FAMILY LAW NEWSLETTER

Published by the Family Law Section of the Oregon State Bar

Oregon State Bar

Vol. 32, No. 1 **February 2013**

CONTENTS

ARTICLES

MILITARY FAMILY LAW

CASENOTES

WEBSITE

Check out the Section Website at:
http://osbfamilylaw.org

Winning and Losing When Dividing PERS Benefits

By David W. Gault, QDRO Specialist and Certified Divorce Financial Analyst, Jones & Roth, CPAs & Business Consultants

Despite a well written and wonderfully informative pair of articles authored by Clark B. Williams appearing in the 2011 April and June issues of the OSB Family Law Newsletter, many family law practitioners appear to have not yet taken the time to give those articles the close reading they deserve. Those who do will come to recognize that a significant advantage can result from making an informed choice between two acceptable methods of dividing pension benefits of Tier One and Tier Two PERS members.

We would like to offer here a very capsulized summary and recommend that the reader digest the full discussion provided in those articles.

Tier One and Tier Two accounts carry what are termed "Member Account Balances", although those do not represent the entire value of the pension. Traditionally, the approach to division was to first isolate the marital portion (which might or might not be 100%) and then transfer 50% of the marital portion to a separate account in the name of the nonmember spouse. This method Williams terms an "Upfront Division".

An optionally available method, however, is to ask the Court to order a division to occur at the time of the member's retirement, while applying a time rule marital fraction to limit the nonmember's award to half of only that portion earned during the marriage. This approach we might term a "Deferred Division".

The choice between Upfront and Deferred will usually result in a substantial difference in the outcome to each party, often in the tens of thousands of dollars. The difference is driven by which of two benefit formulas the member will ultimately retire under: the "Money Match" or the "Full Formula". PERS automatically calculates both and uses the method giving the largest benefit. Probably all Tier Two members who continue to stay in PERS-covered employment until retirement will retire under Full Formula. The same applies to many Tier One members, and particularly many of those who entered PERS after the 1980s.

The general rule (to which there might be exceptions) is that if the member can be expected to retire under Full Formula, a Deferred Division will favor the nonmember spouse and disadvantage the member. If the member retires under Money

Match, a Deferred Division will favor the member and disadvantage the nonmember. Prudent practice suggests that the practitioner perform adequate discovery prior to entry of the General Judgment regarding the member's probable retirement formula.

When both sides are well informed and actively seek the division method that benefits them, what does the law appear to say? Under the rule established by cases such as Kiser and Kiser and Stokes and Stokes, the law would seem to say that if PERS operates as a defined benefit plan (as it does when the benefit is determined pursuant to Full Formula), then a deferred division is appropriate. If, however, PERS operates as a defined contribution plan (which it does under the Money Match), then a traditional Upfront Division is appropriate. Still, as a practical matter, it often happens that one side has not done its homework and a well-informed advocate can seize the advantage.

Parenting Time & Shared Residential Custody: Ten Common Myths

Dr. Linda Nielsen
Wake Forest University
Professor of Adolescent and Educational Psychology
nielsen@wfu.edu

What is the best parenting plan for most children of divorce? Should infants and toddlers spend overnight time with their nonresidential parent? If not, why not? If so, how much time? Is shared residential custody better for children than living with one parent and varying amounts of time living with their other parent – mainly on weekends? Isn't shared residential custody only successful for a small group of well educated, higher income parents who have very cooperative, conflict free relationships – and who mutually agree to share without mediation, litigation or lawyers' negotiations? Since most married mothers do 80% of the childcare, after a divorce shouldn't the children live that same proportion of time with her?

Questions such as these generate a great deal of debate among the judiciary, policy makers and mental health professionals. Unfortunately they also generate myths and misconceptions that are frequently presented as "the research" at conferences and seminars, on the web, or in non-academic articles. At best, these myths far over-reach and exaggerate the findings from only a few of the existing studies. At worst, they have virtually no grounding whatsoever in current research. Either way, misconceptions that are not grounded on a broad spectrum of recent, methodologically sound, statistically significant empirical data have an impact on custody decisions and custody laws. By empirical data I mean research studies where quantitative data has been statistically analyzed and published in peer reviewed academic journals – in contrast to articles where opinions or theories are being presented, often without benefit of peer review. Regrettably we social scientists have done a poor job sharing the empirical research with other professionals or with divorcing parents. As a result, a handful of studies – often outdated or seriously flawed methodologically – are widely disseminated as "the research". In that spirit, this abbreviated overview presents recent research that refutes ten of the most common beliefs related to child custody.

It is better for the children if parenting time is allocated according to the amount of time each parent spent in childcare during the marriage. Since most married mothers do at least 80% of the childcare, the parenting time should be allocated accordingly.

This perspective, referred to as the approximation rule, is not based on empirical research. This is a debatable opinion – a controversial point of view that has been widely discussed in peer reviewed journals. A full discussion of this debate is provided in Richard Warshak's article in the Baltimore Law Review[1]. Three of his major points are these: Most married couples are more equally sharing the parenting time. Employed fathers spend roughly 60 minutes on weekdays with the children while employed moms spend 90 minutes. This would be the equivalent of 120 overnight stays with a father after divorce.[2] Fathers under the age of 30 whose children are young than 13 do 45 minutes less childcare on workdays than mothers do. [3] In two national surveys with 2000 parents, dads spent 33 hours a week with the children and mothers spent 50.[4] Children under the age of 6 require 3 times as much parenting time as older children. And whichever parent gets home from work first or works the fewest hours generally does more of the childcare.[5] The more time the mother works outside the home, the more time the father spends with the children.[6, 7, 8] The most likely mothers to stay home full time with preschoolers are women whose husbands have low incomes and women with the least education who could not earn enough, if working, to pay for child care[9,10] Second, married parents' arrangements for their young children are *temporary* – they are not intended, as are custody orders, to remain in place until the children turn 18. Third, childcare hours are not synonymous with parenting. The fact that one parent is home with the children more often does not mean that the other parent is doing less parenting or that his or her daily presence is any less beneficial and essential.

Infants and toddlers have one primary "attachment figure" (typically the mother) to whom they bond more strongly and at an earlier age than they do with their other parent (typically the father). Given this, they should not be separated from their primary parent for long periods of time – especially not to spend overnight

time with their father, except on rare occasion for short periods of time.

