Family Law Section

2017 Annual Conference
October 12-14, 2017

Sunriver Resort
17600 Center Drive, Sunriver, Oregon

10 General CLE credits and 1 Ethics credit

NOTES

Table of Contents

2017 Family Law Annual Conference

All CLE presentations in the Homestead Conference Room unless otherwise stated.

THURSDAY, OCTOBER 12, 2017 - EVENING

6:00 PM – 8:30 PM **Registration Table Open** (Landmark Room and Gallery)

6:00 PM – 9:00 PM **Vendors Available** (Landmark Room and Gallery)

6:00 PM – 9:00 PM **Welcome Reception** (Landmark Room and Gallery)
(Appetizers & No-Host Bar)
***Sponsored by*:** *Corey, Byler, & Rew LLP, Pendleton, Oregon*

9:00 PM – Closing **After-Hours Gathering at Twisted Tavern** (Sunriver Lodge)
(No-Host Bar)

FRIDAY, OCTOBER 13, 2017 - MORNING

6:30 AM – 7:00 AM **Yoga** (Great Hall Conference Center – Landmark Gallery)
$10 per person (guests welcome – please RSVP)

7:00 AM – 10:30 AM **Registration Table Open** (Great Hall Conference Center Lobby)

7:00 AM – 8:30 AM **Vendors Available** (Great Hall Conference Center)

7:00 AM – 8:30 AM **Breakfast Buffet Available** (Great Hall Conference Center – Great Hall Room)

7:00 AM – 8:00 AM **History of Exclusionary Laws Affecting LGBT Oregonians - Access to Justice Credit** (CLE Video Replay in Heritage #2 Room)

8:00 AM – 8:40 AM **Collaborative Law - What It Is and What It Is Not**
Nancy Retsinas, Retsinas Collaborative Law Center, Vancouver, Washington
Laura Rackner, Gearing Rackner & McGrath LLP, Portland, Oregon

8:40 AM – 9:15 AM **Technology and the Family Law Practice**
Julie Gentili Armbrust, *Mediation Northwest, Eugene, Oregon*

9:15 AM – 10:15 AM **Stop Running From The Alimony Man - Everything You Need to Know About Spousal Support Modifications**
Kimberly Quach, Quach Family Law PC, Portland, Oregon
Michael Yates, Yates Family Law PC, Portland, Oregon

10:15 AM – 10:30 AM **Morning Break** (Beverages & Snacks in Homestead Lobby)

10:30 AM – 11:15 AM **Extreme Makeover: Child Support Edition – What's Changed and Changing in the Oregon Child Support Program**
Kate Cooper Richardson, Director Division of Child Support and Oregon Child Support Program
Michael Ritchey, Oregon Division of Child Support

11:15 AM – 12:00 PM **Parental Alienation**
Dr. Landon Poppleton, Ph.D., J.D., Vancouver, Washington

12:00 PM – 1:15 PM **Luncheon and presentation of 2017 Professionalism Award to Eric C. Larson**
(Great Hall Conference Center – Great Hall Room)

FRIDAY, OCTOBER 13, 2017 – AFTERNOON

1:15 PM – 2:15 PM **Drafting Prenups: The High Road to Perfection**
William Howe III, Gevurtz Menashe Larson & Howe PC, Portland, Oregon

2:15 PM – 3:00 PM **Elderly Clients and Legal Capacity**
Wesley Fitzwater, Fitzwater Meyer Hollis & Marmion, LLP, Portland, Oregon

3:00 PM – 3:15 PM **Remembering the Professor: Presentation in Memoriam of Larry Gorin** (Homestead)

3:15 PM – 3:30 PM **Afternoon Break** (Beverages and Snacks in Homestead Lobby)

3:30 PM – 4:15 PM **Intersection of Criminal Law & Family Law**
Shannon Snow, Saucy & Saucy, Salem, Oregon
Randall Snow, Harris Wyatt & Amala LLC, Salem, Oregon

4:15 PM – 5:00 PM **Oregon and Washington: So Close, Yet So Far Apart**
Elizabeth Christy Taylor, Elizabeth Christy Law Firm, PLLC, Vancouver, Washington
Collin McKean, McKean Smith, LLC, Portland, Oregon

