# FAMILY LAW NEWSLETTER

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# Family Law Mediation: The Master Checklist

*by Mark E. Sullivan*

## INTRODUCTION

In a large number of family law cases, mediation offers the best hope of problem resolution and dispute settlement. Trials are costly in terms of time and money as well as bad blood between the formerly married parties. It takes time to get the case on the docket, and then there are usually several issues to resolve, necessitating several different hearings. Letters and written proposals usually come up short, with the net result being only so many more tress cut down in the rain forest. Given the raw emotions and frayed feelings often found in marital dissolutions, many couples aren't quite ready for face-to-face negotiations.

Mediation offers a better alternative. When a party needs to "tell the story," as so often occurs in the aftermath of a bitter separation, the mediator is there to listen, to understand, to sympathize. When someone is needed to carry a proposal to the other side with candor, encouragement and support, the mediator can do it best; as an uninvolved intermediary, he carries none of the "baggage" that often accompanies a settlement offer from opposing counsel. And when an outsider is needed to pick up a strained or aggressive proposal and give it a bath in the cold water of reality, the mediator can do it best. For all these reasons, mediation is the domestic lawyer's best dispute settlement tool.

Domestic mediation can be a race horse of a different color, however. It bears little resemblance to mediation in a case involving land condemnation, personal injury commercial contracts or workers' compensation. Equitable distribution cases are often multi-level, complex disputes involving numerous issues. These "moving targets" can involve classification of marital, separate, mixed and divisible property, putting a value of the assets in each category both at separation and at trial, and distributing them equally or unequally: Child support and custody/visitation problems must be solved promptly and fairly with an eye to the future, since these parties will, through their children, continue to maintain some sort of relationship after the settlement is done, unlike most parties to a dispute. Future enforcement problems and tax considerations put a premium on creative drafting of the settlement instrument; a well-written one can last for decades and continue to return value to the parties who signed it.

For these reasons, it is important to approach family mediation much as one does a used car for prospective purchase. While here is certainly some value to walking around and kicking the tires, so to speak, it's much better to have an organized approach to the ordeal. And that means using a checklist.

> "A wife may not have any incentive to negotiate when she retains exclusive occupancy of the marital residence, receives substantial support and does not work."
>
> --Gary Skoloff, The Art and Craft of Successful Divorce Negotiation

## BEFORE MEDIATION

___1 **Decide if this case is meant for mediation.** While many cases have a good chance of settlement in mediation, some will never be closed in this way. Take the measure of your case and see if it's a candidate for mediation or not. Does the other side want to reach an agreement? Is there any reason for *your client* to agree on a settlement? What are the incentives promoting agreement? What will each side lose if the case is finished with a mediation instead of a trial? For example, Mr. Jones may want "his day in court" for purposes of vindication, embarrassment of his ex-wife or other reasons. Mr. White, who has control over all of the family and business assets, may see no reason why he should negotiate a settlement which will only divest him of some of these. If Mrs. Brown is receiving a hefty amount of temporary alimony, why should she have any incentive to negotiate a different settlement for final alimony? One side may have nothing to gain and much to lose by engaging in mediation. When this situation is present, you'll save time and money by discarding the idea of mediation in favor of setting a prompt date for trial. While trials are costly, in this case mediation would probably just add unnecessary expenses to the front end because the other side has no incentive to settle and would probably prolong the settlement negotiations indefinitely.

___2 **Choose the right mediator, or** *"Who ya gonna call?"* Choosing the mediator is a vital initial decision. Do you want a tiger? Or perhaps a tiger lily? Is the case right for someone who can act as the impartial umpire, standing apart and carrying offers and messages back and forth? Do you want an involved intermediary who, after listening to both sides, begins to offer independent suggestions on how to settle the case? Will your client listen to and respect a mediator who weighs in with some opinions of her own as to the merits of the client's position? "Hands off" and "hands on" are two of several possible styles that mediators adopt. Background and experience are other factors in deciding on a mediator. Do you need a certified mediator, or will an untrained attorney do? Do you want a former judge, who might have enhanced credibility by her ability to point to cases she has had when on the bench? Do you want a North Carolina lawyer who is board-certified in family law (over 100 in the state), or a Fellow of the American Academy of Matrimonial Lawyers (fewer than 30)? Do you even need an attorney? Perhaps a psychologist would do if the issues are visitation and custody, or a CPA would be useful if the matter involved finances (support or property division). Spend some time analyzing the case and your client to see what kind of mediator and mediation style is right, and then call around to get the lowdown on which mediators can offer your case and your client what you need. *Do not* call the mediator unless you have the opposing attorney linked into the phone conversation; not only does this smack too much of "shopping around," but it also taints the expected neutrality and objectivity that the mediator brings to the settlement table.