The prevailing view among contemporary attachment theories and child development experts is that there is not a "primary" attachment figure. Infants attach equally and at the same time in their development to both parents.[11, 12, 13, 14, 15] A more detailed summary of these studies on attachment is available in the June 2012 issue of Family Court Review and in Emerging topics on father attachment[12]

Most infants and toddlers become more irritable or show other signs of maladjustment when they spend overnight time with their fathers. Overnighting should be limited to no more than once a week – if that much – and only when the children are past the age of four.

There are only seven studies that have assessed overnighting and non-overnighting infants & preschoolers. None of them found *statistically significant* differences in irritability or on other measures of maladjustment between the two groups. Given the confusion and debate on this issue, it is worth providing more details of these studies.

Four studies were conducted 15 to 21 years ago. The first assessed 25 one to five year olds who lived half time with each parent. At the end of one year, those children whose behavior and developmental progress had gotten worse were the ones who had violent, alcoholic, inattentive, or otherwise very dysfunctional parents. The researchers also noted: "The most surprising find was that children below the age of three were able to handle the many transitions in their overnight joint custody arrangements."[16] The second study included 25 children under the age of two and 120 ages two to five when their parents separated. Four years later, those who had lived 30% time with their fathers were better off on all measures of emotional, psychological and behavioral well-being. Moreover 40% of those who had not spent overnight time before the age of three with their fathers no longer had any contact with him – a loss that occurred for only 1.5% of the overnighting children.[17] The third study compared infants 12 to 20 months old: those who spent any overnight time with their fathers, those who spent none, and those who lived with married parents. The infants were classified as having a secure, avoidant, ambivalent or disorganized attachment to their mother. A year later 85% of them were assessed again. Regardless of family type, the less securely attached infants had mothers who were unresponsive to their needs. And there were no significant differences in attachment classifications between those who overnighted and those who did not.[18] The fourth study included 18 three to five year olds. At the end of two years, those who had lived with their fathers ten days a month were more well adjusted emotionally and no different on social or behavioral adjustment. Moreover, the number living this often with their fathers increased from 25% to 38% over the two years.[19]

Two studies have been conducted more recently. Interestingly, the one that was not peer reviewed or published in an academic journal before being released by the Australian government has generated considerable attention among mental health practitioners, the legal profession and policy makers. Indeed, it is widely cited as evidence that overnighting is bad for young children. The limitations of this report have been pointed out by several renowned researchers.[20, 21, 22, 23] For example, the sample sizes in several groups were very small and the vast majority of parents had never been married to each other. Leaving aside its limitations, for children from infancy to age five, there were very few differences between those who never overnighted, those who overnighted 1 to 4 nights a month and those who overnighted more than 10 nights a month. The mean scores for the three groups were not statistically different on measures of: irritability, global health, monitoring their mother, negative response to strangers, developmental concerns, behavioral problems, emotional functioning and persistence. The four to five years olds who overnighted more than nine nights a month had more attention deficit disorders according their mothers. But this may very well be linked more to gender than to overnighting. That is, boys were more likely than girls to be overnighting frequently – and boys in the general population are more likely than girls to have attention deficit disorders[24].

The most methodologically sound study at Yale University is part of an ongoing project. This study assessed 132 children ages two to six whose divorced and never married parents had separated. Of these, 31% spent one overnight a week with their fathers, 44% more than one and 25% none. For the two to four years olds, the overnighters were no different from non-overnighters in respect to sleep problems, anxiety, aggression or social withdrawal. They were, however, less persistent in completing tasks. According to their fathers, but not their mothers, the overnighters were more irritable. Overall then, the differences were small. For the four to six year olds, however, the overnighters had fewer problems than the other children – especially the girls. As the researchers conclude "Overnights did not benefit or cause distress to the toddlers and benefited the 4 to 6 year olds" (p. 135).[25]

The final study assessed 24 children ages one to six who overnighted an average of eight nights a month. Almost 55% were classified as having an insecure attachment to their mother, which is higher than the average of 33% in the general population. Age, when the overnights began and parent conflict were not related to the attachment scores. Since there was no other group included in this study, the researchers conclude that the quality of the mothers' parenting is probably more

FAMILY LAW NEWSLETTER

Published Six Times a Year by the Family Law Section of the Oregon State Bar.

Editor: Daniel R. Murphy
P.O. Box 3151
Albany, OR 97321
(541) 974-0567
murphyk9@comcast.net

Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

Deadline	Issue
April	3/15/13
June	5/15/13
August	7/15/13
October	9/15/13
December	11/15/13

important than overnighting.[26] Overall then, these seven studies do not support the belief that overnighting has a negative impact on infants or preschoolers.

Most children want to live with only one parent and to have only one home. Shared residential parenting is not worth the hassle, according to most children.

When children and young adults have been asked about their preferences, the vast majority have said that living with their mothers and having too little time with their fathers was not in their best interests. Likewise, the vast majority who has actually lived in shared residential parenting families say the inconvenience was worth it – primarily because they were able to maintain strong relationships with both parents.[27, 28, 29, 30, 31, 32, 33, 34, 35]

When there is high verbal conflict between the parents, children do better when their time with their father is limited. More time with their father increases the conflict. This is especially true in shared residential parenting since these children are exposed to more conflict and are more often caught in the middle of conflicts.

With the exception of an ongoing pattern of physical conflict or violence, the vast majority of studies do not support these beliefs.[36, 37, 38, 39: 15, 29, 40, 41, 42, 43, 44, 45] First, conflict generally remains higher in sole residence than in dual residence families. Second, most children are not exposed to more conflict or put in the middle more often in shared parenting families. Third, even when there is ongoing high verbal conflict, most children in shared parenting families and those who see their fathers frequently are better off on measures of well-being. In other words, maintaining a strong relationship with their fathers generally serves to buffer the negative impact of high verbal conflicts.

The level of conflict should be a primary factor when deciding how to allocate the parenting time.

Unless there is a history of physical abuse or violence, many researchers agree that high verbal conflict should not be used as the reason for limiting parenting time, especially since there are ways to reduce much of this conflict and since conflict in the first year of separation is generally not a good predictor of future conflict.[39, 46, 47, 48, 49, 29, 15, 50]

Both parents have to mutually agree from the outset to share the residential parenting, otherwise these families will either fail. If they manage to survive, the children won't benefit. Shared parenting will fail if the agreement is the result of mediation, litigation or lawyers' negotiations. Sharing only works for the self-selected group of parents who are very cooperative and have little or no conflict.

In those studies that have examined how parents arrived at their shared residential parenting plan, from

20%-85% of the parents had not initially wanted to share. In families where the children were successfully living with each parent at least 30% of the time, the parenting plan was often a compromise brought about through mediation, litigation or lawyers' negotiations.[16, 17, 19, 51, 52, 53, 54, 55, 56]

Most shared residential families do not last. The children end up living with one parent anyway.