5:00 PM – 5:20 PM **Family Law Section Business Meeting** (Homestead)
Jennifer Currin, Chair, Oregon State Bar Family Law Section

FRIDAY, OCTOBER 13, 2017 – EVENING

5:00 PM - 6:30 PM **Sunriver Resort Brew Tasting** (Great Hall Conference Center - Great Hall Room)
***Sponsored by*:** *McKean Smith, LLC, Portland, Oregon*

5:00 PM – 7:00 PM **President's Reception** (Great Hall Conference Center – Great Hall Room) (Heavy Appetizers & No-Host Bar)

SATURDAY, OCTOBER 14, 2017 – MORNING

6:30 AM – 7:00 AM **Yoga** (Great Hall Conference Center – Landmark Gallery) $10 per person (guests welcome – please RSVP)

7:00 AM – 10:30 AM **Registration Table Open** (Great Hall Conference Center – Lobby)

7:00 AM – 8:30 AM **Vendors Available** (Great Hall Conference Center)

7:00 AM – 8:30 AM **Executive Committee Meeting** (Great Hall Conference Center – Fireside Room - *Committee members only please)*

7:00 AM – 8:30 AM **Breakfast Available** (Great Hall Conference Center – Great Hall Room)

7:00 AM – 8:00 AM **Elder Abuse Reporting** (CLE Video Replay in Heritage #2 Room)

8:00 AM – 8:30 AM **ORS 109.119: Defining the Child-Parent Relationship**
Tracey RH Naumes, Hamilton & Naumes, LLC, Medford, Oregon

8:30 AM – 9:15 AM **Thoughts on Evidence**
Daniel Margolin, Stephens & Margolin LLP, Portland, Oregon

9:15 AM – 10:15 AM **Ethics in Billing and Collection for Family Lawyers: How Not to Let Money Become the Root of Evil to Your Professional Life**
Arden Olson, Harrang Long Gary Rudnick PC, Eugene, Oregon
Lorelei Craig, Harrang Long Gary Rudnick PC, Eugene, Oregon

10:15 AM – 10:30 AM **Morning Break** (Beverages & Snacks in Homestead Lobby)

10:30 AM – 11:30 AM **Family Law Appellate Case Review**
Hon. Rebecca Duncan, Oregon Supreme Court

11:30 AM – 12:15 PM **Legislative Update**
Ryan Carty, Saucy & Saucy, Salem, Oregon
William A. Boaz, Boaz Law Firm PC, Salem, Oregon

12:15 PM **Conference Adjourns**

Moderator:

