of Alaska (1985); J.D., University of Oregon (1991); Oregon State Bar; practice exclusively in Family Law; Associate Attorney, Case & Dusterhoff; Associate Attorney, Mitchell, Lang & Smith; Oregon State Bar Committees: Local Professional Responsibility Committee, 2006-Present; Continuing Legal Education, 2006-2009: Multnomah Bar Association Member: Judicial Selection Committee, 2009-Present; Mentor Program, 2006, 2008, 2010.

LAWRENCE D. GORIN *Attorney at Law*

6700 S.W. 105TH AVE., SUITE 104
BEAVERTON, OREGON 97008-8831

TELEPHONE: 503-716-8756
FAX: 503-646-1128
E-MAIL: LDGorin@pcez.com

LAWRENCE D. GORIN

Attorney at Law

PROFESSIONAL BACKGROUND

EDUCATION

B.A., 1968 - California State University, Los Angeles
J.D., 1973 - Northwestern School of Law of Lewis & Clark College, Portland, Oregon

BAR ADMISSION

Oregon State Bar - Active member in good standing since 1973

PROFESSIONAL ACTIVITIES

1973 - 1975	Private Practice
1975 - 1978	Deputy District Attorney, Multnomah County (Portland, Oregon)
1978 - 1980	Associate attorney with Ira L. Gottlieb and Harvey W. Keller, Porltand, Oregon
1980 - 1998	Partner: Keller, Gottlieb & Gorin
1998 - Present	Private practice (solo practitioner)

AREAS OF PRACTICE

General civil, trial and appellate practice, with emphasis in family law and family law related matters, including divorce, paternity, adoption, interstate child custody and child support cases, QDROs and related retirement division issues, wills, trusts and probate matters; guardianships and conservatorships.

BAR COMMITTEES, PROFESSIONAL ORGANIZATIONS

Oregon State Bar: Public Service & Information Committee (committee chairman, 1982-83);
Oregon State Bar: Lawyer Referral Service Committee (committee chairman, 1986-87);
Oregon State Bar: Continuing Legal Education Committee (committee member, 1987-89);

Oregon State Bar: Family Law Section,
(Member; Officer and Executive Board member, 1991-94);
Oregon State Bar: Fee Dispute Arbitration Panel (1990-present).
Oregon Academy of Family Law Practitioners (OAFLP) (member)
Multnomah Bar Association: Judicial Candidate Screening Committee
(committee member, 1992-94)
Multnomah County Local Professional Responsibility Committee (1995-97)
Multnomah County Circuit Court: Juvenile Court Referee Pro Tem (1979-81)

MARTINDALE-HUBBELL LAW DIRECTORY RATING

Legal ability: "A" (highest designation)
General recommendation: "V" (highest designation)

MORE INFORMATION

Family law lawyer in the metropolitan Portland, Oregon, area for over 25 years. (Multnomah, Clackamas and Washington counties.)

Practice extends to all areas of family law, both at trial and appellate court levels.

Experienced drafter of PENSION & RETIREMENT DIVISION ORDERS, including qualified domestic relations orders (QDROs) under ERISA and REA; military retired pay under USFSPA; 401(k), 403(b) and 457(b) plans; CSRS/FERS accounts; federal TSP accounts; Railroad Retirement Benefits; union plans; Oregon PERS accounts, etc.

Will drafting, estate planning and probate administration; guardianships and conservatorships.

Special emphasis and expertise in PATERNITY LAW and legal procedure (both defense and prosecution) with extensive experience in analysis of DNA blood test reports. Available nationwide via phone, fax and e-mail as a consultant for case evaluations and test report analysis.

Extensive experience with Oregon's post-18, college-related "CHILD ATTENDING SCHOOL" support law (ORS 107.108), allowing court-compelled parental support for adult offspring (18-21) who are attending college.

Further special emphasis and expertise regarding contempt of count, post-18 child support under ORS 107.108, and interstate child support issues under UIFSA and FFCCSOA.

Author and lecturer on paternity law and procedure. See "Paternity Law," chapter 16 in "Oregon Family Law" (published by Oregon State Bar, 2002, 2004, 2008, 2011).

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LESLIE HARRIS

SUMMARY BIOGRAPHY

Leslie Harris is the Dorothy Kliks Fones Professor of Law at the University of Oregon, where she teaches Family Law and other courses and directs the Oregon Child Advocacy Project, which provides education and assistance to attorneys advocating for the interests of children. She has written law review articles about the child welfare system, nontraditional families, family support duties, and property rights at divorce and is the co-author of textbooks on Family Law and Children and the Law which are widely used throughout the U.S. She is an elected member of the American Law Institute and serves on advisory boards for the Oregon Juvenile Court Improvement Project and several other organizations. She was one of the first recipients of the law school's Orlando John Hollis Faculty Teaching Award.

July 2011

LESLIE JOAN HARRIS

Professional Employment

Fall 1982 - present: University of Oregon School of Law
Fall 2006: Brooklyn Law School (visiting)
Fall 1978 - Fall 1982: University of Utah College of Law
Summer 1991: University of Iowa College of Law (visiting)
Summer 1980: University of Texas School of Law (visiting)
1976 - 1978: Staff Attorney, Public Defender Service for the District of Columbia

Grants and Awards

1998-99: Center for the Study of Women in Society research support for VALUING FAMILIES
1997: Center for the Study of Women in Society research grant for *Welfare-to-Work in Oregon: Examining 20 Years of Experimentation*
1996: Elected to the American Law Institute
1996: Named Dorothy Kliks Fones Professor of Law
1992-93: Law faculty fellowship (research)
1991: Orlando John Hollis Faculty Teaching Award
1989-90: Perrin, Gartland, Doyle, and Nelson Law Faculty Fellowship
1979: University of Utah Law School summer research grant

Books

CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS (with Tamar Birckhead) (Third Ed., forthcoming Aspen 2011)
FAMILY LAW (with June Carbone) (Fourth Ed., Aspen) (2010) (with teachers' manual)
CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS (Second Ed., Aspen/ (2007) (with teacher's manual)
THE RIGHTS OF CHILDREN (Oregon State Bar 2006), reprinted with revisions as Chapter 4 in Oregon State Bar Continuing Legal Education, JUVENILE LAW (2007)
FAMILY LAW *(*with Lee Teitelbaum and June Carbone) (Third Ed., Aspen 2005) (with teacher's manual)
CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS (with Lee Teitelbaum) (Aspen 2002) (with teacher's manual)
FAMILY LAW *(*with Lee Teitelbaum) (Second Ed., Aspen 2000) (with teacher's manual)
VALUING FAMILIES (University of Oregon Center for the Study of Women in Society 1999)
FAMILY LAW (with Lee Teitelbaum & Carol Weisbrod) (Little, Brown & Co. 1996) (with teacher's manual)

Articles, Book Chapters, and Essays

Voluntary Acknowledgments of Parentage for Same-Sex Couples (forthcoming AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 2011)

Questioning Child Support Enforcement Policy for Poor Families (forthcoming FAMILY LAW QUARTERLY 2011)

Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison in JUSTICE FOR KIDS: KEEPING KIDS *OUT* OF THE JUVENILE JUSTICE SYSTEM (Nancy E. Dowd ed., NYU Press forthcoming)

Failure to Protect from Exposure to Domestic Violence in Private Custody Contests, 44 FAMILY LAW QUARTERLY 169 (2010)

The Basis for Legal Parentage and the Clash Between Custody and Child Support, 42 INDIANA LAW REVIEW 611 (2009)

Making Parents Pay: Understanding Parental Responsibility Laws, 31(3) FAMILY ADVOCATE 38 (Winter 2009)

Entries on *Legal Regulation of Children's Conduct* and *Property and Contract, Children's Rights to*, in CHICAGO COMPANION TO THE CHILD (Richard A. Shweder ed., University of Chicago Press 2009)

Entry on *Orr v. Orr* in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (David Tanenhaus ed., Macmillan Reference 2008)

Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions, 9 JOURNAL OF LAW & FAMILY STUDIES 281 (2007)

Symposium Introduction: Promoting Nurturing Relationships for Children, 9(2) JOURNAL OF LAW & FAMILY STUDIES vii (2007)

A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests and Betrayal, 44 WILLAMETTE LAW REVIEW 297 (2007)

The Story of Morgan v. Foretich in FAMILY LAW STORIES (Carol Sanger ed., Foundation Press 2007) (with June Carbone)

An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and to Whom? (2006 UTAH LAW REVIEW 5)

In Memory of Lee Teitelbaum, 7 JOURNAL OF LAW & FAMILY STUDIES 497 (2005)

Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Division Law, 83 OREGON LAW REVIEW 1291 (2005)

Same-Sex Unions Around the World: Marriage, Civil Unions, Registered Partnerships -- What are the Differences and Why Do They Matter? 19(5) PROBATE AND PROPERTY 31 (2005)

Chapter 4 -- Making Custody Arrangements if the Juvenile Court is Not Involved; Chapter 5 – Child Support; Chapter 6 – When the Juvenile Court is Involved in A RESOURCE GUIDE FOR PARENTS INCARCERATED IN OREGON (2004)

Entries on *Children's Rights, Marriage*, and *Spousal Support* in OXFORD COMPANION TO AMERICAN LAW (Kermit E. Hall ed., Oxford University Press 2002)

Entries on *Family Courts* and *Paternity Suits* in THE FAMILY IN AMERICA: AN ENCYCLOPEDIA (Joseph Hawes & Elizabeth Shors eds., ABC-CLIO 2001)

The ALI Child Support Principles: Incremental Changes to Improve the Lot of Children and Residential Parents, 8 DUKE JOURNAL GENDER LAW AND POLICY 245 (2001)

Troxel v. Granville*: Not the End of Grandparent Visitation*, 11(3) EXPERIENCE 7 (2001)

A 'Just and Proper Division:' Property Distribution at Divorce in Oregon, 78 OREGON LAW

REVIEW 735 (1999)

The New ALI Child Support Principles, 35 WILLAMETTE LAW REVIEW 717 (1999)

Semantics and Policy in Physician-Assisted Death: Piercing the Verbal Veil, 5 ELDER LAW JOURNAL 251 (1997)

Reconsidering the Criteria for Legal Fatherhood, 1996 UTAH LAW REVIEW 461

Book review of DIVORCE REFORM AT THE CROSSROADS (S. Sugarman & H. Kay eds.), 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 561

Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children, 69 OREGON LAW REVIEW 689 (1990) (with Dennis Waldrop & Lori Waldrop)

Rethinking the Relationship Between Juvenile Courts and Treatment Agencies--An Administrative Law Approach, 28 JOURNAL OF FAMILY LAW 217 (1990)

New Perspectives on the Law of Rape, 66 TEXAS LAW REVIEW 905 (1988)

Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness, 77 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 308 (1986)

The Utah Child Protection System: Analysis and Proposals for Change, 1983 UTAH LAW REVIEW 1

Children's Waiver of Miranda Rights and the Supreme Court's Decisions in Parham, Bellotti and Fare, 10 NEW MEXICO LAW REVIEW 379 (1980)

Some Historical Perspectives on Governmental Regulation of Children and Parents, in BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 1 (L. Teitelbaum & A. Gough, eds. 1977) (with Lee Teitelbaum)

Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules, 6 NEW MEXICO LAW REVIEW 331 (1976)

Reports to the Legislature

ESTABLISHING AND ENFORCING PARENTING PLANS, Report to the Legislature from the Parenting Plan Work Group of the Family Law Section of the Oregon State Bar (2010)

ESTABLISHING, DISESTABLISHING, AND CHALLENGING LEGAL PATERNITY, Report for the Oregon Law Commission to the Oregon Legislature (2007)

THE RIGHTS OF PUTATIVE FATHERS IN JUVENILE COURT, Report for the Oregon Law Commission to the Oregon Legislature (2005)

Newsletter, Bar Journal and Magazine Articles; Briefs, Legislative Testimony, and Research Memoranda

Written testimony to the Oregon Senate Judiciary Committee on SB 334 and HB 3064 (pertaining to joint custody) (April 2011)

When a Child May Have a Tort Claim: What's the Child's Court-Appointed Attorney To Do? (for Oregon Child Advocacy Project) (with Colin Love-Geiger and Alyssa Knudsen) (June 2010), http://familylaw.uoregon.edu/child/resources/scopeofrepresentation.pdf, , reprinted in 7(4) JUVENILE LAW READER 16 (Aug./Sept. 2010)

Family Leave Laws Help Balance Jobs with Caregiving, 13(2) Oregon State Bar ELDER LAW NEWSLETTER 13 (April 2010)

Waiver of Counsel in Delinquency Proceedings (for Oregon Child Advocacy Project) (with

Jordan Bates, David Sherbo- Huggins and Rebekah Murphy) (March 2010), http://familylaw.uoregon.edu/child/resources/waiverofcounsel.pdf

Reasonable Efforts to Reunify in Dependency Cases (for Oregon Child Advocacy Project) (with Laura Althouse, Farron Lennon, & David Sherbo-Huggins), http://www.law.uoregon.edu/org/child/docs/reasonableeffortsmemo.pdf (rev. 2009)

Termination of Parental Rights in Extreme Conduct Cases (for Oregon Child Advocacy Project) (with Farron Lennon and David Sherbo-Huggins) (2008), http://www.law.uoregon.edu/org/child/docs/extremeconduct.pdf, reprinted in 5(5) JUVENILE LAW READER 9 (Nov. 2008), 5(6) JUVENILE LAW READER 4 (Jan. 2009), and 5(7) JUVENILE LAW READER 6 (Mar. 2009)

Guardians ad Litem for Parents in Dependency and TPR Cases (for Oregon Child Advocacy Project) (with Colin Love-Geiger and Annette Smith) (2008), http://www.law.uoregon.edu/child/docs/ethicsmemo.pdf, reprinted in 5(5) JUVENILE LAW READER 5 (Nov. 2008)

2007 Amendments to Oregon Paternity Law, 27(2) Oregon State Bar FAMILY LAW NEWSLETTER (April 2008)

Appellate Court Rules on Conservatorship Issues, 11(2) Oregon State Bar ELDER LAW NEWSLETTER 19 (APRIL 2008)

2007 Amendments Impact on Oregon's Paternity Law on Dependency Proceedings in Juvenile Court -- Part I, 5(1) JUVENILE LAW READER 1 (Feb.-Mar.2008); *Part II*, 5(2) JUVENILE LAW READER 3 (Feb.-Mar.2008)

Decision-Making Authority for Dependent Children who are not in the Custody of DHS (for Oregon Child Advocacy Project) (with Jordan Bates and Gloria Trainor) (2008), http://www.law.uoregon.edu/org/child/docs/nodhscustody.pdf

Authority of Oregon Juvenile Courts to Review DHS Actions in Child Dependency Cases (for Oregon Child Advocacy Project) (with Molly Allen, Tehan Wittemeyer and Farron Lennon) (rev. 2008), http://www.law.uoregon.edu/org/child/docs/dhsauthority2008.pdf

Amicus Curiae in *State ex rel. Juv. Dept. v. D.C.J.*, Oregon Court of Appeals No. A134837 (brief filed by counsel) (for Oregon Child Advocacy Project) (with Laura Althouse, Farron Lennon, and Gloria Trainor), http://www.law.uoregon.edu/org/child/docs/jenkinsbriefexcerpt.pdf (2007)

The Case of Anna Nicole Smith and the Probate Exception to Federal Jurisdiction, 9(3) Oregon State Bar ELDER LAW NEWSLETTER 23 (July 2006)

Challenges to Paternity Orders in Oregon -- Standing and Grounds (for Oregon Child Advocacy Project) (with Molly Allen), http://www.law.uoregon.edu/org/child/docs/challengingpaternityorders.pdf (2006)

It's a Father, or Not – Changes in Paternity Law from the 2005 Session, 25(1) Oregon State Bar FAMILY LAW NEWSLETTER 1 (2006)

New Laws Affect Inheritance, Slayers' Rights, Death Benefits, More, 8(4) Oregon State Bar ELDER LAW NEWSLETTER 3 (Fall 2005)

Physician Orders for Life Sustaining Treatment (POLST): An Oregon Innovation, 8 (3) Oregon State Bar ELDER LAW NEWSLETTER 8 (Summer 2005)

Marriage, Civil Union, Domestic Partnership: What in the World is the Difference? TRIAL LAWYER 23 (Spring 2005)

Choosing a Long Term Care Facility: An Interview with Letty Morgan, 8(2) Oregon State Bar ELDER LAW NEWSLETTER 9 (Spring 2005)

Paying Family Members for In-Home Care, 8(1) Oregon State Bar ELDER LAW NEWSLETTER 5 (Winter 2005)

Brief for *Amicus Curiae* Vermont Freedom to Marry Task Force et al., Li v. State, Oregon Supreme Court No. S51612 (co-author) (2004)

Reverse Mortgages Can Help Cash-Poor Elders, 7(3) Oregon State Bar ELDER LAW NEWSLETTER 10 (Summer 2004)

Medicare Will Add Prescription Coverage, 7(1) Oregon State Bar ELDER LAW NEWSLETTER 11 (Winter 2004)

Oregon's Third Party Visitation Statutes: Do They Survive Troxel v. Granville? 20(1) Oregon State Bar FAMILY LAW NEWSLETTER 1 (2001)

Brief as *Amicus Curiae*, First Interstate Bank of Oregon v. Young, Oregon Court of Appeals No. CA A71103 (co-author) (1992)

Book Review of CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (C. Cohen & H. Davidson eds. 1990), 10 ABA JUVENILE AND CHILD WELFARE LAW REPORTER 76 (July 1991)

Brief for *Amicus Curiae* Juvenile Rights Project, State ex rel. Juv. Dept. v. Silence, Oregon Supreme Court No. S37865 (co-author) (1991)

Parent-Third Party Custody Disputes Under Hruby, *ORS 109.119*, 8(1) Oregon State Bar FAMILY LAW NEWSLETTER 1 (1988)

Experimentation on People Can't Be Doctors' Decision, OREGONIAN C1 (June 23, 1985)

Presentations to Academic Conferences

Implications of the Fragile Families Studies for the Law of Family Formation and Child Support, Midwest Family Law Conference (East Lansing, MI, June 2011)

Voluntary Acknowledgments of Parentage for All Parents, American University Law School conference on The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage (Washington, D.C. 2011)

The Foster Care-Delinquency-Prison Pipeline, International Society of Family Law North American Regional Conference (Kansas City, Mo. 2010)

Foster Care: Intractable Problem or Highly Effective Strategy?, 2010 Juvenile Justice Conference: Juvenile Justice: Passages, Prevention, and Intervention (University of Florida School of Law 2010)

Clashing Systems for Determining Parentage, First Annual Midwest Family Law Conference (Indianapolis 2008)

Voluntary Acknowledgments of Paternity: Judgments or Creations of Status Relationships?, International Society of Family Law North American Regional Conference (Vancouver, B.C. 2007)

Resolving Conflicting Claims to Paternity: The Case of Voluntary Acknowledgments, Law & Society Assn. annual meeting (Baltimore 2006)

Missing Fathers in Dependency Cases: Of Parents' Rights and Children's Interests, Oregon Child Advocacy Project conference on Protecting Children's Need for Nurturance (2006)

Parental Unfitness in Private Custody Disputes – New Meanings for an Old Construct, International Society of Family Law World Conference (Salt Lake City 2005)

Parental Responsibility Laws: Who Enacts Them? Who Enforces Them? Do They Make Any Difference? International Society of Family Law North American Regional Conference (Eugene 2003)

The Law and Politics of Welfare to Work in Oregon, Work, Welfare and Politics Conference, University of Oregon (2000)

The Dual System of Family Law at the Turn of the New Century, International Society of Family Law North American Regional Conference (Albuquerque, N.M. 1999)

Child Support Under the New American Law Institute Principles: What Can Oregon Learn? Family Law Conference (Willamette University College of Law 1999)

Fatherhood, University of Utah Law Review Family Law Symposium (Salt Lake City 1995)

Legal Challenges to the Recognition of Functional Families, International Society of Family Law North American Regional Conference (Grand Teton 1993)

Other Professional Presentations

Challenging the Overuse of Foster Care and Disrupting the Path to Delinquency and Prison and *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, Family and Juvenile Law Conference of the National Council of Juvenile and Family Court Judges (March 2011)

Zealousness and the Role of Counsel in Delinquency Cases, Oregon Criminal Defense Lawyers' Juvenile Law Seminar (April 2010)

When Parents' Religious Practices Clash with Children's "Best Interests" -- The Examples of Medical Decision-Making and Custody, First Annual Jews and Justice Conference, Portland (November 2009)

A New Paternity Law for the Twenty-First Century, Oregon Legal Services Family Law Task Force, Portland (October 2008)

Ethics Presentation and Discussion: Guardians Ad Litem for Parents with Diminished Capacity, Fourth Annual Juvenile Law Training Academy conference, Springfield, October 2008) (panelist)

The 2008 Paternity Law, Fifth Family Law Conference of the State Family Law Advisory Committee, Salem (September 2008)

Judicial Authority to Review Agency Actions, Oregon Child Advocacy Project Conference on Putting the Puzzle Together: Cooperation, Conflict and Collaboration among Juvenile Courts and Child Welfare Agencies (April 2008)

A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests and Betrayal, Oregon State Bar, Family Law 2008 (February 2008)

Voluntary Acknowledgments of Paternity: Entry into the Status of Co-Parentage, Family Law Institute for the Minnesota Judiciary (October 2007)

Rebutting the Presumption of Equal Contribution in Property Division Cases, Oregon Academy of Family Law Practitioners (May 2007)

Testimony on proposed legislation regarding *Establishing, Disestablishing, and Challenging Legal Paternity (HB 2382)*, Oregon Law Commission (January 2007) and Oregon House Judiciary Committee (February 2007)

Termination of Parental Rights – The Case Law and *Paternity Issues in Termination Cases*, Law

and Practice: Termination of Parental Rights, presented by the Oregon Juvenile Training Academy (October 2006)

Kunze -- *The Aftermath,* Oregon Chapter, American Academy of Matrimonial Lawyers (2006)

The Rights of Children and Adolescents, Essentials of Juvenile Court Practice, presented by the Oregon Juvenile Training Academy (October 2005)

Domestic Partnerships 30 Years After Beal*: The Law in Other Jurisdictions and the Proposal of the American Law Institute,* Oregon Law Institute 18th Annual Family Law Seminar (2005)

Testimony on proposed legislation regarding Rights of Putative Fathers in Juvenile Court (SB234) OREGON LAW COMMISSION (JanuarY 2005)
Oregon Senate Judiciary Committee (February 2005)

Same Sex Marriage, The Legal Background: Other States and Other Countries, Constitutional Law Section, Oregon State Bar (2004)

Ethics Issues – Representation of Best Interests/Expressed Wishes, panel discussion, Oregon Criminal Defense Lawyers Association Juvenile Law Seminar (April 2004)

Children of Incarcerated Parents, panel discussion, Through the Eyes of a Child III, Oregon Juvenile Court Improvement Conference (August 2003)

Reasonable and Active Efforts, panel discussion, Through the Eyes of a Child II, Oregon Juvenile Court Improvement Project Conference (August 2000)

Child Welfare Law and Practice: Parents with Children or Parents vs. Children? 1999 Western Regional Symposium on Child Abuse & Sexual Assault (SCAR Symposium)

Minimally Adequate Parenting, Oregon statewide conference of Citizen Review Boards and Court Appointed Special Advocates (1999)

The Federal Adoption and Safe Families Act, PL 105-89: How It Changes Oregon Law and How It Can Help Your Clients, Oregon Criminal Defense Lawyers Association (1998)

From the Right to Die to Physician-Assisted Death: Law and Semantics, Decisions at the End of Life Conference, University of Oregon School of Law (1997)

Citizen Review Boards -- What the Law Says You Can and Cannot Do, Keynote address, Oregon Statewide Citizen Review Board Conference (1995)

Representing Children and Other Legally Incompetent People: The Roles of Counsel and Guardian Ad Litem, Oregon State Bar Family Law Section Semiannual Meeting (1993)

An Overview of Students' (Mostly Constitutional) Rights, Education Advocacy Project (1993)

The Controversy Over Courts Dictating Agency Actions, National Conference on Children and the Law sponsored by American Bar Association Center on Children and the Law (1990)

Making CSD Do What They Should and *Ethical Dilemmas in Juvenile Court: Defining the Role of the Lawyer,* Oregon Criminal Defense Lawyers Association (1990)

Professional Activities

2011 – present: Oregon State Bar Task Force on Attorney Performance Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

2010: Executive committee, AALS Section on Children and the Law

2010 : Oregon State Bar task force on parenting plan legislation

2009- present – Oregon Law Commission, Child Abuse Work Group

2006 – 2009 – Executive committee, Juvenile Law Section, Oregon State Bar

2003 – present – Newsletter Advisory Board member, Elder Law Section, Oregon State Bar

(chair 2005-2009)
2004 – present -- Oregon Juvenile Law Training Academy workgroup
1999- present: Advisory Board, Family and Children's Law Abstracts
1997 - present: State Advisory Board, Oregon Juvenile Court Improvement Project
April 2008 – Convenor, Oregon Child Advocacy Project conference on Cooperation, Conflict and Collaboration Among Juvenile Courts and Child Welfare Agencies
April 2007 – Convenor, Oregon Child Advocacy Project conference on Research, Resources, and Law Reform for Teens Transitioning Out of State Programs
2006-2007 – Planning committee, North American Regional Conference, International Society of Family Law
2006 - 2007 – Oregon Law Commission, Uniform Parentage Act Work Group (reporter)
March 2006 – Convenor, Oregon Child Advocacy Project conference on Protecting Children's Need for Nurturance
January 2006 –Team Leader, Oregon Office of Public Defense Services site evaluation team, Multnomah County juvenile court contractors
2002-2006 - Board of Directors, Lane County Legal Aid
2003 – 2004 – Oregon Law Commission Putative Father Work Group (reporter)
2003-2004 – Assessment Review Committee for the Oregon Judicial Department Juvenile Court Improvement Project Reassessment Plan
2002 – 2004: Board of Directors, CASA for Lane County
2001 - 2002: Board of Governors, Lane County Bar Association
1991-1996: Multi-state Essay Exam Drafting Committee
1993-94: Steering committee to establish a CASA program for Lane County
1989-1994: Founding member, Board of Directors, Oregon Lawyers for Children
1988-89, 1990-91, 1991-92: Legislation committee, Family Law Section, Oregon State Bar
1989: Board of Directors, Oregon Legal Services
1986-1987: Advisory Committee to the statewide administrator of Oregon's Citizen Review Boards
1981-84: Family and Juvenile Law Section of the American Association of Law Schools: executive board 1984-1986; chair 1983; program chair 1982; secretary 1981
1978-1982: Board of Trustees, Utah Legal Services Corporation
1979-1980: Advisory committee to Utah Director of Youth Corrections on Standards for Youth Detention Centers

Education

1976: J.D. with highest honors, University of New Mexico School of Law, Order of the Coif, Editor-in-Chief of New Mexico Law Review and Natural Resources Journal, valedictorian, American Jurisprudence book awards in ten subjects
1973: B. A. with highest honors, New Mexico State University

WILLIAM J. HOWE, III
SUMMARY BIOGRAPHY

William J. Howe, III, is a lawyer practicing family law and is a shareholder in the firm of Gevurtz, Menashe, Larson & Howe, P.C., of Portland, Oregon. Bill was named *Best Lawyers in America*, 2009 Lawyer of the Year – Family Law, Portland, Oregon, and he is one of ten family law lawyers from Oregon included in the 2005 and subsequent *Best Lawyers.* He has also been listed in *Super Lawyers* and *Portland Monthly*. He was appointed by Chief Justice Carson and re-appointed by Chief Justice De Muniz as the Vice-chair of the Statewide Family Law Advisory Committee; has served as President and Board of Directors' member of Oregon Family Institute and the Oregon Academy of Family Law Practitioners; served on the Board of Directors of the Association of Family and Conciliation Courts; was Chair of the Oregon Task Force on Family Law from 1993 to 1997, having been appointed by Governor Barbara Roberts in 1993, and reappointed by Governor Kitzhaber in 1995; serves as an Oregon Court of Appeals Mediator; served on the Juvenile Court Improvement Advisory Committee and Citizen Review Board, having been appointed by Chief Justice Carson; and served on the Oregon Dispute Resolution Advisory Committee. He has also served as Pro Tem Judge and mediator, and was he awarded the 2003 Pro Bono Challenge Award for the Highest Number of Pro Bono Public Service Hours by the Oregon State Bar. In addition, Mr. Howe has made over 100 presentations at Family Law Conferences and at other venues in the United States, Canada, Australia, Europe and South Africa, and has authored several articles on family law-related matters.

WILLIAM J. HOWE III

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PROFESSIONAL QUALIFICATIONS

ADMITTED TO OREGON STATE BAR – 1975
ADMITTED TO PRACTICE:

- OREGON SUPREME COURT AND ALL COURTS IN OREGON - 1975
- NINTH CIRCUIT COURT OF APPEALS – 1975
- FEDERAL DISTRICT COURT FOR THE DISTRICT OF OREGON – 1975
- SUPREME COURT OF THE UNITED STATES – 1986

EDUCATION AND TRAINING

CERTIFIED MEDIATOR, trained at Willamette University College of Law - 1996

WILLAMETTE UNIVERSITY COLLEGE OF LAW
Doctor of Jurisprudence - May 1975

UNIVERSITY OF WASHINGTON
Bachelor of Arts; Majors in Political Science and Philosophy - June 1970

MEDFORD HIGH SCHOOL, MEDFORD, OREGON
High School Diploma - June 1966

EMPLOYMENT EXPERIENCE

GEVURTZ, MENASHE, LARSON & HOWE, P.C.
Partner - September 1, 1996 to Present

WILLIAM J. HOWE, III - ATTORNEY AT LAW
Sole Practitioner - January 1, 1996 to September 1, 1996

HOWE, HARRIS & VIGNA
Partner - July 1, 1981 to December 1995

DELO, HOWE & HARRIS
Partner - May 1980 - June 1981

DELO & HOWE
Partner - September 1978 - June 1981

WILLIAM J. HOWE, III - ATTORNEY AT LAW
Sole Practitioner - August 1976 - September 1978

HOWE & HUMPHREY
Partner - September 1975 - August 1976

SELECTED ACTIVITIES

- Chair, Oregon Task Force on Family Law, Appointed by Governor Barbara Roberts, reappointed by Governor John Kitzhaber (1993-1997)
- President, Oregon Family Institute (February 2004-2005); Member of Board of Directors of the Oregon Family Institute (1997-Present)
- Director and Officer, Autism Coalition for Treatment, Inc. (Non-Profit) 2006-Present.
- Vice-Chair, Statewide Family Law Advisory Committee, appointed by Chief Justice Carson (1998-present)
- Board of Directors of Association of Family and Conciliation Court (1997-2005); Member of Advisory Committee (2000-2001)
- President, Oregon Academy of Family Law Practitioners (1993-1994 and 1999-2000), Member of Board of Directors (1993-2005)
- Oregon Dispute Resolution Advisory Committee (1996-1998)
- Occasional service as Reference Circuit Court Judge and Pro Tem Judge, Multnomah County, Oregon (1989-Present)
- Oregon Court of Appeals Mediator (1996-Present)
- Juvenile Court Improvement Advisory Committee, Judicial Department, Citizen Review Board (1995-1997), appointed by Chief Justice Carson
- Skylands Neighborhood Association, Member Board of Directors (1993-1997; 2002-2005), President (1996-1997 and 2011-present)
- Oregon State Bar Legal Aid Committee (1990-1991)
- Mentor - Multnomah Bar Association Mentoring Program (1993-1995)
- Chair, Representative Ron Wyden Economic Development Committee (1987)
- Member of Governor's 1986 Small Business Legislature by invitation of Governor Victor Atiyeh
- Board of Directors of Metropolitan Family Services (1978-1981)
- CASA Volunteer Lawyer (1989-1993)
- Best Individual Oral Argument, 1974 Honors Moot Court Competition; Winning Team, 1974 Honors Moot Court Competition
- Page, Oregon Legislature, 1966

SELECTED AWARDS AND MEMBERSHIPS (VARIOUS TIMES 1975 - PRESENT)

- *Best Lawyers*, Lawyer of the Year, 2009 – Family Law, Portland, Oregon
- LexisNexis Martindale-Hubbell Review Rating - AV Preeminent 1985-present.
- *Oregon Super Lawyers* 2006 to present.
- *Best Lawyers in America* listed 2005 to present.
- *Portland Monthly* listed as one of "Portland's Best Lawyers" 2006 to present.
- Oregon State Bar 2003 Pro Bono Challenge Award - Most Total Hours Pro Bono Service (Active Member Category)

- Association of Family and Conciliation Courts (AFCC)
- Oregon State Bar
- American Bar Association
- Oregon Academy of Family Law Practitioners
- Association of Trial Lawyers of America
- Oregon Trial Lawyers Association
- American Civil Liberties Union
- Multnomah Bar Association
- 1000 Friends of Oregon
- Creative Lawyers Institute
- Lawyers Committee for Multnomah County Judges

SELECTED PRESENTATIONS AND PUBLICATIONS

- October 17, 2008, Oregon State Bar Family Law Section, 2008 Family Law Annual Conference, "How to Deal with Difficult Clients and Lawyers While Keeping Your Sanity and Getting Paid," Gleneden Beach, Oregon.
- September 13, 2008, Statewide Family Law Advisory Committee Conference, "Finding a Better Way – Lessons for Oregon from the Australian Family Court Reform," Keizer, Oregon.
- May 30, 2008, Association of Family and Conciliation Courts, "Mediation or Evaluation? Tensions in Resolving Child Custody Disputes," Vancouver, B.C., Canada.
- May 3, 2008, Joint Conference of the American Bar Association and the American Psychological Association, "Attorneys Working with High Conflict Families," with Sanford M. Portnoy, Ph.D.
- Article, January 2008, Family Court Review, "*Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children are at Stake."*
- June 7, 2007, International Commission on Couple and Family Relations 54th Annual International Conference, "Can Listening to Children Moderate 'Zealous Advocacy' and Promote 'Best Interests' in Family Law Disputes," Edinburgh, Scotland.
- May 31, 2007, Association of Family and Conciliation Courts 44th Annual Conference, "My Client Did What?! Representing the Impossible Client," Washington, D.C. (with Diane Gibson of Australia)
- May 23, 2007, Oregon Academy of Family Law Practitioners, "Rebutting the Presumption of Equal Contribution," Portland, Oregon.
- October 20, 2006, Oregon State Bar Family Law Section Annual Conference, "Prenuptial and Postnuptial Agreements," Salishan, Gleneden Beach, Oregon.
- June 2, 2006, Association of Family and Conciliation Courts 43rd Annual Conference, "*Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake,*" Tampa Bay, Florida.
- February 1, 2006, Multnomah Bar Association, "Separately Acquired Property after *Kunze*: What's Mine is Mine . . . Unless," Portland, Oregon.

- May 24, 2005, The Seminar Group, Relationship Agreements, "Premarital/Post Nuptial Agreements," Portland, Oregon.
- March 22, 2005, The 4th World Congress on Family Law and Children's Rights, "Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents when the Interests of Children are at Stake," Cape Town, South Africa.
- March 3-5, 2005, Participant and Presenter Wingspread Conference: "Family Law Education Reform Project," sponsored by the Association of Family and Conciliation Courts at Hofstra University School of Law and the Johnson Foundation, held in Madison, Wisconsin.
- October 26, 2004, Third Annual Conference Jackson County Courts and Community, "Caring for Children and Families: Practical Approaches to Children's Mental Health Issues," Medford, Oregon.
- September 15, 2004, Clackamas County Family Law Group, "The *Kunze* Rule - What Kind of Property is This Anyway?" Oregon City, Oregon.
- June 25, 2004, Keynote Address, Eastern Oregon - Family Law Conference, "Children & Families - Old Issues, New Solutions," LaGrande, Oregon.
- May 15, 2004, Association of Family and Conciliation Courts 41st Annual Conference, "For Better or Worse. . . Why is this so Difficult?" San Antonio, Texas.
- May 14, 2004, Association of Family and Conciliation Courts 41st Annual Conference, Moderator/Presenter, "The Approximation Rule: Are Predictability, Presumptions and Best Interests Compatible?" San Antonio, Texas.
- April 2004 - *Family Law Newsletter - Austin and Austin* Compensatory Spousal Support and the Fatal "Or".
- September 19, 2003, Keynote Speaker, Oregon Statewide Family Law Advisory Committee Conference, "Family Law: Journey of Discovery," Astoria, Oregon.
- May 29, 2003, Association of Family and Conciliation Courts 40th Anniversary Conference, "Custody & Access Reform in Canada," Ottawa, Ontario.
- October 30, 2002, Mid-Columbia Bar Association, "Unbundling Legal Services," The Dalles, Oregon.
- June 7, 2002, Association of Family and Conciliation Courts 39th Annual Conference, "Looking Over the Rim: New Horizons for Families, Courts and Communities," Hawaii.
- April 6, 2002, Statewide Family Law Advisory Committee Conference, "Breaking Barriers, Bending Boundaries, Building Bridges," Hood River, Oregon.
- February 1, 2002, Oregon State Bar, Family Law 2002, "Drafting Parenting Plans: What's New and What Works," Portland, Oregon.
- April 27-28, 2001, Keynote Speaker, 2001 Family Law Residential, Introduced by Chief Justice Alastair Nicholson, "Family Law Reform in the U.S. - Where We've Been, Where We're Going and How We Deal with Litigants-in-Person," Gold Coast, Australia.
- April 26, 2001, Presenter with Dr. Tom Altobelli, Queensland Family Law Specialist Accreditation Training Forum, "The Perils and Potential of Binding Financial Agreements (Premarital Agreements)," Gold Coast, Australia.
- March 14, 2001, Oregon Academy of Family Law Practitioners, "Mediation Protocol for Handling Prenuptial/Cohabitation Agreements," Portland, Oregon.
- February 8, 2001, American Society of Appraisers, "Tips and Traps for Appraisers in Working with Lawyers and Courts," Portland, Oregon.

- November 29, 2000, Multnomah Bar Association, "Red Hot Developments in Family Law - Collaborative Prenuptial Agreements," Portland, Oregon.
- October 20, 2000, Oregon Statewide Family Law Advisory Committee Conference, "Keeping the Flame Alive," Newport, Oregon.
- October 4-5, 2000, The Integrated Court Services Evaluation Design Symposium: "Making the Pieces Fit," Shady Cove, Oregon.
- June 1, 2000, Association of Family and Conciliation Courts 37th Annual Conference, "Developing Skills to Help Families Adjust to Loss," with Dr. Herman Frankel and Elizabeth Hickey, New Orleans, Louisiana.
- May 13, 2000, Regional Women's Conference of the Oregon Chapter of the National Multiple Sclerosis Society, "Dealing With Loss and Living Our Lives Full," Portland, Oregon.
- May 12, 2000, America Society of Bariatric Physicians, "Helping Patients Deal with Loss, Build Confidence, and Make Durable Commitments; How Bariatricians Can Become More Effective Clinicians by Learning from Children of Divorce," Portland, Oregon.
- March 16, 2000, Portland Community College Institute for Health Professionals, "Dealing With Loss: How Health Professionals Can Help Children and Families During and After Divorce," Portland, Oregon.
- February 1, 2000, The Children's Program, "Dealing With Loss: How Pediatric Clinicians Can Protect Children from Harm During and After Divorce," Portland, Oregon.
- January 12, 2000, Children's Village Day School, "Dealing With Loss," Tigard, Oregon.
- November 10, 1999, Legacy Health System, A Continuing Medical Education Presentation for Behavioral Medicine Clinicians, "Dealing With Loss: What the Mental Health Professional Needs to Know About Divorce and Children; Part B: What the Pediatrician Sees and Hears," Portland, Oregon.
- October 28, 1999, Presentation to the Queensland Family Law Practitioners Association on the topic of "Comparing and Contrasting Family Law Practice in the United States and Australia," Brisbane, Australia.
- October 25, 1999, Presentation to Chief Justice Alastair Nicholson and other members of the Family Court of Australia on "Family Law Reform in Oregon and Around the World," Melbourne, Australia.
- October 15, 1999, Eastmoreland Osteopathic, "Dealing With Loss," Portland, Oregon.
- October 6, 1999, Capitol Hill Elementary School Staff, "Dealing With Loss; Helping Children During and After Divorce," Portland, Oregon.
- September 23, 1999, Oregon State Bar, "Living Together - the Domestic Partnership," Portland, Oregon.
- August 9, 1999, SE Portland Rotary, "How We Are Making Family Law Family Friendly," Portland, Oregon.
- June 3, 1999, Association of Family and Conciliation Courts 36th Annual Conference, "Family Law Reform: From Vision to Reality," Vancouver, B.C., Canada
- May 12, 1999, Oregon Academy of Family Law Practitioners, "How Lawyers Can Help Children and Families Deal with Loss During and After Divorce," Tualatin, Oregon.
- May 11, 1999, Kaiser Permanente Medical Care Program - "How Pediatricians Can Help Families and Children Deal with Loss During and After Divorce," Portland, Oregon.
- April 7, 1999, Clackamas County Family Law Group, "Taking Care of the Kids: Practical Tools for Attorneys and Clients," Oregon City, Oregon.

- February 27, 1999, Willamette University, "Mediation in the Context of Divorce: Who Protects the Best Interests of the Children When Mediation Resolves the Custody Issues?" Salem, Oregon.
- May 29, 1998, Association of Family and Conciliation Courts 35th Annual Conference, "Establishing Partnerships Between Courts and Community Agencies," Washington D.C.
- May 29, 1998, Association of Family and Conciliation Courts 35th Annual Conference, "Family Law Reform at the Local, State and National Level, Washington, D.C."
- March 11, 1998, Multnomah Bar Association, "Second Marriage Legal Issues - Drafting Prenuptial Agreements without Torching the Romance," Portland, Oregon.
- March 4, 1998, Clackamas County Family Law Group - Developing Parenting Plans.
- January 30, 1998, Oregon State Bar, "New Family Law Legislation."
- January 21, 1998, Oregon Academy of Family Law Practitioners, "Child Support for 'Children Attending School,'" Portland, Oregon.
- June 6, 1997, Second World Congress on Family Law and the Rights of Children & Youth, "Family Law Reform for Better Access, Better Justice: A Community's Response to the Challenge," San Francisco, California.
- April 1997, Family and Conciliation Courts Review, Vol. 35 No. 2, The Bookshelf,
- "Parenting Our Children: In the Best Interest of the Nation, A Report to the President and Congress."
- February, 1997, Article Healing Currents Journal, "Oregon Task Force on Family Law - Creating a New Family Conflict Resolution System."
- January, 1997, Article Oregon State Bar Bulletin, "Unbundling Legal Services: A Part of the Oregon Task Force on Family Law Reform Package."
- November 16, 1996, Oregon State Bar - Family and Juvenile Law Section, Fall Conference, "Ethical Dilemmas for Family Law Lawyers." Salishan, Oregon
- October 24, 1996 - Association of Family and Conciliation Courts, Northwest Regional Roundtable, Family Law Matters, "Protecting Children of High Conflict Divorce," Post Falls, Idaho
- May 9, 1996, Association of Family and Conciliation Courts 1996 Annual Conference, Best Interest: Special Issues for Children and Families. Moderated Panel of National Experts: "Defining Best Interests of the Child," San Antonio, Texas.
- April 9, 1996, Oregon Judicial Conference, Presentation to Family and Juvenile Law Committee and Futures Committee regarding new legislation of Oregon Task Force on Family Law, Salishan, Oregon.
- February 21, 1996, Multnomah Bar Association, "Family Law Update - 1996," Portland, Oregon.
- January 19, 1996, Oregon State Bar, New Approaches to Troubling Domestic Relation Issues. "Task Force Report: What Is or What Will Be (Hopefully)," Portland, Oregon.
- November 3, 1995, Association of Family and Conciliation Courts Northwest Regional Conference, Panel on Intended Family Law Developments, "Making it Better for all of Us, Building Our Professional Family," Stevenson, Washington.
- April, 1995, Published article in the "Family and Conciliation Courts Review," Vol. 33, "No. 2, Oregon Task Force on Family Law: A New System to Resolve Family Law Conflicts."
- February 22, 1995, Multnomah Bar Association, "Family Law Update, 1995," Portland, Oregon.

- January 27, 1995, Oregon State Bar - Domestic Relations 1995 - Keys to Success. “Managing Emotions in a Divorce” and “Update-Task Force on Family Law," Portland, Oregon.
- December 15, 1994, Oregon Dispute Resolution Commission, “Establishing Court Connected Family Services," Salem, Oregon.
- November 18, 1994, Oregon State Bar: Family & Juvenile Law Section - Fall Conference, “Upcoming Family Law Legislative Reforms," Salishan, Oregon.
- January 27, 1994, Oregon State Bar - Tough Issues in Today's Family Law Practice, “Ethics Conflicts and Other Traps for Family Law Lawyers," Portland, Oregon.
- June 25, 1993, Oregon Law Institute-Spousal Support, “So Long As You Both Shall Live," “Trial Techniques - Proving Need and Other Tips," Portland, Oregon.
- January 31, 1992, Oregon State Bar, Domestic Relations Annual Program, “Current Child Support Issues," Portland, Oregon.
- February 5, 1988, Professional Education Systems Divorce Practice: The Expert Witness, “Art of Cross-Examining an Expert - Use of Experts," Portland, Oregon.

KRISTIN LAMONT
SUMMARY BIOGRAPHY

Kristin LaMont received her law degree from Willamette University College of Law in 1993. In 2005 she left the law firm she had founded some ten year earlier, Pierson, LaMont, Carlson and Gregg P.C., to develop a family law solo practice in Salem, Oregon.

Kristin developed a paperless office system for her solo practice in 2005. The system has improved collaboration with clients, fostered better work flow between attorneys and staff and increased profits. She often provides informal advice to colleagues interested in developing their own paperless systems and she provides practice management consulting to professional practices on a limited basis. Kristin has been a frequent contributor to the Oregon State Bar Family Law Section Newsletter on technology issues.

In her spare time, Kristin enjoys getting reacquainted with her husband, Mike, who gracefully and kindly stood by her while she attended law school and built two law practices. They smile a lot now. The children are grown; college tuition paid; and they still like each other.

Kristin LaMont

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Relevant Experience

- Practice management consulting to various professional practices
- Speaker – various trainings for large and small organizations
- Speaker and author – "Tax Aspects of Divorce in Oregon" *NBI*
- Speaker – "Technology for Law Firms" *NALS*
- Speaker – "Technology – Starting a Practice on a Shoestring" Willamette College of Law family law course and practice management course
- Regular contributor on the subject of law office technology – Oregon State Bar Family Law Section Newsletter

Education

J.D., cum laude *1993*
Willamette University College of Law, Salem Oregon.

B.A. (Psychology) high honors *1982*
Oregon State University, Corvallis Oregon

Career History

State of Oregon, Employment Department *1993-94*
- Researched, wrote and published the Department's unemployment compensation manual

Pierson, LaMont, Carlson & Gregg P.C. *1994-2005*
- Partner in local law firm; practice focus: family law and practice management consulting

Kristin LaMont Attorney at Law P.C. *2005-present*
- Practice focus: family law; practice management consulting – limited basis

Memberships & Affiliations

- Member, American Bar Association, Practice Management Section
- Board Member, family law alternate, Marion County Commission on Dispute Resolution
- Member, Oregon State Bar, Family Practice Section
- Former Treasurer, Marion County Bar Association
- Former vice-chair, Family Law Committee for the Solo and Small Firm Section
- Former, executive board member, Willamette Valley Inns of Court

Robert C. McCann, Jr. is a shareholder in the firm Long, Delapoer, Healy, McCann & Noonan, P.C. where he has been since 1985. He was admitted to the practice of law in the State of Oregon in 1981. He emphasizes in family law and general civil litigation.

Family Law

Mr. McCann's primary focus is family law which involves complex divorce, child custody, juvenile court, Administrative Child Support determination and adoption law matters. He currently is a member of the Oregon Academy of Family Law Practitioners, is a fellow of the American Academy of Matrimonial Lawyers, Chair Elect of the Oregon Chapter of the American Academy of Matrimonial Lawyers, and is a past President of the Linn County Bar Association. He is a member of the Oregon State Bar and is admitted to practice in the United States District Court for the District of Oregon and The Ninth Circuit Court of Appeals. Mr. McCann has served in the past as a court-appointed arbitrator in domestic relations matters for the Linn County Circuit Court and continues to serve as an arbitrator/mediator.

General Civil Litigation

Mr. McCann represents individuals involved in personal injury matters, and he serves as general counsel for the Grand Prairie Water Control District.

Professional Membership:

- Oregon State Bar Association
- Linn County Bar Association
- American Bar Association, Family Law Section
- American Academy of Matrimonial Lawyers
- Oregon Academy of Family Law Practitioners
- Family and Juvenile Law Section of the Oregon State Bar
- Linn County Arbitration and Mediation Commission

Community Involvement:

- Albany General Hospital, Medical Ethics Committee

Education:

- B.S. University of Oregon 1977
- J.D. Gonzaga University 1980

HON. MAUREEN McKNIGHT

SUMMARY BIOGRAPHY

Maureen McKnight is a Circuit Court Judge in Multnomah County, Oregon, handling family, juvenile, and criminal matters. Prior to her appointment to the bench in March 2002, she worked for Oregon's legal aid programs for over two decades. In that role she handled individual cases as well as provided statewide assistance on policy and litigation matters involving family law and later served as Director of the Multnomah County office of Legal Aid Services of Oregon. Her interest both before and after taking the bench has focused on systemic family law issues affecting low-income Oregonians, including access to justice issues, operation of the state's child support program, and the response of Oregon's communities to domestic violence. She was involved as an attorney with a wide range of legislative efforts and as a judge and attorney has authored and presented materials on legislation, the Family Abuse Prevention Act, the Violence Against Women Act, modifications, child support, evidence, and self-representation issues. She is a member of the Oregon Judicial Department's Statewide Family Law Advisory Committee, chairing its Self-Representation Subcommittee and co-chairing its Court/Agency Child Support Subcommittee. She is also currently a member of several Oregon eCourt committees, the Multnomah County Family Violence Coordinating Council Executive Committee, and the Advisory Board for the Gateway Center for Domestic Violence Services. She is the recipient of awards for advocating improvement in Oregon's Child Support Program (2002), for Public Service to the Oregon State Bar (2000), and for Promoting Women in the Legal Profession and the Community (Oregon Women Lawyers' 2000 Justice Betty Roberts Award). Judge McKnight is a 1979 graduate of the University of Oregon School of Law.

R. CRAIG McMILLIN
SUMMARY BIOGRAPHY

R. Craig McMillin has been practicing law since 1972. His office is located in Salem, Oregon and he specializes in bankruptcy issues. Craig was a bankruptcy trustee for a number of years and is recognized as one of the preeminent bankruptcy attorneys in the state

KIMBERLY A. QUACH
SUMMARY BIOGRAPHY

Kimberly A. Quach, Shareholder, Lechman-Su & Quach PC, Portland; B.A., summa cum laude, Carroll College of Montana (1987); J.D., University of Washington (1990); member of the Washington State Bar since 1990 and the Oregon State Bar since 1995; practice focuses on international, appellate, and business issues in family law; Associate Attorney, Betts, Patterson & Mines, Seattle, Washington 1990-1995; Associate Attorney, Gevurtz, Menashe, Larson & Howe 1995-1999; General Counsel, NMG Financial Services 2000-08; Of Counsel, Johnson & Lechman-Su, PC 2008-2010; Shareholder, Lechman-Su & Quach, PC 2010-present; member, Multnomah, Washington County, and Clark County Bar Associations.

CURRICULUM VITAE

Lauren Saucy

Saucy & Saucy, P.C.
Salem, Oregon

J.D. Willamette University College of Law, *cum laude*, Salem, Oregon, 2003

B.A. Colorado College, *cum laude, Phi Beta Kappa,* Colorado Springs, CO, 2000, Major: History

Member of:

Oregon State Bar Family Law Section, Executive Committee, past Legislative Liaison
Oregon Academy of Family Law Practitioners, Board Member
Marion County Bar Association, Executive Committee

Ms. Saucy has been an adjunct professor at Willamette University College of Law since 2009. She teaches Advanced Oregon Family Law.

Ms. Saucy has written numerous articles on domestic relations matters, including two chapters on Family Law Legislation for the Oregon State Bar's CLE Manual, the chapter on Dividing Marital Property in the Oregon State Bar's Family Law CLE Manual, and co-authored *Parenting Plans: Thinking Outside the Box* - American Journal of Family Law, Vol. 19, No. 2 (Summer 2005). She has spoken at numerous CLE presentations regarding property division, spousal support and other issues.

Ms. Saucy was the 2004 recipient of the Marion-Polk County Arno Deneke New Lawyer of the Year award.

CURRICULUM VITAE

Paul Saucy

Saucy & Saucy, P.C.
Salem, Oregon

Graduate of Willamette University -- 1975

Received J.D. from Willamette University -- 1979

Private practice in Salem since 1979. Now in practice with his daughter, Lauren. Both limit their practice to domestic relations matters.

Member of:

Marion County Bar Association
Oregon State Bar Family Law Section
Oregon Academy of Family Law Practitioners
American Academy of Matrimonial Lawyers

Past Chair of the Family and Juvenile Law Section of the Oregon State Bar.

Mr. Saucy is a frequent lecturer at Oregon State Bar continuing legal education programs, the Willamette University College of Law and various legal groups on the subject of divorce. He has for many years been the co-chair and presenter for the Oregon State Bar's program *Handling Domestic Relations Cases*, a program designed to teach less experienced attorneys how to process a divorce case.

Mr. Saucy has written numerous articles on domestic relations matters, including the chapter on Dividing Marital Property in the Oregon State Bar's Family Law CLE Manual; co-authored with Lauren Saucy *Parenting Plans: Thinking Outside the Box* - American Journal of Family Law, Vol. 19, No. 2 (Summer 2005); *Representing the Questionably Competent Client in a Dissolution Proceeding* - American Journal of Family Law, Vol. 17, No. 1 (Spring 2003); and co-authored *The Art of Divorce Settlement Negotiations*, American Journal of Family Law, Volume 14, No. 2 (Summer 2000).

Mr. Saucy is the 2004 recipient of the Oregon State Bar President's Membership Service Award for volunteer law related services on behalf of Oregon Lawyers. Mr. Saucy has been repeatedly ranked as a tier 1 attorney in the annual U. S. News & World Reports ranking of the best lawyers and best law firms in the United States. He holds the highest standing with the legal ratings firm Martindale-Hubbel and Oregon Super Lawyers.

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ANDREW IKE SCHEPARD

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Larchmont, N.Y. 10538
(914) 834 6876 (phone)
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Hofstra University School of Law
121 Hofstra University
Hempstead, N.Y. 11549
(516) 463 5890 (phone)
Andrew.I.Schepard@hofstra.edu
(e-mail)

EDUCATION

1972	J.D. Harvard Law School	
	Honors:	Articles Editor, *Harvard Law Review* Cum Laude graduate
1969	M.A. Columbia University (Political Science)	
1969	B.A. City College of New York	
	Honors:	Magna cum laude Phi Beta Kappa Ward Medal for Outstanding Achievement in Political Science

BAR MEMBERSHIPS

New York, 1980
California, 1973 (inactive status)

ACADEMIC APPOINTMENTS

1987 - present	HOFSTRA UNIVERSITY SCHOOL OF LAW *Professor of Law and Founder and Director, Center for Children, Families and the Law, an institute for education, research and public service to promote the better treatment of children and families involved with the legal system.*
2000 -2006	NEW YORK UNIVERSITY SCHOOL OF MEDICINE *Adjunct Professor, Department of Psychiatry*
1993	NEW YORK UNIVERSITY SCHOOL OF LAW *Adjunct Professor*
1980 - 1986	COLUMBIA UNIVERSITY SCHOOL OF LAW *Associate Professor*
1978 - 1980	UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER *Visiting Associate Professor*

LAW RELATED APPOINTMENTS

2010-	NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN *Appointed member.*
2007-	UNIFORM LAW COMMISSION (FORMERLY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS) *Reporter* for the Drafting Committee for the Uniform Collaborative Law Act
1990- present	NATIONAL INSTITUTE FOR TRIAL ADVOCACY (NITA) *Program Director for:* ▪ *Northeast Deposition Program* ▪ *Training the Lawyer to Represent the Whole Child* ▪ *Modern Divorce Advocacy* ▪ *In house deposition and trial training programs for major law firms*
2006-2008	JUDICIAL CONFERENCE OF THE STATE OF NEW YORK *Attorney Member* from the Second Appellate Division, appointed by the Administrative Board of the Courts of the New York State Courts, one of four attorney members of the Conference.
2006-	AMERICAN BAR ASSOCIATION *Member of Commission on Youth at Risk Initiative (2006-09); Chair of Advisory Committee and Policy Committee (2009-).*
2002 - 2008	FAMILY AND JUVENILE LAW SECTION OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS *Executive Committee member*.
1995 -2000	FAMILY LAW SECTION OF THE AMERICAN BAR ASSOCIATION *Reporter* for Symposium which created *Standards of Practice for Family and Divorce Mediation*. *Co-Chair* of the PARTNERS PROJECT, an educational program for high school students on family law and communications skills adopted in approximately 400 schools nationwide. Helped develop program concept, curriculum and video.
1995 -	ASSOCIATION OF FAMILY AND CONCILIATION COURTS

AFCC is an interdisciplinary professional association of judges, lawyers, mediators, mental health professionals, social service professionals and court administrators from around the world dedicated to promoting better methods for the resolution of family conflict.

Editor, Family Court Review (interdisciplinary scholarly journal of the Association, edited at Hofstra Law School) (since 1997).

Board of Directors, and Chair, Parent Education Committee (1995-97).

1982 - 1986 NATIONAL GOVERNING BOARD OF COMMON CAUSE
Member and Chair, Legal Affairs Committee: provided oversight for the litigation docket of a national public affairs organization. Argued major case before California Supreme Court and participated in other complex litigation on the organization's behalf.

1983 - 1985 NEW YORK STATE LAW REVISION COMMISSION
Consultant: for a major report on how to improve the procedural system for resolving child custody disputes, including recommendation for a mediation program.

AWARDS AND HONORS

- *Lawyer as Problem-Solver Award* presented by the Section of Dispute Resolution of the American Bar Association for serving as Reporter for the Uniform Collaborative Law Act, the Standards of Practice for Family and Divorce Mediation, founding Parent Education and Custody Effectiveness and the Family Law Education Reform Project (presented at the ABA ADR Section Conference in San Francisco, CA on Apr. 9, 2010).

- *Nominated as one of the best law teachers in America* for a study on What the Best Law Teachers Do to be published by Harvard University Press (see http://washburnlaw.edu/bestlawteacherrs/nominees/ (2010)

- *Recognized by Lexis/Nexis as a Leader in the Transformation of Legal Education for the 21st Century* at the Conference of the American Association of Law Schools (San Diego, CA Jan. 2010)

- *2008 Person of the Year Award from the New York Chapter of the Association of Family and Conciliation Courts* "For a Life Dedicated to Children, Families and the Law" (presented at the AFCC NY Conference in New York, NY, Dec. 7, 2007).

- *President's Award of the Association of Family and Conciliation Courts* for outstanding leadership and contributions (presented at the AFCC Conference in Seattle, Wash. May 2005).

- *Special Commendation from the Association of Family and Conciliation Courts* "in recognition of outstanding contributions to professionals who work with families in conflict" (presented at the AFCC Conference in N.Y., N Y., Mar. 18, 2002).

- *2001 Friend of Chair of the Family Law Section of the American Bar Association* for "meritorious service above and beyond what is expected of our leadership"- for serving as Reporter for *Standards of Practice for Family and Divorce Mediation* adopted by the ABA's House of Delegates and for organizing the first national joint law and mental health conference on how the legal system can best respond to the problems of children in high conflict divorce.

- *1994-95 Chair's Cup of the Family Law Section of the American Bar Association* for "meritorious service above and beyond what is expected of our leadership"-- for development of Parent Education and Custody Effectiveness (P.E.A.C.E.), a court-connected law and mental health education program for divorcing and separating parents that promotes responsible conflict management and on PARTNERS, an education program for high school students on family law and communication skills.

- *1994-95 Irwin Cantor Award for Innovative Programming of the Association of Family and Conciliation Courts* -- for an ongoing contribution to improving the lives of parents and children by developing court-affiliated parent education programs promoting responsible conflict management.

- *1995 Telly Award* for excellence in non-broadcast video productions (for P.E.A.C.E. video for divorcing and separating parents).

- *Member of the American Law Institute* (elected 1998).

- *Fellow of the American Bar Foundation* (elected 1997).

PRACTICE EXPERIENCE

1995 -2004	MORRISON, COHEN, SINGER & WEINSTEIN, N.Y., N.Y. *Consultant*: in complex business and matrimonial litigation.
1987 - 1993	WILLIAM S. BESLOW, ESQUIRE, N.Y., N.Y. *Of counsel*: to law firm specializing in matrimonial litigation.
1985 - 1987	POLLACK & KAMINSKY, N.Y., N.Y.

Associate: in business and securities litigation.

1978 - 1980 — DECASTRO, WEST & CHODOROW, L.A., Cal.
Associate: in a wide variety of business litigation.

1977 - 1978 — STATE BAR OF CALIFORNIA, SPECIAL COMMITTEE ON TRIAL COURT IMPROVEMENTS
Consultant: drafted major reports and legislation to improve judicial administration in the state trial courts.

1975 - 1977 — TUTTLE & TAYLOR, L.A., Cal.
Associate: represented airplane manufacturer in multi-district litigation arising out of Paris Air Crash and other civil litigation.

1973 - 1975 — LOS ANGELES CITY ATTORNEY
Special Counsel: counsel to a Committee of the Los Angeles City Counsel for an investigation involving conflicts of interest in sale of oil leases by City. Drafted campaign finance reform legislation, legal opinions on constitutional issues, policy position papers and speeches. Established Office recruiting and training program.

1972 - 1973 — LAW CLERK TO JUDGE JAMES L. OAKES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PUBLIC SERVICE ACTIVITIES

2002- 2007 — GREENWICH HOUSE, N.Y., N.Y.
Vice Chair of the Board of Directors and Chair of the Board's development, governance and planning committees. Greenwich House is a non profit New York City settlement house with an annual budget of $48 million sponsoring music and pottery schools and drug abuse, AIDS treatment, pre-school, senior citizens center and other human and community services. The Board is responsible for fund raising and development as well as overall policy and oversight of Greenwich House.

1987 - 1990 — BOARD OF EDUCATION, MAMARONECK, N.Y. UNIFIED SCHOOL DISTRICT.
Member elected for a three year term after nomination by a citizens' screening committee. Responsible for overall operations and policy of a nationally recognized suburban school district. Duties included budgeting, curricular planning, labor relations, personnel reviews, community relations, data management.

1984 - 1994	COMMISSIONER AND COACH, LARCHMONT-MAMARONECK LITTLE LEAGUE.

PERSONAL INFORMATION

Married: 1969, to Debra Schepard, an educational director of a private school for special needs children. Children: David (a lawyer and high school teacher) born 1977 and Eric (a lawyer), born 1980. Interests: Running (ran New York City Marathon in 1991 for the benefit of the Leukemia Society), baseball (especially the Mets), travel (have been to many countries, including Australia, China, Morocco, South Africa, Israel and throughout Europe) hiking, movies, American history and politics

Description of Center for Children and the Law, Publications, Conference and Media Presentations, and New York Law Journal Children and Law columns are available on request, as are references.

As of August 8, 2011

ANDREW SCHEPARD
Publications, Presentations, Media Appearances and Cases

Publications

Book

CHILDREN, COURTS AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES (Cambridge University Press 2004)

Family Court Review

I have served as *Family Court Review*'s Editor-in-Chief since 1998. I plan out each issue, work with authors and special issue editors, organize the Editorial Advisory Board, edit articles, edit student notes, write editorial notes, supervise operations of the student staff, and coordinate *FCR*'s marketing and development with its publisher.

Family Court Review is an international, interdisciplinary family law journal -- a forum for the exchange of ideas, policy proposals, programs, empirical research, legislation, case law and reforms. Its fundamental premise is that productive discussion of how family law disputes should best be resolved is facilitated by a dialogue between the academic, judiciary, lawyers, mediators, mental health and social services communities. *FCR* has published landmark special issues with articles from the law and social science on subjects such as domestic violence, child protection mediation, youth at risk, drug abuse and the family court, fatherhood, alienation of children during divorce and separation, unified family courts, LGBT families and many other cutting edge subjects.

Wiley- Blackwell Publishing, *FCR*'s publisher, is the world's largest privately owned, independent, academic publishing company. The company publishes books and journals for the higher education, research and professional markets including *Law and Social Inquiry*, the *Journal of Supreme Court History*, and the *Journal of Empirical Legal Studies.* Wiley-Blackwell is the world's leading society publisher, partnering with 665 academic, medical, and professional societies and publishing 850 journals. Every *FCR* issue since it originated in the 1960s is available in PDF form at the Wiley-Blackwell website.

FCR is accessible on the Westlaw and LexisNexis databases, leading social science indices, and is subscribed to by numerous libraries and individuals on both national and international levels. Presently, *FCR* is available at 2,441 learning institutions worldwide. *FCR* is also commonly cited to in judicial opinions and articles from the journal were downloaded from the publisher's website 32,240 times in 2006.

FCR's Associate Editor, Professor Janet Johnston, a noted social scientist, provides guidance on social science and interdisciplinary aspects of *FCR*'s articles. The fifty-member Editorial Board of *FCR* is composed of law and social science professors, researchers, lawyers, judges, psychologists, mediators, and court professionals who are experienced in issues that impact families in the legal process. It provides ongoing advice to the editors, and performs

essential tasks such as completing peer reviews of submitted articles and developing issues on important themes.

At the end of each year, law students are selected as members of the editorial staff of *Family Court Review* through a writing competition conducted in cooperation with the Hofstra Law Journals. Special consideration is given to students who are seriously interested in family law and family dispute resolution. The staff receives academic credit for its work and performs editorial and administrative functions similar to those performed by law students at other law reviews with similar levels of autonomy and supervision. Staff members research and write notes in *FCR*'s area of interest, several of which are published in each issue. The student staff selects which notes are published. During the research and writing of their notes each student makes an oral presentation of his or her thesis to an invited panel of outside experts. The student editor in chief attends the annual meeting of the *FCR* Editorial Board. The student staff administers an essay contest for law students from other school, the winning entry being published in *FCR*.

Law Review Articles

Kramer vs. Kramer Revisited: A Comment on The Miller Commission Report and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients, 27 PACE L. REV. 101 (2007) (symposium issue)

Foreword to the Special Issue on the Family Law Education Project, 44 FAM. CT. REV. 513 (2006) (with Peter Salem)

Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on a Survey of Unified Family Courts, 37 FAM. L. Q. 333 (2003) (part of symposium issue on unified family courts) (with Bozzomo)

Law Schools and Family Court Reform, 40 FAM. CT. REV. 460 (2002) (part of symposium issue on family court reform).

The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management, 22 U. ARK. LITTLE ROCK L. REV.395 (2000) (part of Ben J. Altheimer Symposium on Children of Embattled Divorce).

Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective, 32 FAM. L. Q. 95 (1998) (part of symposium issue on unified family courts).

Planning for P.E.A.C.E.: The Development of Court-Connected Education Programs for Divorcing and Separating Families, 23 HOFSTRA L. REV. 845 (1995) (with Schlissel).

Parent Education as a Distinct Field of Practice, 34 FAM. & CONCIL. CTS. REV. 9 (1996) (with Salem and Schlissel).

War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents, 27 U. MICH. J. L. REF. 131 (Fall 1993).

Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility, 16 NOVA L. REV. 767 (1992) (with Atwood and Schlissel) (part of symposium issue on children and law).

Divorce, Marital Torts and Res Judicata, 24 FAM. L. Q. 127 (1990).

AIDS and Divorce, 23 FAM. L. Q. 1 (1989).

Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 TEX. L. REV. 687 (1986).

Court-Ordered Mediation in Family Disputes: The New York Proposal, 14 N.Y.U. REV. L. & SOC. CHANGE 741 (1986) (with Silberman).

Consultants' Comments on The New York State Law Revision Commission Recommendation on the Child Custody Dispute Resolution Process, 19 COL. J. L. & SOC. PROB. 399 (1985) (with Silberman).

Ground Rules for Custody Mediation and Modification, 48 ALBANY L. REV. 616 (1984) (with Philbrick and Rabino).

Another Look: Trial Court Unification in California in the Post Proposition 13 Era, 11 SW. U. L. REV. 1295 (1979).

Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971) (first law review note ever published that argued that sex should be a "suspect classification" under the equal protection clause).

The Supreme Court, 1970 Term, 85 HARV. L. REV. 135 (1971) (note on reapportionment case).

Reporter for Major Law Reform Projects

(1) I am currently the Reporter for an interdisciplinary Task Force of the Association of Family and Conciliation Courts which is examining the practice of mental health consultation in child custody disputes.
(2) I was a member of multi disciplinary team organized by the Association of Family and Conciliation Courts which evaluated the family court services of the Marion County (Indianapolis), Indiana Court System and made recommendation for reform and

improvements (November 2010)

(3) I was the Reporter for the Uniform Law Commission's (formerly the National Conference of Commissioners on Uniform State Laws) Drafting Committee for the *Uniform Collaborative Law Act*. This was major research and writing project involving working with a Drafting Committee and observers from interested organization as well as drafting a statute and commentary. The UCLA was the subject of a special issue of the *Hofstra Law Review* with additional articles and commentary.

(4) I was the Reporter for the *Model Standards of Practice for Family and Divorce Mediation*, a multi year, multi organization project to create uniform national standards for family and divorce mediation practice. They were approved by the American Bar Association in February 2001. They are published at *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 38 FAM. L. Q. 1 (2001) and the *Model Standards of Practice for Family and Divorce Mediation*, 39 FAM. CT. REV. 121 (2001) and 39 FAM. L. Q. 27 (2001).

(5) *Report of the P.E.A.C.E. Advisory Committee to Chief Judge Judith S. Kaye* (November, 1994) (report to Chief Judge of New York State on the first phases of P.E.A.C.E.'s pilot programs and recommendations for the future).

(6) New York State Law Revision Commission, *Recommendation to the 1985 Legislature on the Child Custody Dispute Resolution Process*, 19 COL J. L. & SOC. PROB 105 (1985) (co-consultant for study recommending creation of a publicly financed mediation system and other changes in way courts handle custody disputes).

(7) Numerous reports for State Bar of California on aspects of judicial administration while serving as a consultant to its Special Committee on Trial Court Improvements.

Law and Children column of the New York Law Journal

I founded the Law and Children column of the *New York Law Journal*, the daily newspaper for the New York legal community to heighten awareness of children's issues. The column has appeared approximately six times a year since 1996. The column highlights new legal developments and discusses public policy issues relating to children including: child abuse, domestic violence, child custody, mediation, foster care, PINS and any other matter relating to children. The column also periodically highlights projects and important events for the child advocacy community. I write some of the columns with co authors, often Professor Theo Liebmann, Director of the Hofstra Law School's Child Advocacy Clinic or other prominent figures in the child advocacy community. A separate list of the columns is available on request.

Book Chapters

The Model Standards of Practice for Family and Divorce Mediation in DIVORCE AND FAMILY MEDIATION (Jay Folberg, Ann Milne & Peter Salem eds.) (Guilford Press 2004)

Divorce, Custody and Visitation in ADR HANDBOOK FOR JUDGES 89-111 (Donna Stienstra & Susan M. Yates, eds. 2004) (Published by the American Bar Association Section of Dispute Resolution) (collection of essays on alternative dispute resolution by national experts intended for judges).

Professional Skills Teaching Materials

Andrew I. Schepard, Gregory Firestone, Louis Ortiz, Arline S. Rotman, Philip M. Stahl, ALLEN V. ALLEN: CASE FILE AND PROBLEMS (National Institute for Trial Advocacy 2005)

This case file, written by an interdisciplinary team for which I am the lead author, is designed to train lawyers, mental health professionals, mediators, and financial planners who work with parents and children experiencing family reorganization because of divorce.

Shorter Articles

Family Law Education Reform Project Seeks Law School Curriculum Reform, UNIFIED FAM. CT. CONNECTION 13 (Winter 2011).

Regulating Collaborative Law: The Uniform Collaborative Law Act Takes Shape. 17 DIS. RES. MAG. 26 (Fall 2010) (with David A. Hoffman)

Collaborative Law and the Uniform Collaborative Law Act, 3 N.Y. DIS. RES. L. 26 (Fall 2010).

Does Your Mediator Measure Up?: Standards of Practice for Family and Divorce Mediation, 24 FAM. ADVOCATE 22 (Spring 2002) (with Ann Milne) (special issue on alternatives to litigation).

Supporting Parent-Clients in Mediation of Child Custody Disputes, 10 PRAC. LITIGATOR 7 (1999).

The Push for Parent Education, 19 FAM. ADV. 53 (Spring 1997) (with Salem and Schlissel).

Parent Education and Custody Effectiveness (P.E.A.C.E.): A Preliminary Report to the New York Legal Community, 68 N. Y. S. B. J. 42 (Feb. 1996) (with Miller and Schlissel).

Judicial Review of Academic Student Evaluations: A Comment on Susan "M" v. New York Law School From Those Who Litigated It, 77 WEST'S EDUC. L. REPORTER 1089 (Dec. 17, 1992) (with Weinberger).

AIDS and Divorce, 12 FAIRSHARE 10 (Feb. 1992).

The Developing Partnership Between Clinical and Traditional Education, 2 HOFSTRA L. MAG. 18 (1989).

AIDS and New York Matrimonial Law, N. Y. S. B. J. Nov. 1988 at 29 (with Rothman and Nassar).

Leaving Home, FAMILY L. REV. OF THE FAMILY LAW SECTION OF THE N.Y.S. B. A. Sept. 1987 at 12 (with Rothman and Nassar).

Book Reviews

Lawyers' Bookshelf, Review of MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE: A COURSE BOOK [Politics, Media, and Popular Culture], N.Y.L.J., Jan. 7, 2005 at 2.

Lawyers' Bookshelf: Review of ROBERT STEPHAN COHEN, RECONCILABLE DIFFERENCES: 7 ESSENTIAL TIPS TO REMAINING TOGETHER FROM A TOP MATRIMONIAL LAWYER (Pocket Books 2002), N.Y. L. J., May 28, 2002 at 2.

Life with Gault, 12 COL. HUM. RIGHTS L. REV. 176 (1980-81) (reviewing PETER PRESCOTT, THE CHILD SAVERS; JUVENILE JUSTICE OBSERVED (1980)).

Review of ONE L by Scott Turow, 1 LOS ANGELES LAWYER 42 (1978).

Review of CRIMES AND RIGHTS: THE PENAL CODE VIEWED AS A BILL OF RIGHTS by Macklin Fleming, 53 Cal. S. B. J. 236 (1978).

Review of *THINKING ABOUT CRIME* by James Wilson, 51 Los Angeles B. J. 394 (1978).

Newspaper Articles

Jurisdiction, Due Process and No-Fault Divorce, N. Y. L. J., Mar. 14, 2011 at 6, col. 1 (with Scheinbaum and Miller).

P.E.A.C.E.: A Program of Parent Education, N.Y. L. J. Dec. 5, 1991 at 2 (with Atwood and Schlissel).

Reagan, Carter and the Bench: A Comparison of Their Records in Appointing Judges, L.A. TIMES § 6, Nov. 2, 1980 at 5.

Judicial Selection Process Lacks Merit, L. A. TIMES, § 2, Oct. 23, 1979 at 5 (advocating merit

selection system for California State judiciary) (co-author).

Campaign Funds: A Fairness Bill Comes Due, L.A. TIMES, § 2, Sept. 17, 1978 at 5 (describing report of Los Angeles Citizens Committee on Municipal Campaign Reform).

A Shotgun Wedding at the Bar, L. A. TIMES, §2, May 2, 1977 at 7 (commenting on proposals to require lawyers to spend a percentage of their time representing indigent clients).

The Sylmar White Elephant: Forget It, L.A. TIMES § 2, Apr. 21, 1977 at 8 (arguing against County's construction of large pretrial detention facility for juveniles).

Presentations

2011

Families Do Matter: Changes in Divorce Practice 1960-2011, presentation to the Family Law Section of the American Bar Association at the annual meeting of the American Bar Association Toronto, Ontario, Canada (Aug. 5, 2011).

Family Law Education Reform and the Law School Family Law Curriculum, workshop presentation at the annual conference of the National Council of Juvenile and Family Court Judges, New York, NY. (July 25, 2011) (with DiFonzo)

High Conflict Families In Divorce and Separation and Parenting Coordination: An Option for the Last Resort, workshop presentation at the annual conference of the National Council of Juvenile and Family Court Judges, New York, NY. (July 25, 2011)

Intimate Partner Violence Best Practices: The Uniform Collaborative Law Act Raises the Bar, workshop presentation at the annual conference of the Association of Family and Conciliation Courts, Orlando, FL, (June 2, 2011).

Mental Health Consultants and Peer Review in Child Custody Evaluations, presentation to the Interdisciplinary Forum on Family and Mental Health of New York, New York, N.Y. (Mar. 17, 2011).

The Uniform Collaborative Law Act and the Past, Present and Future of Collaborative Law presentation at Symposium on The Future is Now: Collaborative & Therapeutic Family Law, at Barry University School of Law, Orlando, FL. (Mar. 11, 2011).

Kramer v. Kramer Revisited: Why Divorce Lawyers for Parents Should Be Required to Discuss ADR with Their Clients presentation at the 2011 Gilvary Symposium on Law, Religion and Social Justice at the University of Dayton Law School, Dayton, OH. (Jan. 21, 2011).

2010

Presentation to Connecticut Council on Divorce Mediation and Collaborative Practice on *Lessons Learned from the Standards of Practice for Family and Divorce Mediation*. New Haven, CT (Nov. 30, 2010)

Moderator of Town Hall meeting on *Mental Health Consultants and Child Custody Evaluations*, Association of Family and Conciliation Courts Conference, Cambridge, MA (Oct. 29, 2010)

Invited participant in the Families Matter Symposium organized by the American Bar Association Section on Family Law and the Center for Children, Families and the Courts at the University of Baltimore School of Law. The purpose of the Symposium was to convene national leaders from different disciplines to create an agenda for "changing the practice of family law from an adversarial and divisive process to one that focuses on methods that are less destructive to families and children." Baltimore, MD. (June 24-25, 2010).

Featured speaker at On the Road to Best Practices in Matrimonial and Family Court Matters: When Children Reject a Parent: Strategies for Professionals. This Symposium was co-sponsored by co sponsored by Children Come First, Catholic Charities, Child & Family Services and the NYS State Child Welfare Court Improvement Project Buffalo, N. Y. (May 7, 2010).

Invited Testimony on The Effects of Fault and No Fault Divorce on Children, New York State Senate Public Hearing on No Fault Divorce and Matrimonial Law Reform, New York, N.Y. (May 6, 2010).

The Uniform Collaborative Law Act and the Past, Present and Future of Collaborative Law, Connecticut Council for Divorce Mediation and Collaborative Practice, New Haven, CT. (May 4, 2010).

Keynote address at the 2010 Conference of the New York State Council on Divorce Mediation entitled *Kramer v. Kramer Revisited: The Evolution of Divorce Lawyers from "Zealous" to "Constructive Advocacy"* Saratoga Springs, N.Y. (Apr. 29, 2010).

Faculty member for a national teleconference continuing education program on *Recent ADR Model Acts on Arbitration, Mediation and Collaborative Law: Latest Progress and Why Does It Matter?* The Program was *c*o-sponsored by the Alternative Dispute Resolution Committees of the ABA Litigation, Business Law, TIPS, and Public Contracts Law Sections and in collaboration with the Alternative Dispute Resolution Committees of numerous State Bar Associations, (Apr, 27, 2010).

Organizer of Charting a Better Future for Youth: A National Summit on Effective Implementation of the Fostering Connections to Success Act sponsored by the American Bar

Association Commission on Youth at Risk and held at Roosevelt House Public Policy Institute at Hunter College, New York, N.Y. (April 15-16, 2010).

The Uniform Collaborative Law Act and the Past, Present and Future of Collaborative Law, Dickinson School of Law at Pennsylvania State University, Carlisle, PA. (Apr. 14, 2010).

Acceptance Speech on Receiving the Lawyer as Problem Solver Award, Awards Dinner of the Dispute Resolution Section of the American Bar Association, San Francisco, CA. (Apr. 9, 2010).

Consultant Conduct in Cases of Contested Custody, Interdisciplinary Forum on Family Law and Mental Health, New York, N.Y. (Jan. 21, 2010).

2009

Presented the Uniform Collaborative Law Act to the Uniform Law Commission's Annual Meeting, Santa Fe, New Mexico (July 9-12, 2009).

The Ten Commandments of Integrating Skills into the Basic Family Law Course, Future of Family Law Education Conference, William Mitchell College of Law, St. Paul, MN (June 26, 2009).

The Evolving Family Court System: Progress at a Price? Moderator of a plenary session panel discussion. Annual Conference of the Association of Family and Conciliation Courts, New Orleans, LA. (May 29, 2009)

Uniform Collaborative Law Act: Open Forum. Annual Conference of the Association of Family and Conciliation Courts, New Orleans, LA. (May 29, 2009)

The Ortiz Family Meets the Family Court: Past Present and Future? Keynote Presentation to the Montgomery County, Maryland Divorce Roundtable Conference called Parenting Together After Separation: How to Keep It Out of Court. at the Universities at Shady Grove in Rockville, MD. (May 8, 2009) .

If *Mediation is So Good, Why is New York So Bad, and What Can We Do About It?* Keynote Plenary Address for Mediate for the Children, the Northeast Mediation Conference sponsored by the New York State Council on Divorce Mediation, Tarrytown, New York (Apr. 30, 2009).

Navigating the Winds of Change, Keynote Plenary Presentation to 2009 Family Dispute Resolution Statewide Educational Institute sponsored by the Judicial Council of California, Administrative Office of the Courts, Center for Families, Children and the Courts, Los Angeles, Calif. (Apr. 23, 2009)

2008

Commentator on *New York's New Multi-Door Courthouse- The Quiet Revolution*, Association of Family and Conciliation Courts- New York Chapter 2008 Annual Conference at the Association of the Bar of the City of New York (Nov. 7, 2008)

Moderator of Arthur Miller style interdisciplinary panel on *Advancing the Right to Quality Education: The Role of the Legal Profession in Educational Reform.* Sponsored by the Youth at Risk Commission of the American Bar Association and Lexis-Nexis at the ABA 2008 Annual Meeting (New York, NY Aug. 8, 2008)

Presented draft of the Collaborative Law Act for "First Read" to the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform Sate Law) at the Commission's 2008 Annual Meeting, Big Sky, Montana (July 22, 2008)

The Uniform Collaborative Law Act, Annual Conference of the Association of Family and Conciliation Courts, Vancouver, British Columbia, Canada (May 30, 2008).

Child Custody, Visitation and Family Offense Proceedings presentation at *Children in the Court: Concerns, Challenges and Benefits of Youth Participation in Court Proceedings*, Committee on Children and the Law, Annual Meeting of the New York State Bar Association, New York, N.Y. (Feb. 1, 2008).

2007

The Uniform Collaborative Law Act at the Conference of the New York Chapter of the Association of Family and Conciliation Courts, New York, NY (Dec. 7, 2007)

Kramer v. Kramer Revisited: Ethical and Practical Considerations for Lawyers and Judges in High Conflict Parenting Disputes, keynote address at multi disciplinary conference *For the Sake of the Children: Advances In Family Dispute Resolution* co sponsored by the Indiana University School of Law and Department of Psychological and Brain Sciences, Bloomington, IN. (Nov. 15, 2007).

The Uniform Collaborative Law Act at the Conference of the International Academy of Collaborative Professionals, Toronto, Ontario, Canada (Oct. 28, 2007)

Moderator Forum on *The Need for No Fault Divorce* at the Association of the Bar of the City of New York, New York, NY (Oct. 11, 2007) (co sponsored by the New York State Judicial Institute and other major bar groups and law schools)

What Makes A Great Family Court? Presentation to Family Law for the Minnesota Judiciary

Minneapolis, MN (Oct. 9, 2007)

Moderator of *Youth "Aging Out" of Foster Care: Enhancing Supports, Court Processes, Laws and Legal Responses* at the American Bar Association Convention, San Francisco, CA (Aug. 11, 2007).

Cross Examination and Expert Testimony in Parenting Disputes at the 44th Annual Conference of the Association of Family and Conciliation Courts, Washington, D.C. (May 31, 2007).