Measured anywhere from 2 to 4 years after divorce, 65%-90% of these families are still sharing the residential custody.[17, 19, 55, 57, 57, 58, 59, 60, 16]

The quality of children's relationships with their fathers is not related to how much time they spend with him after the divorce.

Fathering time, especially time that is not limited mainly to weekends or to other small parcels of time, is closely associated with the quality and the endurance of the father-children relationship. This kind of fathering time is highly correlated with positive outcomes for children of divorce.[61, 62, 63, 64, 65, 66, 67, 68, 69, 70]

In considering the large body of recent empirical research that refutes these ten myths, it is worth remembering that people can always find some study that will support each of these beliefs. Some may be based on very old data. Others are methodologically unsound. Sometimes differences that are not statistically significant are reported as "a trend", or "a difference" or "suggestive of". To be sure, all studies have certain limitations, including those cited in this review. But by using the social science search engines at university libraries to find the recent peer reviewed articles in academic journals, we maximize our chances of finding the general consensus among the most respected researchers. By sharing more of this research with legislators, mental health workers, judges and lawyers, children and their divorced parents will be better served.

Dr. Linda Nielsen has been a Professor of Adolescent & Educational Psychology at Wake Forest University in Winston Salem, NC for 36 years. She is the author of five books and dozens of peer reviewed journal articles. Her areas of expertise are shared residential parenting for children of divorce and divorced fathers' relationships with their daughters. Her comprehensive reviews of 30 years of research on shared residential custody have been presented at the Association of Conciliation and Family Courts national conference and the Midwestern Family Law Conference, and published in the American Journal of Family Law and the Journal of Divorce and Remarriage. She is frequently called upon to provide summaries of this research to legislators in America and abroad.

Linda Nielsen, M.S., Ed.D., is a professor of Adolescent and Educational Psychology at Wake Forest University in Winston Salem North Carolina. Her areas of research are father-daughter relationships – with a special emphasis on divorced fathers – and shared residential custody after divorce. Since 1990 Nielsen has been teaching the only college course in the country devoted exclusively to the study of father-daughter relationships. Her work has been featured in a PBS documentary, on National Public Radio, and in dozens of magazines and newspapers internationally. In addition to her articles in academic journals, including the American Journal of Family Law, Journal of Divorce and Remarriage, and the Harvard Educational Review, she has written three books on father-daughter relationships and a college textbook on adolescent psychology. A member of the Association of Family and Conciliation Courts, National Council on Family Relations and Southeastern Psychological Association, she has presented her research on shared residential custody and divorced fathers at national conferences and has served as an expert witness in a number of custody cases. Her articles on shared parenting research appear regularly in publications for family lawyers and judges. She is frequently called upon to provide her reviews of the research to legislators in the U.S. and abroad. More information about her work is available on her website http://users.wfu.edu/nielsen/.

References

(1) Warshak, R. Parenting by the Clock: The Best Interst of the Child Standard and the Approximation Rule. *Baltimore Law Review* **2011**, *41*, 85-163.

(2) Bianchi, S.; Robinson, J.; Milkie, M. *Changing Rythyms of the American Family*; Sage: New York, 2006.

(3) Galinsky, E.; Aumann, K.; Bond, J. Gender and generation at work and at home. 2009. New York, Families and Work Institute.

(4) Milke, M. The Time Squeeze. *Journal of Marriage and Family* **2004**, *66*, 739-761.

(5) Good, J. Working parents' weekday activities at home. Working Paper. 2010. Los Angeles, University of California, Center for Family Life.

(6) Bianchi, S.; Milkie, M. Work and Family Research. *Journal of Marriage and Family* **2010**, *72*, 704-715.

(7) Brayfield, A. Juggling Jobs and Kids. *Journal of Marriage and Family* **2003**, *57*, 321-332.

(8) Cunningham, M. Women's Employment and Household Labor Over the Life Course. *Journal of Family Issues* **2007**, *28*, 422-444.

(9) England, P.; Beaulieu, C.; Ross, M. Women's Employment. *Gender and Society* **2004**, *18*, 494-509.

(10) Parker, K. Harried life of the working mother. 2009. Washington, DC, Pew Research Center.

(11) Special issue on attachment and divorce. Family Court Review 50. 2012.

(12) Newland, L.; Freeman, H.; Coyle, D. *Emerging Topics on Father Attachment*; Routledge: New York, 2011.

(13) Cassidy, J.; Shaver, P. *Handbok of Attachment: Theory, Research and Clinical Applications*; Guilford Press: New York, 2008.

(14) Garber, B. Attachment and Family Law: Commentary on the Jully 2011 Issue. *Family Court Review* **2012**, *55*, 1-6.

(15) Lamb, M. Critical Analysis of Research on Parenting Plans and Children's Well-Being. In *Parenting Plan Evaluations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; Oxford University Press: New York, 2012.

(16) McKinnon, R.; Wallerstein, J. Joint Custody and the Preschool Child. *Conciliation Courts Review* **1987**, *25*, 39-47.

(17) Maccoby, E.; Mnookin, R. *Dividing the Child*; Harvard University Press: Cambridge, Mass., 1992.

(18) Solomon, J.; George, L. The Effects on Attachment of Overnight Visitation on Divorced and Separated Families: A Longitudinal Follow Up. In *Attachment Disorganization in Atypical Populations*; Solomon, J. G. L., Ed.; Guilford: New York, 1999.

(19) Kline, M.; Tschann, J.; Johnston, J.; Wallerstein, J. Children's Adjustment in Joint and Sole Physical Custody Families. *Developmental Psychology* **1989**, *25*, 430-438.

(20) Lamb, M.; Kelly, J. Improving the Quality of Parent Child Contact in Separating Families

With Infants and Young Children. In *The Scientific Basis of Child Custody Decisions*; Levy, R., kraus, L., Levy, J., Eds.; John Wiley & Sons: Hoboken, NJ, 2009.

(21) Pruett, M.; Cowan, C.; Cowan, P.; Diamond, J. Supporting Father Involvement in the Context of Separation and Divorce. In *Parenting Plan Evaluauations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; Oxford University Press: New York, 2012.

(22) Warshak, R. Securing children's best interests while resisting the lure of simple solutions. May, 2012. 2012. Haifa, Israel, Conference: Parenting in the eyes of practice and the law.

Ref Type: Conference Proceeding

(23) Parkinson, P.; Cashmore, J. Parenting Arrangments for Young Children - a Reply to Smyth, McIntosh and Kelaher. *Australian Journal of Family Law* **2011,** *25,* 284-271.