___3 **"Is the time right?"** Choose the optimum time for settlement discussions. If your client has just been brought to his knees by an onerous award of post-separation support or a preemptive strike involving interim allocation, perhaps the passage of a few weeks or months might help smooth the road for mediation. Your client might be in a bitter and oppositional frame of mind if her husband just walked out of the marriage to spend the rest of his new, middle-aged life with his common-law secretary. On the other hand, the client might be agreeable to a mediation session if some time has passed since the separation, the time and legal expenses have taken their toll, feelings of anxiety and uncertainty about the future are present, or the prospects for a "better deal" do not appear bright on the horizon. The timing of a court date can work both ways in prompting mediation. In some cases, it is best to schedule mediation close to the threshold of the trial so that the fear of a decision over which they will have no control will drive the parties to a bargain. At other times, the fact that the trial is in the far distant future has the effect of moving the parties toward mediation which can speed up the resolution of their domestic case. Analyze the time dynamics of the case. Time is not a neutral factor, ticking away quietly in the background. It is a dynamic, active factor which can drive the entire case to settlement or trial. If John needs to get the case over with quickly so he can marry his secretary, then time is against him and may prompt a settlement meeting. If Jane needs to have a custody order so she can move back to Ohio with the kids, then the time factor might be useful in her case to get mediation moving. Discuss the issue of mediation candidly with your client to find out if it's worth pursuing at this time. And continue to pursue it until the client is ready or else makes a final and informed decision against it.

___4 **Before mediation: Prepare, *Prepare*, PREPARE!** In a limited sense, you can use mediation for discovery, that is, you may probe and explore your opponent's position. This latter point is, of course, important if you wind up in trial - you have used the time in your failed mediation fruitfully to make the other side show its hand. In a broader sense, however, mediation is ***not*** for discovery. Discovery must be accomplished before the mediation starts. No truly effective

mediation session can be held while the attorneys are trading documents and data. The time for this intensive review of your case and the other side's is ***before*** the mediation begins. At least a month in advance of mediation, do an inventory of two items – what ***your own side*** needs to produce to be ready for mediation, and what you need from your opponent. Then start assigning tasks and deadlines for your own "internal discovery" and send out a request (by phone, mail, fax or e-mail) for the other side's information. Tailor the requests to your opponent so that you are not doing boilerplate requests for "everything you've got." This type of request bespeaks no preparation at all. Rather, examine what your position is, what you need to support it or clarify it, and go get the information that you need. In a simple spousal support matter, for example, you might need the other side's financial affidavit, last year's tax returns and a current pay stub. For a custody case you might require school progress reports and report cards, plus a copy of the last two years' medical and dental records. In a pension division matter your request might include the annual benefit statement and the summary plan description for a private plan.

___5 **Outline your issues.** Make an outline of what issues must be resolved in the mediation. This should include substantive ones (custody, decision-making on major issues, visitation for weekends, summer, holidays, travel logistics) as well as administrative ones (separation agreement vs. consent order, attorney's fees if breach, incorporation of agreement into divorce decree, future mediation if disagreements or changes occur, etc.). Finally, don't ignore the "small stuff." Many a client has walked out of a mediation, after signing the final settlement document, and turned to his attorney to ask, "Oh, yeah – what about my pre-marriage guitar and amp that my wife still has. We didn't address those. When does she have to give them back?" Be sure to ask your client to make a "soup to nuts" list of anything else which needs to be resolved in the mediation.