Moderator of *Town Hall on Unified Family Courts* at the American Bar Association and the University of Baltimore Center for Families, Children and the Courts, Summit on Unified Family Courts, Baltimore, Md. (May 4, 2007)

Panelist in Workshop on *Law Schools and the Bar: Serving the Community,* American Bar Association and the University of Baltimore Center for Families, Children and the Courts, Summit on Unified Family Courts, Baltimore, Md. (May 4, 2007)

Moderator of Workshop on *Services and Accountability in a Unified Family Court,* American Bar Association and the University of Baltimore Center for Families, Children and the Courts, Summit on Unified Family Courts, Baltimore, Md. (May 3, 2007)

Moderator of Pre Conference Institute on *Youth at Risk: Keeping Adolescents Out of the Child Welfare and Juvenile Justice Systems by Aiding Teens in Conflict With Their Families*, American Bar Association's 12th National Conference on Children and the Law, sponsored by the ABA Center on Children and the Law and the Harvard Law School Child Advocacy Program, Harvard Law School, (Cambridge, Mass., Apr. 13, 2007)

Law School Child Programs, American Bar Association's 12th National Conference on Children and the Law, sponsored by the ABA Center on Children and the Law and the Harvard Law School Child Advocacy Program, Harvard Law School, (Cambridge, Mass., Apr. 13, 2007)

Domestic Violence and Family Courts invited participant in think tank conference sponsored by the Association of Family and Conciliation Courts, the National Council of Juvenile and Family Court Judges and the Johnson Foundation held at Wingspread Conference Center of the Johnson Foundation (Racine, WI, Feb. 15-17, 2007)

2006

Kramer v. Kramer Revisited: Why Divorce Lawyers for Parents Should Be Required to Discuss ADR With Clients, Association of Family and Conciliation Courts, New York Chapter, Annual Conference at the Association of the Bar of the City of New York, (New York, N.Y., Dec. 1, 2006)

What's Wrong With Children's Rights?, Moderator of a Plenary Session Panel at the Convention of the Association of Family and Conciliation Courts (panelists included Professors Martin Guggenheim of New York University School of Law, Linda Elrod of Washburn University School of Law and Marsha Klein Pruett of Yale University) (Tampa, Fla., June 1, 2006)

Implementing The Family Law Education Reform Project, Workshop at the Conference of the Association of Family and Conciliation Courts, (Tampa, Fla., June 1, 2006)

Ethics in Mediation: Dilemmas and Standards of Practice to Mediation and Domestic Violence: an Interdisciplinary Conference, Vassar College, (Poughkeepsie, N.Y. May 11, 2006) (with Baruch Bush)

The Family Law Education Reform Project to the Council of the Section on Family Law of the American Bar Association, (Wash., D.C., May 5, 2006)

The Family Law Education Reform Project to the Council on Children of the Association of the Bar of the City of New York, (N. Y., N. Y. Apr. 16, 2006)

The Family Law Education Reform Project to the Committee on Family Courts and Family Law, Association of the Bar of the City of New York (N. Y., N.Y. Mar. 15, 2006) (part of a panel on Family Law Education)

The Family Law Education Reform Project at Integrating ADR into Law School Curricula: The Example of Family Law, American Association of Law Schools Section Extended Program, jointly sponsored by the Sections of Alternative Dispute Resolution and Family and Juvenile Law, AALS Convention, (Wash., D.C., Jan. 4, 2006).

Chaired panel responding to Chief Judge Judith S. Kaye's Keynote Address at the American Bar Association's Youth at Risk Initiative Planning Conference, Hofstra Law School, (Hempstead, N.Y., Feb. 2, 2006)

2005

Kramer v. Kramer Revisited: The Evolving Ethical Responsibilities of Divorce Lawyers to Children, High Conflict Process for Child Access Cases, Circuit Court for Baltimore County, (Towson, Md., Oct. 28, 2005)

On the Road to Best Practice: Custody, Access, Conflict and Interventions, University of Buffalo School of Social Work, (Buffalo, N. Y., Oct. 20, 2005) (All day conference on child custody reform co sponsored by the Unified Court System of the State of New York, Catholic Charities

of Buffalo, Child and Family Services Center for Resolution and Justice and the New York State Dispute Resolution Center for which I was the co lead speaker and trainer).

Reforming Family Law Education. National Council of Juvenile and Family Court Judges Forum on Children and Families in Court, (Cleveland, Ohio, Oct. 18, 2005) (panel discussion)

Triage in Child Custody Cases: Matching Appropriate Services with Family Needs, National Council of Juvenile and Family Court Judges Forum on Children and Families in Court, (Cleveland, Ohio, Oct. 18, 2005)

Family Courts and Law: Part of a Professional Training for Judges of the Hashemite Kingdom of Jordan on the U.S. Judicial System organized by the United States State Department's International Visitor Leadership Exchange Program, (N.Y., N. Y. Sept. 23, 2005)

Child Custody Decision Making: Past, Present and Future, Loyola University Law School Chicago's Children's Summer Institute, (Chicago, Ill., May 24, 2005)

The Approximation Rule: Are Predictability, Presumptions and Best Interests Compatible? Association of Family and Conciliation Courts Conference, (San Antonio, Tex., May 14, 2005) (panel discussion with ALI Reporter Dean Katherine Bartlett and Dr. Richard Warshak).

International Relocation: A Children's Rights Perspective. The 4th World Congress on Family Law and Children's Rights, (Cape Town, S. Afr., Mar. 21, 2005 (Moderator of panel with judges from the United Kingdom, Australia and Canada).

Mediation and ADR in Divorce Disputes. Matrimonial Commission of the New York State Office of Court Administration, Judicial Institute, (White Plains, N.Y., Feb. 18, 2005) (invited testimony).

Family Law Through the Generations: A Panel for Law Students, The Association of the Bar of the City of New York, (N. Y., N. Y., Feb. 16, 2005 (panel moderator)

2004

Constructive Advocacy for Children of Divorce and Separation, Presentation to the Kids First Professional Education Series, (Freeport, Me., Nov. 19, 2004).

Doing More With Less to Help Families in Transition: Maintaining Our Core Values, Keynote Address to the Conference of the Florida Chapter of the Association of Family and Conciliation Courts, (Tampa, Fla., Nov. 12, 2004).

Do Family Law and Family Courts Meet the Needs of Twenty-First Century Parents and Children? Moderated Round Table Discussion sponsored by the Center for Children, Families and the Law of Hofstra University and the Association of Family and Conciliation Courts, Hofstra Law School, (Hempstead, N. Y., Nov. 5, 2004).

Expert Testimony by Child Custody Evaluators, Association of Family and Conciliation Courts, Sixth International Symposium on Child Custody Evaluations, (Nashville, Tenn., Oct. 14, 2004).

Top Ten Ideas for Reforming New York's Child Custody Dispute Resolution System, Interdisciplinary Forum on Law and Mental Health, New York County Lawyers Association (N. Y., N. Y., June, 2004).

Child Custody Reform in New York: Where Are We Now and Where Are We Going?, New York State Council on Divorce Mediation Conference, (Bear Mountain, N. Y., Apr. 30, 2004).

Dispute Resolution in Divorce and Family Disputes: Where Have We Been, Where Are We Now and Where Are We Going? American Bar Association, Section on Dispute Resolution Conference, (N.Y., N. Y., Apr. 16, 2004).

Chaired the first interdisciplinary conference on Family Law Education Reform co- sponsored by the Center for Children, Families and the Law, the Association of Family and Conciliation Courts, and the Johnson Foundation (Wingspread Conference Center, Racine, Wis., Mar. 3-5th, 2004).

2003

Top Ten Ideas for New York Child Custody Cases, Presentation to the Conference of the Association of Family and Conciliation Courts, New York Chapter, held at the Judicial Institute at Pace University School of Law, (White Plains, N. Y., Nov. 21, 2003)

Reinventing Court Services, Presentation to the Association of Family and Conciliation Courts, Midwest Regional Conference, (St. Louis, Mo., Nov. 13, 2003).

Parent Coordinators in High Conflict Child Custody Disputes, Committee on Matrimonial Law, Association of the Bar of the City of New York, (N. Y., N.Y., Nov. 4, 2003).

Why is the Cutting Edge West of the Hudson? Presentation to the Association of Judges of the Family Court of the State of New York, (Saratoga Springs, N. Y., Oct. 16, 2003).

The Role of the Judge in High Conflict Divorce Cases, presentation to Washburn University School of Law Seminar on High Conflict Divorce, (Topeka, Kan., Sept. 12, 2003).

Evaluation of Unified Family Courts, Presentation at the Forum on Family Court: Exemplary Practice sponsored by the National Council of Juvenile and Family Court Judges, (Kansas City, Kan., Sept. 15, 2003).

The American Law Institute's Approximation Presumption, Association of Family and Conciliation Courts Convention, (Ottawa, Ont., Can., June, 2003).

Children, Courts and Custody: Interdisciplinary Models for Divorcing Families, presentation to the Touro Law School Faculty Seminar, (Huntington, L. I., N. Y., May 19, 2003).

2002

The Role of Lawyers in Prevention as part of a panel presentation on Evidence Based Prevention Programs: Promoting Wellness in Children and Families of Separation and Divorce, Fifth International Congress on Parent Education and Access Programs, sponsored by the Association of Family and Conciliation Courts, (Tucson, Ariz., Nov. 2002)

Standards of Practice for Parent Education Programs, Fifth International Congress on Parent Education and Access Programs, sponsored by the Association of Family and Conciliation Courts, (Tucson, Ariz., Nov. 2002)

Multidisciplinary Services and the Judicial System, New England Bar Association, (Freeport, Me., Oct. 10, 2002)

The Future of the Family Court at a plenary session of the Association of Family and Conciliation Courts Convention, (Big Island, Haw., June 6, 2002)

Invited Testimony before the Connecticut Governor's Commission on Custody, Divorce and Children, (Meriden, Conn., May 8, 2002)

Mediating Under the New Model Standards and the Uniform Mediation Act-Confidentiality, Domestic Violence, and the New Duties of Mediators, American Bar Association Section of Dispute Resolution, Panel Presentation as part of All in the Family: A Symposium on Family, Family-Business and Intergenerational Disputes, (Phila., Pa., Feb. 1, 2002)

The Role of the Law School in Family Court Reform. Section on Family and Juvenile Law, American Association of Law Schools, (New Orleans, La., Jan. 4, 2002). (Part of panel presentation at AALS Convention on Court Reform, Family Law and the Role of Teaching and Scholarship).

2001

The Transformation of the Child Custody Court: From Fault finder to Conflict Manager to Differential Diagnosis, Second Annual Symposium on Family Law of the Circuit Court for Baltimore City, Family Division, (Baltimore, Md., Nov. 14, 2001)

Current Developments in Child Custody Law and Dispute Resolution Procedure to an International Visitor Project for Germany sponsored by the Office of International Visitors, Bureau of Educational and Cultural Affairs, United States Department of State (N. Y., N.Y. Oct. 19, 2001) (German delegation consisted of leading family court judges, government officials and academics).

Including the Voices of Children in Divorce and Separation Decisions, 25th Anniversary Conference of the Australian Family Court, (Sydney, N.S.W., Austl., July, 2001)

Pro Se Litigants and Divorce and Separation, 25th Anniversary Conference of the Australian Family Court, (Sydney, N.S.W, Austl., July, 2001)

The Model Standards of Practice for Family and Divorce Mediation, American Bar Association, Family Law Section (Phoenix, Ariz., Apr., 2001)

2000

Keynote Speaker, Florida Unified Family Court Summit (Tampa, Fla., Sept., 2000)

Keynote Speaker on Children of High Conflict Divorce Conference Sponsored by the Johnson Foundation and the American Bar Association Family Law Section at the Wingspread Conference Center (Racine, Wis., Sept., 2000)

Therapeutic Justice and Problem Solving Courts, National Association for Court Management (Atlanta, Ga., Aug., 2000)

Unified Family Courts, Association of Family and Conciliation Courts Conference (May, 2000)

1999

Development of Standards of Practice for Divorce and Family Mediation, Section of Dispute Resolution, American Bar Association (Apr., 1999).

Children of Embattled Divorce: The Ben J. Altheimer Symposium, University of Arkansas Law School (Little Rock, Ark., Sept., 1999).

Anglo-American Conference on the Role of the Family in Public Policy: The Ditchley Foundation, (Ditchley Park, U.K., Mar., 1999) (Ditchley sponsors leadership conferences to promote Anglo-American dialogue and understanding).

1990 -98

Reporter, American Bar Association Leadership Summit on Unified Family Courts (Phila., Pa, May 1998).

Presentations at Second World Congress on Family Law and the Rights of Children and Youth on three topics: law school programs for children, parent education programs and no-fault divorce (San Francisco, Cal., June 1997).

Unified Family Courts to Pennsylvania Bar Association Commission on Women in Profession Conference on "Fractured Families, Fractured Courts" (Hershey, PA. May 1997).

New York State Senate Committee on Families and Children on Parent Education and the P.E.A.C.E. Program (Albany, N. Y., Jan. 1996) (invited testimony).

Featured Presenter, First, Second and Third International Congress on Parent Education Programs, sponsored by the Association of Family and Conciliation Courts (Sept., 1994, Jan., 1996 and Sept., 1997).

National Conference of Juvenile and Family Court Judges on education programs for divorcing parents (July, 1994).

Participant in White House Conference with Dr. William Galston, Deputy Director of Domestic Policy for President Clinton, on family structure, divorce and separation and welfare reform (Dec. 1993).

American Academy of Matrimonial Lawyers on education programs for divorcing parents (Chicago, Ill. Nov., 1993).

Numerous presentations to groups of lawyers, judges and mental health professionals about P.E.A.C.E., including presentations in Buffalo, Rochester, Syracuse, Albany, Brooklyn, White Plains, Nassau County, New York County and Orange County (1991 - present).

The P.E.A.C.E. Program to Chief Judge's Committee to Examine the Conduct of Lawyers in Matrimonial Actions, (N. Y., N. Y. Feb. 1993) (invited testimony).

Judicial Review of Academic Grading Disputes, Stetson University Conference on Law and Higher Education, (St. Petersburg, Fla., Feb. 1992).

Divorce, Child Custody and the Law, American Academy of Psychoanalysis (N. Y., N. Y., Nov., 1990).

AIDS and Divorce and Divorce, Interspousal Torts and Res Judicata, New York Chapter, American Academy of Matrimonial Lawyers: (N.Y., N.Y., June, 1990).

Conferences Organized

Prior to founding the Center for Children, Families and the Law, I played a major role in organizing conferences in collaboration with many organizations over the years, including the Association of Family and Conciliation Courts and various sections of the American Bar Association, including:

- Co-organizer of Conference "From War to P.E.A.C.E.: New Directions for New York's Child Custody Disputes," jointly sponsored by Hofstra University School of Law, Hofstra University School of Education, the Office of Court Administration, the Interdisciplinary Forum on Mental Health and Family Law and the Association of the Bar of the City of New York (Apr., 1993).

- Co-organizer of Interdisciplinary Conference on "Children of Divorce: The Legal and Mental Health Professions' Response," jointly sponsored by Hofstra University School of Law, Hofstra University School of Education and the Interdisciplinary Forum on Mental Health and Family Law (Dec., 1991).

- Co-organizer of national conference on Children, Divorce and the Legal System, jointly sponsored by Columbia and NYU Law Schools (April, 1985) - papers published in a symposium issue of the *Columbia Journal of Law and Social Problems*, Vol. 19 (1985).

Media Appearances

With law students from Hofstra, I am featured teaching a class on a PBS Special *Children and Divorce* which was broadcast nationally in September 2006. I am also a commentator on that program. In addition, I have appeared on ABC, CNN, CNBC and the Osgood File radio program and have been extensively quoted in various national newspaper articles (including *Newsweek*, the *New York Times*, the *Wall Street Journal*, *Newsday*, and the *New York Daily News*.

Cases of Interest (1991 - Present)

-Mediator in complex international child custody dispute.

- Represented national licensor in dispute with licensees in Second Circuit appeal on jurisdictional reach of New York long-arm statute.

- Participated as counsel for the New York Civil Liberties Union in challenge to gubernatorial authority to replace district attorney opposed to death penalty.

- Serve as arbitrator for American Arbitration Association in matrimonial and child custody disputes. Chair of multi member arbitration panel in complex securities fraud/directors and officers insurance matter arbitration proceedings.

- Wrote brief amicus curie on behalf of Deans of New York area law schools in New York Court of Appeals case involving judicial review of law school grades.

-- Wrote brief seeking to impose sanctions on divorce lawyer who had sexual relationship with client.

LINDA SCHER
Mediator

3282 S.E. Hawthorne Boulevard
Portland, Oregon 97214
phone (503) 232-8550 fax (503) 232-8494
e-mail Linda@Schermediate.com

Services Offered: Mediation, Mediation Training, and Group Facilitation

Nature of Practice: Private mediation practice specializing in family matters

Type of Issues: Reconciliation, divorce, and post-divorce related matters, including custody, visitation, child support and property division; all other family related matters, including separation, parent-teen, unmarried couples, probate and adoption

Training/Experience

* University of Washington
  Juris Doctorate degree awarded 1986
* Pacific Family Mediation Institute
  Forty hour Family Mediation Training, 1986
* Resolutions Northwest (formerly Portland Neighborhood Mediation Center)
  Thirty hour Facilitation Training, 1988
  Volunteer mediator, facilitator and trainer since 1989
* Clackamas County Family Court Service
  Twelve month Internship Program, 1989-90
  Parent-Teen Mediator 1997-99
* Multnomah County Small Claims Court
  Forty-six hour Mediation and Mediation Trainer Training, 1991
  Volunteer mediator and supervisor 1991-96
* Tri-County Youth Services Consortium
  Eight hour Advanced Parent-Adolescent Mediation Training, 1992
  Volunteer mediator 1992-96
* Cooperative Adoption Mediation Project
  Twenty-four hour Open Adoption Mediation Training, 1993
  Cooperative Adoption Mediator (state contract) since 1993-2000

Professional Affiliations/Honors

* Member, Washington State Bar Association since 1986 (inactive)
* Member, Oregon Mediation Association since 1988
* Board of Directors/Officer, Oregon Mediation Association 1989-97
* Advanced Practitioner Member, Association for Conflict Resolution
  (formerly the Academy of Family Mediators) since 1990
* Associate Member, Oregon State Bar Family Law Section since 1996
* Recipient, OMA Outstanding Mediator Award, 1997
* Member, Statewide Family Law Advisory Committee since 1998
  Chair, Parenting Plan Revision/Outreach Workgroup 2002-10
  Co-Chair, Parental Involvement Workgroup since 2010

LINDA SCHER
SUMMARY BIOGRAPHY

Linda Scher has maintained a private practice in Portland since 1990, offering mediation services on all aspects of family issues. She received her J.D. from the University of Washington and is an inactive member of the Washington Bar Association. Linda has been a member of the State Family Law Advisory Committee since its inception and served on both the Basic and the Safety Focused Parenting Plan Workgroups. She is a Practitioner Member of the Family Section of the Association for Conflict Resolution and a member and Past President of the Oregon Mediation Association. Linda frequently serves as a presenter on current family mediation issues and is a regular mediation role play coach and assistant trainer for public and private training programs in Oregon.

MONICA ATIYEH WHITAKER
SUMMARY BIOGRAPHY

Senior Administrative Law Judge Monica Atiyeh Whitaker received her B.A., *cum laude,* in Business Economics from Willamette University in 2000. She also studied International Business and Trade as an undergraduate through an exchange program with the American University in Washington, D.C. While in Washington, D.C., she interned for a private immigration law firm.

Ms. Atiyeh Whitaker received her J.D. from Willamette University College of Law. During and after law school, she worked as a law clerk for the Marion County District Attorney's Family Support Division, where she worked on all aspects of child support cases. She joined the Office of Administrative Hearings in January 2004. She was assigned as a Lead Administrative Law Judge in April 2005 and again in January 2006. In October 2007, she became a Senior Administrative Law Judge.

Ms. Atiyeh Whitaker presides over a variety of cases, including State Agency, Board, and Commission hearings and child support matters. She is involved in the training of new judges in the child support program as well.

OREGON FAMILY COURTS

WHAT THE FUTURE HOLDS

By: Statewide Family Law Advisory Committee

Judge Maureen McKnight
Bill Howe, Vice Chair SFLAC
Linda Scher

2011 Family Law Annual Conference
October 14, 2011, Salishan, Oregon

What is the Statewide Family Law Advisory Committee (SFLAC)?

- Created by the 1997 legislature upon the sunset of the Oregon Task Force on Family Law (ORS 3.436
- Members appointed by Chief Justice
- To advise the Chief and State Court Administrator
- In carrying out their duties relating to family law
- AND “identifying family law issues that need to be addressed in the future.”

Chief Justice DeMuniz's Charge

- Serve as the principal entity to review or identify those family law issues that need to be addressed
- Make recommendations for major family law policy and legislative changes
- SFLAC Chair and Vice-Chair meet with Chief Justice at least annually

SFLAC MEMBERSHIP

- **CHAIR: The Honorable Paula Brownhill**
  Circuit Judge
  Clatsop County
- **VICE CHAIR: William J. Howe, III**
  Attorney,
  Gevurtz Menashe Larson & Howe P.C.
  Portland
- **James L. Adams**
  Trial Court Administrator
  Jackson County
- **Stephen Adams**
  Attorney and Mediator
  Union & Wallowa Counties
- **Jean Fogarty**
  Director
  Oregon Child Support Program
  Salem
- **Janice Garceau**
  Program Manager
  Multnomah County Family Court Services
- **Russell Lipetzky**
  Attorney
  Salem, Oregon
- **Lauren MacNeill**
  Director
  Family Court Services, Clackamas County
- **The Honorable Maureen McKnight**
  Circuit Judge
  Multnomah County
- **Ernest J. Mazorol, III**
  Trial Court Administrator
  Deschutes County
- **The Honorable Roxanne Osborne**
  Circuit Judge
  Klamath Falls
- **Rebecca Orf, Circuit Judge Ret.**
  Oregon Judicial Dept Staff Counsel
  Salem
- **The Honorable Keith Raines**
  Circuit Judge
  Washington County
- **Linda R. Scher**
  Family Mediator
  Portland
- **Robin Selig**
  Family Law Support Unit Attorney Oregon Law Center
  Portland
- **Chris Walls**
  Family Law Coordinator
  7th Judicial District

SFLAC Subcommittees

SFLAC subcommittees are appointed by the SFLAC Chair to research issues in specific areas involving family law and the courts and make proposals to SFLAC for recommendation to the Chief Justice and the State Court Administrator.

Current SFLAC Subcommittees

(Note: Some Subcommittee memberships have not been updated.)

- **Alternative Methods of Resolving Family Law Matters**
- **Family Law Conference**
- **Court/Child Support Agency Coordination**
- **Domestic Violence**
- **Forms Review**
- **Legislative**
- **Parenting Plan Outreach**
- **Self-Representation**

Alternative Methods of Resolving Family Law Matters Subcommittee

- Researches national and international models for resolving family law disputes outside of the traditional, adversarial legal system and the courts (e.g., the Australian family court system, parenting coordination, guardians ad litem, multidisciplinary team approaches) and develops recommendations for implementation in Oregon.
- ***Chair:*** *Lauren Mac Neill, Director, Family Court Services, Clackamas.* ***Members:*** *Ernie Mazorol Trial Court Administrator, Bend*

Family Law Conference Subcommittee

- Assists the State Court Administrator in developing, organizing and implementing the family law conference mandated by ORS 3.438 (when funds are available). Tasks include developing the conference theme, recommending and contacting national and local speakers, selecting a date and location for the conference, reviewing and selecting workshop proposals, and attending to various other conference details as needed.
- ***Chair:*** *Hon. Paula Brownhill, Clatsop.* ***Members:*** *Linda Scher, Family Mediator, Portland.*

Court/Child Support Agency Coordination Subcommittee

- Focuses on how Oregon's family law courts and the Oregon Child Support Program intersect, researches issues of inconsistency and concern between the courts and the program, and makes recommendations for appropriate rule, statutory, guideline and process changes as needed.
- ***Co-Chairs:*** *Hon. Maureen McKnight, Multnomah, and Jean Fogarty, Administrator, Child Support Program.* ***Members:*** *Donna Brann, Administrative Law Judge, Salem; Thomas Hedberg, Policy Manager, CSP, Salem; Lauren MacNeill, Director, Family Court Services, Clackamas; Ellen Mendoza, Legal Aid Services of Oregon, Oregon City; Concetta Schwesinger, DAs-Child Support Program Liaison, Salem; Kate Richardson, Policy Chief, Division of Child Support; William Castor, Field Operations Chief, Division of Child Support; Claudia Groberg, Asst. Attorney in Charge, DOJ Civil Recovery Section; Karen Colburn, Program Services Chief, Division of Child Support ; Carol Elkins, Division of Child Support, Subcommittee Administrator.*

Domestic Violence Subcommittee

- Serves as a resource to courts on domestic violence issues and legislation, provides input on FAPA and stalking procedures and forms, creates written materials for self-represented litigants and abuse victims, and advocates for improvements in protective orders.
- ***Chair:*** *Robin Selig, Family Law Support Unit Attorney, Oregon Law Center, Portland.* ***Members:*** *Hon. Dale R. Koch, Multnomah County; Hon. Carol Bispham, Linn County; Diana Fleming, DOJ Crime Victims Services Division, Salem; Trish Meyer, Community Partnership Manager, Saving Grace, Redmond; Cheryl O'Neill, Dept. of Human Services, Salem; Linda Scher, Family Mediator, Portland; Dan Norris, District Attorney, Malheur; Rebecca Orf, OSCA, Salem; Amber Frye, Legal Aid Services of Oregon, Lincoln City; Jamie Badeau, Coordinator of Task Force on Firearms and DV, Salem; Erin Greenawald, Attorney General's Office, Salem; Of Counsel: Hon. Maureen McKnight, Multnomah County.*

Forms Review Subcommittee

- Serves as a contact for the creation and update of statewide and eCourt family law forms for use in Oregon's courts. Advocates for and seeks solutions for on-going form revision and creation of new forms.
- ***Chair:*** *Rebecca Orf, Oregon Judicial Department.* ***Members:*** *Hon. Paula Brownhill, Clatsop County; Hon. Keith Raines, Washington County; Hon. Maureen McKnight, Multnomah County; Russell Lipetzky, Attorney, Salem.*

Legislative Subcommittee

- Makes recommendations for legislative concepts to improve family law and court processes, reviews and evaluates family law bills during legislative session, provides feedback to stakeholders on the effect of proposed legislation on the courts, and analyzes the fiscal impact of legislation on the OJD.
- ***Chair:*** *Russell Lipetzky, Attorney, Salem.* ***Members:*** *Ernie Mazorol, Trial Court Administrator, Deschutes, Bill Howe, Attorney, Portland.*

Parenting Plan Outreach Subcommittee

- Develops and revises parenting plan materials, including a basic introduction to parenting plans, safety screening questions, and the basic, medium- and long-distance and safety-focused parenting plan forms. Identifies and publishes resources for the development of family/child-focused parenting plans on the OJD Family Law website.
- ***Chair:*** *Linda Scher, Family Mediator, Portland.* ***Members:*** *Donna Austin, Family Mediator, Lane; Dave Hakanson, Bend, Mediator; Trina Klohe, Attorney, Hillsboro; Lauren Mac Neill, Director, Family Court Services, Clackamas; Collin McKean, Attorney, Portand; Michelle Prosser, Attorney, Hillsboro; Jeffrey Renshaw, Attorney, Portland; Nancy Ross-Bakker, Mediator, Portland; Judith Swinney, Parent Educator, Portland; Alison Taylor, Family Therapist, Director, OFI, Portland; Judy Taylor, Family Court Specialist, Astoria; Hon. Kirsten Thompson, Hillsboro; Ed Vien, Psychologist, Portland.*

- **Note: Linda Scher will discuss this subcommittee's work during her presentation**

Self-Representation Subcommittee

- Identifies needs and develops strategies that will improve both access to justice for self-represented parties and the courts' effective management of cases not handled by attorneys. Strives to establish guidelines and standards for OJD court staff and judges who work with self-represented persons.
- ***Co-Chairs:*** *Hon. Maureen McKnight, Multnomah, and Joel Overlund, St. Andrews Legal Clinic, Portland.* ***Members:*** *William Cooksey, Manager, Portland Branch, Division of Child Support; Beecher Ellison, Law Librarian/Paralegal, Josephine County; Sue Gerhardt, Family Law Coordinator, Washington County; Dave Hakanson, Bend, Mediator; Cathy Keenan, Legal Aid Services of Oregon, Portland; Catherine Petrecca, OSB Pro Bono &LRAP Coordinator, Lake Oswego; Kay Pulju, Communications Manager, Oregon State Bar, Lake Oswego.*

SFLAC WORK GROUPS

Groups of individuals with specialized expertise appointed by the Chair to develop specific programs. Currently there are three:

SFLAC Work Groups

- **Elderly Persons and Persons with Disabilities Abuse Prevention Act GAL Work Group**
- **Parental Involvement Work Group**
- **SFLAC Qualifications and Guidelines**

Elderly Persons and Persons with Disabilities Abuse Prevention Act GAL Work Group

- Will answer: (1) Should there be standardized minimum qualificatons for EPPDAPA GALs? (2) If so, should they be statutory, local rule or advisory? (3) If standards are appropriate, what should they be?
- ***Chair:*** *Hon. Keith Raines, Washington.* ***Members:*** *Hon. Rita Cobb, Washington County; Judy Giggi, DHS Senior Protect Services, Salem; Hon. Lauren Holland, Lane County; Bob Joondeph, Disability Rights Oregon, Portland; Stephen Owen, Clackamas County, attorney; Hon. Katherine Tennyson, Multnomah County, Rebecca Orf, Oregon Judicial Department; Mark Williams, Lane County Attorney*

Parental Involvement Work Group

- Brainstorms and develops ideas for improvement of services to parents and children around parental involvement (parenting time and decision-making).
- ***Co-Chairs:*** *Linda Scher, Family Mediator, Portland, and Ed Vien, Psychologist, Portland.* ***Members:*** *Donna Austin, Director, Family Court Services, Lane County; Adam Furchner, PhD, Therapist and Custody Evaluator, Portland; Janice Garceau, Director, Family Court Services, Multnomah County; Kelly Lemarr, Attorney, St. Andrew Legal Clinic, Washington County; Jane Parisi-Mosher, Therapist and Mediator, Yamhill County; Robin Selig, Support Unit Attorney, Oregon Law Center, Portland; Judith Swinney, Parent Educator, Portland; Judy Taylor, Family Court Specialist, Clatsop County; Hon. Diana Stuart, Multnomah County.*

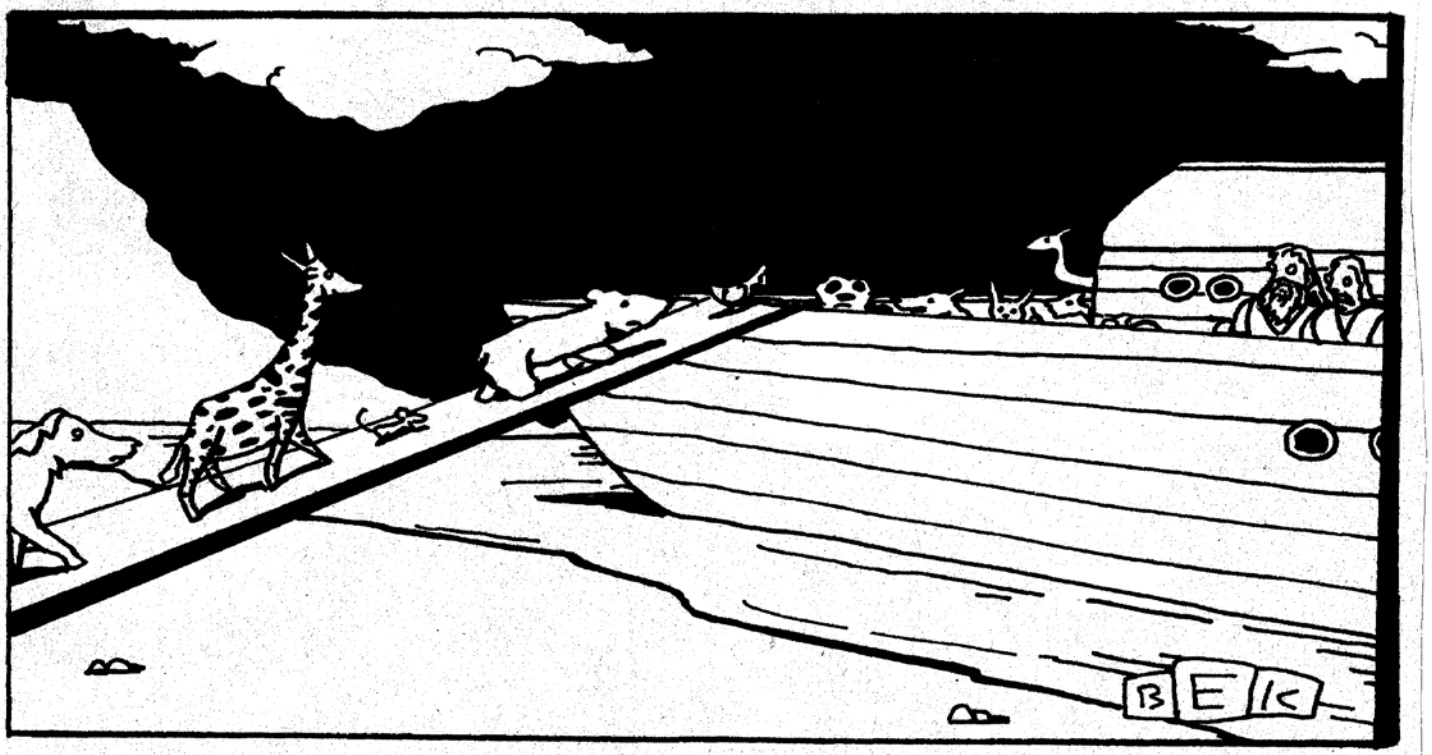
SFLAC Qualifications and Guidelines Work Group

- Establishes guidelines for qualification and appointment of parent coordinators, custody evaluators and supervised parenting time providers pursuant to ORS 107.425(3)(d).
- ***Chair:*** *Ed Vien, Psychologist, Portland.* ***Members:*** *Alison Taylor, Family Therapist, Director, OFI, Portland; Dave Hakanson, Bend, Mediator; Leah Baer, Supervised Parenting Time Provider, Portland;*

CHANGES THAT YOU NEED TO KNOW ABOUT !

- **Budget shortfall – <u>WILL change Courts!</u>**
  - HB 2710 funding changes – Chief distributes $7.4 million of state collected revenue to county programs.
  - Filing fee changes
  - Dockets will slide
  - More from Judge McKnight
- **eCourt** – Judge McKnight
- **Changing Court Rules –** Judge McKnight

Our Budget Plan



"I know we have to cut costs, but is bringing only one of each a good idea?"

More Changes (2)

- **Confidentiality/sealing court records** – huge privacy concerns with eCourt –Judge McKnight will discuss
- **Self-representeds - huge increase**
  - **Impact on Courts (Judge Mcknight)**
  - **Impact on legal practice (Andy Schepard)**
  - **Opportunities:**
    - **Market – many can afford lawyers**
    - **Unbundle legal services**
    - **Adapt practice to self-represents**
    - **Consider collaborative models**

Struggling to Keep Up

"Ignorance of the law is no excuse? — But I didn't even know *that!*"

More Changes (3)

- **New Parenting Plan Guide –** Linda Scher
  - Soon to be interactive
  - http://courts.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/parentingplan.page
- **Evaluation and Possible Changes to Parent Educaton Programs –** Linda Scher
- **Current Research and trends affecting family law practitioners –** Andy Schepard
  - See Family Court Review
  - Current research of Jennifer McIntosh, Marsha Kline-Pruett, Joan Kelley, Robert Emery, Jan Johnston and others

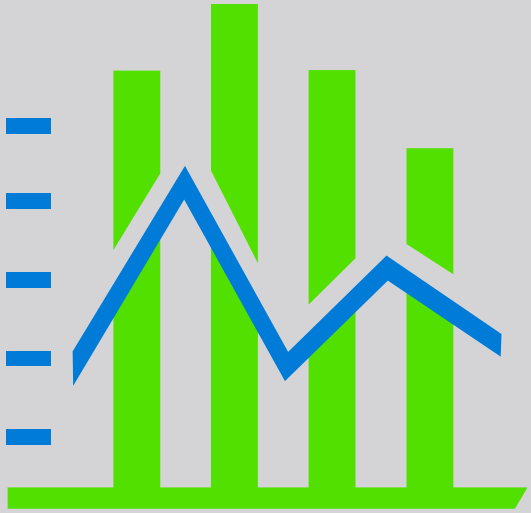
OREGON'S FAMILY COURTS

OSB Family Law Section –
October 2011

Hon. Maureen McKnight --
Multnomah County Circuit Court

Trends

- Limited Resources,
- Privacy Concerns,
- Technology Advances, and
- (*still*) Self-Represented Litigants

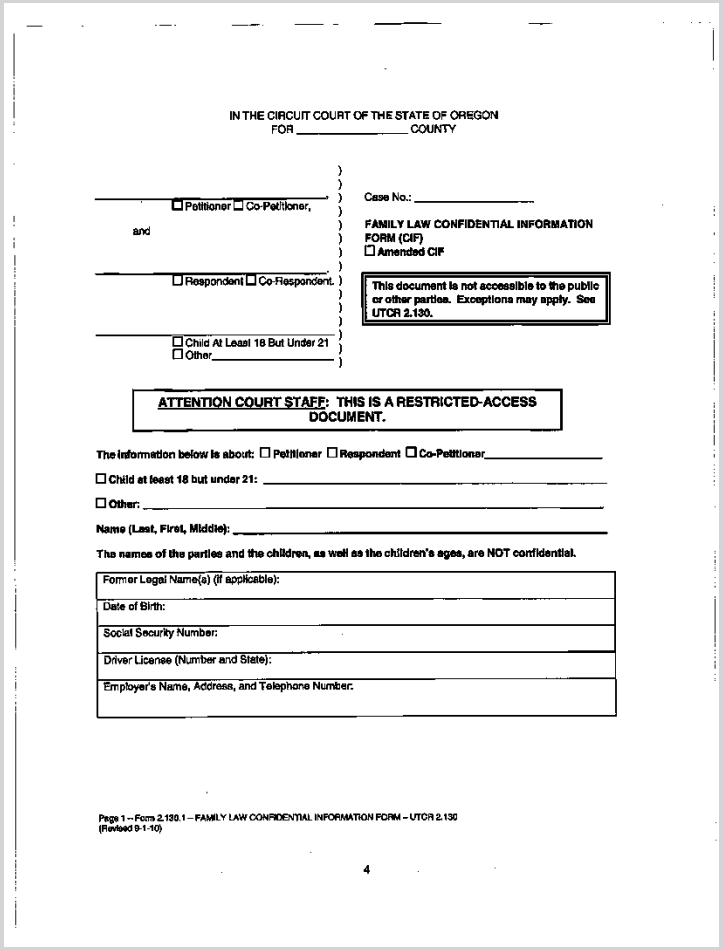


Limited Resources

- **Budget Reductions -- staff & services**
  - **Court cutbacks -- examples**
    - Loss of Family Counsel position at OSCA -- 2009
    - 20% of Judicial Assistant time in Multnomah County
    - Additional 15% cut for Trial Courts this biennium
    - Staff positions not filled
    - Close of courthouse facilitation programs in several counties
    - Result: Delays in processing & entry of documents
  - **Mediation & Conciliation Services**
    - Changed (destabilized?) funding method

Privacy Concerns:

A precursor to eCourt



IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR _____ COUNTY

☐ Petitioner ☐ Co-Petitioner,

and

☐ Respondent ☐ Co-Respondent.

☐ Child At Least 18 But Under 21
☐ Other_____

Case No.: _____

FAMILY LAW CONFIDENTIAL INFORMATION FORM (CIF)
☐ Amended CIF

This document is not accessible to the public or other parties. Exceptions may apply. See UTCR 2.130.

ATTENTION COURT STAFF: THIS IS A RESTRICTED-ACCESS DOCUMENT.

The information below is about: ☐ Petitioner ☐ Respondent ☐ Co-Petitioner_____

☐ Child at least 18 but under 21: _____

☐ Other: _____

Name (Last, First, Middle): _____

The names of the parties and the children, as well as the children's ages, are NOT confidential.

Former Legal Name(s) (if applicable):
Date of Birth:
Social Security Number:
Driver License (Number and State):
Employer's Name, Address, and Telephone Number:

Page 1 – Form 2.130.1 – FAMILY LAW CONFIDENTIAL INFORMATION FORM – UTCR 2.130
(Revised 9-1-10)

4

- **Confidential Information Form (CIF)**
  - Family law only
  - Defined information
    - DOBs
    - SSN
    - Driver's license
    - Former Legal Name(s)
    - Employer name/address/phone
    - *Not addresses*
- **vs. Segregated Info under UTCR 2.100**
- **vs. Redaction of already-filed info under UTCR 2.110**
- **vs. Truncation of info in Money Judgmt under ORS 18.042**

- **Interplay of CIF requirements**
  - **vs. Money Judgment requirements for truncated info**
  - **vs. Support Judgment requirements for required info**
  - **Notice to Attorneys on OJD Family Law / Forms web page**

- **Provide copy of CIF with copy of Child Support Judgment for DOJ**
  - **With eCourt, will be electronic exchange**

- **Privacy policies of court will change operationally with technology advances**

Sealing Files or Documents

Start from standpoint that sealing can't be done:

"*No court shall be secret*, but *justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.*"

- Article I, section 10, Oregon Constitution.

Appellate decisions uphold Open Courts

- Cannot ban press & public from juvenile delinquency courtroom.
  State ex rel Oregonian Publishing Company v. Deiz, 289 Or 277 (1980)
  - Not an individual right but a function of Govt
  - But court retains discretion to bar public or press to control overcrowding and prevent interference & obstruction w/admin of justice

- Cannot ban jury & public from summary hearing on whether witness can be compelled to testify. *Oregonian Publishing Co. v. O'Leary, 303 Or 297 (1987)*
  - Disclosure of after-the-fact- transcript not enough. Justice to be open *when administered*.

Cannot seal Stalking Protective Order file,

even when dismissing SPO and finding that Petitioner obtained order for improper purpose (child custody advantage)

- No express authority to seal in this situation
- No inherent power – appellant did not show how sealing court records in this situation is necessary to perform a judicial function

Cox v. M.A.L., 239 Or App 350 (2010)

(no constitutional issue raised)

BUT no state constitutional protection for a matter:

- **Traditionally closed to public** (maybe)
  - Jury deliberation & judicial conferences. Oregonian Publishing Co. v. O'Leary, 303 Or 297 (1987)
  - Jury Assembly lists Jury Service Resource Ctr v. Wallace Carson, 199 Or App 196, (2005), reversed on review on other grounds, *Paul J. DeMuniz vice Wallace Carson, Jr., 340 Or 423* (2006).

- **Or not an *"adjudication"***

  (= proceedings in court and before a Judge, immediately related to the presentation of evidence and argument)

  Jury Service Resource Ctr

So ….where does this leave court documents?

- **Public records**, subject to Public Records law. ORS chapter 192

- So, what exception to Public Records law do you have in asking judge to seal the particular family law document?

- Is there a *separate* statutory provision allowing sealing of the document?
  - ORS 109.767 (UCCJEA info where danger to health, safety, or liberty of party of child)
  - ORS 7.211 (Adoption)
  - ORCP 36C (Discovery records in specified sit'ns)
  - ORS 137.225 (Record of arrest & conviction in *criminal* case, after set-aside)

BUT is a document nevertheless a part of/directly related to "adjudication" and therefore open under state constitution? Not clear.

- **Pending mandamus:** ***Jack Doe v. Corp of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints.***
- ***Pending Appeal:*** ***Oregonian v. Waller***

Clear: better to tailor narrowly:
Protect documents (or even sections of documents), not entire files.

AND is document covered by presumptive 1st Am. public right to access to court proceedings and documents?

- **Include facts to support specific findings.**
- **See *Oregonian Publishing Co vs. U.S. District Court*, 920 F.2d 1462 (1990)**

Technology Advances

eCourt Vision & Plans

- *Person*-based information
- Security tiers re access to on-line information ★
- Electronic transfer of case information to partners
- E-filing of documents
- Online payments
- Interactive forms for SRLs
- 24/7 electronic access
- Data extraction
- Business continuity

Important to distinguish:

Public access at courthouse

vs.

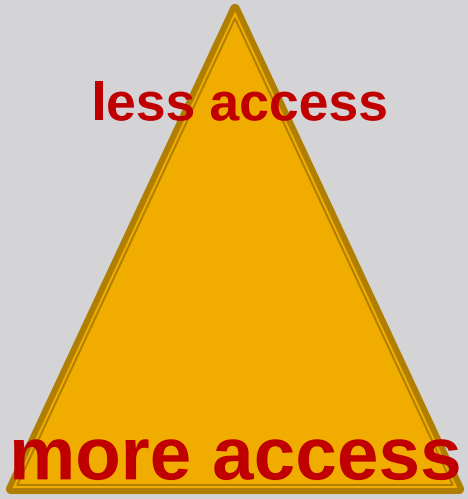
Remote electronic access online

Under discussion

Suggested Tiers of Security Access for OnLine Case Documents

Assumes redaction & segregation of protected info, the User's access to which depends on what tier categorizes the User

- Public
- Registered Public User
- OSB Member
- Party/Attorney of Record



- Other Authorized Users, for specific purpose
  - Child Support Program – judgments & worksheets
  - Sheriff for service & enforcement of FAPA order
  - Vital Stats info for disso's, adoptions, etc.

Suggested Guidelines for Remote Access of Documents in Family Law Cases

- **Registered Public User/+**

  Judgments & Orders

  Excludes: Redacted/segregated info
  Protection orders (VAWA ban)
  Parenting plans, Uniform Support Declaration,
  Ch Sprt worksheets, & Asset statements, CIFs

- **OSB Member/+**

  Above + Other Pleadings & Filings

  Excludes: Same as above

- **Party/Attorney of Record**

  All Documents (no* exclusions)

- *Excludes*: *only CIF of other party

All under discussion

Under discussion

- **Other Authorized Users --**

Registered User View + Identified Document(s) for specific purposes, formalized by agreement with OJD

Examples:

- **Child Support Program – child support worksheets & CIFs**
- **Sheriff -- protection orders for service & enforcement**
- **Division of Health -- Vital Stats info for disso's, adoptions, etc.**
- **Oregon State Police & Dept of Corrections -- Judgments of Conviction**

Fee Structure for Electronic Access at Courthouse

Anyone	No cost

Under discussion

Fee Structure for Remote Electronic Access

Registered Public User	Will be a cost. How much ?
OSB Member	Will be a cost. How much ?
Party/Attorney of Record	Will there be a cost? How much?
Authorized Users (govt agencies, etc .)	Cost dependent on situation.

Interactive Forms for SRLs

- **Web-based series of questions**
  - Follows logic trees, the answers to which populate forms that can be printed out or e-filed (think TurboTax©)
    - Cf. Fillable (Adobe) forms, where the user sees the actual forms and types content into specific fields
  - *Examples*: "Are you the person starting the case?" "Do you have children?"
- **Integral part of eCourt vision for SRLs.**
  - Reduced staff time + superior product + 24/7 access. $ to develop/maintain.
- **OJD has vendor – TurboCourt (aka Intresys)**
- **Timing of this project – on prioritized hold**

In the meantime,

<u>Current Interactive Forms Collaborations:</u>

1. **FAPA Petitions**
   - **City of Portland's Gateway DV Center + Multnomah County Circuit Court**
   - **VAWA funded**

2. **Parenting Plans**
   - **DOJ's Division of Child Support + SFLAC/OJD**
   - **IV-D funded (federal child support $, a specific stream earmarked for "Access & Visitation" issues)**

Self-Represented Litigants

- In addition to Interactive Forms, web-based materials will become more prominent

- Opportunities to develop material re local procedures & forms
- SFLAC pages on OJD website

Maureen.McKnight@ojd.state.or.us

PARENT EDUCATION: WHAT WORKS BEST?

A REPORT OF THE PARENTAL INVOLVEMENT WORKGROUP A SUBCOMMITTEE OF THE STATE FAMILY LAW ADVISORY COMMITTEE

March, 2011

COMMITTEE CHAIR PERSONS:

Linda Scher, Family Mediator and Facilitator, Portland

Dr. Ed Vien, Psy.D, Psychologist and Custody Evaluator, Portland

COMMITTEE MEMBERS:

Donna Austin, Director, Family Mediation Program, Lane County

Paul Edison-Lahm, Multnomah County Family Court Facilitator

Dr. Adam Furcher, PhD, Psychologist and Mediator, Portland

Janice Garceau, LCSW, Director, Family Court Services, Multnomah County

Kelly Lemarr, Attorney/Branch Manager, St. Andrew Legal Clinic, Washington County

Jane Parisi-Mosher, MA, LMFT, Therapist, Mediator, Parent Educator Yamhill County

Robin Selig, Attorney, Oregon Law Center, Portland

The Honorable Diana I. Stuart, Circuit Court Judge, Multnomah County

Judith Swinney, Parent Educator, Portland

I. RECOMMENDATIONS

The SFLAC Parental Involvement Workgroup makes the following recommendations:

- Parent education should be based on the core concepts of parent attunement to children's needs and fostering healthy, post-separation parenting relationships. Content and methods should draw from a broad research base and continue to evolve.
- The court and all other professionals involved in promoting or explaining the required parent education class should make clear that the class is specifically for divorcing/separating parents (vs. a general parenting skills class) and is designed to support them through this family change. Parents of minor children at all ages should be expected to complete the class. Non-parent custodians should be encouraged to enroll if the class is able to accommodate them.
- Materials available to parents regarding parent education classes (handouts, websites, recorded phone messages, etc.) should emphasize positive messages about the benefits of the class over the negative messages about the consequences for not completing the class.
- Classes should be offered regularly to attorneys and other professionals for continuing education credit so the professionals are encouraged to keep abreast of the current curriculum and can inform their clients of the benefits as well as requirements.
- Parents should be encouraged by the court, attorneys and mediators to complete the class early in the process, and if possible, even before a court matter is filed.
- Courts should consider offering positive incentives (i.e. discounted class fee) to parents who complete the class before or within thirty days of filing or being served.

- Courts should look for ways to remove systemic barriers by supporting a timely enrollment process, reasonable class sizes, language accommodations and clear rules for protecting personal safety.
- Parents should be afforded options to complete the class in an alternative way (online, video, in another county), if it taking it in person would pose a hardship in their own county. Parents should be encouraged to supplement the required class with additional educational resources to continue to expand their knowledge.

II. BACKGROUND AND DISCUSSION IN SUPPORT OF RECOMMENDATIONS

A. AN IMPORTANT OPPORTUNITY

A parent filing for divorce, separation or other matter resulting in a parenting plan may only have one contact with a professional during the process. Parent education is the one requirement that applies to all parents whether they are co-petitioners, self-represented, work with an attorney or mediator. The class may be our only opportunity to focus parents' attention on the needs of their children during and after the separation. The importance of this intervention cannot be underestimated if we want to give children and families the best possible chance to adjust and form healthy post-separation relationships. The broader community is beginning to appreciate the importance of parental behavior on infant attachment and early childhood development. Contemporary research confirms that the choices parents make at this vulnerable time are equally critical for adolescent developmental needs. Contrary to earlier assumptions about adolescent individuation and developmental competence, new research on adolescence reveals the brain does not reach adult maturity until age 25. This information spotlights the continued vulnerability of older adolescents to family stressors and parental conflict and underscores the critical role of ongoing parental involvement and support for older

adolescents. The court needs to support and encourage parents and parental figures for children of all ages to engage in the parent education classes, rather than allow parents of older children to opt out.

B. THE BASICS

ORS 3.425(b) provides a starting point for what a parent education class must include in its curriculum: (a) The emotional impact of a dissolution of marriage or a separation on children at different developmental stages; (b) Parenting during and after a dissolution of marriage or a separation; (c) Custody, parenting time and shared parenting plans; (d) The effect on children of parental conduct including, but not limited to, long distance parenting; and (e) Mediation and conflict resolution.

There is current research that gives further guidance on what educational factors can influence parents' post-separation behavior. A child-focused curriculum and the opportunity for parents to participate in the class appear to be important components, as well as the timing of the service. Several studies with skills-based parent education classes (as opposed to those that consist of mostly lecture or those that focus on inducing guilt in parents) have shown greater success.[1] Another study, using low re-litigation rates as a sign of positive outcome, concluded that parents who participated in parent education classes within three weeks of filing had the best outcomes.[2] Classes taken more than three months after filing did not affect re-litigation rates.

C. GETTING OUT THE MESSAGE

Some improvements in promoting the classes can be made simply by getting the word out to parents clearly and consistently from their first contacts with support people (court staff, counselors, mediators, attorneys, paralegals, teachers, church contacts, etc.). We can encourage this effort by educating support providers and providing reminders, handouts and computer links

so that parents can be easily informed about the class. Support providers should be regularly updated on the latest class content and registration process. Some jurisdictions have been successful in offering professionals the class or a condensed version of the class for continuing education credit. If this is not practical, encouraging support people to attend a regularly scheduled class can increase that person's awareness of the content of the class so he or she can promote it in an informed and enthusiastic way.

In addition, the tone of court materials can create a positive or a negative impression upon the parent receiving the information. Those that focus on the law and rules ("NOTICE: A certificate of completion is required to finalize your case") or on the negative impact of divorce ("Workshop Goal: To help parents become aware of how their conflict hurts their children and what they can do about it") may serve to discourage interest and motivation in the parent to attend the class. Materials that offer incentives and hope for parents ("Learn how divorce or separation impacts your children and what you can to do help them") appear to promote greater interest and motivation. Materials that include the notice about the completion requirement can also incorporate a message about the positive goals of the class. This increases the likelihood that parents will see the class as an opportunity for support. Titles such as "Co-Parenting: Children in Changing Families", "Kids First", "Focus on Children" may also encourage parents to participate

D. ENCOURAGING EARLY PARTICIPATION

In light of the research affirming the importance of early participation in parent education, we should continue and expand successful methods of bringing parents into classes earlier and try new techniques to see if early turnout can be increased further.

Individual judicial districts use various operational methods to encourage early participation. The "hurdle" approach requires proof of class completion within a certain time frame or before parents can access certain other services. For example: parents must register for class within a certain number of days after filing (14 for Washington and 15 for Clatsop); parents must complete class a certain number of days before a court appearance (30 days for Coos); parents must complete class prior to attending mediation (Columbia, Coos, Curry, Grant, Klamath, Polk, Tillamook, Washington). In addition, all counties require parents (at least the petitioner) to complete the class before a judgment that includes a parenting plan can be entered. A full index of Parent Education programs and the details for each county is available on the Oregon Judicial Department's Family Law Page and is attached as Appendix 1.

"Incentive" approaches reward early enrollment. Two counties offer an incentive if the class is taken within a certain number of days of filing or completion of service. Multnomah and Clackamas Counties both offer a $15 discount, in Multnomah if parents register within 60 days of filing and in Clackamas if parents register within 15 days of completed service. Yamhill County is in the process of implementing a discount for parents who attend before filing or within thirty days of filing. Another possible incentive that private attorneys and mediators could offer is a discount on their services for clients who complete the class within a certain number of days of their first meeting.

E. BARRIERS

Barriers, intentional and unintentional, may exist which discourage completion of a parent education class. The cost or time commitment may be a significant obstacle. By offering fee waivers, deferrals, and sliding scale fees, the cost burden can be eased. Where the population supports it, counties offer classes at various times so that missed work or inability to find child

care is less of an issue. Language barriers can make it difficult to learn about the class and enrollment process. Lack of translation resources can make it impossible to understand the information taught in class. Classes offered in Spanish or other languages give non English-speaking parents the best opportunity to gain a full understanding of the information.

All counties have some protocol for enrolling parents in separate classes when a restraining order has been filed. If professionals who interact with parents and the written materials about the class refer to broader safety concerns, any parent who has a safety concern can understand that he or she has the option to take the class separately or to ask that other safety measures be taken.

Where access is an issue for parents, due to geographical or physical barriers, safety concerns or other significant obstacles, alternatives to in-person participation may be offered. Of the 36 Oregon judicial districts, three-quarters allow for an online or video alternative to the in-person class: four accept specific online parent education classes, twenty-one others allow them on a case-by-case basis, and another two allow a video alternative. More research is needed to determine the effectiveness of in-person vs. online or video classes.

Other barriers may discourage early participation in particular. More densely populated counties may experience enrollment wait lists or lengthier response times, i.e. delays in returning calls. Less densely population counties may not have enough participants to cover the cost of offering classes frequently. A certificate may expire if the case is not filed within a certain time (6 months in Wallowa, for example). Some counties do not allow enrollment prior to filing (Polk and Curry, for example). In some cases the enrollment process may discourage pre-filing attendance, i.e. appearing to require case numbers and party designation on forms.

F. INVOLVING THE CHILDREN

Two judicial districts in Oregon (Washington and Coos) also offer a separate class for children. Both programs serve children ages 5-17, are voluntary, and do not charge for the children's class. Washington County offers the *Kids Turn* program, which consists of four 90-minute sessions held at the same time as their parents are attending class. Coos County created their own program, which consists of four 60-minute sessions held separately from the parent class. There are some online resources for children to use directly. One excellent example comes from Canada, www.familieschange.ca. This interactive and engaging site has one version for younger children and another for teens and preteens.

G. BASIC SKILLS AND HIGHER NEEDS

A few areas of parent education are particularly difficult for parents to access in Oregon. Some parents need basic parenting skills. Outside of Juvenile Dependency court, Family Courts have not had a lot of referral information for parents in this area. Multnomah County has developed a parenting skills resource list for their website. Similarly, for high conflict parents, resources have been limited. Parents in Multnomah and Clackamas counties can be ordered to take the Parenting Beyond Conflict class. Some decide to take it on their own. In either case parents must pay privately for the class. Other states have wrestled with how to serve high conflict parents. Missouri courts have teamed up with Missouri State University to offer the Common Ground program for high conflict parents and their children. The class provides an opportunity for parents and children to learn skills to improve their relationships using drama and art as tools for learning.

H. THE FUTURE

There is ample evidence that educational support helps parents look beyond simply containing conflict and setting a parenting time schedule. By focusing on the primacy of parent attunement to children's developmental and emotional needs, parents can move towards establishing and maintaining healthy post-separation parenting relationships. Zeroing in on the attitudes and behaviors that promote emotional repair and healthy restructuring can serve as a secure anchor for families in a sea of change. Seminal attachment research and recent ground-breaking developments in the neuroscience of human relationships offer insight into conditions which support children's long term well-being. The more we focus parents' attention on the essence of what will produce success and guide them to recognize their strengths, the more they will be able to develop a clear vision of their responsibilities and resources, and be empowered to act in their children's best interest.

III. ENDNOTES:

[1] Charles Martinez and Marion Forgatch, "Preventing Problems with Boy's Non-Compliance: Effects of a Parent Training Intervention for Divorcing Mothers," Journal of Consulting and Clinical Psychology, 69 (2001): 416-428; Mark A. Fine and John H. Harvey, eds., Handbook of Divorce and Relationship Dissolution (Mahwah, NJ: Lawrence Erlbaum Associates, 2006), 575-604; JoAnn Pedro-Carroll and AE Black, "The Children of Divorce Intervention Program: Preventative Outreach to Early Adolescents," (Final Report to the Gottscalk Mental Health Research Grant, University of Rochester, Center for Community Study, Rochester, New York, 1993); Sharlene Wolchik, et. al., "Six Year Follow-up of Preventative Interventions for Children of Divorce: A Randomized Controlled Trial," 288 (2002): 1874-1881; Gillard, L. & Seymor, F., "Children in the Middle: A Parent Education Programme for Separated Parents," (The University of Auckland, Department of Psychology, New Zealand, April, 2005).

[2] Jack Arbuthnot, Kevin M. Kramer, and Donald A. Gordon, "Patterns of Re-litigation Following Divorce Education," Association of Family and Conciliation Courts FAMILY COURT REVIEW, 35 No. 3 (1997): 269-279.

INDEX OF PARENT EDUCATION CLASSES IN OREGON

NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
BAKER	Included in filing fee	**Children in the Middle II** Baker County Circuit Court 1995 3rd St. #220 Baker City, OR 97814 541-523-6303 ext. 14 Contact: Shawnean Larson www.courts.oregon.gov/baker	No	2 hours 6:30 - 8:30 pm Once per month, usually the 1st Monday of each month.	No, but highly recommended to complete both	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis Contact: Shawnean Larson
BENTON * mandatory in contested custody/parenting time cases only	$45	**Co-Parenting: Children in Changing Families** Old Mill Center 4515 SW Country Club Dr. Corvallis, OR 97333 541-757-8068 Contact: Carol Alley www.oldmillcenter.org	No	3 hours 6:00 - 9 :00 pm Two Tuesdays each month * No childcare is provided. * Parents must attend separate seminars.	No, but must be completed no more than 45 days from receipt of the Court's notice requiring a parent to attend the class	Court accepts certificates of completion from other Oregon court-approved programs. Other certificates from programs not court approved, may be accepted with judge approval on a case-by-case basis.
CLACKAMAS	$70 (Reduced to $55 if registered before filing, or within 15 days after filing, in Clack. County)	**Parents Helping Children Cope with Family Change** Clackamas County Family Court Services 2051 Kaen Rd., Rm. 369 Oregon City, OR 97045 503-655-8415 Contact: Lauren MacNeill www.clackamas.us/fcs/parents.htm	No	3.5 hours Most Wednesdays 5:30 - 9:00 pm	No, but recommended	Certificates from other court-connected/court-approved classes are accepted. Certificates from non-court approved classes accepted only with Judge approval. Contact Judge Jones' judicial assistant at 503-655-8687.
CLATSOP	$45	**Children in the Middle** First Lutheran Church 725 33rd Street Astoria, OR 97103 503-325-6754 Contact: Hope House of LCSNW	No	3 hours 6:00 - 9:00 pm on the second Monday of the month	No, but recommended	Court accepts certificates of completion from other counties on a case-by-case basis Court allows online alternative (Children in the Middle) on a case-by-case basis

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
COLUMBIA	$40	**Parents Helping Children Cope with Divorce** at Head Start Building Rainier: 305 W. 3rd St Helens: 2750 Columbia Blvd. 503-556-3736 Contact: Julianne Cullen www.cat-team.org	No	3.5 hours Ranier: 6:00 - 9:30 pm on the 4th Thursday of the month St. Helens: 6:00 - 9:30 pm on the 2nd Thursday of the month, or 9:00 am - 12:00 pm on the 3rd Wednesday of the month * Preregistration required *	Yes	
COOS	Included in filing fee	**"MODE" - Mediation Orientation and Child Divorce Education** The Coastal Center 125 W. Central Ave. #290 Coos Bay, OR 541-267-2113 Contact: Jeanne Smith	Yes, for ages 7 to 17 (6 hour class at sep. time)	5 hours, Either 5:30 - 8:00 pm on Monday and Tuesday of the first full week of each month, OR 8:00 am - 1:00 pm on the 3rd Tuesday of each month.	Yes	Court accepts certificates of completion from other counties on a case-by-case basis Court allows online alternative (Children in the Middle) on a case-by-case basis
CROOK	$45	**Bridging the Gap: Seminar for Divorcing Parents** Dept. of Human Services 365 N.E. Court Street Prineville, OR 97741 541-447-7441 Contact: Laura Ness	No	3 hours 5:30 - 8:30 pm One Monday every other month (usually the first or second Monday of that month)	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs
CURRY	Included in filing fee	**"MODE" - Mediation Orientation and Child Divorce Education** Curry County Courthouse Gold Beach, OR 97444 541-267-2113 Contact: Jeanne Smith	No	4 hours 9:00 am - 1:00 pm on the third Thursday of each month	Yes	Court accepts certificates of completion from other counties on a case-by-case basis Court allows online alternative (Children in the Middle) on a case-by-case basis

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
DESCHUTES	$55	**Seminar for Divorcing Parents** Rosie Bareis Community Center 1010 NW 14th Street Bend, OR 97701 541-383-6789 Contact: Lamont Boileau www.copedeschutes.com	No	4 hours One Friday evening 5:00 pm - 9:00 pm, and One Saturday morning 9:00 am - 1:00 pm each month (check website for dates)	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis. See http://courts.oregon.gov/Deschutes for more info
DOUGLAS	$50 (in person) (reduced fee available) $39.95 (online)	**Parent Education for Divorced or Separated Parents** Valley View Counseling 1652 NW Hughwood Roseburg, OR 97471 541-673-3985 Contact: Brian/Gloria McCrae	No	3.5 hours, once every 3 weeks on an evening or Saturday morning **or Children in the Middle - On Line** http://divorce-education.com/online	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs
GILLIAM	$10	**Children in the Middle** "The Next Door" Hood River 541-387-6908 Contact: Chris Walls The Dalles/Wasco 541-506-2707 Contact: Kathy McLoughlin	No	2 hours 6:00 - 8:00 p.m. 2nd Tuesday of each month in Hood River 4th Thursday of each month in The Dalles * Classses offered in Spanish as needed	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
GRANT	$45	**Children in the Middle** Families First 401 S. Canyon Blvd. John Day, OR 97845 541-575-1438 Contact: Charlene Morris	No	Various times and days.	Yes.	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) Cost is not included in filing fee

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
HARNEY	Included in filing fee	**Children in the Middle** (check location with:) Harney County Circuit Court 450 N. Buena Vista #16 Burns, OR 97720 541-573-5207 Contact: Tammy Wheeler	No	2.5 hours (approx.) Second Wednesday of each month, starting at 9:30 a.m.	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) Cost is not included in filing fee
HOOD RIVER	$10	**Children in the Middle** "The Next Door" Hood River 541-387-6908 Contact: Chris Walls The Dalles/Wasco 541-506-2707 Contact: Kathy McLoughlin	No	2 hours 6:00 - 8:00 p.m. 2nd Tuesday of each month in Hood River 4th Thursday of each month in The Dalles * Classses offered in Spanish as needed	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
JACKSON * not required for defaults or modifications	$20	**Parent Education Class** Justice Bldg., 2nd Floor Jury Assembly Room 100 S. Oakdale Avenue Medford, OR 97501 541-776-7171 ext. 240 Contact: Mediation Secretary	No	3.5 or 4 hours 1:00 - 5:00 pm on the 2nd & 4th Monday of the month 4:30 - 8:00 pm on the first Wednesday of the month	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) Classes available in Spanish via video (contact mediation secretary)
JEFFERSON	$45	**Bridging the Gap: Seminar for Divorcing Parents** Best Care Treatment Services 125 SW C Street Madras, OR 97741 541-475-6575 Contact : Kathy Hurley	No	3 hours 5:30 - 8:30 pm One Monday every other month (usually the first or second Monday of that month)	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
JOSEPHINE	$45	**Children in the Middle** (call for location) 541-660-8110	No	3 hours, Tuesday 6:00 - 9:00 pm 3 hours, Wednesday 1:30 - 4:30 pm **or Children in the Middle - On Line** http://divorce-education.com/online		Court accepts certificates of completion from other Oregon court-approved programs
KLAMATH	Included in filing fee	**Children in the Middle** Community Meeting Room 133 N 4th Street Klamath Falls, OR 97601 541-850-5800 Contact: Leslie Lowe www.courts.oregon.gov/klamath	No	3 hours Offered one Tuesday each month at 6:00 - 9:00 pm and one Saturday each month at 9:00 am - 12:00 noon. (see website for calendar)	Generally, Yes (see website for details)	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
LAKE	Included in filing fee	**Children in the Middle** Lake County Courthouse 513 Center Street Lakeview, OR 97630 541-274-0525 Steven Torre 541-850-4747 Jeanette Rutherford www.courts.oregon.gov/Lake	No	3-4 hours Once each month by appointment.	Mediation is scheduled to begin the same week as the class is taken.	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
LANE * not required for modifications	$45 (applications for fee reduction available)	**Focus on Children** 151 W. 7th Avenue, Room 258 Eugene, OR 97401 541-682-2070 Contact: Donna Austin or Barry Nobel www.lanecounty.org/familymediation	No	3 1/2 hours 5 times per month (evenings and weekends) Register at Mediation Office: 151 W. 7th Avenue, Ste. 360 Eugene, OR 97401	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
LINCOLN	Included in filing fee	**Children Cope with Divorce** Visual Arts Center 777 NW Beach Drive Newport, OR 97365 541-265-4236 ext. 123 www.courts.oregon.gov/Lincoln/DivorceParenting.page		4 hours 5:30 - 9:30 pm on one Tuesday every other month 9:00 am - 1:00 pm on one Saturday every other month	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) Cost is not included in filing fee

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
LINN * mandatory in contested custody/parenting time cases only	Included in filing fee	**Parent Education Class** Linn County Courthouse 300 4th Avenue Albany, OR 97321 541-967-3952 Contact: Katy Sims	No	1 hour Offered twice per month, as part of mediation orientation	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis Cost is not included in filing fee
MALHEUR	$35	**Co-Parenting for Success** Lifeways 702 Sunset Drive Ontario, OR 97914 541-889-9169 ext. 213	No	2 hours 6:00 - 8:00 pm on the first Wednesday of each month	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs
MARION	$50	**Children Cope with Divorce** YWCA of Salem 1255 Broadway, NE #110 Salem, OR 97301 503-581-9922 www.ywcasalem.org/cope	No	4 hours 5:30 - 9:30 pm on alternate Thursdays 9:00 am - 1:00 pm on alternate Saturdays (see website for calendar)	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
MORROW	$35	**Parenting Class** Health & Human Services 216 S.E. 4th Street Pendleton, OR 97801 541-278-6290* Contact: Joan Howard, Mediation Coordinator * leave mailing address and phone # when calling	No	3 hours once per month in Pendleton and once per month in Hermiston	No, but recommended	Court accepts certificates of completion from other Oregon counties. Court allows online alternative (Children in the Middle). http://online.divorce-education.com Cost is not included in filing fee. Video alternative offered if incarcerated with a sentence of more than 3 months.
MULTNOMAH	$70 (Reduced to $55 if registered before filing, or within 60 days after filing, in Mult. County)	**Parents Helping Children Cope with Family Change** Multnomah County Courthouse, Room 350 1021 S.W. Fourth Avenue Portland, OR 97204 503-988-3037 www.co.multnomah.or.us/dcj/fcourt.shtml#pav	No	3 1/2 hours Tuesday eves & Saturday mornings at 1021 SW 4th, Room 130, and Thursday evenings at Juvenile Justice Complex 1401 NE 68th Ave, Rm 1201 Contact: Chris Christensen	No, but recommended	Certificates from other counties may be accepted with Judges' approval. Court allows online alternative (Children in the Middle) on a case-by-case basis.

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
POLK	Included in filing fee	**Parent Education Class** Polk County Courthouse 850 Main Street, Room 301 Dallas. OR 97338 503-623-1877 or 503-831-5966 Contact: Loy Thommen or Nicol Smith www.courts.oregon.gov/polk	No	4 hours 1:00 - 5:00 pm every other Tuesday in 1st Floor Conference Room of Courthouse	Yes	Court accepts certificates of completion from other Oregon court-approved programs
SHERMAN	$20	**Children in the Middle** "The Next Door" Hood River 541-387-6908 Contact: Chris Walls The Dalles/Wasco 541-506-2707 Contact: Kathy McLoughlin	No	2 hours 6:00 - 8:00 p.m. 2nd Tuesday of each month in Hood River 4th Thursday of each month in The Dalles * Classses offered in Spanish as needed	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
TILLAMOOK	$30	**Helping Children Cope with Divorce** Tillamook County Courthouse 201 Laurel Avenue Tillamook, OR 97141 503-842-2596 ext. 2222 Contact: Abbie Hurliman	No	3 hours 6:30 - 9:30 pm Once every five weeks on Monday evening	Yes	Court accepts certificates of completion from other Oregon court-approved programs
UMATILLA	$35	**Parenting Class** Health & Human Services 216 S.E. 4th Street Pendleton, OR 97801 541-278-6290* Contact: Joan Howard, Mediation Coordinator * leave mailing address and phone # when calling	No	3 hours once per month in Pendleton and once per month in Hermiston	No, but recommended	Court accepts certificates of completion from other Oregon counties. Court allows online alternative (Children in the Middle). http://online.divorce-education.com Cost is not included in filing fee. Video alternative offered if incarcerated with a sentence of more than 3 months.
UNION	Included in filing fee	**Helping Children Cope with Divorce** LaGrande Misener Conf Rm. 1001 4th Street LaGrande, OR 97850 541-962-9500 Contact: Gail Hinshaw x2228	No	3 hours 6:30 - 9:30 pm Offered every 4-6 weeks	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis Contact: Gail Hinshaw

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NAME OF COUNTY	FEE	PROGRAM NAME/ LOCATION/CONTACT	CHILD INCLUDED?	CLASS DETAILS	REQUIRED PRE-MED'N?	ALTERNATIVE WAYS TO MEET REQUIREMENT
WALLOWA	Included in filing fee	**Helping Children Succeed with Divorce** Prarie Creek Building 104 Litch Street Enterprise, OR 97828 541-426-4991 Contact: Jary Homan	No	3 hours 5:30 - 8:30 p.m. Offered every other month.	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis. Contact: Jary Homan
WASCO	$10	**Children in the Middle** "The Next Door" Hood River 541-387-6908 Contact: Chris Walls The Dalles/Wasco 541-506-2707 Contact: Kathy McLoughlin	No	2 hours 6:00 - 8:00 p.m. 2nd Tuesday of each month in Hood River 4th Thursday of each month in The Dalles * Classses offered in Spanish as needed	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
WASHINGTON	$230* * Participants may qualify for a reduced fee	**Kids' Turn** 447 SE Baseline Hillsboro, OR 97123 503-846-0665 Contact: Mandy Ramsey or Rachel Garcia www.youthcontact.org	Yes, for ages 5-16	4 consecutive weeks, Tu/W/Th 6:30-8:00 pm, or Sat. 10:00-11:30 am* Various locations in Beaverton, Hillsboro and Tualatin * class offered in Spanish	Must complete sessions 1 & 2 before med'n. (May attend orientation any time.)	Certificates of Completion from other counties will only be accepted with pre-approval from a judge (granted on a case-by-case basis)
WHEELER	$10	**Children in the Middle** "The Next Door" Hood River 541-387-6908 Contact: Chris Walls The Dalles/Wasco 541-506-2707 Contact: Kathy McLoughlin	No	2 hours 6:00 - 8:00 p.m. 2nd Tuesday of each month in Hood River 4th Thursday of each month in The Dalles * Classses offered in Spanish as needed	No, but recommended	Court accepts certificates of completion from other Oregon court-approved programs Court allows online alternative (Children in the Middle) on a case-by-case basis
YAMHILL	$40	**Kids First** Yamhill County Courthouse Basement 535 E. 5th Street McMinnville, OR 97128 503-434-7459 (Erin) 503-434-7530 x 4000 (info.) Contact: Erin McClane (also contact Erin for case-by-case questions)	No	2.5 hours 9:00 - 11:30 am on the 1st Friday of the month & 1:30 - 4:00 pm on the 3rd Friday of the month Class available in Spanish, call to schedule.	No, but strongly recommended	Certificates of Completion from other counties will only be accepted with pre-approval (granted on a case-by-case basis). Court allows online alternative (Children in the Middle) on a case-by-case basis. Parents are encouraged to us the online program to supplement the class.

CUSTODY AND PARENTING TIME:
SUMMARY OF CURRENT INFORMATION AND RESEARCH

A REPORT OF THE PARENTAL INVOLVEMENT WORKGROUP
A SUBCOMMITTEE OF THE STATE FAMILY LAW ADVISORY COMMITTEE

March, 2011

COMMITTEE CHAIR PERSONS:

Linda Scher, Family Mediator and Facilitator, Portland

Dr. Ed Vien, Psy.D, Psychologist and Custody Evaluator, Portland

COMMITTEE MEMBERS:

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Robin Selig, Attorney, Oregon Law Center, Portland

The Honorable Diana I. Stuart, Circuit Court Judge, Multnomah County

Judith Swinney, Parent Educator, Portland

I. INTRODUCTION

In March 2010, the Oregon State Family Law Advisory Committee (SFLAC) formed the Parental Involvement Workgroup to investigate local and national trends regarding best interest standards and practices for children of divorce, paying particular attention to the distinction between parenting schedules (referred to throughout as parenting time) and custody, referring to legal decision making authority as defined by ORS 107.169. A multi-disciplinary group was established for the purpose of reviewing developmental research, Family Court patterns, and legislative policies for the benefit of Oregon families. The task included examination of factors that support specific types of parenting time schedules and decision-making arrangements. Focused effort was given to identifying the developmental requirements of children, particularly those at risk for harm or maladjustment due to their family circumstances.

As societal customs and knowledge evolve, remaining abreast of relevant empirical evidence and contemporary standards when determining optimal post-divorce or separation arrangements is vital. A critique of existing presumptions and prevailing practices to promote child-centric policies and applications is integral to the process of creating viable custodial and parenting time arrangements.

II. PROTECTIVE FACTORS

Custody and parenting time decisions impact children and families for the rest of their lives, often influencing future inter-generational patterns. Given such potential life-altering effects, a thorough analysis of the complex and dynamic factors associated with the emotional well-being of children is an essential prerequisite to any legislative changes to Oregon's current custody laws.

To promote "best interest" provisions and positive post-separation adjustment, decisions guided by social science research that incorporate individual features of specific families are

optimal. Oregon's current legislative scheme, outlined in ORS 107.137, permits the application of new knowledge to the existing "best interest" standards.

Reliable empirical research has emerged over the past three decades that is highly relevant to the selection of parenting time schedules and legal authority arrangements.[1] Of particular importance and application are studies regarding resiliency and risk to children of divorce. The robust finding that the majority of children are resilient, adjusting to divorce and family changes without signs of acute distress or residual maladjustment, is easily overlooked.[2] Most parents finalize divorce and custody plans without protracted conflict and contentious litigation. This is a protective factor that is strongly correlated with a positive outcome for children.

Other protective factors that increase a child's resiliency and capacity to withstand the potential deleterious effects of divorce are related to both parental attributes and child characteristics. A key determinate to children's positive divorce adjustment is their parents' ability to shield them from adult conflict and controversy. At all ages and developmental stages, children benefit from parents who minimize discord while focusing on their offspring's needs and interests. Post-divorce adaptive functioning in children is enhanced by collaborative and cooperative parenting efforts. Parental communication and effective problem solving skills are strongly correlated with children's resiliency and adaptation.

Another highly influential protective factor is the quality of the parents' relationship with their child. Empathetic, nurturing, and sensitive parents, who cultivate close and secure emotional attachments with their offspring, foster their children's sense of stability and well-being.

Finally, children's pre-divorce functioning is an important factor associated with their capacity to cope with family changes and disruptions. Intelligent, sociable, and confident

children are more able to deflect the impact of parental break-up and maintain emotional stability and academic achievement. Furthermore, as children mature, their preference and satisfaction with their parenting time schedule is related to a positive divorce outcome. Additionally, the studies have suggested that continuity of parental involvement and positive affiliation with step-parents tends to mediate the possible adverse affects of divorce.

III. RISK FACTORS

Unfortunately, children of divorce are at greater risk for emotional and behavioral problems when compared to children of intact, two-parent households. Social science research has identified a long list of potential adverse reactions in children, ranging from acute anxiety and depressive syndromes to conduct disorders and school withdrawal.

Empirical studies consistently cite intra-familial dynamics and parental factors as heavily influencing a child's post-divorce adjustment. Exposure to domestic violence as well as protracted and intense parental conflict adversely impact a child's capacity to maintain a healthy developmental trajectory. Angry, uncooperative, and litigious parents are disruptive to a child's sense of security and stability, frequently creating loyalty binds and untenable triangulation for children. In some children, chronic social maladjustment and inability to sustain interpersonal attachments in adulthood is directly associated with the upheaval and distress of divorce they experienced as children.

Parental factors that impede a child's normative and functional development include: limited emotional availability, low psychological insight, immaturity, deficient knowledge, inadequate parenting skills, personality disorders, and significant mental illness. Poor maternal attachment and low paternal education also have been correlated with negative divorce outcomes. [3]

IV. FAVORABLE CONDITIONS FOR SHARED CUSTODY & PARENTING TIME

Research reviewed by this workgroup examined legal custody, shared parenting time arrangements, or a combination of both joint custody and shared care arrangements. Joint custody in the research and in this document refers to equally shared decision-making authority on the part of the parents. The majority of the research on shared care arrangements identified shared care as any arrangement in which the parenting time ratio constituted a 35/65 percent through a 50/50 percent distribution of parenting time.

In general, shared parenting time schedules are best suited for older children with collaborative parents who live in close proximity to each other, permitting environmental continuity.[4] Consistent school, social, and family relationships tend to promote confidence, ego-strength, and achievement. Parents best serve their children's interests when they practice child-centric decision-making and implement parenting time arrangements that reflect their children's developmental requirements. [5]

The literature offers significant insight into what works in shared custody and parenting time arrangements. Research has repeatedly shown when certain qualities or factors are present, joint custody and shared parenting arrangements can work well. Those factors include families in which:

- The parents are mature, insightful, and free of violence, substance abuse, or psychological disturbance;
- The parents are able to provide warm, sensitive, and responsive parenting;
- The parents are committed to shared parenting *and* enter into the arrangement voluntarily;
- The parents experience low levels of conflict and psychological acrimony between them;
- The fathers have a higher level of formal education;

- The mothers perceive that the child's maternal attachment is not being disrupted;
- Both parents trust that the child is reasonably safe in the other parent's care;
- Logistical factors such as geographical distance and facility of transitions do not constitute barriers.[6]

Parents who demonstrate the above traits routinely and successfully enter into joint custody and shared parenting time arrangements of their own accord. When parents do not enter into these arrangements voluntarily, ample evidence suggests that compelling such an arrangement leads to increased inter-parental conflict, potential disruption in attachment for young children, an increase in children's experience of loyalty conflicts, and a lack of stability in care arrangements over time. These factors all increase the risk of poor child adjustment after divorce. The literature consistently shows that forced joint custody and shared parenting time arrangements are not good for children.

V. CONTRA-INDICATIONS FOR SHARED CUSTODY AND PARENTING TIME

Children with pre-existing vulnerabilities, such as cognitive, emotional, or behavioral problems are particularly at risk for maladjustment. The stress and tumult in high conflict, post-divorce families tends to exacerbate the children's maladies, frequently requiring remedial services and/or intensive interventions to re-direct detrimental patterns. Shared parenting time schedules and joint custody are not suitable for volatile, hostile, and antagonistic parents. Children are harmed by repeated exposure to parental enmity, that occurs often in shared custody arrangements with chronically discordant parents. Children under age ten are particularly vulnerable because they have not yet developed the internal coping skills or external support systems that would help them navigate family conflict.

Relevant to this discussion are findings that delineate situations in which joint custody and care is problematic or contraindicated.[7] Where domestic violence, mental illness and high

levels of inter-parental conflict exist, joint custody and care result in poor outcomes for children and parents alike. These recurrent findings are reflected by the vast majority of jurisdictions in which special consideration is given to cases involving such factors and concerns.

Cumulative research finds additional circumstances that contribute to children and families faring poorly. Parenting plans for very young children, those under age four, pose unique challenges for parents. These challenges are exacerbated by the significant developmental and emotional needs of infants, toddlers, and preschoolers and the complexity of research on what are the best arrangements for children these ages. There are notable gaps and disparities in research results and professional opinions in certain domains.

Some research suggests that young children with responsive, skilled, and collaborative parents are able to adjust, girls more easily than boys, to overnight parenting on a consistent schedule with a non-residential parent with whom the child has a strong bond.[8] Other research evidence indicates that shared overnight care for infants and very young children has a negative impact on certain behavioral and emotional outcomes. In a 2010 longitudinal study, children in shared overnight care situations over time reportedly had greater levels of attachment distress, anxiety, and lower initiative. [9] Taken as such, an apparent lack of research congruence and differing expert opinions can present a confusing picture when parents and the courts endeavor to make decisions in a young child's best interest.

In other aspects the studies do offer very helpful guidance. Of special significance is that all of the research supports that whenever young children are involved, careful consideration must be given to attachment, infant temperament, level of inter-parental acrimony, consistency of contact, and the degree to which a parent has the requisite skills to support a child's transition between two households. Clearly, the critical developmental needs of young children, the complexity of the clinical findings, and the unique set of parental qualities and attributes

required to successfully share time with an infant, toddler or preschooler all reinforce the importance of making diligent and individualized decisions about care arrangements.

Another salient factor is the stability of shared care arrangements over time. Longitudinal studies indicate that the majority of families in these arrangements revert from shared care to primary care over a span of several years. The reasons cited were the expressed wishes of the children for a primary home or more time with a primary parent, fundamental logistical hurdles, and whether or not the families had entered into shared arrangements voluntarily.

Notably, the research finds that joint arrangements entered into willingly by parents were *two and a half times more stable* than their counterparts over time.[10] Of considerable concern are the findings that shared parenting time compelled by a legislative presumption appeared to perpetuate higher levels of inter-parental conflict that increased over time and appeared to increase children's reports of feeling caught in the middle.[11]

VI. PRESCRIPTIONS FOR TAILORED ARRANGEMENTS

In summary, social science research strongly supports the conclusion that legal custody and parenting time arrangements premised on the needs and attributes of a given family rather than statutory presumptions are most desirable.[12] Due to the complex and fluid nature of families, parental decision-making authority and residential schedules that represent the strengths and characteristics of a specific family unit best support positive outcomes for children. Further, arrangements based on the children's welfare and best interests, including their parents' ability to collaboratively address their developmental needs, are ideal. Although joint legal and physical custody is optimal for some families, it is unsuitable and detrimental to others.