(24) Kerns, S.; Prinz, R. Coparenting Children With Attention Deficit Disorders and Disruptive Behavior Disorders. In *Parenting Plan Evaluations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; 2012.

(25) Pruett, M.; Ebling, R.; Insabella, G. Critical Aspects of Parenting Plans for Young Children. *Family Court Review* **2004,** *42,* 39-59.

(26) Altenhofen, S.; Sutherland, K.; Biringen, Z. Families Experiencing Divorce: Age at Onset of Overnight Stays As Predictors of Child Attachment. *Journal of Divorce and Remarriage* **2010,** *51,* 141-156.

(27) Finley, G.; Schwartz, S. Father Involvement and Young Adult Outcomes. *Family Court Review* **2007,** *45,* 573-587.

(28) Harvey, J.; Fine, M. *Children of Divorce*; Routledge: New York, 2010.

(29) Kelly, J. Risk and Protective Factors for Children of Divorce. In *Parenting Plan Evaluations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; Oxford University Press: New York, 2012.

(30) Marquardt, E. *Between Two Worlds: Inner Lives of Children of Divorce*; Crown: New York, 2005.

(31) Parkinson, P.; Cashmore, J.; Single, J. Adolescents' Views on the Fairness of Parent Arrangements After Separation. *Family Court Review* **2005,** *43,* 430-445.

(32) Schwartz, S.; Finley, G. Divorce Variables As Predictors of Young Adults Fathering Reports. *Journal of Divorce and Remarriage* **2005,** *44,* 144-164.

(33) Shulman, S.; et al How Young Adults Perceive Parental Divorce. *Journal of Divorce and Remarriage* **2001,** *34,* 3-17.

(34) Smith, A. Re-Thinking Children's Involvement in Decision Making. *Family Law Journal* **2003,** *259,* 259-266.

(35) Struss, S.; Pfeiffer, C.; Preus, U.; Felder, N. Adolescents Perceptions of Visitation Arrangements. *Journal of Divorce & Remarriage* **2001,** *35,* 75-89.

(36) Buchanan, C.; Maccoby, E. *Adolescents After Divorce.*; Harvard University: Cambridge, Ma, 1996.

(37) Fabricius, W.; Luecken, L. Postdivorce Living Arrangements, Parent Conflict and Physical Health for Children of Divorce. *Journal of Family Psychology* **2007,** *21,* 195-205.

(38) Bauserman, R. Child Adjustment in Joint Custody Versus Sole Custody. *Journal of Family Psychology,* **2002,** *16,* 91-102.

(39) Fabricius, W.; Braver, S.; Diaz, P.; Velez, C. Custody and Parenting Time. In *The Role of the Father in Child Development*; Lamb, M., Ed.; John Wiley & Sons: New York, 2010.

(40) Grych, J. Interparental Conflict As Risk Factor for Child Maladjustment. *Family Court Review* **2005,** *43,* 97-108.

(41) Gunnoe, M.; Braver, S. Effects of Joint Legal Custody on Mothers, Fathers, and Children. *Law and Human Behavior* **2001,** *25,* 25-43.

(42) King, V.; Heard, H. Nonresident Father Visitation and Parental Conflict. *Journal of Marriage and Family* **1999,** *61,* 385-396.

(43) Peters, B.; Ehrenberg, M. The Influence of Parental Separation on Father-Child Relationships. *Journal of Divorce & Remarriage* **2008,** *49,* 78-108.

(44) Sandler, I.; Miles, J.; Cookston, J.; Braver, S. Effects of Parenting in High and Low Conflict Divorces. *Family Court Review* **2008,** *46,* 282-296.

(45) Sandler, I.; Wolchik , S.; Winslow, E.; Mahrer, N.; Moran, J.; Weinstock, D. Quality of Maternal and Paternal Parenting Following Divorce. In *Parenting Plan Evaluations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; Oxford University Press: New York, 2012.

(46) Birnbaum, R.; Fidler, B. The Emergence of Parallel Parenting Orders. *Canadian Family Law Quarterly* **2010,** 111-121.

(47) Birnbaum, R.; Bala, N. Toward the Differentiation of High Conflict Families: An Analysis of Social Science Research and Canadian Case Law. *Family Court Review* **2010,** *48,* 403-416.

(48) Deutsch, R. When the Conflict Continues: The Right Parenting Plan Can Help Defuse Tensions. *Family Law* **2010,** *33,* 40-45.

(49) Johnston, J.; Roseby, V.; Kuehnle, K. *In the Name of the Child: Understanding and Helping Children of Conflicted and Violent Divorce*; Springer: New York, 2009.

(50) Kline, M.; Cowan, P.; Cowan, M.; Diamond, J. Supporting Father Involvement After Separation and Divorce. In *Parenting Plan Evaluations: Applied Research for the Family Court*; Kuehnle, K., Drozd, L., Eds.; Oxford University Press: New York, 2012.

(51) Brotsky, M.; Steinman, S.; Zemmelman, S. Joint Custody Through Mediation. In *Joint Custody and Shared Parenting*; Folberg, J., Ed.; Guilford: New York, 1991.

(52) Irving, H.; Benjamin, M. Shared and Sole Custody Parents. In *Joint Custody and Shared Parenting*; Folberg, J., Ed.; Guilford Press: New York, 1991.

(53) Luepnitz, D. Maternal, Paternal and Joint Custody. In *Joint Custody and Shared Parenting*; Folberg, J., Ed.; Guilford Press: New York, 1991.

(54) Markham, M.; Coleman, M. The Good, the Bad and the Ugly: Divorced Mothers Experiences With Coparenting. *Family Relations* **2012,** *61,* 586-600.

(55) Pearson, J.; Thoennes, N. Child Custody and Child Support After Divorce. In *Joint Custody and Shared Parenting*; Folberg, J., Ed.; Guilford Press: New York, 1991.

(56) Melli, M.; Brown, P. Exploring a New Family Form- the Shared Time Family. *International Journal of Law, Policy and Family* **2008,** *22,* 231-269.

(57) Berger, L.; Brown, P.; Joung, E.; Melli, M.; Wimer, L. Stability of Child Physical Placements After Divorce. *Marriage and Family* **2008,** *70,* 273-283.

(58) Cashmore, J.; Parkinson, P. Shared care parenting arrangements since the 2006 family law reforms. 2010. Sydney, University of New South Wales Social Research Centre.

(59) Kaspiew, R.; Gray, M.; Weston, R.; Moloney, L.; Hand, K.; Qu, L. Evaluation of 2006 family law reforms in Australia. 2009. Sydney, Australian Institute of Family Studies.