___6 **Determine a starting time.** Then give yourself some time with the client before the session begins to listen to any last-minute concerns or questions. Clients can be nervous about mediation, even though (or perhaps ***because***) they control whether a settlement will be reached; this is your way of showing a little extra consideration.

___7 **Rehearse "give-and-take" with your client.** Neither side can demand results in a mediation. Your client can neither force a settlement nor have one forced upon her. She has control over the outcome in the same sense as the other side does – no mediation agreement will result from the session without joint agreement. For this reason, you'll want to do a "shakedown cruise" with the client to find out the answers to a lot of "what-if" questions. Your rehearsal might include the following give-and-take questions: Suppose the other side refuses to extend alimony beyond five years? What if they won't budge on the amount, not offering over $1,000 a month? What can we trade if they won't transfer the house over free and clear? How do we respond when they demand a share of ***our*** pension? Make your client think about the answers to these questions in advance of the mediation so she is ready to confront reality and the dynamics of give-and-take bargaining.

___8 **Prepare the client for what to say.** Go over with the client how the mediation will take place. Try to give him a generally accurate description of where to sit, how to dress, what to bring (documents, pictures, etc.), whether to address the other party or not, how to respond when you ask him questions, and how to signal the need for a break (to ask a question, to add a concern or just to get a drink of water). Emphasize the need to take a businesslike approach to the issues and the importance of controlling emotions so that principles, not passions, rule in the mediation room. If your client needs to "vent," it may be wise to have him do it before the mediator only, instead of in a five-way conference. That way, the mediator can truly understand what motivates your client without the dangers of spending unnecessary time reciting past ***pecadillos*** or former faults, or inflaming the other side to the point that agreement becomes impossible.

## DURING MEDIATION

___9 **Set time limits.** At the outset decide on stopping points, if applicable. When will the lunch break be? At what time will the mediation conclude? Are there any set-in-stone deadlines? You ***don't*** want to be at the point where you're about to write up a memo of the settlement, only to hear opposing counsel say, "Oh, I have to run - I told the sitter I'd be home by 6 to fix supper for the twins!"

___10 **Listen to "Why?"** The best advocates have tight lips and big ears. They listen to the other side and, when a break occurs, then tend to follow up with "Why?" instead of responding immediately with a counterpoint. Getting to the bottom of the other side's position, with reasons, past problems or expectations, can be helpful in solving those problems in mediation. There's no such thing in mediation as "That's ***their*** problem!" If a legitimate problem, not a feigned one, exists, the mediator

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and the parties need to understand it, to explore it in depth, and to try to solve it with creative lawyering and skillful drafting - "thinking outside the box." Finding out what motivates the other side is the key to writing a successful agreement if those needs and requirements are genuine. And if they are not bona fide needs, then listening to "Why?" will help to prepare a good counter-argument in reply or, if the mediation fails, a good case in court.

___11 **Role-play with the mediator.** If you're having trouble getting your client to "come around" to a settlement, use the mediator in a role other than as messenger, just carrying offers back and forth. Ask the mediator to "play judge" for a while, giving some opinions on how the issues would be resolved in court. This can sometimes nudge a reluctant client into a settlement by using the neutrality, experience and objectivity of the mediator as part of the persuasion. Have the mediator explain the problems that are holding back the other side from agreement, the goals that the other side has. Get her suggestions on how to respond to those problems or to achieve a mutual fulfillment of goals. Ask her to propose what can be done to win the settlement without "giving up the farm."

___12 **Use 3-way meetings.** It's a good idea to meet with opposing counsel and the mediator alone to get to the bottom of an impasse. Quite often the mediator will be able to see, explain and articulate the issues and viewpoints which are preventing an agreement. Perhaps he believes that movement on Issue A will produce more progress than dithering on Issues X, Y and Z. Maybe there are some documents which he recommends your client produce. Does he see a "hidden agenda" on either side which should be mentioned first to counsel before laying it out before the parties? Make an ally of the other attorney by committing to nudge and push your client in Area A if she'll do the same to get movement in Area B and C. Work on ways you and the other attorney can cooperate for mutual benefit through positive recommendations to the clients. Focus on problems to be solved, not personalities. Look to the future, don't dwell in the past.