John Barlow

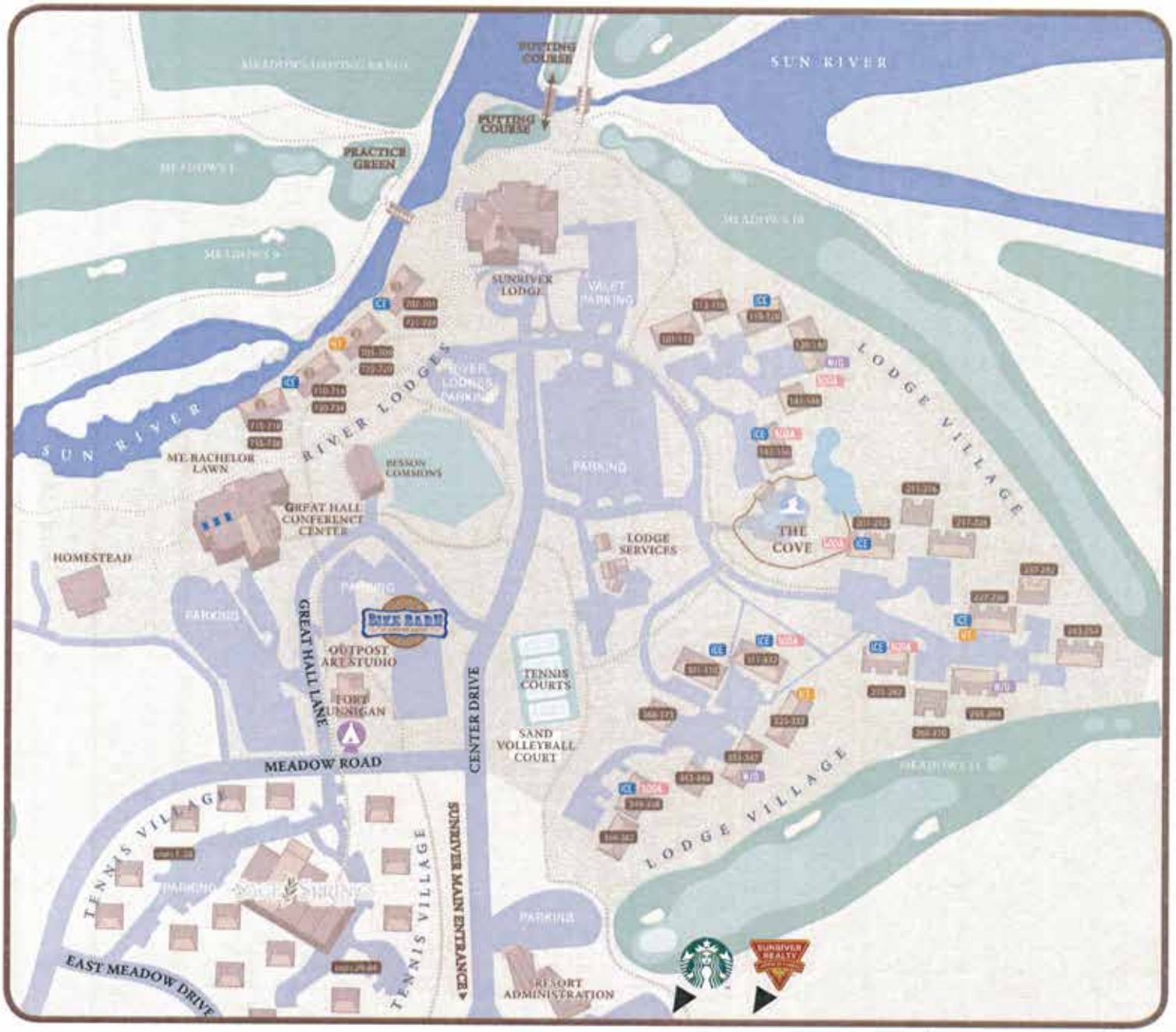
Conference Chair:

Jennifer Brown

Conference Committee Members:

Jennifer Currin, Annelisa Smith, Shannon Snow,

Amanda Thorpe, Stephanie Wilson



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- Hot Tub
- Soda Machine
- Washer/Dryer
- Unit Numbers
- The Cove
- Sunriver Summer Camps

Meeting Rooms

SUNRIVER RESORT LODGE

Abbot I
Abbot II
Hearth Room
Vandevert
Upper Gallery
Fremont
Merchant Trader Lawn

RIVER LODGES

Ponderosa Gallery
Links Gallery
Cascade Gallery

HOMESTEAD

Homestead I
Homestead II
Homestead III
Homestead Lawn

GREAT HALL CONFERENCE CENTER

Great Hall
Landmark I & II
Landmark Gallery
Mt. Bachelor Lawn
Great Hall Courtyard
Heritage I & II
Heritage Gallery
Fireside Room

NOTES

Laura E. Rackner is a founding partner at Gearing, Rackner & McGrath, LLP and is licensed to practice law in the state of Oregon. She practices all areas of family law and collaborative divorce, with special emphasis on complex child custody and parenting time issues. Laura is a frequent lecturer on litigation and settlement issues involving custody and parenting time and is co-author of the Oregon State Bar Family Law chapter on custody and parenting time. Additionally, she regularly provides pro bono services to minor children. Laura was recognized by Super Lawyers as one of the "Top 25 Women and the Top 50 Oregon Attorneys". She holds the "AV Preeminent" peer review rating by Martindale Hubbell. She has earned additional recognition by Washington Law and Politics magazine as one of Oregon's "Super Lawyers". Laura serves as a member of the Multnomah County, Clackamas County and Washington County Bar Associations; the Oregon Academy of Family Law Practitioners; the Oregon State Bar – Family Law Section; the Portland Collaborative Divorce professional group; and the University of Oregon Law School Dean's Advisory Council. She is also on the Board of the Oregon Academy of Family Law Practitioners and the Board of the Association of Family and Conciliation Courts, Oregon Chapter. She has practiced law since 1984.