(60) Lodge, J.; Alexander, M. Views of adolescents in separated families. 1-77. 2010. Sydney, Australian Institute of Family Studies.

(61) Amato, P.; Dorius, C. Fathers, Children and Divorce. In *The Role of the Father in Child Development*; Lamb, M., Ed.; John Wiley & Sons: New York, 2012.

(62) Aquilino, W. Noncustodial Father Child Relationship From Adolescence into Young Adulthood. *Journal of Marriage and Family* **2010,** *68,* 929-945.

(63) Carlson, M. Family Structure, Father Involvement and Adolescent Outcomes. *Journal of Marriage and Family,* **2006,** *68,* 137-154.

(64) Cashmore, J.; Parkinson, P.; Taylor, A. Overnight Stays and Children's Relationships With Parents After Divorce. *Journal of Family Issues* **2008,** *29,* 707-733.

(65) Coley, R.; Medeiros, B. Nonresident Father Involvement and Delinquency. *Child Development* **2007,** *78,* 132-147.

(66) Dunn, J.; Cheng, H.; O'Connor, T.; Bridges, L. Children's Perceptions on Their Relationships With Nonresident Fathers. *Journal of Child Psychology and Psychiatry* **2004,** *45,* 553-566.

(67) Janning, M.; Laney, J.; Collins, C. Spatial and Temporal Arrangements: Young Adults' Postdivorce Experiences. *Journal of Divorce & Remarriage* **2010,** *51,* 413-427.

(68) King, V.; Soboleski, D. Nonresident Fathers' Contributions to Adolescent Well-Being. *Journal of Marriage and Family,* **2006,** *68,* 537-557.

(69) Menning, C. Nonresident Fathers' Involvement and Adolescents' Smoking. *Journal of Health and Social Behavior* **2006,** *47,* 32-46.

Index of Articles: 2012 OSB Family Law Newsletter

Editor's Note: 2012 was a banner year for the OSB Family Law Newsletter. Our 18 authors submitted a record 28 articles. Thank you authors for your hard work and great articles:

Bill Mason
Charles H. Vincent
Clark B. Williams
Darla L. Pierce
David W. Gault
Gene Brentley Tanner
Geordie Duckler
Jean Fogarty
Jen Costa
Jones and Roth
Laura B. Rufolo
Lawrence D. Gorin
Lisa J. Norris-Lampe
Mark E. Sullivan
Mark Johnson Roberts
Mark Kramer
Nicole McOmber
Ryan M. Johnson

Articles are listed by their full title, author and month of publication:

Mr. Smith goes to Washington for work…and Ms. Smith needs help!
Gene Brentley Tanner
February 2012

Oregon eCourt update
Lisa J. Norris-Lampe
February 2012

Tax Deductions and Limits for 2012
Nicole McOmber, CPA,
February 2012

Ways to Avoid Tax Pitfalls
Jones and Roth, CPAs
February 2012

Comment re Contempt, Child Support, and Remedial Sanctions
Lawrence D. Gorin
April 2012

Mr. Smith goes to Washington for work…and Ms. Smith needs help, Part II
Gene Brentley Tanner
April 2012

A Thing or Two about Managing a Law Practice…
Darla L. Pierce, Legal Administrator
April 2012

Employee Gifts and Awards: What are the Tax Consequences?
Jones & Roth, CPAs and Business Advisors
April 2012

Oregon Child Support Benchbook
Jean Fogarty, Child Support Program
April 2012

What About the Children? The Rise and Fall of the Best Interests Standard in Third Party Custody and Visitation Cases
Mark Kramer, Kramer and Associates
June 2012

Pension Division – Three Easy Steps to Avoiding Costly Errors
David W. Gault
June 2012

Marriage Equality Background and the Oregon Family Fairness Act
Mark Johnson Roberts
June 2012

Flying Solo Without Flying Alone
Ryan M. Johnson
June 2012

Matrimonial Law Grants Available
American Academy of Matrimonial Lawyers
June 2012

The Military Family Law Feature
Military Divorce: Returning Warriors and "The Home Front"
Mark E. Sullivan
June 2012

The Military Family Law Feature
The Missing Military Annuity – Case Continued
Published in the September 2011 Issue

Correction Notice
Mark E. Sullivan
June 2012

***Slater vs. Slater:* An Appraiser's View**
Bill Mason, ABA, CPA/ABV, CFF
August 2012

Court's Authority to Award Dependent Child Tax Exemption
Lawrence D. Gorin
August 2012

Caution re: Dividing Disability Payments on Divorce
Clark B. Williams
August 2012

The Military Family Law Feature
V.A. Payments and Family Support
Mark E. Sullivan
August 2012

Evidence and Family Law: Medical Records
Charles H. Vincent
October 2012

Reflections of a First-Year Associate
Jen Costa
October 2012

Caution re: Dividing Disability Payments on Divorce
Clark B. Williams, Esq
October 2012

The Military Family Law Feature
Getting Government Records into Evidence
Mark E. Sullivan
October 2012

MILITARY FAMILY LAW

Hidden Money in Military Divorce Cases

*by Mark E. Sullivan**

Q. I'm representing Mrs. Roberts, the wife of Army Colonel Bill Roberts, in her divorce case. What are some of the overlooked sources of money and benefits?

A. When representing the nonmilitary spouse, the accrued leave of the servicemember (SM) is a valuable but often overlooked part of marital property division. Each person in military service on active duty accrues thirty days of paid leave per year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the Defense Finance and Accounting Service (DFAS) website, www.dfas.mil.

Thus, if COL Roberts's gross pay is $6,600 per month and he has forty-five days of accrued leave at the point of evaluation according to state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about $9,900 (45/30 x $6,600), which represents gross pay before tax and other withholdings. Counsel for Mrs. Roberts should advocate use of the gross pay figure, whereas opposing counsel should use after-tax computations for the pay and eliminate any non-pay entitlements.

Counsel for the SM sometimes will attempt to confuse the issue by pointing out that the nonmilitary spouse cannot be awarded military leave. This argument misses the point. The issue is not who can use military leave but whether, under applicable state law, assets such as "vacation time" and "sick leave" are marital or community property if it is acquired during the marriage.