___13 **Limit what you say.** You should make a studied decision as to what you say in the mediator's presence and what you let the mediator tell the other side. Sometimes this approach will enable the mediator, if allowed to sit in on the attorney-client session, to convey more clearly to the other side what is holding up an agreement. When you do this, discuss it first with the client to decide how much role-playing there will be. You might want your client to take a forceful position before the mediator, without you as the voice of reason. Or it might be the opposite. Or there might be *no*

role-playing at all, with everything *on the record* and available for the other side. You should know that the mediator will honor what you tell her about taking information to the other side and you should use this to your advantage. Many mediators will start a session with the statement, "Whatever you say to me will be fair game for me to repeat to the other side, unless you instruct me otherwise." Play an active part in deciding what the mediator can carry into the other room and what will remain behind. If you don't want the mediator to sit in on your counseling sessions with your client, say so. That way, you can invite the mediator to join the two of you once you have firmed up your position or response, and not before.

___14 **Listen to the mediator.** When the mediation is slowing down and doesn't appear to be making much progress, ask the mediator how to keep it moving along. Mediators have a vested interest in effecting a successful conclusion to each and every mediation that they conduct. Sometimes the mediator, when invited to comment, will respond with something dramatic: "You need to tell them that you're fed up and will be walking out in five minutes." At other time, she'll suggest that small movements; for example, when the other side is only making small adjustments to their position, you should respond in the same way with nickels and dimes of change in each counterproposal instead of big bucks. Get the perspective of the mediator on the process that is going on and how to promote prompt resolution.

___15 **Be honest.** No settlement is worth risking a bar complaint or grievance. If the other side has made a mistake on the math, point it out to them promptly. Never use the other side's inattention or lack of understanding to help settle a case. These problems will come back to bite you later on, and it's not worth that hard-earned law license to settle a case with a major misunderstanding on the other side. Stay within the rules. The settlement doesn't have to be fair; it *does* have to be *right*.

___16 **Be persuasive.** Nothing that's written about mediation says you have to leave your persuasive abilities parked at the mediation room door. Do you have exhibits you'd use in trial? Bring them. Are you adept at PowerPoint? Prepare a set of slides which you use to show the mediator - or the mediator and the other side - at the outset of the session. If the case involves equitable distribution or alimony, come armed with your spreadsheets and also your laptop (in case some numbers need adjustment during the meeting). Appealing to the eye and the ear make your persuasion tools doubly powerful.

___17 **Close the deal.** Make sure there are no stones left unturned at the end of the meeting. The mediation advocate should be adept at ***closing doors*** as well as opening them. If you have, for example, settled everything but the pension, don't just leave it out. If the pension is to be waived, say so. If it is to be resolved in court, write that down. While some say "Silence is golden," the domestic attorney knows that in agreements "Silence is deadly." ***When in doubt, write it out.*** Don't let the omission of an item, such as the availability of attorney's fees in the event of breach or the incorporation of the agreement into a decree of divorce, be the subject for a later fight between the parties. If at all possible, leave nothing for later resolution; if there is any such open item, write down exactly what it is, how long will be given for resolution, and what the consequences or default result will be if there is no agreement. The author found this out the hard way. In one mediation opposing counsel begged off signing the settlement because of "dinner deadlines" and asked that her client be given a week to think about the settlement and discuss it with her CPA. It was nine months later, at the cost of many thousands of dollars, that the final revised settlement agreement was signed by the wife!

## AFTER MEDIATION

___18 **Sign the settlement.** When a session is winding toward conclusion, the good advocate whips out his laptop and starts to draft the agreement. All too often a settlement is lost because the parties shake hands at the ends of the session and fail to finalize the agreement. The document to prepare is the final settlement agreement, not just a brief memo of this. If you can write up the entire agreement, you can close the case file on that issue upon leaving the mediation room. Be sure to have the appropriate templates on your laptop for a separation agreement, a parenting plan or a consent order. Remember, the job isn't finished till the paperwork is done!