A legislative solution requiring presumptive joint legal and physical custodial arrangements is not supported by empirical evidence. No other state has a presumption that

mandates joint physical custody reaching the level of shared care. Of the eight states (and District of Columbia) that do have presumptions regarding joint custody, none require more than a "significant" amount of parenting time for each parent, let alone equal time. Thus statutes in these states effectively create a presumption for joint *legal* custody, for which Oregon already has a statutory preference. Presumptions or preferences for joint legal custody are often easily overcome: for example, by a finding of domestic violence or by a finding that joint custody is not in the best interests of the child, or, as in Oregon, when parents do not agree. Moreover, there is no evidence that the absence of presumptions in the other forty-one states creates any kind of barrier to parents arriving at joint legal custody – nor is there any evidence that Oregon's existing statutory preference is insufficient for this purpose. Finally, there has been no legislative trend toward joint custody presumptions in the two decades since most were enacted in the 1970s and '80s. Instead most jurisdictions, including Oregon, avoid "one size fits all" presumptions and encourage custom-tailored arrangements that accurately correspond with a child's best interests.

VII. FUTURE TRENDS:

Oregon families are well served by our current statutory requirement for mediation and parent education. Most parents avoid the need for custody evaluation and litigation by working together, often using mediation to establish practical arrangements that benefit their children. These families recognize the importance of cooperative care of their children, mutually supporting their healthy development. This large group of parents accepts responsibility for their children's needs without the imposition of legal presumptions and directives.

Collaborative parental attitudes and efforts are promoted by parent education that affirms the value of working together in a flexible and conciliatory manner. Recent research highlights the benefits of a skills based curriculum to teach pragmatic co-parenting skills.[13] Early

participation in the class strengthens a positive outcome, prompting some states to consider requiring parents to simultaneously enroll when filing divorce petitions. At a minimum, parent education completed prior to mediation is suggested to enhance parental understanding and motivation for settlement agreements. Parent education that occurs as early in the dissolution process as possible, even prior to filing, is ideal.

As Oregon moves toward implementing online court access and procedures, parenting education materials will be readily available, along with interactive use of the SFLAC parenting plan guides. These will further enhance the parents' ability to create plans that fit their children's needs. Instead of reflecting contemporary knowledge and standards, statutory presumptions represent rigid adherence to a bygone era. Oregon families will greatly benefit from policies that encourage parents to use all available resources to create optimal custody and parenting time schedules that correspond with their unique circumstances.

VIII. ENDNOTES

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[1]. Jonathan Gould and David Martindale, *The Art and Science of Child Custody Evaluations* (New York: Guilford Press, 2007).

[2]. Eleanor Maccoby and Robert Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge: Harvard University Press, 1992).

[3]. Jennifer McIntosh et. al., "Child Focused and Child Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post-separation Adjustment," *Family Court Review* 14 (2008):105-124.

[4]. Jennifer McIntosh and Richard Chisolm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation," *Journal of Family Studies* 14 (2008): 37-52 McIntosh and Chisolm review two studies. The first follows 183 families participating in mediation over a four year period. The second discusses seventy-seven parents and 111 children involved in pre and post litigation interviews and assessment for a period of up to four years. It concludes the following:

1. There is a high risk to children's overall emotional well-being in families where there is shared care of children and parents demonstrate immaturity and low

levels of insight, parents demonstrate poor emotional availability to the child, there is ongoing inter-parental conflict there is ongoing psychological acrimony between the parents, and the child is perceived by one parent to be at risk in the care of the other parent.

2. Children who do not fare well are in shared care arrangements are those that are under age ten years, report being unhappy with shared care arrangements, and experience one or both of their parents as emotionally unavailable.

[5]. Rosemary McKinnon and Judith Wallerstein, "Joint Custody and the Preschool Child," *Conciliation Courts Review* 25 (1987): 39-47. The article reviews a longitudinal study of twenty-six children under the age of five years living in shared care arrangements. It concludes that overall there is no evidence that joint custody protects children from the negative impact of parental separation and divorce. Children who did well in joint custody arrangements had parents that were highly motivated to make joint custody work, had high levels of investment in the child, and were able to protect their children from exposure to conflict. In families where fathers had engaged in little primary care prior to separation, mothers struggled for years with fears about the quality of care young children were receiving Children younger than age three adapted better to the frequent transitions required by joint custody than children aged three to five years. The key to success for parents and children was the presence of committed, mature, sensitive parenting on the part of both parents.

[6]. Janet Johnston, "Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custodial Decision Making," *Family and Conciliation Courts Review* 33 (1995): 415-425. Johnston's article is a literature review of six separate studies exploring the impact of custodial arrangements on children. The reviewed studies include a combined total of 1,300 subjects representing children ages 3 to 16 years and their parents. The article identifies the following conclusions and recommendations.

1. Warm, responsive parenting is the best overall predictor of good outcomes for children and is therefore "the domain that should carry the most weight" in making decisions about residential arrangements post divorce/separation.
2. Children fare better in the care of parents free from psychological disturbance and substance abuse.
3. Children need arrangements that minimize exposure to inter-parental conflict.
4. High conflict parents have poor prognosis for cooperative parenting and make poor candidates for joint custodial decision making.
5. In families where there is high conflict or poor quality of parenting it is beneficial to children to maintain supportive relationships with other positive adults.
6. The presence of domestic violence should be addressed by:
    - parenting plans that address the safety of children and the victim,
    - sole custody for the non-offending parent, and
    - supervised parenting time when there is current violence or current threats

of violence.

See Also, Jennifer McIntosh, et. al., "Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes for Infants and Children: Collected Reports," *Australian Government Attorney General's Department Special Report*, (2010) 1-169. This article can be downloaded by going to the following website: www.ag.gov.au and adding the title to the above report or by simply typing the name of the report into an internet search engine, such as Goggle.

The authors summarize two studies commissioned by the Australian Government Attorney General's Department to explore outcomes of different post separation parenting arrangements on infants and children. Findings were drawn from a study that examined 131 high conflict families and a second study that randomly sampled the parents of 10,000 children between birth and five years of age. The authors cite the following findings:

1. Educational and employment resources, geographic proximity and inter-parental relationship factors such as mutual respect and flexibility made up the "component parts" of dyads in which shared care appeared to "work".
2. Nurturing relationships with each parent and a supportive relationship between the parents had a greater impact on children's overall mental well-being than any particular pattern of overnight arrangements.
3. However, rigid arrangements, especially those fueled by acrimony and poor cooperation, did have a negative impact on children's overall emotional well-being.
4. Children under age two years living with a non-residential parent only one or more nights per week were more irritable and anxious.
5. Children age two to three years spending five nights or more per fortnight with the other parent had lower levels of persistence in tasks, play and learning than their peers, higher levels of distress in their relationship with the primary caregiver, and overall problems consistent with attachment distress.
6. Negative effects for the four to five year age group were negligible and the authors hypothesize that this is due to the development of the capacity to anticipate contact with the other parent that developments by preschool age.

See Also, Jennifer McIntosh, "Legislating for Shared Parenting: Exploring Some Underlying Assumptions," *Family Court Review* 47 No. 3 (2009): 389-400. McIntosh's article reviews twenty years of research on the impact of shared care arrangements on children and families. The article also reports on the findings of a study of 141 families (276 children) involved in Child Involved and Child Inclusive Mediation. Participants were assessed at the one and four year mark post mediation. Based on the literature review and the study specifically

described in the article, McIntosh concludes the following:

1. Over the four year period, 65% of families reverted from shared cared to primary care arrangements.
2. Overall, shared care arrangements entered into voluntarily were 2.4 times more stable over time rather than shared care arrangements imposed by the courts.
3. Nearly two times as many children in shared care arrangements wanted to change their arrangements vs. children in primary care arrangements.
4. Approximately one third of the children in shared cared arrangements expressed the desire to see more of their mothers. One in ten expressed the desire to see more of their fathers.
5. Over the four year period of the study 45% of all the children in shared care arrangements expressed the desire to change their arrangements. All but one of those children wanted more time with their mothers.
6. Children in shared care arrangements reported sustained inter-parental conflict over the four year period, while children in traditional/primary care arrangements reported significant decline in inter-parental conflict.
7. Children in shared care arrangements were significantly more likely to report feeling caught in the middle than children in primary care arrangements.
8. Fathers in shared care arrangements ultimately reported higher levels of ongoing conflict over time than their counterparts in more traditional arrangements.
9. Mediation that included direct input from the child was significantly more likely to result in less than shared care arrangements, i.e. less that 65:35 parenting time ratio.

[7]. Joan Kelly and Robert Emery, "Children's Adjustment Following Divorce," *Family Relations* 52 (2003): 352-362.

[8]. Marsha Kline-Pruett, Rachel Ebling, and Glendessa Insabella, "Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate about Overnights," *Family Court Review* 1 (2004): 39-59.

[9]. Jennifer McIntosh, et. al., "Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes for Infants and Children," *Australian Government Attorney General's Department Special Report*, (2010) 1-169. This article can be downloaded by typing the name of it into the search box of www.ag.gov.au or by using an internet search engine, such as Google.

[10]. *Id.*

[11]. McIntosh, *Post-Separation Parenting Arrangements.*

[12]. Joan Kelly, 'Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce, " *Journal of the American Academy of Matrimonial Lawyers,* 19 (2005): 237-254.

[13]. Kevin Kramer et. al., . "Effects of Skilled-based vs. Information-based Divorce

Education Programs on Domestic Violence and Parental Communication'" *Family and Conciliation Courts Review,* 36 (1998) : 9-31.

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CUSTODY AND PARENTING TIME : SUMMARY OF CURRENT INFORMATION AND RESEARCH (REPORT OUTLINE)

BY THE PARENTAL INVOLVEMENT WORKGROUP
A SUBCOMMITTEE OF THE STATE FAMILY LAW ADVISORY COMMITTEE

I. Parental Involvement Workgroup.

- A Formed in May, 2010.
- B Multi-Disciplinary
- C Reviewed literature (statewide, national, international)
- D Particular focus on child development, risks and protective factors

II. Protective Factors

- A Some protective factors are:
  - 1 Resilience found in children generally
  - 2 Agreements reached by parents without conflict, contentious litigation
  - 3 Quality of parents' relationship with child
  - 4 Pre-divorce qualities of child
  - 5 Satisfaction with parenting arrangements (older children)
  - 6 Continuity of parental involvement
  - 7 Positive relationship with stepparents

III Risk Factors

- A Children of divorce face greater risk of emotional and behavioral problems (anxiety, depression, dropping out of school, etc.)
- B Risk factors can lead to social and relationship problems that carry into adulthood
- C Some risk factors are:
  - 1 Long-lasting and intense parental conflict
  - 2 Domestic violence
  - 3 Angry, uncooperative and litigation-prone parents
  - 4 Parents who are impaired (mentally, lack of knowledge and experience, lack of role models)
  - 5 Poor attachment to mothers
  - 6 Low education level of fathers

IV Conditions that Favor Shared Parenting Time and Shared Decision-Making

A Shared Decision-Making = joint custody

B Shared Parenting Time = each parent has at least 35% of time with child

C In general, shared parenting time schedules work better when:

1 Children are older

2 Parents live in close proximity

3 Social, school and family relationships are consistent

4 Parents focus on the child in their decision-making

5 Child's developmental requirements are taken into consideration

D In general, joint custody and shared parenting time work better when:

1 The parents are able to provide warm, sensitive, and responsive parenting

2 The parents are mature, insightful, and free of violence, substance abuse, or psychological disturbance

3 The parents are committed to shared parenting *and* enter into the arrangement voluntarily

4 The parents experience low levels of conflict and psychological acrimony between them

5 The fathers have a higher level of formal education

6 The mothers perceive that the child's maternal attachment is not being disrupted

7 Both parents trust that the child is reasonably safe in the other parent's care

8 Practical factors such as geographical distance and ease of transitions do not create barriers

E Voluntary vs. Compelled joint custody and shared parenting

1 Parents with the above traits routinely and successfully choose to share decision-making and parenting-time

2 Joint arrangements entered into voluntarily are 2.5 more stable over time vs. compelled orders

3 If compelled, high potential for

a increased conflict between parents

b disruption of parental attachment for young children

c loyalty conflicts (child caught between parents, needing to take sides)

d lack of stability in care arrangements

e All these increase the risk of poor adjustment of children

V. Cautionary Factors for Shared Parenting Time and Shared Decision-Making

A Studies suggest that shared decision-making and shared parenting time arrangements are **not** advisable if any of these qualities are present:

1 Pre-existing vulnerabilities of child (problems with thinking, behavior and dealing with emotions) – stress and changes in family can worsen these conditions, requiring a higher level of parental attention

2 Hostile, volatile, antagonistic parents

a Children are harmed by repeated exposure to these factors

b Children under 10 are especially vulnerable, because they have not developed internal coping skills or external support to help them deal

3 Domestic violence

4 Mental illness of parent

B Young children (under age 4) offer a special challenge to plan for

1 One study [fn 8 from paper] suggests that young children can do well with overnights with a non-residential parent if these conditions are present:

a Parents are responsive, skilled and collaborative

b Schedule is consistent

c Child has a strong bond with non-residential parent

2 Other studies [fn 9 from paper] suggest that young children in shared overnight care experienced greater levels of attachment distress, anxiety, and lower initiative

3 Factors to consider in forming shared parenting time plans for young children

a Does the child have a strong primary attachment (clinical term)?

b Does the young child's temperament support the arrangement?

c Is there a low level of negative energy between the parents?

d Has there been consistent contact of both parents with the young child?

e Do the parents have the required skills to support the child in moving between two households?

4 Important to make careful and unique decisions about the child, based on qualities of the child and the parents

VI Support for Creating Custom-Tailored Parenting Plans

A. Mediation

B. Parent Education

C. Interactive Parenting Plan Forms/Guide

How to Read a Tax Return

This paper is intended to serve as a checklist for an attorney when reviewing a client's tax return. Use it as such often enough and the practitioner will become so skilled and comfortable in what to look for that the checklist will be necessary only to remind the practitioner of what that "Ah-Ha!" discovery really means.

Hyperlinks have been inserted to facilitate obtaining forms and additional information.

I. Overview of the tax law

A. The magic of April 15

The IRS mission: Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

IRS.gov (*www.irs.gov*) was visited over 137 million times during last year's filing season, making it one of the most used websites in America. IRS.gov provides ready access to all IRS forms and publications, answers to frequently asked questions, and interactive features, such as "Where's My Refund," the Withholding Calculator, and the EITC Assistant eligibility tool.

B. What you should have in hand

1. W-2

Employers must file a W-2 for wages paid to each employee for whom income, social security, or Medicare tax was withheld or income tax would have been withheld if the employee had claimed no more than one withholding allowance or had not claimed exemption from withholding on form W-4.

Every employer engaged in a trade or business who pays remunerations for services performed by employees, including non-cash payments, must furnish a form W-2 to each employee even if the employee is related to the employer.

2. Forms 1098 and 1099

Form 1098 is a mortgage interest statement designed to report mortgage interest, including points paid, in the amount of $600 or more received by the form filer (usually a bank) during the year.

Form 1099 has various versions, each of which is designed to report a taxable event for which taxes were not withheld. See Appendix 1 for the various 1099 form numbers and the specific type of taxable event for which each is designed to report.

Of critical import in these economic times is form 1099-C. Creditors and debt collectors who agree to accept at least $600 less than the outstanding balance are required by law to file form 1099-C with the IRS and to send debtors notices as well. Taxpayers must report that "income" on their federal income tax returns.

> *“A lot of people don't realize they have any tax issues at all when they are going through this," says Alison Flores, a researcher at The Tax Institute at H&R Block, the nation's largest tax preparation service. "They say 'I'm really poor, I'm broke and I can't pay my bills. How can you consider this income?'" It is, according to the Internal Revenue Code. For example, a person with $10,000 in credit card debt who negotiates to pay only $6,000 of the balance would have $4,000 in forgiven debt income. That $4,000 must be reported as "other income" on Line 21 of the 1040 tax form. Depending on the amount of debt forgiven, the taxpayer's income level, deductions and other factors, the consumer could face a sizable tax bill come mid-April.*
>
> *Many consumers have no clue what the 1099-C forms are, and some may be trashing the cancellation of debt notices because the forms are sent by creditors or debt collectors with whom they thought they no longer had business. Still others are not filing the 1099-Cs with their federal income tax returns -- putting taxpayers at risk for IRS audits, penalties and fines. Consumer credit counselors and tax attorneys say few consumers are aware of the tax implications of settling to pay a lesser amount than they owe in credit card debt.*
>
> *Taxpayers may qualify for one of several exclusions that allow them to reduce taxable income from canceled debts. If the exclusions apply, they must file an IRS form 982 in addition to the 1099-C. “Theoretically, you have income if you don't meet one of the exceptions," says Eric L. Green, a tax attorney with the Convicer & Percy law firm in Glastonbury, Conn. The exclusions include debts discharged during bankruptcy and debts of consumers who are insolvent (meaning their liabilities exceed their assets)*

prior to the cancellation of debt. However, the exclusion applies only up to the amount by which consumers are insolvent. That means if $5,000 in debts were forgiven and liabilities exceeded assets by $2,000, then the $2,000 would be excluded as income. "The remaining $3,000 would be reported under other income," says H&R Block's Flores.

Homeowners who default on mortgage loans may also qualify for exclusion of their foreclosures under the Mortgage Forgiveness Debt Relief Act, which took effect Dec. 20, 2007, to help homeowners caught in the mortgage crisis. This provision applies to debt forgiven in calendar years 2007 through 2012.

Other exclusions are for certain farm debt, student loans and real property business debts. From *http://www.creditcards.com/credit-card-news/forgiven-debt-1099C-income-tax-3513.php*

3. Form 1040

The garden-variety tax form filed by taxpayers who meet the following qualifications:

If your filing status is . . .	**AND at the end of 2010 you were* . . .**	**THEN file a return if your gross income** was at least . . .**
Single	under 65 65 or older	$ 9,350 10,750
Married filing jointly***	Under 65 (both spouses) 65 or older (one spouse) 65 or older (both spouses)	$18,700 19,800 20,900
Married filing separately	any age	$ 3,650
Head of Household	under 65 65 or older	$ 12,050 13,450
Qualifying widow(er) with dependent child	under 65 65 or older	$ 15,050 16,150

*If you were born on January 1, 1946, you are considered to be age 65 at the end of 2010.
****Gross income** means all income you received in the form of money, goods, property, and services that is not exempt from tax, including any income from sources outside the United States or from the sale of your main home (even if you can exclude part or all of it). Do not include any social security benefits unless (a) you are married filing a separate return and you lived with your spouse at any time in 2010 or (b) one-half of your social security benefits plus your other gross income and any tax-exempt interest is more than $25,000 ($32,000 if married filing jointly). If (a) or (b) applies, see the instructions for lines 20a and 20b to figure the taxable part of social security benefits you must include in gross income.
***If you did not live with your spouse at the end of 2010 (or on the date your spouse died) and your gross income was at least $3,650, you must file a return regardless of your age.

4. Forms W-2, 1098 and 1099 should accompany the Form 1040.

II. What can you learn from a W-2?

A. Employers are required to check various boxes on the employee's form W-2 to alert the taxing authorities to certain financial information. It can be used to develop a discovery plan by the attorney representing the spouse.

B. See Appendix 2 for a sample form W-2.

C. An explanation of the various boxes on the form follows:

Box 1 - wages, tips, other compensation. The amount shown in this box before any payroll deductions includes the following:

1. Total wages and tips paid.
2. Total prizes and awards paid.
3. Certain business expense reimbursements.
4. Certain business expense reimbursements.
5. Taxable benefits for a §125 (cafeteria) plan.
6. Under certain circumstances the cost of accident and health insurance, group life insurance, and qualified long-term care services.
7. All other compensation including items such as certain scholarships and fellowship grants and moving expense payments.
8. This figure in Box 1 excludes elective deferrals except §501(c)(18) contributions.

Box 2 - federal income tax withheld. This shows the federal income tax withheld from the employee's wages for the year.

Box 3 - Social Security wages. This box shows the total wages paid (before payroll deductions) subject to an employee Social Security tax, but not including Social Security tips and allocated tips. This is the box where elected deferrals to certain qualified cash or deferred compensation plan appears, including Roth contributions made to a §401(k) plan under a §403(b) salary reduction agreement.

Box 10 - dependent care benefits. The total amount of dependent care benefits under §129 that are paid for or incurred by the employer for the benefit of the employee are to be reported in this box. If it is employer-provided or sponsored day care, the employer is to report the fair market value of these services. Also to be reported are amounts paid or incurred in a §125 cafeteria plan. The total reported should include any amount in excess of the exclusion.

Box 11 - non-qualified plans. The total amount of any distribution from a non-qualified plan or a non-governmental §457(b) plan is included here. The Social Security Administration needs this information to verify they have properly applied the Social Security earnings test and paid the correct amount of benefits. The amount is also included in Box 1.

Box 12 - code. Code letters in this box identify a variety of categories of income, including:

A- Uncollected Social Security or RRTA tax on tips;
B - Uncollected Medicare tax on tips;
C - Cost of group-term life insurance over $50,000;
D - Elective deferrals §401(k) cash or deferred arrangement;
E - Elective deferrals under a §403(b) salary reduction agreement;
F - Elective deferrals under a §408(k)(6) salary reduction SEP;
G - Elective deferrals and employer contributions to a §457(b) deferred compensation plan;
H - Elective deferrals to a §501(c)(18)(D) tax-exempt organization plan;
J - Non-taxable sick pay;
K - 20 percent excise tax on excess golden parachute payments;
L - Substantiated employee business expense reimbursements;
M - Uncollected Social Security tax or RRTA tax on cost of group term life insurance over $50,000 (for former employees);
N - Uncollected Medicare tax on cost of group term life insurance over $50,000 (for former employees);
P - Excludable moving expense reimbursements paid directly to employee;
Q - Military employee basic housing, subsistence, and combat zone compensation;
R - Employer contributions to an Archer MSA;
S - Employee salary reduction contributions under a §408(p) SIMPLE;

T - Adoption benefits;
V - Income from the exercise of non-statutory stock options.

Box 14 - other. This box can be used by the employer to provide information to the employee on various topics. These include the lease value of a vehicle provided to the employee, educational assistance payments, union dues, and health insurance premiums deducted from wages.

III. Form 1040 - personal income tax return – Appendix 3

A. Look at the first two pages as a summary of the information set forth in the overall tax return (the schedules and attachments). These pages are actually a roadmap of the body of the tax return because they tell the practitioner where to go next.

1. Line 3 tells you the taxpayer's filing status, such as single, married jointly with a spouse, or married filing separately.

A taxpayer who files married filing separately will usually pay tax at a higher rate on the taxpayer's income than if the taxpayer filed jointly. There are occasions in which a spouse (especially a dependent spouse) may not want to file a joint tax return, even if joint returns were filed in previous tax years. A taxpayer who files as married filing separately cannot take the standard deduction if the other spouse itemizes deductions, which is why the spouse's Social Security number must be listed on the tax return. In addition, parties that are married but file separately must *both either* itemize or take the standard deduction.

Practice Tip - Can one spouse force the other to file a joint return?
"Under IRC § 6013 and ORS 316.367, each spouse has the right to elect whether or not to file a joint return. As one court noted in refusing to require a wife to sign a joint federal return in order to receive marital property in a divorce proceeding:

> *"The propriety of considering tax matters in divorce proceedings, however, does not serve as a license for the trial court to compel a party to execute a joint tax return. The trial court is not at liberty to alter basic precepts of federal or of state tax law. The Internal Revenue Code speaks in terms of an election for joint income tax returns made by husbands and wives. * * **
>
> *" * * * * **

> *"To sanction the trial court's effectively ordering a spouse to cooperate in filing a joint return would nullify the right of election conferred upon married taxpayers by the Internal Revenue Code. Such a right is not inconsequential; its exercise affects potential criminal and/or civil liabilities of taxpayers." Leftwich v. Leftwich, 442 A.2d 139, 144 (D.C.App, 1982).*

"We "We adopt the same reasoning here. We conclude that the court cannot order the parties to file either a federal or a state joint tax return." Lewis and Lewis, 81 Or App 222,723 P2d 1079 (1986). Footnotes omitted.

2. You can see where the income comes from so you can determine what other tax reporting forms (schedules) you need to review. It reflects the taxpayer's employment status (self-employed versus W-2 employee), how the taxpayer is paid, the types of taxable income that exist, the existence of assets and investments and what contributions and withdrawals have been made to certain retirement plans.

   Schedule A - Used to itemize deductions including mortgage interest, taxes, medical expenses, gifts to charities, and other items.

   Schedule B - Used to report taxable interest income and dividends in excess of $400 each year.

   Schedule C - Used to report income or loss from self-employment income, including a closely held business or a professional practicing as a sole proprietor. There should be a Schedule C for each business the taxpayer has.

   Schedule D - Used to report gains or losses on the sale of capital assets.

   Schedule E - Used to report income or loss from rental real estate, royalties, partnerships, S Corporations, estates, and trusts.

   The attorney should take a close look at Schedule E because of the amount of depreciation and other deductions that may have been claimed. Look at the cash flow. Remember that many of the line numbers on the form K-1 do not end up on Schedule E.

   Schedule F - Used to report farm income and expenses.

   There are several more schedules, many of which are esoteric and not commonly applicable.

3. What schedules does the form 1040 indicate are attached?

   a. Are they really there? Are the worksheets there?

   b. Count the pages. The schedules are numbered with an attachment sequence in the top right hand corner as a way of designating the order in which they need to be attached to the tax return.

   c. Do you have the W-2 and 1099 tax reporting forms?

d. Is it the final version or a draft? Are you worried that it may not be the final version of the return or that it was "dummied up" for the divorce using TurboTax or another tax filing program? There are two easy and convenient options for getting copies of the taxpayer's federal tax return information from the IRS (tax return transcripts and tax account transcripts) by phone or by mail.

An exact copy of a previously filed and processed tax return and all attachments (including form W-2) can be obtained by the taxpayer by completing Form 4506 (PDF), *Request for Copy of Tax Return*, and mailing it to the address listed in the instructions, along with a $57.00 fee for each tax period requested.
http://www.irs.gov/pub/irs-pdf/f4506t.pdf

Copies are generally available for returns filed in the current and prior six years. Copies of jointly filed tax returns may be requested by either spouse and only one signature is required. Allow 60 calendar days to receive your copies.

You can also ask the taxpayer under oath whether the specific return was actually filed but if the taxpayer would go to the effort of faking a return, the taxpayer may also lie in response to the question. Yes, people to do lie under oath and yes, people do provide false income tax returns to the attorney during a divorce.

e. Electronic filing leaves you with little information.

IRS E-file is an electronic transmission system that sends tax returns to IRS processing centers. Taxpayers can E-file through their tax preparers, through commercial software that the taxpayer used to prepare individual returns or through Free File, the free tax software and E-file program offered through IRS.gov. Over 100 million individual taxpayers e-filed their 2010 income tax returns – more than 79 percent of taxpayers who used e-file to submit tax returns for the 2010 tax year. Congress originally set an 80 percent goal for the electronic filing of federal tax and information returns back in 1998 when the program started. E-file is now very close to that mark.

Congress passed legislation in 2009 requiring tax preparers who file 10 or more tax returns to use E-file. IRS E-file has been steadily growing, but the new law, which the IRS is phasing in, brought a surge of e-filed returns for the 2010 tax years. For 2011, tax preparers who filed 100 or more returns are required to E-file. For 2012, tax preparers who file 11 or more returns will be

required to E-file.

B. Who prepared the return?

1. Garbage in, garbage out.

2. Personally prepared - handwritten.

a. High likelihood of errors in the actual reporting.

b. Check the math.

3. TurboTax or other tax preparation programs.

4. Licensed tax preparer and Licensed Tax Consultant.

Oregon licenses two levels of tax preparers. According to the State of Oregon's licensing board website, the distinction is:

> A tax preparer license enables a person to lawfully prepare personal income tax returns in the State of Oregon. A tax preparer must work under the supervision of a Licensed Tax Consultant, a Certified Public Accountant, a Public Accountant, or an Attorney who prepares tax returns for their clients.
>
> A tax consultant license enables a person to lawfully prepare personal income tax returns in the State of Oregon for a fee as a self-employed or independent tax practitioner.

In my experience, these two types of licensees are much more likely to write things off as business expenses than would a Certified Public Accountant. For example, the taxpayer can claim the vehicle as being owned by the company if, and only if, the vehicle is in the company's name.

5. Certified Public Accountant

Certified Public Accountant (CPA) is the statutory title of qualified accountants in the United States who have passed the Uniform Certified Public Accountant Examination and have met additional state education and experience requirements for certification as a CPA.

C. Where does the money come from and where did it go?

Line 7 - **Wages, salaries, tips, etc.** A spouse's income is included on this line if a joint return is filed. The amount on this line should be the total of the amounts shown on the taxpayers' W-2 forms.

Line 8a - **Taxable interest.** The total interest paid to a taxpayer by banks, investments, etc., and should be supported by a form 1090-INT or form 1099-OID.

Line 8b - **Tax-exempt interest.** This comes from several possible sources, including municipal bonds, exempt interest dividends from mutual funds or another regulated investment company. This line does not include interest earned on an IRA or an Educational Savings Account.

Line 9a - **Ordinary dividends.** These dividends should be supported by a form 1099-DIV.

Schedule B must be attached if the amounts of dividends claimed are over $400.

Schedule B should provide a wealth of information, including a listing of what generated the income. See Appendix 5. An attorney reviewing this sample schedule should ask the following questions.

Do you have all of the Merrill Lynch statements?

Who is Freeport-McMoran Resources? Do you have the partnership documents? Was a K-1 form filed for the partnership?

Is there more money coming from Aunt Mildred's estate?

What is Gypum Company, Inc.? What kind of ownership interest does the taxpayer have in it?

Line 12 - **Business income.** Any entry must be supported by a Schedule C.

An entry on line 12 of form 1040 indicates that a least one party is operating as a sole proprietor of a business which realized a gain or loss.

This is the place where it is often easy for individuals with closely held businesses to pad expenses. Businesses often own equipment

which means that depreciation schedules will be attached. Where is the equipment now? There should be a schedule C for *each* business operated by the taxpayer.

Line 13 - **Capital gain or loss.** Any entry must be supported by a Schedule D.

An entry on line 13 indicates sales of investments or business related properties, or it could indicate the sale of the marital home.

Were there unusually large capital gains in the tax year? If so, what was sold and where did the proceeds go? Is there a capital loss carryover? If so, which spouse will claim it in the next tax year?

Keep in mind that a negative number on this line means that there was a loss on the transaction for income tax purposes but there was still money received, so where did that money go?

Be very wary of information on Schedule D on self-prepared (and many times professionally prepared) income tax returns. Check the underlying records to verify entries if there is any doubt *and* the dollar amounts in question justify the review.

Lines 15a and 15b - IRA distributions.

Is one of the parties 59½ years of age or older? Was this a taxable distribution subject to a penalty representing an early withdrawal? Did both spouses participate in the benefit of the withdrawal? Are you aware of each IRA that exists?

Line 17 - **Rental real estate, royalties, partnerships, S-Corporations, Trusts, etc**. Any entry must be supported by a Schedule E. This line indicates income from rental property, partnership, "S" corporation income, patent ownership, or an estate or trust. Look to the Schedule E to identify the type of activity and the expenses generated by those activities. For example, a loss reported here could actually be a result of depreciation rather than an actual loss from a sale.

Are there real estate holdings that might be or should be sold as part of the divorce to raise money or to create a situation in which the soon-to-be former spouse shares in the tax burden created by the sale? Is a reported loss actual or a result of depreciation? The income generated should be included in the computation of both

child and spousal support.

A negative number on this line should cause the practitioner to look at form 8582 for passive loss. The most common passive loss is from rental activities. The unused portion of a rental loss in one year can be used to offset rental income in another year.

Practice Tip - Suggested judgment language for the party that is awarded the rental house:

9.7 **Unused Suspended Passive Losses.** Husband is awarded and shall have the right to utilize any unused suspended passive income tax losses that the parties have incurred in prior tax years, claiming those losses against any future income tax obligation that he may owe.

Are the partnership or LLC schedule K-1 forms attached? Such forms will tell you what percentage of the business the taxpayer owns and information about its profitability. Additional inquiries can then be made.

Adjusted Gross Income - Lines 23 through 37. These are elective deductions which mean that the practitioner may want to add them the taxpayer's income for support calculation purposes. They are added back because these deductions create a benefit that is not taxed.

Line 26 - Moving Expenses. A claim for moving expenses may indicate that residential real estate was recently sold. Where did the money go? Perhaps this means there is now property owned in another state.

The proceeds from the sale of a residence will be received tax-free without having to reinvest the proceeds in another residence if the property has been the taxpayer's primary residence for the required number of years and the profit from the sale is less than $500,000.

Line 28 - Self-employed SEP, Simple or qualified plans. This indicates that a pension plan is in existence. Compare this entry with entries in prior tax years. Obtain plan documents and account statements because this line shows only the current contribution, not what the plan itself may be worth.

Line 30 - **Early Withdrawal Penalty.** Where did the money go and when was the withdrawal made? Did the client know about the withdrawal and if not, why not?

Line 32 - **IRA deductions.** This line reflects contributions made to an IRA. Look at form 8606 to determine whether the contribution was to a traditional IRA or Roth IRA. A Roth contribution should not appear on this line. Remember that a Roth IRA provides tax-free growth. While a normal investment account results in you being taxed twice, a Roth, just like a normal IRA, is taxed only the once. With a normal IRA account, your contributions are tax-deductible (depending on your income) whereas they are not with a Roth IRA. However, you pay taxes on earnings when you withdraw them with the traditional IRA, while earnings are tax-free with a Roth.

Do not assume that the fact there is no entry on this line means that there is no IRA; it simply means that no contribution was made to the IRA during the tax year. The practitioner should ask for any records reflecting an IRA account.

The taxpayer cannot make additional contributions to a roll-over IRA. This means that the practitioner needs to look for more than one IRA.

Line 33 - **Student loan interest deduction**. Did both parents sign on the student loan? Should payments made on the student loan be considered in the calculation of child support? Is it a liability the child will actually ultimately pay rather than the parent?

Line 48 - **Credit for child and dependent care expenses.** This information is helpful in determining whether qualifying daycare expenses should be included in the child support calculation at full value.

Line 56 - **Self-employment tax.** An entry on this line requires that the taxpayer complete Schedule SE. Review the schedule to determine all sources of self-employment income. It is important to note that income from one source of self-employment can be reduced by a loss in another.

Line 62 - **Estimated tax payments.** The best place to hide money is in plain sight. Look for over-withholding that was done in anticipation of a divorce. A wise practitioner will take advantage of overpayments for the client's sake, either by pointing it out to the court (judges do not like sneaks) or factoring the overpayment into the division

of assets. Compare the withholding for this tax year with prior tax years to see if there has been any significant, inexplicable increase.

Line 75 - Was the refund credited to the taxpayer's 2006 estimated tax?

IV. The schedules

A. **Schedule A** - Used to itemize deductions including mortgage interest, taxes, medical expenses, gifts to charities, and other items.

Line 5 - **State and local taxes paid.** Look at each state's tax return if there are multiple state filings as the practitioner may discover activity in another state that merits additional inquiry.

Line 10 - **Home mortgage interest paid.** The concern here is the secured creditline, not the closed-end first or second mortgage or home equity loan. Get the paperwork that reflects where the money went that was charged to the creditline.

Remember that where there is a loan, there is a loan application and the always required financial statement. This is of interest in the garden variety, mom-and-pop case because they often state a value (under oath) for their furniture, cars, etc. If it is a business loan, the practitioner will often find that business revenue and income projections are included in the loan paperwork. This documentation can be priceless.

Line 16 - **Gifts to Charity.** Is there a relationship between the donor and the donee that merits further investigation?

Line 23 - **Other expenses.** The practitioner absolutely must follow up on any entry on this line.

B. **Schedule B -** Used to report taxable interest income and dividends in excess of $400 for the year.

Examine the Schedule B because it shows the source of the interest income. The practitioner needs to make a discovery request if income or dividends are reported on lines 8 and 9 of the form 1040 but there is no schedule B attached to the return.

Only dividends and interest paid during the tax year appear on Schedule B. Taxpayers often have investments from which no interest or dividends were received in the tax year, which means the investment did not have to be listed but it still exists. That is why it is important to compare this schedule for several tax years.

Do not rely solely on the brokerage house year-end statement. Ask for the month-by-month statements so that account activity can be monitored, especially in the year prior to the divorce.

C. **Schedule C** - Used to report income or loss from self-employment income, including a closely held business or a professional practicing as a sole proprietor.

Look for shareholder loans, particularly with closely held corporations such as a doctor's office or any other small business. This is money loaned to the corporation that will be paid back to the shareholder or which the corporation loaned to the shareholder that either needs to be paid back or reported as income to the shareholder.

Line F - **Accounting method.** Is the taxpayer reporting on a cash basis or on an accrual basis? Have there been any changes in the accounting method since the prior tax year? If so, it can affect the bottom line when it really should not.

Line 1 - **Gross receipts.** Make sure to ask for the amount of accounts receivable because this is an area that can be easily manipulated simply by asking the customer to hold off in making payment for a few months.

Line 4 - **Cost of goods sold.** Look at additional depreciation charges that can be added back.

Part II - **Expenses generally.** Look for personal expenses disguised as business expenses that should be added back as personal income. The obvious examples include a taxpayer who writes off the divorce attorney's bill as a business expense, but there are many others. I even had a case in which the personal garbage collection fee was deducted as a business expense.

Line 9 - **Car expense.** How is this being calculated? Is there a mileage log? Is a charge being assessed to the taxpayer for the taxpayer's personal use of the vehicle? Is the company paying for all of the fuel and maintenance on the taxpayer's private vehicle? The practitioner should get the backup documents to verify which vehicle the work was performed on.

Line 15 - **Insurance.** Are the insurance premiums being deducted actually business versus personal insurance premiums?

Line 17 - **Legal and professional services.** Is any portion of the attorney and accountant's fees being claimed here attributable to the divorce rather than the business?

Line 24 - **Travel, meals and entertainment.** Do I really need to explain this one? Was it a meal for one or two (boy/girlfriend)?

Line 27 - **Other expenses.** The practitioner absolutely must follow up on any entry on this line if it is of any significant amount.

Part III - **Cost of goods sold.** A last in, first out (LIFO) method of accounting typically understates the value of the inventory.

V. Other considerations

A. **Family debts** - Parents often "loan" children money to purchase a first house or to meet other immediate needs, perhaps never expecting to get it back . . . that is until the divorce occurs and the house is sold, at which point that gift becomes a loan in the eyes of the parents and their child. Have the parents treated the money as a real loan, charging and reporting interest received? Have the children deducted interest paid? Was it claimed as a gift on the parents' tax return? See *Street and Street*, 90 Or App 466, 470, 753 P2d 424 (1988) (the "debts" due the husband's father were found to be gifts even though they were characterized as a debt, evidenced by a promissory note, and secured by a deed of trust against the parties' home).

B. **Property taxes paid** - Do the totals claimed on the return coincide with the property tax statements? Perhaps a parcel is missing in the divorce discovery process? Most often it is a small parcel that the client thought was encompassed in a larger one.

C. **Schedule F - farm return** - Get some help.

Where To Report Certain Items From 2010 Forms W-2, 1098, and 1099

IRS *e-file* takes the guesswork out of preparing your return. You may also be eligible to use Free File to file your federal income tax return. Visit *www.irs.gov/efile* for details.

If any federal income tax withheld is shown on these forms, include the tax withheld on Form 1040, line 61. If you itemize your deductions and any state or local income tax withheld is shown on these forms, include the tax withheld on Schedule A, line 5, unless you elect to deduct state and local general sales taxes.

Form	Item and Box in Which It Should Appear	Where To Report if Filing Form 1040
W-2	Wages, tips, other compensation (box 1)	Form 1040, line 7
	Allocated tips (box 8)	See *Wages, Salaries, Tips, etc.* on page 19
	Advance EIC payment (box 9)	Form 1040, line 59
	Dependent care benefits (box 10)	Form 2441, Part III
	Adoption benefits (box 12, code T)	Form 8839, line 18
	Employer contributions to an Archer MSA (box 12, code R)	Form 8853, line 1
	Employer contributions to a health savings account (box 12, code W)	Form 8889, line 9
W-2G	Gambling winnings (box 1)	Form 1040, line 21 (Schedule C or C-EZ for professional gamblers)
1098	Mortgage interest (box 1) Points (box 2)	Schedule A, line 10*
	Refund of overpaid interest (box 3)	Form 1040, line 21, but first see the instructions on Form 1098*
	Mortgage insurance premiums (box 4)	See the instructions for Schedule A, line 13*
1098-C	Contributions of motor vehicles, boats, and airplanes	Schedule A, line 17
1098-E	Student loan interest (box 1)	See the instructions for Form 1040, line 33, on page 32*
1098-T	Qualified tuition and related expenses (box 1)	See the instructions for Form 1040, line 34, on page 33, or Form 1040, line 49, on page 38, but first see the instructions on Form 1098-T*
1099-A	Acquisition or abandonment of secured property	See Pub. 4681
1099-B	Stocks, bonds, etc. (box 2)	See the instructions on Form 1099-B
	Bartering (box 3)	See Pub. 525
	Aggregate profit or (loss) (box 11)	Form 6781, line 1
1099-C	Canceled debt (box 2)	See Pub. 4681
1099-DIV	Total ordinary dividends (box 1a)	Form 1040, line 9a
	Qualified dividends (box 1b)	See the instructions for Form 1040, line 9b, on page 20
	Total capital gain distributions (box 2a)	Form 1040, line 13, or, if required, Schedule D, line 13
	Unrecaptured section 1250 gain (box 2b)	See the instructions for Schedule D, line 19, that begin on page D-8
	Section 1202 gain (box 2c)	See *Exclusion of Gain on Qualified Small Business (QSB) Stock* in the instructions for Schedule D on page D-4
	Collectibles (28%) gain (box 2d)	See the instructions for Schedule D, line 18, on page D-8
	Nondividend distributions (box 3)	See the instructions for Form 1040, line 9a, on page 20
	Investment expenses (box 5)	Schedule A, line 23
	Foreign tax paid (box 6)	Form 1040, line 47, or Schedule A, line 8. But first see the instructions for line 47 on page 38.
1099-G	Unemployment compensation (box 1)	See the instructions for Form 1040, line 19, on page 25.
	State or local income tax refunds, credits, or offsets (box 2)	See the instructions for Form 1040, line 10, that begin on page 21. If box 8 on Form 1099-G is checked, see the box 8 instructions.
	ATAA/RTAA payments (box 5)	Form 1040, line 21
	Taxable grants (box 6)	Form 1040, line 21*
	Agriculture payments (box 7)	See the Instructions for Schedule F or Pub. 225*
	Market gain (box 9)	See the Instructions for Schedule F

**If the item relates to an activity for which you are required to file Schedule C, C-EZ, E, or F or Form 4835, report the taxable or deductible amount allocable to the activity on that schedule or form instead.*

Form	Item and Box in Which It Should Appear	Where To Report if Filing Form 1040
1099-INT	Interest income (box 1)	See the instructions for Form 1040, line 8a, on page 20
	Early withdrawal penalty (box 2)	Form 1040, line 30
	Interest on U.S. savings bonds and Treasury obligations (box 3)	See the instructions for Form 1040, line 8a, on page 20
	Investment expenses (box 5)	Schedule A, line 23
	Foreign tax paid (box 6)	Form 1040, line 47, or Schedule A, line 8. But first see the instructions for line 47 on page 38.
	Tax-exempt interest (box 8)	Form 1040, line 8b
	Specified private activity bond interest (box 9)	Form 6251, line 12
1099-LTC	Long-term care and accelerated death benefits	See Pub. 525 and the Instructions for Form 8853
1099-MISC	Rents (box 1)	See the Instructions for Schedule E*
	Royalties (box 2)	Schedule E, line 4 (for timber, coal, and iron ore royalties, see Pub. 544)*
	Other income (box 3)	Form 1040, line 21*
	Nonemployee compensation (box 7)	Schedule C, C-EZ, or F. But if you were not self-employed, see the instructions on Form 1099-MISC.
	Excess golden parachute payments (box 13)	See the instructions for Form 1040, line 60, on page 43
	Other (boxes 5, 6, 8, 9, 10, and 15b)	See the instructions on Form 1099-MISC
1099-OID	Original issue discount (box 1) Other periodic interest (box 2)	See the instructions on Form 1099-OID
	Early withdrawal penalty (box 3)	Form 1040, line 30
	Original issue discount on U.S. Treasury obligations (box 6)	See the instructions on Form 1099-OID
	Investment expenses (box 7)	Schedule A, line 23
1099-PATR	Patronage dividends and other distributions from a cooperative (boxes 1, 2, 3, and 5)	Schedule C, C-EZ, or F or Form 4835, but first see the instructions on Form 1099-PATR
	Domestic production activities deduction (box 6)	Form 8903, line 23
	Credits (boxes 7, 8, and 10)	See the instructions on Form 1099-PATR
	Patron's AMT adjustment (box 9)	Form 6251, line 27
	Deduction for qualified refinery property (box 10)	Schedule C, C-EZ, or F
1099-Q	Qualified education program payments	See the instructions for Form 1040, line 21, on page 27
1099-R	Distributions from IRAs**	See the instructions for Form 1040, lines 15a and 15b, that begin on page 22
	Distributions from pensions, annuities, etc.	See the instructions for Form 1040, lines 16a and 16b, that begin on page 23
	Capital gain (box 3)	See the instructions on Form 1099-R
1099-S	Gross proceeds from real estate transactions (box 2)	Form 4797, Form 6252, or Schedule D. But if the property was your home, see the Instructions for Schedule D to find out if you must report the sale or exchange. Report an exchange of like-kind property on Form 8824 even if no gross proceeds are reported on Form 1099-S.
	Buyer's part of real estate tax (box 5)	See the instructions for Schedule A, line 6, on page A-5*
1099-SA	Distributions from health savings accounts (HSAs)	Form 8889, line 14a
	Distributions from MSAs***	Form 8853

**If the item relates to an activity for which you are required to file Schedule C, C-EZ, E, or F or Form 4835, report the taxable or deductible amount allocable to the activity on that schedule or form instead.*
***This includes distributions from Roth, SEP, and SIMPLE IRAs.*
****This includes distributions from Archer and Medicare Advantage MSAs.*

22222	a Employee's social security number	OMB No. 1545-0008	
b Employer identification number (EIN) 93-72654542		1 Wages, tips, other compensation 98630.73	2 Federal income tax withheld 21614.16
c Employer's name, address, and ZIP code Ajax Widgets 500 Main Street SSalem, OR 97301		3 Social security wages 90000.00	4 Social security tax withheld 5580.00
		5 Medicare wages and tips 104088.96	6 Medicare tax withheld 1509.29
		7 Social security tips	8 Allocated tips
d Control number 123-45-6789		9	10 Dependent care benefits
e Employee's first name and initial Last name Suff. Father A. Darling 100 Century Drive S. Salem, OR 97302 f Employee's address and ZIP code		11 Nonqualified plans	12a Code D 5458.23
		13 Statutory employee ☐ Retirement plan ☐ Third-party sick pay ☐	12b Code
		14 Other	12c Code
			12d Code

15 State	Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
OR	0987654-3	98630.73	8244.00			

Form **W-2** **Wage and Tax Statement** 2010 Department of the Treasury—Internal Revenue Service

Copy 1—For State, City, or Local Tax Department

Form **1040** Department of the Treasury—Internal Revenue Service **U.S. Individual Income Tax Return** **2010** (99) IRS Use Only—Do not write or staple in this space.

For the year Jan. 1–Dec. 31, 2010, or other tax year beginning , 2010, ending , 20 OMB No. 1545-0074

Name, Address, and SSN See separate instructions. PRINT CLEARLY

Your first name and initial: John Q.	Last name: Taxpayer
If a joint return, spouse's first name and initial: Sally M.	Last name: Taxpayer
Home address (number and street). If you have a P.O. box, see instructions.	Apt. no.
City, town or post office, state, and ZIP code. If you have a foreign address, see instructions.	

Your social security number

Spouse's social security number

▲ Make sure the SSN(s) above and on line 6c are correct.

Checking a box below will not change your tax or refund.

Presidential Election Campaign ► Check here if you, or your spouse if filing jointly, want $3 to go to this fund . . . . . ► ☑ You ☑ Spouse

Filing Status Check only one box.

1 ☐ Single
2 ☑ Married filing jointly (even if only one had income)
3 ☐ Married filing separately. Enter spouse's SSN above and full name here. ►
4 ☐ Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here. ►
5 ☐ Qualifying widow(er) with dependent child

Exemptions

6a ☐ **Yourself.** If someone can claim you as a dependent, **do not** check box 6a . . . . .
b ☐ **Spouse** . . . . . } **Boxes checked on 6a and 6b**

c **Dependents:**

(1) First name Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) ✓ if child under age 17 qualifying for child tax credit (see page 15)
John Taxpayer, Jr.		child	☑
Susie Taxpayer		child	☑
			☐
			☐

No. of children on 6c who:
• **lived with you**
• **did not live with you due to divorce or separation (see instructions)**

Dependents on 6c not entered above

If more than four dependents, see instructions and check here ► ☐

d Total number of exemptions claimed . . . . . **Add numbers on lines above ►** 4

Income

Attach Form(s) W-2 here. Also attach Forms W-2G and 1099-R if tax was withheld.

If you did not get a W-2, see page 20.

Enclose, but do not attach, any payment. Also, please use **Form 1040-V.**

7	Wages, salaries, tips, etc. Attach Form(s) W-2			7	31,694
8a	**Taxable** interest. Attach Schedule B if required			8a	4,321
b	**Tax-exempt** interest. **Do not** include on line 8a	8b	21,289		
9a	Ordinary dividends. Attach Schedule B if required			9a	16,231
b	Qualified dividends	9b			
10	Taxable refunds, credits, or offsets of state and local income taxes			10	
11	Alimony received			11	
12	Business income or (loss). Attach Schedule C or C-EZ			12	60,251
13	Capital gain or (loss). Attach Schedule D if required. If not required, check here ► ☐			13	(3,000)
14	Other gains or (losses). Attach Form 4797			14	
15a	IRA distributions 15a		b Taxable amount	15b	
16a	Pensions and annuities 16a		b Taxable amount	16b	
17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E			17	32,892
18	Farm income or (loss). Attach Schedule F			18	
19	Unemployment compensation			19	
20a	Social security benefits 20a		b Taxable amount	20b	
21	Other income. List type and amount			21	
22	Combine the amounts in the far right column for lines 7 through 21. This is your **total income** ►			22	142,389

Adjusted Gross Income

23	Educator expenses	23			
24	Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ	24			
25	Health savings account deduction. Attach Form 8889	25			
26	Moving expenses. Attach Form 3903	26			
27	One-half of self-employment tax. Attach Schedule SE	27	4,257		
28	Self-employed SEP, SIMPLE, and qualified plans	28			
29	Self-employed health insurance deduction	29	6,710		
30	Penalty on early withdrawal of savings	30			
31a	Alimony paid b Recipient's SSN ► 1 2 3 4 5 6 7 8 9	31a	12,000		
32	IRA deduction	32			
33	Student loan interest deduction	33			
34	Tuition and fees. Attach Form 8917	34			
35	Domestic production activities deduction. Attach Form 8903	35			
36	Add lines 23 through 31a and 32 through 35			36	22,967
37	Subtract line 36 from line 22. This is your **adjusted gross income** ►			37	119,422

Tax and Credits	38	Amount from line 37 (adjusted gross income)		38	119,422
	39a	Check if: ☐ **You** were born before January 2, 1946, ☐ Blind. ☐ **Spouse** was born before January 2, 1946, ☐ Blind. **Total boxes checked ▶ 39a**			
	b	If your spouse itemizes on a separate return or you were a dual-status alien, check here ▶ **39b** ☐			
	40	**Itemized deductions** (from Schedule A) **or** your **standard deduction** (see instructions)		40	30,945
	41	Subtract line 40 from line 38		41	88,477
	42	**Exemptions.** Multiply $3,650 by the number on line 6d		42	12,400
	43	**Taxable income.** Subtract line 42 from line 41. If line 42 is more than line 41, enter -0-		43	76,077
	44	**Tax** (see instructions). Check if any tax is from: **a** ☐ Form(s) 8814 **b** ☐ Form 4972		44	15,881
	45	**Alternative minimum tax** (see instructions). Attach Form 6251		45	272
	46	Add lines 44 and 45 ▶		46	16,153
	47	Foreign tax credit. Attach Form 1116 if required	47		
	48	Credit for child and dependent care expenses. Attach Form 2441	48		
	49	Education credits from Form 8863, line 23	49		
	50	Retirement savings contributions credit. Attach Form 8880	50		
	51	Child tax credit (see instructions)	51		
	52	Residential energy credits. Attach Form 5695	52		
	53	Other credits from Form: **a** ☐ 3800 **b** ☐ 8801 **c** ☐	53		
	54	Add lines 47 through 53. These are your **total credits**		54	
	55	Subtract line 54 from line 46. If line 54 is more than line 46, enter -0- ▶		55	16,153
Other Taxes	56	Self-employment tax. Attach Schedule SE		56	8,513
	57	Unreported social security and Medicare tax from Form: **a** ☐ 4137 **b** ☐ 8919		57	
	58	Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required		58	
	59	**a** ☐ Form(s) W-2, box 9 **b** ☐ Schedule H **c** ☐ Form 5405, line 16		59	
	60	Add lines 55 through 59. This is your **total tax** ▶		60	24,666
Payments	61	Federal income tax withheld from Forms W-2 and 1099	61	4,000	
	62	2010 estimated tax payments and amount applied from 2009 return	62	26,000	
	63	Making work pay credit. Attach Schedule M	63		
If you have a qualifying child, attach Schedule EIC.	64a	**Earned income credit (EIC)**	64a		
	b	Nontaxable combat pay election **64b**			
	65	Additional child tax credit. Attach Form 8812	65		
	66	American opportunity credit from Form 8863, line 14	66		
	67	First-time homebuyer credit from Form 5405, line 10	67		
	68	Amount paid with request for extension to file	68		
	69	Excess social security and tier 1 RRTA tax withheld	69		
	70	Credit for federal tax on fuels. Attach Form 4136	70		
	71	Credits from Form: **a** ☐ 2439 **b** ☐ 8839 **c** ☐ 8801 **d** ☐ 8885	71		
	72	Add lines 61, 62, 63, 64a, and 65 through 71. These are your **total payments** ▶		72	30,000
Refund	73	If line 72 is more than line 60, subtract line 60 from line 72. This is the amount you **overpaid**		73	5,334
	74a	Amount of line 73 you want **refunded to you.** If Form 8888 is attached, check here ▶ ☐		74a	2,000
Direct deposit? See instructions.	b	Routing number ▶ **c** Type: ☑ Checking ☐ Savings			
	d	Account number ▶			
	75	Amount of line 73 you want **applied to your 2011 estimated tax** ▶	75	3,334	
Amount You Owe	76	**Amount you owe.** Subtract line 72 from line 60. For details on how to pay, see instructions ▶		76	
	77	Estimated tax penalty (see instructions)	77		

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see instructions)? ☐ **Yes.** Complete below. ☐ **No**

Designee's name ▶ | Phone no. ▶ | Personal identification number (PIN) ▶

Sign Here

Joint return? See page 12. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature	Date	Your occupation	Daytime phone number
Spouse's signature. If a joint return, **both** must sign.	Date	Spouse's occupation	

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶			Firm's EIN ▶	
Firm's address ▶			Phone no.	

SCHEDULE A (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Itemized Deductions

▶ Attach to Form 1040. ▶ See Instructions for Schedule A (Form 1040).

OMB No. 1545-0074

2010

Attachment Sequence No. 07

Name(s) shown on Form 1040 | Your social security number

Medical and Dental Expenses		**Caution.** Do not include expenses reimbursed or paid by others.				
	1	Medical and dental expenses (see instructions)	1	6,182		
	2	Enter amount from Form 1040, line 38 | 2 | 83,022				
	3	Multiply line 2 by 7.5% (.075)	3	6,227		
	4	Subtract line 3 from line 1. If line 3 is more than line 1, enter -0-			4	0
Taxes You Paid	5	State and local **(check only one box):** a ☐ Income taxes, **or** b ☐ General sales taxes	5	3,676		
	6	Real estate taxes (see instructions)	6	10,816		
	7	New motor vehicle taxes from line 11 of the worksheet on back (for certain vehicles purchased in 2009). Skip this line if you checked box 5b	7			
	8	Other taxes. List type and amount ▶	8			
	9	Add lines 5 through 8			9	14,492
Interest You Paid	10	Home mortgage interest and points reported to you on Form 1098	10	9,119		
Note. Your mortgage interest deduction may be limited (see instructions).	11	Home mortgage interest not reported to you on Form 1098. If paid to the person from whom you bought the home, see instructions and show that person's name, identifying no., and address ▶	11	0		
	12	Points not reported to you on Form 1098. See instructions for special rules	12			
	13	Mortgage insurance premiums (see instructions)	13			
	14	Investment interest. Attach Form 4952 if required. (See instructions.)	14			
	15	Add lines 10 through 14			15	9,119
Gifts to Charity If you made a gift and got a benefit for it, see instructions.	16	Gifts by cash or check. If you made any gift of $250 or more, see instructions	16	7,334		
	17	Other than by cash or check. If any gift of $250 or more, see instructions. You **must** attach Form 8283 if over $500	17			
	18	Carryover from prior year	18			
	19	Add lines 16 through 18			19	7,334
Casualty and Theft Losses	20	Casualty or theft loss(es). Attach Form 4684. (See instructions.)			20	
Job Expenses and Certain Miscellaneous Deductions	21	Unreimbursed employee expenses—job travel, union dues, job education, etc. Attach Form 2106 or 2106-EZ if required. (See instructions.) ▶	21			
	22	Tax preparation fees	22	100		
	23	Other expenses—investment, safe deposit box, etc. List type and amount ▶	23	100		
	24	Add lines 21 through 23	24			
	25	Enter amount from Form 1040, line 38 | 25 | 119,422				
	26	Multiply line 25 by 2% (.02)	26	2,388		
	27	Subtract line 26 from line 24. If line 26 is more than line 24, enter -0-			27	0
Other Miscellaneous Deductions	28	Other—from list in instructions. List type and amount ▶			28	
Total Itemized Deductions	29	Add the amounts in the far right column for lines 4 through 28. Also, enter this amount on Form 1040, line 40			29	30,945
	30	If you elect to itemize deductions even though they are less than your standard deduction, check here ▶ ☐				

Worksheet for Line 7—New motor vehicle taxes

Before you begin: ✓ You cannot take this deduction if the amount on Form 1040, line 38, is equal to or greater than $135,000 ($260,000 if married filing jointly).

✓ See the instructions for line 7 on page A-6.

Use this worksheet to figure the amount to enter on line 7.

(Attach to Form 1040.)

1 Enter the state and local sales and excise taxes you paid in 2010 for the purchase of any new motor vehicle(s) **after** February 16, 2009, and **before** January 1, 2010 (see instructions) 1

2 Enter the purchase price **(before taxes)** of the new motor vehicle(s) 2

3 Is the amount on line 2 more than $49,500?

☐ **No.** Enter the amount from line 1.

☐ **Yes.** Figure the **portion** of the tax from line 1 that is attributable to the first $49,500 of the purchase price of each new motor vehicle and enter it here (see instructions). 3

4 Enter the amount from Form 1040, line 38 4

5 Enter the total of any—

• Amounts from Form 2555, lines 45 and 50; Form 2555-EZ, line 18; and Form 4563, line 15, and

• Exclusion of income from Puerto Rico . . . 5

6 Add lines 4 and 5 6

7 Enter $125,000 ($250,000 if married filing jointly) 7

8 Is the amount on line 6 more than the amount on line 7?

☐ **No.** Enter the amount from line 3 above on Schedule A, line 7. **Do not** complete the rest of this worksheet.

☐ **Yes.** Subtract line 7 from line 6 8

9 Divide the amount on line 8 by $10,000. Enter the result as a decimal (rounded to at least three places). If the result is 1.000 or more, enter 1.000 . . . . . 9 .

10 Multiply line 3 by line 9 10

11 **Deduction for new motor vehicle taxes.** Subtract line 10 from line 3. Enter the result here and on Schedule A, line 7 11

SCHEDULE B
(Form 1040A or 1040)

Department of the Treasury
Internal Revenue Service (99)

Interest and Ordinary Dividends

▶ **Attach to Form 1040A or 1040.** ▶ **See instructions on back.**

OMB No. 1545-0074

2010

Attachment Sequence No. **08**

Name(s) shown on return | **Your social security number**

Part I Interest

(See instructions on back and the instructions for Form 1040A, or Form 1040, line 8a.)

Note. If you received a Form 1099-INT, Form 1099-OID, or substitute statement from a brokerage firm, list the firm's name as the payer and enter the total interest shown on that form.

			Amount
1	List name of payer. If any interest is from a seller-financed mortgage and the buyer used the property as a personal residence, see instructions on back and list this interest first. Also, show that buyer's social security number and address ▶		
	West Coast Bank	1	4,321
2	Add the amounts on line 1	2	4,321
3	Excludable interest on series EE and I U.S. savings bonds issued after 1989. Attach Form 8815	3	
4	Subtract line 3 from line 2. Enter the result here and on Form 1040A, or Form 1040, line 8a ▶	4	4,321

Note. If line 4 is over $1,500, you must complete Part III.

Part II Ordinary Dividends

(See instructions on back and the instructions for Form 1040A, or Form 1040, line 9a.)

Note. If you received a Form 1099-DIV or substitute statement from a brokerage firm, list the firm's name as the payer and enter the ordinary dividends shown on that form.

			Amount
5	List name of payer ▶		
	Merrill Lynch	5	588
	AG Edwards		11,087
	Smith Barney		1,133
	Merrill Lynch		240
	Freeport-McMoran Resource Partners		3
	Terra Nitrogen		2,414
	Estate of Aunt Mildred		471
	Gypum Company, Inc.		295
6	Add the amounts on line 5. Enter the total here and on Form 1040A, or Form 1040, line 9a ▶	6	16,231

Note. If line 6 is over $1,500, you must complete Part III.

Part III Foreign Accounts and Trusts

(See instructions on back.)

You must complete this part if you **(a)** had over $1,500 of taxable interest or ordinary dividends; **(b)** had a foreign account; or **(c)** received a distribution from, or were a grantor of, or a transferor to, a foreign trust.

		Yes	No
7a	At any time during 2010, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See instructions on back for exceptions and filing requirements for Form TD F 90-22.1		
b	If "Yes," enter the name of the foreign country ▶		
8	During 2010, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back		

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

Use Schedule B if any of the following applies.

- You had over $1,500 of taxable interest or ordinary dividends.
- You received interest from a seller-financed mortgage and the buyer used the property as a personal residence.
- You have accrued interest from a bond.
- You are reporting original issue discount (OID) in an amount less than the amount shown on Form 1099-OID.
- You are reducing your interest income on a bond by the amount of amortizable bond premium.
- You are claiming the exclusion of interest from series EE or I U.S. savings bonds issued after 1989.
- You received interest or ordinary dividends as a nominee.
- You had a financial interest in, or signature authority (or other authority that is comparable to signature authority) over, a financial account in a foreign country or you received a distribution from, or were a grantor of, or transferor to, a foreign trust. Part III of the schedule has questions about foreign accounts and trusts.

Specific Instructions

TIP *You can list more than one payer on each entry space for lines 1 and 5, but be sure to clearly show the amount paid next to the payer's name. Add the separate amounts paid by the payers listed on an entry space and enter the total in the "Amount" column. If you still need more space, attach separate statements that are the same size as the printed schedule. Use the same format as lines 1 and 5, but show your totals on Schedule B. Be sure to put your name and social security number (SSN) on the statements and attach them at the end of your return.*

Part I. Interest

Line 1. Report on line 1 all of your taxable interest. Taxable interest should be shown on your Forms 1099-INT, Forms 1099-OID, or substitute statements. Include interest from series EE, H, HH, and I U.S. savings bonds. List each payer's name and show the amount. Do not report on this line any tax-exempt interest from box 8 or box 9 of Form 1099-INT. Instead, report the amount from box 8 on line 8b of Form 1040A or 1040. If an amount is shown in box 9 of Form 1099-INT, you generally must report it on line 12 of Form 6251. See the Instructions for Form 6251 for more details.

Seller-financed mortgages. If you sold your home or other property and the buyer used the property as a personal residence, list first any interest the buyer paid you on a mortgage or other form of seller financing. Be sure to show the buyer's name, address, and SSN. You must also let the buyer know your SSN. If you do not show the buyer's name, address, and SSN, or let the buyer know your SSN, you may have to pay a $50 penalty.

Nominees. If you received a Form 1099-INT that includes interest you received as a nominee (that is, in your name, but the interest actually belongs to someone else), report the total on line 1. Do this even if you later distributed some or all of this income to others. Under your last entry on line 1, put a subtotal of all interest listed on line 1. Below this subtotal, enter "Nominee Distribution" and show the total interest you received as a nominee. Subtract this amount from the subtotal and enter the result on line 2.

TIP *If you received interest as a nominee, you must give the actual owner a Form 1099-INT unless the owner is your spouse. You must also file a Form 1096 and a Form 1099-INT with the IRS. For more details, see the* General Instructions for Certain Information Returns (Forms 1098, 1099, 3921, 3922, 5498, and W-2G) *and the* Instructions for Forms 1099-INT and 1099-OID.

Accrued interest. When you buy bonds between interest payment dates and pay accrued interest to the seller, this interest is taxable to the seller. If you received a Form 1099 for interest as a purchaser of a bond with accrued interest, follow the rules earlier under *Nominees* to see how to report the accrued interest. But identify the amount to be subtracted as "Accrued Interest."

Original issue discount (OID). If you are reporting OID in an amount less than the amount shown on Form 1099-OID, follow the rules earlier under *Nominees* to see how to report the OID. But identify the amount to be subtracted as "OID Adjustment."

Amortizable bond premium. If you are reducing your interest income on a bond by the amount of amortizable bond premium, follow the rules earlier under *Nominees* to see how to report the interest. But identify the amount to be subtracted as "ABP Adjustment."

Line 3. If, during 2010, you cashed series EE or I U.S. savings bonds issued after 1989 and you paid qualified higher education expenses for yourself, your spouse, or your dependents, you may be able to exclude part or all of the interest on those bonds. See Form 8815 for details.

Part II. Ordinary Dividends

TIP *You may have to file Form 5471 if, in 2010, you were an officer or director of a foreign corporation. You may also have to file Form 5471 if, in 2010, you owned 10% or more of the total (a) value of a foreign corporation's stock, or (b) combined voting power of all classes of a foreign corporation's stock with voting rights. For details, see Form 5471 and its instructions.*

Line 5. Report on line 5 all of your ordinary dividends. This amount should be shown in box 1a of your Forms 1099-DIV or substitute statements. List each payer's name and show the amount.

Nominees. If you received a Form 1099-DIV that includes ordinary dividends you received as a nominee (that is, in your name, but the ordinary dividends actually belong to someone else), report the total on line 5. Do this even if you later distributed some or all of this income to others. Under your last entry on line 5, put a subtotal of all ordinary dividends listed on line 5. Below this subtotal, enter "Nominee Distribution" and show the total ordinary dividends you received as a nominee. Subtract this amount from the subtotal and enter the result on line 6.

TIP *If you received dividends as a nominee, you must give the actual owner a Form 1099-DIV unless the owner is your spouse. You must also file a Form 1096 and a Form 1099-DIV with the IRS. For more details, see the* General Instructions for Certain Information Returns (Forms 1098, 1099, 3921, 3922, 5498, and W-2G) *and the* Instructions for Form 1099-DIV.

Part III. Foreign Accounts and Trusts

Line 7a. Check the "Yes" box on line 7a if either (1) or (2) below applies.

1. You own more than 50% of the stock in any corporation that owns one or more foreign bank accounts.

2. At any time during 2010 you had a financial interest in, or signature authority (or other authority that is comparable to signature authority) over, a financial account in a foreign country (such as a bank account, securities account, or other financial account).

TIP *For line 7a, item (2) does not apply to foreign securities held in a U.S. securities account.*

Exceptions. Check the "No" box if any of the following applies to you.

- The combined value of the accounts was $10,000 or less during the whole year.
- The accounts were with a U.S. military banking facility operated by a U.S. financial institution.
- You were an officer or employee of a commercial bank that is supervised by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation; the account was in your employer's name; and you did not have a personal financial interest in the account.
- You were an officer or employee of a domestic corporation with securities listed on national securities exchanges or with assets of more than $10 million and 500 or more shareholders of record; the account was in your employer's name; you did not have a personal financial interest in the account; and the corporation's chief financial officer has given you written notice that the corporation has filed a current report that includes the account.

See Form TD F 90-22.1 to find out if you are considered to have a financial interest in or signature authority (or other authority that is comparable to signature authority) over, a financial account in a foreign country (such as a bank account, securities account, or other financial account). You can get Form TD F 90-22.1 by visiting the IRS website at *www.irs.gov/pub/irs-pdf/f90221.pdf.*

If you checked the "Yes" box on line 7a, file Form TD F 90-22.1 by June 30, 2011, with the Department of the Treasury at the address shown on that form. Do not attach it to your tax return.

CAUTION *If you are required to file Form TD F 90-22.1 but do not do so, you may have to pay a penalty of up to $10,000 (more in some cases).*

Line 7b. If you checked the "Yes" box on line 7a, enter the name of the foreign country or countries in the space provided on line 7b. Attach a separate statement if you need more space.

Line 8. If you received a distribution from a foreign trust, you must provide additional information. For this purpose, a loan of cash or marketable securities generally is considered to be a distribution. See Form 3520 for details.

If you were the grantor of, or transferor to, a foreign trust that existed during 2010, you may have to file Form 3520.

Do not attach Form 3520 to Form 1040. Instead, file it at the address shown in its instructions.

If you were treated as the owner of a foreign trust under the grantor trust rules, you are also responsible for ensuring that the foreign trust files Form 3520-A. Form 3520-A is due on March 15, 2011, for a calendar year trust. See the Instructions for Form 3520-A for more details.

SCHEDULE C (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Profit or Loss From Business

(Sole Proprietorship)

▶ **Partnerships, joint ventures, etc., generally must file Form 1065 or 1065-B.**
▶ **Attach to Form 1040, 1040NR, or 1041.** ▶ **See Instructions for Schedule C (Form 1040).**

OMB No. 1545-0074

2010

Attachment Sequence No. **09**

Name of proprietor: John Q Taxpayer

Social security number (SSN)

A Principal business or profession, including product or service (see instructions): Auto Repair

B Enter code from pages C-9, 10, & 11 ▶

C Business name. If no separate business name, leave blank.: JQT Company

D Employer ID number (EIN), if any

E Business address (including suite or room no.) ▶

City, town or post office, state, and ZIP code

F Accounting method: **(1)** ☐ Cash **(2)** ☑ Accrual **(3)** ☐ Other (specify) ▶

G Did you "materially participate" in the operation of this business during 2010? If "No," see instructions for limit on losses ☑ **Yes** ☐ **No**

H If you started or acquired this business during 2010, check here ▶ ☐

Part I Income

1	Gross receipts or sales. **Caution.** See instructions and check the box if: • This income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked, or • You are a member of a qualified joint venture reporting only rental real estate income not subject to self-employment tax. Also see instructions for limit on losses. ▶ ☐	1	836,868
2	Returns and allowances	2	
3	Subtract line 2 from line 1	3	836,868
4	Cost of goods sold (from line 42 on page 2)	4	556,082
5	**Gross profit.** Subtract line 4 from line 3	5	280,786
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions)	6	
7	**Gross income.** Add lines 5 and 6 ▶	7	280,786

Part II Expenses. Enter expenses for business use of your home **only** on line 30.

8	Advertising	8	17,885	18	Office expense	18	1,392
9	Car and truck expenses (see instructions)	9		19	Pension and profit-sharing plans	19	
10	Commissions and fees	10		20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11		a	Vehicles, machinery, and equipment	20a	5,680
12	Depletion	12		b	Other business property	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions)	13	50,001	21	Repairs and maintenance	21	8,435
14	Employee benefit programs (other than on line 19)	14		22	Supplies (not included in Part III)	22	
15	Insurance (other than health)	15	14,388	23	Taxes and licenses	23	16,171
16	Interest:			24	Travel, meals, and entertainment:		
a	Mortgage (paid to banks, etc.)	16a	18,638	a	Travel	24a	
b	Other	16b	80	b	Deductible meals and entertainment (see instructions)	24b	
17	Legal and professional services	17	9,800	25	Utilities	25	7,563
				26	Wages (less employment credits)	26	36,987
				27	Other expenses (from line 48 on page 2)	27	33,515

28	**Total expenses** before expenses for business use of home. Add lines 8 through 27 ▶	28	220,535
29	Tentative profit or (loss). Subtract line 28 from line 7	29	60,251
30	Expenses for business use of your home. Attach **Form 8829**	30	
31	**Net profit or (loss).** Subtract line 30 from line 29. • If a profit, enter on both **Form 1040, line 12,** and **Schedule SE, line 2,** or on **Form 1040NR, line 13** (if you checked the box on line 1, see instructions). Estates and trusts, enter on **Form 1041, line 3.** • If a loss, you **must** go to line 32.	31	60,251
32	If you have a loss, check the box that describes your investment in this activity (see instructions). • If you checked 32a, enter the loss on both **Form 1040, line 12,** and **Schedule SE, line 2,** or on **Form 1040NR, line 13** (if you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on **Form 1041, line 3.** • If you checked 32b, you **must** attach **Form 6198.** Your loss may be limited.	32a ☐ All investment is at risk. 32b ☐ Some investment is not at risk.	

For Paperwork Reduction Act Notice, see your tax return instructions. Cat. No. 11334P **Schedule C (Form 1040) 2010**

Part III Cost of Goods Sold (see instructions)

33 Method(s) used to value closing inventory: a ☑ Cost b ☐ Lower of cost or market c ☐ Other (attach explanation)

34 Was there any change in determining quantities, costs, or valuations between opening and closing inventory? If "Yes," attach explanation . . . ☐ Yes ☑ No

35	Inventory at beginning of year. If different from last year's closing inventory, attach explanation	35	10,718
36	Purchases less cost of items withdrawn for personal use	36	171,472
37	Cost of labor. Do not include any amounts paid to yourself	37	247,084
38	Materials and supplies	38	
39	Other costs	39	137,526
40	Add lines 35 through 39	40	566,800
41	Inventory at end of year	41	10,718
42	**Cost of goods sold.** Subtract line 41 from line 40. Enter the result here and on page 1, line 4	42	566,082

Part IV Information on Your Vehicle.

Complete this part **only** if you are claiming car or truck expenses on line 9 and are not required to file Form 4562 for this business. See the instructions for line 13 to find out if you must file Form 4562.

43 When did you place your vehicle in service for business purposes? (month, day, year) ► / /

44 Of the total number of miles you drove your vehicle during 2010, enter the number of miles you used your vehicle for:

a Business _____ b Commuting (see instructions) _____ c Other _____

45 Was your vehicle available for personal use during off-duty hours? . . . ☐ Yes ☐ No

46 Do you (or your spouse) have another vehicle available for personal use? . . . ☐ Yes ☐ No

47a Do you have evidence to support your deduction? . . . ☐ Yes ☐ No

b If "Yes," is the evidence written? . . . ☐ Yes ☐ No

Part V Other Expenses. List below business expenses not included on lines 8–26 or line 30.

Postage	1,512
Business Telephone	16,040
Bank Charges	6,705
Dues and Subscriptions	2,215
Uniforms and Laundry	3,907
Answering Service	539
License and Permits	216
Misc. Employee Expense	2,381
48 **Total other expenses.** Enter here and on page 1, line 27	33,515

SCHEDULE D (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Capital Gains and Losses

► Attach to Form 1040 or Form 1040NR. ► See Instructions for Schedule D (Form 1040).
► Use Schedule D-1 to list additional transactions for lines 1 and 8.

OMB No. 1545-0074

2010

Attachment Sequence No. **12**

Name(s) shown on return | **Your social security number**

Part I Short-Term Capital Gains and Losses—Assets Held One Year or Less

(a) Description of property (Example: 100 sh. XYZ Co.)	(b) Date acquired (Mo., day, yr.)	(c) Date sold (Mo., day, yr.)	(d) Sales price (see page D-7 of the instructions)	(e) Cost or other basis (see page D-7 of the instructions)	(f) Gain or (loss) Subtract (e) from (d)
1					
2 Enter your short-term totals, if any, from Schedule D-1, line 2		2			
3 **Total short-term sales price amounts.** Add lines 1 and 2 in column (d)		3			
4 Short-term gain from Form 6252 and short-term gain or (loss) from Forms 4684, 6781, and 8824				4	
5 Net short-term gain or (loss) from partnerships, S corporations, estates, and trusts from Schedule(s) K-1				5	
6 Short-term capital loss carryover. Enter the amount, if any, from line 10 of your **Capital Loss Carryover Worksheet** on page D-7 of the instructions				6	( )
7 **Net short-term capital gain or (loss).** Combine lines 1 through 6 in column (f)				7	

Part II Long-Term Capital Gains and Losses—Assets Held More Than One Year

(a) Description of property (Example: 100 sh. XYZ Co.)	(b) Date acquired (Mo., day, yr.)	(c) Date sold (Mo., day, yr.)	(d) Sales price (see page D-7 of the instructions)	(e) Cost or other basis (see page D-7 of the instructions)	(f) Gain or (loss) Subtract (e) from (d)
8 PW Asset Allocation Fund	3/2000	3/2005	6,600	4,000	2,600
Brunswick Corp			11,105	10,000	1,105
CitiCorp			21,336	10,000	11,336
1st Union Union			90,000	18,643	71,357
Markli Properties			2,281	500	1,781
9 Enter your long-term totals, if any, from Schedule D-1, line 9		9	131,322		
10 **Total long-term sales price amounts.** Add lines 8 and 9 in column (d)		10	131,322		
11 Gain from Form 4797, Part I; long-term gain from Forms 2439 and 6252; and long-term gain or (loss) from Forms 4684, 6781, and 8824				11	43,143
12 Net long-term gain or (loss) from partnerships, S corporations, estates, and trusts from Schedule(s) K-1				12	
13 Capital gain distributions. See page D-2 of the instructions				13	
14 Long-term capital loss carryover. Enter the amount, if any, from line 15 of your **Capital Loss Carryover Worksheet** on page D-7 of the instructions				14	(75,000)
15 **Net long-term capital gain or (loss).** Combine lines 8 through 14 in column (f). Then go to Part III on the back				15	(31,857)

Part III Summary

16 Combine lines 7 and 15 and enter the result **16** (31,857)

- If line 16 is a **gain**, enter the amount from line 16 on Form 1040, line 13, or Form 1040NR, line 14. Then go to line 17 below.
- If line 16 is a **loss**, skip lines 17 through 20 below. Then go to line 21. Also be sure to complete line 22.
- If line 16 is **zero**, skip lines 17 through 21 below and enter -0- on Form 1040, line 13, or Form 1040NR, line 14. Then go to line 22.

17 Are lines 15 and 16 **both** gains?

☐ **Yes.** Go to line 18.

☐ **No.** Skip lines 18 through 21, and go to line 22.

18 Enter the amount, if any, from line 7 of the **28% Rate Gain Worksheet** on page D-8 of the instructions . . . . . ▶ **18**

19 Enter the amount, if any, from line 18 of the **Unrecaptured Section 1250 Gain Worksheet** on page D-9 of the instructions . . . . . ▶ **19**

20 Are lines 18 and 19 **both** zero or blank?

☐ **Yes.** Complete Form 1040 through line 43, or Form 1040NR through line 41. Then complete the **Qualified Dividends and Capital Gain Tax Worksheet** in the Instructions for Form 1040, line 44 (or in the Instructions for Form 1040NR, line 42). **Do not** complete lines 21 and 22 below.

☐ **No.** Complete Form 1040 through line 43, or Form 1040NR through line 41. Then complete the **Schedule D Tax Worksheet** on page D-10 of the instructions. **Do not** complete lines 21 and 22 below.

21 If line 16 is a loss, enter here and on Form 1040, line 13, or Form 1040NR, line 14, the **smaller** of:

- The loss on line 16 or
- ($3,000), or if married filing separately, ($1,500)

. . . . . **21** (3,000)

Note. When figuring which amount is smaller, treat both amounts as positive numbers.

22 Do you have qualified dividends on Form 1040, line 9b, or Form 1040NR, line 10b?

☐ **Yes.** Complete Form 1040 through line 43, or Form 1040NR through line 41. Then complete the **Qualified Dividends and Capital Gain Tax Worksheet** in the Instructions for Form 1040, line 44 (or in the Instructions for Form 1040NR, line 42).

☐ **No.** Complete the rest of Form 1040 or Form 1040NR.

SCHEDULE E (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Supplemental Income and Loss

(From rental real estate, royalties, partnerships, S corporations, estates, trusts, REMICs, etc.)

▶ **Attach to Form 1040, 1040NR, or Form 1041.** ▶ **See Instructions for Schedule E (Form 1040).**

OMB No. 1545-0074

2010

Attachment Sequence No. **13**

Name(s) shown on return

John Q Taxpayer

Your social security number

Part I **Income or Loss From Rental Real Estate and Royalties** **Note.** If you are in the business of renting personal property, use **Schedule C** or **C-EZ** (see page E-3). If you are an individual, report farm rental income or loss from **Form 4835** on page 2, line 40.

1	List the type and address of each **rental real estate property:**	2 For each rental real estate property listed on line 1, did you or your family use it during the tax year for personal purposes for more than the greater of: • 14 days **or** • 10% of the total days rented at fair rental value? (See page E-4)		Yes	No
A	Service Station		A		✓
B			B		
C			C		

Income:			Properties A	Properties B	Properties C		Totals (Add columns A, B, and C.)
3	Rents received	3	37,446			3	37,446
4	Royalties received	4				4	
Expenses:							
5	Advertising	5					
6	Auto and travel (see page E-5)	6					
7	Cleaning and maintenance	7					
8	Commissions	8					
9	Insurance	9					
10	Legal and other professional fees	10					
11	Management fees	11					
12	Mortgage interest paid to banks, etc. (see page E-5)	12				12	
13	Other interest	13					
14	Repairs	14					
15	Supplies	15					
16	Taxes	16	3,452				
17	Utilities	17					
18	Other (list) ▶	18					
19	Add lines 5 through 18	19	3,452			19	3,452
20	Depreciation expense or depletion (see page E-5)	20	1,102			20	1,102
21	Total expenses. Add lines 19 and 20	21	4,554				
22	Income or (loss) from rental real estate or royalty properties. Subtract line 21 from line 3 (rents) or line 4 (royalties). If the result is a (loss), see page E-6 to find out if you must file **Form 6198**	22	32,892				
23	Deductible rental real estate loss. **Caution.** Your rental real estate loss on line 22 may be limited. See page E-6 to find out if you must file **Form 8582.** Real estate professionals **must** complete line 43 on page 2	23	( )	( )	( )		
24	**Income.** Add positive amounts shown on line 22. **Do not** include any losses					24	32,892
25	**Losses.** Add royalty losses from line 22 and rental real estate losses from line 23. Enter total losses here					25	( )
26	**Total rental real estate and royalty income or (loss).** Combine lines 24 and 25. Enter the result here. If Parts II, III, IV, and line 40 on page 2 do not apply to you, also enter this amount on Form 1040, line 17, or Form 1040NR, line 18. Otherwise, include this amount in the total on line 41 on page 2					26	32,892

Name(s) shown on return. Do not enter name and social security number if shown on other side. | Your social security number

Caution. The IRS compares amounts reported on your tax return with amounts shown on Schedule(s) K-1.

Part II Income or Loss From Partnerships and S Corporations

Note. If you report a loss from an at-risk activity for which **any** amount is **not** at risk, you **must** check the box in column **(e)** on line 28 and attach **Form 6198.** See page E-2.