Nancy Retsinas is a collaborative lawyer and mediator in Washington and Oregon, representing clients who seek out-of-court solutions to conflict. As a settlement advocate, she has extensive experience guiding clients through alternative dispute resolution processes. She is a frequent speaker and trainer on the difference in roles between traditional advocacy and settlement advocacy, collaborative law, mediation, client-centered dispute resolution, and legal ethics, and is a contributing author of the Washington Practice Manual, 2017 edition. Nancy co-founded Two Rivers Institute for Dispute Resolution and serves as its Executive Director. Her professional associations include: Association of Family and Conciliation Courts, Oregon Mediation Association, Washington Mediation Association, Oregon Association of Collaborative Professionals, Collaborative Professionals of Washington (board member), Global Collaborative Law Council (Northwest Regional Chair, board of directors) and the International Academy of Collaborative Professionals. Active in her community, Nancy serves as a board member with numerous community organizations, including: Children's Center – a mental health agency serving children and families in Southwest Washington; and, Cappella Romana (Board President) – an internationally-recognized choral ensemble based in Portland. She has practiced law since 1991.

Julie Gentili Armbrust

Summary Biography

Julie Gentili Armbrust is an attorney-mediator, president of Mediation Northwest, president of SupportHound.com, author of *Divorce Mediation In Oregon*, and an adjunct professor at the University of Oregon School of Law where she teaches mediation. Julie lives and breathes mediation. She gets parties to settlement, even if that means she walks with them through the fiery pits of the conflict.

In 2017, Julie was referenced in a United States Supreme Court Writ of Certiorari as an expert in special education facilitation. Julie has also received the prestigious 2014 Oregon Mediation Association's Sid Lezak Award of Excellence for providing outstanding mediation services throughout Oregon. Julie has been recognized as a 2012 and 2013 Super Lawyer Rising Star in Oregon. She also received the Top-20-Under-40 Business Leaders in Lane County award by The Register-Guard in 2011.

Julie is the proud mother of two handsome boys, two beautiful dachshund girl puppies, and is happily married to her handsome husband. She HATES exercise, but loves the outdoors. She is a riddle, wrapped in a mystery, inside an enigma; perhaps there is a key.

Julie has proudly served on the Lane County Bar Association's board of directors, the Oregon State Bar ADR section's executive committee, the Oregon Mediation Association's board of directors, and is the former chair for the Lane County Bar Association family law section.

KIMBERLY A. QUACH

QUACH FAMILY LAW, P.C.
1 SW COLUMBIA STREET, SUITE 1800, PORTLAND, OREGON 97258
☎ 503.224-1650 503.750.6344 ✉ Kimberlyq@quachfamilylaw.com

EMPLOYMENT BACKGROUND

Quach Family Law, P.C. ● 2016 to present

- Manage complex asset and custody matrimonial and domestic partnership matters in Oregon and Washington
- Independently, and with great collaboration with client, advise matrimonial and domestic partnership clients regarding estates of minimal to multi-million dollar value, including matters involving complicated business valuation of privately-held interests.
- Collaborate with clients, parenting evaluators, parenting coordinators, therapists, to develop strategically appropriate plans in contested dissolution, paternity, domestic partnership and third-party custody actions.
- Develop and implement appropriate strategic and tactical approaches to modify custody, parenting time, and support cases.
- Collaborate with prospective appellate clients during drafting and litigation of judgments, and advise, mediate and brief appellate pleadings in support of appeals, as well as defense of appellate actions.

Partner, Lechman-Su & Quach, PC ● 2010-2016

- Managing partner of family law boutique

Of Counsel • Johnson & Lechman-Su, PC 2009-2010

- Support experienced family law appellate attorney Mark Johnson with the drafting and argument of significant Oregon appellate matters.
- Litigate complex matrimonial and domestic partnership matters as first chair.
- Provide consulting services to attorneys requiring complex briefing for hearings, trials and appeals.