# From the Bench: Making the Most of Short Hearings

*By Hon. Daniel R. Murphy, Circuit Judge*

In the family law arena a lot of crucial decisions must be made by judges in a very short time during short hearings on temporary relief, immediate danger orders, and other pretrial matters. Domestic relations case filings continue to increase while Oregon courts are faced with no more docket time and often less due to staff and judge shortages. No new trial judge positions have been added for several years despite growing dockets. As a result many of these hearings are by necessity squeezed into short hearing slots.

The challenge for attorneys is how to make the best use of this limited time to get before the judge the essential evidence needed to make a good decision. These hearing times can be as little as 30 minutes and often not more than an hour or two. Here are some tips on how to use that short time to be most effective.

1. Stipulate to as much as you can: Contact opposing counsel as soon as you can and offer to stipulate to facts that are not in controversy in exchange for stipulations that you need. There is often a lot of background information which is not in controversy and using precious hearing time to recite it or solicit it in testimony denies you the time you need to focus on the important matters in controversy. Consider preparing a short and concise statement of these stipulations which you can submit to the court and avoid wasting time.
2. Maintain Focus on the issues at hand: there is often a temptation to ask questions about every dispute that exists and every complaint your client has, even those that are not relevant to the limited issue before the court. Every minute spent on these irrelevant matters denies you time to offer proof on what is crucial to the limited issue before the court.
3. Object to irrelevant and redundant questions: even if you carefully limit your inquiry to what is relevant opposing counsel can waste everyone's time with repetitive evidence or long diversions. Be prepared to raise the relevance objection and limit the evidence to what the judge must decide at this time.
4. Limit Opening statements and closing arguments: there is not sufficient time during a short hearing for long openings and closings. Every moment spent in argument again decreases crucial time for evidence. Judges must make decisions based on evidence, not on argument. Consider waiving opening. It is extraordinarily rare that an attorney gains any advantage from an opening statement in short hearing. Limit your closing to 2 or 3 issues – no more than 3 minutes.
5. Obtain stipulations to documents: time is saved when stipulations to documents are used. Unless you cannot lay the foundation for a document no one should be objecting to it. With a proper foundation it will come in.
6. Prepare your witnesses: this is especially true of clients who want to tell their whole story and digress. Tell them up front what you are going to ask them. Preferably give them the questions in writing before the day of the hearing so they can be prepared to answer them. If a witness cannot remember events reliably or cannot remember dates, times and places do not ask those questions.
7. Make sure the facts are available: insure that you are calling the right witness to prove the facts at issue. Does this witness know these facts or is it merely hearsay or supposition? Focus on what is admissible. Ask the witness in advance how they know what they say they know it.
8. Limit the number of witnesses: you have only a short time. Call only the most essential witnesses to offer the essential evidence the court needs to render a decision.
9. Make sure a witness is credible: find out about their criminal record in advance. Find out if they have previously testified in the case and what that testimony was. Review depositions if they exist to make sure you do not ask the wrong question and ambush your own case.
10. Google the Ten Commandments of Cross Examination by Irving Younger. These are golden. Effective cross examination is the greatest challenge for trial attorneys and often the least skillfully done. Short hearings are not discovery opportunities or fishing expeditions. If you do not know the answer likely to be given do not even ask the question – unless you really can impeach the witness.
11. Often the most powerful cross examination are these seven words: "I have no questions of this witness". In family law especially the opposing party is not likely to make damaging admissions. They will deny anything that they perceive hurts them. You only waste time arguing with a recalcitrant witness. Remember that every minute you waste arguing with the opposing party is a minute you cannot elicit useful testimony on direct from your witnesses.
12. Maintain your focus on a few salient and crucial issues: limit your inquiry to a very small number of crucial facts and forget all the fluff.
13. Almost always call your client first. I cannot tell you how many times I've seen attorneys spend all their time with secondary witnesses and fruitless cross examination only to have no time left to have their client testify.