27 Are you reporting any loss not allowed in a prior year due to the at-risk or basis limitations, a prior year unallowed loss from a passive activity (if that loss was not reported on Form 8582), or unreimbursed partnership expenses? If you answered "Yes," see page E-7 before completing this section. ☐ Yes ☐ No

28	(a) Name	(b) Enter P for partnership; S for S corporation	(c) Check if foreign partnership	(d) Employer identification number	(e) Check if any amount is not at risk
A			☐		☐
B			☐		☐
C			☐		☐
D			☐		☐

	Passive Income and Loss		Nonpassive Income and Loss		
	(f) Passive loss allowed (attach Form 8582 if required)	(g) Passive income from Schedule K–1	(h) Nonpassive loss from Schedule K–1	(i) Section 179 expense deduction from Form 4562	(j) Nonpassive income from Schedule K–1
A					
B					
C					
D					
29a Totals					
b Totals					

30	Add columns (g) and (j) of line 29a	30	
31	Add columns (f), (h), and (i) of line 29b	31	( )
32	**Total partnership and S corporation income or (loss).** Combine lines 30 and 31. Enter the result here and include in the total on line 41 below	32	

Part III Income or Loss From Estates and Trusts

33	(a) Name	(b) Employer identification number
A		
B		

	Passive Income and Loss		Nonpassive Income and Loss	
	(c) Passive deduction or loss allowed (attach Form 8582 if required)	(d) Passive income from Schedule K–1	(e) Deduction or loss from Schedule K–1	(f) Other income from Schedule K–1
A				
B				
34a Totals				
b Totals				

35	Add columns (d) and (f) of line 34a	35	
36	Add columns (c) and (e) of line 34b	36	( )
37	**Total estate and trust income or (loss).** Combine lines 35 and 36. Enter the result here and include in the total on line 41 below	37	

Part IV Income or Loss From Real Estate Mortgage Investment Conduits (REMICs)—Residual Holder

38	(a) Name	(b) Employer identification number	(c) Excess inclusion from Schedules Q, line 2c (see page E-8)	(d) Taxable income (net loss) from Schedules Q, line 1b	(e) Income from Schedules Q, line 3b

39	Combine columns (d) and (e) only. Enter the result here and include in the total on line 41 below	39	

Part V Summary

40	Net farm rental income or (loss) from **Form 4835**. Also, complete line 42 below	40	
41	**Total income or (loss).** Combine lines 26, 32, 37, 39, and 40. Enter the result here and on Form 1040, line 17, or Form 1040NR, line 18 ►	41	
42	**Reconciliation of farming and fishing income.** Enter your **gross** farming and fishing income reported on Form 4835, line 7; Schedule K-1 (Form 1065), box 14, code B; Schedule K-1 (Form 1120S), box 17, code U; and Schedule K-1 (Form 1041), line 14, code F (see page E-8)	42	
43	**Reconciliation for real estate professionals.** If you were a real estate professional (see page E-2), enter the net income or (loss) you reported anywhere on Form 1040 or Form 1040NR from all rental real estate activities in which you materially participated under the passive activity loss rules	43	

SCHEDULE SE (Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Self-Employment Tax

▶ **Attach to Form 1040 or Form 1040NR.** ▶ **See Instructions for Schedule SE (Form 1040).**

OMB No. 1545-0074

2010

Attachment Sequence No. **17**

Name of person with **self-employment** income (as shown on Form 1040)

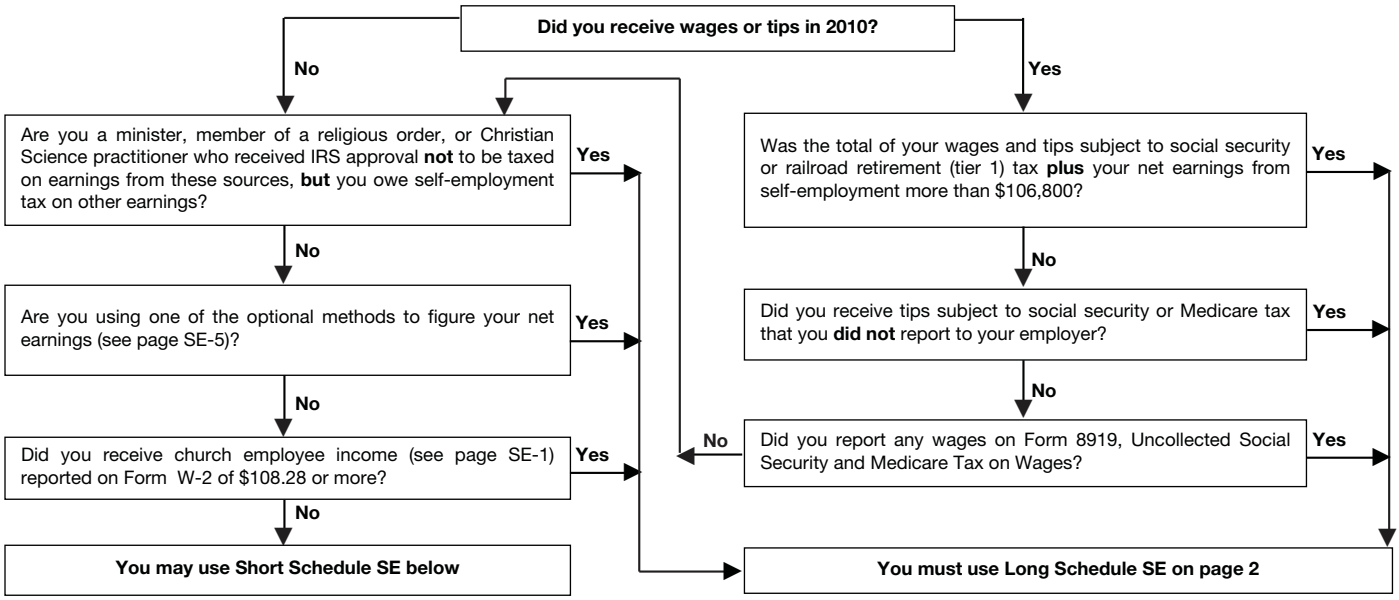
John Q Taxpayer

Social security number of person with **self-employment** income ▶

Before you begin: To determine if you must file Schedule SE, see the instructions on page SE-1.

May I Use Short Schedule SE or Must I Use Long Schedule SE?

Note. Use this flowchart **only if** you must file Schedule SE. If unsure, see *Who Must File Schedule SE* on page SE-1.



Section A—Short Schedule SE. Caution. Read above to see if you can use Short Schedule SE.

1a	Net farm profit or (loss) from Schedule F, line 36, and farm partnerships, Schedule K-1 (Form 1065), box 14, code A	**1a**		
b	If you received social security retirement or disability benefits, enter the amount of Conservation Reserve Program payments included on Schedule F, line 6b, or listed on Schedule K-1 (Form 1065), box 20, code Y	**1b**	(	)
2	Net profit or (loss) from Schedule C, line 31; Schedule C-EZ, line 3; Schedule K-1 (Form 1065), box 14, code A (other than farming); and Schedule K-1 (Form 1065-B), box 9, code J1. Ministers and members of religious orders, see page SE-1 for types of income to report on this line. See page SE-3 for other income to report	**2**	60,251	
3	Combine lines 1a, 1b, and 2. Subtract from that total the amount on Form 1040, line 29, or Form 1040NR, line 29, and enter the result (see page SE-3)	**3**	60,251	
4	Multiply line 3 by 92.35% (.9235). If less than $400, you do not owe self-employment tax; **do not** file this schedule unless you have an amount on line 1b ▶	**4**	55,642	
	Note. If line 4 is less than $400 due to Conservation Reserve Program payments on line 1b, see page SE-3.			
5	**Self-employment tax.** If the amount on line 4 is: • $106,800 or less, multiply line 4 by 15.3% (.153). Enter the result here and on **Form 1040, line 56,** or **Form 1040NR, line 54** • More than $106,800, multiply line 4 by 2.9% (.029). Then, add $13,243.20 to the result. Enter the total here and on **Form 1040, line 56,** or **Form 1040NR, line 54**	**5**	8,513	
6	**Deduction for one-half of self-employment tax.** Multiply line 5 by 50% (.50). Enter the result here and on **Form 1040, line 27,** or **Form 1040NR, line 27**	**6**	4,257	

Name of person with **self-employment** income (as shown on Form 1040) | Social security number of person with **self-employment** income ▶

Section B—Long Schedule SE

Part I Self-Employment Tax

Note. If your only income subject to self-employment tax is **church employee income,** see page SE-3 for specific instructions. Also see page SE-1 for the definition of church employee income.

A If you are a minister, member of a religious order, or Christian Science practitioner **and** you filed Form 4361, but you had $400 or more of **other** net earnings from self-employment, check here and continue with Part I . . . . . ▶ ☐

1a	Net farm profit or (loss) from Schedule F, line 36, and farm partnerships, Schedule K-1 (Form 1065), box 14, code A. **Note.** Skip lines 1a and 1b if you use the farm optional method (see page SE-5)		1a	
b	If you received social security retirement or disability benefits, enter the amount of Conservation Reserve Program payments included on Schedule F, line 6b, or listed on Schedule K-1 (Form 1065), box 20, code Y		1b	( )
2	Net profit or (loss) from Schedule C, line 31; Schedule C-EZ, line 3; Schedule K-1 (Form 1065), box 14, code A (other than farming); and Schedule K-1 (Form 1065-B), box 9, code J1. Ministers and members of religious orders, see page SE-1 for types of income to report on this line. See page SE-4 for other income to report. **Note.** Skip this line if you use the nonfarm optional method (see page SE-5)		2	
3	Combine lines 1a, 1b, and 2. Subtract from that total the amount on Form 1040, line 29, or Form 1040NR, line 29, and enter the result (see page SE-3)		3	
4a	If line 3 is more than zero, multiply line 3 by 92.35% (.9235). Otherwise, enter amount from line 3		4a	
	Note. If line 4a is less than $400 due to Conservation Reserve Program payments on line 1b, see page SE-3.			
b	If you elect one or both of the optional methods, enter the total of lines 15 and 17 here		4b	
c	Combine lines 4a and 4b. If less than $400, **stop**; you do not owe self-employment tax. **Exception.** If less than $400 and you had **church employee income,** enter -0- and continue ▶		4c	
5a	Enter your **church employee income** from Form W-2. See page SE-1 for definition of church employee income	5a		
b	Multiply line 5a by 92.35% (.9235). If less than $100, enter -0-		5b	
6	Add lines 4c and 5b		6	
7	Maximum amount of combined wages and self-employment earnings subject to social security tax or the 6.2% portion of the 7.65% railroad retirement (tier 1) tax for 2010		7	106,800 00
8a	Total social security wages and tips (total of boxes 3 and 7 on Form(s) W-2) and railroad retirement (tier 1) compensation. If $106,800 or more, skip lines 8b through 10, and go to line 11	8a		
b	Unreported tips subject to social security tax (from Form 4137, line 10)	8b		
c	Wages subject to social security tax (from Form 8919, line 10)	8c		
d	Add lines 8a, 8b, and 8c		8d	
9	Subtract line 8d from line 7. If zero or less, enter -0- here and on line 10 and go to line 11		9	
10	Multiply the **smaller** of line 6 or line 9 by 12.4% (.124)		10	
11	Multiply line 6 by 2.9% (.029)		11	
12	**Self-employment tax.** Add lines 10 and 11. Enter here and on **Form 1040, line 56,** or **Form 1040NR, line 54**		12	
13	**Deduction for one-half of self-employment tax.** Multiply line 12 by 50% (.50). Enter the result here and on **Form 1040, line 27, or Form 1040NR, line 27**	13		

Part II Optional Methods To Figure Net Earnings (see page SE-4)

Farm Optional Method. You may use this method **only** if **(a)** your gross farm income[1] was not more than $6,720, **or (b)** your net farm profits[2] were less than $4,851.

14	Maximum income for optional methods		14	4,480 00
15	Enter the **smaller** of: two-thirds (2/3) of gross farm income[1] (not less than zero) **or** $4,480. Also include this amount on line 4b above		15	

Nonfarm Optional Method. You may use this method **only** if **(a)** your net nonfarm profits[3] were less than $4,851 and also less than 72.189% of your gross nonfarm income,[4] **and (b)** you had net earnings from self-employment of at least $400 in 2 of the prior 3 years. **Caution.** You may use this method no more than five times.

16	Subtract line 15 from line 14		16	
17	Enter the **smaller** of: two-thirds (2/3) of gross nonfarm income[4] (not less than zero) **or** the amount on line 16. Also include this amount on line 4b above		17	

[1] From Sch. F, line 11, and Sch. K-1 (Form 1065), box 14, code B.

[2] From Sch. F, line 36, and Sch. K-1 (Form 1065), box 14, code A—minus the amount you would have entered on line 1b had you not used the optional method.

[3] From Sch. C, line 31; Sch. C-EZ, line 3; Sch. K-1 (Form 1065), box 14, code A; and Sch. K-1 (Form 1065-B), box 9, code J1.

[4] From Sch. C, line 7; Sch. C-EZ, line 1; Sch. K-1 (Form 1065), box 14, code C; and Sch. K-1 (Form 1065-B), box 9, code J2.

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Slater and Slater, Where Do We Go From Here?

I. SLATER AND SLATER

Oregon case law recognizes that the value of a business is the sum of its tangible assets added to the value of its intangible assets, if they exist. The phrase "Intangible Assets" is synonymous with the term "Goodwill". The question of how to value the goodwill of a business has been a source of contention for many years.

Practitioners often offer the testimony of expert witnesses hired to determine the value of a business. Frequently, two or more highly credentialed financial experts, after reviewing the same data, arrive at significantly different values for the same business. Almost without exception, the difference in their opinions evolve from the valuation of the intangible assets or goodwill of the subject business. Usually, the witness' reasoning is compelling and well documented. Most times it is shrouded in mathematical models and assumptions that are difficult for lawyers, judges and laymen to comprehend. Trial courts are left with the unenviable task of trying to decipher competing and frequently inconsistent theories and accounting practices. From the information gleaned, they must try to fashion a reasonable result.

In December of 2010 the job of practitioners, judges and business appraisers became more complex. In a case of first impression, the Oregon Court of Appeals issued its decision in *Slater & Slater*, 240 Or. App. 30, 37, 245 P.3d 676, 680 (Or. Ct. App. 2010) *review denied,* 350 Or. 408 (2011). In it, the court determined that the value of a chiropractic practice was derived from its tangible assets, goodwill that was personal to a chiropractic physician and goodwill that was associated with the practice itself. The court's ruling established two principles which will increase the already difficult job of valuing a business in a marital dissolution: Personal goodwill is not goodwill for divorce valuation purposes, and, it may not be assumed when valuing a business that the party remaining in control of the business will sign a covenant not to compete.

Although the decision in *Slater* brings new difficulties and more uncertainty to the task of valuing businesses involved in dissolutions, it is a logical extension of prior Oregon case law and is consistent with the holdings of the majority of state courts which have dealt with these same issues. The Oregon Supreme Court has declined to review the Court of Appeals decision. *Slater* therefore is the law which Oregon attorneys, business appraisers and trial courts will debate, interpret and wrestle with over the forthcoming years.

Although the holding in *Slater* is new to us, it deals with a an area of law which has been debated by dissolution courts and legal scholars nationwide for many years. It has been the subject of a significant amount of legal writing and analysis. Perhaps the most practical analysis of why it has been the subject of such extensive discussion is best summarized in *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58, 68 (Cal. Ct. App. 1974). In *Lopez*

the California court used the term "professional goodwill" rather than the phrase "personal goodwill". In Lopez, the court said:

> "While 'market value' and the value for marital dissolution purposes of 'professional goodwill' may be synonymous, in our view such value should be determined with Considerable care and caution, since **it is a unique situation in which the continuing practitioner is Judicially forced to buy an intangible asset at a judicially determined value and compelled to pay a former spouse her share in tangible assets.** " 38 Cal. App. 3d at 110 (Emphasis Added)

A. <u>Refining the definition of "Goodwill"</u>

The court of appeals in its decision in *Slater* refined the definition of "goodwill" as that term is utilized in prior dissolution decisions. The evolution of the term within *Slater* is captured below:

> "At the outset, it is essential to define the content of some predicate terms, including, especially, the meaning of "goodwill"—a concept of chameleon capability. Our cases have generally defined "goodwill" to mean the value of a business "over and above the value of its assets." *Slater & Slater*, 240 Or. App. 30, 37, 245 P.3d 676, 680 (Or. Ct. App. 2010) *review denied,* 350 Or. 408 (2011)
>
> In sum, "goodwill" generally refers to those intangible assets of a business, such as its relationships with suppliers, customers, and employees, as well as its location, name recognition, and reputation, that engender customer loyalty **regardless of who works there**. (Emphasis added) 240 Or. App. at 38
>
> The matter becomes less simple, and more confusing, when the term "goodwill" is qualified by reference to the purported source of a business's enhanced value beyond the value of its physical assets. In particular, complication and potential misunderstanding arise from reference to "business goodwill" and "personal goodwill." The former is, in fact, functionally the same as simple "goodwill" as defined above—that is, it connotes enhanced value attributable to factors related to, or inhering in, the *entity.* The latter connotes the increased earning capacity of a business attributable to an *individual's* (often, the principal's) skills, efforts, personality, or reputation. 240 Or. App. at 38-39
>
> Nevertheless, aside from some slippage at the margins, our cases, like those of the majority of courts that have considered the issue,* * * have generally distinguished between the intangible income-producing assets of a business—that is, its "goodwill"—from the value that inheres to the personal traits of that business's employees or owners. Indeed, the import of those decisions is that "personal goodwill" is not, in fact, "goodwill" for purposes of

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valuation in the marital dissolution context. 240 Or. App. 39-40

> Taken together, our cases demonstrate that, for purposes of valuation in this context, cognizable "goodwill" refers to the value of a business "over and above the value of its assets" irrespective of the owner's or professional's continued "personal services," * * * or "personality or reputation," * * *. Accordingly, where a business has no value above and beyond its assets absent "the owner personally promis[ing] his [or her] services to accompany the sale of the business,"* * * there is no goodwill. * * *. At the same time, a closely held business may have goodwill value where the "success or failure," * * * of that business does not rest entirely on the business owner's personal services, personality, or reputation." 240 Or. App. at 41

B. <u>Covenant not to compete may not be assumed in valuation of business goodwill in marital dissolution context.</u>

In *Slater* the court determined that a covenant not to compete may **not** be assumed when valuing a business in a marital dissolution context. This issue was a matter of first impression in Oregon. The court's decision regarding this read in part as follows:

> "On appeal, the parties generally reprise the arguments they made before the trial court. On *de novo* review, we agree with husband that the trial court erred in predicating its valuation of the business—and, particularly, its goodwill—on the assumption that husband would execute a noncompetition covenant. 240 Or. App. at 37
>
> * * * the same rationale that warrants exclusion of enhanced earnings uniquely referable to an individual's or principal's skills, qualities, reputation, or continued presence from the calculation of a business's goodwill, * * * also pertains to the treatment of the value of a putative noncompetition covenant. Both correspond, at least broadly, to a component of earnings attributable to the individual, and not the entity, that the business would lose if the individual withdrew from the business and, especially, opted to compete. In this context, each is a function of the individual's earning capacity, with the value of the noncompetition covenant corresponding to the present value of the forgone stream of future earnings." 240 Or. App. at 43

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II. OREGON CASES REGARDING "PERSONAL" AND "ENTERPRISE" GOODWILL IN DISSOLUTION CASES PRIOR TO SLATER

Oregon law, in matters of this kind, prior to *Slater* is succinctly set forth in *Maxwell and Maxwell*, 128 Or App 565 (1994). In Maxwell, Husband was a self-employed advertising copywriter. The value of Husband's business beyond a few assets was the subject of dispute at trial. Husband's expert testified that the value of the goodwill in the business was negligible because Husband was the sole proprietor of the business and the business's success depended on his skills and talents.

Wife's expert testified that although the business would have no value without Husband, it had substantial goodwill value with the key person in place because there was a value to Husband's proven ability to continue working with the people with whom he dealt. Using an excess earnings capitalization approach, Wife's expert valued Husband's business at $63,000.

In its holding, the court of appeals determined that the trial court had erred in giving Husband's business any goodwill value. Husband was the sole proprietor of a talent based personal service business, that had no value without him. In its holding, the *Maxwell* court reviewed prior decisions associated with the issue of goodwill in businesses dependent upon a key employee. The *Maxwell* court stated at 128 Or. App. 568-9:

> "A business ordinarily has value over and above the value of its assets, known as "goodwill" value. * * * However, when a business consists of the work of a sole practitioner, we have declined to assign a value for goodwill. In *Reiling and Reiling*, 66 Or.App. 284, 673 P.2d 1360 (1983), rev. den., 296 Or. 536, 678 P.2d 738 (1984), we noted that determination of the goodwill value of a sole proprietorship must be approached " '*with considerable care and caution.*' " 66 Or.App. at 288, 673 P.2d 1360, quoting *Lopez v. Lopez*, 38 Cal.App.3d 93, 110, 113 Cal.Rptr. 58 (1974). (Emphasis in original.)
>
> In that case, we assumed, for the sake of argument, that the goodwill value of a law firm owned by a sole practitioner could be appropriate in some cases, depending on the factual record as to the owner's age, health, professional reputation, skill, knowledge and work habits. An expert had valued the goodwill of the sole practitioner's firm on the basis of an average of the excess of his earnings over a period of years above the median income for lawyers in the area. We concluded that the expert's testimony was an insufficient basis on which to assign a value to the goodwill in the practice. 66 Or.App. at 288-89, 673 P.2d 1360.
>
> More recently, in *Lankford and Lankford*, 79 Or.App. 742, 720 P.2d 407 (1986), we held that there was no goodwill value in a logging business, when the evidence showed that the success or failure of the business was dependent on the

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> husband owner's personal services and on his ability to generate new work. "There is generally no goodwill in such an operation," we wrote, "unless the owner personally promised his services to accompany the sale of the business." 79 Or. at 745, 720 P.2d 407; see also *Rolie and Kunkel*, 127 Or.App. 428, 433 n 3, 873 P.2d 397 (1994)."

The *Maxwell* court went on to state:

> "In this case, as in *Reiling and Reiling, supra*, the testimony in support of the trial court's conclusion concerning the goodwill value of husband's business consists principally of an expert's calculations on the basis of a capitalization of excess earnings theory. There is no testimony concerning the extent to which the expert took into account the factors we described in *Reiling and Reiling, supra*. Moreover, the evidence concerning those factors shows that, as in *Lankford and Lankford, supra*, the success of husband's business is completely dependent on the creative, personal services that he provides. Even wife's expert agreed that husband's business would have no value beyond its assets without husband "in place." The trial court erred in assigning a goodwill value to this sole proprietorship. On de novo review, we find that the goodwill value is zero." 128 Or. App. at 569

In *Maxwell, Reiling, and Lankford* the valuation of the businesses was limited to the net tangible assets. To use the language of *Slater*, the decisions in *Maxwell* and *Lankford* concluded that only personal goodwill existed: Therefore, no goodwill existed. In *Reiling*, the court contemplated that in a sole practitioners' business, enterprise goodwill and personal goodwill might exist. It concluded however that the trial court record did not include sufficient information to be able to decipher the value of either and therefore declined to establish what, if any, enterprise goodwill existed.

III. GOODWILL AS MARITAL PROPERTY VARIES BY JURISDICTION

A. Majority View

Distinction. The courts of 25 states distinguish between personal and enterprise goodwill. Enterprise goodwill constitutes marital property and personal goodwill does not. An illustrative case is *Yoon V. Yoon, 711 N.E. 2d. 1265 (Ind. 1999)*

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Rationale. "If goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity, which although relevant in determining alimony, is not a proper consideration in dividing marital property in a dissolution proceeding." *Taylor v. Taylor,* 222 Neb. 721, 386 N.W.2d 851 858 (Neb. 1986)

States subscribing. Alaska, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Wisconsin and Wyoming.

B. <u>Minority View</u>

No Distinction. The courts of 12 states *make no distinction* between personal and enterprise goodwill. Both personal **and** enterprise goodwill constitute marital property. An illustrative case is *Poore v. Poore,* 75 N.C.App. 414, 331 S.E.2d 266 (1985).

Rationale. "[I]n a divorce case, the good will of the husband's professional practice as a sole practitioner should be taken into consideration in determining the award to the wife.... [I]n a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under the principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business." *Golden V. Golden, 270 Cal.App.2d 401, 75 Cal.Rptr. 735(1969)*

States subscribing. Arizona, California, Colorado, Michigan, Montana, Nevada, New Jersey, New York, North Carolina, New Mexico, North Dakota and Washington.

C. <u>Minor Minority View</u>

Goodwill doesn't count. The courts of 5 states take the position that neither personal or enterprise goodwill constitutes marital property. An illustrative case is *Singley V. Singley, 846 So.2d 1004 (Miss. 2002).*

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Rationale. "The term goodwill as used in determining valuation of a business for equitable distribution in a domestic matter is a rather nebulous term clearly illustrating the difficulty confronting experts in arriving at a fair, proper valuation. Goodwill within a business depends on the continued presence of the particular professional individual as a personal asset and any value that may attach to that business as a result of that person's presence. Thus, it is a value that exceeds the value of the physical building housing the business and the fixtures within the business. It becomes increasingly difficult for experts to place a value on goodwill because it is such a nebulous term subject to change on a moment's notice due to many various factors which may suddenly occur, i.e., a lawsuit filed against the individual or the death and/or serious illness of the individual concerned preventing that person from continuing to participate in the business. It is also difficult to attribute the goodwill of the individual personally to the business. The difficulty is resolved however when we recognize that goodwill is simply not property; thus it cannot be deemed a divisible marital asset in a divorce action." *Singley V. Singley, 846 So.2d at 1010*

States subscribing. Kansas, Louisiana, Mississippi, South Carolina and Tennessee.

IV. MAJORITY VIEW DECISIONS

A. Distinguishing between "enterprise goodwill" and "personal goodwill"

Oregon courts are consistent with the majority of states within the United States on the issue of business valuation in light of the existence of personal goodwill. The reasoning of other jurisdictions helps to more fully understand the reasoning of Oregon's case law. In *May v. May*, 214 West Virg. 394 (W.VA. 2003), the court stated:

> "Enterprise goodwill" is an asset of the business and may be attributed to a business by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. Additionally, we hold that "personal goodwill" is a personal asset that depends on the continued presence of a particular individual and may be attributed to the individual owner's personal skill, training or reputation. Furthermore, we hold that in determining whether goodwill should be valued for purposes of equitable distribution, courts must look to the precise nature of that goodwill. Personal goodwill, which is intrinsically tied to the attributes and/or skills of an individual, is not subject to equitable distribution. It is not a divisible asset. It is more properly considered as the individual's earning capacity that may affect property division and alimony. On the other hand, enterprise goodwill, which is wholly attributable to the business itself, is subject to

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equitable distribution." *May*, 214 W. Va. At 405.

In *Yoon and Yoon*, 711 N.E. 2d. 1265 (Ind. 1999), Wife was granted a divorce from her husband. The trial court found that the husband's medical practice had a value of $2,519,366. That value included goodwill. Husband appealed to a mid-level appellate court. The valuation was at that level upheld. Husband then appealed to the state supreme court. In addressing the issue of goodwill, the Indiana Supreme Court stated:

> "Goodwill has been described as the value of a business or practice that exceeds the combined value of the net assets used in the business. Goodwill in a professional practice may be attributable to the business enterprise itself by virtue of its existing arrangements with suppliers, customers or others, and its anticipated future customer base due to factors attributable to the business. It may also be attributable to the individual owner's personal skill, training or reputation. This distinction is sometimes reflected in the use of the term "enterprise goodwill," as opposed to "personal goodwill." 711 NE 2d at 1268
>
> Enterprise goodwill is an asset of the business and accordingly is property that is divisible in a dissolution to the extent that it inheres in the business, independent of any single individual's personal efforts and will outlast any person's involvement in the business. It is not necessarily marketable in the sense that there is a ready and easily priced market for it, but it is in general transferrable to others and has a value to others. 711 NE 2d at 1268-1269
>
> * * * * *
>
> In contrast, the goodwill that depends on the continued presence of a particular individual is a personal asset, and any value that attaches to a business as a result of this "personal goodwill" represents nothing more than the future earning capacity of the individual and is not divisible. Professional goodwill as a divisible marital asset has received a variety of treatments in different jurisdictions, some distinguishing divisible enterprise goodwill from nondivisible personal goodwill and some not. 711 NE at 1269
>
> Accordingly, we join the states that exclude goodwill based on the personal attributes of the individual from the marital estate. 711 NE at 1269.
>
> . . .Before including the goodwill of a self-employed business or professional practice in a marital estate, a court must determine that the goodwill is attributable to the business as opposed to the owner as an individual. If attributable to the individual, it is not a divisible asset and is properly considered only as future earning capacity...." 711 NE at 1269.

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In *Antolik v. Harvey,* 7 Haw. App. 313, 761 P2d. 305 (Haw.App. 1988) the court stated:

> "In determining whether the goodwill of the business of a professional that is accumulated during the marriage is marital property, a distinction must be made between true goodwill which is a marketable business asset and the goodwill which is dependent on the voluntary continued presence of the professional. The former is marital property, while the latter is not."

B. **Covenants not to compete**

The holding in *Slater,* as it relates to covenants not to compete is consistent with decisions of other states who subscribe to the majority view; that a distinction between personal goodwill and enterprise goodwill exists. Below are some representative decisions from other states which discuss the issue of assuming a covenant not to compete when valuing a business in a dissolution context.

In *Stewart v. Stewart*, 143 Idaho 673, 152 P.3d 544, 554 (2007), the Idaho Supreme Court cogently discussed this issue. The Idaho Supreme Court justices in a concurring opinion addressed the issue of whether the court should include the value of a hypothetical covenant not to compete in the valuation of a professional business in a dissolution. The court stated:

> "The valuation of [Husband's] business at divorce cannot be based upon a requirement that he limit his post-divorce income in order to enhance the value of the community business. Any such requirement would simply amount to taking his post-divorce earnings, which are his separate property.
>
> When professionals who personally provide services to patients, clients, or customers are ready to retire, change careers, or move to another area, they will often execute agreements not to compete when selling their businesses in order to increase the sale price of the business. They do so because they have personal goodwill, and the purchaser does not want to have to be in competition with them. When valuing a community business in a divorce action, however, the court cannot assume that the spouse would execute a covenant not to compete, nor could the court require it. The spouse conducting the business is not retiring, changing careers, or moving to another area. **Basing a valuation upon the assumption that there would be a noncompetition agreement, or that the spouse would continue working for the purchaser at a reduced income, would simply constitute taking the spouse's post-divorce income, which is separate property, in order to enhance of value of community property."** (Emphasis Added)143 Idaho at 683

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In *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W. 2d 210 (1999), the Nebraska court considered whether the value of a covenant not to compete should be included in the valuation of a professional practice as marital property. As stated by the court:

> "The reasoning of the courts which have excluded covenants not to compete from the value of a professional practice are persuasive and consistent with the rationale * * * that any "asset" that does not have a value independent of the presence or reputation of a particular individual is not a marital asset. In that case, goodwill which was dependent on the continued presence of an individual was deemed not to be a marital asset. Similarly, the value of a typical covenant prohibiting or restricting an individual from competing with another is, by definition, dependent upon the presence or reputation of the individual who gives the covenant. For example, if an individual loses his or her license to practice medicine, he or she ceases to be "present" in a competitive sense. Consequently, it is unlikely that any value would be paid to that person for a covenant not to compete, as he or she could not compete anyway. To the extent that the value of a covenant not to compete is solely dependent on the presence or reputation of an individual, it is not a marital asset." 8 Neb. App. at 18-19

The Kentucky Supreme Court in 2009 discussed the concept of assuming a non-compete agreement should be included within the valuation of a professional practice (oral surgery practice). In *Gaskill v. Robbins* the court stated:

> "Further complicating the matter, the practice is not actually being sold and was assigned in its entirety to *Gaskill*. Part of the value the trial court relied on that could impact a goodwill valuation was the assumption by [spouse's expert] that a non-compete agreement should be a part of the valuation. While fair market value of Gaskill's practice anticipates what a willing buyer would give a willing seller, the fictional sale must be viewed as a "fire sale," meaning that it must be valued in its existing state. This precludes factoring in a non-existent non-compete clause, as there is no requirement that she enter into one other than as a possible negotiated term of a real sale. It was improper to include such a speculative item to enhance the value of the practice." *Gaskill v. Robbins*, 282 S.W.3d 306, 316 (Ky. 2009), reh'g denied (May 21, 2009)

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Set forth below are a number of additional cases wherein courts ruled that it is appropriate to exclude a covenant not to compete from the valuation of a business in the division of marital assets:

1. *Held v. Held*, 912 So. 2d 637 (Fla. App. 4 dist. 2005) (Florida court concluding that the trial court should have excluded the covenant-not-to compete from the valuation of the business since it constitutes personal goodwill which is not marital property - insurance agency - no actual sale);

2. *Hoeft v. Hoeft*, 74 Ohio App. 3d 809, 600 N.E.2d 746 (Ohio Ct App. 1991) (Ohio court concluding that money received from a covenant-not-to-compete was non-marital - dental practice - actual sale - court determined that portion of sale price attributed to covenant not to compete was unreasonable and remanded to trial court);

3. *Cutsinger v. Cutsinger*, 917 S.W.2d 238 (Tenn. Ct. App. 1995) (Tennessee court excluding from the purchase price of a chiropractic practice monetary amounts for a covenant–not-to-compete - actual sale);

4. *Lowe v. Lowe*, 372 N.W.2d 65 (Minn.App 1985) (Minnesota court affirming the trial court's conclusion that a spouse should not benefit from a valuation method that denies or restricts the other spouse's future employment options - vocational rehabilitation business - no actual sale);

5. *Theilen v. Theilen*, 847 S.W.2d 116, 120 (Mo.App. 1992) (Missouri court holding a covenant not to compete should not be included in the valuation of a professional practice and observing, "Perhaps a reason for this rule is that no professional practitioner is required to give up his profession in order to be divorced" - dental practice - no actual sale);

6. *Ellerbe v. Ellerbe*, 323 S.C. 283, 473 S.E.2d 881 (1996) (South Carolina court holding a covenant not to compete is not marital property - actual sale - insurance business);

7. *Marriage of Monaghan*, 78 Wash. App. 918, 899 P.2d 841 (1995) (Washington court observing that a covenant not to compete is separate property of the covenantee because it restricts covenantee's future conduct - dental practice - actual sale); and

8. *In re Marriage of Czapar*, (1991) 232 Cal. App. 3d 1308, 284 Cal. Rptr. 41 (holding that it is improper to consider a hypothetical covenant not to compete in the valuation of a business if immediate sale is not expected - plastic extruding business - no actual sale - too speculative. Court stated, " If [the business] is ever sold it will be William's decision affecting his separate property. The true value of a possible covenant not to compete can only be determined with reference to his circumstances at that time. Reducing the community value of [the business] by the covenant's speculative value was error.") 232 Cal. App. 3d at 1316.

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As an analogy, Oregon courts normally do not allow parties to adjust the value of their businesses or properties based upon potential tax deductions, liabilities or closing costs unless such costs are a certainty. The rationale is that there is no present intention to sell and as such, any such adjustment is speculative.

Underscoring the speculative nature of including a covenant not to compete within a hypothetical sale is the reality that it should not be assumed that all practices are sold, some are simply closed. As stated by the *Kricsfeld* court some practitioners lose their license to practice. Some die; Others suffer from ill health and are not viewed as viable competitors to whom monies must be paid.

V. **WHAT DO WE DO NOW? B.A.S.S**.

A. <u>Slater makes our job harder</u>

Trying to establish the value of a business, the sale of which is not contemplated, has always been a somewhat subjective analysis. This is demonstrated by the wide range of value that two appraisers, hired by opposing parties, can arrive at for the same business. Under *Slater*, if it is determined that a business has any goodwill, the appraisers, attorneys and trial courts must determine what type of goodwill it is. If "personal goodwill" and "enterprise goodwill" are present, appraisers must calculate and courts must decide how much of each is present. This will increase the amount and the degree of subjective review, analysis and calculation by appraisers and the courts.

Oregon has never established that "Fair Market Value" is the standard of valuation to be used in the divorce setting. Despite that, appraisers hired to value businesses within a dissolution have generally set about trying to establish what a hypothetical willing buyer would pay to a hypothetical willing seller who was attempting to maximize his profit. Inherent in that endeavor is the assumption that a seller is voluntarily selling a business and will execute a covenant not to compete with the buyer. That can no longer be assumed.

B. <u>Build your record</u>

Under Slater, the burden upon practitioners has substantially increased. We must now establish a record at the trial court level to support our client's position regarding the value of the business, the presence or absence of goodwill and what portion of goodwill, if any, is attributable to the enterprise and what part to the person who will continue to operate the business following the termination of the marriage.

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In *Matter of Marriage of Reiling*, 66 Or. App. 284, 673 P.2d 1360, 1363 (Or. Ct. App. 1983), the court of appeals discussed those attributes of a sole practitioner's practice that should be examined when trying to establish whether enterprise goodwill exists. Almost universally, those same considerations are recited as a basis for helping to establish a distinction between enterprise and personal goodwill. They are:

> "* * *the practitioner's age, health, past demonstrated earning power, professional reputation in the community as to his judgment, skill, knowledge, his comparative professional success, and the nature and duration of his business as a sole practitioner or as a member of partnership or professional corporation to which his professional efforts have made a proprietary contribution." 66 Or. App. at 288

It seems reasonable that evidence which explores the criterion discussed in *Reiling* is a minimum record needed to sustain a trial court's decision on appeal. Successful advocacy will probably require more. The courts in Washington, for instance, must put on the record which factors and accounting methods were used in valuing goodwill; otherwise, the value will be deemed unsupported by sufficient evidence, reversed, and remanded for further findings. *In re Marriage of Brumback*, 122 Wash. App. 1022 (Wash. Ct. App. 2004).

The value of personal and enterprise goodwill is a question of fact. There must be evidence within the record to support the trial court's determination. Formulating the proof that you wish to establish in support of your position should be based upon this reality. Requesting before the commencement of trial that the court make special findings of fact pursuant to ORCP 62A may be the most effective way to force appropriate findings to be made. The value of findings of fact supporting the court's decision in a matter cannot be overemphasized. The method for requesting special findings of fact and their impact upon appeal is discussed in ORCP 62. The most important provisions of said rule for this discussion are set forth below:

ORCP 62. Findings of fact

> **"A. Necessity.** Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein.
>
> **B. Proposed findings; objections.** Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all parties who have appeared in the case and shall be filed with the clerk; and any party may, within 10 days after such service, object to such proposed findings or any part thereof, and request other, different, or additional special findings, whether or not such party has previously requested

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special findings. Any such objections or requests for other, different, or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different, or additional special findings shall conclusively be deemed denied.

* * *

F. Effect of findings of fact. In an action tried without a jury, except as provided in ORS 19.415(3), the findings of the court upon the facts shall have the same force and effect, and be equally conclusive, as the verdict of a jury."

C. Assist your appraiser

Simply hiring a qualified business appraiser to value the subject business is not good enough. Discuss with him the need to first determine whether any goodwill exists. If goodwill exists discuss with him the need to explore the distinction between personal goodwill and enterprise goodwill. Consider with him what information is necessary to allow such a distinction to be made and how to go about quantifying each type of goodwill present.

You must understand the appraiser's methodology, assumptions, reasoning and conclusions. If you don't understand or believe what your expert has asserted, insist that he educate or convince you. You owe the appraiser your careful analysis of his work. Neither the appraiser or you want your expert to be unconvincing, look unprepared, appear less than thorough or motivated by any purpose other than rendering an intellectually honest opinion. If he can't convince you, his opinion is either confusing and needs to be simplified for judicial consumption or is logically impaired and needs further refinement. Further, it has been my experience that I cannot sell what I don't understand or believe. Only after I understand and believe can I try to explain to the court why I believe the conclusion which is in support of my position and why the court should also believe it.

D. Spousal Support

The decision in *Slater* should not be interpreted to mean that the value of a business which is attributable to the personal goodwill of the person who will retain the business is simply lost to the other party. Such an interpretation would ignore that there is a value associated with that goodwill. That value of that goodwill will only be realized with any certainty when the business is sold and the purchaser and buyer through arms length negotiation determine the value of insuring that the seller will not compete with the purchaser. As stated in many of the cases discussed above, until then, the value is only realized by the increased income it creates for the person in whom the personal goodwill vests.

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The value represented by the increased income can be addressed through an award of spousal support. Compensatory spousal support logically seems the most appropriate designation of the type of support, however, the statutorily listed factors for consideration of an award of maintenance spousal support may make such an award appropriate. Set forth below in bold are the portions of ORS 107.105 dealing with spousal support which seem most relevant for consideration:

> "ORS § 107.105(1)(d) For spousal support, an amount of money for a period of time as may be just and equitable for one party to contribute to the other, in gross or in installments or both. The court may approve an agreement for the entry of an order for the support of a party. In making the spousal support order, the court shall designate one or more categories of spousal support and shall make findings of the relevant factors in the decision. The court may order:

* * *

ORS § 107.105(1)(d)(B) - **Compensatory spousal support when there has been a significant financial or other contribution by one party to** the education, training, vocational skills, career or **earning capacity of the other party and when an order for compensatory spousal support is otherwise just and equitable in all of the circumstances.** The factors to be considered by the court in awarding compensatory spousal support include but are not limited to:

(I) The amount, duration and nature of the contribution;
(ii) The duration of the marriage;
(iii) The relative earning capacity of the parties;
(iv) The extent to which the marital estate has already benefitted from the contribution;
(v) The tax consequences to each party; and
(vi) Any other factors the court deems just and equitable.

ORS § 107.105(1)(d)(C) - Spousal maintenance as a contribution by one spouse to the support of the other for either a specified or an indefinite period. The factors to be considered by the court in awarding spousal maintenance include but are not limited to:

(I) The duration of the marriage;
(ii) The age of the parties;
(iii) The health of the parties, including their physical, mental and emotional condition;
(iv) The standard of living established during the marriage;
(v) The relative income and earning capacity of the parties, recognizing that the wage earner's continuing income may be a basis for support distinct from the income that the supported spouse may receive from the distribution of marital property;

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(vi) A party's training and employment skills;
(vii) A party's work experience;
(viii) The financial needs and resources of each party;
(ix) The tax consequences to each party;
(x) A party's custodial and child support responsibilities; and
(xi) Any other factors the court deems just and equitable."

Additionally, the provisions of ORS § 107.105(1)(f) provides a mechanism to insure the life of the party retaining the business and the personal goodwill. It reads in relevant part:

> * * * If a spouse has been awarded spousal support in lieu of a share of property, the court shall so state on the record and shall order the obligor to provide for and maintain life insurance in an amount commensurate with the obligation and designating the obligee as beneficiary for the duration of the obligation. If the obligor dies prior to the termination of such support and such insurance is not in force, the court may modify the method of payment of spousal support under the judgment or order of support from installments to a lump sum payment to the obligee from the estate of the obligor in an amount commensurate with the present value of the spousal support at the time of death.

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Goodwill Valuation

with Consideration for Oregon Case Law

Presenter:

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- -Forensic accounting (C.F.F.A in matrimonial litigation)
- -Expert testimony
- -See C.V. online at www.fhapc.com

Valuator

Attorney

HIGHER-VALUE-LOWER

Total Value of Business

Excess working capital
Personal use assets

} Excess & Non-operating Assets

Personal Goodwill

Enterprise Goodwill

} Total Goodwill

Net Asset Value of Business

+ Cash
+ Receivables
+ Inventory
+ Fixed assets
+ Other assets
- Accounts payable
- Other liabilities
- Long-term debt
=Net asset value

} Begin with accrual basis balance sheet – adjust for missing assets, liabilities and adjust to market values, as applicable

Generally considered minimum or "floor value" of a business

Goodwill Definition

Distinguishing personal goodwill from enterprise goodwill cannot begin without basic understanding of terms.

Definition from the International Glossary of Business Valuation Terms -

Goodwill: that intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Personal Goodwill Definition

Functional definition considers:

- Earnings or cash flows to recognize that goodwill value is based on earnings;
- Attributes of the individual and enterprise;
- New customers;
- Returning customers; and
- Referrals.

Definition: Personal goodwill is the value of earnings or cash flow attributable to the attributes of the individual that results in earnings from consumers that return because of the individual, in earnings from new customers who seek out the individual, and in earnings from referrals made to the individual.

Enterprise Goodwill Definition

Definition: enterprise goodwill is the value of earnings or cash flow directly attributable to attributes of the enterprise that results in earnings from consumers that return because of the enterprise, in earnings from new consumers who seek out the enterprise, and in earnings from referrals made to the enterprise.

- Location
- Work force in place
- Contractual relationships
- Marketing and branding

What are Key Issues to Address to Determine Personal vs. Enterprise Goodwill?

1. Obtain, review, and evaluate the underlying contract(s) between the key owner-employee(s) and the entity to determine if the ownership interest (stock, member units) is contractually entitled to the value of personal goodwill, specifically:
    - Covenant(s) not to compete
    - Employment agreement(s)
    - Buy-sell agreement

What are Key Issues to Address to Determine Personal vs. Enterprise Goodwill?

2. Determine the appropriate "standard of value" – fair market value, fair value, investment value, or other.
   - Determine if standard of value is with or without key owner-employee employment agreement and a covenant not to compete.
   - Importance of measuring total value under a given standard.

What are Key Issues to Address to Determine Personal vs. Enterprise Goodwill?

3. Determine reasonable compensation
   - Determination doesn't separate goodwill, but can have significant impact on the total amount of goodwill.
   - Reasonable or "replacement" compensation should consider:
     - Misclassified personal expenses and unreported income
     - Qualifications
     - Nature, extent , and scope of work
     - Size of complexity of business
     - Compensation for comparable positions, etc.

Approach Used to Quantify Personal Goodwill and Enterprise Goodwill

- **With & Without Approach**: First, value business with the in-spouse owner as of the valuation date, i.e. with inclusion of all goodwill . Second, value the business without the in-spouse owner (if no employment agreement in place) and with the in-spouse owner competing (if no covenant not to compete in place).

- Understand that there are virtually no real world benchmark buy/sell transactions that occur without a covenant not to compete, so any method used will be subjective. Moreover, value of covenants not to compete in actual buy/sell transactions are not generally equal to the value of personal goodwill.

Approach Used to Quantify Personal Goodwill and Enterprise Goodwill

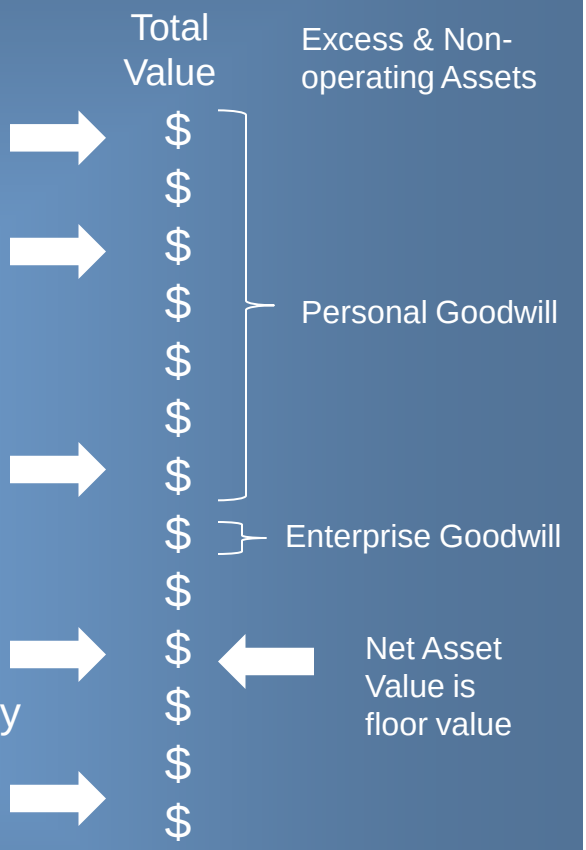
With & Without Approach – Summary

* **Step 1**: Value total business equity <u>with</u> the in-spouse owner
* **Step 2**: Value the business equity <u>without</u> the in-spouse owner assuming no employment agreement
* **Step 3**: Value of business equity <u>without</u> the in-spouse owner assuming no covenant not to compete. Others with personal goodwill in business should be considered.

Step 4: Compare step 3 value to step 5 value

Step 5: Determine net asset value

Step 6: Consider percentage ownership, minority & marketability discounts. Discounts apply only to enterprise and net asset value of the business



* Key is to determine relative difference in cash flows “with & without”. Difference in cash flows should be based on understanding of the business, inquiry and financial data analysis.

OSB Family Law Section CLE
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Taking Your Paperless Office to the Next Level: Leveraging Technology to Improve Work Flow and Profits

By: Kristin LaMont, Attorney at Law

You've practiced five, ten, perhaps twenty years with a paper file system and the thought of overhauling your work flow to create a paperless office is, to say the least, daunting. You aren't a "tech" person, you don't want to spend a lot of money on new equipment and software and you aren't convinced that you could effectively and efficiently practice without a paper file. Besides, your assistants' role their eyes at the thought of changing their work flow and your partners are dead set against it. A paperless office sounds interesting, but it isn't for you.

I'm a lawyer. What do I know about computers?

I began in earnest to transition to a paperless work flow in 2005. I had left my firm to start a solo family law practice and I started from scratch. I had no "tech" background, but I did have a vision of the experience I wanted to give my clients and the work environment I wanted for my staff and for me. Over the years I have followed one maxim: ***Deconstruct your work flow to the simplest form***. When you use technology to foster a clean and simple work flow, profits will increase and headaches will decrease.

Before you buy a single piece of equipment, stop and think about how you want to practice. Does your dream job include mobility? Do you want the option to work from your boat, your back yard or a coffee house? Do you want to leave work at the office and never look at files when you are at home? Would you like to spend more time on certain tasks (research or writing) and less time on other tasks (managing your staff's workload?) It is up to you to create the most rewarding work flow for you and your staff.

There are significant benefits to developing a paperless system for your law practice. Don't let a lack of technical experience slow you down.

Why paperless?

Would you like to lessen your environmental footprint? A ream of typical office paper (500 sheets) uses about 6% of a tree (Source: Conserveatree.) How many reams of paper does your office use in a year? Need we mention ink? Oregon courts handle 50 million pieces of paper per year. (Source: Wall Street Journal.)

Would you like to increase your profits? Paper is expensive. You pay for ink, printers, labor to organize and file the paper, filing cabinets, office space to store the paper,

postage to mail the paper, and finally, in office or off site storage to keep the paper file archived for at least ten years. A paperless workflow gives you the option to give up a brick and mortar office, join forces with other attorneys working in different locations or outsource work to contract employees with the same efficiency you would find in a regular office setting.

Would you like happy clients? In 2008, 20% of all heads of household had never sent an email. (Source: CNET.) In 2011, 40% of mobile phone users have smart phones with data plans. (Source: Neilson.) Clients who can afford our fees can also afford access to technology. Most of our clients have home internet, work internet and mobile access to the web through their phones. They tweet, blog and chronicle their lives on Facebook. Now the most important thing on their mind is the case you are working on for them. You could make them very happy if they had quick, reliable access to you, their file and updates on their case.

Do you want to keep your files safe and protected from disaster? Paper documents are subject to two risks – physical theft and destruction from disasters (fire, flood, etc….) Digital documents are simply easier to protect. You can restrict access to files by anyone outside your firm and, for very sensitive data, restrict access by others within your firm. You control the security keys. Your data can easily be stored off site and backed up electronically on an automatic schedule. That data is instantly available to restore your computers in the event of disaster. In fact, you can back up your data to multiple sources, creating secure, redundant case files.

Do you enjoy your work life? Let's face it: practicing family law is a tough job. Law school attracts and rewards perfectionism and pessimism. We are a stressed, risk adverse group. Upon graduation a select few gravitate toward litigation and, even fewer, to the practice of family law. A paperless office won't eliminate the stress of litigation, but it can go a long way towards improving work flow, access and mobility. Ultimately a paperless work flow gives you the freedom to practice in a way that works for you and your life.

Oregon e-Court is coming. Are you ready? It is inevitable, isn't it? Lawyers are slow to adopt new technology, but adoption is inevitable. Tune up your practice now to make the transition to e-Court painless.

I've lost you at "environmentalism" haven't I?

The Basic Paperless Office: A simple and inexpensive plan.

You can set up a paperless office system with a modest investment in equipment and software. Each person (whether attorney or staff) will benefit from having their own work station with the equipment, software and web access needed for efficient work flow. This approach is scaleable and affordable.

If cost (or cooperation) is an issue, you can start by outfitting just your desk and your legal assistant's desk. Add additional work stations as your practice (or paperless

flow) grows. You probably already have most of the hardware and software you will need.

With this system, your staff will stay at their workstations (working and billing.) Since each work station is redundant, one equipment failure will have little effect on the days' work flow.

Workstation Hardware

- *Computer*. If your computer is four years old (or older) you will likely benefit from upgrading or buying a replacement. If you aren't sure what to get, call Dell Computer and have them help you design a computer for your workload and needs. Dell employs tech assistants who will talk with you about your needs while you browse together on their website. Not only will they talk to you about their recommendations, but they will email you a bid outlining their proposed selections for processor, hard drive etc… Their prices are competitive and Dell offers discounts to ABA members. Even if you don't buy the Dell computer, the bid will be a great reference tool to help you compare other models during your selection process. You can choose a desktop or laptop version.
  - Estimated cost for a new computer: $500.00 - $1500.00.

- *Network.* You will need a way for your devices (computers etc…) to talk to each other and share access to files. Your office probably already has that system set up in the form of a computer network with a "server" as the main storage device for the office files. In a small office, you can network your computers together with one computer functioning as the "server" for file storage, without the investment of server software. If you want to skip the expense of setting up a network, look at the web based services available. With a web service you can store your files on the web and "network" your staff and devices through a web portal. In that way the internet functions as your server and file storage location.
  - Estimated cost to set up a computer network: $2000.00 to $5000.00;
  - Estimated cost to set up a web portal system: free to $50.00/month per user.

- *Monitors.* Splurge. Use at least two flat screen monitors (minimum 20 inch.) You will be happier with three or four. Remember how you like to spread out your file on your desk? Multiple screens let you do the same thing. It is hard to overdo on the number of screens.
  - Estimated cost: $150 to $300 per screen
  - How to: If you don't know how to set up multiple screens on one computer, this YouTube video gives you a step by step guide.

- *Multifunction Laser Printer, Copier and Flatbed Scanner* (with paper feeder.) Instead of keeping a printer at your workstation, consider using a multifunction laser printer, copier and flatbed scanner. You will be able to

print and copy at speeds of 20 to 30 pages per minute. The flatbed scanner is useful to scan book pages. The scanner speed on these machines is not fast enough to use for large scanning jobs, but they will work just fine for small jobs. You will enjoy being able to print or copy paper at your desk.

- Estimated cost: $300-$400 for black and white; $400 to $600 for color.
- Popular multifunction machines: Brother MFC-6490CW $300; HP LaserJet Pro M1536 $249; Canon ImageClass MF8350Cdn 9 (color) $699;

- *High Speed Desktop Scanner.* These scanners will be the work horses of your office. Scanning speeds range from 20 to 40+ pages per minute (twice that speed for double sided pages.) *Tip:* If your office processes a lot of paper documents, help your staff remain productive by giving them two computers and one set of monitors. Connect one computer to the scanner. The other computer will be used for their work. A toggle switch (KVM) allows the user to switch monitor views from one computer using a keyboard shortcut. One computer can be humming away on the scanning job while the other computer remains ready for other tasks.
  - Estimated cost: $400.00 - $800.00 Scanner; KVM Switch: $15.00
  - Popular scanners: Xerox DocuMate 262i scans 38 ppm @ $800.00; Xerox DocuMate 162 scans 25 ppm @ $500.00; Fujitsu ScanSnap S1500 scans 20 ppm @ $400.00

- *Automatic File Backup System.* You can use one or more back up systems to be sure that all of your electronic files are backed up to a remote server (via the web) and you may also want to keep a copy of your files on one or more external hard drives. Make sure you have a complete copy of your files stored outside of your physical office at all times. You may also want to have a system that archives your files on a weekly or monthly basis so that you have a sequential set of files over time in case your most recent back up is corrupted for some reason.
  - Estimated cost: $50 to $100 per year.
  - Popular online back up services include: Carbonite, Mozy, Dropbox, Box.net

The Software (Mandatory)

- *Word processing:* Most offices use Microsoft Word and/or WordPerfect. Use what you prefer. Free tools also exist on the web: Google Docs and Zoho offer suites very similar to Microsoft Office at little or no cost.

- *Spreadsheet:* Again, most offices use Microsoft Excel, but you can also explore the spreadsheet applications available through Google Docs and Zoho.

- *Email:* Use the mail server that works well for you. Many of you use Microsoft Outlook. You can also use free web mail services (Gmail etc….)

- *PDF Maker*. Most of your documents will be saved to the file in PDF format at some point. You will need a program that allows you to edit, comment and create PDF documents. Since you will be using PDF documents frequently, having a good tool will be essential. You may already use Adobe Acrobat X Standard ($299.00 per license) or X Pro if you want all the bells and whistles. NitroPDF Professional offers an excellent product at a much reduced cost (only $119.00 per license.) This is hands down the best tool if you need to convert Microsoft Word to WordPerfect and back and you want to keep all formatting intact.

The Software (Recommended additions)

- *Note taking*: Hand writing your notes doesn't make a lot of sense when you have a paperless office. Why create more paper that has to be scanned and cannot be searched? However, if you are like me, you like the feel of handwriting and you don't like clicking on keys while you talk to clients. Note taking software can help you simulate the feel of using a notepad with the added benefit of being able to add photos, research, documents and web pages to your handwritten notes.
  - Popular programs: Microsoft OneNote; EverNote (web based); Circus Ponies (iPad or Mac.)

- *Desktop document organization*: Nuance Paperport allows you to look at all of your file documents as thumbnail images and work with those files without opening the document. It can be a handy tool in scanning and batching documents.

- *Contact/Case Management*: Popular programs are reviewed on this ABA Comparison Chart.) If you use Outlook for your email, consider using Credenza, an Outlook add-on that offers many of the features of more expensive case management programs (file management, billing, phone calls, notes, research, time entry and billing and improved task management. The free version works for single users. A paid version networks your firm at $24.95/month per user.

- *Billing/Accounting program*: (see ABA Chart above.)

- *Desktop search program* that will allow you to search for files using a "key word(s)" search. Try Windows Search or Copernic Desktop Search (Note: Google Desktop is no longer supported by Google.)

Subscriptions/Downloads

- *Internet*: Chose as fast a connection as you can afford.

- *Fax service*. Replace your paper fax machine with an e-fax subscription. Faxes are sent and received as email and the "fax" is attached as a PDF

document. Most services also issue a certificate of delivery that you can use to show proof of service, when necessary. Most providers include 500 to 700 pages per month in the basic fee, with a small charge for extra pages.
  - Popular services include: MyFax $10.00/month; eFax $16.95/month; MetroFax $7.95/month

- *PDF Print Driver*. To easily convert any document to PDF format (Word, WordPerfect, web pages, Excel spreadsheets etc….) install a free PDF print driver. This handy software installs as a "printer device" on your computer. When you click "print" in any program, you can chose to print to paper on your printer or to PDF through this software. The steps are identical. Just select the PDF printer and press "print" and your document will be saved as a PDF.
  - Popular free software includes: CutePDF Writer; DoPDF

Extra Gadgets and Add-ons (optional but well worth it)

- *Handheld Tablets*. With all of the functionality of a smart phone and more, these tablets are small, lightweight, instant "on" and carry a battery life that will give you a full day's use without recharging.
  - Popular options include: Apple iPad; Motorola Xoom and Samsung Galaxy Tab (which devices both use Google's Android operating system.) All priced at $499.00.

- *Smart phone* (preferably iPhone or Android based so that you can take advantage of the tie in with Apple and Google apps.)

- *Flatscreen wall mounted monitor or TV*. Add a flat screen monitor or TV to your conference room. You can connect wirelessly to the screen from your laptop or tablet to display documents on the wall mounted screen for your client's view. IOGEAR, Atlona, Cables to Go and others make a wireless USB to VGA kit for this purpose. Caveat: streaming video wireless is data intensive and adapters on the market currently are not particularly well suited for smooth video streaming.

- *Wireless Router*. If you want to use your laptop or other mobile devices to access your files or the internet wirelessly in your office, add a high speed wireless router. You can also add printers to the wireless router, allowing you to print directly from your laptop during meetings. Added bonus: you can offer your visitors access to the internet by giving them a "guest" password.

- *Cloud File Storage and Backup*. Automatic online backup services are an inexpensive and fairly foolproof way to maintain a mirror image of all of your files on remote servers.

- Popular providers: DropBox (free up to 2GB, $9.99/month up to 50GB) or Box.net (free up to 50GB, $15/user/month up to 500GB), Carbonite ($59/year), Mozy Pro ($6.95/month + $.50/GB per month.)

- *File Transfer Service (FTS).* When you need to send sensitive files or a large batch of files (discovery) use a File Transfer Service. These services are low cost, the upload and download process uses bank grade encryption and the recipient is able to down the files simply and efficiently.
  - Popular services include: YouSendIt ($9.99/month or $49.99/year); Sendthisfile (free to $4.95/month) and Adobe SendNow (free to $9.99/month).

- *Video Chat, Instant Messaging & Screen Sharing.* When clients live out of the area, having a face to face meeting is often out of the question. Use Skype (free) or Google Talk (free) for video conferencing. Want to review a document together? An added feature allows you to share your computer screen during your video conference. Use this feature to review documents, pleadings and exhibits together. One extra bonus: communicate with your client using the instant message feature during hearings in which your client is participating by telephone. "Pass notes" with your remote client as you might during a traditional trial setting with your client by your side.

- *VPN (Virtual Private Network)* to allow you mobile access to the web through a secure portal. This allows you to hop on the coffee house internet connection and not share your passwords with the entire block.

  - Popular services include: GoTrusted $5.99/month; VyprVPN $20/month; Witopia $39.99/year.

- *Telephone Headset.* Save yourself from trying to cradle a phone while typing. Most of us use a headset for our cell phones and many headsets will work with office phones as well.
  - Popular headsets manufacturers include: Plantronics, OfficeRunner and Sennheiser DW. Costs range between $199.00 and $399.00.

- *Digital Dictation.* Digital dictation allows you to record to a .wav file on your computer and send it to your staff for transcription. NCH Software's Express Dictate Digital Dictation Software is a product worth investigating. This software allows you to simply record and send your dictation to your typist by email, Internet or over your computer network. An iPhone app is also available. You and your typist can manage the dictation assignments from a dashboard, allowing you to see when transcriptions are completed. Download a free version to try the product. A single user license is only $69.00. Some lawyers like to use Dragon Naturally Speaking for transcription. The software takes your speech and converts it to text. I've found it can take some practice for the software to improve its accuracy enough for regular use.

How to Organize your Files: From paper to paperless.

With a simple organization plan for your computer files, you won't miss your paper file at all.

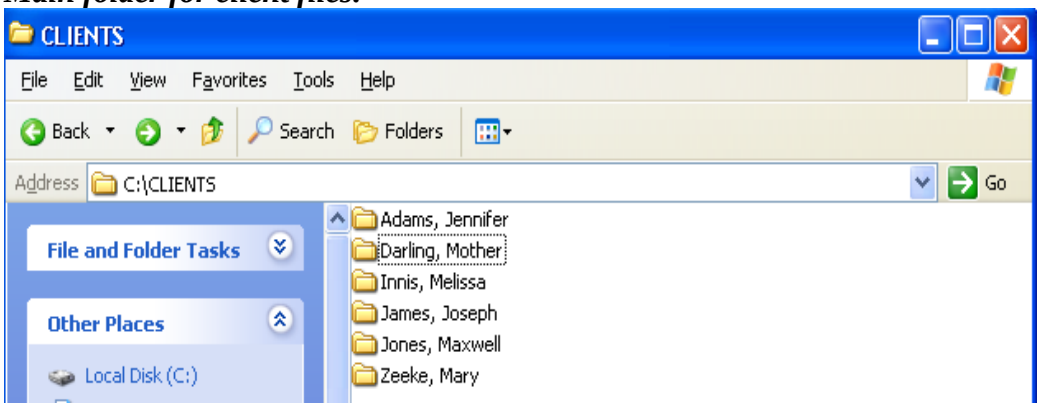
Organize your computer files in a logical folder format. The folder system in your computer can mimic your paper file organization.

Organize your client files in a uniform way. A uniform folder system will help you locate documents easily and quickly.

The Folder System:

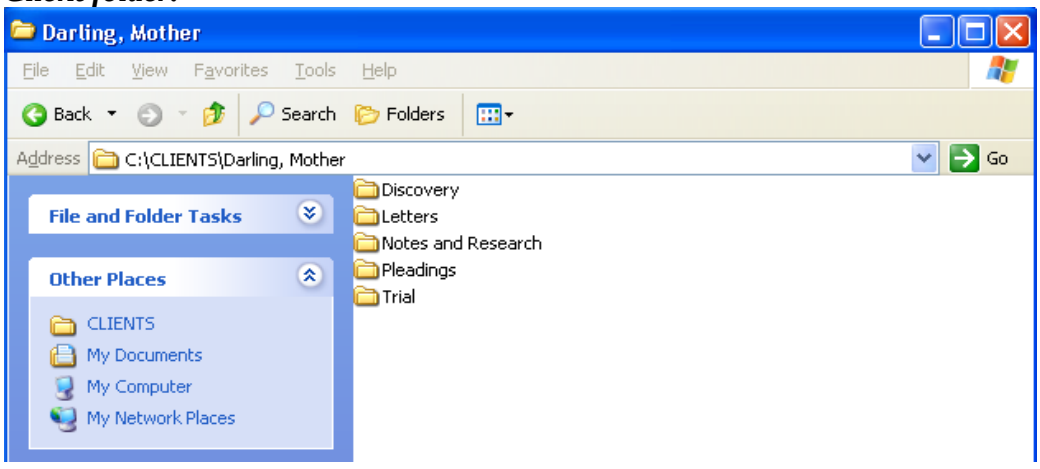
The folder system below is one example of how you can organize your computer folders. First, create a client folder for all of your case files. Each client is given their own subfolder, named as follows: LAST, FIRST. Your folders will sort alphabetically (just like your file cabinets.)

Main folder for client files:

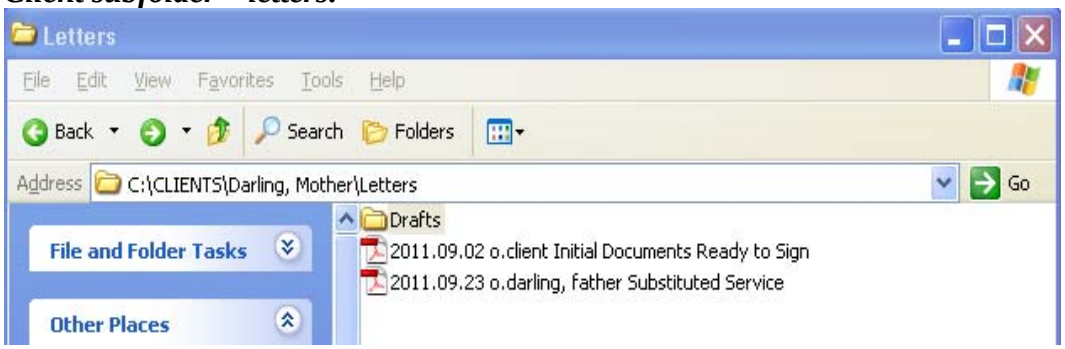


Inside of each client folder, create subfolders in the same configuration you use for your paper file.

Client folder:



Client subfolder – letters:



Name your files in a logical format. Pick a uniform naming convention that is simple, easy to type and easy to sort. Start with the date (YYYYMMDD.) Dates will allow you to easily sort the folder into an orderly file, mimicking a paper file system. Name the documents in a uniform way. My preference is to use basic shorthand for naming conventions that I can easily type and instantly understand. For example, our office uses the following naming conventions for letters:

Outgoing letters: **2011.09.02 o.client** (the "o" stands for "outgoing")
2011.09.15 i.saucy, paul (the "i" stands for "incoming")

Incoming letters: **2001.09.10 i.client**
2011.09.13 o.judge smith

Name your files descriptively. Finally, go "big" by using full words to describe the subject of the document in the rest of the file name. It is much easier to spot that settlement letter that you sent a few months ago if the document looks like this:

2011.02.13 o.jones, jim settlement offer

File name examples:

Letter: **2011.10.14 o.client discovery request**
2011.10.11 i.Jones, Jim proposed judgment

Pleadings: **2011.09.01 temp motion, affidavit order**
2011.09.02 general judgment

Creating, Receiving and Sending Documents:

Define a set system for creating documents, saving documents, receiving documents in paper and electronic form and sending documents (signed and unsigned.) Just as you follow a protocol for paper flow in your office now, your paperless flow should be simple and uniformly followed.

Creating Documents. You already create documents electronically, but your organization system may be lacking. Using a simple folder system, uniform naming

conventions and version control protocol will make it much easier for you to document your work and to find documents when you need them.

- *Save drafts to a "drafts" subfolder* so that your main folder only contains final documents. With this system, your main folder can be sorted by date to show you pleadings, letters etc… in date order, just as you would use a paper file. You will also know that any document in the main folder was actually filed, sent or received.

- *Save drafts in their native format* (.docx for Word; .wpd for Wordperfect etc….)

- *Save drafts by version* so that your work product and process is preserved.
  - *Simple system*: name the draft by date or number
  - *Automatic system*: use document management software
    - Popular programs: Worlddox, Netdocuments

- *Save final documents in PDF format*

Incoming Documents. Documents will arrive in your office as paper (via mail and hand delivery) or electronically (via email, download or CD/DVD.) If the documents arrive electronically, you have saved yourself the step of scanning the document.

Make your life easier. Let your colleagues and clients know that you prefer documents in electronic form and give them an easy way to send the documents to you. You will be pleasantly surprised by how many more documents arrive electronically if you ask.

Processing Incoming Documents. All paper is scanned and converted to PDF format. A basic office process might look something like this:

Paper:

Receptionist Duties

- Scan, name and save the document in PDF format to the appropriate folder.
- Apply OCR and indexing (to make document searchable)
- Apply "received date" stamp.
- Calendar deadlines
- Send copy to client (mail original or send electronic copy)
- Send electronic copy to attorney for review
- Drop paper into "inbox" to be shredding at a later date.

E-doc:

Receptionist Duties

- Re-name (if needed) and save document appropriate folder
- Convert to PDF if needed.
- Apply "received date" stamp.
- Calendar deadlines
- Send copy to client (electronic)

- Send to attorney for review

Outgoing Documents. Send documents electronically whenever possible. You will save paper, postage/delivery costs and staff time. There are three common ways to send a document electronically:

Email attachment. Attachments work well for everyday transfers of small files and non-sensitive documents. If the document is sensitive, you can apply password protection.

File transfer protocol. Various providers offer secure (SSL) file transfer services. The service is often free or low cost. You create a user profile and then upload the file(s) to the FTP website. The website prompts you to enter the email address(s) of the recipient(s) and you can type your own message. The recipient(s) receive an email in their inbox with your message and a link. The link takes them to the webpage containing the documents you uploaded to the FTP website and the recipient can download the files(s) to their own computer. The upload and download is managing with bank grade security. These sites offer better protection for sensitive documents, such as medical records and tax documents. These sites also handle large files and multiple files with ease, making them useful to send large batches of discovery.

Popular FTP providers include: Adobe SendNow; ShareFile; YouSendIt

File sharing sites. File sharing websites allow you to upload documents to a secure folder on the web and grant secure access to someone else (opposing counsel, clients etc….) These sites often offer an automatic "sync" option, allowing you to simply drag and drop files into a folder on your computer desktop and the software does the rest (syncing with the matching web folder automatically.) One word of caution: some of these sites allow those granted access to a folder to edit documents, delete documents and add documents. You are essentially creating a "shared" work folder with your client, co-counsel, expert witness or opposing attorney. If you want to control the integrity of the folder, chose a site that offers guest access controls on shared folders (ie, view only.)

Popular providers include: Dropbox: Box.net; Sugarsync.

CD/DVD. Many attorneys burn a copy of the files onto a CD or DVD and deliver or mail the disk. You aren't technically "sending" the documents electronically, but the cost of mailing a CD/DVD will be much less than sending a large batch of paper documents and, you will save the recipient from having to scan the documents into their system.

Signing outgoing documents. Don't bother printing a letter, signing it with ink and then scanning the document back into the computer before sending it to the recipient. If you would like to sign outgoing documents, the solution is quite simple. Electronic signatures save you time and, if executed properly, the signatures are legally binding.

Typed Signature or Scanned Image Signature. Many lawyers sign electronic letters with "italic" or "script" font to create the appearance of a signed letter. This will work just fine for many uses. You can also save a scanned image of your signature and

"stamp" the image signature onto your PDF letters. If you want to apply the signature image permanently, you can "flatten" the image using the Adobe toolbar.

Adobe Acrobat "Sign and Certify". The Pro and Standard versions of Adobe Acrobat allow you to sign documents digitally, using a password to authorize your signature, or using a registered digital signature (should you wish to have one) to sign contracts and other legally binding documents. The signature stamp tool in Adobe Acrobat can include an image of your signature and, after the stamp is applied, the document may be locked. Locking the document gives you the added security that your signature will remain only if the document is not changed. If the PDF document is edited in any way, the program removes your signature.

Web based subscription service. Electronic signature services allow you to upload a document to a website securely and the website allows you to sign and send the document. Theses services may warrant compliance with the Federal ESIGN Act, giving you assurance that you can produce a court admissible audit trail. These services also allow you to send a document to someone else for their electronic signature.

Popular providers include: Rightsignature; DocuSign.

What Do You Do With The Paper?

Rule # 1 - Get rid of the paper. What happens to the paper after it is scanned to the client's file? Don't fall into the trap of maintaining a paper file and an electronic file. You won't need it. Instead, establish an office protocol to:

Shred the paper (or)
Send the paper to your client (or)
Drop the paper into a box for scanned documents for later destruction.

One easy way to handle paper is to drop the most recent documents into a banker's box in date order (newest documents on top.) In the unlikely event you need to retrieve a document, the date order will make that job easy. Make sure you schedule the chronological file to be destroyed at a later date (perhaps one, three, six months or a year after the box is full.)

Rule # 2 – Refer to Rule # 1 unless:

- *Client originals.* If the client gave you the paper – give it back to the client.
- *Legal significance*. Original wills, deeds, bills of sale, contracts, fee agreements, promissory notes must be kept in their original form if they contain ink signatures, or if a statute requires you to retain the original (for example, ORS 126.725 Affidavit of a Custodian in a guardianship.)
- *Authenticity concerns*. If authenticity of a signature or document is at issue – keep the paper.
  (For a review of these guidelines, see OSB Beverly Michaelis' recent article)

How will you get along without a paper file at trial? Easily. Your digital files can travel along with you easily and remember, you can search your entire file in an instant for key words.

Remember to Tell Your Clients: Set a paperless policy.

It is important that your client understands that files are kept electronically. Spell out your policies in your fee agreement with regard to electronic communication (emails) and your paperless file retention policy. Remind your client of your policies again in your closing letter. You can also provide them with their own digital copy of the file at the end of their case for handy reference.

Three Rules For A Good Night's Sleep.

This is a good sign – you are still reading. However, those two lawyer traits of yours (perfectionism and pessimism) are probably still working against you. You've either decided that a big change to your office system presents too much risk of *something falling through the cracks*, OR you've decided this is a great idea, but you want to make sure you design *a perfect* system before implementing it.

Reject both thoughts. If the rest of the business world can do this, so can you. Start by scanning all of your documents. Build the rest of your system one step at a time.

My rules for a good nights sleep are:

Keep it simple. Change brings opportunity. Don't confuse your career with your life.

A good paperless plan is like any good office system, simple enough to be easy to use and relatively foolproof. So, check your pessimism at the door. Embrace a little change. Don't worry if your first attempt at paperless office isn't perfect. Let technology help you design your career around your life, not the other way around.

Attachment A:
Web Based Paperless Plan – Handy Tools:

A list of some of the most popular tools to use in a web based practice.

Appointment Scheduling Tools

- Timebridge (www.timebridge.com)
- Tungle (www.tungle.com)
- When Is Good (http://whenisgood.net)
- Genbook (www.genbook.com)
- BookFresh (www.bookfresh.com)
- Appointment-Plus (www.appointmenet-plus.com)

Time and Billing

- Bill4Time (www.bill4time)
- Chrometa (http://app.chrometa.com)

Electronic Signatures

- Right Signaure (www.rightsignature.com)
- DocuSign (www.docusign.com)

Case Management / Project Management

- Advologix PM (www.advologix.com)
- Clio (www.goclio.com)
- RocketMatter (www.rocketmatter.com)
- Credenza for Outlook (www.credenzasoft.com)

Document Management

- DropBox (www.dropbox.com)
- Box.net (www.box.net)
- NetDocuments (www.netdocuments.com)
- Worldox (www.worldox.com)

Online Document Storage and Backup

- Carbonite (www.carbonite.com)
- Mozy (www.mozy.com)

Remote Access to Work Computers

- Remote Desktop Connection (free and included in Windows operating system)
- GoToMyPC (www.gotomypc.com)
- LogMeIn (www.logmein.com)
- Legal Workspace (www.legalworkspace.com)

Virtual Law Office Services

- Total Attorneys.com (www.totalattorneys.com)

Web Conferencing Tools

- Skype (www.skype.com)
- Google Video (www.google.com/chat/video)
- Google Talk (www.google.com/talk)
- Yugma (www.yugma.com)

Attachment B:
Client Handout: Tips for Email Communications

Email can be a great way to stay in contact with us. However, any electronic communication raises security concerns. To maintain our attorney/client privilege, there must be a "reasonable expectation of confidentiality". That means that we both use care in keeping our communications private. No system is foolproof and we cannot guarantee that email communications between us are absolutely secure. Please follow these simple rules to improve the security of those communications.

Basic Rules:

1. **Only use email if you feel comfortable with your security.** Send sensitive communications in attachments that are password protected if needed.
2. **Open a new email account and only use it for our communications.** Free email services include Yahoo!, Hotmail (Microsoft) and may others.
3. **Choose a new, secure password.** Your password should be 8 characters or more long and a mixture of characters, numbers and symbols. Example: mk1do!a+ Check your password's strength at: www.securitystats.com/tools/password/php
4. **Do not share your email address with anyone but us.**
5. **Do not share you password with anyone.**
6. **Do not access your email from a computer that is available to the other party.** If you are using a computer that the opposing party used to have access to, you may want to check your computer for spyware, keystroke recording programs or other software that could allow someone else to access your computer remotely. Change your computer's security password so that no one can enter your computer remotely from the internet. Most computer service shops can help you "clean up" your computer security for a nominal charge.
7. **Do not use your work computer to communicate with us.** Employers often do not allow employees to use work computers for personal need and employers may also monitor your use. There may be no reasonable expectation of privacy on your work computer or work email address.

Please send us an email from your new email account so that we can update your address. Send to: [insert email address]

Memo: Use my new email address

Thank you!

Navigating Your Way Through the Administrative Hearing Process

Monica Whitaker, Senior ALJ
Donna Brann, Presiding ALJ

Contested Case Hearings

- OAR 137-055-2120
  - Contested case hearings for the Child Support Program are conducted in accordance with the Attorney General's Model Rules at OAR 137-003-0501 through 137-003-0700 and with OAR 137-055-2120 through 137-055-2180.
  - The hearings are not open to the public and are closed to non-participants, except the ALJ may permit non-participants to attend subject to the parties' consent.

Final Orders
ORS 416.427

- ALJ's order is a Final Order.
- Appeal of the ALJ's Final Order may be taken to the circuit court the county in which the order has been entered pursuant to ORS 416.440 for a hearing de novo.
  - Appeal shall be by petition for review filed within 60 days after the order has been entered pursuant to ORS 416.440.
  - Exception: License suspension cases are appealed to the Court of Appeals.

Types of Cases Referred to OAH

- Establishment of support (past support, ongoing support, and/or medical support)
- Modifications
- Employment-related modifications
- Early reinstatement (of an employment-related modification)
- Arrears
- Interest on arrears
- Credit against arrears for Social Security or Veterans' Benefits paid retroactively on behalf of a child
- Credit for direct payments
- Joinder of party
- Removal of joined party
- Credit for physical custody
- Suspension of child support obligation
- License suspension
- Termination of child support obligation
- Application for credit and satisfaction

Preparing for your Hearing

- Evidence
  - Submission to the ALJ and parties prior to the hearing, or risk exclusion from the record.
  - “Party” includes
    - In any action taken under ORS 25.080, the State of Oregon, the obligor, and the obligee are parties.
    - In any action taken under ORS 25.080, for purposes of Oregon Administrative Rules, chapter 137, division 55, a child attending school as defined in ORS 107.108 and OAR 137-055-5110, is a necessary party to all legal proceedings.

Discovery

- OAR 137-055-2140(8) delegates ALJ authority to order and control discovery.
- OAR 137-003-0570 sets forth process for obtaining discover order from ALJ.
- Discovery request must be reasonably likely to produce information that is generally relevant and necessary to the case, or is likely to facilitate resolution of the case.

Subpoenas
ORS 416.427

- ALJ may issue subpoenas for witnesses necessary to develop a full record.
- The attorney of record for the office of DCS or the office of the DA may issue subpoenas.

FAPAs and Administrative Hearings

- What to do when your client has an administrative hearing

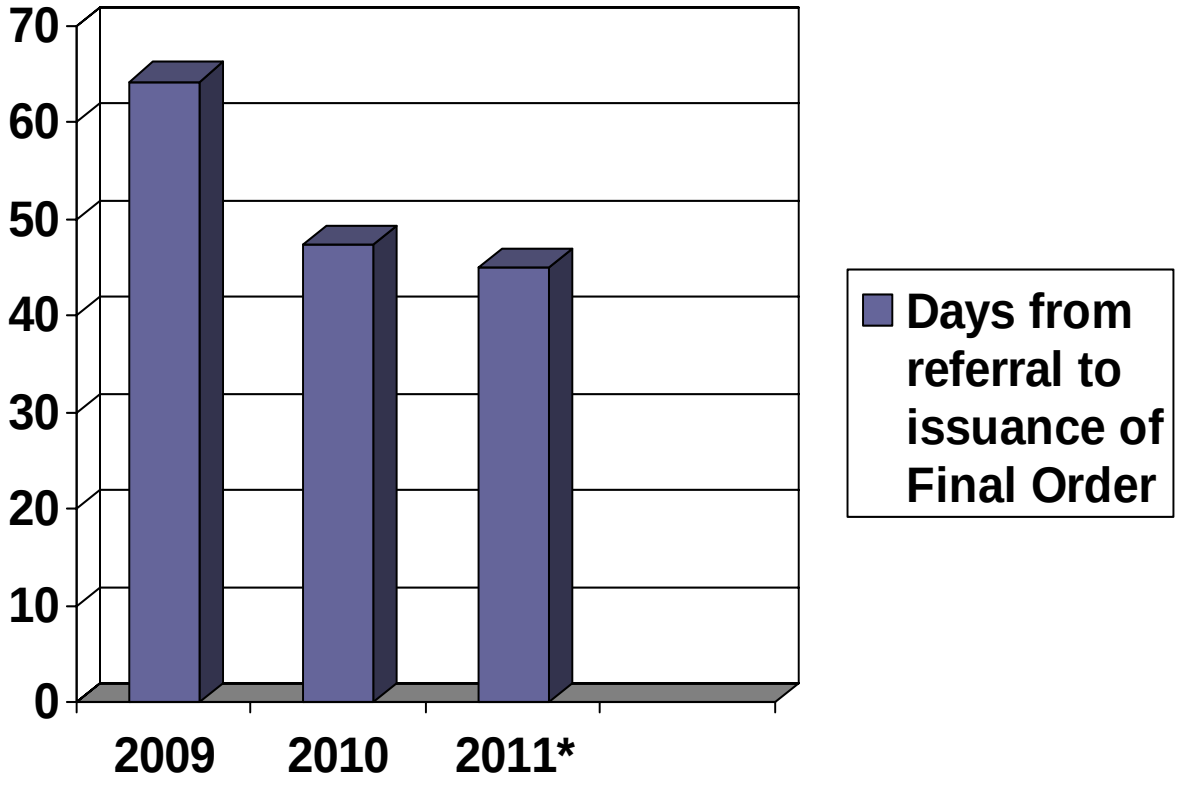
Pending Judicial Proceedings

- OAR 137-055-3220
  - If a judicial proceeding involving the support of the child is pending in this state, the administrator may proceed to establish or modify the support of if:
    - It appears likely that a final judgment will not be entered without substantial delay; or
    - The state's financial interests cannot be adequately protected without proceeding with the administrative action.

Pending Judicial Proceedings, cont'd.

- If a support proceeding is discovered after commencing an administrative action but prior to finalizing the administrative order, the administrator may:
  - Certify all matters under the notice to the court for consolidation in the court proceeding;
  - Finalize any potion of the order and file it in the county where the proceeding is pending; or
  - Withdraw the administrative proceeding.