If the individual will not voluntarily produce his monthly LES, counsel may resort to formal discovery procedures if the matter is in litigation. In addition, the DFAS office in Cleveland will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

Sometimes the attorney for the retiree will disavow any knowledge of the existence of the LES, or the SM will claim that it was lost, misplaced, or "floated away in that big flood last month." All SM's are eligible for a free "**myPay**" account at the DFAS website. This secure website is found at *https://mypay.dfas.mil*. Once there, it is a simple matter for the member to obtain his current LES; he just enters his "LogIn ID" and password, and then goes to the screen for current pay information. Sometimes a judge, when frustrated with the refusal of a SM or his attorney to produce an LES, will issue an order requiring both attorneys and the SM to use a computer to access the current or past LES from the **myPay** website.

DFAS even has a way that a third party can be given access to the secure website to view, but not to change, the SM's pay information. Here's what the DFAS website says:

> ***What is a restricted access Personal Identification Number (PIN)?***
>
> You now have the ability to establish a Restricted Access PIN. The Restricted Access PIN may be given to others along with your Social Security Number to view your pay or tax statements without allowing them to create any pay changes. You may establish a restricted access PIN by clicking on the Personal Setting Page, and selecting the Restricted Access PIN option. You may delete the restricted access PIN at any time. If the user suspends their restricted access PIN you must reset the PIN and provide that new PIN number to the user.

Q. What else can we do for the non-military spouse?

A. Even with a short marriage of, say, five years, the pension share is worth something. Don't waive it without getting a trade. Assume that the husband is a Sergeant First Class John Doe, in the pay grade of E-7, with 20 years of service, who will get an estimated $1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50% of 5/20 of $1,600, or $200 a month. If she is 40 when he retires and he were to live another 35 years, this would be

worth $2,400 a year, or $84,000 (and this ignores all cost-of-living adjustments). That's a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If your client is asked to waive military pension division, make sure she or he does it for a reasonable, fair trade – don't just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you're doing better than just giving it away.

Q. What about reenlistment bonuses and other special pay?

A. "Reenlistment bonuses can be big money, especially when you consider the impact of signing reenlistment papers in a combat zone," according to Stephen T. Lynch, a Coast Guard legal assistance attorney in Cleveland. Lynch notes:

> For military members who are 1) about to get divorced, and 2) about to reenlist, counsel should be sensitive to the timing of both events, and the potential impact of one on the other. Many enlisted personnel are eligible for a reenlistment bonus. For example, assume that Petty Officer Jake Jones (PO2) is a Navy Seal Independent Duty Corpsman. He would be eligible for a reenlistment bonus totaling as much as $75,000 – which will come free of state and federal income taxes if reenlistment occurs in a combat zone. There are obvious advantages for this sailor if he were to obtain a divorce prior to signing the reenlistment papers, and obvious advantages to Mrs. Jones is she were to delay the divorce until after Jake reenlisted and received his bonus. How much of the bonus, if any, would accrue to Mrs. Jones is a matter of state law and artful negotiation. However, if counsel for Mrs. Jones is unaware of the pending bonus and the timing implications, then counsel surely will fail to assert Mrs. Jones' interest in a sizeable payment that can be made in a lump sum and just might serve as a ready source for alimony, child support, and the payment of pending bills (such as mortgages, car payments, and attorney fees). Information about reenlistment bonuses may be found at:
>
> http://usmilitary.about.com/od/enlistmentbonuses/l/bl01bonus.htm.

Q. Is there anything else for the spouse who is not in the military?

A. Yes, and it has to do with insurance. Many military members, including Guard and Reserve, choose USAA for their insurance needs. A little known fact about USAA is that members have a Subscriber's Account (formerly called a "Subscriber Savings Account") which contains moneys contributed through premiums for property and casualty insurance (such as car insurance) and distributed from time to time to the subscribers. These periodic distributions amount to a refund of money not needed for operating reserves and they come as a credit on the quarterly or yearly premium, thus saving money for the customer. If one of the parties will be retaining USAA membership and benefits, including the balance in the Subscriber's Account, then it makes sense to ask how much is in the Account and allocate the sum to that party, even though it is money which can't be spent at present. The USAA pamphlet on this states (using *SSA* for "Subscriber Savings Account"):

An SSA is <u>not</u> a bank account. A member cannot make withdrawals from, or deposits to, an SSA. Since SSA funds are an integral part of USAA's capital structure, they remain with the association as long as the member has at least one P&C [property and casualty] policy. If a member terminates all P&C policies, the balance of the SSA is paid out approximately six months later.

An example of a Subscriber's Account Annual Statement for 2008 from USAA is at ATCH A at the end of this article.

Q. How can we save some money for COL Roberts?

A. You can save money for COL Roberts in several ways in negotiations over his pension or, if your trial judge allows it, in the courtroom. The first one to use a ***set dollar amount*** in specifying the pension share for his wife upon divorce. This means that the spousal entitlement is calculated (usually with 50% of the marital share as the model) and then converted in today's dollars to a specific monetary amount, such as: "Mrs. Roberts shall receive $495 a month from the disposable retired pay of COL Roberts, the defendant." This method of dividing the pension, if accepted by the other side, means that all future increases in COL Roberts' pay belong to him and, upon retirement, the cost-of-living adjustments (COLAs) which are applied to retired pay go solely to him. She receives none of these benefits. The COLA, when applied solely to COL Roberts' pension, will roughly double its value over twenty years.

Another option, if the first won't work, is freezing the benefit for Mrs. Roberts at the rank and years of service of her husband at divorce or separation, whichever is used under state law for the point of evaluation of marital assets. In this way, we will be fixing his rank at the date of separation or divorce. That will mean that we're dividing the pension of a colonel right now, not a two-star general, which he might be at the time of retirement.

COL Roberts will also want to try to keep the denominator of the marital fraction as the total years of creditable military service, not the years up to the date of separation or divorce. In doing this, we are creating a marital fraction that is constantly shrinking in absolute

value, not one that, in fairness, should be fixed as of the latter date.

A third step would be to state that we are dividing the retired pay of a colonel with a certain number of creditable years of service, fixing the years of service at the date of divorce or separation. The years of creditable service would usually be stated in even numbers, so we could say "a colonel over 20" or "a sergeant over 16" to show how many years of service at that rank. This likewise keeps the divisible pay down; we are fixing the benefit to be divided at the time of divorce or separation.

Finally, we would want to fix the pay tables involved as of the date of the separation or divorce, whichever is appropriate under state law. In doing this, we insulate Mrs. Roberts from any future congressional pay raises; all of these accrue solely to the benefit of COL Roberts.

If we specify these in the pension division clause for COL Roberts, it could mean a savings of tens or hundreds of thousands of dollars for him, in comparison to using his final rank upon retirement, and the pay tables that would apply when he retires.