14. Know your judge: if you have not practiced before the judge in the past ask colleagues about the judge. What are the judge's preferences, attitudes about going over time, etc? Irritating the fact finder is never a good strategy.
15. Save something for trial: do not show all your cards at pretrial hearings. Focus on the limited issue at hand and resist using limited time for showboating.
16. Offer findings of fact: be prepared to offer the judge written proposed findings of fact and be prepared to amend them as needed. Most judges are buried in work and anything you can do to reduce their work demands is effective. On the other hand do not offer proposed findings of fact that are not supported by the evidence.
17. Tell your client in advance the limited nature of these hearings, the limited time available, and that you have a strategy for limiting what you ask. Explain that all the relevant facts will come out at the trial if there is one.
18. Do not overlook possible settlement: good lawyers settle as many disputed matters as quickly as they can and they don't give up on their efforts to settle. Document those efforts carefully – they may be valuable when you seek an attorney fee award.
19. Be organized: nothing frustrates a judge more than a disorganized attorney. Prepare a trial notebook with an outline of the essential facts you need to elicit. Pre-mark all exhibits in advance (the rules require it) and have a copy available for opposing counsel, the court clerk and the judge. Submit an exhibit list to the judge and clerk in advance.
20. Have an exit strategy: think about how you will want to proceed if you lose on the initial hearing. This inspires confidence from your client and helps you plan your strategy for trial.

One great way to see how a judge sees the evidence in these hearings is to be a judge. Explore opportunities in your court or in neighboring courts to act as a pro tem judge. You will gain a whole new perspective on what the judge must do and how best to present information to the judge in a limited time if you sit behind the bench a few times.

The most effective attorneys in short hearings are those that are well organized, have prepared thoroughly, know what their witnesses know and how they know it, and have planned out the crucial evidence they need to offer while pruning away that which is not essential.

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*Daniel R. Murphy is the presiding judge of the 23rd judicial district in Linn County, Oregon. He has been on the bench since 1994. He has heard hundreds of family law cases. He is also the editor of the OSB Family Law Newsletter.*

# MILITARY FAMILY LAW

## Ten Commandments for Handling Military Retirement Benefits

*by Mark E. Sullivan* and Amy M. Privette***

Military retirement benefits are not handled in the same manner as private pension plans, which are governed by ERISA (Employee Retirement Income Security Act). Allocating and dividing military retirement benefits as part of a divorce case is not easy. The best advice is to find someone "in the know" who can help you and your client navigate the minefield of military pension division, Survivor Benefit Plan (SBP) coverage, medical care before and after divorce, and other retirement benefits. Still, for those bold enough to take on the challenge, here are some tips to help you get started:

1. **Get the docs!** There are numerous documents that you need to request from the servicemember (SM) to evaluate what retirement benefits are available. This could include a Leave and Earnings Statement (for active duty members), Retirement Points Statement (for Reserve and Guard members), Retiree Account Statement (for retirees), SBP election forms, retirement orders and discharge papers, as well as Officer or Enlisted Record Briefs.
2. **Know the rules!** The division of military retired pay is authorized by the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. It is an enabling act which allows states to divide military retired pay but leaves the specifics of how to do it up to each state. The Survivor Benefit Plan (SBP) is the survivor annuity program which allows the former spouse to continue receiving a stream of payments after the servicemember/retiree dies. SBP is provided for under 10 U.S.C. § 1447 et seq. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) expands upon the federal statutes to provide more detailed guidance as to the division of military retirement benefits. See also 10 U.S.C. § 1408 (c)(4) for specific rules regarding which courts have jurisdiction to divide military retirements.
3. **Identify the system!** Active duty retirement occurs under one of 3 systems: a) Final retired pay b) High-3 c) CSB/Redux - http://militarypay.defense.gov/retirement/ad/01_whichsystem.html. Reserve/National Guard retirements are based on retirement points, NOT time, and the servicemember must have at least 20 "good years" of service (50 points are required to have a good year) to be retirement-eligible. Active duty retirements pay out immediately upon

retirement whereas Reserve or Guard retirements generally do not pay out until the retiree reaches age 60. The cost of providing SBP coverage to a former spouse can also differ, depending on whether it is an active-duty or reserve retirement.