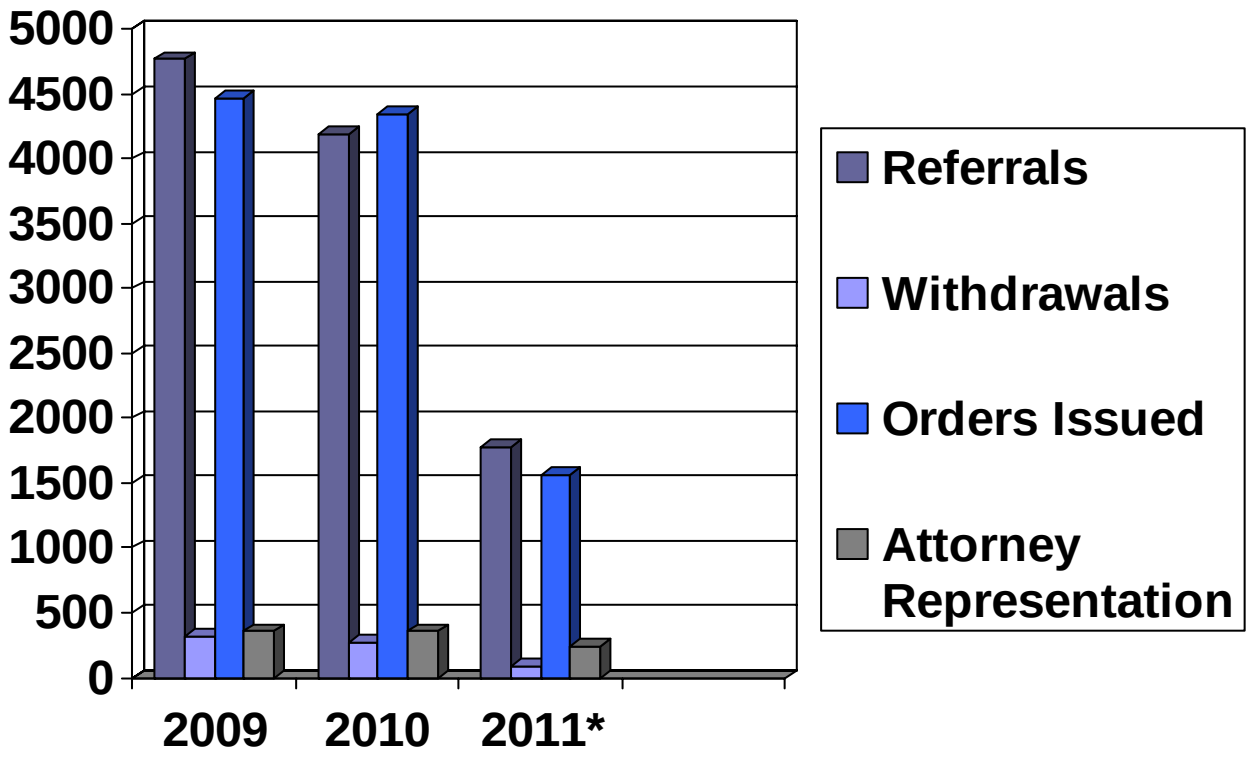
Timelines
(Excludes Temporary Modifications)



*Through June 30, 2011

OAH Case Statistics

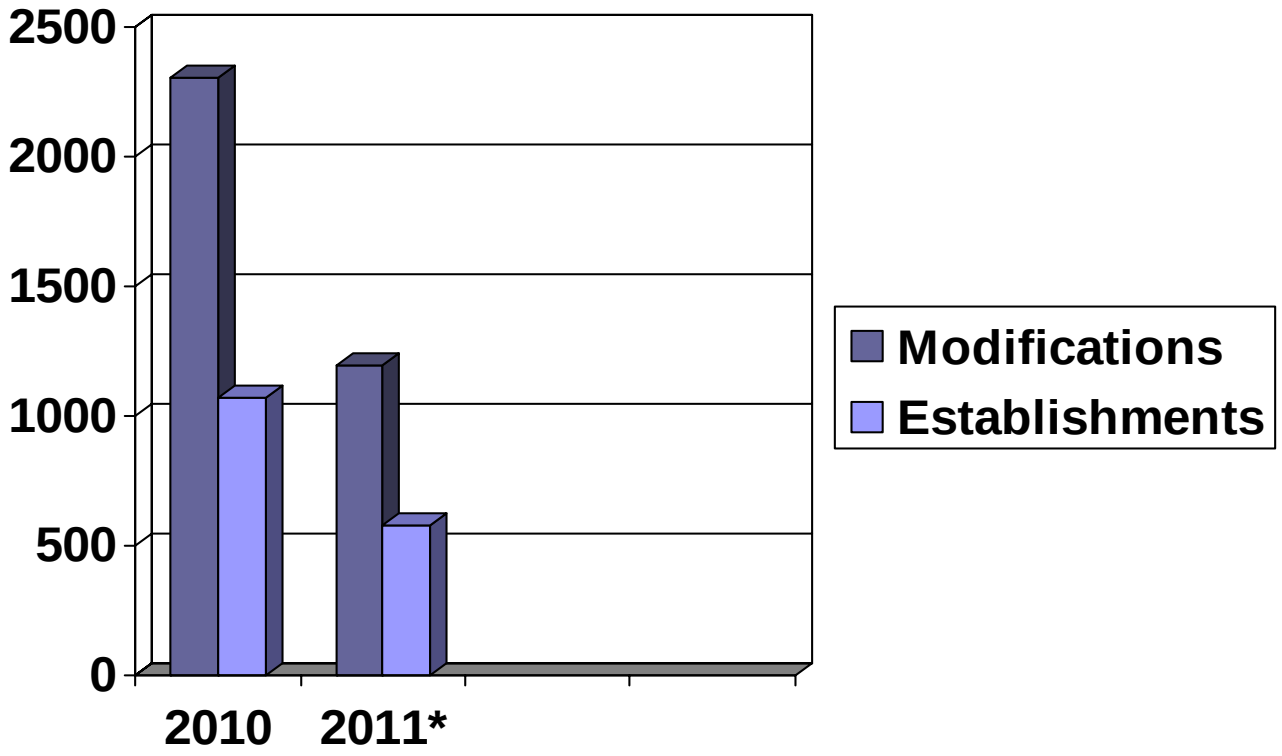
(Excludes Temporary Modifications)



*Through June 30, 2011

CSP Referrals to OAH

(Excludes temporary modifications)



*Through June 30, 2011

Temporary Modifications
(aka Employment-Related Modifications)

- ORS 416.425(13)
- Available during “period of significant unemployment” declared by AG
  - Declared May 6, 2009
  - Party must show employment-related change of income
  - Includes, but not limited to reduced work hours, unpaid furloughs, loss of jobs, wage reductions.

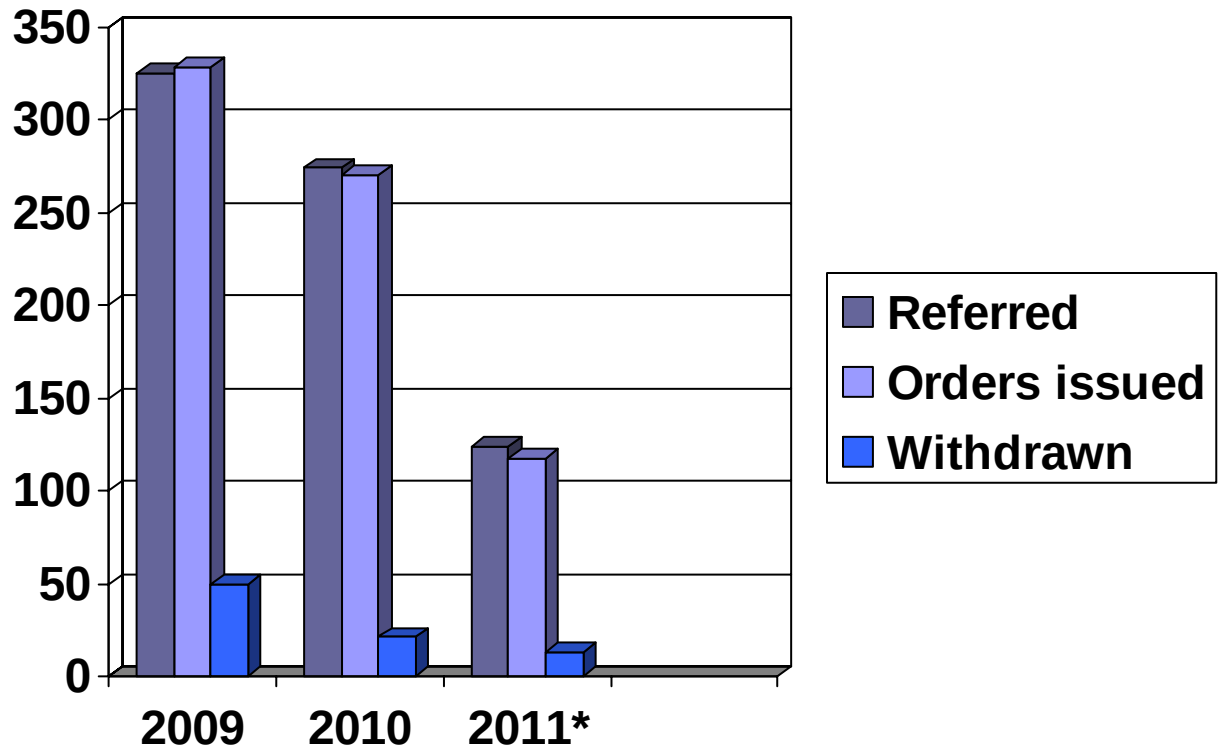
Temporary Modifications, Cont'd.

- Can be renewed, pursuant to ORS 416.425(13)(j) upon request of a party. The administrator may renew the order of suspension and temporary modification for additional six-month periods or until the party obtains employment as described ORS 416.425(13)(i), whichever occurs first, if the circumstances under which the order was originally issued continue to exist unchanged.

Temporary Modifications, Cont'd.

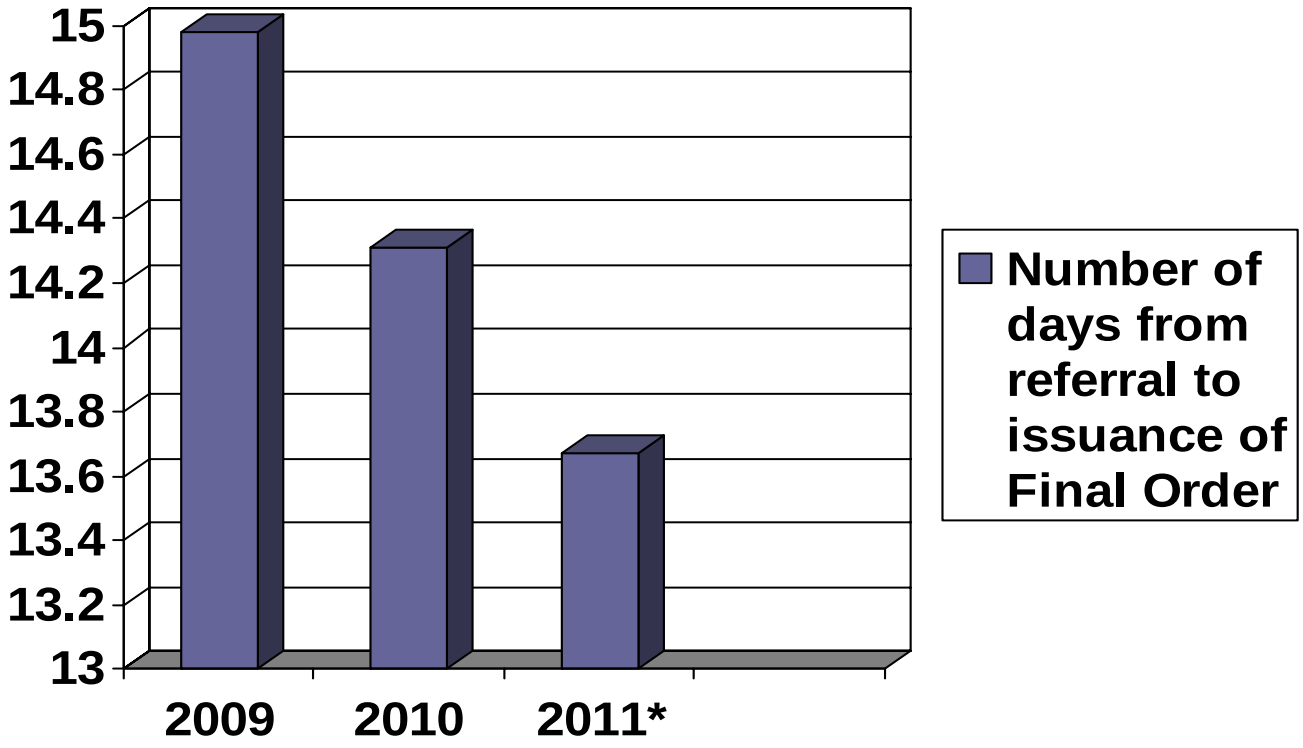
- OAR 137-055-2140(4) authorizes ALJ to Issue an order dismissing a temporary modification if the party seeking a temporary modification fails to appear for a scheduled hearing, without further action by the administrator.

Temporary Modifications: Statistics



*Through June 30, 2011

Temporary Modifications: Timelines

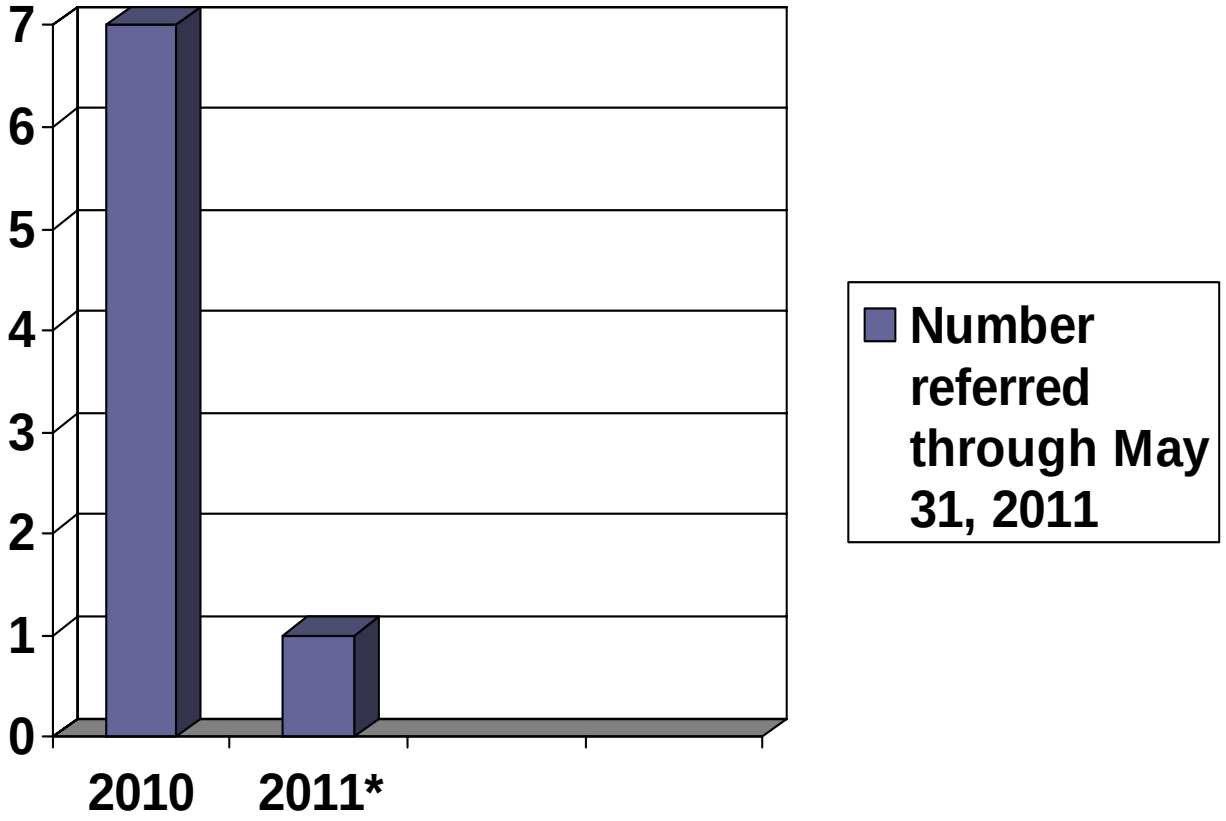


*Through June 30, 2011

Early Reinstatements

- ORS 416.425(13)(i)
  - The administrator may issue a notice of reinstatement at any time during which an order of suspension and temporary modification is in effect under this subsection when a party obtains employment and receives income that is sufficient to reinstate support in an amount substantially similar to the amount in the preexisting support order or judgment.

Early Reinstatements



*Through June 30, 2011

Petitions for Reconsideration/Rehearing

- OAR 137-055-2180 requires request be filed with ALJ who signed final order.
- OAR 137-003-0675requires request be filed within 60 calendar days after order is served.
- Petition for reconsideration or rehearing may be considered as a request for either or both.

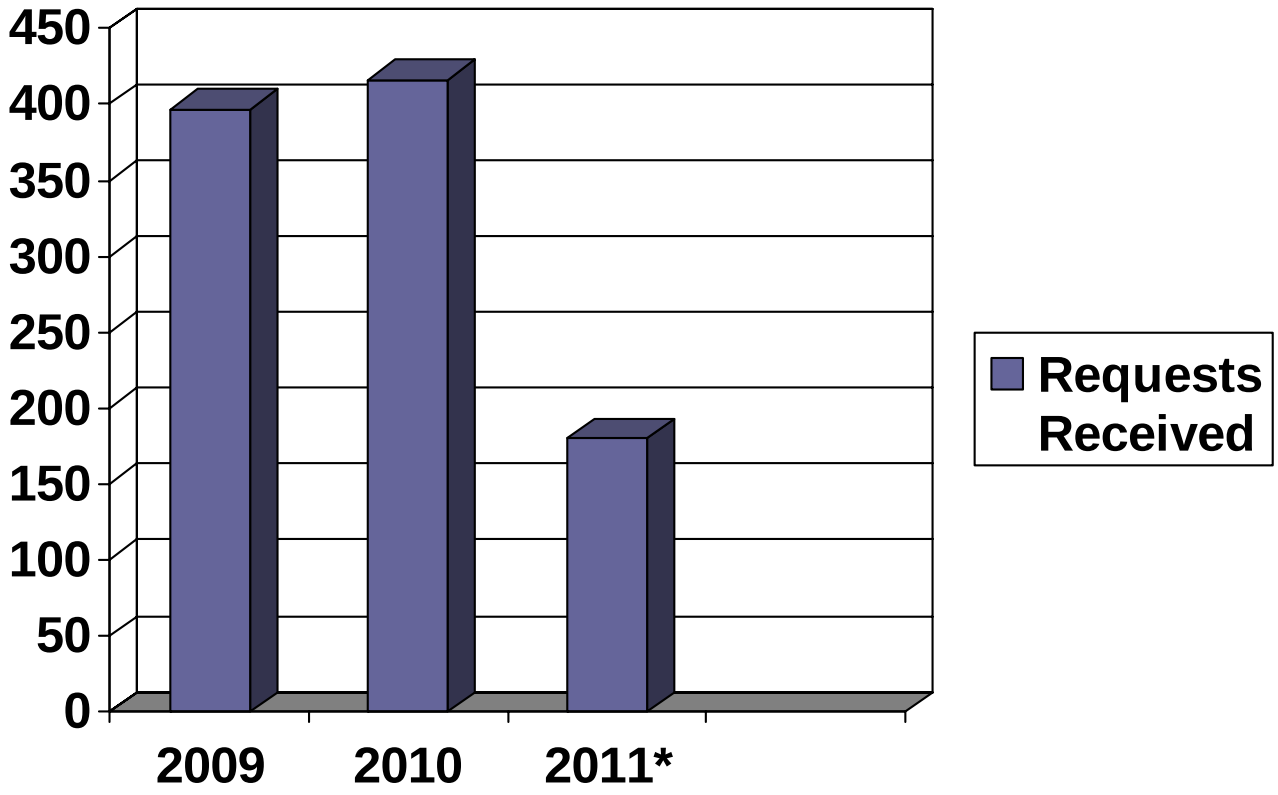
Request to Reschedule

- OAR 137-055-2165
- Party failing to appear for hearing may request a rescheduled hearing.
- Request must be filed:
  - In writing
  - To the CSP
  - Within 60 days of Notice of Hearing Cancellation
  - Or before a final order entered in circuit court

Reschedule Requests, cont'd.

- CSP must
  - Forward request to OAH for a ruling from ALJ or
  - Deny request
- If forwarded to OAH, parties have 10 days to respond to request.
- ALJ will review and either grant or deny request.

Post-hearing Requests Reconsiderations/Rehearings/ Reschedules



*Through June 30, 2011

E-Court

- Implementation
- Where we are headed
- Long-term plan

"Separate But Not Equal:

Current Insights into the Criteria for Establishing and Modifying Spousal Support"

Saville W. Easley & Kimberly A. Quach

Oregon State Bar Association Fall Family Law Conference

Salishan, Oregon

October 14-15, 2011

These materials are designed to provide insights into the spousal support cases published by the Oregon Court of Appeals and Supreme Court during the last two years. They are case summaries of those decisions, to be reviewed in conjunction with the speakers' Power Point Presentation, which explores the more subtle aspects of the decisions in more detail.

The case summaries in these narrative materials are divided into transitional, compensatory and maintenance support sections, based upon the divisions created by the version of ORS 107.105(1)(d) that has been in effect since 1999.

1) The Statutes.

a) Original Spousal Support Judgments. ORS 107.105(1)(d):

> (1) "Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment:
>
> * * *
>
> (d) For spousal support, and amount of money for a period of time as may be just and equitable for one party to contribute to the other, in gross or in installments or both. The court may approve an agreement for the entry of an order for the support of a party. In making the spousal support order, the court shall designate one or more categories of spousal support and shall make findings of the relevant factors in the decision. The court may order:

b) Transitional Support. ORS 107.105(1)(d)(A):

"(A) Transitional spousal support as needed for a party to attain education and training necessary to allow the party to prepare for reentry into the job market or for the advancement therein. The factors to be considered by the court in awarding transitional spousal support include but are not limited to:

(i) The duration of the marriage;
(ii) A party's training and employment skills;
(iii) A party's work experience;
(iv) The financial needs and resources of each party;
(v) The tax consequences to each party;
(vi) A party's custodial and child support responsibilities; and
(vii) Any other factors the court deems just and equitable."

c) Compensatory Support. ORS 107.105(1)(d)(B):

"(B) Compensatory spousal support when there has been a significant financial or other contribution by one party to the education, training, vocational skills, career or earning capacity of the other party and when an order for compensatory spousal support is otherwise just and equitable in all of the circumstances. The factors to be considered by the court in awarding compensatory spousal support include but are not limited to:

(i) The amount, duration and nature of the contribution;
(ii) The duration of the marriage;
(iii) The extent to which the marital estate has already benefitted from the contribution;
(iv) The tax consequences to each party; and
(v) Any other factors the court deems just and equitable."

d) Maintenance Support. ORS 107.105(1)(d)(C):

"(C) Spousal maintenance as a contribution by one spouse to the support of the other for either a specified or an indefinite period. The factors to be considered by the court in awarding spousal maintenance include but are not limited to:

(i) The duration of the marriage;
(ii) The age of the parties;
(iii) The health of the parties, including their physical mental and emotional condition;
(iv) The standard of living established during the marriage;
(v) The relative income and earning capacity of the parties, recognizing that the wage earner's continuing income may be a basis for support distinct from the income that the supported spouse may receive from the distribution of marital property;
(vi) A party's training and employment skills;
(vii) A party's work experience;
(viii) The financial needs and resources of each party;
(ix) The tax consequences to each party;
(x) A party's custodial and child support responsibilities; and
(xi) Any other factors the court deems just and equitable."

e) Modification. ORS 107.135(3)(a):

"A substantial change in economic circumstances of a party, which may include, but is not limited to, a substantial change in the cost of reasonable and necessary expenses to either party, is sufficient for the court to reconsider its order of support, except that an order of compensatory spousal support may only be modified upon a showing of involuntary, extraordinary and unanticipated change in circumstances that reduces the earning capacity of the paying spouse."

2) Transitional Spousal Support.

a) *Carlson and Carlson,* 236 Or App 291, 236 P3d 310 (2010).

This was a six-year marriage. Husband was 44 years old, and Wife was 37 years old. At the time of trial, Husband owned a large company and earned approximately $14,500 a month and Wife was a homemaker and aspired to start an interior design business. She had significant back problems.

The trial court awarded Wife transitional support of $6,000 per month for three years, followed by $3,000 per month for three more years, and $2,000 per month of indefinite maintenance support.

The Court of Appeals concluded that transitional support was appropriate because Wife had not worked outside the home since her back surgery. The Court noted that although she had been trained as an interior designer, she had not yet begun the process of starting a business and establishing herself. Taking into the consideration the large property award, the Court found that an award of $3,000 in transitional support for three years was appropriate to allow Wife to regain her health and build a design business or otherwise prepare for re-entry into the job market.

With regard to maintenance support, the Court found that, even with an award of transitional support, Wife's income would not be sufficient for many years to cover her expenses and allow her to be self-supporting, and an award of maintenance support was appropriate.

As to the duration of support, the Court considered the short duration of the marriage and the Wife's young age; however, because of the Wife's health problems, it awarded a longer period of maintenance support that might otherwise be warranted in a marriage of short duration. The Court modified the maintenance award to $3,000 per month for six years which would allow her to live a very comfortable life and allow her a reasonable amount of time to become self-sufficient.

b) *Cassezza and Cassezza,* 243 Or App 400, ___ P3d ___ (2011).

The Court of Appeals modified a dissolution judgment to delete the trial court's award of transitional support holding that a party's health-related needs are taken into account in an award of maintenance support and not in an award of transitional support.

This was an 18 year marriage. Husband was 37 years old and earned $120,000 per year as an engineer. Wife was 44 years old and earned $10,000 to $12,000 per year as a part-time typist. Wife had health problems, including anxiety disorder, agoraphobia, fibromyalgia, and a meniscus tear in her hip, which prevented her

from obtaining full-time employment. The trial court awarded Wife indefinite maintenance support of $1,500 per month and transitional spousal support of $500 per month for 18 months to allow Wife to receive pain management treatment. The trial court believed that pain management treatment might allow Wife to "start taking charge of her life in a more direct way."

According to ORS 107.105(1)(d)(A), a court may award transitional support only "for a party to attain education and training necessary to allow the party to prepare for reentry into the job market and for advancement therein." The Court concluded the trial court erred in labeling any portion of the spousal support award as transitional support in the absence of evidence that Wife intended to attain education and training necessary for re-entry into the job market or advancement therein.

Although Husband had filed the appeal, and Wife had not filed a cross-appeal, the Court of Appeals reviewed *de novo* the amount and duration of the maintenance support award in light of the reversal of the transitional support to properly evaluate whether the award was just and equitable. The Court of Appeals found the award of indefinite $1,500 per month maintenance spousal support award was "just and equitable" because of the length of marriage, Wife's chronic health problems, and Husband's earning capacity. In addition, the court reclassified the transitional support award to a maintenance award of $500 per month for 18 months in order for Wife to manage her chronic health problems.

c) *Quant and Carrier*, 234 Or App 336, 227 P3d 832, *rev. den.*, 348 Or 621 (2010).

This was a seven year marriage. At the time of trial, Husband was 58 years old, and Wife was 56 years old. Husband earned $160,000 a year, and Wife was not able to work due to a health condition. Wife wanted to be re-trained as a medical coder.

The trial court awarded transitional support of $2,000 per month for two years. Wife appealed seeking an award of indefinite support award. The Court of Appeals held that, in addition to an award of transitional support of $2,000 per month for two years, an award of maintenance support of $1,500 per month for seven years was just and equitable. The Court held the maintenance support would

provide Wife with sufficient income to be self-supporting as her income from employment grew and until she reached retirement age and could begin collecting Social Security. The Court held that an indefinite award was not warranted because Wife was "resourceful" and testified that she hoped to be self-sufficient as a medical coder.

The Court of Appeals distinguished transitional support from maintenance support. Transitional support is typically awarded when one spouse has been out of the workforce for an extended period of time and needs education or on-the-job training to prepare for re-entry into the job market. The purpose of maintenance support is to allow a period of time for the dependent spouse to become financially independent and self-supporting.

3) Compensatory Spousal Support.

a) *Barron and Barron,* 240 Or App 391, 246 P3d 500 (2011).

Barron is a spousal support modification action. At the original trial establishing spousal support, the parties had been married 24 years and had 9 children. Husband worked during the entirety of the marriage, and earned $3,304 per month, while Wife had been a homemaker. The April 1998 General Judgment required Husband to make monthly payments of $1,200 for spousal support indefinitely and $694 for child support.

Wife remarried in 2007, and Husband sought termination of his spousal support judgment a few months later. At the time of the modification action, Wife's new Husband was earning $3,547 per month, and Wife was not working outside the home. Husband's income had increased to $7,500 per month.

At trial on the modification issue, Wife acknowledged that the original spousal support award was not segregated between transitional, compensatory and maintenance support because the statute in effect at the time did not require such segregation. However, the trial court in the original action made findings that might have supported a compensatory support award if the statute segregating the forms of support had been in effect. She argued

that a portion of the original 1998 award represented compensatory support. The trial court agreed, holding that $900 of the $1,200 award represented compensatory support that would not be terminated

HELD: Entire spousal support award terminated. Wife's remarriage constituted a substantial change in circumstances. Wife's income is her imputed minimum wage of $1,039 plus one half of her new Husband's income, for a total of $2,306.50. This is higher than the original award of $1,039 in imputed income and the $1,200 in spousal support. Husband's increased income is not relevant to the inquiry.

b) *Harris and Harris,* 349 Or 393, 244 P3d 801 (2010).

This case presents a 16 year marriage producing two children. Wife worked full time supporting Husband through part of his undergraduate and dental school education. Her position supported their growing family and provided health insurance. When the parties' second child was born, Wife became a full-time homemaker. Two years after graduating from medical school, Husband's father sold his dental practice to him at a "substantially below-market price." Wife worked 10 hours a week in the practice. The practice generated over $400,000 in income to Husband at the time of trial. Wife and Husband were 38 and 37 years old at the time of trial.

The trial court awarded each party $720,402 in assets, and required Husband to pay Wife the following support:

	Transitional	**Maintenance**	**Total**
Years 1-4	$3,000/month	$4,000/month	$7,000/month
Years 4-6		$4,000/month	$4,000/month
Years 7-8		$2,500/month	$2,500/month
Year 9		$1,000/month	$1,000/month

The trial court denied Wife a compensatory support award, reasoning that her contributions were typical and expected. The Court of Appeals affirmed the trial court, finding that Wife's contributions *were* significant within the meaning of the statute,

but finding that it would not be just and equitable to award compensatory support.

HELD: Reversed. Wife awarded $2,000 per month in compensatory support for 10 years in addition to trial court order.

To determine whether a compensatory award is appropriate, the court must first determine whether a spouse's contribution is "significant." The court rejected Husband's contention that this required a contribution above and beyond what is considered "typical of a healthy marital relationship," holding "as long as the contributions . . . are meaningful and are likely to have influence and effect," they are significant within the meaning of the statute. The court analogized the enhanced earnings property statute (formerly ORS 107.105(1)(f), in effect from 1993 to 1999), and determined that Wife's contribution was significant under that statute's case law and therefore under the compensatory support statute as well.

The court then applied the compensatory support factors, and concluded an award was appropriate. It found that two of the factors – the duration of the marriage and the extent to which the marital estate had benefitted from the enhanced capacity – were interrelated. It concluded that the objective is not to divide the entirety of the enhanced earning capacity, nor is it to simply divide the benefit acquired during the marriage. It therefore ordered 10 years of compensatory support in light of Husband's likely 17-27 year "highly productive earning career."

c) *Morrison and Morrison,* 240 Or app 656, 247 P3d 1281 (2011).

This case presents a 20 year marriage producing 4 children. At the time of divorce, Husband was a 47 year old cardiologist and Wife was a 46 year old homemaker. The parties married while Husband was in his final two years of medical school in Chicago. Wife supported the family by working as a medical technologist. Wife moved to Denver with Husband for his residency, and to Boston for his fellowship. When Husband began his cardiology training, the parties agreed Wife would be a full-time homemaker. The parties

moved to Minnesota after Husband's training, and, 8 years before their separation, they moved to southern Oregon.

At the time of trial Husband earned $233,457 gross per annum, but he previously earned over $300,000 per year. Wife, on the other hand, had been out of the workforce for 17 years, and had not worked as a medical technologist for 24 years. She was enrolled in a graduate program in biology at trial.

The trial court declined to award any compensatory support, and awarded "transitional and maintenance spousal support" in the amount of $5,000 for 3 years, $4,000 for 3 years, and $2,000 for 2 years. Each party also was awarded one-half of the parties' $1.2 million estate.

HELD: Wife's contributions to Husband's earnings capacity were significant because she worked outside the home to support the family, even after the parties had children, and, when Husband started practice, she was a full-time homemaker which allowed him to focus his energies. The final award is as follows:

	Compensatory	**Maintenance**	**Total**
Years 1-3	$2,000/month	$5,000/month	$7,000/month
Years 4-6	$2,000/month	$4,000/month	$6,000/month
Years 7-8	$2,000/month	$3,000/month	$5,000/month
Indefinite		$2,000/month	$2,000/month

d) *Hook and Hook,* 238 Or App 172, 242 P3d 697 (2010).

This case involved a 21 year marriage producing 2 children who were 12 and 14 at the time of the divorce. At trial, Wife was 54 and working part-time as an occupational therapist earning a monthly net income of $1,421, and Husband was 56 and working an assistant psychology professor at a medical school earning $19,992 gross per month. During the marriage, Wife supported Husband's completion of medical school, with the parties electing that he (and not she) would attend medical school even though both parties desired to pursue that path. Wife further supported Husband's education and career by working outside the home, moving long-distance for his residency and again when he started

practice, agreeing to liquidate the parties' assets to pay for Husband's schooling, transitioning to a full-time homemaker to raise the children, and caring for Husband's parents while they aged in the family residence.

The trial court awarded Wife the following spousal support:

	Transitional	**Compensatory**	**Maintenance**	**Total**
Years 1-2	$1,000/month	$3,000/month	$2,000/month	$6,000/month
Years 3-4			$4,000/month	$4,000/month
Indefinite			$3,000/month	$3,000/month

HELD: Spousal Support modified as follows:

	Transitional	**Compensatory**	**Maintenance**	**Total**
Years 1-4	$2,000/month	$4,000/month		$6,000/month
Years 5-10		$4,000/month	$1,000/month	$5,000/month
Indefinite			$3,500/month	$3,500/month

The Court determined that it was appropriate to address a compensatory support award first because it is the most secure of the various types of spousal support given the limited ability to modify it pursuant to ORS 107.135. It concluded that "there is no doubt that Wife has met the initial threshold of making a significant contribution to the education, training and career of Husband." It found that the parties had diverted marital funds to pay Husband's student loans and finance his practice, thereby suggesting that an equal division of the estate did not adequately compensate Wife for her contributions.

The court also agreed with Wife's contention that the trial court's reduction of maintenance spousal support in years 1 and 2 of the award had the effect of diluting her compensatory award.

e) *Talik and Talik,* 226 Or App 67, 202 P3d 267 (2009).

This case involves a 14 year marriage producing 3 children. Wife was attending medical school at the time the parties married. Husband worked during much of the marriage of America West airlines, and also attended school to become a certified teacher. The parties moved from Arizona to Denver and ultimately to Oregon to accommodate Wife's career needs. Husband provided the

bulk of the care for the children, but it was discovered that he had physically and emotionally abused the children, leading the custody evaluator to recommend Wife have custody of the children, which the trial court ultimately ordered. Husband furthermore managed the parties' finances, but he arranged for payment of his student loans, and not Wife's, during the marriage, and he mis-managed the children's accounts that Wife created from her inheritance during the marriage.

The trial court found that Husband's contribution to Wife's earning capacity was significant, but found it was not just and equitable to award him compensatory support due to Husband's abusive behavior to the children.

HELD: The Court of Appeals affirmed the decision. It agreed that Husband's contribution was significant. While the Court of Appeals agreed that it would be unjust and inequitable for it to award spousal support, it disagreed that Husband's abusiveness justified the denial. Instead, it relied upon Husband's payment of his student loans over Wife's, and his mismanagement of the children's accounts, to justify the denial of a compensatory support award.

4) Maintenance Spousal Support.

a) *Abrams and Abrams,* 243 Or App 203, ___ P3d ___ (2011).

The Court of Appeals modified an award of spousal support to include an award of indefinite maintenance support.

This was 28 year marriage, including periods of separation. Both parties were 48 years old. Husband had a college education and had been the primary wage earner during the marriage. At the time of trial, Husband earned $7,600 per month as an information technologist. Wife had primarily been a homemaker during the marriage but had trained as a hair stylist. Wife began to work as a hair stylist following the parties' separation and earned $900 a month but testified that if the economy improved, she hoped to earn $2,000 a month. The parties led a frugal lifestyle during the

marriage, and Wife led an even more frugal lifestyle during the parties' separation.

The trial court attributed to Wife a minimum-wage monthly income of $1,455 and awarded 24 months of transitional spousal support at $750 per month and no maintenance support.

The Court of Appeals affirmed the award of transitional spousal support but concluded that without an award of spousal maintenance to Wife, the spousal support award was not just and equitable.

In considering each of the factors relating to maintenance support, the Court of Appeals modified the trial court's judgment to include $1,800 per month in indefinite maintenance support.

The Court of Appeals considered the standard of living during the marriage which it described as modest, but comfortable. The Court also focused on the disparate earning capacities of the parties.

The Court of Appeals concluded that an award of indefinite maintenance support was just and equitable. In its ruling, the Court provided in relevant part:

> "[I]n a long term marriage such as this, where the parties should be separated on as equal footing as possible, the relevant level of self-sufficiency is that which allows them to maintain a standard of living that is comparable to that enjoyed during the marriage."

Abrams at 5 (citations omitted).

The Court of Appeals further noted:

> "It is true, as Husband points out, that the payment of spousal support will have an adverse effect on his standard of living, but that is a consequence of dissolution (citations omitted). And as Husband also correctly states, '[i]t is appropriate that the impact of the reduction of the standard of living be borne equally by the parties.'"

Abrams at 6.

The Court of Appeals declined to consider the lump sum equalizing award awarded to Wife where it was not income producing in arriving at an appropriate spousal support award.

b) *Bolte and Bolte,* 233 Or App 565, 226 P3d 116, *rev. den.,* 348 Or 623, 226 P3d 116, *rev. den.* 349 Or 289, 243 P3d 1187 (2010).

This was a 22 year marriage. At the time of trial, Husband was employed as a professor, and earned approximately $10,700 a month, including substantial benefits. Wife was employed as a physical therapist for a non-profit organization, and earned approximately $2,700 a month. She would also receive $600 a month in additional income from the family farm.

At trial, Husband argued even though he earned an extra $2,800 per month for his administrative work as a department head, his base monthly income for his work as a professor was only $7,900, and the appointment was temporary.

Husband also argued Wife was underemployed at her current job. Wife had specialized experience in pediatric and end-of-life physical therapy, and worked for a non-profit organization. Husband argued Wife could make more money and earn better benefits by working for a hospital or other organization. Husband also argued Wife did not work full-time.

The trial court rejected Husband's argument, and found Wife was suitably employed. The trial court awarded Wife monthly indefinite spousal support of $1,500. Wife appealed.

On appeal, Husband again argued Wife was underemployed. The Court of Appeals rejected this argument, providing in relevant part:

> "[W]e agree with the trial court's determination that Wife was suitably employed. Wife is not, for spousal support purposes, required to work for the highest paying employer in her region or in the most lucrative specialty areas of her field."

The Court also held the trial court could consider Wife's need to obtain a mortgage to pay Husband the $415,000 equalizing

judgment for the farm when determining a just and equitable amount of spousal support.

The Court further found Wife worked full-time based on her testimony she usually worked at least 40 hours per week between her two jobs, and Wife explained that her billable hours at one job did not accurately reflect how much time she devoted to that job.

The Court modified the spousal support order from $1,500 to $2,500 per month as the parties had a long-term marriage and were approaching retirement age. Furthermore, Husband's monthly income of $10,700 was substantially higher than Wife's monthly income of $3,300 and, as a result of the dissolution, Wife would have to pay $750 per month for health insurance while Husband would continue to receive insurance through his employer.

c) *Boyd and Boyd,* 226 Or App 292, 203 P2d 312 (2009).

This was a 30 year marriage. At the time of trial, both parties were in their 50's. Husband's gross monthly income was $4,000 per month. Wife was a homemaker and raised the children during the marriage.

The trial court awarded Wife $200 a month in indefinite spousal support. Wife appealed. The Court of Appeals modified the judgment to award Wife $750 a month in indefinite spousal support maintenance. The Court based its holding on the length of the marriage, Wife's age, Wife's limited education, the disparity in the parties' incomes and the impairment of Wife's earning capacity because of her absence from the job market.

d) *Cook and Cook,* 240 Or App 1, 248 P3d 430 (2010).

This was an appeal from a judgment of unlimited separation. The parties had been married ten years at the time of separation. Husband was 69, and Wife was 60. Both parties were in good health. Husband was a surgeon, who earned $300,000 a year. He had no plans to retire. Wife had a high school education, worked as Husband's office assistant, and earned $21,000 a year. She also performed a homemaker role throughout the marriage. They had no children together.

The trial court awarded Wife indefinite maintenance support in the amount of $8,000 a month. Husband appealed.

The Court of Appeals does not change the maintenance award. Wife received no income-producing property unless her uncertain Measure 37 claim was successful, and Wife had no skills to transition into the workforce. The Court of Appeals agreed with the trial court's findings. The Court concluded that under all of the circumstances that existed at the time of trial, and because the spousal support award is subject to modification if and when the Measure 37 claim is successful, it would not disturb the award.

e) *Draper and Draper,* 236 Or App 463, 236 P3d 788 (2010).

This was a 17 year marriage. In a short opinion, the Court of Appeals modified the trial court's award. The trial court awarded Wife three years of spousal support: $3,000 per month for one year; $2,000 per month for the next year; and $1,000 per month for the third year. The Court of Appeals modified the award because it was too short. Based on the length of the marriage, the disparity in the parties' earning capacities and incomes, and the Wife's custodial responsibilities for the parties' children, the Court awarded Wife 11 years of support by extending the $1,000 per month support until the parties' youngest child turned 18.

f) *Finear and Finear,* 240 Or App 755, 247 P3d 1238 (2010).

This was a 21-year marriage. Both parties were 46 years old and healthy at the time of trial. Husband managed a farm, and an inheritance he had received during the marriage. Wife had been primarily a homemaker, and home-schooled the parties' children during the marriage. At the time of trial, she coached gymnastics part-time, and had no plans to further her education or training. The parties lived a relatively frugal lifestyle.

The trial court found that Husband could earn $5,000 per month and Wife could earn $1,650 per month if they elected to work full-time. The trial court awarded spousal support of $1,100 per month for 10 years and $850 per month for an additional six years. The trial court did not explain why it limited the duration of support to 16 years or why it stepped down support after 10 years. Wife appealed.

Given the length of the marriage, Wife's lengthy absence from the workforce while raising and home-schooling the parties' children, her age and lack of meaningful work experience and skills and the disparity in the parties' incomes and earning capacities, the Court concluded it was just and equitable to award Wife $1,100 per month in indefinite maintenance support.

The Court of Appeals held in the absence of evidence that Wife's earning capacity will increase over time, it was not appropriate to step down spousal support. Accordingly, the Court ordered that the spousal support be indefinite.

g) *Forney and Forney,* 239 Or App 406, 244 P3d 849 (2010).

This was a 20 year marriage. Husband was retired and earned income of $4,583 from retirement benefits. Wife earned approximately $2,000 a month working at a Fred Meyer's Starbucks.

The trial court awarded Wife $500 a month in indefinite maintenance support because of the length of the marriage and the disparity of the parties' incomes. The Court of Appeals affirmed the award, but held the trial court erred in ordering the spousal support be paid from Husband's pension.

The Court noted that there may be circumstances where it is appropriate to require an obligor to secure an obligation to pay spousal support, but there was no evidence of security was necessary in this case, nor was there any basis for requiring separate property be used as the source of that security.

h) *Gillis and Gillis,* 234 Or App 50, 227 P3d 809 (2010).

The Court of Appeals modified a spousal support award to add maintenance support to an award of transitional spousal support where it found a greater disparity in the parties' incomes than that found at trial.

This was a 16 year marriage. At the time of trial, Wife was 52 years old, and Husband was 41 years old. Husband had a bachelor's degree in computer science and owned a software

business. Wife had been a homemaker. She had a college degree and was licensed as a realtor.

The parties disputed Husband's income at trial, and the trial court found his income was $186,000 a year. The trial court further found Wife was capable of earning $20,000 a year. The trial court awarded Wife $3,000 a month for five years in transitional spousal support. Wife appealed.

The Court of Appeals found Husband's income to be higher than that found by the trial court because Husband's income should have included his voluntary contributions to his retirement plan. Based on this conclusion, the Court determined it would be just and equitable to award Wife spousal maintenance of $5,000 for a period of three years, which encompassed $2,000 in transitional and $3,000 in maintenance support, followed by five years of maintenance support of $4,000 per month, for a total of eight years of spousal support from the date of the dissolution judgment. At that time, Wife would be able to draw on her retirement accounts without penalty. Wife's earning capacity was no more than $20,000 per year, whereas with retirement contributions, Husband earned $205,000 per year.

i) *McLauchlan and McLauchlan*, 227 Or App 476, 206 P3d 622, *rev. den.,* 246 Or 363, 213 P3d 577 (2009).

This was a 30 year marriage. At the time of trial, Wife was 53 years old, and Husband was 56 years old. Husband had a significantly greater income earning capacity during the marriage than did Wife. At the time of trial, Husband and Wife were both employed as realtors. Husband earned $4,800 a month, and Wife earned $1,700 a month. Wife raised the parties' six children.

The trial court awarded Wife maintenance spousal support of $1,000 per month for five years Husband appealed.

The Court of Appeals held that no single spousal support factor is dispositive in determining the amount and duration of maintenance spousal support, but economic self-sufficiency of each spouse is the objective of a spousal support order. A spousal support order must recognize the effect of the marriage upon the capability of a spouse for economic self-sufficiency. In setting the

amount and duration of spousal support, the court keeps in mind the goal of ending the support-dependency relationship within a reasonable time if that can be accomplished without injustice or undue hardship.

The Court concluded a spousal maintenance award to Wife of $1,000 per month for five years was just and equitable after 25 years of marriage even though Wife had four years prior to trial to establish her real estate career. Husband had more experience as a real estate agent than Wife, and Wife estimated it would take her approximately five years to become established in real estate business.

As to reducing Husband's spousal support obligation to its lump sum present value, the Court held alternative spousal support awards are expressly authorized by the spousal support statute and thus the trial court could award both $1,000 per month for five years and alternative lump sum amount of $54,000, representing present value of required installments. ORS 107.105(1)(d).

j) *Morales and Morales*, 230 Or App 132, 214 P3d 81 (2009).

This was a 35 year marriage. Husband served in the U.S. Army for 20 years, but later retired with symptoms of post-traumatic stress-disorder. He returned to work with the U.S. Postal Service until the VA found he was totally disabled. Wife was a homemaker during the marriage. During the dissolution, Wife obtained her GED, and had completed courses to become a licensed tax preparer, and had briefly worked as a part-time receptionist for H & R Block. Husband had a total gross monthly income of $5,494 from non-taxable disability benefits and taxable retirement benefits. Wife did not have any income.

The trial court awarded Wife $500 per month in indefinite spousal support. Wife appealed. The Court of Appeals held that the trial court erred when it omitted Husband's Veterans Affairs (VA) disability benefits from Husband's income for purposes of setting spousal support. The award to Wife of $500 per month in indefinite spousal support was inequitable. The Court modified the spousal support award to $1,400 in indefinite spousal support.

Courts are precluded from treating Veterans Affairs (VA) disability benefits that a veteran receives in lieu of retirement pay as property subject to division, but VA disability payments may be considered as income in awarding spousal support. When determining the appropriate amount of spousal support, the touchstone concern is setting an amount that is just and equitable under the totality of circumstances.

k) *Powell and Powell,* 225 Or App 402, 202 P3d 183 (2009).

This was a long-term marriage. At the time of trial, Husband was 56 years old, and Wife was 54 years old. Husband was a professional musician and music teacher. Wife was in poor health and not working.

The trial court awarded Wife indefinite spousal support of $750 a month. Husband appealed. Husband disputed his income, but the trial court and the Court of Appeals determined his income as a professional musician and music teacher to be $2,000 per month. Wife had health issues related to her work, but medication could combat those issues so her income was imputed at $900 per month. The Court of Appeals concluded that $550 per month in indefinite maintenance support would be just and equitable in order to afford parity in the parties' disposable income.

l) *Rudder and Rudder,* 230 Or App 437, 217 P3d 183, *rev. den.,* 347 Or 365, 222 P3d 1091 (2009)

This was a 17 year-marriage. Husband was an electrician, and earned $5,648 a month. He earned an additional $800 a month in rental income. Wife was primarily a homemaker during the marriage. Wife had operated a small hair salon for some years during the marriage, but the income was insignificant and she was unemployed when she came before the court. At the time of trial, Husband was 55 years old, and Wife was 49 years old. Husband was in good health. Wife suffered from debilitating migraines.

The trial court awarded Wife spousal support of $1,000 per month for five years. The trial court based its award on its finding Wife was able to return to work, noting Wife had been able to work in the past, even with her health concerns.

In a cross-appeal, Wife assigned error to that ruling, arguing that the trial court erred in failing to award her indefinite spousal support. According to Wife, the factors set out in ORS 107.105(1)(d)(C) supported such an award. In particular, Wife emphasized the lengthy duration of the parties' cohabitation and marriage, Wife's poor health, the standard of living established during the marriage, the disparity in Wife's earring capacity compared with Husband's earning capacity, her limited education, employment skills, and work experience, and the disparity in the financial needs and resources of the parties.

The Court of Appeals accepted the trial court's finding that Wife was able to work and could return to some level of employment. Nonetheless, the court agreed with Wife that an award of indefinite support was warranted under the circumstances.

The parties were married for almost 17 years and cohabitated for approximately three years before that. Husband was an electrician working for the same employer since 1991. At the time of dissolution, he was earning approximately $5,600 per month. In addition, in the property division, he was awarded property generating $800 per month in rental income.

Wife, on the other hand, functioned primarily as a homemaker over the course of the cohabitation and marriage. She took care of the home, groceries, laundry, cleaning, preparing meals, and transporting the children. Although she owned a two-chair hair salon for some years during the marriage, it was always a struggling business. In addition, because Husband wanted her with him when his job took him out of town, she was often absent from the business for extended periods. The most income she reported over the course of the parties' relationship was in 1992, when she reported a gross annual income for tax purposes of $4,989. The last year that she reported any income for tax purposes was 2000, when she reported $1,351. At the time of trial, Wife had no income and was living with relatives in California. Her expenses included over $300 per month in medications to treat her migraines.

In short, there was no evidence in the record to indicate that Wife's earning capacity if and when she does find employment would be

anything more than minimum wage. Moreover, it was unlikely that Wife will ever be able to work more than part time, given her health problems. Given all of those circumstances, the court concluded that it was just and equitable to award Wife indefinite spousal support of $1,000 per month. Moreover, because Wife will need to reestablish herself as a cosmetologist or find some other unknown source of employment and being absent from the job market for some time, the Court concluded that an award of $1,500 per month was appropriate for the first 60 months.

m) *Sather and Sather,* 238 Or App 235, 243 P3d 76 (2010).

This was a 38 year marriage. Husband was 50 and the primary wage earner. At the time of trial, he earned $107,000 a year or about $8,917 a month. Wife had health problems, and there was little chance she could find work. The trial court awarded Wife spousal maintenance of $5,000 a month until 2012 and $4,000 indefinitely thereafter.

Husband appealed, arguing the award was not just and equitable because it left him with insufficient funds to maintain a standard of living that was sufficiently proportionate to the standard that the parties enjoyed during the marriage.

The Court of Appeals agreed and found Husband's standard of living was greatly diminished by the award, and he would not be able to maintain a standard of living that began to approach the standard enjoyed during the marriage.

The Court reduced the support award providing that a reduction in spousal support will enable Husband to enjoy a standard of living that is closer to the parties' marital standard of living while also ensuring that Wife's standard of living is not overly disproportionate to the marital standard. The Court reduced the award to $4,000 a month for five years and $3,000 a month thereafter.

5) Modification of Spousal Support.

a) *Beebe and Beebe*, 244 Or App 44, ___ P3d ___ (2011).

The Court of Appeals held that the exclusion of testimony regarding the purpose of a transitional spousal support award in a modification hearing was reversible error.

After the parties' 15 year marriage, the marriage was dissolved in 2008 based on the stipulation of the parties. At the time of dissolution, Husband earned $5,614 per month as a trucker, and Wife earned $1,400 per month as a day care provider. According to the stipulated judgment, Husband would pay transitional spousal support of $1,100 per month for 24 months, then $750 per month for the next 18 months, then $500 per month for 48 months in maintenance support. After the economic downturn, Husband's earnings dropped to $3,200 per month, and he filed for a modification of the spousal support order.

During the Husband's direct testimony at the hearing, Husband's attorney asked him to describe the underlying purpose of the transitional support award. The trial court, *sua sponte*, declared this line of inquiry irrelevant because the award was the product of the parties' stipulation. The trial court denied his motion to reduce or terminate the spousal support award and Husband appealed.

Husband's appeal was based on numerous challenges. However, the Court of Appeals focused solely on the paramount evidentiary issue of the trial court's exclusion of Husband's testimony. The Court emphasized that nothing in ORS 107.135(15) or case law limits a party's ability to file a motion to modify a spousal support award where parties have stipulated to the initial support award. Therefore, the trial court erred in declaring Husband's testimony irrelevant. It is relevant to the necessary determination of whether the purpose of the transitional support award had been satisfied. Because Husband testified only under an offer of proof, Wife provided no evidence in response. The Court reversed and remanded to allow both parties the opportunity to develop the record.

The fact that a spousal support award is stipulated does not affect its ability to be modified and the purpose of the support award is relevant in the determination of whether or not to modify.

b) *Daly and Daly*, 228 Or App 134, 206 P3d 1189 (2009).

Wife appealed an Oregon judgment that modified the support provisions of a California judgment. The trial court modified the California judgment's "family support" award into a child support award of $1,580 per month and a spousal support award of $4,000 per month, which resulted in an overall decrease in monthly support.

After an examination of California family support statutes and the intent of the parties as evidenced by the judgment, the Court of Appeals concluded "family support" combined child support and spousal support, and that those amounts, under the parties' agreement, could be separately determined.

Modifications of child support and spousal support awards are within an Oregon court's jurisdiction, and it follows that a family support award consisting of child support and spousal support is within an Oregon court's jurisdiction to modify.

The Oregon courts had subject matter jurisdiction over the child support award that was part of family support award in a California dissolution judgment after parties filed stipulations giving the Oregon Judicial Department exclusive jurisdiction to modify orders, including jurisdiction over all family support, spousal support, child support, child custody, and visitation matters. Although the parties' stipulation shifted jurisdiction from California courts to Oregon courts to modify the support, custody, and parenting time provisions of the California dissolution judgment, it did not, by its terms, make modifiable the family and spousal support awards that the California judgment made non-modifiable. The non-modification provision contained in the California dissolution judgment precluded modification of the spousal support portion of family support award by Oregon court, in the absence of a written agreement between the parties to make such award modifiable or some significant decrease in the earnings of either party. The non-modification provision in the California dissolution judgment, which prevented modification of the family

support award, was not invalid under California law, even though only spousal support could be made non-modifiable under California law.

c) *Frost and Frost,* 244 Or 16, ___ P3d ___ (2011).

The Court of Appeals affirmed the trial court's termination of spousal support because Wife's income had increased due to remarriage and the purpose of the spousal support had been satisfied.

The parties' 20-year marriage was dissolved by a marital settlement agreement in 2003. Under the agreement, Husband paid $3,000 per month in maintenance spousal support for eight years. At the time of dissolution, Husband earned $12,000 per month as a pharmacist and Wife earned $3,200 per month as a part-time dental hygienist. After the dissolution, Wife began living with her current Husband whom she married in 2007. The new Husband, a retired dentist and real estate investor, had a net worth of $4.6 million and earned $332,000 annually.

In 2008, Husband filed a motion to modify the judgment to terminate his spousal support obligation. At trial, the court found that Wife enjoyed a lifestyle of substantially higher quality than the lifestyle she enjoyed at the time the parties separated. The financial resources the new Husband contributed to his marriage with Wife supplanted the purposes of the spousal support award. The trial court terminated the spousal support. Wife appealed.

On *de novo* review, the Court of Appeals found that the purpose of the initial spousal support award was to ensure that the Wife's standard of living would not be overly disproportionate to that enjoyed during the marriage. The judgment did not elaborate on the purpose of the spousal support, but the evidence showed that it was intended to narrow the discrepancy between the parties' incomes.

In determining whether to modify the spousal support award, the Court asked two questions: whether or not Wife's remarriage constituted a substantial, unanticipated change in economic circumstances and, if there has been such a change, then whether the amount of spousal support is "just and equitable" under the

totality of the circumstances. In evaluating whether or not a remarriage constitutes a substantial change in circumstances, the Court looked at the "potential shared income" of the obligee spouse. The potential shared income is then weighed against the standard of living that the initial award was intended to ensure for the obligee spouse. If, as a result of remarriage, the obligee's means of support have increased to the point where, without the spousal support, they are equal to or greater than the income the support was intended to ensure, the support should be terminated The Court used the potential shared income model and concluded that Wife's remarriage had increased her income from $6,200 to $22,433 per month.

A court must also find that this presumption is just and equitable under the circumstances. Wife attempted to argue that because Wife and new Husband had a pre-nuptial agreement that set-out an expense sharing formula it would not be just and equitable to presume this new income. However, the Court found that new Husband still provided lavish vacations and gifts to Wife and considered it an "extra-contractual largesse." Therefore, irrespective of the agreement's expense sharing formula, Wife was able to lead a lifestyle that substantially exceeded her lifestyle during her marriage to Husband. The Court concluded that it was just and equitable to presume this new income.

The Court of Appeals agreed with the trial court's findings that, as a result of her remarriage, Wife had become able to exceed the parties' martial standard of living without the support award. Therefore, the trial court's order terminating the spousal support was affirmed.

d) *Haley and Haley*, 228 Or App 731, 208 P3d 1006 (2009).

The trial court found Husband did not meet his burden of proving a substantial change of circumstances, and denied Husband's motion to reduce or terminate his maintenance spousal support obligation where Wife had remarried, and his salary had been reduced.

The Court of Appeals found that although Husband's monthly salary was reduced from $4,000 to $2,500 shortly before the modification hearing, Husband's accountant testified Husband had

a practice of using a corporation he owned to pay certain personal expenses and, inasmuch as the record did not establish how much additional income Husband received from corporation, the court could not determine how much, if at all, Husband's total income had actually diminished. Modification of a spousal support award is proper if the original purpose of the award has been fulfilled or if changed circumstances have substantially affected the obligor's ability to pay or the obligee's need for support. The burden in a domestic relations action of establishing a change of circumstances as grounds to reduce or terminate a spousal support obligation is on the party requesting the modification of support.

e) *Paresi and Paresi*, 234 Or App 426, 228 P3d 642 (2010)

Husband filed a motion to modify or terminate spousal support. The trial court denied the motion and entered a supplemental judgment that modified the amount of spousal support awarded to Wife from $1,500 per month to $4,000 per month and awarded Wife attorney fees and costs. Husband appealed the denial of the motion and supplemental judgments.

The Court of Appeals held that: (1) Wife's worsening health condition was a substantial change in economic circumstances; (2) the change in circumstances was unanticipated; (3) modification of spousal support from $1,500 per month to $4,000 per month was appropriate; and (4) neither termination or modification of spousal support was necessary to allow Husband to adjust to his change in economic circumstances.

In addition to being substantial, a change in circumstances warranting a modification of spousal support must be one that could not have been anticipated at the time of the judgment. If a spouse adequately demonstrates a substantial change in economic circumstances, the court modifies the amount of spousal support awarded to maintain the relative positions of the parties as established in light of their changed circumstances. ORS 107.135.

Wife's worsening health condition due in part to rheumatoid arthritis was a substantial change in economic circumstances supporting modification of spousal support. Her new health problems, some related to rheumatoid arthritis and some not,

substantially increased Wife's actual medical expenses, and Wife experienced a dramatic reduction in her income and earning capacity when her health problems worsened to the extent that she was no long able to work. Moreover, Husband was able to pay the additional amount without affecting his ability to enjoy an affluent standard of living.

Even if the change in Husband's economic circumstances was substantial, neither termination nor modification of spousal support was necessary to allow Husband to adjust to the change, where Husband's household income, while reduced, was still significant enough to continue paying spousal support amount awarded without imposing a disproportionate hardship on his household. Further, reducing or terminating support for Wife would have impermissibly diminished her relative financial position.

f) *Stokes and Stokes*, 234 Or App 566, 228 P3d 701 (2010).

On appeal, Wife contended that the trial court lacked authority to "forgive" Husband his past-due support obligation. Husband contended that the trial court's ruling did not, in effect, forgive his past due obligation, but rather treated the delinquency as having been satisfied by his payment of the parties' credit card bills.

The Court of Appeals agreed with Husband that satisfying payment of support with credit card payments appeared to be the rationale for the trial court's decision, but rejected the conclusion that said payments could be credited against his temporary support obligation as set forth in the limited judgment. The temporary support was awarded to provide Wife with assistance in meeting her monthly expenses during the pendency of the dissolution proceeding. Husband's arrearage could not be adjusted for his payment of the parties' joint debt. Crump and Crump, 138 Or App 362, 370 (1995) (arrearage award for unpaid temporary spousal support could not be reduced to reflect Husband's voluntary payment of Wife's share of house payments). Therefore, the trial court erred in crediting Husband's delinquent temporary support obligation by the amounts paid toward the parties' debt.

GORIN'S TALKING POINTS**.....**

FAMILY LAW CONFERENCE - 2011

THINGS WE SHOULD HAVE LEARNED LONG AGO HAD WE BEEN PAYING ATTENTION.....

PET PEEVES.....

1. "Each party shall pay their own attorney fees....."

Great! Thank you, Judge, for including that provision in the judgment. Without it, my client would obviously have no obligation to pay my fees. By the way, can I have my client held in contempt for disobeying your court order regarding payment of my fees?

Better choice of words: "*Neither party shall be liable for the attorney fees of the other.*"

2. "Petitioner shall have judgment against respondent....." (Or was it supposed to be respondent who has judgment against petitioner?)

Better, easier and safer to say "*Wife shall have judgment against husband....*"

When drafting your judgment document (or motion or legal memorandum), simply include a paragraph at the beginning that says:

> "*As used herein, "mother" or "wife," as appropriate, refers to the petitioner, and "father" of "husband," as appropriate, refers to the respondent.*"

This eliminates have to repeatedly flip back to page 1 to see who's who.

You can also do this in your Petition for Dissolution of Marriage. This will go a long way in avoiding the common error of alleging that "Petitioner is not now pregnant" in cases in which the petition is the husband.

Note, also, the nomenclature requirements for appellate courr briefs. ORAP 5.15:

> *"In the body of a brief, * * * in domestic relations proceedings, the parties shall be referred to as husband or wife, father or mother, or other appropriate specific designation."*

STATUTES YOU NEED TO KNOW.....

3. ORS 25.089(7). Specifying the effect of a child support modification.

ORS 25.089(7): *"When modifying a child support judgment, the court, administrator or administrative law judge shall specify in the modification judgment the effects of the modification on the child support judgment being modified."*

So be sure to include in your support modification judgment appropriate language in compliance with the statutory requirement. Consider the following language, for example:

> ***Effect of this judgment on prior judgment.*** *The previously ordered child support judgment entered on October 15, 2004 in Lincoln County Circuit Court, case # _____; DCS # _____) that required father (as obligor) to pay to mother (as obligee) the sum of $802 per month as child support for the benefit of Mitchell James Smith is terminated, effective June 30, 2010, and no further sums shall accrue thereunder. The Division of Child Support is directed to forthwith adjust the obligor's support payment account record, as maintained by said division, in accordance with the provisions of this judgment.*

4. ORS 107.135(10)(b). The FFCCSOA.

ORS 107.135(1)(b). *"The courts of Oregon, in a proceeding to establish, enforce or modify a child support order, shall recognize the provisions of the federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. 1738B)."*

The FFCCSOA is a federal statute that establishes the standards that a state must apply in determining the state's jurisdiction to issue support orders and to determine the effect to be given to support orders issued by other states.

The FFCCSOA interacts with the UIFSA, much like the PKPA and the UCCJEA interact together. In general, the federal statute lays out the jurisdictional requirements for state courts to recognize, enforce, and modify orders of sister states, while the state statute lays out the requirements for the state to made original orders, recognize foreign orders, and modify any outstanding order. And, of course, as a federal statute, the FFCCSOA pre-empts all similar state laws pursuant to the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2.

More likely than not, if you are correctly applying the UIFSA's jurisdictional rules regarding recognition, modification and enforcement of support orders issued by other states, you will be in compliance with the FFCCSOA. But still, it is always advisable to be aware and knowledgeable of both state and federal law. Remember: *Ignorance of the law is no excuse.*

For further education, see ***State ex rel Alaska v. Anderson***, 189 Or App 162, 74 P3d 1149 (2003). A complex and acronym-intensive case involving the enforceability of an Alaska child support order in Oregon. (Very well-written opinion from Judge Landau.)

5. **ORS 336.025. Frances E. Willard.**

"*The second week in March shall be known as Women in History Week. During school hours in Women in History Week, time shall be set apart for instruction and appropriate activities in commemoration of the lives, history and achievements of women in history, including Frances E. Willard and women in Oregon history.*"

Had you been paying attention when you were in school, you would know that Frances E. Willard was a woman who was born in 1839 and died in 1898, at age 59. She was an American teacher, suffragist and social reformer. She was a co-founder of the WTCU (Women's Christian Temperance Union) in 1874 and its president from 1879. Her influence was instrumental in the passage of the Eighteenth (Prohibition) and Nineteenth (Women Suffrage) Amendments to the United States Constitution. Her causes included federal aid to education and free school lunches, unions for workers, the eight-hour work day, work relief for the poor, municipal sanitation and boards of health, national transportation, strong antirape laws, and protections against child abuse. (The Tea Party would have loved her!)

ISSUES OF INTEREST.....

6. Dissolution after legal separation: The "vested rights" fallacy.

There seems to be a widespread belief that once you have a Judgment of Legal Separation, any provisions of the separation judgment that resulted in "vested rights" cannot be affected by a subsequent proceeding to dissolve the marriage.

If that is true, somebody needs to tell Justice Landau, who came to a different conclusion in the 1997 Court of Appeals case of *Jones and Jones*, 147 Or App 280, 936 P2d 372 (1997). In that case, wife had obtained a judgment of separation upon default in 1988 that awarded to her, *inter alia*, the parties' entire interest in the family residence. Five years later, in 1993, wife filed a petition for dissolution of marriage, independent and apart from the separation case. In the dissolution case, wife asked the court "to preserve the disposition reflected in the separation judgment," including the award to her of the family residence. In opposition, husband asked the dissolution court to simply make an equal division of the parties' property, including the house. The dissolution court granted husband's request, thereby taking away from wife half of the residence that had been awarded to her by the separation judgment.

Wife was not very happy. She appealed. Relying on ORS 107.465(1), the statute that allows a separation judgment to be converted to dissolution judgment if done within two years and that further says that "*A supplemental judgment of dissolution entered under this section does not set aside, alter or modify any part of the judgment of separation that has created or granted rights that have vested.*"

As explained by then-Judge Landau:

> The terms of ORS 107.465 that prohibit alteration or modification of rights that had become "vested" through the separation judgment "*only applies to judgments entered upon a motion for supplemental proceedings within two years of the entry of a separation judgment. In this case, the parties made no such motion. Rather, wife filed a petition for dissolution five years after the entry of the separation judgment.*"
>
> "*Thus, in this case, even if wife's interest in the residence vested before the dissolution, the property remained "property * * * of either or both of the parties" within the meaning of ORS 107.105(1)(f) and remained within the dispositional authority of the court. Such property may be disposed of in a manner that is "just and proper in all the circumstances.*"

Of course -- and as usual --- Judge Landau was correct.

For more on this topic, see **LDG Monograph # 46**: "**DISSOLUTION AFTER LEGAL SEPARATION"**
http://ldgorin.justia.net/article_40-1504215.html

7. Who's your Daddy? Name of father on child's birth certificate.

Let me take moment to clear up some confusion. Basically, here are the rules:

1. As a general rule, when a married woman gives birth to a child, the woman's husband is presumed to be the child's father, *biological reality to the contrary notwithstanding*. Upon the birth of the child, the married mother may cause the child's birth certificate to list her husband's name as the child's father, *OR* she can simply have no "name of father" listed at all. Those are the only two options. In sum, she cannot have the boyfriend listed as father, and this is true even if mother, husband and boyfriend are all at the hospital and all are in agreement that the boyfriend (and not husband) is the biological father of the child.

2. If husband's name is listed as "father" on the child's birth certificate, or if there is simply no name of father listed, Vital Records will change or amend the birth certificate only upon a court order that effectively "disestablishes" the husband's presumptive paternity of the married mother's child. This may be the result, for example, of a filiation proceeding declaring a man other than husband as being the child's legal father, or a judgment of dissolution of marriage the declares the husband's nonpaternity of the wife's child, or by judgment of adoption that effectively establishes a new father in place of the old one.

3. In the case of a child born to an unmarried woman, no "name of father" will appear on the child's birth certificate until and unless LEGAL paternity is established through one or more of the various methods provided by law for doing so. Until then, the child is presumed as a matter of law as having only ONE legal parent, that being the mother. (The biological father, on that basis alone, has no legal rights and no legal responsibilities, since legal rights and legal responsibilities are founded on LEGAL paternity, not BIOLOGICAL paternity.) At

such time as legal paternity of the child born to an unmarried woman is established through one or more of the various methods provided by law for doing so, and Vital Records is appropriately notified, the child's birth record will then be changed or amended to show "name of father."

4. *PRACTICE TIP*: As a general rule, do NOT accept your client's representation that "name of father" is "listed" on the child's birth certificate. Have the client produce the official state-issued birth certificate. If the client does not have it, have the client contact Vital Records in Portland to get copy. (Note: The will also verify where the child was born, just in case there is any question in the future should the child decide to run for President of the United States.)

8. Contempt of court. When to use it. And when not.

That a remedy may be *available* does not mean that it must be used, or that it is the best choice if others are also available. The problem with "contempt" is that the mere mention of the word invokes and injects into the proceeding a needless degree of hostility and adverse reaction.

Lawyers filing a contempt motion tend to become prosecutorial predators, seeking to bring the wrath of God and the court on the scumbag putative contemnor. The details and specifics of the requested *remedy* to cure or fix the contumacious conduct so as to bring it to an end (which is really what a contempt proceeding seeking a remedial sanction is all about) seems to lose significance (if even thought about at all), with all efforts being directed to "proving" the contempt and getting the judge to "hold 'em in contempt" (or worse yet, "find him guilty of contempt"). The adrenaline is running high and rancor is aggravated.

And the lawyer whose client is on the receiving end of a contempt motion, upon being notified by the client as to what is occurring, usually goes immediately into "defense mode," planning a defense to the "charge" as if it were a criminal case.

All of this is unnecessary and generally not in the best interests of the client. Whenever the lawyer is presented with a complaint from a client about ex-spouse not doing with ex-spouse is supposed to be doing (or not paying what ex-spouse is supposed to pay), rather than thinking with your gut ("*contempt!!*"), think first with your head about what it is that the client wants and what methods (other than contempt) might be available to accomplish what the client is seeking. Generally, contempt should be a last consideration, if a consideration at all.

All of this is particularly true with regard to enforcing a money obligation. Recall what Willie Sutton (the infamous bank robber from the 1930's) said when asked by news reporters after his arrest why he robbed banks: "'*Cause that's where the money is!*" If what your client wants is money, use the "judgment remedies" provided by law that are best suited for the collection of money. Contempt is really NOT designed to be used as a debt collection device.

In contrast, garnishment, levy, execution, liens on property, judgment debtor exams, etc., are all remedies that are specifically designed and intended for the purpose of collecting money.

Again, as has been said before: ***If you want his body, go after his ass. But if what you want is money, go after his assets***. Sound advice, in my opinion.

9. <u>Attorney fees in dissolution cases. It's a question of equity.</u>

We all too often seem to forget that when it comes to attorney fees in a marital dissolution case, Oregon is NOT a "loser pays" state, nor is there any automatic right for recovery of attorney fees by the "prevailing party."

What Chief Judge Brewer said in *Niman and Niman*, 206 Or App 259, 136 P3d 105 (2006), is worth repeating:

> [T]he court in a dissolution action is not required to award attorney fees merely as a reward to the prevailing party. Instead, the court is to evaluate the financial resources of the parties, the property division made by the court's judgment, any orders of support, and the like in determining whether it would be <u>*equitable*</u> to assign to one party or the other the obligation to pay attorney fees.

In *Niman*, the trial court awarded attorney fees to wife, apparently doing so in part due to the position husband asserted regarding custody. The Court of Appeals noted that "*[E]ven if we shared the trial court's view of the record regarding husband's position on the custody issue, it would not override the considerations that lead us to conclude that an award of attorney fees is not appropriate in this case.*"

10. <u>Dependent child tax exemption. Can it be allocated over objection?</u>

NO! *See Gleason v. Michlitsch*, 82 Or App 688, 692-93, 728 P2d 965 (1986).

> "Present IRC § 152 [26 USC § 152] contains no provision recognizing a state court award of a dependency exemption when the parents have been married but later have divorced or separated, except for decrees made before January 1, 1985. ***<u>There is now no federal statutory basis for a state court to award the dependency exemption.</u>***" (Emphasis supplied.)

In sum, federal law grants to the custodial parent the right to claim the dependent child tax exemption. The only exception is if the custodial parent VOLUNTARILY agrees to release the right to claim the exemption by signing IRS Form 8332 and giving it to the non-custodial parent. In the event the custodial parent then breaches the agreement, the recourse of the noncustodial parent is simple: *Ask the court for a money award so as to compensate for the financial damage sustained as a result of the breach.*

Point of interest: IRS regulations regarding the dependent child tax exemption were revised in 2008. In the process of formulating the revised regulations, it was suggested to the IRS that the new regulation include a provision specifically allowing a noncustodial parent to claim a child as a dependent *if a divorce decree allocates the exemption to that parent, regardless of whether the custodial parent releases the right to claim the child.* IRS rejected the suggestion because it would be contrary the existing IRS Code. Specifically, according to the IRS:

> "A state court may not allocate an exemption because sections 151 and 152, not state law, determine who may claim an exemption for a child for Federal income tax purposes." 73 Fed Reg 37800 (column 1).

Another point of interest: Without actually and directly "awarding" the dependent child tax exemption to the noncustodial parent, the court may effectively do so indirectly by simple adjusting the amount of the child support obligation that the noncustodial parent would otherwise be required to pay.

Indeed, one of the recognized "rebuttal factors" listed in the Guidelines, at OAR 137-050-0760 (h), is "*The tax consequences, if any, to both parents resulting from * * * the determination of which parent will name the child as a dependent, child tax credits, or the earned income tax credit received by either parent.*"

SUGGESTION: Also note that if the custodial parent AGREES to transfer to the NCP the right to claim the exemption, all is OK and the agreement is enforceable. In the custodial parent then fails to abide by the agreement, remedial action by the noncustodial parent could then be taken. BUT, the proper recourse –- IN MY OPINION --- is NOT contempt. Rather, the proper recourse is *CONTRACT ENFORCEMENT*. After all, what you have is simply a breach of contract. And if the agreement is within the scope of those described in ORS 107.104(2) --- [a stipulated judgment signed by the parties, a judgment resulting from a settlement on the record or a judgment incorporating a marital settlement agreement] --- the terms of the agreement can be enforced, "*as contract terms using contract remedies*."

Bottom line (again, IN MY OPINION): Forget about contempt. Rather, think in terms of REMEDY = MONEY. In other words, what is the real and actual value of the right to claim the exemption? Determine the dollar amount of the increased tax liability incurred by your client as a result of not being able to claim the dependent child tax exemption and then seek a supplemental judgment and money award through the divorce court. And also ask for attorney fees, if you want, since the proceeding is taken for judgment enforcement purposes.

11. A "Motion for Reconsideration"? Not at the trial court level.

As former Chief Justice Petersen explained in his concurring opinion in *Carter v. U. S. National Bank*, 304 Or 538, 747 P2d 980 (1987), such a procedural device does not exist at the trial court level. Said the Chief Justice:

> The so-called "motion for reconsideration" appears neither in the Oregon Rules of Civil Procedure nor in any other Oregon statute. Lawyers filing motions to reconsider after entry of judgment might better denominate such a motion as a "***motion asking for trouble***." 304 Or at 546.

12. Whew! It's time for me to stop! Probably said too much already!

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81 - When is it alimony (for income tax purposes)? And when is it not?

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WHEN IS IT ALIMONY (for income tax purposes)? AND WHEN IS IT NOT?

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Contents

1. Introduction

Marital settlement agreements and dissolution judgments typically include provisions establishing obligations for the payment of money by one spouse to the other. Such obligations usually fall into one of three classifications: child support, spousal support or property division. How such obligations will be treated for purposes of Oregon domestic relations law is a matter for state law determination. In contrast, how such obligations will be treated for income tax purposes is a matter controlled by federal law.

Here we focus on the classifications of spousal support and property division and the treatment of such obligations for income tax purposes. Understanding the underlying concepts, principles and rules of law, coupled with careful planning, draftsmanship and use or proper wording, will enable practitioners to better serve their clients, and to rest easier at night.

2. Overview

Under Oregon domestic relations law, as explained in *Moak and Moak*, 64 Or App 487, 668 P2d 1249 (1983), spousal support may be modified based on evidence establishing a change of circumstances, ORS 107.135(1)(a), but a division of property may not. The distinction between spousal support and property division is not always clear. And when that occurs, the court will determine the appropriate classification based on the underlying facts of the case. *Horesky and Horesky*, 30 Or App 941, 569 P2d 34 (1977), *rev den* 281 Or 1 (1978). The labels used by the parties are not decisive nor binding on the court. *Schaffer v. Schaffer*, 57 Or App 43, 643 P2d 1300 (1982). Rather, the controlling issue is *"the nature and purpose of the award*." *Fletcher and Fletcher*, 72 Or App 708, 696 P2d 1182 (1985).

However, regardless of the classification made by the state court, a payment of money from one spouse to the other under the terms of a dissolution judgment or marital settlement agreement, whether labeled as spousal support or property division, will be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for federal income tax purposes unless, under the criteria of Internal Revenue Code (IRC) § 71(a), 26 USC § 71(a), the payment is disqualified from such treatment. If deemed and treated under federal law as "alimony," the payment will be tax deductible for the payor and taxable income to the payee, in accord IRC §§ 71 and 215 (26 USC §§ 71 and 215).

Thus, money paid to a former spouse pursuant to a court-ordered obligation deemed as "spousal support" for state law purposes (and therefore subject to future modification) may or may not end-up being treated by the IRS as "alimony" for income tax purposes. And the same is true for money paid to a former spouse as "property division" for state law purposes (and therefore not subject to future modification). As lawyers are prone to say when answering tough legal questions, "*Well, it all depends.....*"

Consequently, when drafting marital dissolution judgments and settlement agreements that establish money payment obligations, problems will be avoided if the intentions of the parties (and the court) regarding the payment classification for state divorce law purposes, as well as the intended income tax treatment and effect, are clearly expressed by the language used in the controlling document. Failure to do so may result in consequences unintended or undesired by the parties and the court.

3. Uncle Sam says.....

Under federal income tax law, Internal Revenue Code (IRC) § 71(b)(1), a payment to or for the benefit of a spouse or former spouse under a divorce or separation instrument will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes and thus will be tax deductible from the payor's gross income, IRC § 215, and taxable income to the payee, IRC § 71, if all of the following requirements are met:

- The payment is received by (or on behalf of) a spouse under a divorce or separation instrument. IRC § 71(b)(1)(A).
- The divorce or separation instrument does not designate the payment as "a payment that is not includible in gross income under IRC § 71 and not allowable as a deduction under IRC § 215." IRC § 71(b)(1)(B).
- The spouses are not members of the same household at the time the payment is made. IRC § 71(b)(1)(C).
- There is no liability to make any payment (in cash or property) after the death of the recipient (payee) spouse. IRC § 71(b)(1)(D).

In addition (and no less important):

- The payment must be in cash (or check or money order) [rather than property or services].
- The spouses do not file a joint return with each other.
- The payment is not designated as or treated as child support.

As declared by the U.S. Tax Court: "***If a payment satisfies all of these factors then the payment is alimony; if it fails to satisfy any one of these factors then the payment is not alimony.***" *Baker v. Comm.*, 79 TCM 2050 (2000).

"*Spouse*" as used in IRC § 71 includes a former spouse. *See* IRC § 71(d).
"*Divorce or separation instrument*" means a decree of divorce or separate maintenance or a written instrument incident to such a decree, or a written separation agreement, or a decree requiring a spouse to make payments for the support or maintenance of the other spouse. *See* IRC § 71(b)(2).

4. Spousal support vs. property division

So far as the Internal Revenue Service is concerned (with the exception of a payment specifically designated as "child support"), the label, designation or classification, if any, given to a court-ordered money payment obligation (be it "spousal support," "property division" or "alimony"), without more, is not necessarily controlling or determinative as to the tax consequences of the obligation. Indeed, while it may be inferred from the labels used that the court and the parties had tax considerations in mind, such labels alone do not "clearly, explicitly and expressly" say anything, one way or the other, as to the tax treatment to be accorded by the IRS to the payment obligation. *Richardson v. Commissioner*, 125 F3d 551, 556 (7th Cir 1997).

It is therefore important when drafting marital dissolution judgments and settlement agreements that establish money payment obligations to use specific language, in accord with the criteria set forth in IRC § 71, to "*clearly, explicitly and expressly*" convey the actual tax treatment and tax effect that is intended to be accorded by the IRS to payments made pursuant to the court-ordered obligation.

Further, under the federal income tax code, the phrase "nondeductible alimony" is an

oxymoron. A payment received by the payor's spouse that meets the test of "alimony" under IRC § 71 is -- *per se* -- tax deductible for the payor, IRC § 215, and taxable income to the payee, IRC § 71. Careful draftsmanship requires careful attention to the criteria of IRC § 71.

On the other hand, pursuant to IRC § 1041, "*no gain or loss shall be recognized on a transfer of property*" from one former spouse to the other former spouse "but only if the transfer is incident to the divorce." Again, careful draftsmanship is needed to assure that a money payment intended as a transfer to property be disqualified from being deemed and treated by the IRS as alimony.

5. Spousal support intended to be "alimony" for income tax purposes

If a "spousal support" obligation made pursuant to ORS 107.105(1)(d) is intended to qualify and be treated as "alimony" for income tax purposes, as is typically the case, a carefully drafted dissolution judgment should (1) expressly declare the intended tax effect and (2) should also include appropriate "termination on death" language. The qualifying "magic words" should be included both in the main text of the judgment document as well as the "money award" section at the end of the document. One possible format:

> ***Spousal support intended as alimony.*** *Payments herein designated as spousal support are intended to qualify and be treated as "alimony" for income tax purposes pursuant to Internal Revenue Code §§ 71 and 215 and shall therefore be deductible from the gross income of the payor and includable in the gross income of the payee. Further, the obligation for the payment of spousal support designated by this judgment shall terminate upon the death of husband or wife, whichever death first occurs, and the payor spouse shall have no liability to make any such payment for any period after the death of the payee spouse nor any liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.*

6. Spousal support not intended to be "alimony" for income tax purposes

Spousal support as allowed under ORS 107.105(1)(d) is not required to be "alimony" for income tax purposes. If it is intended that the payments, even though labeled in the judgment as "spousal support," not be treated as "alimony" for income tax purposes, appropriate *disqualifying* language will do the trick. Consider the following:

> ***Spousal support not treated as alimony.*** *Payments herein designated as spousal support are NOT intended to qualify and be treated as "alimony" for income tax purposes pursuant to Internal Revenue Code §§ 71 and 215. Accordingly, payments of spousal support made pursuant to the obligation established by this paragraph [or provision] are hereby expressly designated as payments that are not includable in gross income of the payee under IRC § 71 and not allowable as a deduction for the payor under IRC § 215.*

7. Lump-sum money award to equalize division of marital property

ORS 107.105(1)(f) authorizes the court to divide property between the parties "as may be just and proper in all the circumstances." Property division often involves the use of an "equalizing money award," typically being a lump-sum fixed-dollar amount, due and payable upon entry of the dissolution judgment or by a specified future due date (often with a provision allowing the debtor to satisfy the obligation by making a single in-full payment or a series of partial payments, usually on a monthly basis, doing so until the obligation has been fully paid).

Typically, a money award made for the purpose of equalizing the division of marital property is not intended to be treated as spousal support and, as such, would not be subject to post-judgment modification.
Further, such an award is typically intended to be treated as a transfer of propety to a spouse incident to dissolution of marriage and therefore, in accord with 26 USC § 1041, not deductible for the payor nor taxable for the payee. Payment of the obligation is so recognized and treated by the parties, their attorneys and the court. Not so, however, for the IRS. A survey of U.S. Tax Court decisions reveals a number of cases in which a lump-sum property division money award was deemed by the IRS as tax deductible alimony.

The problem is usually the result of a dissolution judgment that, although labeling the award as being for purposes of equalizing the division of marital property, fails to include appropriate language clearly disqualifying payments made pursuant to the award from satisfying the "alimony" criteria of the federal tax code. Husband (as payor, for example) then claims the payments made pursuant to the judgment as tax deductible alimony on his tax return. Wife files her tax return and does not include the payments in her gross income. This results in the IRS (and ultimately, perhaps, the U.S. Tax Court) having to determine, one way or the other, whether the payment is or is not alimony for income tax purposes.

This is a problem that can and should be avoided. If the intent of the parties is that a lump-sum property division money award NOT be treated by the IRS as alimony for income tax purposes, appropriate "alimony *disqualifying* language" expressing the parties' intent should be included in the judgment provision that establishes the obligation. Don't leave it to IRS to engage in a guessing game as to the parties' intent. More often than not, it seems, when IRS guesses, it guesses wrong. Consider the following provision (which should be included in both the main body of the judgment document as well as in the "money award" section at the end of the document):

> ***Equalizing property division judgment not intended as alimony.*** *The equalizing money award herein established, and the payment(s) made pursuant thereto, is intended by the parties and the court as a transfer of property to a former spouse incident to divorce in accord with Internal Revenue Code (IRC) § 1041. Accordingly, all payments of money by husband to wife (or to a third party on behalf of wife) pursuant to the aforesaid money award are NOT intended as "alimony" for*

income tax purposes pursuant to IRC §§ 71 and 215 and such payments are hereby designated as not includible in the gross income of the payee under IRC § 71 and not allowable as a deduction for the payor under IRC § 215. Husband's liability for payment of the aforesaid money award shall continue notwithstanding his death or the death of the payee spouse. Further, husband shall not claim any payments made pursuant to the aforesaid money award as "alimony paid" on his federal income tax return.