Q. What about military medical care – is there some money to be saved there? Is Mrs. Roberts eligible for that after divorce?

A. Yes, if the marriage and the military career were long enough. There must be 20 years of military service concurrent with 20 years of marriage to get full military medical benefits. This means medical insurance coverage through TRICARE, the military equivalent of Blue Cross, and some free medical care at military medical treatment facilities.

Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members. If the former spouse was married to a member or former member for at least 20 years during which he or she performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage, and 20 years of overlap), then the former spouse is entitled to full military medical care, including TRICARE, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.[1]

If the former spouse was married to a member or former member for at least 20 years during which the member or former member performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that the former spouse is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for this spouse.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as he or she does not remarry. If the decree date is on or after April 1, 1985, then the former spouse is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy"[2] under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(a) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.[3] Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension or SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than $350 per month as of 2008. There is an article explaining

1 10 U.S.C. § 1062.

2 10 U.S.C. § 1086 (a).

3 10 U.S.C. § 1078 a(g)(1)(C).

this coverage in the Summer 2008 issue of Roll Call (the newsletter of the Military Committee, ABA Family Law Section) at www.abanet.org/family/military.

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that these are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

Q. You said that military medical benefits depend on the date of divorce. What if my client has all the other requirements but is just 6 months short of 20 years of marriage?

A. Since 20-20-20 medical coverage depends not on the date of separation or the date of filing, you might need to postpone the divorce for 6 months. This may not be easy, but if you look hard enough you might be able to find something that you can contest, that the other side did wrong in the pleadings, or that you can at least question through discovery. I had a case several years ago where there was a question about the domicile of the SM – he was the one filing for divorce. We were desperate to delay the granting of a divorce. I started with a set of interrogatories and document requests related to domicile, which of course is an essential jurisdictional element in divorce. The plaintiff got so busy fighting off my discovery requests and my motions to compel that he went through two separate civilian lawyers before the court finally granted him a divorce. That was a year and a half after he'd filed!

Q. Are there any retirement benefits in the military similar to a 401(k) plan?

A. Yes. In addition to the military pension, which is a defined benefit plan that has existed all along, we now have another retirement benefit. This is the Thrift Savings Plan, or TSP. It's a voluntary defined contribution plan, it can be divided, and it's basically the same as the federal civil service TSP. Contributions are sheltered from taxes and are allowed to grow in a number of different funds selected by the servicemember.

Q. Are there any resources which can help attorneys understand the military TSP and how to divide it?

A. Yes. There's a booklet available on-line. Go to www.tsp.gov and click on *Military – Forms and Publications*, then click on *Publications*, then on *Booklets*, then on *Court Orders*. It's quite helpful and has sample clauses that'll make your work a lot easier and your TSP division order "rejection-proof."

**Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com*

Atch A - USAA Subscriber's Account Annual Statement

9800 Fredericksburg Road
San Antonio, Texas 78288
USAA ®

December 12, 2012

Dear

Thank you for the privilege and honor of being your financial services provider.

This year, we celebrated 90 years since 25 Army officers got together to insure one another when no one else would. Serving the military community has been our mission from the very beginning, and that's still our mission today. We understand the financial pressure of a sudden deployment and the special challenges of service members returning home and starting a new life. We know the everyday financial challenges of members who hung up their uniforms many years ago, as well as their children who may have never served. Building relationships where we can help members in every stage of life - from raising children to retirement - drives us to do more than our competitors can or will.

Our association stayed strong in 2012. That matters because members look to USAA to help them meet their financial needs. And it means we can fulfill our commitments when you need us most. **We are grateful for your continued trust and pleased to present this year's distribution from your Subscriber's Account.** Your distribution check is enclosed.

In addition remember that your **Senior Bonus distribution**, if approved by our Board of Directors, will be delivered in February. If you haven't told us how you would like to receive your

Senior Bonus distribution, which is a separate transaction from your Subscriber's Account selection, you can do so logging onto usaa.com, then:

1. Go to My Profile at the top of the page.
2. Click on Manage Preferences under Personal Information.
3. Select Insurance Dividend and Distribution.

You have until Jan. 31, 2013, to set your Senior Bonus preference. If you do not wish to change your preference, no action is required.
If you have questions, please call a member service representative at 1-800-531-3027 or refer to **Contact Us** on usaa.com

We wish you the best this holiday season and in the year to come.

Sincerely,

Josue (Joe) Robles Jr.

Maj. General, USA (Ret.)

CEO, United Services Automobile Association

You can always change your preference by logging onto usaa.com and going to My Profile, Manage Preferences, Insurance Dividend and Distribution.

Use of the term 'member' or 'membership' does not convey any legal, eligibility, or ownership rights. Ownership rights are limited to eligibly policyholders of United Services Automobile Association. Eligibility may change based on factors such as marital status, rank, or military status. Contact us to update your records. Children of USAA members are eligible to purchase auto or property insurance if their eligible parent purchases USAA auto or property insurance.

There is no guarantee or promise of future Subscriber's Account allocations or distributions, or auto insurance dividends.

USAA means United Services Automobile Association and its family of companies.

WEBSITE

Check out the Section Website at:

http://osbfamilylaw.org

CASENOTES

Editor's Note: these are brief summaries only. Readers should read the full opinion. A hyperlink is provided to the on-line opinion for each case.

SUPREME COURT

There were no family law decisions in the Supreme Court during this period.

OREGON COURT OF APPEALS

Visitation

In the Matter of R. J. T., a Minor Child. Jacquelin E. GARNER, *Petitioner-Appellant*, *v.* Marci Rae TAYLOR, *Respondent-Respondent*, 254 Or 635 (213) http://www.publications.ojd.state.or.us/docs/A144895.pdf

Lincoln County Circuit Court 064939; A144895

Trial Judge: Paulette Sanders, Judge pro tempore.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

ORTEGA, P. J.

This case involves visitation rights awarded under ORS 109.119 to a nonparent of a minor child. In 2007, petitioner, by a default judgment, obtained visitation rights with respect to the child. The relationship between the parties was contentious, and respondent, the child's mother, did not cooperate in permitting petitioner to have contact with the child. Eventually, petitioner filed a motion to modify the judgment, seeking sole custody of the child or, alternatively, temporary custody of the child or extended periods of visitation. She also asked the court to hold respondent in contempt.

The court entered a judgment in which it denied all of the relief sought by petitioner. In addition, in considering petitioner's motion, the court concluded that the correct statutory and constitutional analysis had never been applied in the case and, pursuant to ORCP 71 C, set aside the 2007 default judgment granting petitioner visitation rights. Petitioner appeals and raises three assignments of error. First, she contends that the trial court erred when it, sua sponte, set aside the default judgment. In addition, respondent argues that the court erred in the legal standard it applied in considering the modification and in its determination that visitation was not in the child's best interest.