4. **Use the right lingo!** SCRA – When the SM has not yet retired, the pension division order must state that the SM'S rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 *et seq.,* have been honored. DFAS is the retired pay center for Army, Navy, Air Force, Marine Corps (as well as Reserve units and Air and Army National Guard). There are separate pay centers for retirees of the Coast Guard, Public Health Service, and National Oceanographic and Atmospheric Administration. Disposable Retired Pay (DRP) is gross retired pay less any VA disability waiver, the premium for SBP (if coverage is for former spouse of this divorce), and any other money owed to Uncle Sam. DRP (Disposable Retired Pay) is what the pay center divides, regardless of what the court order says. COLAs (cost-of-living adjustments) are usually applied to retired pay in January and are automatically included in the share received by the former spouse unless the court order awards the spouse a flat dollar amount. The pension is not a "fund," so you cannot refer to the account balance or the part of the fund acquired during the marriage or vested at the date of divorce. Use an MPDO (Military Pension Division Order) to divide the retirement benefits, not a QDRO, since this is not a "qualified plan" under federal law; it is a statutory retirement program.
5. **Choose wisely!** When the pension is based on retirement from active duty, there are four acceptable methods for dividing it: a) fixed dollar amount; b) percentage; c) formula clause; and d) hypothetical award. There are pro's and cons for each method, so make sure you evaluate which would be best for your case. A full explanation of the four methods can be found in the Attorney Instruction Guide available at the DFAS website: http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html
6. **Don't forget the SBP!** SBP is a unitary benefit and cannot be divided between a present and former spouse. Without SBP, the stream of pension payments to the former spouse ceases upon the death of the servicemember/retiree. The benefit paid out is 55% of the selected base amount. The maximum base amount is the full retired paycheck; the minimum base amount is $300. The cost for coverage is generally 6.5% of the selected base amount, paid upon retirement by deduction from the pension check. If the former spouse predeceases the retiree, then the spouse's share of the retired pay automatically reverts back to the retiree – at NO cost. If the former spouse gets remarried before age 55, then her coverage under SBP is halted.
7. **Watch the clock!** There must be ten years of marriage overlapping ten years of military service for the former spouse to get pension payments directly from the pay center. Even with an overlap of less than ten years, the former spouse is still eligible to claim a share of the retired pay, but the retiree will have to make the payments. There are two deadlines for setting up SBP coverage for the former spouse. When the SM makes the election, it must be done within one year of divorce; when the former spouse sends in a "deemed election," it must be done within one year of the order requiring the other party to elect SBP coverage.
8. **Beware of disabilities!** Certain types of disability compensation can reduce the retired pay that is divisible with a former spouse. The primary types of disability payments are military disability retired pay, VA disability compensation, and Combat-Related Special Compensation (CRSC). The court cannot divide VA disability compensation (see 1989 Mansell decision by the U.S. Supreme Court), and only a small part of military disability retired pay is subject to pension division (although disability benefits ARE subject to consideration in support cases, in general). When the military retiree has a VA disability rating of less than 50%, election of VA payments means a dollar-for-dollar reduction of retired pay; thus, the retired pay share for the former spouse gets reduced due to the unilateral action of retiree. Courts and agreements often employ indemnification language to guard against this and to protect the property share awarded to a former spouse.
9. **(Don't) Get a Life!** When representing the former spouse, don't rely on Servicemembers Group Life Insurance to secure benefits; a 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).
10. **"Medic!"** If there have been 20 years of marriage overlapping 20 years of military service, then an un-remarried former spouse may qualify for full medical benefits as a 20/20/20 spouse. For shorter term marriages, look in to CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.

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***Amy Privette, a North Carolina State Bar Certified Paralegal, wrote this when employed by the Law Offices of Mark E. Sullivan, P.A., where her primary responsibility was family law, with a special focus in the area of military divorce and federal pension division issues. Ms. Privette is now in law school at Regent University.*

## Coming in December: U.S. Supreme Court's DOMA and Prop 8 Rulings and Their Implications

By Pamela L. Jacklin and Margaret "Gosia" Fonberg

From the Bench: Contempt by the Hon. Keith Raines, Circuit Judge

The 13 Commandments of Cross Examination by Mark Sullivan

## Where is Your Article?

Please consider submitting an article to the newsletter. It is a great way to establish your reputation as knowledgeable about family law and to deepen your understanding of that law. There is no better teacher than writing a well-researched and well-reasoned article. Send inquiries and submissions to the editor at murphyk9@comcast.net today.