8. Lump-sum award of "*in gross*" spousal support

ORS 107.105(1)(d) allows for an award of spousal support "*in gross*." An *in gross* spousal support award typically refers to a lump-sum fixed-dollar amount, due and payable upon entry of the dissolution judgment or by a specified future date. Provision is often included allowing the lump sum to be paid-off through a series of monthly payments of a designated minimum amount. It is typically assumed that, as a spousal support award, it is subject to future modification as allowed by ORS 107.135 and, for income tax purposes, will be treated as alimony and thus be tax deductible for the payor and taxable income for the payee. But without careful wording in the judgment document, such may not always be the case. *See Fletcher and Fletcher*, 72 Or App 708, 696 P2d 1182 (1985) (trial court's award of $36,000 lump sum "alimony" held on appeal to be property division and not spousal support). To avoid unintended and unwanted tax consequences, the judgment establishing a spousal support "*in gross*" award should include language that clearly and explicitly expresses the intent of the parties.

If the spousal support "*in gross*" award is intended to qualify as alimony for federal income tax purposes (deductible for the payor; taxable for the payee), include a provision in the judgment document such as the following:

> ***"In gross" spousal support intended as alimony or tax purposes.*** *Payments herein designated as "in gross" (or "lump sum") spousal support are intended to qualify and be treated as "alimony" for income tax purposes pursuant to Internal Revenue Code §§ 71 and 215 and shall therefore be deductible from the gross income of the payor and includable in the gross income of the payee. Further, the obligation for the payment of "in gross" (or "lump sum") spousal support designated by this judgment shall terminate upon the death of husband or wife, whichever death first occurs, and the payor spouse shall have no liability to make any such payment for any period after the death of the payee spouse nor any liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.*

Conversely, if the *in gross* spousal support judgment is intended not to be alimony for federal income tax purpose (and thus be tax-free), appropriate alimony disqualifying language should be included in the provision of the judgment that establishes the obligation. Specifically, the judgment should expressly designate the payment obligation as not includable in gross income for the payee under IRS Code § 71 and not allowable as a deduction for the payor under IRS Code § 215. For example:

"In gross" spousal support <u>not</u> alimony for tax purposes. *The award of "in gross" (or "lump sum") spousal support herein established and the payment obligation thereby established is intended by the parties and the court as a non-taxable transaction. Accordingly, all payments of money by husband to wife (or to a third party on behalf of wife) pursuant to the aforesaid award of "in gross" (or "lump sum") spousal support are NOT intended as "alimony" for income tax purposes pursuant to IRC §§ 71 and 215 and such payments are hereby designated as not includible in the gross income of the payee under IRC § 71 and not allowable as a deduction for the payor under IRC § 215. Further, husband shall not claim any payments made pursuant to the aforesaid money award as "alimony paid" on his federal income tax return.*

9. Other payments not intended to be "alimony" for income tax purposes.

Court-ordered money payment obligations established by dissolution judgments come in all shapes and sizes. Obligations labeled as "spousal support" are typically intended to have tax consequences, while obligations designated as "child support" or classified as "property division" are intended to be "tax-free," being neither deductible for the payor nor taxable to the payee. Examples of the latter include money awards intended to equalize the division of marital property (payable either as a lump sum or in a series of payments), as well as provisions requiring one spouse to pay the other spouse's rent or mortgage, or pay debt obligations that are owed by the other spouse, or pay the premiums on a life insurance policy that is owned by the other spouse.

All too often the specific tax consequences of such obligations are not considered at the time of the dissolution proceeding and the dissolution judgment fails to include any language that expresses the parties' intent regarding the tax treatment and tax effect to be given to the obligation. Unintended or undesired consequences may result.

For example, a cash payment from one spouse to the other (or to a third party on the other's behalf) that is made pursuant to a dissolution judgment ("divorce instrument" in IRS parlance) may qualify as "alimony" for income tax purposes, and thus be deductible for the payor and taxable to the payee, even though not so intended, if, inter alia, the payment obligation terminates upon the death of the recipient (payee) spouse, with no liability to make any payment (in cash or property) thereafter, 26 USC § 71(b)(1)(D), AND the divorce instrument "does not designate such payment as a payment that is not includable in gross income [for the payee] under section 71 and not allowable as a deduction [for the payor] under section 215." 26 USC § 71(b)(1)(B). Words matter. It is important to use them, wisely and correctly.

10. Avoiding unintended alimony

To guard against "unintended alimony," it is advisable to include a "cover all the bases" provision in the dissolution judgment that will disqualify the payment from being treated as alimony for income tax purposes. Consider the following language:

Tax treatment of money payments. *Except and unless otherwise specifically and expressly so provided by the terms of this judgment, all payments of money by either party to the other, or to third parties on behalf of the other, pursuant to this judgment are NOT intended to qualify and be treated as "alimony" for income tax purposes pursuant to Internal Revenue Code §§ 71 and 215, and such payments are hereby designated as not includible in gross income of the payee under IRC § 71 and not allowable as a deduction for the payor under IRC § 215. Further, the party making any such payment(s) shall NOT claim such payment(s) as "alimony paid" on said party's federal income tax return, it being the intent of the parties and the court that such payment(s) be deemed and treated as a transfer of property to a former spouse incident to divorce, in accord with IRC § 1041.*

11. Requirement for termination on death of payee spouse

To qualify as "alimony" under IRC § 71(b)(1)(D), there must be no liability to make any payment (in cash or property) after the death of the recipient (payee) spouse. This requirement will be deemed as satisfied if (1) the dissolution judgment expressly so declares or (2) the payor's payment liability ceases upon the death of the payee spouse by operation of law. Either or both.

> [Note: For several years prior to 1987, IRC § 71(b)(1)(D) required the qualifying factor of "*no liability for payment after payee's death*" to be specifically stated in the divorce or separation instrument. Omission of such an express declaration from the divorce or separation instrument effectively disqualified the payment obligation from being deemed as alimony, thus eliminating the payments from being tax deductible to the payor. However, section 1843(b) of the Tax Reform Act of 1986, Pub L 99-514, amended 26 USC § 71(b)(1)(D) so as to delete from the statute the words "*and the divorce or separation instrument states that there is no such liability*." Under present IRC § 71(b)(1)(D), all that is required is that there be "*no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.*"]

The general rule of Oregon domestic relations law is that an obligation to pay spousal support is a personal debt that does not survive the debtor. *See Schaffer v. Schaffer*, 57 Or App 43, 643 P2d 1300 (1982). Further, under Oregon law spousal support is deemed to terminate upon death of payee spouse absent a provision in the judgment providing otherwise. *Kemp v. Dept. of Rev.*, OTC-RD No 4241, WL 477958 (July 27, 1998) (unpublished opinion). Further, "a hallmark of spousal support is that the beneficiary's death terminates the obligation." *Miller and Miller*, 207 Or App 198, 203, 140 P3d 1172 (2006). This appears to be quite reasonable, given that the underlying function and purpose of spousal support is to support a spouse (or former spouse), not to support a former spouse's estate. Once deceased, there is generally no further need for spousal support.

Given Oregon case law, it is apparent that the obligation of payment of court-ordered

spousal support terminates by operation of law upon the death of the payor or the payee, whichever death first occurs. Nonetheless, if a spousal support award is intended to be alimony for income tax purposes, better practice for Oregon divorce purposes is to expressly declare in the dissolution judgment (both in the main body of the document as well as the "money award" section as the end of the document) that the obligation terminates on the death of either payee or payor, whichever first occurs.

Conversely, if a money payment obligation created by a dissolution judgment --- whether designated a spousal support or otherwise --- is not intended to be alimony for income tax purposes, practitioners need to consider whether the obligation is one that will terminate upon the payee's death by operation of law even though "termination on death" language is intentionally omitted for the judgment document. If such would occur, the obligation may end up being deemed as alimony for income tax purposes even though not so intended. To avoid such a result, precautions need to be taken, such as inclusion of language in the dissolution judgment expressly designating the payment obligation as "not includible in gross income under IRC § 71 and not allowable as a deduction under IRC § 215."

12. Will it be alimony or will it be not? Examples to consider

In *Proctor v. Comm.*, 129 TC No. 12 (2007), the parties' divorce decree awarded wife a portion of husband's military pension, referring to the payment obligation as a division of the marital property. Husband thereafter made payments to wife in compliance with the court's property division award. (Wife did not qualify for direct payments from DFAS, the military's payroll agency, because of the marriage was of less than ten years' duration.) Husband then filed a tax return, claiming the amount paid to wife as tax deductible alimony (thus resulting in taxable income for wife). Deeming the payments to wife as property division, in accord with the divorce decree, and therefore not alimony under IRC § 71, the IRS rejected husband tax deduction claim. Husband appealed. The U.S. Tax Court agreed with husband and upheld the husband's tax deduction claim.

The Tax Court explained that although the divorce decree referred to the payment obligation as part of a division of the marital property, that classification, without more, did not amount to a "clear, explicit and express direction" designating the payment obligation as not includable as income to wife and not allowable as a deduction for husband. "*Labels attached to payments mandated by a decree of divorce or marriage settlement agreement are not controlling.*" The requirement of IRC § 71(b)(1)(B) (that the payment not be designated as not taxable to the payee and not deductible for the payor) was satisfied. Further, as to termination on death of the payee, the court cited 10 USC § 1408(c)(2), the provision of the Uniformed Services Former Spouses' Protection Act (USFSPA) the says that a divorce court's division and award of a military pension to a retiree's former spouse "does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse." Thus, by operation of law, wife's right to receive the court-awarded share of husband's military retirement will terminate upon her death, with husband thereafter having no further liability. Consequently, the payments husband made directly to wife

while she was alive met the "termination upon payee's death" requirement of IRC § 71(b)(1)(D) and therefore qualified as tax deductible alimony.

In *Aday v. Dept. of Rev.*, ____ OTC-MD_____ (1/17/2006), the parties' property settlement agreement, incorporated into a dissolution judgment, specifically recited that neither party shall pay spousal support. The agreement also provided that husband pay wife monthly payments ($706 per month) for 25 years but with the obligation to make payments ending with wife's death. Wife did not include and report as "alimony received" the payments received from husband. The Oregon Dept. of Revenue then assessed a deficiency for unpaid taxes. Wife appealed. *HELD:* The payments received by wife were alimony for income tax purposes. Said the court:

> *"The payments to plaintiffs satisfied all the requirements of IRC section 71(b)(1). They were made under a divorce or separation instrument. The instrument did not designate the payments as not includible in gross income. The payor and payee were not members of the same household at the time the payments were made. A provision in the instrument expressly provides for the termination of payments upon the death of the payee spouse. The payments to plaintiffs are therefore alimony."*

As for the provision of the agreement that specifically declared that the payments were not spousal support, the court said: "This court has previously held that the labels the parties attach to the payments are not as compelling as their characteristics, and that the court must apply the current version of the Internal Revenue Code." (Citing *Kemp v. Dept. of Rev.*, an unpublished Oregon Tax Court opinion (July 27, 1998) holding that under Oregon law spousal support is deemed to terminate upon death of payee spouse absent a provision in the judgment providing otherwise.)

13. Other examples

There are many other types of court-awarded payment obligations that will terminate upon the payee's death by operation of law, thus allowing payments made pursuant to the obligation to be treated as alimony for income tax purposes (assuming the payment otherwise qualifies as alimony under the tax code).

For example, as security for a child support obligation payable to wife, husband may be ordered to pay the cost of a life insurance policy on his life, with wife being the owner of the policy. As explained in IRS Publication 504, "Alimony [for federal income tax purposes] includes premiums you must pay under your divorce or separation instrument for insurance on your life to the extent your spouse or former spouse owns the policy." Upon wife's death, husband's obligation to pay the premiums for a life insurance policy on his life that is owned by wife, as security for his child support obligation owing to her, would terminate by operation of law. (Once dead, wife would no longer be entitled to child support from husband and would no longer need the life insurance protection; nor would she any longer be the owner of the policy.) If husband claims the premium payments as deductible "alimony paid" on this tax return, wife would be required to report the payments on her tax return as "alimony received" and pay any resulting income tax.

Another situation: Husband is ordered to pay the balance due on wife's federally insured student loan. Under 20 USC § 1087dd(c)(1)(F), the liability for repayment of such a loan is automatically canceled upon the death of the borrower. Thus, husband's court-ordered payment obligation would terminate upon wife's death by operation of law. Husband makes monthly payments on the loan and claims the payments on his federal tax return as "alimony paid." Wife ends up having to report the payments on her income tax return as "alimony received" and pay income taxes thereon.

Another situation: Dissolution judgment requires husband is provide health insurance for wife and pay the cost thereof. Obviously, once wife dies, there would be no need or basis to continue to provide health insurance for her benefit, so the obligation would therefore terminate upon her death by operation of law.

In all such situations, unless appropriate precautions are taken, payments made pursuant to the divorce instrument may qualify as tax deductible alimony for the payor under the Internal Revenue Code. And if tax deductible alimony for the payor, the payments become tax includable income for the payee.

14. *Not, not & not*: Requirement that divorce instrument not designate the payment as not deductible for the payor and not taxable for the payee

A cash payment will satisfy the "alimony" criterion of 26 USC § 71(b)(1)(B) if the dissolution judgment requiring the payment does *not* designate the payment as "a payment that is *not* includable in gross income under 26 USC § 71 and *not* allowable as a deduction under 26 USC § 215." (Note the "triple negative" language.)

To satisfy this statutory requirement and disqualify the payment obligation from being treated as alimony for income tax purposes, the language used in the divorce instrument must "clearly, explicitly and expressly" designate (or "make known directly") that a spouse's payments are not to be treated as income. *Richardson v. Commissioner*, 125 F3d 551, 556 (7th Cir. 1997), cited and followed by the US Tax Court in Dato-Nodurft v. Comm., 2004 TC Memo 119 (2004); *Maloney v. Comm.*, 80 TCM 53 (2000) (instrument must contain a clear and explicit designation that the payment is not includable in the recipient's income under section 71 or deductible by the payor under section 215, although it need not refer expressly to section 71 or section 215); *Baker v. Comm.*, 79 TCM 2050 (2000) (designation of payment as "property settlement" with no further clarification would be a "designation by uncertain implication" rather than by "clear, explicit, and express direction"); *Estate of Goldman v. Comm.*, 112 TC 317 (1999) (statutory requirement satisfied by designating monthly $20,000 payments as "transfers of property subject to the provisions of Section 1041").

In *Baker v. Comm.*, 79 TCM 2050 (2000), the tax court rejected a former wife's claim that the payments received by her from her former husband from his military pension, paid to her pursuant to a divorce judgment that specifically designated the payments as a "property settlement," should be treated as "nonalimony" and thus not taxable income under IRC § 71(b)(1)(B). The tax court noted that the statutory language of IRC § 71

(b)(1)(B) does not allow designations by "attenuated implication." Citing *Richardson v. Commissioner*, 125 F3d 551, 556 (7th Cir. 1997), and prior tax court cases, the court declared that the dissolution judgment must contain a "*clear, explicit and express direction*" that the payments are not to be treated as income for income tax purposes. The court concluded that labeling the payments as a "property settlement," with nothing more, was not a "*clear, explicit, and express direction* that the payments are *not* includable in petitioner's gross income and are *not* deductible by Mr. Baker."

> "*In making our determination, we note that in divorce instruments parties may characterize payments in different ways, such as alimony, periodic alimony, alimony in gross, property settlement, division of property, etc. The meaning of these terms may vary from State to State. Moreover, the effect that such classifications may have in each State may be dependent upon the intent of the parties or other factual circumstances. As we noted above, Congress specifically revised section 71 in order to eliminate the subjective inquiries into the nature of payments. * * * The label of "property settlement", with no further clarification, does not clearly inform us that the parties considered the Federal income tax consequences of the payments under sections 71, 215, and/or 1041*." *Baker v. Comm.*, 79 TCM at 2053.

To be on the safe side (whichever side that may be), it is advisable when establishing a money payment obligation, whether designated as spousal support or otherwise, to expressly declare the parties' intent regarding the tax treatment and tax effect to be to accorded to the obligation, using the statutory verbiage of IRC § 71(b)(1)(B). If the obligation is intended to be tax deductible for the payor under IRC § 215 and taxable income for the payee under IRC § 71, say so. And if it is not so intended, say that too. ("Payments made pursuant to this obligation are hereby expressly designated as not includible in gross income of the payee under IRC § 71 and not allowable as a deduction for the payor under IRC § 215.")

15. If it's child support, it's not alimony

Unlike alimony payments, child support payments are not tax deductible for the payor (obligor) nor taxable income for the payee (obligee). While the label given to a particular payment obligation (*e.g.*, "property division" or "spousal support") is generally by itself not controlling or determinative as to the tax treatment to be accorded, "child support" is an exception. Pursuant to IRC § 71(c)(1), if a divorce or separation instrument expressly designates a payment obligation as "*child support*" it will automatically disqualify the payment from being deemed or treated as alimony for income tax purposes.

Further, a payment obligation that might otherwise qualify as alimony under IRC § 71 will be disqualified as alimony if the payment is "treated as child support." A payment obligation will be "treated as child support" if the obligation will be reduced (A) on the happening of a contingency specified in the instrument relating to the payor's child (such as attaining a specified age, marrying, dying, leaving school or a similar contingency) or (B) at a time that can "clearly be associated" with such a contingency. IRC § 71(c)(2)(A) and (B). The amount of the reduction would be treated as child support and therefore not as alimony.

IRC Regulation 1.71-1T (26 CFR § 1.71-1T), at Q&A 18, sets forth the two situations that will "clearly be associated" with a contingency relating to a child. The first situation occurs when "the payments are to be reduced not more than six months before or after the date the child is to attain the age of 18, 21, or the local age of majority." The second situation occurs when "the payments are to be reduced on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child, but need not be a whole number of years."

If the parties to a dissolution proceeding are contemplating an award of spousal support pursuant to ORS 107.105(1)(d) and they have children, care needs to be taken so as to avoid alimony disqualification due to the application of IRC § 71(c)(2). For further discussion and illustration of the problem, *see* *Linder v. Dept. of Rev.*, 18 OTR 11 (/2004) (Dissolution court awarded wife $2,300 per month spousal support, with a reduction of $800 to occur on February 1, 2002, a date that was within six months of the parties' eldest daughter attaining age 21, followed by a $500 reduction to occur on May 1, 2007, a date that was within six months of the youngest daughter attaining age of 18; Oregon Tax Court ruled the reduction amounts as nondeductible child support and denied husband's tax deduction claim).

16. Practicality vs. legality

As a matter of practicality, the strict application of the alimony rules of IRC §§ 71 and 215 will arise only in the event a dispute arises when a payor spouse claims a deduction for "alimony paid" (see IRS Form 1040, line 31a) and a corresponding amount is not reported by the payee spouse as "alimony received" (see IRS Form 1040, line 11). So long as the two tax returns are "in sync" with one another, the IRS processing computer will be happy and, absent other problems, both returns will be accepted and not questioned.

On the other hand, if the payor claims a deduction for "alimony paid" that is not correspondingly reported by the payee as "alimony received," it will inevitably cause a problem the requires IRS resolution. And in doing so, IRS will strictly apply the Internal Revenue Code statutes, 26 USC §§ 71 and 215, and the IRS Regulations, 26 CFR §§ 1.71-1, 1.71 1T, 1.215-1 and 1.215.1-T.

17. Conclusion (and word of advice to Oregon practitioners)

Many if not most of the problems, real or potential, involving the tax consequences of court-ordered money payment obligations can and will be avoided if the parties and their attorneys, and the court, reach a clear understanding and agreement, at the time the marital dissolution proceeding is occurring, as to the intended tax treatment and tax effect of each payment obligation being established, and include in the dissolution judgment or separation agreement appropriate language expressing that intent, in compliance with

applicable IRS statutes and regulations. Failure to do so may result in an unwanted tax obligation for one spouse or the other and, for the attorney involved, an unwanted "Personal and Confidential" letter from the PLF.

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Spousal support, alimony, child support..... ..... and the IRS

Draper and Draper, 236 Or App 463, 236 P3d 788 (2010)

Dissolution judgment awarded wife three years of spousal support, commencing in 2007, consisting of $3,000 per month for one year, followed by $2,000 per month for the next year, and $1,000 per month for the third year, with no spousal support after the third year. Wife appealed. *HELD*: On *de novo* review, Oregon Court of Appeals modifies the trial court's judgment and extends the duration of spousal support. Said the Court:

> "Given all the circumstances in this case * * * we conclude it is just and equitable for wife to continue to receive $1,000 per month in spousal support until January of 2018, *when the youngest child turns 18*." [Emphasis supplied.]

See any problems with this? Consider the following:

When spousal support is ordered in Oregon dissolution cases, it is generally assumed and intended that it will qualify as "alimony" under the federal income tax law and will therefore be tax deductible for the payor (26 USC § 215) and taxable income for the payee (26 USC § 71). In contrast, child support (or a payment obligation "treated" as child support) is not tax deductible for the payor nor taxable income for payee. IRS Reg 1.71-1T (Q&A 15).

The distinction between spousal support as tax deductible alimony for income tax purposes, as opposed to nondeductible child support, is not always as clear as we would like it to be. So when formulating a spousal support award, it is important to make sure we are not inadvertently making a child support award, or at least what the IRS says is a child support award, *i.e.*, "an amount fixed as payable for the support of children of the payor spouse."

Specifically, under the applicable IRS tax law and regulations, a court-ordered payment obligation established by dissolution judgment, *even though designated as spousal support* (and intended by the parties, and the court, to be tax deductible for the payor and taxable income for the payee) is *presumed* by the IRS to be *child support*, not alimony (and therefore not deductible for the payor nor taxable for the payee), *if and to the extent* that the amount of the court-ordered payment obligation will be reduced (or terminated):

(a) on the happening of a "*contingency*" specified in the divorce instrument relating to a child of the payor (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), *OR*

(b) at a time that can "clearly be associated" with such a contingency.

See 26 USC § 71(c)(2) and IRS Reg 1.71-1T.

In either circumstance, in case of a dispute with the IRS, the amount of the reduction will initially be presumed under the federal income tax code as child support (and not alimony) and will therefore not be deductible for the payor nor taxable to the payee.

Federal income tax law deems a "contingency" to be related to a child of the payor "if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to a child of the payor include the following: the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment." IRS Tax Reg 1.71-1T (Q&A 17).

Significantly and importantly, payments that would otherwise qualify as alimony will be *presumed* to be reduced "*at a time clearly associated with the happening of a contingency relating to a child of the payor*" *IF* the payments "*are to be reduced not more than 6 months before or after the date the child is to attain the age of 18, 21, or local age of majority*." IRS Tax Reg 1.71-1T (Q&A 18).

Additionally, payments that would otherwise qualify as alimony payments will also be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor if the payments are to be reduced "on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child but need not be a whole number of years." IRS Tax Reg 1.71-1T (Q&A 18).

The presumption that payments are to be reduced "at a time clearly associated with the happening of a contingency relating to a child of the payor" may be *rebutted* and overcome (either by the IRS or by the taxpayer) by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. [And the time of payment reduction is merely coincidental with the happening of a contingency relating to a child of the payor.] IRS Tax Reg 1.71-1T (Q&A 18).

In *Draper and Draper*, the spousal support as awarded by the Court of Appeals will be terminate in January of 2018, "*when the youngest child turns 18*." For IRS purposes, this results in a reduction of the payment amount (in this case, a reduction to zero) on the happening of a "contingency" clearly relating to the payor's child, *to-wit*: the payor's child attaining a specified age. Consequently, under the federal income tax code the amount of the reduction (should it come into question) will be treated as an amount "*fixed as payable for the support*" of the payor spouse's child and will therefore not qualify as tax deductible alimony for Mr. Draper. 26 USC § 71(c)(2)(A).

The same result would also occur if the time at which the reduction is to occur is "*not more than six months before or after the date the child is to attain the age of 18, 21, or local age of majority*." Consequently, for IRS purposes, a reduction of the payment obligation amount occurring at a time that is within six months of the payor's child attaining age 18 or

age 21 (whether before or after) will be deemed as being a reduction occurring "*at a time that can clearly be associated with a contingency relating to the child*." Under the applicable tax law and regulations, the amount of the reduction will be treated as an amount "fixed as payable for the support" of the payor spouse's child and will therefore not qualify as tax deductible alimony for the payor nor taxable income for the payee. 26 USC § 71(c)(2)(B); 26 USC § 215; and IRS Tax Reg 1.71-1T (Q&A 18).

BOTTOM LINE: Notwithstanding the benign intentions of the Oregon Court of Appeals in extending the duration of Mrs. Draper's spousal support award, if Mrs. Draper were to treat the "spousal support" payments received from Mr. Draper as being child support (and not report the payments as being "*alimony received*" on line 11 of her IRS Form 1040), the IRS would most likely uphold her position, deny Mr. Draper's deduction of "*alimony paid*" on line 31a of his IRS Form 1040, and send Mr. Draper a notice of tax deficiency for the full amount of the claimed deduction. The burden would then be on Mr. Draper to rebut the child support presumption otherwise applicable to these facts by evidence showing that the January 2018 spousal support termination date was derived *independently* from any consideration of the youngest child's attaining age 18 and that it is merely a *coincidence* that the termination (reduction) date is scheduled to occur within six months of youngest child's 18th birthday. (Good luck with that one!)

QUERY: Is this *really* the tax consequence that was intended by the Court of Appeals? Or, perhaps, did the Court simply not recognize the potential tax problem that might result by ordering that spousal support termination (reduction to zero) occur "*when the youngest child turns 18*"?

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FILED: July 28, 2010

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

CHARLES OLIVER DRAPER,

Petitioner-Respondent,

and

JOANNE MARIE DRAPER,

Respondent-Appellant.

Josephine County Circuit Court
05DR0837
A136364

Thomas M. Hull, Judge.

Argued and submitted on April 14, 2010.

Clayton C. Patrick argued the cause and filed the briefs for appellant.

George W. Kelly argued the cause and filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Rosenblum, Judge.

PER CURIAM

Judgment modified to award wife spousal support in the sum of $3,000 per month for a period of one year, commencing February 1, 2007, and continuing through January 1, 2008; thereafter wife is awarded spousal support in the sum of $2,000 per month for a period of one year, commencing February 1, 2008, and continuing through January 1, 2009; thereafter wife is awarded spousal support in the sum of $1,000 per month commencing on February 1, 2009, and continuing through January 1, 2018; otherwise affirmed.

PER CURIAM

Wife appeals a general judgment in a marriage dissolution case and challenges the trial court's spousal support award. On *de novo* review,[(1)] we concur in the trial court's judgment in this case in all respects except one: In our view, the trial court's award of only three years of spousal support was not just and equitable. *See* ORS 107.105(1)(d). Wife, who has custody of the parties' children, requested spousal support until the children, the youngest of whom was born in January 2000, graduate from high school. However, in the dissolution judgment, the trial court awarded spousal support of $3,000 per month for one year, followed by $2,000 per month for the next year, and $1,000 per month for the third year, with no spousal support after the third

year. Given all the circumstances in this case, including the length of the marriage (nearly 17 years), the disparity in the parties' incomes and earning capacities, and wife's custodial responsibilities, we conclude it is just and equitable for wife to continue to receive $1,000 per month in spousal support until January of 2018, when the youngest child turns 18.

Judgment modified to award wife spousal support in the sum of $3,000 per month for a period of one year, commencing February 1, 2007, and continuing through January 1, 2008; thereafter wife is awarded spousal support in the sum of $2,000 per month for a period of one year, commencing February 1, 2008, and continuing through January 1, 2009; thereafter wife is awarded spousal support in the sum of $1,000 per month commencing February 1, 2009, and continuing through January 1, 2018; otherwise affirmed.

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1. ORS 19.415, which governs our standard of review, was recently amended. Or Laws 2009, ch 231, §§ 2-3. The amendments apply to appeals in which the notice of appeal was filed on or after June 4, 2009. Because the notice of appeal in this case was filed before that date, we apply the 2007 version of ORS 19.415.

Return to previous location.

Contempt of Court: Punitive vs. Remedial

Gorin's Analysis

Porter and Griffin, **____ Or App ____ (8/31/2011)**

FACT SUMMARY. The stipulated dissolution judgment awarded custody of the parties' three children to mother. The stipulated judgment also provided that mother is entitled to claim the dependent child tax exemptions for all three children for income tax purposes.

For the year 2008, mother did not file an income tax return (and therefore did not claim for herself the dependent child tax exemptions). As part of subsequent judgment modification proceeding, mother sought to have the court impose remedial contempt sanctions on father based, *inter alia*, on father's having claimed the exemptions on his 2008 income tax return.

The trial court determined that father was in contempt, *inter alia*, for having claimed on his tax return the dependent child tax exemptions for the parties' three children for the year 2008. The trial court then assessed a $3,000 *fine* against father (payable to mother) for having done so, which the court stated approximated half of father's tax refund.

Father appealed, arguing that the trial court erred in determining that he was in contempt of the dissolution judgment and further erred in imposing a sanction which is unrelated to the alleged contempt and punitive.

***HELD*:** Father's arguments are rejected. Trial court's judgment is affirmed. Appellate court says that the imposition of a fine of $3,000 payable to mother is not a punitive sanction in light of ORS 33.045(4), which declares that "*Any sanction requiring payment of amounts to one of the parties in a proceeding is remedial.*"

Gorin's Critical Analysis (for whatever it may be worth):

By definition, a "remedial" sanction is one that is intended to *"terminate a continuing contempt of court OR to compensate for injury, damage or costs resulting from a past or continuing contempt of court*." ORS 33.015(4) (defining "remedial sanction"). (Corollary rule: A sanction that is not remedial is therefore "punitive." Those are the only two classifications provided be law.)

Assuming the three children spent the majority of their overnights in mother's home during the year 2008 --- thus qualifying her as the "custodial parent" under the applicable federal income tax law, 26 USC 152(e)(4)(A) --- she would have had the legal right under the federal tax code to claim the dependent child tax exemptions on her federal income tax return even had there been no provision in the dissolution judgment declaring that mother was

"entitled" to claim them. (In other words, that particular provision of the dissolution judgment did not give mother any right or entitlement regarding the dependent child tax exemptions that she did not already have under the applicable federal income tax law.) As it turned out, however, for the year 2008, mother did not file an income tax return (and therefore could not claim for herself the dependent child tax exemptions). Rather than let the dependent child tax exemptions go to waste (with neither party claiming the exemptions), father proceeded to do so on his 2008 tax return.

Also -- and importantly --- it is reasonable to infer that the provision of the dissolution judgment that declared that mother would be entitled to claim the dependent child tax exemptions on her income tax return was based on the ASSUMPTION that mother would in fact be filing an income tax return for herself (and that, in such event, father would then NOT claim the same children as exemptions on *his* tax return). After all, it would not make much sense, nor serve any purpose, to bar father from claiming the tax exemptions on his tax return in the event mother did not file her own tax return.

Upon close analysis of the applicable Oregon contempt statutes, perhaps the Court of Appeals might have reached a different conclusion.

First, given that the contempt proceeding was initiated by a private party, the only sanction that can be sought by a private litigant is a *remedial* sanction. *See Dahlem and Dahlem*, 117 Or App 343, 844 P2d 208 (1992) (contempt proceedings initiated by private litigants are limited to seeking only remedial sanctions).

Second in a contempt proceeding initiated by a private party, the only sanction that can be imposed by the court, is a remedial sanction. *See Miller and Miller*, 204 Or App 82, 129 P3d 211 (2006) (in a contempt proceeding initiated by a private litigant, the court may not impose a punitive sanction).

Third, a remedial sanction is one that is "*imposed to terminate a continuing contempt of court **or** to compensate for injury, damage or costs resulting from a past or continuing contempt of court*." ORS 33.015(4).

Fourth, from all that can be discerned, it appears that while the dissolution judgment included a provision declaring that mother was entitled to claim the children as her dependents on her tax return, the judgment did not directly bar father from claiming the dependent child tax exemptions on *his* tax return *in the event mother did not file a tax return at all*. As explained hereinabove, it would serve no purpose to bar father from claiming the tax exemptions for the children on *his* tax return in the event mother did not do so on *her* tax return (as would be the case if mother filed no tax return at all).

Fifth, father's having claimed the dependant child tax exemptions on his 2008 tax return did not create a "*continuing contempt*." Rather, father's actions, if contumacious at all, would constitute a "*completed contempt* that can no longer be avoided by belated compliance." *See*

State v. Thompson, 294 Or 528, 53`, 659 P.2d 383 (1983) (explaining the difference between civil (remedial) contempt and criminal (punitive) contempt.

The trial court assessed on father a $3,000 ***fine*** (which the trial court stated approximated half of father's tax refund).

Pursuant to ORS 33.045(**3**), imposition of a ***fine*** as a contempt sanction is (a) ***punitive*** if it is for a ***past*** contempt; and is (b) ***remedial*** if it is for a ***continuing*** contempt ***AND*** the fine accumulates until the defendant complies with the courts judgment or order OR if the fine may be partially or entirely forgiven when the defendant complies with the courts judgment or order..

While apparently basing its decision on ORS 33.045(**4**) ("*Any sanction requiring payment of amounts to one of the parties in a proceeding is remedial*"), the appellate court makes not mention of ORS 33.045(**3**). As explained above, father's having claimed the dependent child tax exemptions on his 2008 tax return is a "past contempt" (and ***not*** a "continuing contempt). A fine that is imposed as a contempt sanction is ***punitive*** "*if it is for a past contempt*." ORS 33.045(3)(a). And this is precisely the case here.

Further, pursuant to ORS 33.045(**3**)(b), imposition of a ***fine*** as a contempt sanction is remedial ***only*** if it is for ***continuing*** contempt ***AND*** the fine accumulates until the defendant complies with the courts judgment or order ***OR*** if the fine may be partially or entirely forgiven when the defendant complies with the courts judgment or order.

Here, there was (and is) no "continuing contempt." Further, the fine was a fixed amount ($3,000), not a fine that "accumulates until the defendant complies with the courts judgment," nor was it a fine that "may be partially or entirely forgiven when the defendant complies with the courts judgment." The intent of the statute, ORS 33.045(3)(b), is that the fine will have some remedial aspect to it, *i.e.*, it in some way will ***remedy*** (*i.e.*, fix, cure, repair) the on-going problem by acting as an inducement to get the defendant to comply with the underlying court order, thus bring the "continuing contempt" to an end. But what exactly was the underlying court order that father was ostensibly violating? Where in the dissolution judgment does it say that father shall NOT claim the dependent child tax exemptions on his tax return in the event mother does not do so on her tax return? I suspect the dissolution judgment simply declared the mother was entitled to claim the exemptions, an entitlement that would have been hers anyway even without the court's so declaring.

It also needs to be understood that if there is no "continuing contempt" there would be no purpose for imposing a fine as a "remedial" sanction since there would be nothing to remedy. *See* ORS 33.015(4) (a remedial sanction is one that is intended "to *terminate* a continuing contempt of court "). And if there is nothing to "remedy," the imposition of a fine would be purely punitive. Unless, of course, the fine was intended to "***compensate*** for injury, damage or costs resulting from a past or continuing contempt of court."

The provision of ORS 33.015(4). that declares a sanction as remedial if it is "*imposed * * * to compensate for injury, damage or costs resulting from a past or continuing contempt of court*" is based on the premise that the defendant's contumacious conduct has in fact resulted in "*injury, damage or costs*." Thus, "any sanction requiring payment of amounts to one of the parties to a proceeding is remedial." ORS 33.045(4). But the problem here is that father's having claimed the dependent child tax exemptions on his 2008 tax return did NOT result in any "*injury, damage or costs*" to mother, since mother did not file a tax return for 2008 (and thereby did not and could not claim the exemptions herself).

So, bottom line, I find a bit of fault with the decision of the Court of Appeals. Had I been presiding on the this case, I would have dismissed mother's allegations of contempt, since they were not well-taken at all. (Well, at least in my judgment.)

HOWEVER, I would have found that father was able to claim the tax exemptions for the three children for 2008 because mother did not file a tax return for herself for that tax year. Presumably, had mother filed a tax return for 2008 claiming the exemptions, father would not have claimed the exemptions on his tax return for the same year (and he would not have received the benefit of a reduced tax liability). But since he DID claim the exemptions for that year, and thus derived a tax savings by doing so, I would have ordered a child support modification so as to increase father's child support obligation by a one-time lump-sum amount equal to the amount of the tax savings father incurred as a result of his having claimed the three dependent child tax exemptions on his 2008 tax return. This would be allowable under ORS 25.280(9) and OAR 137-050-0725(9), which permit child support amounts to be adjusted upon consideration of "the tax consequences, if any, to both parents resulting from * * * the determination of which parent will name the child as a dependent."

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August 1, 2011

Stephen W. Edwards
Attorney at Law

Re: **Use of attorney liens in marital dissolution proceedings.**

Dear Steve:

In response to your request for my views and comments regarding the use of attorney liens in marital dissolution proceedings, I offer the following thoughts:

ORS 87.445 declares that that "*An attorney has a lien upon actions, suits and proceedings after the commencement thereof * * *.*" Based on this statute, some family law lawyers routinely file with the court a "*Notice of Claim of Lien*" contemporaneously with the filing of a Petition for Dissolution of Marriage. As I see it, this does not make much sense. A legal action for dissolution of marriage, unlike a action seeking monetary recovery for personal injury damages, does not have any monetary value. Claiming a lien on something that has no money value is pretty meaningless. Many family law lawyers are apparently unwilling or unable to understand this.

Further, a lien on an "*action*" needs to be distinguished from a lien on a "*judgment*." ORS 87.445 says "*An attorney has a lien upon * * * judgments, orders and awards entered therein in the client's favor and the proceeds thereof * * *.*" As explained in *Rockwood Water Dist. v. Steve Smith Contracting*, 80 Or App 136, 139, 720 P2d 1332, *rev den* 302 Or 35 (1986):

> When ORS 87.445 through ORS 87.490 are read together, it is apparent that the legislature deemed that a lien described in ORS 87.445 would be on one of three kinds of *judgments*:
>
> (1) "for a sum of money only,:" ORS 87.450(1);
>
> (2) "for the possession, award or transfer of personal property." ORS 87.455(1); or
>
> (3) "for the possession, award or conveyance of real property." ORS 87.460(1).

I see no problem with attorneys in divorce cases claiming a lien as provided in ORS 87.450 on a judgment that grants to the attorney's client a *property division money award* against client's former spouse. However, the situation is different with respect to the division of real and personal property between divorcing spouses. The wording of ORS 87.455 and 87.460, at least as construed by many family law attorneys, appears to allow an attorney to assert a claim of lien on real and personal property that was ostensibly "awarded" to the attorney's client as part of the divorce proceeding. I have a different view. (Because we rarely see attorneys in divorce cases filing a lien on *personal* property, my thoughts here are confined to the issue of attorney liens on *real* property.)

First, as I see it, a judgment for dissolution of marriage is not a judgment for "the possession, award or transfer" of property from one party to the other. In most cases, the property is *already* owned by both parties, and both parties are legally entitled to possession. (In essence, one pier having two owners, with each owner legally owning 100%.) In dividing property incident to dissolution of marriage, the divorce court is not affirmatively "awarding" property (notwithstanding the verbiage often used in dissolution judgment documents). Rather, what is occurring is that one of the owners is being DEPRIVED of the ownership (and possessory) interest that was previously held. (The pie then has only one owner, rather than two, but the extent of the retaining owner's interest --- 100% --- remains the same as before.) *Leaving a spouse as the owner of property that the spouse already owned prior to the divorce does not substantively result in a judgment for the "the possession, award or transfer" of such property*. In sum, the divorce does result in any increase in the extent of the retaining owner's interest in the property.

For example, prior to divorce, the family home had two owners (husband and wife). Divorce judgment "awards" the house to wife. Following divorce, the family home has only one owner (wife). But that does not mean that the extent of wife's ownership interest has increased as a result of the divorce judgment (and the attorney's labors and efforts in connection therewith). Wife already owned 100% of house going into the divorce. And she leaves the divorce continuing to own 100%. In effect, what the divorce judgment did was to simply *take away* from husband the ownership interest that he previously had. There has been no "gain" for wife. She has not received anything of value that she did not previously have. Thus, the concept underlying an attorney's "charging lien" -- to allow the attorney to secure payment of the attorney' fee in the particular litigation by satisfying it from the fund (or property) attained by the attorney's efforts -- just does not seem to apply. The attorney's efforts in the divorce case did not result in the wife obtaining anything she did not already have. Consequently, as I see it, there is no basis for an attorney to look to the client's previously-owned real property as the source for payment of the attorney's fee for legal services rendered in the case. But divorce lawyers are unwilling or unable to understand this view, or they simply disagree.

Second --- and this is really my main gripe --- the existing Oregon law allows the attorney to assert a lien on the client's real property without prior consent of the client, and to unilaterally determine the dollar amount of lien, and to claim it as being a "*true and bone fide existing debt*," all without any prior judicial oversight, approval or judicial adjudication. And once the lien is formally asserted on the client's real property, it ties-up and encumbers the property. For all practical purposes, the client's real property is held hostage by virtue of the lien asserted by the client's attorney, with the amount of the lien having been unilaterally determined by the lawyer, unconsented to by the client and unadjudicated by the court. Oregon appears to one of the few states in the nation that allows this to occur.

The problems are perhaps best summed up on the decision of the Washington Supreme Court in *Ross v. Scannell*, 97 Wash 2d 598, 647 P2d 1004 (1982), which rejected an opportunity to construe that state's lien law so as to allow the procedure that we here in Oregon have come to accept as routine.

> *"Although we recognize the common problems faced by attorneys in collecting their well deserved fees, the reasons for our hesitancy are apparent. The result of our approving the practice would allow members of the bar to cloud title to real property with 'claims of attorney lien' without resort to any adjudication of such claims. The potential for economic coercion by attorneys is obvious. In today's economic setting a client may well be forced to settle the attorney's claim for fees, no matter how unfounded, simply to gain the ability to convey, lease or otherwise utilize the 'liened' property. * * * We are convinced that the dangers of extending our statute beyond its terms are too great to discount."* *Ross*, 647 Wash2d at 606-607.

The Michigan Court of Appeals reached a similar conclusion in *George v. Sandor M. Gelman, P.C.*, 201 Mich App 474, 506 NW2d 583 (1993). Attorney Gelman represented Mrs. George in her divorce proceeding. There was no written fee agreement. Just an oral understanding for payment of a $1,500 retainer, with attorney services to be billed at $150 per hour. When the case was over, Gelman sent Mrs. George a bill for $12,569.90. Mrs. George was not a happy camper. She disputed several of the services the attorney claimed to have rendered, and also claimed that Gelman had told her at the beginning of the case that the total fee would be "$5,000 to $6,000 tops." When payment was not forthcoming, Gelman recorded an attorney's lien in the amount of $10,569.90 against a condominium that had been "awarded" to Mrs. George in the judgment of divorce. Gelman never sued Mrs. George to collect the fee and never obtained a judgment against plaintiff for the lien amount. Mrs. George then brought an action against Gelman seeking to remove an attorney's lien that Gelman had recorded against her real property. Mrs. George prevailed. Said the Michigan Court of Appeals:

> *"An attorney's lien can be one of two kinds: (1) a general, retaining, or possessory lien, or (2) a special, particular, or charging lien. A general or retaining lien is the right to retain possession of all documents, money, or other property of the client until the fee for services is paid. The special or charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit. The attorney's charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services. In this case, defendant is asserting the right to a charging lien.*
>
> *"A review of case law in Michigan involving attorneys' charging liens reveals that these liens automatically attach to funds or a money judgment recovered through the attorney's services. No Michigan authority, however, permits an attorney's charging lien to attach to real property.*
>
> *"We conclude that an attorney's charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless (1) the parties have an express agreement providing for a lien, (2) the attorney obtains a*

> *judgment for the fe*es and follows the proper procedure for enforcing a judgment, or (3) special equitable circumstances exist to warrant imposition of a lien."

I agree with the views expressed by the Michigan Court of Appeals. Oregon law on this point is unfair and unreasonable, and arguably a denial of due process of law. But until some bright and zealous attorney (such as you) challenges the existing Oregon lien law and its use by divorce lawyers, the existing Oregon system will continue to exist. Most unfortunate.

If a client owes money to the client's attorney following completion of the case and the attorney wants to have a lien on the client's real property as security for the debt, the better practice, in my opinion, is to require the attorney to do what all other creditors in that situation do: file a lawsuit seeking judgment. The claim can then be scrutinized, adjusted if appropriate, adjudicated, and sanctified with judicial blessing. And the resulting judgment will then automatically be a "judgment lien" -- ORS 18.005(10) -- on all of the judgment debtor's real property.

But in no event should a divorce attorney be permitted to assert a claim on lien on the client's real property -- as presently allowed by ORS 87.460 -- in the absence of a prior written agreement in which the client consents to the lien or a prior judicial approval obtained only after due notice to the client and opportunity to be heard in objection.

Admittedly, the views I have expressed here are often met with resistance and disagreement by many family law lawyers, particularly those whose apparent priority is payment rather than professionalism. I hope your approach will be different. And I thank you for seeking my views on this topic.

Regards,
Larry

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Form **1040** Department of the Treasury—Internal Revenue Service **U.S. Individual Income Tax Return** **2010** (99) IRS Use Only—Do not write or staple in this space.

OMB No. 1545-0074

Name, Address, and SSN

See separate instructions.

PRINT CLEARLY

For the year Jan. 1–Dec. 31, 2010, or other tax year beginning , 2010, ending , 20

Your first name and initial	Last name	Your social security number
If a joint return, spouse's first name and initial	Last name	Spouse's social security number
Home address (number and street). If you have a P.O. box, see instructions.	Apt. no.	▲ Make sure the SSN(s) above and on line 6c are correct.
City, town or post office, state, and ZIP code. If you have a foreign address, see instructions.		Checking a box below will not change your tax or refund.

Presidential Election Campaign ▶ Check here if you, or your spouse if filing jointly, want $3 to go to this fund . . . . . ▶ ☐ You ☐ Spouse

Filing Status

Check only one box.

1 ☐ Single
2 ☐ Married filing jointly (even if only one had income)
3 ☐ Married filing separately. Enter spouse's SSN above and full name here. ▶
4 ☐ Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶
5 ☐ Qualifying widow(er) with dependent child

Exemptions

6a ☐ **Yourself.** If someone can claim you as a dependent, **do not** check box 6a . . . . .
b ☐ **Spouse** . . . . . } **Boxes checked on 6a and 6b**

c **Dependents:**

(1) First name Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) ✓ if child under age 17 qualifying for child tax credit (see page 15)
			☐
			☐
			☐
			☐

If more than four dependents, see instructions and check here ▶ ☐

No. of children on 6c who:
• **lived with you**
• **did not live with you due to divorce or separation (see instructions)**

Dependents on 6c not entered above

d Total number of exemptions claimed . . . . . **Add numbers on lines above ▶**

Income

Attach Form(s) W-2 here. Also attach Forms W-2G and 1099-R if tax was withheld.

If you did not get a W-2, see page 20.

Enclose, but do not attach, any payment. Also, please use **Form 1040-V.**

7	Wages, salaries, tips, etc. Attach Form(s) W-2	7	
8a	**Taxable** interest. Attach Schedule B if required	8a	
b	**Tax-exempt** interest. **Do not** include on line 8a — 8b		
9a	Ordinary dividends. Attach Schedule B if required	9a	
b	Qualified dividends — 9b		
10	Taxable refunds, credits, or offsets of state and local income taxes	10	
11	Alimony received	11	
12	Business income or (loss). Attach Schedule C or C-EZ	12	
13	Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶ ☐	13	
14	Other gains or (losses). Attach Form 4797	14	
15a	IRA distributions — 15a — b Taxable amount	15b	
16a	Pensions and annuities — 16a — b Taxable amount	16b	
17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E	17	
18	Farm income or (loss). Attach Schedule F	18	
19	Unemployment compensation	19	
20a	Social security benefits — 20a — b Taxable amount	20b	
21	Other income. List type and amount	21	
22	Combine the amounts in the far right column for lines 7 through 21. This is your **total income** ▶	22	

Adjusted Gross Income

23	Educator expenses	23	
24	Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ	24	
25	Health savings account deduction. Attach Form 8889	25	
26	Moving expenses. Attach Form 3903	26	
27	One-half of self-employment tax. Attach Schedule SE	27	
28	Self-employed SEP, SIMPLE, and qualified plans	28	
29	Self-employed health insurance deduction	29	
30	Penalty on early withdrawal of savings	30	
31a	Alimony paid b Recipient's SSN ▶	31a	
32	IRA deduction	32	
33	Student loan interest deduction	33	
34	Tuition and fees. Attach Form 8917	34	
35	Domestic production activities deduction. Attach Form 8903	35	
36	Add lines 23 through 31a and 32 through 35	36	
37	Subtract line 36 from line 22. This is your **adjusted gross income** ▶	37	

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Trying Cases to the Bench
2011 Family Law Conference
Friday, October 14, 2011
Gleneden Beach, Oregon

1. Know your judge and his/her staff's preferences, they are more important than baseball umpires.

2. Demonstrate competence, and earn credibility which will result in the judge's trust.

3. Demonstrate a strong sense of organization, "ABC," meaning accurate, brief and clear. Get to the key matters, don't dance around.

4. What are the precise legal questions, including key words and phrases? Talk legalese.

5. Does this particular judge need to be educated in this particular case? If so, on what and why?

6. Would a pretrial memo be of assistance?

7. Are a few powerful exhibits or visual aids available?

8. Judges believe they make decisions unemotionally, therefore don't make obvious appeals to emotion.

9. The reality is judges tend to make quick, intuitive decisions.

10. Welcome the judge's questions!

11. Good fishermen bait the hook for the fish, not the fisherman.

12. Talk to the judge, don't argue with your opponent.

This talk is partially drawn from a wonderful lecture by Dave Markowitz titled "Mastering The Art of Persuading Trial Judges" for OLI on May 6, 2011. I've also drawn upon "Blinking On the Bench: How Judges Decide Cases" 93 Cornell L. Rev. 1, 2007.

2011 OREGON LEGISLATION HIGHLIGHTS

DOMESTIC RELATIONS LAW

Ryan Carty
Saucy & Saucy, P.C.
October 2011

The author acknowledges Russell Lipetzky, David Gannett, and Susan Grabe for their invaluable assistance throughout the 2011 legislative session.

I. INTRODUCTION

II. SPOUSAL AND CHILD SUPPORT

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C. HB 2687 (ch 115) Changes recommended by OSB Family Law Section

1. Temporary support order in general judgment

2. Payment of temporary support

III. FAMILY ABUSE PREVENTION ACT ISSUES

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B. HB 2928 (ch 244) Appearance by electronic communication

C. HB 3433 (ch 206) Renewal by protected child

IV. OTHER DOMESTIC RELATIONS BILLS

A. SB 386 (ch 306) Gifted property (*Olesberg* fix)

B. HB 2710 (ch 595) Uniform Filing Fees

C. SB 522 (ch 438) Impact of rape conviction on custody determination

D. HB 2183 (ch 606) False report of child abuse is a crime

E. HB 2667 (ch 398) Change to Summons form

F. HB 2685 (ch 60) Termination of Attorney-Client relationship

G. HB 2686 (ch 114) Changes recommended by OSB Family Law Section

1. Repeal of 90-day waiting period

2. Post-judgment *ex parte status quo* order

3. Rights and responsibilities of unmarried parents

H. HB 3162 (ch 64) Custody orders involving a parent in active military service

I. INTRODUCTION

The 2011 legislative session resulted in numerous changes impacting the family law practice area. General judgments may now provide for temporary support and the practice of paying temporary support directly to the other party has been codified by statute. Family Abuse Prevention Act (FAPA) orders may now provide for the safey of certain animals and may be renewed by a protected child. Courts are authorized to allow appearance by electronic communication in FAPA proceedings. Gifted property is no longer presumptively considered marital property. Courts are restricted from awarding custody to a parent whose rape of the other parent resulted in conception of the child at issue. Knowingly making a false report of child abuse is now a crime. Practitioners may now successfully terminate the Attorney-Client relationship upon filing a notice at the conclusion of a case. Dissolution cases are no longer subject to a 90 day waiting period. Parties who file requests for post-judgment *ex parte status quo* orders must now concurrently file a motion to modify the underlying judgment. ORS chapter 109 has been updated to incorporate previous changes made to ORS chapter 107. Courts are restricted from modifying judgments dealing with custody or parenting time issues that involve a deployed parent until 90 days after completion of the deployment.

All bills are effective January 1, 2011, unless stated otherwise.

II. SPOUSAL AND CHILD SUPPORT

A. SB 43 (ch 317) Changes withholding caps for collection of arrearages

SB 43 removes the federal minimum hourly wage standard cap on child support arrearage withholding in cases where there is no present, or previously ordered, monthly support amount. In

these cases, the withholding will now be calculated according to the child support computation formula established under ORS 25.275. This bill also increases the cap from the current 25% to 50% for the collection of arrearages from lump sum payments (*e.g.*, workers' compensation benefits, lump sum retirement plan disbursements or withdrawals, insurance payments or settlements, severance pay, bonus payments, lottery winnings, etc.). Practitioners should update garnishment forms (*e.g.*, writs and notices of exemptions) accordingly.

SB 43 provides limits on the amount that can be withheld when the withholding is from: (1) Social Security disability benefits; (2) black lung benefits; or (3) veterans disability benefits. The bill also limits withholding for arrearages if the person has an obligation to pay current child support or is unable to meet his or her own basic needs.

B. SB 45 (ch 318) Time to object to administrative child support order

SB 45 standardizes at 30 days the time to request hearings in administrative child support proceedings. Previous deadlines ranged from 14 to 30 days depending on the type of hearing and the issue involved. The bill also removes the presumption of an inability to pay child support for obligors receiving foster care payments, regardless of actual income. The bill provides flexibility to the Division of Child Support in expanding how and by whom service may be accomplished. Finally, the bill allows individuals seeking limited support enforcement services such as accounting and disbursement assistance to complete a simpler application form. These individuals are no longer required to apply for full services.

C. HB 2687 (ch 115) Changes recommended by OSB Family Law Section

1. Temporary support order in general judgment

The court currently has no authority to retroactively award temporary support in a final

judgment if there was no temporary support order (*i.e.*, limited judgment) entered by the court prior to the final hearing. HB 2687 grants the court authority to award temporary spousal support and/or child support in an ORS 107.105 general judgment. Parties must request such temporary support in either an ORS 107.085 petition or an ORS 107.095 motion. Temporary support may only be ordered retroactive to the date the petition or motion was served on the nonrequesting party.

2. Payment of temporary support and suit money

ORS 107.095 authorizes the court to order temporary spousal support and/or temporary child support during the pendency of a domestic relations case. The statue further authorizes the court to award what is commonly referred to as suit money as may be necessary to enable the other party to prosecute or defend the suit. As currently written, the statute requires that if a party is required to pay suit money, such payment must be made to the "clerk of the court." The clerk would then distribute any such funds to the other party. Similarly, parties ordered to pay temporary spousal support are directed to pay such funds to "the Department of Justice, court clerk or court administrator, whichever is appropriate."

HB 2687 amends ORS 107.095 to allow for direct payment from one party to the other party. This change conforms the law to current practice by practitioners. Nothing in HB 2687 prohibits the Department of Justice, through the Division of Child Support, from facilitating the collection and distribution of spousal support payments as set forth in the provisions of ORS 25.020.

III. FAMILY ABUSE PREVENTION ACT ISSUES

A. SB 616 (ch 274) Prevent neglect and provide for safety of animals

SB 616 allows the court to order relief in a Family Abuse Prevention Act (FAPA) hearing as necessary to prevent the neglect and protect the safety of any service or therapy animal or any

animal kept for personal protection or companionship. The bill excludes animals that are kept for business, commercial, agricultural, or economic purposes.

This bill became effective as of June 7, 2011.

B. HB 2928 (ch 244) Appearance by electronic communication

HB 2928 permits the court to allow appearance of a party or witness by telephone or other two-way electronic communication device in a Family Abuse Prevention Act (FAPA) proceeding. The party requesting an electronic appearance must file a motion under ORS 45.400, which requires that the party provide written notice of such request to all other parties to the proceeding at least thirty days before the trial or hearing at which electronic testimony will be offered unless good cause is shown. HB 2928 requires that the court take into consideration the expedited nature of FAPA hearings when deciding whether to allow ORS 45.400 motions submitted with less than 30 days notice.

From a practical standpoint it will rarely be possible to provide thirty days notice given that if a respondent requests a hearing to challenge the FAPA, the court is required to hold the hearing within 21 days after the request, or within 5 days after the request if the respondent contests an order granting temporary child custody to the petitioner.

In deciding whether to allow electronic appearance, the court must also consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at the FAPA proceeding.

No ORS 45.400 motion or good cause determination is required for *ex parte* hearings held by telephone to determine whether the petitioner satisfies the statutory requirements in order to qualify for a FAPA order.

C. HB 3433 (ch 206) Renewal by protected child

HB 3433 allows a child who is now 18 years of age or older, and who was a protected person in the petitioner's custody under a Family Abuse Prevention Act (FAPA) order when under the age of eighteen, to seek a renewal of that order if the person reasonably fears abuse. A finding of further acts of abuse is not required to renew a FAPA order under this bill.

The court may renew a FAPA order under this new bill regardless of whether the original petitioner agrees to or seeks a renewal of the order. If the original petitioner does not agree to or seek renewal of the order concurrently with the request of the child who has now reached 18 years of age, the court may modify the original order to exclude the original petitioner as a protected person in the renewed order.

The person seeking renewal under this section is not required to file a new FAPA petition.

This bill applies to petitions for renewal filed on or after January 1, 2012, regardless of the date the initial FAPA was filed or took effect.

IV. OTHER DOMESTIC RELATIONS BILLS

A. SB 386 (ch 306) Gifted property (*Olesberg* fix)

Under current ORS 107.105(1)(f), a "marital asset" is any asset acquired during the marriage by either party from any source. There is a rebuttable presumption that both parties have contributed equally to all marital assets. If the presumption is not rebutted, the value of the marital asset is included in the marital property and typically divided equally between the parties upon dissolution of the marriage. If a party is successful in rebutting the presumption of equal contribution, the court may still divide the property, but division must be "just and proper," giving consideration to the

degree of contribution by each party.

In order to rebut the presumption of equal contribution to the acquisition of gifted property under existing case law, the burden falls on the recipient spouse to prove there was no intent by the donor that the non-recipient spouse share in that particular asset. This issue was specifically addressed in *Olesberg and Olesberg*, 206 Or App 496, rev den 342 Or 633 (2007).

The *Olesberg* court held that the intent of a donor cannot be established merely by proving that the donor specifically named one spouse as the recipient and not the other. The husband in *Olesberg* received an inheritance from his mother. Husband's mother never named her daughter-in-law (Wife) in the will. Nonetheless, because Husband was unable to present affirmative proof that his mother intended to exclude Wife from her will, the court found that Husband had failed to rebut the presumption of equal contribution. A just and proper division of Husband's inheritance in *Olesberg* resulted in an equal division.

The Family Law and Estate Planning Sections of the Oregon State Bar identified this issue as being contrary to established principles of donative intent. SB 386 removes property received by gift, devise, bequest, operation of law, beneficiary designation or inheritance from the presumption of equal contribution under ORS 107.105(1)(f). The bill leaves intact the court's authority to divide such property as may be "just and proper" depending upon the facts presented in a particular case. The non-recipient spouse is not precluded from presenting evidence to show the donor intended to include the non-recipient spouse in the gift and simply omitted his or her name from the donative document.

Finally, SB 386 breaks ORS 107.105(1)(f) down in to subject-based subparagraphs. This reorganization of the statute provides no substantive change other than those discussed above. ORS

107.105(1)(f) now reads as follows:

> *"(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. In determining the division of property under this paragraph, the following apply:*
>
> *(A) A retirement plan or pension or an interest therein shall be considered as property.*
>
> *(B) The court shall consider the contribution of a party as a homemaker as a contrib-ution to the acquisition of marital assets.*
>
> *(C) Except as provided in subparagraph (D) of this paragraph, there is a rebuttable presumption that both parties have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held.*
>
> *(D)(i) Property acquired by gift to one party during the marriage and separately held by that party on a continuing basis from the time of receipt is not subject to a presumption of equal contribution under subparagraph (C) of this paragraph.*
>
> *(ii) For purposes of this subparagraph, "property acquired by gift" means property acquired by one party through gift, devise, bequest, operation of law, beneficiary designation or inheritance.*
>
> *(E) Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets under a judgment of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.*
>
> *(F) The court shall require full disclosure of all assets by the parties in arriving at a just property division.*
>
> *(G) In arriving at a just and proper division of property, the court shall consider reasonable costs of sale of assets, taxes and any other costs reasonably anticipated by the parties.*
>
> *(H)(i) If a party has been awarded spousal support in lieu of a share of property, the court shall so state on the record and shall order the obligor to provide for and maintain life insurance in an amount commensurate with the obligation and designating the obligee as beneficiary for the duration of the obligation.*
>
> *(ii) If the obligor dies prior to the termination of spousal support and life insurance is not in force as provided in sub-subparagraph (i) of this subparagraph, the court may modify the method of payment of spousal support under the judgment or order of support from installments to a lump sum payment to the obligee from the estate of the obligor in an amount commensurate with the present value of the spousal support at the time of death.*
>
> *(iii) The obligee or attorney of the obligee shall cause a certified copy*

of the judgment to be delivered to the life insurance company or companies.

(iv) If the obligee or the attorney of the obligee delivers a true copy of the judgment to the life insurance company or companies, identifying the policies involved and requesting such notification under this section, the company or companies shall notify the obligee, as beneficiary of the insurance policy, whenever the policyholder takes any action that will change the beneficiary or reduce the benefits of the policy. Either party may request notification by the insurer when premium payments have not been made. If the obligor is ordered to provide for and maintain life insurance, the obligor shall provide to the obligee a true copy of the policy. The obligor shall also provide to the obligee written notice of any action that will reduce the benefits or change the designation of the beneficiaries under the policy."

B. HB 2710 (ch 595) Uniform Filing Fees

HB 2710 establishes a new fee schedule for circuit court filing fees. The caption of all documents filed in a circuit court ***for the purpose of commencing an action or other civil proceeding*** must include a reference to the statute that establishes the filing fee for the proceeding. This requirement allows court staff to quickly identify the proper fee to charge based on the document filed. The fee schedule includes:

$260

Dissolution of marriage
Annulment of marriage
Separation
Filiation proceedings (ORS 109.124-109.230)
Support for spouse and children (ORS 108.110)
Child custody, parenting time and support (ORS 109.100 and 109.103)

$240:

Standard filing fee (if no specific fee is provided by other law for a proceeding)
Registering foreign judgment

$105:

Name change (separate from dissolution judgment)
Legal change of sex
Guardianship proceedings (ORS chapter 125)

Registering foreign judgment re: Child Custody

Miscellaneous fees:

Motion seeking entry of supplemental judgment (not including motions filed under ORCP 68, 69 or 71): $150
Parenting time enforcement or contempt action: $50
Trial fee: $125 from moving party for full or partial day bench trial
Settlement conference: Each party pays $100 per day or partial day if dissolution of marriage, annulment of marriage, separation, filiation, support for spouse and children, or child custody, parenting time, and support. All other civil is $200 per day.
Marriage solemnization: $100
Appeal: $355

Eliminated fees:

Ex Parte Order fee: $10
Judgment fee: $10

This bill became effective as of October 1, 2011.

C. SB 522 (ch 438) Impact of rape conviction on custody determination

SB 522 amends ORS 107.105 and ORS 107.137 to allow the court to terminate parental rights if the court finds that the child at issue was conceived as a result of an act that led to the parent's conviction for rape, other than Rape III (sexual intercourse with another person under 16 years of age, but over 14 years of age). The bill prohibits the court from awarding custody of a child to a parent convicted of rape if the rape resulted in the conception of the child. The court is required to deny parenting time to a parent under these circumstances.

Nothing in this bill relieves the affected parent of any obligation to pay child support.

D. HB 2183 (ch 606) False report of child abuse is a crime

HB 2183 establishes as a crime the false report of child abuse. In order to commit the crime of making a false report of child abuse, the reporting individual must know the report is false and,

with intent to influence a custody, parenting time, or child support decision, either: (1) personally makes such a report to the Department of Human Services; or (2) makes such a report to a public or private official with the intent that the public or private official make a report to the Department of Human Services. This is a Class A violation and carries with it a $720 fine.

E. HB 2667 (ch 398) Change to summons form

HB 2667 requires that all summons forms must now include the Oregon State Bar's website address in addition to phone numbers in order to assist individuals in reaching the Oregon State Bar's Lawyer Referral Service. The language now required is:

> *"If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636."*

This bill became effective as of June 17, 2011.

F. HB 2685 (ch 60) Termination of Attorney-Client relationship

In order to currently withdraw from a case, an attorney must follow the requirements set forth in ORS 9.380. That statute lacks clarity, which has resulted in varying requirements in various jurisdictions as to how an attorney may withdraw from a case. Courts in some counties require nothing more than a notice that advises the court the case is over and that the attorney-client relationship is terminated. Courts in other counties require that the attorney file a formal motion, supported by an affidavit, together with a proposed order for the court to sign prior to allowing the attorney to withdraw.

HB 2685 standardizes the procedure attorneys must follow in order to terminate the attorney-client relationship *after* the entry of a judgment or other final determination. The attorney now need

only file a notice of termination of the relationship in the action or proceeding. The notice must be signed by the attorney and state that all services required of the attorney under the attorney-client agreement have been provided. This bill makes no change to procedures for withdrawing from a case prior to judgment or other final determination.

G. HB 2686 (ch 114) Changes recommended by OSB Family Law Section

1. Repeal of 90-day waiting period

ORS 107.065 currently prohibits a final trial or hearing on the merits of a dissolution of marriage proceeding from taking place until after 90 days from the date of service unless the court finds grounds of emergency or necessity and that immediate action is warranted to protect the rights or interest of any party or person who might be affected by a judgment in the proceedings. Sections 1 and 2 of HB 2686 repeal the 90 day waiting period. Domestic relations cases are now subject to the same 30 day period as any other civil case.

2. Post-judgment *ex parte status quo* order

ORS 107.139 currently provides a mechanism through which a party may seek an immediate post-judgment *ex parte* order from the court that provides for temporary custody of a child if the child is in immediate danger. The party requesting such an order must demonstrate that a good faith effort has been made to confer with the other party regarding the purpose and time of the court appearance, rather than serve any type of formal notice on the other party. In other words, a temporary custody order under ORS 107.139 requires no formal notice procedure. An ORS 107.139 order is intended to be temporary in nature. As written, however, there is no statutory requirement that a party who requests a post-judgment immediate danger order concurrently commence a proceeding under ORS 107.135 in order to permanently modify an award of child custody. As a

result, a party who receives a temporary order of custody on the grounds of immediate danger need take no further action and can essentially turn the temporary order into an indefinite order modifying custody.

The Family Law Section of the Oregon State Bar proposed legislation that requires a party who utilizes the *ex parte* immediate danger provisions of ORS 107.139 to concurrently initiate an ORS 107.135 proceeding. ORS 107.135 requires filing and service of a motion, supporting affidavit, and an order requiring the other party to show cause why the motion should not be granted. After providing notice, and a hearing if the motion is contested, the court may modify the prior custody order based on a "best interests of the child" determination.

Section 3 of HB 2686 requires that parties requesting an ORS 107.139 temporary order concurrently file a modification proceeding under ORS 107.135, which results in formal service on the non-requesting party and an eventual modification hearing. That provides the court with a mechanism through which it can adequately address the best interests of the child and prevent parties from misusing the ORS 107.139 temporary custody process.

3. Rights and responsibilities of unmarried parents

The court's authority in dissolution proceedings is set forth in ORS chapter 107. ORS 109.103 extends to unmarried parents the same parental rights and obligations that apply to married or divorced parents under ORS chapter 107. ORS 109.103 specifically identifies the provisions of chapter 107 that are extended to unmarried parents.

Various sections of ORS chapter 107 have been added or amended without ORS 109.103 concurrently being amended in order to incorporate those changes. Those omissions were unintentional. The Family Law Section of the Oregon State Bar sponsored HB 2686, in part, to bring

ORS chapter 109 up to date with ORS chapter 107. The provisions of ORS chapter 107 that now specifically apply to unmarried parents include:

1. Procedure for modifying judgments relating to parenting time or child support (ORS 107.431).

2. Expedited parenting time enforcement procedure (ORS 107.434).

3. Order of assistance to obtain custody of child held in violation of custody order (ORS 107.437).

4. Attorney fees in certain domestic relations proceedings (ORS 107.445).

5. Transfer of proceeding to auxiliary circuit court (ORS 107.449).

6. Mediation procedures (ORS 107.755 - ORS 107.795).

H. HB 3162 (ch 64) Custody orders involving a parent in active military service

The Servicemembers Civil Relief Act of 2003 (SCRA), formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940, is a federal law that provides specific rights and legal protections to certain individuals in military service (*e.g.*, full-time military personnel and reservists and National Guard members on active duty). One of the hallmarks of SCRA is that once the servicemember has received notice of a judicial action or proceeding, the court *may* (upon its own motion) and *shall* (upon the application of the servicemember) enter a stay of proceedings for at least 90 days if the motion includes information required under SCRA to determine whether a stay is needed.

HB 3162 goes one step further in relation to any portion of a judgment that provides for custody, parenting time, visitation, support and welfare of a minor child of a deployed parent and restricts the court from setting aside, altering, or modifying such judgments *until 90 days after the completion of the deployed parent's deployment* unless a motion to set aside, alter or modify was

filed with, heard by and decided by the court before the commencement of the deployed parent's deployment. The court has discretionary authority to enter a temporary order modifying the terms of a preexisting judgment in order to reasonably accommodate the circumstances of the deployed parent's deployment in the best interests of the child. Any such temporary order must include:

1. Parenting time for the deployed parent during leave;

2. Parenting time in consideration of best interests of the child, but can include telephone, e-mail, and other electronic means;

3. Modification of child support to match new situation;

4. A provision that the non-deployed parent must provide 30 days advance notice of new address or telephone number; and

5. An automatic expiration notice (*i.e.*, the temporary order terminates by operation of law 10 days after the deployed parent serves the other parent and the Department of Justice with official notification that the deployment has ended). This means the preexisting judgment automatically goes back in to effect *unless* an *ex parte* order is entered based on immediate danger or irreparable harm to the child.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 10C-12345

In the Matter of the Marriage of MOTHER ANN DARLING, Petitioner, and FATHER ALAN DARLING, Respondent, and WENDY SUE DARLING, A Child, ORS 107.108.	Judge Hook **NOTICE OF TERMINATION OR ATTORNEY-CLIENT RELATIONSHIP**

COMES NOW Ryan Carty, attorney for Petitioner, and represents that the above-entitled matter has been brought to its conclusion and the attorney-client relationship regarding said matter has been terminated. All services required of the attorney under the attorney-client agreement have been provided There are no matters now pending before this court in this case.

The last known address of Petitioner is 1776 Liberty Street, Salem, Oregon 97302.

DATED this ____ day of September, 2011.

Ryan Carty, OSB #093071
Attorney for Petitioner

9/22/11 4:56 pm H:\Ryan\Legislation\2011 Chapter\Termination docs.wpd ()

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Telephone (503) 362-9330 • Fax (503) 362-3908
Ryan@YourAtty.com Shannon@YourAtty.com

CERTIFICATE OF SERVICE

I certify that I served the foregoing NOTICE OF TERMINATION OF ATTORNEY-CLIENT RELATIONSHIP upon David Gannett, attorney for Respondent, and Mother Darling, Petitioner, by placing a true, full and exact copy thereof, duly certified to be such by me, in a sealed envelope, postage prepaid, and depositing the same to the United States post office at Salem, Oregon, on September _____, 2011, addressed to:

David Gannett
Attorney at Law
1 SW Columbia Ste 1850
Portland OR 97258

Mother Darling
1776 Liberty Street
Salem, OR 97302

Ryan Carty, OSB #093071
Attorney for Petitioner

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 10C-12345

In the Matter of the Marriage of MOTHER ANN DARLING, Petitioner, and FATHER ALAN DARLING, Respondent, and WENDY SUE DARLING, A Child, ORS 107.108.	Judge Hook **PETITIONER'S MOTION TO ALLOW WITHDRAWAL OF ATTORNEY**

COMES NOW Ryan Carty, attorney at law, and respectfully moves this court for an order removing himself as counsel for Petitioner, on the grounds and for the reasons set forth in the affidavit attached hereto and by this reference made a part hereof.

The date on which the next hearing or trial in this matter has been scheduled is December 1, 2011.

DATED this ___ day of _____, 2011.

_____
Ryan Carty, OSB #093071
Attorney for Petitioner

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Ryan@YourAtty.com Shannon@YourAtty.com

CERTIFICATE OF SERVICE

I certify that I served the foregoing PETITIONER'S MOTION TO ALLOW WITHDRAWAL OF ATTORNEY upon David Gannett, attorney for Respondent, by placing a true, full and exact copy thereof, duly certified to be such by me, in a sealed envelope, postage prepaid, and depositing the same in the United States post office at Salem, Oregon, on September ____, 2011, addressed to:

David Gannett
Attorney at Law
1 SW Columbia Ste 1850
Portland OR 97258

_____
Ryan Carty, OSB #093071
Attorney for Petitioner

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 10C-12345

In the Matter of the Marriage of MOTHER ANN DARLING, Petitioner, and FATHER ALAN DARLING, Respondent, and WENDY SUE DARLING, A Child, ORS 107.108.	Judge Hook **AFFIDAVIT OF RYAN CARTY**

STATE OF OREGON)
) ss:
County of Marion)

I, Ryan Carty, being first duly sworn, depose and say:

I am the attorney of record for Petitioner in the above-entitled proceeding.

There has been a breakdown in the attorney-client relationship.

_____
Ryan Carty, OSB #093071
Attorney for Petitioner

Subscribed and sworn to before me this _____ day of _____, 2011.

_____
Notary Public for Oregon

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 10C-12345

In the Matter of the Marriage of MOTHER ANN DARLING, Petitioner, and FATHER ALAN DARLING, Respondent, and WENDY SUE DARLING, A Child, ORS 107.108.	Judge Hook **ORDER RELIEVING ATTORNEY FOR PETITIONER**

The court finds that the motion of Ryan Carty for permission to withdraw as attorney for Petitioner is well taken and should be allowed upon the conditions stated below. Now, therefore;

IT IS HEREBY ORDERED:

1. Ryan Carty shall be relieved as attorney of record for Petitioner in this action at such time as Ryan Carty shall accomplish due service of a certified true copy of this Order on Petitioner by sending it in the mail to the address shown below and shall file proof of such service in the record of this action.

2. Unless and until Petitioner may appear in this action by new counsel, or may file in the record of this action a written notice of a change of his mailing address, all written communication to Petitioner and the service of all documents upon Petitioner in this action which may be made by mail in accordance with the Oregon Rules of Civil Procedure shall be accomplished by mailing such communication or documents to Petitioner, postage fully prepaid, to the mailing address shown below.

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Ryan@YourAtty.com Shannon@YourAtty.com

3. Petitioner shall be charged with notice of communications or documents duly mailed to her at such address, unless Petitioner proves such communication or document was not, in fact, duly mailed to Petitioner at the address shown below, or Petitioner proves the communication or document was not delivered to the address for reasons other than the act of Petitioner in rejecting such delivery or changing her mailing address without filing a written notice of such change of address in this action.

The present mailing address of Petitioner is: 1776 Liberty Street, Salem, Oregon 97302.

Trial date: December 1, 2011

DATED this ____ day of _____, 2011, at Salem, Oregon.

_____
The Honorable Captain Hook
Circuit Court Judge

Submitted by: Ryan Carty, OSB #093071
Attorney for Petitioner

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

No. 10C-12345

In the Matter of the Marriage of MOTHER ANN DARLING, Petitioner, and FATHER ALAN DARLING, Respondent, and WENDY SUE DARLING, A Child, ORS 107.108.	**AFFIDAVIT OF MAILING ORDER RELIEVING ATTORNEY**

STATE OF OREGON)
) ss:
County of Marion)

I, Ryan Carty, certify that I served the Order Relieving Attorney for Petitioner herein on Petitioner by certified mail, at Salem, Oregon, on the _____ day of _____, 2011, by then depositing in the United States Post Office thereat in a sealed envelope with postage fully paid, a copy thereof addressed to Petitioner, at her last known address, to wit: 1776 Liberty Street, Salem, Oregon 97302.

_____
Ryan Carty, OSB #093071

Subscribed and sworn to before me this ____ day of September, 2011.

_____
Notary Public for Oregon

9/22/11 4:42 pm H:\Ryan\Legislation\2011 Chapter\Withdrawal docs.wpd ()

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PATERNITY LAW TODAY AND NEW ISSUES ON THE HORIZON

Oregon State Bar Family Law Section Conference
October 15, 2011

Leslie J. Harris
Dorothy Kliks Fones Professor, University of Oregon School of Law

I. Demographic background

A. Births in Oregon (from *Population, Live Births, Births to Unmarried Mothers, Marriages, and Divorces, Oregon, 1910-2008*, 1 OREGON VITAL STATISTICS ANNUAL REP. 2008, Tbl. 1-2)

1. Total in 2008: 49,117
2. Nonmarital in 2008: 17,686 or about 36 percent

B. Paternity establishment for children born outside marriage

1. Total paternities established
    a. FY 2010: 17,125
    b. FY 2009: 16,659
    c. FY 2008: 17,568
2. Methods of paternity establishment
    a. Jan. 2011 Oregon Health Authority reported 90 percent paternity establishment rate. Oregon Center for Health Statistics, *Matters of Record* 1 (Jan. 2011)
    b. In 2010, paternity established by acknowledgment signed at birthing facility in 73.3 percent of cases. *Id.* at 3.

II. Overview: Significance of and means for establishing legal paternity

A. Significance

1. Child support
2. Custody and visitation
    a. Against mother – mother has right to custody if legal paternity not established; if established, parent who has physical custody at time of filing has sole legal custody until court orders otherwise. ORS 109.175. Parents on equal footing legally, and so in custody suit, no preference based on gender. ORS 109.030, 109.060
    b. Against third parties – father has no preference if paternity not established; if established, has preference under ORS 109.119)
3. Adoption
    a. If legal paternity established, has same rights as all other legal parents, ORS 109.094
    b. If legal paternity not established, entitled to notice only if the petitioner knows, or by the exercise of ordinary diligence should have known that the child lived with the man at any time during the 60 days preceding initiation of the petition or at any time since the child's birth if child is less than 60 days old or the man has repeatedly contributed or tried to contribute to the child's support during the last year or during the child's life if the child is less than a year old. ORS 109.096(1)

c. If legal paternity not previously established but man has received notice and is participating in the suit, less protection for substantive rights even if biological paternity is established. ORS 109.098

B. Methods of establishing legal paternity

1. The marital presumption(s) – ORS 109.070(1)(a) and (b)
2. Adjudication – ORS 109.070(1)(d)
3. Administrative process -- ORS 416.400 - 416.470
4. Voluntary acknowledgment of paternity filed in this or another state – ORS 109.070(1)(c), (e) and (f). NB: Federal law requires states to give full faith and credit to voluntary acknowledgments from other states
5. By other provision of law – ORS 109.070(1)(g)-- Thom v. Bailey, 257 Or. 572, 481 P.2d 335 (Or. 1971); Fox v. Hohenshelt, 275 Or. 91, 549 P.2d 1117 (Or. 1976) (suits for declaratory judgments and heirship proceedings in probate)

C. What law applies

1. Oregon law amended in 2005 and in 2007; what if child born before 2005 or between 2005 and 2007?
2. Legislation in effect at time of litigation governs. State ex rel. Juvenile Dept. of Lane County v. G.W., 217 Or. App. 513, 177 P.3d 24 (2008)

D. About genetic testing

1. "Blood tests" is the statutory term that includes "any test for genetic markers to determine paternity of a type generally acknowledged as reliable by accreditation bodies designated by the Oregon Health Authority in compliance with the United States Secretary of Health and Human Services, and performed by a laboratory approved by such accreditation body. "Blood tests" includes but is not limited to the Human Leucocyte Antigen Test, the deoxyribonucleic acid test and any test that extracts genetic material from any human tissue." ORS 109.251

2. Home tests – problems of chain of custody and reliability of testing procedure. *See* Fox v. Olsen, 87 Or. App. 173, 741 P.2d 924, review den. 304 Or. 405, 745 P.2d 1225 (1987)

3. Court or child support administrator has authority to order testing

a. Filiation suit -- ORS 109.252(1)

b. Administrative proceeding to establish paternity -- ORS 109.252(1)

c. Petition to vacate judicial or administrative determination of paternity filed under ORS 109.072 -- court may deny request if, considering the interests of the parties and the child, it finds that to do so is "just and equitable" -- ORS 109.072(6)

d. Application to child support administrator to set aside paternity finding made in administrative proceeding, provided that blood tests were not done and no more than a year has passed – ORS 419.443(2)

e. Signer of voluntary acknowledgment of paternity petitions child support enforcement administrator to set aside voluntary acknowledgment of paternity within one year of signing under ORS 109.070(6). Petition may also be filed by DHS if child is in DHS custody.

4. If party refuses to submit to testing, "the court or administrator may resolve the question of paternity against such person or enforce the court's or administrator's order if the rights of others and the interests of justice so require." ORS 109.252(1). If a party refuses to submit to testing in an administrative action challenging an administrative finding of paternity or a voluntary acknowledgment, "the issue of paternity shall, upon the motion of the administrator, be resolved against that party by an order of the court either affirming or setting aside the order establishing paternity or the voluntary acknowledgment of paternity." ORS 419.443(5)

5. Payment for testing

a. In action to establish paternity, if child support enforcement services being provided, child support program pays subject to recovery from the party who requested the tests – ORS 109.252(2)

b. If ordered in the course of judicial action to disestablish paternity, party who petitions for blood tests pays – ORS 109.072(6)

c. If ordered in the course of administrative action to set aside administrative paternity finding or voluntary acknowledgment under ORS 416.443, state pays, subject to recovery from the party who requested the tests. ORS 416.443(9)

II. Establishing paternity

A. Based on marriage

1. Rebuttable presumption if child born while mother married -- ORS 109.070(1)(a)
2. Rebuttable presumption if child born within 300 days of termination of marriage – ORS 109.070(1)(b)
3. Parents marry after child is born – no presumption; parents must execute voluntary acknowledgment of paternity -- ORS 109.070(1)(c) (see below for details)
4. Shineovich and Kemp, 229 Or. App. 670, 214 P.3d 29, review den. 347 Or. 365, 222 P.3d 1091 (2009) (presumption only applies if it is biologically possible for mother's spouse to be the father, i.e., if mother's spouse is not a woman)

B. By adjudication (filiation suit) – ORS 109.1070(10(d) and 109.124-109.237

1. Jurisdiction and venue

a. Venue – ORS 109.135 (county where initiating party or child resides

b. Long-arm jurisdiction – ORS 110.318

2. Rules apply to any action to determine paternity, not just those under 109.124-109.237 – Marriage of Gridley, 28 Or. App. 145, 558 P.2d 1277 (1977)

3. Standing to file a petition – ORS 109.125(1) (mother, pregnant woman, child's guardian, conservator or guardian ad litem, administrator of child support program, man claiming to be father of child, even it not yet born, child)

4. Petition requirements – OS 109.125(2)

NB: If mother is married, husband must be identified

5. Necessary parties – ORS 109.125(3), (4), and (5)

a. Mother's husband if she is married

b. Man whose paternity has been established under ORS 109.070 unless paternity has been legally disestablished

c. If petition filed by child support office, mother and alleged father

d. If petition not filed by child support office but support rights have been assigned to the state (i.e., the child is receiving public assistance), office of child support enforcement must be served

6. Court may enter default judgment if respondent fails to appear – ORS 109.145

7. Relief that may be granted

a. Finding of legal paternity (only allowed when child had another legal father if that man's legal paternity disestablished previously or in this proceeding) ORS 109.155(1) and (7)

b. Past and future child support, including support for child attending school – ORS 109.155(4)

c. Prenatal and birthing expenses -- ORS 109.155(4)

d. Costs and attorney's fees -- ORS 109.155(4)

e. Order of custody or visitation not authorized by this statute; must bring action under ORS 109.103

C. In a child support administrative proceeding – ORS 416.400 - 416.470

1. Long-arm jurisdiction – ORS 110.318

2. Rules to prevent inconsistent findings of paternity discussed in Part II.B. do not apply

3. Process of establishing paternity is part of bigger process of establishing child support obligation. Process set in motion by the agency providing support enforcement services. ORS 416.415 and 416.430

4. Who may seek support enforcement services (which are provided in some situations by the DA and in come situations by the DCS of the DOJ)? ORS 416.415(1)

a. The state if it is providing assistance and support rights have been assigned to it

b. A person to whom support is owed who has made a written request for support enforcement services under ORS 25.084

c. A man who alleges himself to be the father if he is receiving TANF or makes an application for services under ORS 25.080 OAR 137-055-3080 (subject to many requirements)

5. If petition filed while woman pregnant, agency will not take action until child born. OAR 137-055-3020(1)

6. Process – ORS 416.415

a. For paternity establishment – administrator issues notice that asserts claim of paternity and serves it on the respondent.

b. Burden is on the recipient to object. "if the alleged parent or the obligee does not timely send to the office issuing the notice a written response that denies paternity and requests a hearing, then the administrator, without further notice to the alleged parent, or to the obligee, may enter an order that declares and establishes the alleged parent as the legal parent of the child." ORS 416.415(3)(e), 416.430(2)

c. Procedure when hearing requested – ORS 416.427

d. Administrator may order blood testing -- ORS 109.252(1)

e. If party refuses to submit to testing, "the court or administrator may resolve the question of paternity against such person or enforce the court's or administrator's order if the rights of others and the interests of justice so require." ORS 109.252(1)

f. Certification to court (party disputes) – ORS 416.435

g. Administrative orders are filed with court and become court orders – ORS 416.440

D. By voluntary acknowledgment – ORS 109.070(1)(e) and (f), 432.287

1. Must be executed even if parties marry after birth of child – ORS 109.070(1)(c)
2. Executed by parents and filed with state office of vital statistics – ORS 432.287
3. ORS 109.070(7) -- Acknowledgment invalid even if filed with state if signed after
   a. Party signed consent to adoption
   b. Party signed document relinquishing child to child-caring agency
   c. Court previously terminated party's parental rights
   d. Party determined not to be biological parent in a prior adjudication

III. Disestablishing paternity

A. Rebutting the marital presumptions in 109.070(1)(a) and (b)

1. Statute does not create cause of action; instead, creates an evidentiary rule
2. No statute of limitations
3. Limit on standing to rebut the presumption in 109.070(1)(a)– ORS 109.070(2) --Third parties may not challenge the presumption under 109.070(1)(a) if spouses living together unless both consent;
4. Judicial discretion about whether to admit evidence to rebut presumption in 109.070(1)(a) or (b) – ORS 109.070(3) (admitted if court finds that it is just and equitable, giving consideration to the interests of the parties and the child)
5. Estoppel -- court may refuse to allow the presumption of paternity to be rebutted because the petitioner is equitably estopped from denying paternity.
   a. Marriage of Johns and Johns, 42 Or. App. 39, 601 P.2d 475 (1979) (mother estopped to deny husband's paternity where she had twice represented to the court that husband was father)
   b. Warren and Joeckel, 61 Or.App. 34, 41, 656 P.2d 329 (1982) (mother not estopped to deny husband's paternity because court found husband would have married wife even though there was doubt about whether he was father of child she was carrying; therefore, insufficient detrimental reliance)
   c. Marriage of Hodge and Hodge, 84 Or. App. 62, 733 P.2d 458, rev. den. 303 Or. 370, 738 P.2d 1999 (1987) (mother estopped to deny husband's paternity where she signed birth certificate identifying him as father and represented that he was father and never raised issue until divorce when child was three years old)
   d. Marriage of Sleeper and Sleeper, 145 Or.App. 165, 929 P.2d 1028 (1996), aff'd on other grounds, 328 Or. 504, 982 P.2d 1126 (1999) (although spouses knew husband was not biological father, both spouses represented that he was, and husband developed "deeply involved and continuing relationship with the children," upon which husband and children relied).