Held: The trial court abused its discretion when, in the absence of extraordinary circumstances, it set aside the 2007 default judgment pursuant to ORCP 71 C. Otherwise, the trial court's decision was proper based on

the court's conclusion, which is supported by the record, that visitation was not in the child's best interest. Judgment setting aside January 2007, default judgment reversed; otherwise affirmed. COA 01.30.13

Jurisdiction

In the Matter of the Marriage of Gregory Thomas EWALD, *Petitioner-Appellant*, and Judith Ellen EWALD, *Respondent-Respondent*. 254 Or App ___ (2012) http://www.publications.ojd.state.or.us/docs/A146609.pdf

Jackson County Circuit Court 073222D2; A146609

Trial Judge: G. Philip Arnold, Judge.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

Armstrong, P. J.

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

Held: (1) Husband's appeal is not moot by virtue of the Alaska decree because a decision on husband's appeal has the potential of altering the rights of the parties; (2) The doctrine of claim preclusion, upon which husband solely relies, applies in the context of separate actions; thus, it does not preclude a motion under ORCP 71 B(1)(d) made in the same action that produced the judgment that is said to be preclusive; (3) Husband's alternative contention is rejected without discussion. Affirmed. COA 12.19.12

Spousal Support

In the Matter of the Marriage of Kelly Eugene STEELE, *Petitioner-Appellant*, and

Kelly Anne STEELE, *Respondent-Respondent*, 254 Or App ___ (2012)

http://www.publications.ojd.state.or.us/docs/A143696.pdf

Multnomah County Circuit Court 080868370; A143696

Trial Judge: Merri Souther Wyatt, Judge.

Before Ortega, Presiding Judge, and Brewer, Judge, and Hadlock, Judge.

Ortega, P. J.

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

Held: Given the duration of the marriage, wife's health, the disparate earning capacities of the parties, and the other factors considered by the trial court, the amount and duration of the spousal support awarded by the court was not an abuse of discretion. Further, the record does not indicate that the court awarded compensatory spousal support as a punitive measure for husband's financial mismanagement. Affirmed. COA 12.12.12

Stalking Order

V. A. N., *Petitioner-Respondent*, v. Kenneth D. Parsons, *Respondent-Appellant*, 253 Or App ___ (2012) http://www.publications.ojd.state.or.us/opinions/A150909.pdf

Linn County Circuit Court 120246; A150909

Trial Judge: James C. Egan, Judge.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

Hadlock, J.

Respondent appeals the trial court's entry of a stalking protective order (SPO), challenging the sufficiency of the evidence supporting the order. The parties were coworkers for a number of years and had become friends. At some point, respondent developed a romantic interest in petitioner, who is married. When respondent made a "romantic overture," petitioner told him that their friendship had to end. Respondent suffered an emotional breakdown and voluntarily admitted himself to the hospital for psychiatric treatment.

After he was released from the hospital, respondent sent petitioner a series of text messages over the course of the next month. Initially, he acknowledged and appeared to accept petitioner's wish to end their friendship, but he ultimately refused to accept that petitioner had rejected his overtures. Petitioner did not respond to any of respondent's text messages. In respondent's last message, he stated that, because petitioner would not talk to him, he would have to "confront" her at work or at her home. The trial court found that, by using the word "confront," respondent had implied a threat of aggression. The court went on to state that, viewed in the light of respondent's final message, his earlier messages had threatened petitioner either to accept the relationship on his terms or there would be consequences.

Held: Respondent's communications with petitioner could qualify as unwanted contacts supporting an SPO only if they included unequivocal threats of violence that were objectively likely to be acted upon. Nothing in the record supports an objective determination that respondent intended to, and probably would, carry out any threat that was implicit in his messages to petitioner. Even if it was objectively reasonable to believe that respondent likely would follow through on his threat to "confront" petitioner, no evidence suggests that such a confrontation probably would involve violence or other unlawful acts. Reversed. COA 12.05.12

D. A., *Petitioner-Respondent*, v. Joshua Bruce WHITE, *Respondent-Appellant*, 253 Or App ___ (2012) http://www.publications.ojd.state.or.us/opinions/A149377.pdf

Jackson County Circuit Court 113127Z0; A149377

Trial Judge: Timothy C. Gerking, Judge.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

Hadlock, J.

Respondent appeals the trial court's entry of a stalking protective order (SPO), challenging the sufficiency of the evidence supporting the order. Respondent argues that, under the "official duties" provision of ORS 163.755(1)(c), two of the incidents that led petitioner to seek the SPO could not constitute "unwanted contacts," as a matter of law, because they involved the parties at their workplace while acting within the scope of their employment as police officers. He also argues that there is insufficient evidence that the contacts were unwanted or caused petitioner subjective alarm, and he argues that any alarm that petitioner may have experienced was not objectively reasonable. Respondent raises similar challenges concerning the remaining contacts.

Held: Respondent concedes that, if he intended to intimidate petitioner during the workplace incidents, the "official duties" provision of ORS 163.755(1)(c) does not apply. The trial court expressly found that it was respondent's intent to intimidate petitioner, and that is an inference that the court could reasonably draw from the evidence. With respect to respondent's remaining arguments, the evidence in the record is sufficient to support the conclusion that two of the incidents at issue constituted actionable contacts for purposes of issuing an SPO. Affirmed. COA 12.05.12

Property Division

In the Matter of the Marriage of Jill CHRISTENSEN, Petitioner-Respondent, and Edward CHRISTENSEN, Respondent-Appellant, 253 Or App ___ (2012)

http://www.publications.ojd.state.or.us/docs/A145281.pdf

Clackamas County Circuit Court DR09010492; A145281

Trial Judge: Eve L. Miller, Judge.

Before Armstrong, Presiding Judge, and Brewer, Judge, and Duncan, Judge.

Brewer, J.

Husband appeals from a judgment dissolving the parties' marriage. In multiple assignments of error, he challenges the property and debt division that the trial court made.

Held: The court did not abuse its discretion in dividing the parties' property and liabilities as it did. Because the trial court's findings of fact were supported by evidence in the record, in light of those findings, each party had rebutted the presumption of equal contribution as to all the marital assets of any significance and husband had failed to demonstrate that a "just and proper" distribution of those assets required giving him a greater share than the court awarded him. Affirmed. COA 12.05.12

Note on Opinions Reviewed:

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.