# 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

### Custody; Grandparent; Constitutionality

*John Paul Epler and Andrea Michelle Epler,* 258 Or App ___ (2013)

http://www.publications.ojd.state.or.us/docs/A148643.pdf

Trial Court: Dennis J. Graves, Judge, Marion County Circuit Court 04C33678; A148643

En Banc

Armstrong, J.

Mother appeals a judgment denying her motion to modify custody, parenting time, and child support for her daughter. Mother contends that the trial court erred under ORS 107.135, ORS 109.119, and the federal constitution when it refused to modify a 2005 marital dissolution judgment that awarded sole legal and physical custody of daughter to grandmother. In the alternative, mother contends that the trial court erred when it refused to modify the parenting plan for daughter and to adjust the child-support obligations of the parties.

Held: The trial court did not err under ORS 107.135, ORS 109.119, or the federal constitution when it refused to modify custody. In light of the trial court's failure to explain the basis for its decision to reject mother's motion to modify the parenting plan and child support, the Court of Appeals cannot determine whether the trial court abused its discretion in ruling on those issues because it is unclear that the trial court exercised its discretion. Remanded for reconsideration of parenting plan and child support; otherwise affirmed. Supplemental judgment awarding attorney fees reversed. COA 09.11.13

### Property Division; Spousal Support

*Victoria Marcel Salgado and Avel Rincon Salgado,* 258 Or App ___ (2013)

http://www.publications.ojd.state.or.us/docs/A148101.pdf

Trial Court: Cynthia D. Carlson, Judge, Lane County Circuit Court 151009612, A148101

Schuman, P. J.

Husband appeals a dissolution judgment, requesting that the Court of Appeals modify the trial court's property division and reduce his spousal support and child support obligations. With respect to the property division, husband argues that the trial court erred in valuing the family business at $600,000, awarding it to him, and awarding wife an equalizing judgment for half that amount. The court compounded the mistake, he argues, by failing to take that equalizing judgment into account when calculating his support obligations. More specifically, he argues that, after the equalizing judgment, his income is not sufficient to pay the amount awarded in spousal and child support, and that the equalizing judgment (and interest on that judgment) should be treated as wife's income for calculating child support.

Held: The trial court erred in valuing the business based on a "multiple of earnings valuation model" that was not supported by any evidence in the record. Because the support obligations are intertwined with the property valuation (and any equalizing judgment), the Court of Appeals did not reach husband's assignments of error concerning support issues, but instead remanded those issues for the trial court to consider in the first instance.

Dissolution judgment reversed and remanded with regard to property division, spousal support, and child support; otherwise affirmed. Supplemental judgment for attorney fees reversed. COA 09.17.13

### Spousal Support; Child Support

*Kaarin Beth Andersen and Steven Craig Andersen,* 258 Or App ___ (2013)

http://www.publications.ojd.state.or.us/docs/A151241.pdf

Trial Court: Deanne L. Darling, Judge, Clackamas County Circuit Court DR11060152, A151241

Haselton, C. J.

Husband appeals a general judgment of dissolution, challenging, inter alia, the trial court's awards of transitional and compensatory spousal support and child support. Husband contends, in part, that (1) the court erred in determining that wife was entitled to compensatory spousal support; and (2) in all events, the court erred in fixing the amount of transitional and compensatory spousal support and child support in that the court's finding as to his earning capacity was unsupported by legally sufficient evidence.

Held: Given the parties' circumstances, the trial court could properly determine that wife had made significant contributions to husband's education, training, vocational skills, career, or earning capacity. The fact that wife enjoyed some of the benefits that resulted from husband's enhanced earning capacity for a number of years during the marriage did not completely offset those contributions. Accordingly, the trial court did not err in awarding compensatory spousal support. However, the trial court erred in determining husband's earning capacity and, thus, its derivative determinations of the amounts of spousal support and child support were necessarily flawed. Awards of child support and spousal support reversed and remanded; otherwise affirmed. COA 09.25.13

## 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.