B. Setting aside a judicial finding of paternity – ORS 109.072

1. Procedure in intended to parallel ORCP 71 as much as possible; action under ORCP 71 also permitted
2. Standing – ORS 109.072(2)(a) (party to the judgment, DHS if child is in DHS

custody, and Division of Child Support of the Department of Justice if the support rights assigned to the state)

3. Statutes of limitation

a. If grounds are mistake, inadvertence, surprise or excusable neglect discovered after entry of the judgment and blood tests establish that the man is not the biological father – one year after paternity judgment – ORS 109.072(2)(c)

b. If grounds are fraud, misrepresentation or other misconduct of a party and blood tests establish that the man is not the biological father – one year after discovery of the misconduct – ORS 109.072(2)(d)

4. Court authority regarding conduct of case

a. May appoint counsel for the child and shall do so if child requests

b. May order parties to submit to blood tests; court may deny request if, , considering the interests of the parties and the child, it finds that to do so is "just and equitable" -- ORS 109.072(6)

c. May grant the relief upon a party's default, or by consent or stipulation of the parties, without blood test evidence.-- ORS 109.072(10)

5. Relief granted upon proof of grounds and proof that man is not biological father of child

a. Court may grant relief on ground of fraud whether it is extrinsic or intrinsic – ORS 109.072(8). Leaves open what kind of fraud justifies setting aside judgment.

1. Case law under prior statute recognized intrinsic/extrinsic distinction, refusing to set aside paternity judgment based on allegedly perjured testimony. Watson v. State, 71 Or. App. 734, 694 P.2d 560 (1985); McClain v. McClain, 155 Or. App. 258, 958 P.2d 909 (1998).

2. Restatement of Judgments 2nd

a. § 70(1)(a) provides "Subject to the limitations stated in § 74, a judgment in a contested action may be avoided if the judgment:(b) Was based on a claim that the party obtaining the judgment knew to be fraudulent.

b. Comment d to § 70:

Elements required for relief from fraud. Four elements must be established to obtain relief. First, it must be shown that the fabrication or concealment was a material basis for the judgment and was not merely cumulative or relevant only to a peripheral issue. Second, the party seeking relief must show that he adequately pursued means for discovering the truth available to him in the original action. …

Third, the applicant must show due diligence after judgment, in that he discovered the fraud as soon as might reasonably have been expected. This is an application of the general principle of due diligence, see § 74.

Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present, and must offer clear and convincing proof to establish that the evidence underlying the judgment was indeed fabricated or

concealed. This heavy burden of proof is an important measure of protection against attacks on honestly procured judgments. It also transforms the issue from a retrial of a question previously litigated to a search for something approaching incontestable proof as to truth of the underlying matter in issue.

c. Section 74 provides: …[R]elief from a judgment will be denied if:

(1) The person seeking relief failed to exercise reasonable diligence in discovering the ground for relief, or after such discovery was unreasonably dilatory in seeking relief; or

2) The application for relief is barred by lapse of time; or

(3) Granting the relief will inequitably disturb an interest of reliance on the judgment. When such an interest can be adequately protected by giving the applicant limited or conditional relief, the relief will be shaped accordingly.

b. Estoppel as limit on relief: State ex rel. Adult and Family Services Div. v. Evans, 126 Or.App. 592, 869 P.2d 891 (1994) (man who signed stipulated order admitting paternity was estopped from denying paternity years later, even though decree never entered)

c. Privity – D'Amico ex rel. Tracey v. Ellinwood, 209 Or. App. 713, 149 P.3d 277 (2006) (child and mother were not in privity regarding marital dissolution proceeding, and thus even though mother was precluded from challenging husband's paternity, child was not)

6. Judgment setting aside paternity finding must terminate future support duties, may vacate or deem satisfied unpaid past due support obligations, but may not order restitution from the state for support paid -- ORS 109.072(11)

C. Setting aside an administrative order establishing paternity – ORS 416.443

1. Applies when paternity has been established by administrative process under ORS 416.415 and registered as court order under ORS 416.440 or by voluntary acknowledgment under ORS 109.070(1)(e)
2. Party may petition to reopen issue of paternity within one year of order being registered if blood tests not done before the paternity order was entered
3. Administrator must order blood tests
4. If party refuses to submit to blood tests, , "the issue of paternity shall, upon the motion of the administrator, be resolved against that party by an order of the court either affirming or setting aside the order establishing paternity or the voluntary acknowledgment of paternity." ORS 419.443(5)
5. Dept. of Human Resources v. Shinall, 148 Or.App. 560, 941 P.2d 616 (1997) (man who did not seek relief from administrative order adjudicating him to be father of child within one year provided by statute, alleging that he had no reason to doubt his paternity until child was older, could not invoke court's inherent authority under Rules of Civil Procedure set aside order five years later)

D. Setting aside a voluntary acknowledgment of paternity

1. Rescission of voluntary acknowledgment – ORS 109.070(4) by either party

a. Must be filed 60 days after filing the acknowledgment; or by the date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party, whichever is earlier

b. File with State Registrar of the Center for Health Statistics

2. Challenges after the rescission period by action filed in court -- ORS 109.070(5)

a. Standing: a party to the acknowledgment, the child, and DHS if the child is in DHS custody pursuant to ORS ch. 419B (juvenile court child abuse/neglect case)

b. Grounds: fraud, duress, material mistake of fact

1) What about the statute providing that an acknowledgment may be signed by both biological parents (ORS 432.287)?

2) See Part III.C.5. above on meaning of fraud

3) State ex rel DHS v. W.C., 216 Or. App. 137, 172 P.3d 264 (2007) (Mother whose parental rights had been terminated signed a voluntary acknowledgment identifying a man as the child's father, apparently without knowledge that she had no legal authority to sign. This did not constitute fraud because no evidence showed that she knew that she was making a false representation or that she intended to deceive. This was also not a material mistake of fact because it was not a mistake about a fact but rather was a mistake about the legal effect of a known fact.)

c. Process: file petition in court, hearing conduct according to the rules of civil procedure, challenger has burden of proof by a preponderance

d. Court shall set aside the acknowledgment if petitioner carries the burden of proof unless "giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable"

3. Administrative challenges after the rescission period – ORS 109.070(6) and 416.443

a. Blood tests not previously completed

b. Time limit: one year after voluntary acknowledgment filed

c. Who: party to the acknowledgment or DHS if child is in custody of DHS pursuant to ORS ch. 419B

d. May petition child support enforcement office for order for blood tests and proceed as in ORS 416.443

THE 2007 AMENDMENTS TO OREGON PATERNITY LAW

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Oregon's statutes regarding paternity were lasted comprehensively revised in the 1970s, at a time when most children were born to married women, genetic testing to determine paternity was very primitive, and serious efforts to establish the paternity of children born outside marriage were rare. All these conditions have changed in the last 30 years. Perhaps of greatest importance, today, because of higher rates of divorce and nonmarital births, many more children spend portions of their lives living in households with a parent and the parent's partner who is not the child's biological parent but who may function as a parent and to whom the parent may or may not be married.

As a result of these changes, several of the major assumptions underlying traditional paternity law have been challenged in Oregon, as in other states. The most important issue underlying the current challenges is the relative importance of social and biological paternity in determining legal paternity when a child's legal father and biological father are not the same. This issue arises both for legal fathers who are not and have never been married to the children's mothers and for husbands who are presumed to be the legal fathers of their wives' children.

During the 2005 Oregon legislative session, these issues bubbled to the surface and produced legislation that temporarily changed many aspects of state paternity law, changes that sunsetted at the end of 2007. About the same time, the Oregon Child Support Program asked the Oregon Law Commission to convene a work group to examine the law of paternity, identifying as a possible model for reform the 2002 Uniform Parentage Act. Because paternity law potentially affects so many areas of the law, the work group was very large and included state trial court judges, juvenile court attorneys, family law attorneys, adoption attorneys, representatives from the state child support enforcement office and from the state child welfare office, and a self-identified fathers' rights lobbyist. The work group completed its work just as the 2007 legislature convened, and its proposal was eventually enacted with some amendments as HB 2382. This article describes the new law.

ORS 109.070(1) sets out the bases for a finding of legal paternity. The three most important means are presumptions of paternity based on marriage, judicial or administrative orders, and voluntary acknowledgments of paternity. ORS 109.070(1)(a), (b0), (c), (d), (e), (f).[1] The next sections discusses how legal paternity is established on these bases and explains changes made by the 2007 legislation.

Paternity presumptions based on marriage

About two-thirds of all children born in the U.S. today are born to married women, and their husbands are presumed to be the legal fathers. Until 2005, ORS 109.070(1)(a) provided that if a married woman and her husband were cohabiting when a child was conceived and the

[1] ORS 109.070(1)(g) is a catchall provision saying that paternity may be established or declared by other provision of law. The Oregon Supreme Court held in Thom v. Bailey, 257 Or. 572, 481 P.2d 355 (Or. 1971), that suits for declaratory judgments and heirship proceedings in probate court are examples of such other provisions of laaw.

husband was not infertile, he was conclusively presumed to be the father of children born to her. Oregon was one of only two states with a conclusive presumption, and the only one with a conclusive presumption that applied to the husband and wife in all circumstances. The 2005 legislature temporarily repealed the conclusive presumption. Laws of 2005 c.160 §11. The 2007 legislation repealed the conclusive presumption permanently. A recent Court of Appeals decision addresses which law governs litigation brought in 2007 over the legal paternity of a child born in 2002 -- the law in effect in 2002 or 2007. In State ex rel. Juvenile Dept. of Lane County v. G.W., --- P.3d --- (Or. App. 2008), the court held that the legislation in effect at the time of the litigation governed, and the court's reasoning supports the conclusion that the same should be true for litigation arising under the 2007 legislation.

The 2007 legislation retained and amended the other presumption based on marriage that has long been part of ORS 109.070(1) – that a married woman's husband is rebuttably presumed to be the father of children born to her during the marriage. ORS 109.070(1)(a). However, the 2007 legislation imposed new limits on standing to rebut the presumption. It provides that either the husband or the wife may challenge the presumption under any circumstances, but third parties, including DHS and the child, may not challenge it if the spouses are living together unless the spouses consent. ORS 109.070(2). The purpose of this limitation, which was borrowed from California law, is to protect the privacy and integrity of the intact family.

The 2007 legislation also enacted a new rebuttable presumption, derived from the 2002 Uniform Parentage Act, that woman's former husband is rebuttably presumed to be the father of any child born within 300 days of the termination of the marriage by any means. ORS 109.070(1)(b). This provision codifies prior practice. It could clash with the rebuttable presumption that a woman's husband is the father, as when a married woman becomes pregnant, divorces, and remarries within 300 days of the divorce. In the rare cases of clashing presumptions, courts generally give effect to the one supported by the more important policy considerations and facts of the particular case.

Finally, the new legislation significantly reduces the effect of a section of ORS 109.070 that previously provided that the biological father of a child born outside marriage became the legal father automatically if he married the mother. As amended, ORS 109.070(1)(c) now requires that the spouses also file a voluntary acknowledgment of paternity form with the state office of vital statistics. As discussed below, filing such a form is in itself sufficient to determine paternity; the man and woman's marriage is, therefore, irrelevant to the legal paternity determination. However, this section is still important because the rule permitting only the spouses to challenge paternity while they are cohabiting, discussed above, also applies here.

The 2007 legislation does not impose a statute of limitations on bringing challenges to the marital presumption, but it does give judges discretion about whether to admit evidence to rebut the presumption. ORS 109.070(3) provides that the judge should admit such evidence only upon a finding that it is "just and equitable, giving consideration to the interests of the parties and the child." In several cases decided before the 2005 and 2007 paternity legislation, the Oregon Court of Appeals held that a trial court may refuse to allow the presumption of paternity to be rebutted because the petitioner is equitably estopped from denying paternity. Marriage of Johns and Johns, 42 Or. App. 39, 601 P.2d 475 (1979); Marriage of Hodge and Hodge, 84 Or. App. 62, 733 P.2d 458, rev. den. 303 Or. 370, 738 P.2d 1999 (1987); Marriage of Sleeper and Sleeper, 145 Or.App. 165, 929 P.2d 1028 (1996), aff'd on other grounds, 328 Or. 504, 982 P.2d 1126 (1999). These cases remain good law, though a judge's authority under the "just and equitable" standard to exclude evidence to rebut a marital presumption is not limited to facts giving rise to estoppel.

Paternity based on an adjudication

The traditional way of determining the paternity of a child born outside marriage is by litigation – a filiation suit, as the Oregon statutes call it. ORS 109.124 – ORS 109.237. ORS chapter 416 also allows legal paternity to be established by administrative proceedings conducted by the office of child support enforcement. ORS 416.400 to 416.470. The 2007 legislation amended the filiation statutes to prevent courts from entering findings of paternity that are inconsistent with each other, but it did not enact similar provisions for the administrative proceedings under Chapter 416.

The amendments to the filiation statutes complement ORS 109.326, which provides that a court may make a determination that a married woman's husband is not the father of a child born during the marriage only if the husband has been served with a summons and a true copy of a motion and order to show cause, provided that the child has lived with the husband at some point or the husband has repeatedly contributed or tried to contribute to the child's support. As amended, ORS 109.125, which governs filiation proceedings, is even more protective of the rights of and other men who have the status of legal father. It requires that a petition to establish paternity identify the mother's husband if she is married and provides that a man who paternity is presumed or has been previously established is a necessary party to the proceedings unless his paternity has been legally disestablished. ORS 109.155(7) precludes a court from entering a judgment of paternity in a filiation suit if another man's paternity is presumed or established under ORS 109.070(1) unless paternity has been disestablished. Chapter 416 does not include parallel provisions, and it is, therefore, still possible for administrative child support proceedings to result in paternity findings that conflict with paternity presumptions or preexisting determinations of paternity.

Setting aside administrative findings of paternity The 2007 legislation also amends existing legislation that governs challenges to administrative determinations of paternity. The amended version of ORS 416.443 allows a party to an administrative proceeding that established paternity to petition to reopen the issue for up to one year after the administrative order was registered with the court, provided that blood tests were not done before the paternity order was issued. In response to such a petition, the agency administrator must order blood tests and, if the blood tests exclude the man as the child's biological father, may file a motion with the court for an order setting aside the order of paternity. If either party refuses to submit to blood tests, the issue of paternity must be resolved against him or her. The child support program must pay for the costs of testing, though it may seek to recover them from the party who requested the tests.

Setting aside judicial findings of paternity Until the 2007 legislation was enacted, the only way to set aside a judicial determination of paternity was to bring an action under ORCP 71. The 2007 law establishes a new method for bringing such an action that is intended to parallel ORCP 71 as much as possible. This method is not exclusive, but was enacted at the urging of the child support enforcement office to help pro se litigants who often do not understand Rule 71 and its application to paternity findings. The new legislation is found in Section 9 of the 2007 legislation, HB 2382. (At the time this is written, the legislation has not yet been codified into the ORS.)

For purposes of Rule 71 and the new legislation, judicial determinations of paternity are not limited to orders entered in filiation suits. Most importantly, a divorce decree identifying children as children of the marriage (or using equivalent language) probably constitutes a

judgment of paternity even if the issue of paternity was not actually contested. Before the conclusive presumption that the husband was the father was abolished, family law practitioners may not have considered such a divorce decree as a judicial order establishing paternity because the issue of paternity could not be contested. Now that the conclusive presumption is abolished, paternity is now contestable in every divorce, and even if it is not contested, res judicata (claim or issue preclusion) may prevent a party from raising a challenge later. The report of the Oregon Law Commission committee that wrote the 2007 legislation observes, "Practitioners need to be made aware of this and to recognize that practice needs to change in response to this change in the law."

A petition under the new legislation may be filed by the parties to the original litigation, DHS if the child is in the custody of DHS as a dependent child under ORS Chapter 419B, or the Division of Child Support if support rights have been assigned to the state. If anyone else has interests that are affected by an order determining paternity, he or she may challenge the order only under ORCP 71. Challenges based on mistake, inadvertence, surprise or excusable neglect must be filed within one year. A challenge based on fraud, misrepresentation or other misconduct must be filed within one year from the date of discovery.

The petition must state "the facts and circumstances that resulted in the entry of the paternity judgment and explain why the issue of paternity was not contested." Necessary parties include everyone who was a party to the original proceeding, the child if he or she is "a child attending school" under Oregon law, DHS if the child is in DHS custody under the dependency provisions of ORS Chapter 419B, and the Division of Child Support if child support rights have been assigned to the state. The court on its own motion or the motion of a party may appoint counsel for the child and must appoint counsel on the child's request. This provision parallels the requirements of ORS 107.425(2).

The court may order the parties and the child to submit to blood tests; in deciding whether to enter such an order, "the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, many deny a request for blood tests." This section, granting the court discretion over whether to order blood testing, recognizes that, as a practical matter, this may be the most important decision, more important than how to determine legal paternity once the biological facts are clear. If blood tests show that the man is not the biological father and the petitioner proves the judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, or other misconduct, the court must set aside the determination of paternity unless it finds "giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable."

A judgment setting aside a paternity finding must terminate future support duties and may vacate or deem satisfied unpaid past due support obligations, but may not order restitution from the state for support paid

Paternity based on voluntary acknowledgments

For the third of all children born outside marriage, the most commonly-used method of determining paternity today is the voluntary acknowledgment. According to data from the Oregon Vital Records office and Child Support Program, in fiscal years 2004, 2005 and through March of 2006, paternity was established for 31,866 children in the state; of these, 27,536 or more than 86 per cent of the total, were by voluntary acknowledgment. Since 1975 Oregon statutes have allowed the mother and putative father of a child born outside marriage to establish

legal paternity by signing and filing a voluntary acknowledgment of paternity. Federal legislation enacted in 1993 and amended in 1996 requires states to have voluntary acknowledgment statutes as a condition of receiving federal funds for the state's child support and child welfare systems. The Oregon legislation has been amended to comply with these requirements, and the 2007 legislation did not change any of the basic features of the law.

Legal paternity may be established by the parents filing a voluntary acknowledgment form with the state office of vital statistics, and the state must recognize voluntary acknowledgments filed in other states. ORS 109.070(1)(e), (f). Most voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility.

The one important change to the statutes regarding establishment of paternity by voluntary acknowledgment protects adoptions and juvenile court placements from being disrupted by late-filed acknowledgments. An acknowledgment is invalid if one of the parties signed it after having consented to the child's adoption or having relinquished the child to a child-caring agency. Similarly, an acknowledgment signed by a party whose parental rights have been terminated or who has previously been adjudicated not to the child's parent is invalid. ORS 109.070(7).

The principles governing rescission and collateral attacks on voluntary acknowledgments also were not changed by the 2007 legislation; however, the new law spells out the procedure for rescinding or challenging an acknowledgment and explicitly authorizes judges to exercise discretion in deciding judicial challenges.

Rescissions ORS 109.070(4) allows either party to rescind a voluntary acknowledgment within 60 days of its signing. If the party wishing to rescind is a party to a "proceeding relating to the child" which occurs within that 60-day period, he or she must rescind before an order is entered in the proceeding. The rescission must be in writing and filed with the bureau of vital statistics.

Challenges/motions to set aside in court After the 60-day rescission period has expired, a challenge to a voluntary acknowledgment on the basis of fraud, duress, or material mistake of fact may be filed by a party to the acknowledgment, the child, or DHS if the child is in DHS custody pursuant to ORS chapter 419B. ORS 109.070(5), This section was amended to specify that a challenge is initiated by a petition filed in circuit court. The challenger bears the burden of proof by a preponderance of the evidence, and the rules of civil procedure apply. The amendment also gives the judge discretion about whether to set aside the voluntary acknowledgment even if the alleged misconduct is proven. ORS 109.070(5)(f) provides, "the court shall set aide the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable."

Actions to set aside through the child support agency ORS 109.070(6) reenacts part of the substance of a rule that preexisted the 2007 legislation; it provides that the child support enforcement administrator may order testing to determine the biological paternity of a child whose legal paternity was established by voluntary acknowledgment if blood tests have not been done. The blood tests must be sought within a year of the filing of the acknowledgment and can be requested only by a party to the acknowledgment or by DHS if the child is in the custody of DHS pursuant to an action brought under ORS Chapter 419B. ORS 416.443, which governs administrative orders for blood tests following an administrative determination of paternity, and which is described above, applies to these requests. Unlike the situation in which a party asks a court to order blood testing after a judicial determination of paternity, the agency administrator has no discretion to deny the petition for a blood test under this section. Until the 2007

legislation, a blood test order could also be obtained from a court. This provision was eliminated because it was rarely used and because the administrative process is simpler.

Unresolved issues

The 2007 legislation clarifies and updates Oregon's paternity law in important ways, but two important issues remain unresolved, both of them intrinsically related to disagreements about the relative importance of biological paternity for determinations of legal paternity.

The first issue is whether a voluntary acknowledgment that is signed by a man who is not the child's biological father is void. Those who believe that it is argue that the statute setting out the requirements for a voluntary acknowledgment, ORS 432.287, provides that paternity is established if the man is the biological father. Those who take this view also argue that for purposes of challenges to voluntary acknowledgments under ORS 109.070(5), proof that the man is not the biological father is sufficient to prove that the acknowledgment was signed "mistakenly" or even "fraudulently." On the other hand, those who disagree say that the language regarding "biological father" in ORS 432.287 is intended to make clear that a voluntary acknowledgment is not an alternative to adoption. They also argue that if proof that the man is not the biological father automatically establishes "mistake" or "fraud," parts of ORS 109.070 are redundant and some of its language is meaningless. Moreover, this interpretation is inconsistent with federal policy, which provides that voluntary acknowledgments must have the legal status of judgments and can be challenged only on the bases that a judgment could be challenged. The OLC drafting committee did not resolve this issue and left it for judicial development.

The second unresolved issue is how judges should exercise their discretion about whether to grant a petition for blood tests or a challenge to a presumption in favor or finding of paternity. As discussed above,

-- The judge may reject evidence to rebut the marital presumption upon a finding that this is "just and equitable, giving consideration to the interests of the parties and the child." Or. Rev. Stat 109.070(3).

-- If the court finds that the legal father is not the biological father and a paternity judgment was obtained by mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct of a party, it must vacate or set aside the judgment unless it finds, "giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable." HB 2382 § 9(7).

-- In a suit to set aside a judgment of paternity, the judge must "consider the interests of the parties and the child and, if it is just and equitable to do so," may deny a request for blood tests. HB 2382 § 9(6).

-- If a court finds that a voluntary acknowledgment names a man not the biological father and was procured by fraud, duress or material mistake of fact, the court "shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable." ORS 109.070(5)(f).

Some of the OLC drafting committee wanted the statute to state explicitly that the judge could consider the child's best interests in making the determination and to set out criteria for judges to consider, as similar sections of the Uniform Parentage Act do, Those who opposed including the "best interests" language argued that some judges would take it as a signal to deny

most petitions on the theory the best interests of the child is not usually served by disestablishing paternity. The work group settled on the language “just and equitable to the parties and the child” as best expressing that judges should consider both the conduct of the parties and the interest of the child in exercising this discretion. However, as the language quoted above shows, the legislature amended the language governing motions to set aside judgments and voluntary acknowledgments to require that, before a court denies such a motion, it must find that to do so is necessary to avoid “substantial inequity.”

Bankruptcy Issues for the Family Law Attorney

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Presentation for Salishan 2011,
with co-presenter Craig McMillin

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Introduction

It will be assumed for purposes of this discussion that the vast majority of divorcing couples, in which one or both of them file for bankruptcy before or after the divorce is final, will have primarily consumer debts, and their choice will be to file either a petition for liquidation under Chapter 7 or a petition for reorganization under Chapter 13 of the Bankruptcy Code. Generally, a petition under Chapter 7 results in the liquidation (sale) of all the debtor's non-exempt property, and the discharge of most or all of the debtor's obligations. A petition under Chapter 13 results in a plan that is filed and confirmed by the court under which the debtor makes payments to a trustee for distribution to his creditors over a three or five year period. When the plan is completed, most debts that have not been paid are discharged, and the debtor is allowed to keep most of her property, such as houses, cars, and personal property items.

Note that the Bankruptcy Code was substantially amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Most of the changes rendered by BAPCPA are applicable to consumer bankruptcies, and a number of them affect the intersection of divorce and bankruptcy.

Issue 1: Bankruptcy Planning: In processing the dissolution, I think my client might be eligible for a bankruptcy . . .

1.1 Can I talk to my client about the potential for filing bankruptcy without violating any ethical or bankruptcy court rules?

Answer: Generally yes, you can help your client plan for bankruptcy – just do not cross the line into fraudulent transfer.

Under BAPCPA any lawyer discussing bankruptcy (providing "bankruptcy assistance") with his or her client may become a "debt relief agency" subject to various restrictions and disclosures. This provision is constructed to make it illegal to recommend that someone incur debt in anticipation of a bankruptcy case, and, as it is written, it may apply when the client is either the debtor or creditor. 11 U.S.C. §526(a)(4) (2005). See also 11 U.S.C. §101(3); §101(4A); §101(12A). "Bankruptcy assistance" is defined as service provided with the "purpose of providing information, advice, counsel . . ." with respect to any bankruptcy case. *Id*. at §101(4A). Once the attorney is a "debt relief agency," various disclosures must be given, documents must be provided to the client, and various restrictions apply to all advertising.

In 2010, the US Supreme Court reversed the Eighth Circuit panel that found the provision unconstitutional and, instead, held that the statute was meant to be narrowly construed. The narrow construction limited the application to advice that was an *abuse* of bankruptcy because the decision ". . . to incur more debt [was] because the debtor is filing for bankruptcy, rather than for a valid purpose."

In an attempt to give more meaning to the distinction, Justice Sotomayor refers to a history of bankruptcy reform attacking loading up on debt that would be discharged in bankruptcy as fraudulent and therefore excepted from discharge in bankruptcy. Justice Sotomayor states:

> *"Thus advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve his ability to repay is not prohibited, as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause. Advice to incur additional debt to buy groceries, pay medical bills, or make other purchases "reasonably necessary for the support or maintenance of the debtor of a dependent of the debtor," § 523(a)(2)(C)(ii)(II), is similarly permissible." Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 130 S. Ct. 1324, 176 L. Ed. 2d 79, 63 Collier Bankr. Cas. 2d (MB) 910, Bankr. L. Rep. (CCH) P 81703 (2010) (footnote 6).

The family law attorney must, therefore, balance what may be appropriate legal advice with the restrictions set forth in the debt relief agency provisions. To avoid violating these provisions, the attorney must either avoid providing the client with any advice regarding bankruptcy, or make sure that any advice that is given does not advise the client to incur more debt in contemplation of a bankruptcy filing if such action could be considered abuse of the bankruptcy discharge.

1.2 Under what circumstances do I encourage my client to file bankruptcy now, before the divorce is final? Under what circumstances would it benefit my client to wait until after the divorce is processed to start a bankruptcy proceeding? Does the timing really matter?

If both Husband and Wife are contemplating bankruptcy (their joint situation is upside down), there are potential benefits and potential detriments to either option – whether filing a bankruptcy before a divorce is finalized or waiting for the divorce to be completed before filing the bankruptcy proceeding. Family law attorneys and their clients are well-served by considering the potential ramifications of either decision before filing or finalizing either the bankruptcy or the divorce case, and action taken in both preferably includes cooperation between spouses and cooperation between the family law and bankruptcy counsel.

Remember that married, heterosexual debtors can file a joint bankruptcy. All other debtors will be filing as separate individuals. A married debtor can also file separately and the other spouse is not required to file.

When considering the timing of a bankruptcy as it relates to the divorce proceeding, there is no universal answer; however, be sure to consider:

1.2.1 Only obligations that exist as of the <u>date of filing</u> bankruptcy are dischargeable. The divorce may create new obligations, such as an obligation to hold the other spouse harmless.

Example:

Husband is being plagued by credit card collection calls and a looming foreclosure and wants relief through bankruptcy. He expects his separation from Wife to transition to an actual divorce in the foreseeable future, but he does not want to wait to get relief from the pressure his creditors are applying. He files a Chapter 7 petition.

After the bankruptcy is filed, Wife files for divorce and the case proceeds on a contested basis. Husband's bankruptcy discharge is granted while the divorce is pending. No assets are collected, and Husband's personal liability for debt both in his name and jointly in his and Wife's names is discharged. 11 U.S.C. §524(a) and §727(b).

Wife's personal liability for debt in her name and jointly with Husband is *not addressed in Husband's bankruptcy.* The divorce court orders Husband to pay the creditors and hold Wife harmless from one-half of the marital debt and one-half of the parties' joint mortgage debt.

Husband has, in effect, wasted his bankruptcy. The pre-divorce bankruptcy he filed did not and cannot discharge his liability to his now former wife. Only obligations that exist as of the date of filing bankruptcy are dischargeable. The obligations to hold Wife harmless did not exist at the time Husband's bankruptcy was filed; bankruptcy discharges debt that exists at the time of filing of the petition. *Id*.

Had Husband waited to file his bankruptcy until after entry of the dissolution judgment, he could have chosen to file either a Chapter 7 bankruptcy or a Chapter 13 bankruptcy. In a Chapter 7 case filed after entry of the dissolution judgment, any obligation to hold Wife harmless *could not have been discharged*. 11 U.S.C. §523(a)(15). In a Chapter 13 case, the obligations to hold Wife harmless from those credit card and mortgage accounts ordered in the divorce *would have been discharged* unless it was considered a domestic support order.11 U.S.C. §1328(a)(2). (See discussion below regarding Chapter 7 vs. Chapter 13).

1.2.2 Filing bankruptcy prior to finalizing the divorce may cause the client to lose use of non-exempt assets to the bankruptcy court that could have been used to assist in paying expenses during the dissolution proceeding.

Property of the bankruptcy estate that is subject to liquidation under 11 U.S.C. §541 includes all interests of the debtor and the debtor's spouse held jointly with the debtor as of the commencement of the case that is:

1. Under the sole, equal or joint management and control of the debtor, or
2. Liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse.

This means that the family law attorney must take steps to protect her client's jointly held property from liquidation where either her client or her client's spouse is eligible for Chapter 7 bankruptcy. For example:

Wife consults with a family law attorney and immediately files a divorce petition. She then engages bankruptcy counsel for an immediate filing of a Chapter 7 bankruptcy petition. In the course of the proceeding, both bankruptcy and divorce counsel discover that Husband, during the marriage, surreptitiously had saved in excess of $25,000, held in stocks and bonds. Wife's interest in this asset must be listed in the schedule of assets in her bankruptcy proceeding. The Chapter 7 trustee can (and will) demand turnover of one-half of the funds. 11 U.S.C. §541(a). Had Wife waited to file her bankruptcy case until after resolution of the divorce, she may have had the opportunity to use the non-exempt funds for her immediate needs, including paying attorney fees for the divorce and

bankruptcy. If the bankruptcy case is filed when there are savings, the trustee will demand turnover for the benefit of unsecured creditors. However, if the parties cooperate prior to filing bankruptcy, they could agree to use cash resources to pay both divorce and bankruptcy attorneys, and not leave those savings to their creditors.

1.2.3 Timing of the filing (and the terms of the dissolution judgment) could raise or lower household income for purposes of passing the means test.

Husband and Wife, after consulting with their separate family law attorneys, together consult with bankruptcy counsel. Husband earns $10,000 per month. Wife historically has been a stay-at-home mother of their two children, ages 10 and 12. Under the "means test,"[1] if they file together, they would be forced into a Chapter 13 filing because their income is too high. If they file separately prior to divorce, Wife would qualify for a Chapter 7 discharge, but Husband would be forced into a Chapter 13 case with a large payment plan. However, if they work together and in their dissolution judgment negotiate a combined child support and spousal support of $3,500 per month for the next seven years, Wife still qualifies for a Chapter 7 filing, and Husband's income is reduced to a point that he now also qualifies for a Chapter 7 discharge. The family as a unit saves both assets and future income that can be used for the children.

1.2.4 Pre-dissolution joint ownership of property might allow higher combined property exemptions which may be advantageous in some situations, while in others the post-dissolution division of property allows a more favorable application of the exemptions.

Husband and Wife both anticipate filing for divorce and filing for bankruptcy. They have $100,000 of equity in their home. If they file bankruptcy jointly, they can together claim a $50,000 homestead exemption. If they divorce, and as a part of the divorce are awarded the home as tenants in common without a right of survivorship, if they file individual bankruptcies thereafter Husband and Wife may each be able to claim a homestead exemption of $40,000 rather than the combined exemption of $50,000. Keep in mind, however, that to claim a homestead exemption the property must be the abode of the debtor in accordance with Oregon law.

1.2.5 Other logistical things every family law attorney should know about bankruptcy filings:

- Once spouses are divorced they can no longer file a joint bankruptcy petition with his or her former spouse.

- If a married couple enters a Chapter 13 bankruptcy (payment plan over a period of years) and wants to be divorced before completion of their plan, you have three

[1]The most significant provision of the 2005 Act is the so-called "means test" calculation, by which the debtor's average gross income for the six months prior to filing, less allowable expenses, is considered "disposable income." If monthly disposable income, paid over sixty months, is $6,000 or 25 percent of unsecured debt (whichever is greater), the debtor's Chapter 7 case is subject to dismissal or being converted to Chapter 13. 11 U.S.C. § 707(b). Also, disposable income is a factor in determining the amount of plan payments in a Chapter 13 case. 11 U.S.C. § 1325(b).

options:

1. The spouse can dismiss the Chapter 13 bankruptcy;

2. The spouse can move to segregate the soon-to-be former Husband and Wife and determine whether each qualifies for bankruptcy in their own right (this may give one party the option of segregating to a Chapter 7);

3. The spouse can wait to finalize the divorce due to the financial considerations associated with the joint Chapter 13 bankruptcy; or

4. The spouses can divorce but continue to keep the Chapter 13 plan in place. This option is available because the bankruptcy deals only with debts that existed at the timing of filing. In such a case the family law attorney should, however, make clear in the divorce judgment which party is ordered to make payments according to the Chapter 13 plan. Also, both parties should be aware that the bankruptcy court will not defer to a dissolution judgment provision requiring a husband or wife to make payment in accordance with the Chapter 13 plan – the bankruptcy will be dismissed if payment is not made, regardless of who the divorce orders to pay it or which party's fault it is that payment has not been made.

- Though the bankruptcy estate consists of property and entitlements of the debtor as of the date the bankruptcy is filed, there is one asset that can be acquired after the filing that can be brought back in to the Chapter 7 estate: inheritance to which the debtor becomes entitled to within 180 days of the bankruptcy filing. In a Chapter 13 bankruptcy, however, all assets acquired while the bankruptcy is in progress (three to five years) that is not necessary for the support of the household belongs to the bankruptcy court and the creditors.

- The trustee in bankruptcy, at the commencement of the case, has the rights and powers of the holder of a judicial lien against property of the estate. It is therefore important to file a notice of *lis pendens* on marital property that is not titled to the client. After the divorce judgment is entered, immediately perfect transfers of marital property to avoid the ex-spouse/debtor having legal title to property that was supposed to have been transferred to the client.

- The bankruptcy trustee has all of the rights and powers of the individual who is in bankruptcy but nothing more. For that reason, money a client held their divorce attorney's trust account as of the date of bankruptcy filing may be subject to capture by the trustee in bankruptcy. If the debtor had the right to come in and fire you as their attorney and get the unearned retainer back, then the bankruptcy trustee has the right to ask for it.

Issue 2: Which Marital Obligations Can a Spouse Discharge in Bankruptcy?

The Problem: A typical divorce judgment deals with various types of financial obligations, including:

1. Spousal and child support payments;
2. Unreimbursed medical expenses relating to the children;
3. Property equalization judgment between spouses;
4. One or more home mortgages;
5. Credit card balances;
6. Auto loans;
7. Student loans;
8. Tax obligations; and
9. Other miscellaneous secured and unsecured obligations.

The negotiation and litigation process involved in a divorce proceeding must be carried out with the understanding that either or both spouses might subsequently file for bankruptcy.

2.1 Bullet Point Q & A Regarding Dischargeability

1. Are spousal or child support obligations ever dischargeable?

   No. Non-dischargeable under both Chapter 7 and Chapter 13.

2. Are expenses in the nature of support, such as healthcare expenses for the children, ever dischargeable?

   Generally, no. Non-dischargeable under both Chapter 7 and Chapter 13.

3. Are property equalization judgments to spouses dischargeable?

   Never in a Chapter 7 filing. They are possibly dischargeable in a Chapter 13 (after full completion of the payment plan, part of which may be paid to the equalization judgment), and depending on whether or not any portion of the award was intended to be in the nature of support.

4. Is a court ordered obligation to pay a mortgage dischargeable?

   In a Chapter 7 the obligation is dischargeable as to the mortgage holder. It is not dischargeable as to the requirement to hold Wife harmless from the obligation.

   In a Chapter 13 it depends on whether or not the payment is in the nature of support. This is a determination that the bankruptcy court makes, and a statement in the judgment that such payment is non-

dischargeable is not binding on the bankruptcy court. Findings of fact or correspondence between the parties and their attorneys as to why it should be considered support may influence the bankruptcy determination.

5. Is a court-ordered obligation to pay off joint credit cards dischargeable?

Yes as to third party creditors. A new and separate obligation as to the spouse, to hold the spouse harmless from action by the creditors, is the issue that arises.

2.2 Exceptions to Discharge: Chapter 7 Filings vs. Chapter 13

Prior to the enactment of the BAPCPA, 11 U.S.C. §523, contained two exceptions to discharge that related to debts arising in the context of a marriage. The first exception relevant to family law was set forth at 11 U.S.C. §523(a)(15) which intended to serve as a catch-all for those debts and obligations arising from the dissolution of a marriage that did not meet the requirements of 11 U.S.C. §523(a)(15)(in the nature of support, discussed *infra*). Such obligations most frequently took the form of property division or equitable distribution, and were allowed a "conditional exempt" status subject to explicit limitations. Under the new BAPCPA, 11 U.S.C. §523(a)(15) was revised to do away with the problematic "balance of harm" analysis.

Current law automatically excepts all divorce related property division and non-support orders for the benefit of the spouse – such as hold harmless orders – from discharge in a Chapter 7 filing. 11 U.S.C. §523(a)(15).

§523(a)(15) provides that a debt is excepted from discharge if it meets these three elements:

1. The debt must be to a spouse, former spouse, or child of the debtor;
2. The debt must not be a domestic support order; and
3. The debt must have been incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court

That statute, combined with 11 U.S.C. §523(a)(5) which excepts "domestic support obligations" (discussed *infra*) from discharge in a Chapter 7 filings, effectively means that [***any* obligation owed to a former spouse is non-dischargeable under a Chapter 7 bankruptcy, whether or not the obligation is considered in the nature of support, or merely relates to property.**] This includes the fact that an equalizing money award is now non-dischargeable in a Chapter 7 bankruptcy.

The distinction between support debts and property settlement debts is still important in Chapter 13 cases, however, because §523(a)(15) does not apply to Chapter 13 filings, meaning that property settlement debts may be discharged and are not priority claims in Chapter 13 filings. 11 U.S.C. §1328(a). Dischargeable property settlements/non-domestic support obligations are treated and paid as general unsecured claims in a Chapter 13 case. In Chapter 7 cases, the distinction between a domestic support obligation and property settlements debts is usually not important because the debt is non-dischargeable as a domestic support obligation under §523(a)(5) or as a property settlement

debt under §523(a)(15).

Example:

Husband owes Wife a $100,000 equalizing property judgment. The judgment *cannot* be discharged if Husband files a Chapter 7 bankruptcy. If Husband files a Chapter 13 bankruptcy, the obligation can be discharged after completion of the debtor's payment plan, which may require periodic payments toward this obligation, but has no requirement that the debt be paid in full. Discharge is also dependent upon whether any portion of the award can be considered a domestic support obligation.

2.3 Exceptions to Discharge: Domestic Support Obligations, Debts in the Nature of Support

Exceptions to discharge are governed by 11 U.S.C. §523 which sets out an enumerated list of specific debts excepted from discharge. The exceptions to discharge provided for in this section are applicable to discharges brought under Chapter 7 *and* Chapter 13 bankruptcy filings.

2.3.1 Domestic Support Orders: History

Prior to the enactment of the BAPCPA, the former11 U.S.C. §523's second exception to discharge in family law cases was found at 11 U.S.C. §523(a)(5), and excepted from discharge any debt:

> *to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child in connection with a separation agreement, divorce decree, or other order of a court * * * but not to the extent that –*
>
> *a. such debt is assigned to another entity * * *, or*
> *b. such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance ,or support.*

This former exception to discharge also contained substantial limitations. By definition the exception only applied to a creditor who was as spouse, former spouse or child of the debtor. Legal guardians and relatives who had undertaken custodial responsibility for the debtor's children could not rely on this exception. Even a creditor who was a biological parent of the debtor's child (e.g., mother of a child born out of wedlock) could not utilize the statute's protections.

2.3.2 Domestic Support Obligations: Current Law

BAPCPA has addressed the limitations in the former 11 U.S.C. §523(a)(5) by replacing the "debts actually in the nature of alimony maintenance or support" language with "domestic support obligation." If a debt is a domestic support obligation, the debt **will not be discharged** if the debtor files a bankruptcy case **under any chapter**. 11 U.S.C. §523©.

A domestic support obligation is defined at 11 U.S.C. §101(14A) (2007) as:

> *The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--*
>
> *(A) owed to or recoverable by--*
>
> *(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or*
>
> *(ii) a governmental unit;*
>
> *(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;*
>
> *(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-*
>
> *(i) a separation agreement, divorce decree, or property settlement agreement;*
>
> *(ii) an order of a court of record; or*
>
> *(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and*
>
> *(D) not assigned to a non-governmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.*

2.3.3 Domestic Support Obligations: Payment Under a Chapter 13 Plan

In a Chapter 13 case, a debtor is required to propose a bankruptcy plan that both cures a non-dischargeable domestic support obligation arrearage and keeps up with current payment on non-dischargeable domestic support obligations that accrue over the course of the Chapter 13 plan. As a common example, this means that the debtor must pay:

1. Any child and spousal support arrearage that existed at the time of filing in full over the course of the payment plan; and

2. Any ongoing child or spousal support order that accrues during the bankruptcy according to its terms (not late).

In most cases the plan provides an amount that is to be paid monthly toward satisfaction of the arrearage and the full current support obligation. This works provided the payment on the arrearage is enough to fully satisfy the arrearage within the term of the plan. The debtor cannot obtain a discharge unless the debtor certifies that all amounts due on the spousal and child support obligations – both pre-petition arrearages and payments that became due during the time the bankruptcy plan was in place – have been paid. 11 U.S.C. §1325(a)(8), 1328(a), 1328(g).

Debtors who have a support arrearage (or an arrearage in any other non-dischargeable domestic support obligation) are therefore, able to "buy" time through filing a Chapter 13 plan. As family law

attorneys it is important to note that the domestic support obligation arrearage (support arrearage) is a priority debt under §507(a)(1) and must be paid in full pursuant to §1222(a)(2) and 1322(a)(2) "unless the creditor consents to a different treatment." "Consent" may be construed from a failure to object to confirmation. *In re LaForgia*, 241 B.R. 351 (Bankr. M.D. Pa. 1999).

Example:

Husband owes a spousal support arrearage. He files for Chapter 13 bankruptcy. Husband must make timely payment on each month's support payment over the course of the three year payment plan, and must pay the arrearage in full. His bankruptcy will be dismissed if Husband fails in either of these regards. Though Husband has to pay the full amount of the obligation to Wife, the benefit to Husband is that he is protected from garnishment by Wife (e.g., Wife taking his bank account balance) or by the state support collection service over the life of his bankruptcy plan.

2.3.4 Domestic Support Obligations: Determining Whether a Debt "In the Nature of Support;" Drafting Strategies if Chapter 13 is on the Horizon

During the negotiation process, when issues of support are regularly resolved in a comprehensive agreement – and often through trade offs on other non-support related issues – the divorce attorney must consider the possibility that an obligation to pay a money award as equitable distribution, or an obligation to assume a martial debt, may be subject to discharge. Maintenance and child support payments and arrears are exempt from property of the estate, if court-ordered. Payments reflecting property distribution, however, may be dischargeable under a Chapter 13 filing. For that reason, the distinction between support and non-support is critical in drafting the divorce judgment.

Resolution of the issue of whether a particular debt may or may not be discharged under a Chapter 13 bankruptcy will often hinge upon whether or not the debt is designated as support, and is, in fact, in the form of support. A state court's designation or language in a judgment stating that a debt is support or property settlement ***is not*** binding on the bankruptcy court in determining dischargeability. The bankruptcy court can look behind such language to determine the real nature of the debt. Even if a dissolution judgment or marital settlement agreement contains language stating that there is no spousal support, or that a debt cannot be discharged in bankruptcy, a bankruptcy court will make its own determination as to the nature of the obligation. That means provisions in a judgment such as the following are **not** binding on the bankruptcy court:

> *6.6 **No Bankruptcy**. The obligation of a party to pay, defend, indemnify and hold the other party harmless from the payment of any debt described in this judgment is a support obligation under 11 U.S.C. subsection 523(5) which is not dischargeable in bankruptcy as to the other party.*

Many family law attorneys choose to include this language in their judgments knowing that it is ineffective in hopes that the provision itself might have some psychological impact on an opposing party who is unfamiliar with the law. Regardless of the reason such a provision is included, the family law attorney should make clear to her own client that nothing stated in the divorce judgment can guarantee a particular result in the bankruptcy court.

Instead, the family law attorney should take care to utilize language that specifically identifies obligations as and for support. Certainly an argument can be made that any obligation arising out of a martial settlement agreement constitutes support. A party receives financial relief when he or she is relieved of an obligation to pay a particular debt to a third party creditor that would otherwise have to be paid. However, the determination of what constitutes domestic support will fall to the bankruptcy court. The bankruptcy court looks to federal rather than state law, and the focus of the inquiry is *the intent of the parties or the divorce court at the time the obligations were created*. Therefore, the family law attorney must clearly identify the nature of the debt, describe its purpose, and provide for enforcement by the spouse. This requires thoughtful consideration and drafting centered around whether or not a particular obligation is or is not *in the nature of support*.
The Sixth Circuit opinion in *Long v. Calhoun,* 715 F2d 1103 (6 Cir. 1982), is widely cited for the factors the courts use to determine whether the obligation was intended to create a support obligation, but courts consider all relevant evidence pertaining to the ***intent of the parties***, including but not limited to:

- actual substance and language of the judgment;
- the financial situation of the parties at the time of the agreement;
- the parties' employment histories and prospects for financial support;
- whether one party received marital property;
- the function served by the obligation at the time of the agreement;
- the number and frequency of payments;
- whether it would be difficult for the former spouse and children to subsist without the payments;
- the length of the marriage; and
- whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse.

The bankruptcy court will analyze the respective financial situations of the parties at the time of the obligation, and the more factors that support concluding a particular obligation is in the nature of support, the more likely it is that a bankruptcy court will consider the obligation to be non-dischargeable under 11 U.S.C. §523(a)(5).

A family law attorney should help her client in advance by making clear the character of a particular obligation, and whether or not it is in the nature of support, through findings of fact in their judgment, or even by negotiating the point directly in their correspondence leading up to settlement (which can be used as evidence in the bankruptcy proceeding).

Example: To prove a credit card payment is in the nature of support, a finding of fact as to the parties' intent may not be enough; the judgment itself should demonstrate that the payment was truly support.

Sample finding: "Wife is awarded $1,500 per month in spousal support. Husband is obligated to pay not less than $800 per month toward satisfaction of the credit card debt. Wife's spousal support shall increase to $2,000 per month once the credit card debt has been satisfied."

Sample finding: "This judgment obligates Husband to pay the Visa credit card obligation directly to the creditor thereby leaving Wife sufficient funds to support herself on a monthly basis. But for Husband's assumption of this obligation and promise to pay it, Wife would be entitled to an award of cash spousal support."

Sample finding: "Wife is awarded a larger share of the martial assets in the form of an equalizing judgment because it is both parties' desire that Wife have sufficient resources at her disposal to use for investment and to assist her in being self-supporting. Both parties anticipate that Husband's payment of this judgment will allow Wife to generate income and, therefore, reduce her need for Husband to make cash spousal support payment to her. Thus, the property award is actually in lieu of a direct spousal support obligation against Husband."

Simply stating that "this award is made in lieu of spousal support" is insufficient. There must actually be information on the circumstances of the parties that will lead the bankruptcy court, under its own inquiry, to determine that a payment is actually a domestic support obligation – that it in some way assists in actually supporting the obligee or her family.

Example: At trial, the trial court awards no spousal support to Wife. Wife is awarded the home, and Husband is ordered to pay Wife's medical bills, credit cards, and all past due property taxes on the home awarded to Wife. The bankruptcy court finds that the credit card obligation is not in the nature of support, but the medical bills and property taxes are. Therefore, while all of Husband's obligations are dischargeable as to third party creditors (credit card, hospital), the obligation that Husband has to hold Wife harmless from the medical bills and property taxes is not dischargeable.

Example: The family law attorney should consider negotiating for dischargeability or non-dischargeability, or asking the domestic court to rule on dischargeability, using federal law. For example, the separation agreement could specify that in light of Wife's and Son's economic circumstances, by undertaking to pay Son's education loan (co-signed by both parents), Husband's promise is a child support obligation and, as such, is intended by the parties to be non-dischargeable in bankruptcy. The crucial issue in determining whether an obligation is a support obligation is the function intended to be served, and that should be the focus of drafting language that would survive a challenge in bankruptcy court.

Items that, under the correct circumstances, may qualify as non-dischargeable domestic support obligations under the revised bankruptcy code.

- child support payments
- spousal support payments
- payments for uninsured medical expenses
- health insurance premiums
- daycare expenses
- obligation to pay life insurance premiums

- accrued interest on an outstanding support obligations
- mortgage payments
- payments on a spouse's car
- attorney fees
- an equalizing judgment in the nature of spousal support
- obligation to pay tax liabilities

2.4 Attorney Fees. Is an obligation to pay the opposing party's attorney fees dischargeable?

Prior to the BAPCPA the question of whether or not a debtor's obligation to pay attorney fees could be dischargeable in bankruptcy hinged upon the determination of whether or not the award fell within the 11 U.S.C. §523 exception to discharge reserved for debts of "alimony, maintenance, or support." That is why wise practitioners who recover an award of attorney fees always try to include a finding of fact in the judgment like the following:

> *5. _____ percent (___ %) of the attorney fee award represents charges directly related to the establishment of a child support award.*

With revisions to §523 that incorporate a new, more inclusive definition of "domestic support obligation," and the addition of 11 U.S.C. §523 (a)(5) which further excepted all other debts arising from a divorce settlement agreement, the question of whether or not an attorney fee award is a debt in the nature of alimony, maintenance or support is not as important for a Chapter 7 proceeding. An attorney fee award is generally not dischargeable under a Chapter 7 bankruptcy because the award is either related to an award of support (and therefore non-dischargeable under §523 (a)(5)) or falls under the protection of §523(a)(15) property settlement.

Because property settlements are dischargeable under Chapter 13 filings, however, the inquiry as to what portion of the attorney fee award is attributable to spousal or child support is still relevant, as the ability to discharge will depend on whether the obligation is deemed part of a domestic support obligation.

Therefore, it is still good practice to designate the percentage of the attorney fee award that is attributable to spousal and child support issues to assist in preventing discharge under a Chapter 13 bankruptcy filing.

2.5 Hold Harmless

In a divorce, the divorcing couple or the court will have to make a determination of how post-divorce responsibility for paying debts and obligations will be allocated between the spouses. In some cases your client may be personally liable for each debt and obligation. In other cases only one party may be personally liable to the creditor for a particular debt, but the court, or the agreement of the parties, requires that the other non-liable spouse is to be responsible for paying it post-divorce. Or it may be that both spouses are jointly personally liable for a debt, but only one spouse is ordered or agrees to pay it post-divorce.

When a spouse is ordered to pay marital obligations post-divorce, either because the court entered such an order after a trial or because the spouse agreed to pay such obligations in an agreed order,

the rights of the creditors to whom such obligations are owed are not affected in any way. This means that personal liability of a spouse for an obligation cannot be affected by an order of a divorce court assigning responsibility for payment of that obligation post-divorce. If a spouse is personally liable for an obligation before the divorce, he will continue to be personally liable for it after the divorce, even if the divorce court orders the other spouse to pay it. Likewise, the court's order cannot create personal liability of a spouse to a creditor where none previously existed. If the court orders a spouse to pay an obligation post-divorce with respect to which such spouse is not personally liable, such spouse will continue after the divorce to have no personal liability to the creditor to whom such debt is owed, notwithstanding the court's order.

In any of these cases there is substantial risk after the divorce that the spouse who is responsible to pay the various debts and obligations will fail to do so. In most cases, the spouse who is responsible for paying debts and obligations post-divorce will also be ordered, or will stipulate in the judgment, to hold the other spouse harmless from his failure to pay those obligations, and to indemnify the other spouse to the extent she incurs damages as a result of such failure.

Therefore, family law attorneys include standard judgment language such as:

> *Husband shall pay according to the creditor's repayment terms, defend, indemnify and hold Wife harmless from any debt in his name alone not otherwise specifically described herein.*

Does this provision protect clients? What is the impact of such a provision in bankruptcy?

In the context of a bankruptcy proceeding, a hold harmless provision in a divorce judgment is treated as any other debt held by any other creditor. The existence of a hold harmless provision *does not* mean that the spouse filing for bankruptcy cannot discharge his or her obligation as to the creditor. Rather, the hold harmless provision itself is an obligation between the spouses, separate from the obligation to the original creditor, but still subject to a determination as to whether or not it should be discharged in a Chapter 7 or Chapter 13 bankruptcy. As stated previously, the majority of obligations to former spouses are non-dischargeable under a Chapter 7 or Chapter 13 filing under either the domestic support obligation exception (§523(a)(5)), or the property settlement exception under §523(a)(15). Under a Chapter 13 filing, however, as the property settlement exception does not apply, to determine whether or not a requirement that the debtor hold a former spouse harmless is excepted from discharge requires a determination as to whether or not the provision satisfies the criteria to be considered a domestic support obligation. *In re Calhoun*, 715 F.2d 1103, 1106 (6th Circ 1983); *In re Burckhalter,* 389 B.R. 185 (Bankr. D. Colo. 2008); *In re Forgette*, 379 B. R. 623 (Bankr. W.D. Va. 2007).

As with other obligations, a bankruptcy court will look behind the labels in order to determine the intent of the dissolution court and the parties in ordering the payment. A hold harmless obligation to pay a mortgage may or may not be considered to be a domestic support obligation, depending on the language of the judgment and the circumstances of the parties at the time of the obligation. See *In re Blad*, Bankr. D. Kan. Aug. 22, 2008)(Bankruptcy Court in a Chapter 13 case found that a hold harmless obligation to pay a mortgage in a divorce decree was not in the nature of maintenance or support but was in the nature of property division and, therefore, was not entitled to priority and may be discharged at the completion of payments under the plan); See also *In re Johnson*, 397 B. R. 289,

298 (Bankr. M.D.N.C. 2008)(Bankruptcy Court held that hold harmless obligation in a divorce decree that required debtor to pay mortgage on residence was in the nature of alimony, maintenance or support and was non-dischargeable under §523(a)(5)).

Regardless of the terms of the judgment and a determination by the bankruptcy court that a hold harmless provision is non-dischargeable, practically speaking, enforceability of an order to pay an obligation or a hold-harmless agreement is problematic. A judicial action will have to be brought against the responsible spouse by the other spouse, and a judgment will have to be entered against the responsible spouse. This will, of course, involve incurring attorney's fees and other costs, and the judgment may very well be uncollectible, depending on the responsible spouse's financial situation and the availability of assets to satisfy the judgment.

Possible solution: If spousal support was ordered, move to modify spousal support in the divorce court to ask for an increase in alimony or child support. You will need to show a change in your financial circumstances caused by the additional debt or the reality of not receiving property or money you were awarded.

Possible solution: Include an additional provision in your judgments, to the effect of:

> ***Money Judgment.*** *In addition to any other remedies available to her in law or in equity, Wife shall be entitled to a money judgment to the extent she is financially harmed by Husband's failure to pay in accordance with the creditor's payment terms, defend, indemnify and hold Wife harmless from any debt in his name alone not otherwise specifically described herein, For example, if Husband does not pay the payment to _____ credit card and Wife does so to protect her credit, Wife shall have judgment against Husband for the amount paid and for the harm she suffered to her credit.*

Possible solution: A potential creditor spouse may obtain some protection by obtaining a lien to secure the repayment of a debt. The lien should be on property held jointly, not property held only in the name of the debtor spouses. 11 U.S.C. §522(f)(1)(A) gives a debtor a right to avoid any judicial lien that impairs an exemption, subject only to the exception for domestic support obligation debt, which may not be avoided.

Possible solution: Hold harmless obligations with collateral in the hands of the obligor also should be considered. For example, a party could require execution of a deed of trust on real property, the release of which is preconditioned on payoff of hold harmless obligations. As another example, consider a conditional QDRO that divides the paying party's retirement account in "a dollar amount equal to the balance owing on the USBank Visa account ending 8397 of Husband's (Plan), if any, on July 5, 2015 [the date the account is to be paid in full].

Note that if your client anticipates filing bankruptcy, the family law attorney should avoid agreements that include hold harmless (indemnification) provisions regarding marital debt.

Issue 3: Planning for Bankruptcy in the Dissolution Judgment

3.1 The Terms of the Settlement

In anticipation of one party filing bankruptcy, it might be tempting in divorce negotiations to make a disproportionate award of property or debt to one party with the expectation that the other party will file bankruptcy. This strategy, however, is dangerous as the bankruptcy court does conduct an independent investigation as to what might be considered a fraudulent transfer.

Under 11 U.S.C. §548, the bankruptcy trustee may avoid transfers of property or obligations made or incurred by the debtor within two years prior to filing bankruptcy, if made or incurred with actual intent to hinder, delay, or defraud creditors, or, if less than fair value for the property was received, and the debtor was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result. The trustee will scrutinize settlement terms to determine whether the debtor received appropriate values for what was given to the debtor's ex-spouse. In a subsequent bankruptcy of one spouse it would be a question of fact as to whether such a settlement was voidable or not. Property divisions ordered by a trial judge after a contested hearing are not controlled by the debtors and, therefore, are not as likely to be viewed as fraudulent voidable events.

3.2 Judgment Provisions:

What is the impact of the following judgment provisions; do they work? Does the fact that these provisions may be "boilerplate" in that they are included in every judgment matter in deciding whether or not they can be enforced?

3.4.1 ***No Bankruptcy***. *The obligation of a party to pay, defend, indemnify and hold the other party harmless from the payment of any debt described in this judgment is a support obligation under 11 U.S.C. sub§ 523(5) which is not dischargeable in bankruptcy as to the other party.*

> The bankruptcy court is not bound by such a provision, but include it in your judgment for its psychological impact on the opposing party. Just make sure your client knows it is unenforceable.

3.4.2 ***Debt Forgiveness.*** *It shall be the sole responsibility of the party that this judgment directs pay a debt to report for income tax purposes any forgiveness of that debt which the creditor reports to the parties and any taxing authority as debt forgiveness for income tax purposes. The party obligated to report the debt forgiveness as income shall pay to the other party as liquidated damages any additional tax that party was forced to pay, together with attorney and accountant fees, interest and any penalties that may be incurred or assessed as a result of the obligated party's failure to comply with this provision of the judgment.*

This is an IRS issue, not a bankruptcy issue, but it should be addressed in every case where there is the potential for bankruptcy, foreclosure or debt forgiveness.

3.4.3 ***Failure to Pay A Debt***. *This judgment requires each party to pay certain debts however each party is aware that the court's order cannot modify the repayment agreement between the parties and their creditors. The court's order can only impact the obligation to pay as between the parties themselves.*

3.4.3.1 If either party fails to pay any debt or liability as set forth herein, the other party shall have the right, but not the obligation, to make any payment due provided the nonpaying party is given ten (10) days prior notice of the party's plan to make payment. If payment is made, the party who failed to pay shall be responsible for reimbursing the amount paid to the party who did make the payment together with interest computed at the same rate charged by the creditor on the obligation to which payment was made. Interest shall accrue from the time payment is made until full reimbursement is made.

3.4.3.2 A party who pays the other party's debt pursuant to this provision is hereby authorized to deduct the amount of money so paid from any payment then or thereafter due or owing the other party, ***including from any obligation to pay support.***

Be careful on including the ability to deduct money from a support obligation. If stipulated, it may be more enforceable as a contract, but if not, it may be in violation of the Oregon exemption statutes that prohibit parties from garnishing support. In addition, it is problematic if support is being collected by the Department of Justice.

3.4.4 ***Nondischargabiliy.*** *Each party's property and debt payment obligations provided for in this agreement to or on behalf of the other, either directly or by way of indemnification, are intended to be "non-support debt obligations" and, therefore, nondischargeable under 11 U.S.C. §523(a)(15) of the U.S. Bankruptcy Code.*

This is ineffective as dischargeability is ultimately determined under the bankruptcy code.

3.4.5 ***Debts***. *The parties are insolvent. Neither party is ordered to pay any debts. Each party is entitled to seek any relief he or she may have from joint or separate debts through bankruptcy.*

3.4.6 ***Money Judgment.*** *In addition to any other remedies available to her*

in law or in equity, Wife shall be entitled to a money judgment to the extent she is financially harmed by Husband's failure to pay in accordance with the creditor's payment terms, defend, indemnify and hold Wife harmless from any debt in his name alone not otherwise specifically described herein, For example, if Husband does not pay the payment to _____ credit card and Wife does so to protect her credit, Wife shall have judgment against Husband for the amount paid and for the harm she suffered to her credit.

Could be helpful if stipulated and if a divorce court will uphold it.

Issue 4: The Bankruptcy Automatic Stay

Exceptions to automatic stays, the injunction issued automatically upon the filing of a bankruptcy case that prohibits collection actions against the debtor, the debtor's property or the property of the estate, were expanded by the BAPCPA as they relate to family law proceedings. 11 U.S.C. §362(b)(2)(a) was amended to add several new exceptions the automatic stay. The following types of actions are no longer stayed:

(a) . . . the commencement or continuation of a civil action or proceeding –

(i) for the establishment of paternity;
(ii) for the establishment or modification of an order for domestic support obligations;
(iii) concerning child custody or visitation;
(iv) for the dissolution of marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
(v) regarding domestic violence;

(b) . . . the collection of a domestic support obligation from property that is not property of the estate;

(c) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or statute;

(d) . . . the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law;

(e) . . . the reporting of overdue support owed by a parent to any consumer reporting agency;

(f) . . . the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(g) . . . The enforcement of a medical obligation as specified under title IV of the Social Security Act . . . .

Property determinations regarding the non-bankrupt spouse's interest in the debtor's retirement assets may also be exempt from the automatic stay. In *Zettwoch v. Zettwoch*, the trial court held that a non-bankrupt Wife's interest in the bankrupt Husband's retirement fund vested in her at the time of the divorce judgment was entered, and that the Husband's bankruptcy filing did not stay the court's execution of a QDRO. *Zettwoch v. Zettwoch,* 2008 WL 2447366 (June 10, 2008).

Issue 5: When Action in the Bankruptcy Court is Needed to Protect Your Dissolution Client

Bankruptcy filings have timelines, some of which are jurisdictional. If your dissolution client is served with a document from a bankruptcy court for a case involving her current or former spouse, do not wait. Get the help of a bankruptcy attorney immediately.

In a Chapter 7 filing, all obligations to a former spouse should be non-dischargeable. In a Chapter 13 filing, however, circumstances may arise where your client may need to take action to protect her interests.

The following are a few examples of circumstances under which it might be helpful or necessary to participate in a spouse or former spouse's bankruptcy:

1. The party in bankruptcy owes your client what is clearly a support obligation.

Obligations such as spousal and child support are clearly non-dischargeable in bankruptcy. Many times, either the debtor or the trustee will include these debts in the payment plan with or without any action on the part of the creditor. Regardless, it is always a good idea to make sure your client's claim is properly filed with the bankruptcy court, and to make sure it is filed timely. In the event of an untimely filing, though the obligation will not ultimately be discharged though the bankruptcy, your client as the receiver of alimony may be prohibited from taking any lawful action to collect and will have to wait for the discharge and exit from bankruptcy to initiate garnishment.

> Example: Husband owes Wife $30,000 in spousal support arrearage, but Wife fails to timely notify the bankruptcy court of this claim. Husband cannot discharge the $30,000 obligation, but Wife cannot collect until his plan is completed five years later.

2. The party in bankruptcy owes your client an obligation that could be classified as a domestic support obligation.

Obligations that are not clearly itemized as support will need to have a determination by the bankruptcy court as to whether or not the particular payment satisfies the criteria of a domestic support obligation. Only if the bankruptcy court rules that it is a domestic support obligation will the debt be protected from discharge. To raise that issue your client will have to make an appropriate claim in the bankruptcy court.

Example: Payment of past due uninsured medical expenses, payments on a mortgage and equalizing judgments all have the ability to be considered domestic support obligations. Their characterization as "in the nature of support" or "as property distribution" will govern whether or not they are paid in full, paid in part as a regular unsecured claim, or not paid at all over the course of the Chapter 13 plan.

3. The bankruptcy schedules filed by the filing party are not accurate.

If a debtor files a Chapter 13 and the ex-spouse's interests or claims are affected, the ex-spouse should carefully review the bankruptcy schedules and the Chapter 13 plan to determine whether all assets were disclosed with the appropriate value.

Strategic decisions need to be made to determine if it is in the ex-spouse's best interests to agree to a debtor's bankruptcy plan if such result will make funds available to pay current support debts.

Example: In a Chapter 7 filing your client may not agree that all assets were disclosed. You may think the bankrupting party has more assets and more available funds than they claim. Does your client want to point that out to the bankruptcy court? Or will the fact that more assets exist only mean that there is more money available to the debtor to pay your client's non-dischargeable claim at a further date?

Example: In a Chapter 13 filing where some of your client's claims are not domestic support obligations, your client is going to be paid based on the available assets the bankruptcy court determines the debtor has. It is, therefore, imperative that all assets are itemized and the values for each asset are as high as possible to get the maximum benefit for your client prior to discharge.

Example: The values and schedules created by the debtor in bankruptcy are sworn to under penalty of perjury by the debtor. Sometimes the values listed in the bankruptcy court vary considerably from the values asserted in the divorce court – it may, therefore, be useful information for your client to take advantage of.

COLLATERALIZING THE DIVORCE JUDGMENT

Learn to think like a lender, not an ex-spouse. There is little your client can do about the bankruptcy laws which are fundamentally debtor-oriented. But, even if your client is unable to pursue the debt from the ex-spouse because of bankruptcy relief, the Bankruptcy Court will not take away your client's collateral if your client has a properly perfected security interest in collateral.

The key to collateralizing the judgment (loan) is to *perfect* the security interest in the manner required by law. If done correctly then at least your client might have some leverage after bankruptcy. The means of perfecting a security interest in given types of property is statutory. The law recognizes three basic categories of property and each carries with it different mechanisms for perfection.

What is perfection of a security interest? It is the method of recording the pledge of collateral in the public records.

What do you need to have a perfected security agreement? Two things are required:

1. You must have a signed security agreement wherein the debtor pledges the collateral to the lender. No particular words are required. These will suffice:

> "Husband hereby pledges all of his right, title and interest in and to the following described collateral to Wife to secure repayment of the obligation owed wife as set forth herein. (Then describe with particularity the collateral.)

2. The security agreement must be perfected to be assertable against a trustee in bankruptcy. There are several methods of perfection and the following are the most common:

   A. Real Property. A security interest in realty must be in writing, signed by the debtor and recorded in the county where the land is located. These include mortgages, trust deeds and assignments of land sale contracts. Each carries with it different remedies and so you should consult with someone familiar with each to determine what is best for client. It is not a costly process. Debtor's signature is required.

   B. Automobiles. A perfected security interest in an automobile is created by causing the name of your client to be placed on the title to the vehicle as "secured party". This is done through the Oregon Department of Motor Vehicles and forms can be found online at the official website. If the automobile is already pledged as collateral you are not going to be able to do this but you might consider providing in the decree that as long as the debt is owed

the borrower (Husband?) shall pledge the title to any vehicle in which there is no security holder or upon release of the title by an existing security holder. The debtor's signature is required.

C. Other Property. There is a great deal of "property" that is not titled by written documents. These included furnishings, bank accounts, jewelry, guns, personal effects and the like. If you take a pledge of these items you must perfect them by filing a Uniform Commercial Code financing statement with the Oregon Secretary of State. This is extremely simple. The form identified as a "UCC-1" financing statement can be found at the general website, is extremely easy prepare and file. The debtor's signature is not required to file these.

BULLETPOINTS:

1. DO NOT DELAY IN FILING THE PERFECTION DOCUMENTS!! The timing of filing may affect whether a bankruptcy trustee can "avoid" the security interest by attacking the timing of the perfection. Generally, you have ten days from the time of the execution of the security agreement to file or perfect. In the case of a car title you must file the application for new title within the ten days.

2. THE DEBTOR CAN AVOID A SECURITY INTEREST IN PERSONAL EFFECTS AND FURNISHINGS. If the debtor chooses, he (or she) can avoid a security interest in household items, clothing, etc. to the exent that it impairs their respective exemption in the asset. Nevertheless, take the security interest because if you don't then you know you have nothing.

3. THINK LIKE A LENDER!!! There is not a banker alive who has ever had enough collateral.

4. CAN YOU GET SOMEONE TO GUARANTEE REPAYMENT? A "guarantor" is one who agrees to pay the debt if the primary debtor (husband or wife) does not pay. This is highly unlikely in divorce cases, but do explore the possibility of a relative or someone guaranteeing the debt. Why? Because bankruptcy does not relieve the guarantor of the liabililty to pay the debt!

5. BE SURE TO GET SOME HELP WITH PERFECTION. This document is not intended to be comprehensive. Just learn to think like a lender and to think about collateralizing the loan.

Family Law Conference Presentation October 15, 2011

"Avoiding the Disciplinary Spotlight"

"The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge properly their professional duties." American Bar Association *Standards*, Section 1.1.

"[Bar discipline] is not intended to be punitive but to deter future wrongful conduct." *In re Stauffer,* 327 Or 44, 66 (1998).

I. Disciplinary Process

Subject to Oregon Supreme Court oversight. Sanctions are governed by ABA *Standards for Imposing Lawyer Sanctions*.

A. Intake and Investigation

1. All complaints are first screened by the Client Assistance Office.

2. If the complaint does not contain facts sufficient to support an actual rule violation, the Client Assistance Office offers other options to the complaining party, e.g., Fee Arbitration, Lawyer Referral. On average, 80-90 percent of complaints are retained by the Client Assistance Office and go no further in the disciplinary process.

3. If the complaint raises an actual complaint of misconduct covered by a Disciplinary Rule, the matter is referred to Disciplinary Counsel. BR 2.5(b) authorizes referral when there is credible evidence to support an allegation that misconduct has occurred.

4. Disciplinary Counsel investigates all written complaints referred to it by the Client assistance office and may initiate an investigation without a written complaint.

5. Disciplinary Counsel notifies the accused lawyer in writing of the

complaint and requests a response within 21 days. Extensions may be granted for the responses. The complainant will see, and have an opportunity to respond to, the information provided by the accused lawyer. The lawyer will see, and have an opportunity to respond to, the information provided by the complainant.

The lawyer's response is of critical importance. Lawyers who fail to respond may be disciplined on that basis *alone*. *In re Hereford,* 306 Or 69, 750 P2d 30 (1988). Failure to respond may also result in direct referral to a Local Professional Responsibility Committee (LPRC) for investigation.

6. After reviewing the initial complaint, response, and further comments from each side, Disciplinary Counsel may conduct further investigation. It will dismiss complaints lacking in probable cause. It may also refer the complaint to a LPRC for further investigation.

B. The "Grand Jury"–State Professional Responsibility Board (SPRB)

1. The SPRB is a panel of seven lawyers and two public members appointed by the Oregon Supreme Court. The SPRB meets monthly to review all complaints on which Disciplinary Counsel has completed initial investigation. All members see Disciplinary Counsel case summaries for each case; individual SPRB members review the actual case files and report on those to the other members. The SPRB also reviews any reports from LPRCs after cases referred out have been investigated.

2. The SPRB may:

a. Dismiss cases lacking in probable cause.

b. Issue a letter of admonition if a violation is found but was not serious in nature. The lawyer must consent to the admonition and can require the case to go to hearing. Admonitions are relatively rare and are not considered formal discipline. (Practice tip: If you are offered an admonition, take it!)

c. Refer back to Disciplinary Counsel or an LPRC for further investigation.

d. Authorize prosecution by the Bar. Approximately 100–120 prosecutions are authorized in a given year.

e. Some complaints are diversion eligible, but diversion requires the lawyer to stipulate to the facts supporting the complaint and the rule violation. If the diversion fails, the lawyer preserves the right to a disciplinary hearing but is bound by the stipulated facts in that hearing.

f. The SPRB may also seek interim relief from the Supreme Court in extreme circumstances, such as temporary suspension of an accused lawyer or summary order placing the lawyer on inactive membership status. These cases arise when a lawyer is incapacitated by mental illness or addiction, has been convicted of criminal misconduct, or poses an immediate and ongoing threat to clients or the public interest.

C. The trial.

1. Trial panels consist of two members of the Oregon State Bar and one public member from the Disciplinary Board, in most cases drawn from the region where the accused member practices. There are approximately 75 Disciplinary Board members statewide, organized into seven geographic regions.

2. Panel members may be challenged for cause. Each side also has one peremptory challenge which may be used to strike a panel member.

3. Trial panels conduct a trial-type hearing. The Bar must show, by clear and convincing evidence, that the lawyer violated a duty owed to a client, the public, the legal system or profession. Evidentiary rules follow the more relaxed, administrative hearing standards. Trial panels make a decision regarding each alleged violation and determine an appropriate sanction for any proven violations.

4. Sanctions include public reprimands, suspensions, and disbarment. All trial panel decisions are final unless either the Bar or the accused lawyer seeks review by the Oregon Supreme Court within 60 days. Unlike most matters brought before the Supreme Court, review is mandatory when requested by either party.

Among the factors considered in imposing an appropriate sanction are the duty owed by the lawyer, the mental state of the lawyer, the extent of the injury (actual or potential) caused or threatened by the violation and any mitigating or aggravating factors.

Adapted from "Lawyer Discipline in Oregon" by Jeffrey D. Sapiro, Oregon State Bar Disciplinary Counsel

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II. Substantive Claims Against Lawyers

A. Diligence. Rule 1.3

A lawyer shall not neglect a legal matter entrusted to the lawyer.

B. Communications. Rule 1.4

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A "knowing" failure to perform services nearly always results in a suspension. A negligent failure usually results in the presumptive sanction, a reprimand. *In re Cohen*, 330 Or 489 (2000); *In re Freudenberg*, 22 DB Rptr 195 (2008).

Lawyers are responsible for staff communications with clients and must act upon client requests for information made through staff. *In re Unfred*, 22 DB Rptr 276 (2008) (lawyer unaware that client was trying to contact him until the client terminated his services; no work performed on case for six months while paralegal failed to pass on emails and voicemails.

C. Competence Rule 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In re Peterson, 22 DB Rptr 1 (2008) Violation of competence rule led to violation of second rule against accepting or continuing employment when such action leads to a violation of Rules (Rule 1.16).

In re Jackson, 347 Or 426, 223 P3d 387 (2009)–not presented as a competency case, but a good example of where lack of competence can lead. Accused attorney sanctioned for neglect, conduct prejudicial to administration of justice, and knowingly making a false statement of fact to a tribunal.

D. Conflicts of Interest

1. Simultaneous representation of parties to a dissolution.

Parties to marital dissolution proceedings will almost always have directly adverse interests that require the lawyer to contend for something on behalf of one client that the lawyer must oppose for the other client. Such conflicts cannot be waived by clients. Oregon RPC 1.7(b). *In re McKee*, 316 Or 114, 849 P2d 509 (1993) (lawyer disciplined for representing husband and wife as copetitioners in divorce.

Consider this issue when representing a party in a dissolution involving at least one child is a "child attending school" as defined in ORS 107.108. Child's interest is potentially adverse to both parents.

See Formal Ethics Opinion No. 2005-86 (attached).

2. Former Client conflicts. RPC 1.9

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.
. . . .
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

See Formal Ethics Opinion No. 2005-11 (attached).

F. Disciplinary Matters. RPC 8.1 A lawyer . . . in connection with a disciplinary matter, shall not: . . . knowingly fail to respond to a lawful demand for information from . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

A lawyer violates RPC 8.1(a)(2) when he does not respond to the inquiries or requests of Disciplinary Counsel, which is empowered to investigate the conduct of lawyers. *In re Bourcier,* 325 Or 429, 939 P2d 604 (1997); *In re Schaffner*, 323 Or 472, 477, 918 P2d 803 (1996)..

The duty to comply with this rule is no less important than other ethical responsibilities. *In re Hereford*, 306 Or 69, 756 P2d 30 (1988). The court has expressed a virtual no tolerance approach to a lawyer's failure to cooperate. *In re Miles*, 324 Or 218, 222–223, 923 P2d 1219 (1996).

III. Resources.

Oregon Rules of Professional Conduct:

http://www.osbar.org/_docs/rulesregs/orpc.pdf

Formal Ethics Opinions (issued by Board of Governors):

http://www.osbar.org/ethics/toc.html

Disciplinary Reporter:

http://www.osbar.org/publications/dbreporter/dbreport.html

FORMAL OPINION NO. 2005-17

Conflicts of Interest, Former Clients: Use of Confidential Information

Facts:

Lawyer *A* prepared a will for Client *A*. After the lawyer-client relationship between Lawyer *A* and Client *A* terminated, Lawyer *A* was asked to assist another client in selling a boat to former Client *A*.

Lawyer *B* prepared a will for Client *B*. After the lawyer-client relationship between Lawyer *B* and Client *B* terminated, Lawyer *B* was asked by another client to collect money from Client *B*.

Lawyer *C* represented Client *C* in marital dissolution proceedings. After those proceedings concluded and the lawyer-client relationship ended, Lawyer *C* was asked to represent a subsequent spouse of Client *C* in dissolution proceedings against Client *C*.

Question:

May Lawyer *A*, Lawyer *B*, and Lawyer *C* undertake these representations without disclosure to and consent from their former and current clients?

Conclusion:

See discussion.

Discussion:

The rules that are relevant to this matter are Oregon RPC 1.6, Oregon RPC 1.8(b), and Oregon RPC 1.9. Oregon RPC 1.6[1] provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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[1] In addition, ORS 9.460(3) provides that a lawyer "shall . . . [m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490." Oregon RPC 1.6 uses the phrase *information relating to the representation of a client* to describe the information covered by the phrase *confidences and secrets* in *former* DR 4-101. *See* Oregon RPC 1.0(f).

Oregon RPC 1.8(b) provides:

> A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

Oregon RPC 1.9 provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless each affected client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

See *In re Brandsness,* 299 Or 420, 702 P2d 1098 (1985), discussing and creating the matter-specific and information-specific former-client conflicts categories used in subsequent cases and in OSB Formal Ethics Op No 2005-11.[2]

None of the situations described above presents a representation adverse to a former client involving the same transaction or legal disputes. Thus, there is no matter-specific conflict. *Cf.* OSB Formal

[2] For additional Oregon ethics opinions on former-client conflicts questions, see OSB Formal Ethics Op Nos 2005-28 (conflict of interest in representing both sides in adoption), 2005-62 (representation of original and successor personal representatives), 2005-120 (former and current conflicts of interest), 2005-128 (conflict of interests when lawyer changes firms), 2005-174 (former client conflict in public defender organization).

Ethics Op No 2005-11. It follows that unless the lawyers have acquired some confidential information in representing the former clients that could be used to materially advance the new client's position, there is no information-specific conflict and the matters are not substantially related within the meaning of Oregon RPC 1.9(a). Similarly, unless the lawyers have information from the prior representations that could be used to the material disadvantage of their former clients in violation of Oregon RPC 1.9(c), the lawyers may accept those representations without the consent of the former or new clients.

The facts do not suggest that Lawyer *A* would have learned any confidential information from Client *A* that would be material and detrimental to Client *A* if used in the boat sale transaction. If material confidential information that could be used adversely to the former client was obtained, however, informed consent from both the current and former clients would be necessary. To be effective, the informed consent must be confirmed in writing and would have to include a discussion of the potential for adverse use of the confidential information and the possible effect of that use on the former client. *Cf.* Oregon RPC 1.0(h).[3] *See also* OSB Formal Ethics Op No 2005-11.

There is a possibility that in the course of preparing Client *B*'s will, Lawyer *B* obtained information about Client *B*'s assets that could be used to Client *B*'s detriment in the subsequent collection action. If so, Lawyer *B* may not accept the representation of Client *B* without informed consent, confirmed in writing, of both the current and former clients.

If Lawyer *C* gained material information through the prior representation of Client *C* that is not otherwise known to the spouse who subsequently sought to employ Lawyer *C* and that could be used to former Client *C*'s disadvantage in the new matter, Lawyer *C* could not represent the spouse without informed consent, confirmed in writing, of

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[3] Oregon RPC 1.0(g) provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

See Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters,* 62 OSB BULLETIN 69 (June 2002).

both the current and former clients. There is no reason to apply the information-specific category if, in fact, the spouse already knows the information in question. *Cf.* OEC 503(4)(e) (no privilege between jointly represented clients who share a lawyer and who subsequently have a falling out).

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and related subjects, see *PGE v. Duncan, Weinberg, Miller & Pembroke,* 162 Or App 265, 986 P2d 35 (1999) (former-client conflicts of interest and disqualification motions filed as result thereof); THE ETHICAL OREGON LAWYER §§9.2–9.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 128–132 (2003); and ABA Model Rule §1.9.

FORMAL OPINION NO. 2005-11

Conflicts of Interest, Former Clients: Matter-Specific Conflicts

Facts:

Lawyer *A* was lawyer of record for Husband in a dissolution proceeding. Several years later, Wife approaches Lawyer *A* and asks Lawyer *A* to represent her in a proceeding to modify the previously entered decree by having custody of a child changed from Husband to Wife.

Lawyer *B* is employed by Smith to investigate a possible claim on behalf of Smith against a particular business. After Lawyer *B* begins to represent Smith but before litigation is filed, Lawyer *B* learns that the business is a sole proprietorship of Jones, a client of Lawyer *B* on unrelated matters. Lawyer *B* withdraws from representing Smith, and Smith retains other counsel, who files the lawsuit against Jones. Jones then asks Lawyer *B* to defend Jones in that litigation.

Lawyer *C* represents Richard in an action against a defendant for personal injury suffered by Richard in an automobile accident. Some time after this representation has begun, Freda, who was also injured in the same accident, approaches Lawyer *C* and asks Lawyer *C* to file an action against the same defendant arising out of the same accident; Lawyer *C* does so. Lawyer *C* later learns that the positions of Richard and Freda are adverse and that Richard ought to be pursuing a damages claim against Freda as well as against the common defendant. When Lawyer *C* explains this to Richard and Freda, Freda replies that she will get other counsel, but Richard replies that he would like Lawyer *C* to represent him against Freda as well as against the common defendant.

Lawyer *D* represents Maria and Henry in buying a corporation or partnership from third parties. When Maria and Henry later have a falling out, Maria seeks separate counsel, and Henry asks Lawyer *D* to represent him against Maria in connection with litigation or negotiations pertaining to dissolution of the corporation or partnership.

Questions:

1. May Lawyer *A* represent Wife against Husband?
2. May Lawyer *B* represent Jones against Smith?

3. May Lawyer *C* represent Richard against Freda?
4. May Lawyer *D* represent Henry against Maria?

Conclusions:

1. No, qualified.
2. No, qualified.
3. No, qualified.
4. No, qualified.

Discussion:

In each of these examples, the lawyer is seeking to take action adverse to a former client.[1] Oregon RPC 1.9 provides, in pertinent part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.
>
> . . . .
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[1] We assume that in each of these examples, the client has become a former client either by voluntarily seeking other counsel or because the prior representation had come to an end. A lawyer cannot "fire" a current client in mid-matter to avoid the current-client conflict of interest rules. *See, e.g., Picker Intern., Inc. v. Varian Assoc., Inc.,* 869 F2d 578, 582 (ND Ohio 1989); *Unified Sewerage Agency v. Jelco Inc.,* 646 F2d 1339, 1345 n 4 (9th Cir 1981); *Manoir-Electroalloys Corp. v. Amalloy Corp.,* 711 F Supp 188, 193 n 7 (D NJ 1989).

Matters can be "substantially related" in either of two ways: (1) the lawyer's representation of the current client will work some injury or damage to the former client in connection with the same matter[2] in which the lawyer represented the former client; or (2) there is a risk that confidential factual information learned in representing the former client could be used to advance the new client's position. *See* ABA Model Rule 1.9, comment [3].The "substantial relationship" limitation in Oregon RPC 1.9(a) is similar to the "matter-specific" and former client conflicts described in *In re Brandsness,* 299 Or 420, 702 P2d 1098 (1985). Given these similarities, we believe it is appropriate to continue to refer to matter-specific and information-specific former client conflicts.

We strongly caution, however, against an overbroad interpretation that would dilute the requirements that must be met before two matters can be said to be "the same or . . . substantially related." For example, the fact that two matters may both involve the same disputants, the same industry, and some of the same facts will generally be insufficient, standing alone, to create a matter-specific conflict. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke,* 162 Or App 265, 986 P2d 35 (1999). Similarly, merely acquiring confidential information in a prior representation does not create an "information-specific" conflict if the information is not material to the new matter and cannot be used to materially advance the new client's position. For a comprehensive discussion and collection of cases on this subject, which notes, among other things, the fact that courts in different jurisdictions have not always applied the rule consistently, see ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT §55:225.[3]

In each of the examples discussed above, however, the new matter that the lawyer is asked to handle is the same or substantially related to the lawyer's earlier representation of the former client. *Compare Collatt*

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[2] *Matter* is defined in Oregon RPC 1.0(i) as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties."

[3] For additional Oregon ethics opinions on former-client conflicts questions, see OSB Formal Ethics Op Nos 2005-28 (conflict of interest in representing both sides in adoption), 2005-62 (representation of original and successor personal representatives), 2005-120 (former and current conflicts of interest), 2005-128 (conflict of interests when lawyer changes firms), 2005-174 (discussing former client conflict in public defender organization).

v. Collatt, 99 Or App 463, 782 P2d 456 (1989), *with In re Pierce,* 4 DB Rptr 1 (1990).

When a former client conflict is present, Oregon RPC 1.9(a) provides that a lawyer may represent the current client if each affected client gives informed consent in writing. *See, e.g., In re Sawyer,* 331 Or 240, 13 P3d 112 (2000) (lawyer had former-client conflict of interest and failed to seek consent from affected parties).[4] If the former client conflict exists because the lawyer possesses confidential factual information relating to the former representation that could be used to the disadvantage of the former client in the current proceeding, the lawyer must specifically disclose this fact to have the former client's informed consent to the conflict. *Cf.* OSB Formal Ethics Op No 2005-17; *Vestron, Inc. v. National Geographic Soc.,* 750 F Supp 586, 595 (SDNY 1990).

Approved by Board of Governors, August 2005.

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[4] *See* Oregon RPC 1.0(g):

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall hive and the writing shall reflect a recommendation that he client seek independent legal advice to determine if consent should be give.

See also Peter R. Jarvis, Mark J. Fucile & Bradley F. Tellam, *Waiving Discipline Away: The Effective Use of Disclosure and Consent Letters,* 62 OSB BULLETIN 69 (June 2002).

COMMENT: For additional information on this general topic and related subjects, see *PGE v. Duncan, Weinberg, Miller & Pembroke,* 162 Or App 265, 986 P2d 35 (1999) (former-client conflicts of interest and disqualification motions filed as a result thereof); THE ETHICAL OREGON LAWYER §§9.2–9.6 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 128–132 (2003); and ABA Model Rule §1.9. *See also* OSB Formal Ethics Op Nos 2005-28 (conflict of interest in representing both sides in adoption), 2005-62 (representation of original and successor personal representatives), 2005-120 (former and current conflicts of interest), 2005-128 (conflict of interests when lawyer changes firms), 2005-174 (former client conflict in public defender organization).

Bar Counsel
Confidentially Speaking
The Many Faces of Mentoring
By Helen Hierschbiel

Mentoring is a valuable and integral component of lawyers' professional development. When a lawyer is handling cases outside of the lawyer's expertise or comfort zone, seeking guidance from other lawyers may even be necessary in order to provide competent representation to clients. Consultations between lawyers range from informal, superficial discussions — such as might occur at a CLE event over coffee or on a list-serve — to detailed, lengthy discussions with the aim of obtaining more individualized, substantive assistance.

This peer to peer guidance will play an important role in the development of the professional skills, habits and character of new lawyers participating in the Oregon New Lawyer Mentoring Program. The program was created by the Oregon Supreme Court in conjunction with the Oregon State Bar over the last year and launched in May with the first group of 2011 new admittees.

While consultations among lawyers are clearly important and encouraged, lawyers who are not members of the same firm or formally affiliated on a particular case must be mindful of their ethical obligations to clients when engaging in such discussions.

In the recent OSB Formal Ethics Op No 2011-184, the OSB Legal Ethics Committee identifies some of the ethical issues that can arise in such consultations and the steps that lawyers can take to avoid problems. The committee summarizes its advice as follows:

For the consulting lawyer … care should be taken not to violate the duty to maintain the confidentiality of information relating to the representation of a client. For the consulted lawyer … the duty of loyalty to existing clients must be considered.

Consulting Lawyer Duties
The committee starts by reminding us that Oregon RPC 1.6 prohibits the disclosure of "all information relating to the representation of a client" except as specifically provided in the rule. There is no exemption for lawyers participating in mentorship programs. Disclosure is allowed, however, where "impliedly authorized to carry out the representation." RPC 1.6(a). ABA Formal Ethics Op 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation, interprets identical language in Model Rule 1.6 "to allow disclosures of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the

representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consult- ing lawyer's client."

The committee distinguishes between consultations involving the disclosure of protected information and those that are general in nature. For example, requesting direction on case law, statutes or rules relating to a subject relevant to a client matter would not normally involve the disclosure of information relating to the representation of a client. Therefore, such inquiries would not implicate RPC 1.6. The committee cautions, however, that framing a question as a hypothetical could still result in a violation of RPC 1.6 if the facts given are so detailed and unique that the client's identity could easily be determined.

A lawyer may reveal information relating to the representation of a client when the client gives informed consent. While consent need not be in writing, RPC 1.0(g) requires the lawyer to provide the client with "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Referring again to ABA Formal Op No 98-411, the committee notes that lawyers may want to explain whether disclosure will constitute a waiver of attorney-client privilege or might otherwise prejudice the client's interests.

Finally, the committee cautions consulting lawyers to avoid consulting with a lawyer who is likely to be or has already become counsel for an adverse party in the matter because, "[i]n the absence of an agreement to the contrary, the consulted lawyer does not assume any obligation to the consulting lawyer's client by simply participating in the consultation." Thus, the consulting lawyer may risk divulging sensitive information to a potential or actual adversary. One way to avoid this risk is for the consulting lawyer to obtain a confidentiality agreement with the consulted lawyer prior to the consultation.

The possible adverse use of information is of particular risk when posting an inquiry to a listserv. The collegial atmosphere fostered on many listservs belies the fact that listserv members often include counsel or parties on all sides of legal issues, as well as adjudicators of pending cases. Thus, the committee urges lawyers to exercise even greater caution when soliciting guidance on a case from a listserv community.

Although not mentioned by the committee in its recent opinion, at least one lawyer in Oregon has been disciplined for posting confidential information on a listserv. *See In re Quillinan*, 20 DB Rptr 288 (2006). As social networking sites and tools become more popular, lawyers are more likely to use such communication methods to seek guidance from other lawyers. The committee makes clear that the same considerations that apply to mentoring relationships and the use of listservs, also apply to discussions on blogs and other online forums.

Consulted Lawyer Duties

As indicated above, the consulted lawyer assumes no obligations to the consulting lawyer's client by the mere fact of the consultation. Consequently, the consulted lawyer does not violate RPC 1.6 if he later discloses or uses information received from the consulting lawyer.

Even so, the consulted lawyer must take care not to provide guidance that might subsequently be used to harm her own clients. Drawing on ABA Formal Op No 98-411, the committee gives the following example of the lurking dangers for the consulted lawyer. Imagine seasoned lawyer, Lawyer B, advises less experienced lawyer, Lawyer A, about how a tenant might void a lease. Following Lawyer B's guidance, Lawyer A advises his tenant client to repudiate the lease. Lawyer B later discovers that his own firm represents the landlord whose lease was repudiated by Lawyer A's client.

Without a confidentiality agreement in place, Lawyer B would likely be required to inform the landlord client of the consultation with Lawyer A and its possible consequences. While sharing this information is not a breach of Lawyer B's ethical duties, doing so may have the practical result of seriously damaging Lawyer B's relationship with the firm's client. On the other hand, if the two lawyers had entered into a confidentiality agreement about the consultation, Lawyer B and his firm could be disqualified from representing the landlord under RPC 1.10 because a conflict of interest may exist. Under RPC 1.7(a)(2), a self-interest conflict would exist if Lawyer B's obligations under the confidentiality agreement would materially limit his ability to represent the landlord in the matter.

Consulted lawyers can avoid such conflict problems by insisting, prior to the consultation, that the consulting lawyer provide the name of his or her client so that the lawyer can check for possible conflicts with existing firm clients.

Conclusion

As mentors and new lawyers gear up for participation in the OSB New Lawyer Mentoring Program, they should consider (among other things) how best to structure consultations involving particular cases or clients so as to avoid unintended breaches of confidentiality and conflicts of interest. For example, framing hypothetical scenarios in generic terms, using agreements to maintain confidentiality, and conducting conflict checks prior to more detailed consultations, can all be helpful tools to avoid ethical problems while still getting the best and most out of the mentoring relationship.

ABOUT THE AUTHOR

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RECENT APPELLATE DECISIONS

FAMILY LAW CASE SUMMARIES (2010-2011)

David Brewer, Oregon Court of Appeals

Property Division

In re Marriage of Patterson, 242 Or App 452, __ P3d __ (2011) (Separation Agreement)

Approximately seven years after husband and wife executed separation agreement which was incorporated into separation judgment, wife filed petition for dissolution. Based on extrinsic evidence, husband and wife intended separation agreement to control division of their property at dissolution of marriage; letters between husband and wife's attorney, written at time parties were negotiating separation agreement, indicated that husband knew wife wanted to resolve their property issues permanently, husband's proposed process provided for separation judgment to be quickly converted into dissolution judgment, and husband never asserted that division would not be final.

To interpret a separation agreement that has been incorporated into a separation judgment, a court first examines the text of the agreement; if the text is ambiguous, the court considers extrinsic evidence of the parties' intentions. If extrinsic evidence is ambiguous as to the parties' intent in a separation agreement, the court applies maxims of construction. Assuming terms of separation agreement allowed for rescission of agreement by conduct, husband and wife did not rescind agreement to keep their property separate by continuing to live together for approximately seven years following separation agreement; parties generally kept their finances separate, parties each paid their own housing expenses, parties did not use their jointly-titled bank accounts and credit card accounts together, parties did not open any new joint accounts or make any major joint purchases, parties made separate contributions to children's expenses, and there was no evidence parties pooled their financial resources or acted as if their resources were available to each other.

Parties that have entered an agreement to keep their marital property separate can rescind the agreement by conduct that demonstrates a mutual intent to no longer be bound by the agreement's terms. Enforcement of husband and wife's separation agreement to control division of their property in dissolution proceedings did not violate statute providing that marital property be divided in just and proper manner, despite husband's argument that, given changes in parties' relative financial situations between separation and dissolution, using separation agreement to divide property was not just and proper; fact that a marital settlement agreement contained terms other than those a court could order absent the agreement did not necessarily mean that the agreement violated law or was contrary to public policy, and public policy strongly favored marital settlement agreements and full enforcement of those agreements. ORS 107.105(1)(f); ORS 107.104.

In re Marriage Gagliardi, 241 Or App 293, 249 P3d 1287 (2011)

Husband could not challenge the trial court's authority to award wife a particular vehicle during dissolution proceeding, even though corporation, of which husband was only a 20 percent shareholder, held title to the vehicle, where husband accepted an offer of settlement by wife that included awarding her the vehicle.

Lump sum payment of disability benefits to husband was marital property that was subject to division in a dissolution proceeding. Husband failed to preserve for appellate review his claim that the trial court erred in awarding a portion of child support out of husband's lump sum disability payment, in a dissolution proceeding, where husband failed to present his argument in the trial court.

In re Finear, 240 Or App 755, 247 P3d 1238 (2011)

Husband rebutted presumption of equal contribution with respect to the assets that he inherited during the marriage, as there was no evidence that wife made any contribution or had any influence over the acquisition of the inheritance, while husband "contributed" to the acquisition of his inheritance by virtue of his legal relationship to his deceased uncle. Husband rebutted presumption of equal contribution with respect to properties acquired during the marriage with husband's inheritance funds, since there was no dispute that the assets were acquired with husband's separate funds, without contribution from wife, and without wife's knowledge.

Appreciation, during marriage, of a separately held asset is a marital asset, subject to a presumption of equal contribution. Wife was entitled to equal division of the appreciation, over the course of marriage, of property that was a separately held asset of husband; the parties lived on the property during the marriage, and wife contributed to the marital partnership through her help in maintaining the property, and her work as a homemaker and primary caregiver for and educator of the parties' children.

Trial court did not abuse its discretion in failing to award wife an interest in husband's separately held inheritance assets; although husband commingled inheritance funds by using them as the source of family's support, husband expressed intention to retain the inheritance as a separate property, and wife would achieve economic self-sufficiency through award of indefinite spousal support and equal division of the appreciation of property that was due largely to husband's investment of time, labor, and inheritance funds.

Separately acquired assets may be so commingled with the joint assets of the marriage that the court is precluded from identifying the source of the disputed asset with sufficient reliability to rebut the statutory presumption that both spouses have contributed equally to the disputed asset. "Commingling" occurs when a spouse has so integrated a separately acquired asset into the joint finances of the marital partnership that it would be inequitable to award the asset to that spouse as separate property under a just and proper distribution of marital property.

In making determination of whether assets have been integrated to the extent that it would be inequitable to award them as separate property, courts focus on whether the spouse with the separate property has demonstrated an intent to retain that spouse's separately acquired asset as separate property or whether, instead, that spouse intended for that property to become the joint property of the marital estate. Factors relevant to the determination of intent to retain separately acquired asset as separate property include: (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 on the disputed property as a joint asset.

A determination that there has been commingling of a separately acquired asset does not necessarily require the sharing of an entire asset; commingling may justify a division of a portion of a separately acquired asset.

In re Marriage of Deming, 240 Or App 447, 246 P3d 513 (2011)

Statutory presumption of equal contribution was not rebutted, for purposes of property division in dissolution decree, with respect to increase in value of husband's retirement accounts realized between parties' separation and entry of decree, and, thus, appropriate date to use in determining value of the accounts was as of date of dissolution, not date of parties' separation; throughout the marriage, the parties functioned as a marital unit for financial purposes, each contributed to the marital estate, they both worked in support of the family's ability to acquire property, and there is no indication that they intended to hold acquired property separately, and parties were separated for only 11 months prior to husband filing for divorce, and they were not financially independent of each other during the separation.

To rebut the statutory presumption of equal contribution that applies to marital assets with respect to property acquired during the period between separation and dissolution, a party generally must make a showing of a long period of separation and mutual financial independence before the dissolution; such a showing indicates that the spouses have separated their financial lives and are no longer performing roles they assumed based on an understanding that they would share in the results of each other's efforts.

In determining whether a spouse has contributed to the acquisition of an asset acquired during a separation, for purposes of determining whether statutory presumption of equal contribution that applies to marital assets has been rebutted, the court does not focus only on the activities of the spouse during the separation, as assets acquired during separation may have roots extending far back into the marriage.

In re Marriage of Cook, 240 Or App 1, 248 P3d 420 (2010)

Fact that husband added wife's name to title of residence property after marriage did not convert husband's premarital interest in the property into a marital asset to which the presumption of equal contribution applied in wife's petition for unlimited separation. Evidence was insufficient to ascertain and trace either the value of husband's premarital interest in the residence property or the actual purchase price of one-half interest in property that husband acquired from his former spouse during husband's marriage to former spouse, and thus trial court's determination that it was just and proper to equally divide the property between the parties was appropriate in wife's petition for unlimited separation, where there was no evidence as to either the gross or net value of property at time of marriage, there was no evidence concerning what portion of husband's payment to former spouse was for purchase of former spouse's interest in property, and wife contributed substantially to upkeep and development of property and served as homemaker throughout marriage.

Trial court's allocation of husband's retirement accounts, awarding wife an equal interest in accounts after discounting evidence husband produced, was not just and proper in wife's petition for unlimited separation; account funds were already used as contingency in division of parties' interests in residence property, wife did not contribute to creation or preservation of retirement accounts, husband brought the vast bulk of parties' total assets to marriage, husband was much older than wife, and, apart from retirement accounts and a property husband purchased during separation proceedings, remainder of marital estate was equally divided. Equity which husband invested in property purchased during separation proceeding was husband's separate property and was not properly considered marital property as sanction for husband's use of retirement funds to finance acquisition of property, in violation of restraining order that enjoined the parties from encumbering or disposing of their assets during the pendency of wife's separation action, where trial court had awarded attorney fees to wife as sanction for husband's use of retirement funds to finance property, and the equity was derived from the proceeds of husband's premarital retirement accounts.

Equal division of value of husband's medical practice was just and proper in wife's petition for unlimited separation, even if there was no affirmative evidence that any appreciation in value of practice occurred during marriage; parties had a 12-year relationship, wife worked for husband in his practice throughout the marriage without a salary increase in addition to performing her homemaker contributions, and husband was receiving outright awards of the residence he purchased during separation proceedings and his retirement accounts.

Slater and Slater, 240 Or App 30, 245 P3d 676 (2010)

Valuation of husband's chiropractic business, and, particularly, its goodwill, for purposes of marital property division in marital dissolution proceeding, could not be predicated on an assumption that husband would execute a noncompetition covenant. "Goodwill" generally refers to those intangible assets of a business, such as its relationships with suppliers, customers, and employees, as well as its location, name recognition, and reputation, that engender customer loyalty regardless of who works there. "Business goodwill" is functionally the same as simple goodwill; it connotes enhanced value attributable to factors related to, or inhering in, the entity. "Personal goodwill" connotes the increased earning capacity of a business attributable to an individual's (often, the principal's) skills, efforts, personality, or reputation. Personal goodwill is not, in fact, goodwill for purposes of valuation in the marital dissolution context.

For purposes of valuation in the marital dissolution context, cognizable "goodwill" refers to the value of a business over and above the value of its assets irrespective of the owner's or professional's continued personal services or personality or reputation. Where a business has no value above and beyond its assets absent the owner personally promising his or her services to accompany the sale of the business, there is no goodwill, for purposes of valuation in the marital dissolution context. A closely held business may have goodwill value, for purposes of valuation in the marital dissolution context, where the success or failure of that business does not rest entirely on the business owner's personal services, personality, or reputation.

To the extent that the enhanced earnings of a closely held business or professional practice are due to an individual's skills, qualities, reputation, or continued presence, those

earnings are attributable to the individual, not to the business entity, in valuing the business entity's goodwill for purposes of marital property division in marital dissolution proceeding. Goodwill inhering to husband's chiropractic business as an entity was minimal, for purposes of valuation in marital dissolution context; husband was the sole shareholder of the business, he named the business after himself, over half of the entity's business came from husband's status as a preferred provider, and there was no evidence that that status could be transferred to the business or to a new owner. Capitalized excess earnings formula in expert witnesses' valuations of husband's chiropractic business, for purposes of marital property division in marital dissolution proceeding, did not, itself, justify a finding that business had goodwill value apart from any excess earnings attributable to an employee chiropractor, where there was no evidence that business had any excess earnings apart from revenues attributable to employee's practice, that were not attributable to husband's skills, qualities, reputation, or continued presence.

In re Marriage of Forney, 239 Or App 406, 244 P3d 849 (2010)

In determining a just and proper division of marital property, the first step is to determine which assets are "marital assets" because they were acquired during the marriage. Although husband's military pension was not marital property because it was acquired and fully vested prior to marriage, survivor annuity on pension for which wife was beneficiary was marital asset for which present value should have been included in distribution of marital estate.

Survivor annuity on husband's retirement pension for which wife was beneficiary was marital property for which present value should have been included in and attributed to wife for purposes of equal distribution of property in divorce. Although farm on which husband and wife lived was marital property subject to equal distribution, it was just and proper for husband to retain interest in farm free of interest by wife, insofar as husband would continue to live on property for remainder of his life, husband continued to care for aunt who held life estate, and wife ultimately received greater share of marital estate. Cash surrender values of three life insurance policies and credit union savings account, all acquired during marriage, were marital property subject to equal distribution in divorce.

Clapp and Clapp, 238 Or App 529, 244 P3d 377 (2010)

Wife was entitled to credit, in property division order, for post-separation payments that she had made toward the mortgage on the family home, in divorce action; mortgage on the family home was a marital debt that should have been accounted for in the property division, and husband did not pay toward the mortgage after the parties' separation, and, hence, wife paid both parties' share of that debt.

In dividing property in a divorce case, the court may consider the treatment and payment of marital debt, including a mortgage, by the parties between their separation and the dissolution of their marriage.

Entry of qualified domestic relations order (QDRO) awarding wife a percentage of husband's pension was necessary in order to offset otherwise inequitable division of marital estate resulting from husband's inability to pay equalizing judgment, in divorce action.

Cohabitation/Domestic Partnership

In re Greulich, 238 Or App 365, 243 P3d 110 2010)

Male cohabitant brought action against female cohabitant alleging existence of domestic partnership, seeking money judgment for his share of assets in the amount of $1.3 million, and to have female cohabitant's allegedly fraudulent conveyances of real property set aside. Male cohabitant also named female cohabitant's daughter and trust as third-party respondents. The trial court ruled that no domestic partnership existed. Male cohabitant appealed. Female cohabitant died while appeal was pending and personal representative of her estate was substituted as the real party in interest.

Relationship of male and female cohabitants was not a "domestic partnership" such that male cohabitant was entitled to an equitable portion of partnership property at conclusion of relationship, although parties lived together for over 18 years, he performed maintenance work on her eight acre estate, and they occasionally held themselves out as married; there was no evidence that they used their assets to maximize mutual economic benefit, the vast majority of work to maintain estate was performed by cadres of hired help, they never entered financial transaction representing themselves as married, and there were no joint accounts, investments, or jointly-held properties or retirement plans.

In relationships involving cohabitation, there is no presumption of equal contribution to the acquisition of property owned by the parties during the relationship; rather, in determining how property should be distributed following the breakdown of a relationship that is arguably a domestic partnership, the primary consideration is whether the parties, either expressly or impliedly, intended to pool their resources for their common benefit. In the absence of an express agreement to form domestic partnership, a court determining how property should be distributed following the breakdown of a relationship must examine the evidence to determine whether the parties intended to pool their resources for their common benefit; factors to consider in determining whether there was such an implied agreement include how the parties held themselves out to their community, the nature of the cohabitation, joint acts of a financial nature, if any, how title to the property was held, and the respective financial and nonfinancial contributions of each party.

Parties to a prenuptial agreement may, by their conduct, rescind it.

In re Marriage of Carlson, 236 Or App 291, 236 P3d 810 (2010)

Even if parties lived in domestic partnership before their marriage, the division of partnership assets was determined by intention of the parties, and the evidence was clear that husband and wife did not intend to share ownership of husband's business, and thus, wife was not entitled on divorce to half the appreciation in the value of husband's business during existence of a domestic partnership in the first two years of the parties' relationship; there were no joint financial endeavors or commitments, parties did not share bank account, husband did not place wife's name on his assets, and wife did not participate in husband's business or make financial contribution to it.

In determining how property should be distributed following the termination of a domestic partnership, the primary consideration is the express or implied intent of the parties. When determining how property should be distributed following the termination of a domestic partnership, in the absence of an express agreement, courts examine the evidence and inferences that can be drawn from it to determine what the parties implicitly agreed upon and whether the parties intended to pool their resources for their common benefit, and if the evidence indicates that the parties had that intent, then property acquired during the relationship is considered to be jointly owned, and should be divided accordingly. Factors that are relevant when determining how property should be distributed following the termination of a domestic partnership include how the parties held themselves out to their community, the nature of the cohabitation, joint acts of a financial nature, if any, how title to the property was held, and the respective financial and nonfinancial contributions of each party.

Although the appreciation in value of husband's business that occurred during marriage was a marital asset subject to the presumption of equal contribution, husband rebutted that presumption; considering husband's relatively frugal lifestyle before marital relationship, husband would not have undertaken redecorating projects on his own, wife's efforts as homemaker did not contribute indirectly to appreciation of husband's business or free husband to devote more time and energy to his business, wife made no direct contribution to the acquisition or growth of business, either economically or by working there, parties did not have children, and the assets of the marriage were not otherwise commingled with the business.

Whether property is a marital asset is determined solely by reference to when it was acquired, and relative contribution to the increase in the value of a marital asset may appropriately weigh in the division of that value, but it does not mean that it is any less a marital asset. The burden is on the party seeking to overcome the presumption of equal contribution, that applies to the appreciation in the value of marital asset during marriage, to prove, by a preponderance of the evidence, that the other spouse did not make an equal contribution to the acquisition of the disputed marital asset.

In evaluating whether the presumption of equal contribution, that applies to the appreciation in the value of marital asset during marriage, has been rebutted, statute requires courts to consider a spouse's work as a homemaker as a contribution to the acquisition of marital assets, but fact that a spouse worked as a homemaker does not conclusively establish that the spouse's contribution to the acquisition of an asset was equal. Provision of statute governing division of marital property, requiring court to determine that homemaker spouse made a contribution to acquisition of marital assets, does not mean that courts simply place an economic value on specific tasks that make up the homemaker spouse's contributions, and while homemaker may stay at home and raise children, the value of that work is not simply measured in terms of economic value of child care, but, rather, it entails evaluating the extent to which such work also enables the other spouse to travel or devote time and energy to development of business that otherwise would have been devoted to day-to-day obligations of child rearing. In cases in which the marital asset in dispute is a business, it is important to connect the work of the homemaker spouse, directly or indirectly, to the development of that business pursuant to statute requiring court to determine that homemaker spouse made a contribution to acquisition of marital assets. A portion of the retained earnings of husband's business that otherwise could

have been income to husband were considered to be a contribution by wife, who was a homemaker spouse, but wife would not be credited on an equal basis to husband for that contribution because wife did not work in the business and the retained earnings were compensation for husband's own efforts. Considering wife's moderate homemaking efforts, the dramatic growth of husband's business over the short duration of the marriage, largely due to husband's efforts, and wife's testimony that she had little to do with the business, the evidence established that wife's overall contribution to the business's growth was minimal for purposes of determining distribution of appreciation of husband's business during marriage.

The "just and proper" division of marital property takes into account the social and financial objectives of the dissolution, as well as other considerations that may bear upon the question of what division of the marital property is equitable, and some of those equitable considerations include: the preservation of assets; the achievement of economic self-sufficiency for both spouses; the particular needs of the parties; and the extent to which a party has integrated a separately acquired asset into the common financial affairs of the marital partnership through commingling. Award to wife, who was homemaker, of 15 percent of the appreciation in value of husband's business was just and proper, and because wife's contributions, though relatively limited, were not restricted to time that parties were married, but, rather, included time during which parties lived together before marriage, it was equitable to take wife's contribution during that period of time into account and, as result, to require that the 15 percent apply to total appreciation of husband's business, and not just the appreciation that occurred during marriage; wife came into marriage with few assets, parties were together for six years, and during that time, husband's business grew dramatically, largely because of his own efforts and largely free of any contribution from wife.

Spousal Support

In re Marriage of Harris, 349 Or 393, 244 P3d 801 (2010)

Overall statutory framework for spousal support awards in dissolution actions informs the analysis that should govern the specific statutory provisions addressed to compensatory support. For a spouse's contributions to be "significant" under statute governing compensatory spousal support awards, those contributions need not be significant in some aspect that is separate and apart from contributions that are typical of a healthy marital relationship. Statutory amendment, providing for award of compensatory spousal support when there has been a significant financial or other contribution by one party to the education, training, vocational skills, career or earning capacity of other party, did not establish higher threshold for an award of compensatory spousal support than previously existed for property distributions under the former enhanced earning capacity statute; new compensatory spousal support provision broadened kinds of contributions that could be considered beyond those enumerated under former enhanced earning capacity statute, and new provision did not require that contributions all be connected to enhanced earning capacity.

Wife made "significant" contributions to husband's education and career sufficient to trigger consideration in dissolution action of a compensatory spousal support award under the relevant statutory criteria, where wife worked full time while husband attended both undergraduate and dental school, wife's work provided the family with financial support and health insurance, wife assumed primary homemaking and childcare responsibilities once husband established his dental practice, and wife also worked part time in husband's dental practice for a period of seven years. Wife's contributions were sufficient in amount, duration, and nature to weigh in favor of an award of compensatory spousal support in dissolution action, even if husband's higher earning capacity depended in part on being allowed to buy into his father's already successful dental practice on favorable terms and on husband's personal skill level, where wife's full-time work while husband attained his undergraduate degree and his dental degree contributed significantly to husband's education and training and was instrumental in his ability to obtain the dental degree that was the gateway to his dental career.

Substantial contrast in parties' relative earning capacities weighed in favor of an award of compensatory spousal support to wife who worked full time while husband attended undergraduate and dental school, where husband averaged more than $350,000 per year in income from his dental practice and also received rental income in each of those years averaging $23,000, while wife had earning capacity of approximately $30,000 to $40,000 per year based on her current training and prior job experience, and provision governing proceedings to reconsider spousal support awards established a particular connection between compensatory support and the earning capacity of spouse paying such support.

The fact that a contributing spouse receives significant assets in the disposition of a marital estate should not preclude an award of compensatory spousal support in all circumstances. Relevant inquiry, under provision requiring consideration of extent to which the marital estate has already benefited from the contributions made by the spouse seeking an award of compensatory spousal support, is how much the marital estate has already realized those

benefits compared to how much the marital estate would ultimately realize as the benefits of those contributions.

Appropriate benchmark for compensatory spousal support is not to provide the contributing spouse with an award that fully realizes all the benefits that would be obtained were the marriage not dissolving. Significant asset distribution upon dissolution of marriage and the financially comfortable lifestyle available to wife during the marriage did not disqualify her from an award of compensatory spousal support based on her contributions in helping husband through the years it took for him to obtain his dental degree; wife would almost certainly have received same distribution of marital assets if she and husband had married after he completed dental degree, and husband still had a remaining 17-to-27-year highly productive earning career.

The amount of support awarded under each category of spousal support is relevant and should be considered in determining the overall amount of spousal support that is just and equitable, but because each category of spousal support serves a different function, an award of spousal support under one or more of the categories should not generally serve to negate entirely an award of support under the other categories. Compensatory spousal support award to wife of $2,000 per month for ten years was just and equitable in connection with wife's contributions including working full time to enable husband to complete dental degree, where trial court also awarded wife transitional support and maintenance support totaling $7,000 per month for four years, $4,000 per month for two years, $2,500 per month for two years, and $1,000 per month for one year, marital assets provided wife a comfortable lifestyle during marriage, she received substantial distribution of marital assets in dissolution action, and husband had ability to produce income of $350,000 to $400,000 per year over the next 17 to 27 years.

Cassezza and Cassezza, __ Or App __, __ P3d __ (June 15, 2011)

Husband appealed a dissolution judgment, arguing that the trial court erred in awarding wife transitional spousal support for which she was ineligible by the terms of ORS 107.105(1)(d)(A) and in awarding wife too much maintenance spousal support for too long a period of time. Husband argued that, because wife presented no evidence that she intended to attain education and training necessary to allow her to prepare for reentry into the job market, or for advancement therein, the trial court's award of transitional spousal support was error. The Court of Appeals held that the trial court erred in awarding transitional spousal support in the absence of evidence from wife that she intended to attain education and training necessary to allow her to prepare for reentry in the job market or for advancement therein, as required by ORS 107.105(1)(d)(A). On *de novo* review, the Court of Appeals increased the maintenance spousal support award to take into account wife's chronic poor health, which significantly impaired her earning capacity.

Abrams and Abrams, 243 Or App 203, __ P3d__, (2011)

This case involves the award of spousal support upon the dissolution of the parties' 28–year marriage. Wife appeals from a judgment awarding transitional support to her in the amount of $750 per month for 24 months. Wife contends that she is entitled to a longer duration of

transitional support and to indefinite maintenance support. On *de novo* review, ORS 19.415, we modify the judgment to award maintenance support of $1,800 per month and otherwise affirm.

The parties married in 1980 when they were 19 years old. During the last seven years of the marriage, they separated "in house" several times, and in 2005, wife moved to Nevada. At the time of trial, both parties were age 48 and in good health. The parties have one adult child who is independent. Husband was the primary wage earner during the marriage and has consistently had stable full-time employment. At the time of dissolution, he worked for Oregon State University as an information technologist, and the trial court found that his income was approximately $7,600 per month. His monthly expenses as shown on his uniform support affidavit were approximately $6,175. Husband testified that he is also attempting to develop a musical entertainment business, but that it is not yet profitable. Should the business not become profitable in the next year, husband's intention is to abandon it. Should the business become profitable, his intention is to sell it.

At the time of the marriage, the parties agreed that they would live off of husband's income and that they would not go into debt. Wife was a homemaker throughout the marriage and had primary responsibility for childcare. She also managed the parties' finances and frugal lifestyle and earned a small amount of income from a variety of part-time jobs, including house cleaning, working in retail and in restaurants, and driving for the United States Postal Service. In 2004, wife obtained a hair stylist license. She volunteered at a salon before the parties separated, because she did not need the income and wanted to improve her skills.

In 2005, the parties separated, and wife moved in with family in Nevada. During the first year of separation, she did not work. She had access to the parties' joint accounts and used her debit card to withdraw small amounts of cash each month and to pay for living expenses. Husband also gave her $400 to $500 when she requested it; but, wife was frugal and did not have many expenses. Husband continued to pay for wife's health and auto insurance.

After the first year of separation, wife began to work cutting hair. Most recently, during the seven months preceding trial, wife was employed at a salon in Nevada at minimum wage and earned approximately $990 per month. Wife testified that the economy has had a negative impact on her employment as a stylist and on her ability to find other work. She testified that she has not found full-time employment in a hair salon, but that, if the economy improves, she hopes to have income of $2,000 per month. The trial court imputed to wife a potential minimum wage income of $1,455. Wife's uniform support affidavit lists monthly expenses of approximately $3,380.

At trial, wife sought 48 months of transitional support of $750 and indefinite maintenance support of $2,000. The trial court awarded wife 24 months of transitional support of $750 per month, but no maintenance support. In its letter opinion, the trial court explained that no maintenance support was warranted because "[w]ife is young enough and healthy enough to improve her earning ability and seek employment within two years that would sustain her."

Wife contends on appeal that the duration of transitional support is insufficient to allow her to attain full-time employment in light of current economic conditions. She contends, further,

that in light of the length of the marriage and the disparity in the parties' earning capacities, she is entitled to an award of maintenance support in the amount of $2,000 per month. In support of the trial court's award, husband argues that, considering wife's already-marketable skills as a hair stylist, two years is sufficient to allow her to attain a level of self-sufficiency. *See* ORS 107.105(1)(d)(A); *Harris and Harris*, 349 Or 393, 416, 244 P3d 801 (2010) (transitional support is appropriate in an amount and duration "needed for a spouse to obtain the training and education necessary for reentry into the job market"). Husband contends, further, that the trial court appropriately determined that an award of maintenance support, see ORS 107.105(1)(d)(C), is unnecessary, because the parties lived frugally during the marriage, and wife's eventual earnings as a hair stylist will be sufficient to support the lifestyle that she has chosen for herself during the years of separation. The court concluded that the trial court's award of transitional support is adequate and affirm that award without further discussion. The court addressed the issue of maintenance support and concluded that, without an award of spousal maintenance to wife, the judgment was not just and equitable, and that an award of $1,800 per month in indefinite support is appropriate.

The court is authorized by ORS 107.105(1)(d) to award spousal support in an amount and for a duration that is "just and equitable." Maintenance support, the type of support at issue in this case, allows one financially able spouse to contribute to the support of the other, depending on the financial needs and resources of each party. *Harris*, 349 Or at 416. In a long-term marriage such as this, 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, *Mallorie and Mallorie*, 200 Or App 204, 219–20, 113 P3d 924 (2005), while at the same time keeping in mind the objective of ending the support/dependency relationship within a reasonable time, if that is possible without injustice or undue hardship, *Taylor and Taylor*, 136 Or App 416, 419, 902 P2d 120 (1995).

A spousal support award should be based on circumstances existing at the time of dissolution, but must also take into account the lifestyle enjoyed by the parties during the marriage. In addition, spousal support should not be set at an amount that is higher than the obligor can reasonably afford to pay at the time of dissolution. An award of spousal support is not precluded when one party has received a lump sum award, such as wife's equalizing judgment in this case, as long as it is otherwise just and equitable to award support to enable the dependent spouse to maintain a standard of living comparable to that enjoyed during the marriage. In determining the amount and duration of support, the court must consider the factors outlined in the statute, ORS 107.105(d)(C), as well as the other financial provisions of the judgment; none can be considered in isolation. *Grove and Grove*, 280 Or 341, 344, 571 P2d 477, *modified on other grounds*, 280 Or 769 (1977).

The statutory provision relating to maintenance support, ORS 107.105(d)(C), provides that the court may award

"[s]pousal maintenance as a contribution by one spouse to the support of the other for either a specified or an indefinite period. The factors to be considered by the court in awarding spousal maintenance include but are not limited to:

"(i) The duration of the marriage;

"(ii) The age of the parties;

"(iii) The health of the parties, including their physical, mental and emotional condition;

"(iv) The standard of living established during the marriage;

"(v) The relative income and earning capacity of the parties, recognizing that the wage earner's continuing income may be a basis for support distinct from the income that the supported spouse may receive from the distribution of marital property;

"(vi) A party's training and employment skills;

"(vii) A party's work experience;

"(viii) The financial needs and resources of each party;

"(ix) The tax consequences to each party;

"(x) A party's custodial and child support responsibilities; and

"(xi) Any other factors the court deems just and equitable."

The court considered each of the relevant factors:

The duration of the marriage. This is a marriage of over 28 years and, even with the periods of separation, it is considered to be long-term, thus weighing in favor of a support award that places the parties in relative parity regarding their standard of living, and-to the extent possible-allows the parties to maintain the standard of living enjoyed during the marriage.

The age of the parties. Both parties were age 48 at the time of trial. Their ages make it less likely that either of them will undergo a significant career change during the remainder of their lifetimes.

The health of the parties. The parties are both in good health, weighing in favor of their ability to earn their potential incomes.

Standard of living during the marriage. The record shows that the parties lived modestly but comfortably during the marriage on husband's salary. They had health and dental insurance through husband's employment, were able to save for retirement and pay off the mortgage on their small home, took a family vacation each year, and were debt-free at the time of dissolution. During the most recent period of separation, wife lived with family or friends in Nevada, paying a small amount of rent, and, although she did have access to the parties' accounts and used her debit card to the parties' joint account to pay her expenses, she did not draw significantly from the parties' resources. Husband asserts that wife's chosen standard of living during the period of

separation represents the lifestyle "during the marriage" and should guide the support decision and militates against an award of spousal support. However, it was clear from the record that wife's modest-indeed, spartan-lifestyle during the period of separation was driven by a desire not to deplete the marital resources and the hope that the parties would reconcile. The court declined to consider that lifestyle as exemplary of the standard of living during the marriage.

The relative income and earning capacity of the parties. The parties' incomes and earning capacities are clearly disparate. Husband is college-educated, has held full-time employment for the duration of the marriage, and is regularly employed, and the record shows that his gross monthly income in 2008 was $7,739. Although wife held some part-time employment, her primary role during the marriage was as a homemaker, and she did not begin to develop a career until she became trained as a hair stylist in 2004; her average monthly income from hair styling in 2008 was $992. The trial court attributed to wife a minimum-wage monthly income of $1,455, and wife testified that, if the economy should improve, she hoped to earn $2,000 per month. Even under the best of circumstances, however, wife's earning capacity is a fraction of husband's.

In husband's view, wife's more limited income is self-imposed due to her lifestyle decisions and conduct over the last several years showing that she places her social and personal life over full-time work, as illustrated by her decision to quit her minimum wage job cutting hair when her employer would not give her time off for her daughter's wedding, and to spend her time instead attempting to develop a career as a professional poker player, an irregular, erratic, source of income. He argued that "[a]ll of the evidence supports the conclusion that she intends to rely solely on Husband for support so long as the Court will allow her to do so." The court understood the record differently. Contrary to husband's contention, wife was interested in working and had made an effort to do so.

Training and employment skills. As noted, husband has a college degree and has been stably employed throughout the marriage. Wife's license as a hair stylist is her only specialized training, and it is relatively recent.

Work experience. Husband has had stable employment throughout the marriage and had been with his current employer for nine years at the time of trial. Wife, in contrast, has dabbled in employment and has never worked full time.

Financial resources and needs. As noted, wife's earning capacity is considerably less than husband's, and he has the ability to live comfortably while also paying support. It is true, as we have noted, that wife will receive an equalizing judgment of $140,000 as part of the property division; that money could be a resource for the purchase of a home or as a retirement investment. Contrary to husband's contention, however, it is not income-producing property such that it reduces her need for monthly support. *See Grove*, 280 Or at 344 (property division should be considered in determining whether to award spousal support, especially if the purpose of the property award is to provide income). The parties' uniform support affidavits show that wife's monthly expenses are approximately half of husband's.

Indefinite support is appropriate. It is true, as husband argues, and as the cases indicate, that in determining the amount and duration of spousal support, the goal of self-sufficiency is an important consideration. However, in a long-term marriage such as this, where the parties should be separated on as equal a footing as possible, the relevant level of self-sufficiency is that which allows them to maintain a standard of living that is comparable to that enjoyed during the marriage. Wife, having spent at least the first 20 years of the marriage working primarily as a homemaker, is seriously disadvantaged in her earning capacity, and, although wife's income might increase over a transitional period of two years, the parties agree that her earning capacity will not exceed $2,000. On that amount of income, wife could be minimally self-supporting, but not in a manner comparable to that enjoyed during the marriage. Husband, in contrast, has a stable career in information technology, with a prospect for income growth and with a current income sufficient to pay spousal support and to allow both parties to enjoy a standard of living not overly disproportionate to that enjoyed during the marriage. The court rejected husband's characterization of the record as showing that wife wants to live off of husband as long as possible and has made no effort to improve her standard of living.

The court noted that the "not overly disproportionate" standard that has been so frequently cited in our cases was a statutory standard, former ORS 107.105 (1997), and the statute no longer includes that exact construct. It continues, however, to be an appropriate guideline under the general considerations. *See, e.g., English and English*, 223 Or App 196, 194 P3d 887 (2008) ("Under ORS 107.105(1)(d)(B)(vi), the amount of support awarded by the trial court will allow wife to close the gap between her income and expenses and will provide her with a standard of living not disproportionate to that maintained during the marriage.").

As for the amount of support, the court concluded that, based on the parties' uniform support affidavits, support of $1,800 per month is just and equitable. That is an amount that husband can afford to pay and that, together with the equalizing judgment, will allow wife to buy a home, to continue to pursue a career in hair styling, and to live a lifestyle comparable to that enjoyed during the marriage. It is true, as husband points out, that the payment of spousal support will have an adverse effect on his standard of living, but that is a consequence of dissolution. And, as husband also correctly states, "[i]t is appropriate that the impact of the reduction of the standard of living be borne equally by the parties." An award of monthly maintenance spousal support of $1,800 will allow for just such a sharing.

In re Marriage of Hendgen, 242 Or App 242, __ P3d __ (2011)

The trial court entered judgment of dissolution, in which it divided marital property and debt, and awarded wife $4000 per month in indefinite spousal support. Former husband appealed. Amendments to statutory provision governing standard of appellate review did not apply to appeal in which the notice of appeal was filed after June 4, 2009. ORS 19.415 (2007), (2009).

Trial court award to wife of indefinite spousal support in addition to equal property division was warranted, but earning capacity of husband was speculative, such that the Court of Appeals would modify the amount of the award from $4000 per month to $400 per month; both parties earning capacities were speculative in that prospective income was derived from divided

investment properties, award could be reconsidered at later date should incomes become less speculative, and award of $400 was within husband's current ability to pay and would assist wife with approximately half of her monthly medical expenses. Evidence supported trial court finding, in determining spousal support award on petition for marital dissolution, that wife's post-petition expenditures were for appropriate household expenditures not grossly disproportionate to the standard of living to which she had been accustomed during the marriage; expenditures were reflected in wife's withdrawal of significant amounts from various accounts owned by the parties and by an additional incurred debt on the parties' credit card, but wife explained that she expended the funds and incurred the debt in order to run the household, including paying for food, gas, utilities, clothing, entertainment, repairs, and a handyman, and that she had to do so because husband had denied her access to other sources of funds.

In re Finear, 240 Or App 755, 247 P3d 1238 (2011)

Wife was entitled to indefinite maintenance support of $1100 per month, where wife did not hold regular employment outside the home during the 21-year marriage, had raised and home-schooled the parties' children, and lacked meaningful work experience and skills; such amount, together with wife's full-time employment, would cover her reasonable household expenses.

In re Marriage of Morrison, 240 Or App 656, 247 P3d 1281 (2011)

Income attributable to wife, for purposes of determining husband's spousal support obligation in divorce action, was the $36,000 per year she could earn after she completed her master's degree in biology, rather than the higher amount she could earn if she retrained and upgraded her skills as a medical technologist; wife had been absent from job market for 17 years and had not worked as a medical technologist for 24 years, and before the separation husband had supported wife's plan to return to school so that she could earn a master's degree in biology.

The amount of support awarded under each statutory category of spousal support, *i.e.*, compensatory spousal support, transitional spousal support, and maintenance spousal support, is relevant and should be considered in determining the overall amount of spousal support that is just and equitable, but, because each category of spousal support serves a different function, an award of spousal support under one or more of the categories should not generally serve to negate entirely an award of support under the other categories. In considering the extent to which the marital estate has already benefited from the contribution of the spouse seeking compensatory spousal support, as factor for awarding compensatory spousal support, the relevant inquiry is how much the marital estate has already realized the benefits of the spouse's contributions compared to how much the marital estate would ultimately realize as the benefits of those contributions.

Wife's contributions to husband's medical education, training, career, or earning capacity were significant, so as to trigger an award of compensatory spousal support, in divorce action; wife's income was predominant source of income for spouses as husband completed his final two years of medical school, thereafter, while husband completed his three-year internship and residency, wife worked to supplement his modest income even after birth of their two older

children, and, while spouses eventually agreed that wife would leave the workforce to maintain the family home and assume primary child-care responsibilities, those contributions allowed husband to concentrate his attention on completion of his cardiology training.

Statutory factors weighed in favor of awarding compensatory spousal support to wife, whose contributions to husband's medical education, training, career, or earning capacity were significant; wife contributed not only economically to marital unit and parties' growing family for many years but also supported husband's efforts by moving the family and caring for their children so he could concentrate on completion of the necessary training in his medical specialty, during the marriage of more than 20 years husband's earning capacity as a cardiologist had been meaningfully realized only in the last decade preceding the separation and husband would continue to have a highly productive earning career for at least another decade, marital property awarded to wife did not completely offset the contributions that she made to husband's education, career, training, and enhanced earning capacity, and there was great disparity between relative earning capacities of parties.

Compensatory spousal support award for eight years, rather than indefinite award that would essentially allow cardiologist's wife to receive compensatory support that would realize all of the benefits that she would have obtained had the marriage lasted until end of husband's earning career, was warranted; husband was in his late forties, so it could be expected that his earning career would last at least another decade.

In a divorce involving a long-term marriage, the primary goal of maintenance spousal support is to provide a standard of living comparable to that enjoyed during the marriage. Award of indefinite maintenance spousal support to cardiologist's wife was warranted; parties were married for over 20 years, wife's earning capacity would never begin to approach husband's earning capacity as a cardiologist, and husband earned a substantial income in the years before the parties separated, though the parties were relatively young and in good health at time of divorce trial, and wife would likely be financially independent and self-supporting after obtaining her master's degree in biology and transitioning back into the work force.

In re Marriage of Cook, 240 Or App 1, 248 P3d 420 (2010)

Evidence supported indefinite spousal support award to wife of $8,000 per month, in wife's petition for unlimited separation, where husband was 69 and wife was 60 years old, husband had no current plans to retire, parties enjoyed very comfortable lifestyle, husband earned more than $300,000 per year working only 30 hours per week, wife received no income-producing property, wife lacked skills necessary for meaningful full time employment, based on spousal support award parties' after-tax spendable incomes were substantially disparate, it was uncertain that parties' attempt to claim for development of property would be successful, and wife's total monthly expenses were greater than amount of support awarded.

In re Marriage of Forney, 239 Or App 406, 244 P3d 849 (2010)

A survivor's annuity is analogous to an unvested pension, and is subject to valuation and the court's disposition on dissolution. There was no authority for trial court to require that

spousal support obligation to wife be paid out of husband's military pension benefits, which were non-marital property, or that benefits serve as security for spousal support obligation. While it may be appropriate in some circumstances to require an obligor to secure an obligation to pay support, there is no evidence that such security is necessary, nor is there any basis for requiring that property that is not a marital asset be the source of that security. Percentage of husband's retirement benefits earned during marriage was marital property and should have been included in trial court's distribution of marital estate pursuant to qualified domestic relations order; the trial court's splitting the asset through a division of the monthly income stream did not reflect a correct division of the marital portion, and marital portion would be divided equally. Order that husband pay wife $500 per month in spousal support indefinitely was supported by trial court's findings regarding length of marriage and disparity in parties' incomes.

In re Marriage of Sather, 238 Or App 235, 243 P 3d 76 (2010)

Trial court's spousal support award to wife of $5,000 per month for five years and $4,000 per month thereafter was not just and equitable because it left husband with insufficient funds to maintain standard of living that was sufficiently proportionate to standard of living that parties enjoyed during marriage, and accordingly, the spousal support award would be modified to give wife $4,000 per month for five years and $3,000 per month thereafter; husband's gross monthly income, after subtracting his fixed monthly deductions, was $7,633, and after subtracting his monthly spousal support payment of $5,000, husband was left with $2,633 in gross income per month, and that amount was insufficient to cover husband's monthly expenses, which were modest and included rent for two-bedroom apartment.

In appropriate cases, one aim in awarding spousal support is to ensure that the supported spouse is provided with a standard of living that is not overly disproportionate in relationship to the marital standard of living. Eliminating disparities is not the goal of spousal support, but, in a long-term marriage, the court may place the parties in relative parity regarding their standards of living.

Hook and Hook, 238 Or App 172, 242 P3d 697 (2010)

The purpose of maintenance support is to allow one spouse who is financially able to contribute to the support of the other spouse the time necessary to allow the dependent spouse to become financially independent and self-supporting. In deciding how much and for how long maintenance support should be ordered, the Court of Appeals does not attempt merely to eliminate any disparities in the parties' incomes or to enable one spouse to look to the other indefinitely for support. In determining the amount and duration of maintenance support, the Court of Appeals keeps in mind the goal of ending the support-dependency relationship within a reasonable time if that can be accomplished without injustice or undue hardship.

In determining the amount and duration of maintenance support, the court must consider the other financial provisions of the judgment, and none can be considered in isolation. Court of Appeals would extend duration of wife's transitional support award in divorce proceedings to expire at time of her estimated completion date for securing her master's degree as set out in her education plan, since wife's plan to obtain such degree was reasonable.

Trial court's award to wife, who made significant financial and labor contributions to education, training, and career of husband while deferring her own educational and career plans, of $3,000 per month in compensatory support for two years, which was subsidized through reduction of her separate maintenance support award during same period by $2,000 per month, was inadequate, in divorce proceeding; just and equitable award was $3,000 per month for 10-year period without utilizing any subsidy from other awards.

The determination of whether a compensatory award in a divorce proceeding meets the statutory requirement of being just and equitable in all the circumstances is fact specific. The statutory factor of the extent to which the marital estate has already benefited from a spouse's contributions, used in determining whether a compensatory award in a divorce proceeding meets the statutory requirement of being just and equitable in all the circumstances, requires the court to look at the totality of the dissolution judgment, specifically to the property division, to determine how, and if, spousal support should be awarded based on the property division ordered by the court.

Trial court's maintenance support award, in divorce proceeding, to wife of $2,000 for first two years, which was used to subsidize portion of wife's monthly compensatory support award of $3,000 during same two-year period, $4,000 per month for following two years, and $3,000 per month for indefinite period thereafter, was inadequate in that it did not provide sufficient support at time wife would have great need due to low employment income, educational plans, and duties as children's primary caretaker; just and equitable award was $2,000 per month for four years, without using such award as subsidy for compensatory award, $1,000 for following six years, and $3,500 per month for indefinite period thereafter.

In re Marriage of Draper, 236 Or App 463, 236 P3d 788 (2010)

Wife appeals a general judgment in a marriage dissolution case and challenges the trial court's spousal support award. On de novo review, we concur in the trial court's judgment in this case in all respects except one: In our view, the trial court's award of only three years of spousal support was not just and equitable. See ORS 107.105(1)(d). Wife, who has custody of the parties' children, requested spousal support until the children, the youngest of whom was born in January 2000, graduate from high school. However, in the dissolution judgment, the trial court awarded spousal support of $3,000 per month for one year, followed by $2,000 per month for the next year, and $1,000 per month for the third year, with no spousal support after the third year. Given all the circumstances in this case, including the length of the marriage (nearly 17 years), the disparity in the parties' incomes and earning capacities, and wife's custodial responsibilities, we conclude it is just and equitable for wife to continue to receive $1,000 per month in spousal support until January of 2018, when the youngest child turns 18.

In re Marriage of Carlson, 236 Or App 291, 236 P3d 810 (2010)

Award to wife of $3,000 in transitional spousal support for three years was appropriate to allow wife to regain her health and build up design business or otherwise prepare for re-entry into job market; wife had not worked outside home for past 9 years and, because of her back

problems, it would be difficult for wife to return to her work as cosmetologist, wife had yet to establish herself despite training as interior designer, she had begun process of starting business, and, while wife hoped to earn $60,000 to $80,000 per year as interior designer, it would take time for wife to meet that goal. Even with award of $3,000 in transitional spousal support for three years, wife's income would not be sufficient for many years to cover her expenses or to allow her to be self-supporting, and, for that reason, an award of maintenance support in the amount of $3,000 per month for six years was also appropriate; parties' relationship was relatively brief, wife was young and had skills and desire to become self-supporting, the expectation was that, with time, wife's health would improve and allow her to work and she would be able to be self-supporting, and, despite her back problems, wife kept active, decorating the parties' houses and caring for their pets.

Spousal Support Modification

Beebe and Beebe, __ Or App __, __ P3d __ (June 29, 2011)

Husband appealed from a judgment that denied his motion to modify his spousal support obligation to wife, arguing that the trial court erred in failing to terminate the transitional portion of the award and in failing to substantially reduce the residual maintenance award. Husband argued that because there had been a substantial change in his economic circumstances, his support obligation should be reduced. During the course of husband's direct testimony at trial, husband's counsel asked husband to describe the underlying purpose of the transitional support award. At that point, the trial court, *sua sponte*, informed the parties that because the spousal support award in the case was the product of the parties' stipulation, the pending line of inquiry was irrelevant. Husband then made an offer of proof in which husband indicated that the purpose of the transitional support award had been to allow wife to obtain education or career training and that wife had told him that she no longer intended to do so. Wife offered no evidence of her own on the subject. The trial court did not allow husband to testify regarding the purposes of the transitional support award. On review, the Court of Appeals held that the trial court erred in excluding husband's testimony because it would have been relevant to the determination of whether the purpose of the transitional support award had been satisfied. Thus, neither party had a reasonable opportunity to develop the record on that issue.

Frost and Frost, __ Or App __, __ P3d __ (June 29, 2011)

Wife appealed the trial court's supplemental judgment terminating husband's maintenance spousal support obligation to wife. The parties were married for 20 years before separating in 2001. In 2003 the parties entered into a martial settlement agreement that was incorporated into a judgment of dissolution. That judgment awarded wife maintenance spousal support in the amount of $3,000 per month for a period of eight years. Wife remarried in 2007 and her new husband had an annual income of $500,000 and assets of $7 million. Wife's net worth had increased to $1 million as a result of her remarriage and accumulation of assets during the years she co-habited with her new husband before marrying him. In 2008 husband filed a motion to modify the dissolution judgment to terminate his spousal support obligation, on the grounds that the increase in wife's income and standard of living had supplanted the purposes of the spousal support award. On *de novo* review, the Court of Appeals found that husband had not anticipated wife's remarriage and that, as a result of that marriage, wife's income and standard of living had increased substantially. Accordingly, the Court of Appeals held that the purpose of the spousal support award had been satisfied and the support award should be terminated.

Barron and Barron, 240 Or App 391, 246 P3d 500 (2011)

Version of spousal support modification statute in effect at the time of the dissolution applied to former husband's motion to terminate or reduce his spousal support obligation, where the law that subsequently amended the statute specifically provided that the amendments applied only to petitions for annulment, dissolution or separation filed on or after the effective date of the act. ORS 107.135(2)(a) (2002).

If there has been a substantial change in economic circumstances of a party, then the overriding consideration in determining the appropriate amount of spousal support, on motion to terminate or reduce, is what is just and equitable under the totality of the circumstances. ORS 107.135(2)(a) (2002). Purpose of spousal support award was to enable wife to maintain a standard of living not overly disproportionate to that enjoyed during the marriage, where dissolution court explained the spousal support award in the judgment by noting that it was a long term marriage, wife had remained outside the traditional work force throughout the marriage to maintain the family home and to raise the parties' children, and wife had suffered extreme professional detriment, had few marketable skills, and required spousal support. ORS 107.105(1)(d) (1998).

Whether changes in the economic circumstances of an obligee spouse justify termination of spousal support depends on whether the changes satisfy the purposes of the support. ORS 107.105(1)(d) (1998). When determining whether to terminate spousal support, the first question is what the purpose of the support was, and the second question is whether the changes in economic circumstances satisfy that purpose. ORS 107.105(1)(d) (1998).

Remarriage is not, by itself, grounds for termination of spousal support, because some of the purposes behind spousal support are not altered or ended by remarriage. ORS 107.105(1)(d) (1998). Wife's remarriage and resulting improved economic circumstances satisfied the purpose of spousal support award, warranting termination of spousal support, where the dissolution judgment was intended to ensure wife an income of $2,239 ($1,039 in presumed income and $1,200 in spousal support), and after wife remarried, her one-half of potential shared income, excluding spousal support, had increased to $2,306.50. ORS 107.105(1)(d) (1998). The first factor in evaluating spousal support after remarriage is the potential shared income of the obligee spouse, which is then weighed against the standard of living that the initial award was intended to ensure for the obligee spouse. If, as a result of remarriage, an obligee's income has increased to the point where, without the spousal support, it is equal to or greater than the income the support was intended to ensure, the support should be terminated, unless it would be inequitable to do so.

In re Marriage of Reaves, 236 Or App 313, 236 P3d 803 (2010)

Former husband's reduced income as result of planned retirement did not justify outright termination of his spousal support obligation; after retirement, former husband's monthly income was $10,000, whereas former wife's, without spousal support, was $3,300, former husband's income minus expenses resulted in almost $6,000, whereas former wife, without support, would have had a deficit, meaning former wife could not continue to make ends meet, while former husband enjoyed ample income to continue to contribute to former wife's needs.

A termination of spousal support is proper when the purpose of the initial award has been met; however, when the award does not provide any guidance as to its purpose, the court's task is to maintain the relative positions of the parties as established in the initial divorce decree. Former husband's voluntary contributions to his retirement benefits, which went towards survivor benefits for his current wife, was appropriately recognized as income for purpose of calculating former husband's post-retirement income and determining an appropriate spousal

support obligation, on his motion to terminate his obligation; former husband's retirement income was available to him to spend as he wished, and the fact that he chose to spend part of it to secure a benefit for his current wife did not make it any less a resource that was available to him.

When calculating a former spouse's available resources and considering need and ability to pay spousal support, it is appropriate to take into account, among other relevant considerations, the number of members of a household and the expenses that they incur. The determination of an appropriate level of spousal support is not a matter of applying a mathematical formula. When calculating income and financial resources available to each party for purposes of ruling on former husband's motion to terminate his spousal support obligation, trial court appropriately refrained from considering wife's potential retirement benefits as current income, which would have, in effect, required her to take early retirement and suffer a reduction in benefits from the amount that would have been available to her were she to retire later, as she planned to do.

Whether, if wife were to sell her residence and timber property, property could have been sold for an amount that would have allowed her to reinvest a surplus that could yield a return that could supplement her income was too speculative for purposes of attributing the unrealized return to her as income, for purposes of calculating each party's available financial resources in ruling on former husband's motion to terminate his spousal support obligation. Former husband's planned retirement, with resulting drop in monthly income to approximately $10,000, created a change in circumstances warranting reduction of his monthly spousal support obligation to former wife from $3,200 to $1,400; amount was affordable for former husband and would allow former wife to meet her expenses while preserving savings that she would need when she was no longer working.

Child Support

Gellatly v. Gellatly, 243 Or App 367 , __ P3d __ (2011)

Petitioner seeks review of a Columbia County Circuit Court order that directed the Division of Child Support of the Department of Justice to withdraw an income-withholding order that the division had issued to the Social Security Administration to enforce respondent's child support obligations. The income-withholding order directed the Social Security Administration to deduct the amounts that respondent owed for child support from his Social Security payments and to pay those amounts to the division. Respondent challenged the income-withholding order in circuit court. The court held a hearing on the challenge on April 27, 2009, and two days later issued an opinion letter in which it concluded that the income-withholding order had to be withdrawn.

The court noted in its letter that "ORS 25.405 sets out the rules for contesting an order to withhold and makes it clear at ORS 25.405(2) [that] the only basis for contesting the order to withhold is a mistake of fact." ORS 25.405(2) defines "mistake of fact" as "an error in the amount of current support or arrearages, or an error in the identity of the obligor." The court then turned to ORS 25.245 (2007), amended by Or Laws 2009, ch 80, § 1, which establishes a rebuttable presumption that an obligor is unable to pay child support if the obligor is receiving cash payments from any of a variety of governmental assistance programs, including the federal Supplemental Security Income Program. The court concluded that (1) respondent was subject to the rebuttable presumption because he "receives income from the Federal Supplemental Security Income Program" and (2) no one had sought to rebut the presumption. See ORS 25.245(3), (4) (2007) (prescribing procedure by which to rebut presumption that an obligor receiving governmental assistance payments is unable to pay child support). The court concluded, therefore, that the income-withholding order had to be withdrawn because "there is a mistake of fact, to wit, [respondent's] ability to pay and the amount to be paid if he is able to pay child support."

ORS 25.245(1) (2007) provides:

"Notwithstanding any other provision of Oregon law, a parent who is eligible for and receiving cash payments under ORS 412.001 to 412.069 and 418.647, the general assistance program as provided in ORS chapter 411 or a general assistance program of another state or tribe, the Oregon Supplemental Income Program or the federal Supplemental Security Income Program shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue unless the presumption is rebutted."

The Court of Appeals' review of the transcript of the April 27, 2009, hearing revealed, however, that no evidence was submitted at the hearing. Consequently, there is no evidence in the record to support the court's finding that respondent was receiving cash payments from the federal Supplemental Security Income Program and, hence, that he was subject to the rebuttable presumption in ORS 25.245 (2007). The court therefore erred in ordering the child support division to withdraw its income-withholding order.

In re Marriage of Mathews, 242 Or App 225, __ P3d __, (2011)

Remand was required for a recalculation of father's child support obligation, in post-divorce administrative review of father's child support obligation; no evidence supported the trial court's estimate of father's gross receipts from his business based on a ratio identical to the ratio used for mother's business.

Hunt and Hunt, 238 Or App 195, 242 P3d 682 (2010)

Trial court did not have authority, in proceeding concerning action to establish father's alleged child support arrearage, to reduce claimed arrearage based on alleged oral agreement between mother and father to reduce child support obligation from $392 per month to $200 per month until minor child attained age of 18; father did not file and serve motion to modify child support obligation prior to child's reaching age of 18. Father was entitled to credit, under statute permitting trial courts to allow credits against child support arrearages where obligor had physical custody of child, against child support arrearages in amount representing four-month period in which child, who had already attained age of 18, lived with father, in proceeding concerning establishment of father's alleged child support arrearage; father and mother acknowledged that child resided with father for such period of time.

In re Marriage of Reeves, 237 Or App 126, 238 P3d 427 (2010)

Stipulated judgment of dissolution providing that child support would continue up to age 23 so long as child was unmarried and a full-time student neither violated the law nor contravened public policy and, thus, was enforceable. An agreement to provide child support after the child turns 21 neither violates the law nor contravenes public policy. ORS 107.104, 107.108. Statute authorizing court to award support to a child attending school who is under age 21 does not forbid payment of child support beyond the age of 21. ORS 107.108.

Attorney Fees

In re Marriage of Polacek, 349 Or 278, 243 P3d 1190 (2010)

Statute governing awards of attorney fees incurred "on an appeal" did not authorize an award for fees incurred in opposing a petition for review, in action in which mother sought fees for defending against father's petition for review, upon affirmance of order denying his motion to modify parenting time provision of dissolution order; services of mother's counsel, principally the preparation and filing of a brief urging Supreme Court to deny petition for review, were not rendered "on an appeal" within meaning of ORS 19.440.

In re Marriage of Bolte, 349 Or 289, 243 P3d 1187 (2010)

Statute governing awards of attorney fees incurred "on an appeal" did not authorize an award for fees incurred in opposing a petition for review, in action in which wife sought fees for defending against husband's petition for review, upon affirmance and modification of marital dissolution judgment; when Supreme Court denied petition for review, the Court declined to entertain an appeal and there was no appeal before the Court.

In re Marriage of Dang and Chhun, 238 Or App 218, 242 P3d 680 (2010)

When exercising its discretion to award attorney's fees in a custody proceeding, the trial court is to assess the parties' financial resources, the division of the parties' property in the dissolution, and any support payments, as well as the factors set forth in the "factors for awarding attorney's fees statute". ORS 20.075(1). Evidence was insufficient to support trial court's finding that ex-wife's parents or sister would provide her with financial support sufficient to pay a $15,000 attorney's fees judgment, in ex-husband's action seeking custody of children, notwithstanding the trial court's conclusion ex-wife was not fully forthcoming about her access to financial resources, where trial court merely noted ex-wife had taken a trip to Australia and worked for her sister.

In re Marriage of Carlson, 236 Or App 291, 236 P3d 810 (2010)

In light of the property division, it was appropriate for wife to bear her own attorney fees, and husband should be credited in the property division for his payment of that portion of a credit card bill that was attributable to wife's attorney fees incurred during the pendency of the dissolution.

Child Custody

In re Custody of M.T., 237 Or App 192, 238 P3d 1003 (2010)

Father filed motion seeking change in custody of out-of-wedlock child from mother to father. The trial court changed custody from mother to father. Mother appealed. Appellate court would exercise its discretion to review de novo the facts concerning trial court's determination that change of custody was in out-of-wedlock child's best interests, where trial court's express factual findings were limited and did not mirror the statutory factors considered in determining best interests of child regarding custody such that appellate court could conclude that trial court considered them as it was required to do, apart from those express findings of fact, appellate court could not discern the extent to which the ultimate determination of best interests may have depended on implied findings of fact that related to the statutory factors, and trial court's lack of explanation in the judgment as to the reasons why its findings supported its best interests determination hampered appellate court's ability to understand the specific factual findings that underlay it. ORS 19.415(3)(b), 107.137(1); ORAP 5.40(8).

Although a trial court is not required to make extensive, detailed factual findings or provide an in-depth analysis of its reasoning in a case involving a change in child custody, its decision whether to do so is a factor in appellate court's decision whether to exercise its discretion to review de novo. In reviewing de novo the facts concerning trial court's determination that change of custody was in out-of-wedlock child's best interests, appellate court deferred to trial court's credibility judgments insofar as they were based on demeanor.

Even assuming that father demonstrated that there had been a substantial change in circumstances, father did not establish that a change in custody from mother to father was in out-of-wedlock child's best interests, even though there was a tremendous animosity between mother and father and father appeared to be more willing and able to facilitate and encourage child's relationship with mother than mother would be with respect to facilitating a relationship between child and father; father did not demonstrate that child's emotional ties to members of mother's and father's extended families had suffered after mother and child moved to a new location, despite father's concern about mother's relationship with her fiancé, there was no evidence that mother's fiancé's relationship with mother and child had been anything other than appropriate, and mother was child's primary caregiver.

In re Marriage of Bradburry, 237 Or App 179, 238 P3d 431 (2010)

Determining whether to change a child custody award is a two-step process: the first step is to determine whether, since the last judgment or order regarding custody, there has been a change in circumstances relevant to the capacity of one or both parents to care for the child; if there has been such a change, then the second step is to determine whether a change of custody is in the child's best interests. ORS 107.137(1). Mother's argument that father failed to prove a change in circumstances, as required for change in child custody, was not preserved for appellate review, where mother's attorney conceded, in the trial court, that the court could find that there had been a change of circumstances, and informed the court that he was going to probably not make an objection that father had not proven a change in circumstances, the supplemental

judgment, which the court sent to the parties two weeks before entering it, provided that mother, through counsel, stipulated that the court could find a substantial change in circumstances, and mother did not object to that characterization of her position.

Father failed to demonstrate that a change in sole custody of child from mother to father was in child's best interests; preference for keeping children with their primary parent and for keeping siblings together weighed in mother's favor, it was desirable to continue the relationships that child had formed at school and with his peers, father committed abuse against mother, and father failed to establish that any interference by mother with father's relationship with child was significant enough to justify removing child from mother's custody.

In considering the emotional ties between child and other family members, for purposes of determining whether change in custody is in child's best interests, there is a strong preference for keeping child with his primary parent.

In considering the emotional ties between child and other family members, for purposes of determining whether change in custody is in child's best interests, there is a strong preference for keeping child with his siblings. ORS 107.137(1)(a). At the least, father recklessly placed mother in fear of imminent bodily injury, within statutory definition of "abuse," and thus there was a rebuttable presumption that father should not be awarded custody of child on his motion to change sole custody from mother to him, where mother obtained one restraining order against father after he kicked down her door and a second restraining order against father after he came at her with a pole and threw things at her while she was in a car with one of their children.

Father who sought change in sole custody of child failed to establish that any interference by mother with father's relationship with child was significant enough to justify removing child from his home and community, despite whatever role mother played in allowing, or at worst encouraging, child's older siblings to become soured on father, and despite fact that mother had not enrolled child in certain extracurricular activities during her parenting time that father would enjoy sharing with child; there was no evidence that mother had withheld child from father, and mother was not required to make child available to father for extracurricular activities during her parenting time.

In re Travis, 236 Or App 563, 237 P3d 868 (2010)

In order to modify custody of a minor child, the party seeking the change must first establish that there has been a substantial change in circumstances since the last custody order and that it would be in the child's best interests to change custody. Even if a sufficient change of circumstances had been shown, it was not in child's best interests to modify custody from unwed mother to father; mother had been child's primary caregiver throughout his entire life and, consequently, was the preferred person to receive custody if she was fit to do so, change in custody to father would effect a significant lifestyle change for child to a likely less supportive and structured home environment, best interests of child were served by continuity of custody with mother, and since father had abused mother and restraining order has been issued against father, there was rebuttable presumption that it was not in best interests and welfare of child to award custody to father.

Evidence about numerous instances of police involvement with the family in response to interactions between unwed mother and the two fathers of her four children did not mean that mother was unfit for purposes of determining whether to modify custody from mother to father; there was no indication in the record that children were present during any of these police interactions or were in any way affected by them.

Buxton v. Storm, 236 Or App 578, 238 P3d 30 (2010)

Escalated conflict between mother and father, and particularly mother's evident role in that conflict, had had an adverse effect on their out-of-wedlock child sufficient to constitute a change in circumstances, as required for a change of custody; child's extreme comments and behavior, including verbal attacks on father and his fiancée and standing over father's fiancée with a baseball bat in the middle of the night, appeared to reflect mother's influence, child's grooming and appearance during transfers for parenting time with father seemed calculated to provoke conflict, and mother had interfered with father's participation in child's medical evaluation and treatment, contrary to treatment providers' recommendations.

A party seeking a change of custody must show, first, that circumstances relevant to the capacity of either the moving party or the legal custodian to take care of the child properly have changed since the entry of the last custody order and, second, that, considering the asserted change of circumstances in the context of all relevant evidence, it would be in the child's best interests to change custody. Where the claimed change of circumstances warranting modification of custody involves events of inadequate care and supervision, they must be of such a nature or number reflecting a course of conduct or pattern that has had or threatens to have a discernable adverse effect upon the child.

In determining whether changing custody was in child's best interests, appellate court could consider all relevant evidence, including evidence considered at prior custody proceeding. Change in legal and physical custody from mother to father, who was more likely to facilitate and encourage a positive relationship with mother than the reverse, was in out-of-wedlock child's best interests, where mother had a pattern of making unsubstantiated criminal accusations against father, had obstructed his access to child's treatment providers, and had sent child to father's house with changes in his appearance designed to provoke conflict; although both parties had contributed to the parental conflict, mother's escalation of that conflict, heedless of the effect on child, showed a willingness to disregard child's needs and had been damaging to child.

Visitation/Parenting Time

Digby and Meshishnek, 241 Or App 10, 249 P3d 988 (2011)

The trial court erred when it awarded former foster parents visitation with children on the basis that they had a qualifying ongoing personal relationship with the children, where former foster parents alleged in their complaint that they had a "child-parent relationship" with the children, foster parents failed to meet the standard of a child-parent relationship, foster parents did not allege that they had an ongoing personal relationship with children, and the child-parent relationship and ongoing personal relationship standards for awarding visitation differed. ORS 109.119(10)(a, e).

Long and Leduc, 237 Or App 652, 241 P3d 340 (2010)

Trial court acted within its discretion in awarding father, the noncustodial parent, unsupervised parenting time with child who was born out of wedlock; father had addressed his prior drug problems and had implemented and followed a plan to continue to stay clean, father had taken a parenting class on his own volition to prepare to take care of child, and, contrary to mother's assertion on appeal, father did not abandon child but instead left the home upon mother's ultimatum, and although allegations of sexual abuse involving father and mother's older child were deeply concerning, mother failed to produce evidence to support them. As to whether parenting time with the noncustodial parent should be unsupervised, generally, courts attempt to promote a strong relationship between children and their noncustodial parents. ORS 107.149.

Miscellaneous

Eusiquio v. State ex rel. Dept. of Human Services, Center for Health Statistics, 243 Or App 100, __ P3d __ (2011) (Birth Certificate)

Petitioner appeals from a general judgment denying her petition for a court-ordered birth certificate for her minor son. ORS 432.142. On *de novo* review, the Court of Appeals reversed and remanded. Petitioner, a resident of Washington State, alleges that she gave birth to her son in a migrant camp near North Plains, Oregon, on January 22, 2005. She testified that she lived at the migrant camp in North Plains with her cousin from November 2004 to February 2005. She asserted that she gave birth to her son while in Oregon, but that she never sought prenatal care or any medical care in Oregon after the birth. According to petitioner, due to an incident around the time of her oldest daughter's birth, she feared that her son's father would be arrested if authorities were informed that petitioner and the father had conceived another child. Petitioner testified that Hernandez was the only other person present at the birth and that Hernandez helped deliver the baby. She asserted that she never sought medical care in Oregon, that she "hardly ever" left Hernandez's house after the birth, and that she did not apply for a birth certificate at that time. Further, she admitted that she had no documentation that would verify that she was in Oregon at the time of her son's birth.

Hernandez also testified and corroborated petitioner's account. She acknowledged that she and petitioner were the only attendees to the birth and that she assisted with the delivery. Hernandez confirmed that, during petitioner's time in Oregon, petitioner rarely left the house because it was winter.

Petitioner applied to the State Registrar of the Center for Health Statistics of the Department of Human Services under ORS 432.140 for issuance of a delayed birth certificate. That statute provides, in relevant part:

*"(1) When a certificate of birth of a person born in this state has not been filed within one year after the date of birth, a delayed certificate of birth may be filed in accordance with rules of the State Registrar * * *. No delayed certificate shall be registered until the evidentiary requirements as specified by rule have been met.*

" * * * * *

"(4)(a) When an applicant does not submit the minimum documentation required by rule of the state registrar for delayed registration or when the state registrar has cause to question the validity or adequacy of the applicant's sworn statement or the documentary evidence, and if the deficiencies are not corrected, the state registrar shall not register the delayed certificate of birth and shall enter an order to that effect stating the reasons for the action. The state registrar shall advise the applicant of the right to appeal under ORS 183.480 to 183.484."

ORS 432.140.

In accordance with the statute, the state registrar has promulgated rules that establish the minimum documentation required for issuance of a delayed birth certificate. *See* OAR 333–011–0043(4)–(11). In this case, the state registrar denied petitioner's application because the rule required petitioner to submit two pieces of documentary evidence in support of the delayed birth certificate, but petitioner submitted only one acceptable document, an affidavit in which she attested to her son's birth in Oregon. OAR 333–011–0043(7) (requiring two pieces of documentary evidence when the application is filed within seven years of the birth date, only one of which can be an affidavit of personal knowledge). Petitioner then, as provided by ORS 432.142, filed the petition that is at issue on appeal.

The Court of Appeals' conclusion that ORS 432.142 created a separate statutory proceeding apart from judicial review under the APA leads to the next question: What is the correct standard of review? When an action arises from statute and the legislature has not expressly provided a standard of review, as is the case here, the court examines the "essential nature of the case, including the nature of the relief sought," to determine whether the legislature intended the claim to be legal or equitable in nature. In short, the court examines the pleadings to determine if the nature of the relief sought is legal or equitable. However, even if equitable relief is pleaded, if an adequate remedy at law exists, the court will not invoke equitable jurisdiction.

Given the nature of the relief available under ORS 432.142, the court concluded that the legislature intended the claim to be equitable in nature and, thus, subject to de novo review. ORS 19.415 (2007). Petitioner, pursuant to the statute, has requested a court-ordered delayed birth certificate, which is in essence a declaration by the court that petitioner's son was born in Oregon. In addition, when the legislature transferred jurisdiction over certain family-related matters to the circuit courts in 1967, the legislature explicitly stated that the issuance of a delayed birth certificate was within the "exclusive and original judicial jurisdiction" of the circuit courts. ORS 3.260(2)(g). That statute also included mental commitment, domestic relations, and name change cases, all of which were traditionally cases in equity subject to de novo review. In addition, because petitioner's requested relief—a declaration of her son's legal status—is not available at law, we conclude that the claim is equitable in nature.

On *de novo* review, the Court of Appeals examined the record independently. ORS 19.415(3) (2007). Initially, the court noted that the basis of the trial court's decision is unclear. The record does not establish that the court accepted the proposition that it could decide the case solely on the basis of testimonial evidence. Although the court and the state registrar's counsel discussed whether the statute allowed the court to issue a court-ordered birth certificate based solely on the hearing testimony, the court never stated its agreement with that legal proposition, and the court's letter opinion does not establish the basis for the court's conclusion.

The court's letter opinion placed particular emphasis on petitioner's failure to provide documentary evidence to corroborate her testimony, noting three times that "no documents were introduced in evidence corroborating that either [petitioner], father, or [son] were present in the state of Oregon" on the date son was born. Indeed, the court goes so far as to state that there was "simply no evidence in the record" to corroborate petitioner's testimony, even though Hernandez's testimony did provide such corroboration and the court did not address the

credibility of that testimony. Although the court did not state directly that, as a matter of law, petitioner was required by ORS 432.142 to submit documentary evidence to corroborate the testimony, we are persuaded that the court's conclusion, more likely than not, was based on the lack of documentary evidence, rather than on an implicit finding that petitioner's testimony and the testimony of her corroborating witness were not credible. In light of that likely error by the trial court, the Court of Appeals proceeded to review the testimony *de novo*, rather than remanding for the trial court to do so in the first instance, especially in light of the need to bring finality to the question of child's legal existence.

Based upon our review of the testimony recounted above, and the affidavits supplied to the state registrar under ORS 432.140, the court concluded that petitioner satisfied her burden of establishing that her son was born in Oregon.

Tupper v. Roan, 349 Or 211, 243 P3d 50 (2010) (Constructive Trust)

Husband's stipulation, in settlement agreement incorporated into marriage dissolution decree, to imposition of constructive trust on proceeds of any life insurance policy he owned at time of his death, as remedy if he was not in compliance with agreement's requirement that he maintain a life insurance policy of not less than $100,000 naming wife as trustee on behalf of any supported child, was not binding, under the law of contracts, on husband's girlfriend, with respect to life insurance policy obtained by husband after marriage dissolution, which named girlfriend as beneficiary; girlfriend was a stranger to the dissolution decree and the stipulation of remedy.

Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, devolves from the trustee to a third person, who is a mere volunteer or who is a purchaser with actual or constructive notice of the trust, such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary, and it is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice.

When a marriage dissolution agreement requires a party to maintain a specified, existing life insurance policy naming his or her ex-spouse as the beneficiary, the ex-spouse thereby obtains an equitable property interest in the policy and its proceeds that is superior to the legal right of any subsequently designated beneficiary who is not a bona fide purchaser for value without notice. The obligation of a party to a marriage dissolution agreement to obtain a life insurance policy naming the party's ex-spouse as beneficiary may confer on the ex-spouse an equitable interest in a later-acquired policy that does not name the ex-spouse as beneficiary, if the obligation in some fashion clearly identifies that policy as one of its objects.

Settlement agreement incorporated into marriage dissolution decree, containing generic requirement that each party maintain “an” insurance policy insuring his or her life in an amount of not less than $100,000 and naming the other spouse as trustee on behalf of any supported

child, but also stipulating to imposition of constructive trust on proceeds of "any" life insurance policy owned by a spouse at time of his or her death, as remedy if the spouse was not in compliance with agreement's requirement of naming other spouse as trustee on behalf of any supported child, clearly identified as an object of the agreement the life insurance policy obtained by husband after marriage dissolution, which named husband's girlfriend as beneficiary, and thus, wife had a vested equitable interest in that life insurance policy, as element for imposition of constructive trust as common-law remedy for unjust enrichment. Genuine issues of material fact as to whether former husband's girlfriend gave valuable consideration for being named as beneficiary of former husband's life insurance policy, which he obtained after marriage dissolution, and as to whether girlfriend had notice of former husband's obligation, under settlement agreement incorporated into marriage dissolution decree, to maintain an insurance policy of at least $100,000 naming former wife as trustee on behalf of any supported child, precluded summary judgment for either former wife or girlfriend, in former wife's action against girlfriend seeking to impose a constructive trust, based on unjust enrichment, on a portion of the proceeds of the life insurance policy that named girlfriend as beneficiary.

McIntire v. Lang, 241 Or App 518, __ P3d __ (2011) (Constructive Trust)

Ex-husband had a property interest in ex-wife's estate and therefore was entitled to establishment of constructive trust over ex-wife's estate assets for purposes of securing payment of claim based on requirement in parties' marriage dissolution that required each to maintain life insurance, which ex-wife failed to do; understood in context, insurance requirement was not intended to secure support obligations imposed in the dissolution judgment, but to secure the general obligation that all parents had to support their children as judgment expressly stated that neither party would pay support and opposite interpretation of insurance requirement would have rendered it meaningless.

It was contrary to public policy not to enforce terms of dissolution judgment on ground that ex-husband failed to vigilantly protect his rights, and therefore ex-husband was entitled to establishment of constructive trust over ex-wife's estate assets for purposes of securing payment of claim based on requirement in parties' marriage dissolution that required each to maintain life insurance, which ex-wife failed to do; insurance requirement was intended to protect minor child's right to support from parents. ORS 107.820.