Internal Counsel • NMG Holdings Limited - Guernsey, United Kingdom: Dec 2001-Summer 2009

- Sole corporate generalist for multinational, privately-held financial services consulting company, working within Group Support & Control Team to oversee offices and strategic interests within Australasia, Europe, Canada, and South Africa.
- Manage all litigation defense, external counsel, human resource supervision, acquisitions, corporate governance, and contracting with multinational banks and insurance companies and vendors.
- Draft varied agreements including Non-Disclosure, Joint Venture, Pre-Incorporation, Shareholder, Sale & Purchase, Franchise Business Model, Employment Termination, Terms & Conditions, Settlement, Licenses, and Work Permit Applications.
- Assist with hiring and supervision of in-house South African lawyer and other key personnel.
- Advise directors, and minute Board and subsidiary board meetings in Canada, Europe, Australasia, and South Africa, as well as notice and lead Annual General Meetings of Shareholders.

Senior Associate Attorney at Law • Gevurtz, Menashe, Larson & Howe, PC - Portland, OR: Oct 1995-Nov 2000

- Senior Associate in the second largest, exclusively family law boutique in the United States.
- Responsible for 100-150 annual caseload comprised of nominal estates to estates worth tens of millions of dollars.
- Independently managed multiple trials and hearings, as well as related appellate matters
- Supported the management of more junior associates and satellite office.

Highlights:

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- Prevailed at the trial court level in first Oregon grandparent custody case heard following a key negative US Supreme Court Decision which was ultimately upheld by the Oregon Supreme Court (*In re Marriage of O'Donnell v. Lamont,* 184 Or App 249, 56 P3d 929 (2002), *rev'd*, 337 Or 86, 91 P3d 721 (2004), *cert denied,* 543 US 1050 (2005)).

Associate Attorney at Law • Betts, Patterson, & Mines, PC - Seattle, WA: Nov 1990-Jun 1995

- Associate in commercial litigation
- Assisted with Washington Public Power Administration matter, a constitutional taking claim and several shareholder derivative class action cases.

Highlights:

- Created a Family Law Department in a 60-attorney firm as a mere second year associate, ultimately managing staff of three, and generated a sustainable profit in less than one year.
- Autonomously monitored trials and appellate matters; collaborated inter-departmentally to ensure seamless legal protection for clients.

EDUCATION

Juris Doctorate: 1990
University of Washington School of Law - Seattle, WA (*Top 1/3 of class*)

Washington State Bar #19781: 1990

Oregon State Bar#95387: 1995

Dual Bachelor of Arts in International Relations and Communication Arts: 1987
Carroll College - Helena, MT (*summa cum laude*)

TRAINING

NITA/ABA Family Law Section Advanced Family Law Institute Attendee (Business Valuation), 2012

American Corporate Counsel University & Annual Meetings: 2005-2007

Graduate Management Admissions Test: Feb 2001
710 total score (95th percentile); 41 verbal score (93rd percentile); and quantitative score (86th percentile)

NITA/ABA Family Law Section Family Law Institute Attendee, 1993

AWARDS AND HONORS

American Academy of Matrimonial Lawyers, 2015-present

Superlawyers, 2013-2016

Order of the Barristers, University of Washington School of Law 1988-1990

Top Speaker (Faulknor Appellate Advocacy Competition), University of Washington 1989

Vice-President (Moot Court Honor Board), University of Washington: 1998-1990

Truman Scholar ($100,000 US Scholarship covering two years of university and two years of graduate education):

8th & 11th Extemporaneous and Impromptu Speaking, (National Individual Events Tournament) - Fort Worth, TX: 1986

8th in Partner CEDA Debate (CEDA National Debate Tournament) - Wichita, KS: 1986

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☎ 503.224-1650 503.750.6344 ✉ Kimberlyq@quachfamilylaw.com

2nd & 8th in Extemporaneous and Impromptu Speaking (NIET) - Tousland, MD: 1985

AFFILIATIONS AND ACTIVITIES

American Academy of Matrimonial Lawyers, 2015-present

Oregon State Bar Family Law Executive Committee, 2013-present (Chair 2015-16)

Oregon State Bar Annual Meeting Planning Committee, 2012-13, President 2013-14

Oregon State Bar Spring Family Law CLE Co-Chair, 2008-2012

Member, ABA Family Law Section, 1992-2000 and 2011-present

Member, American Corporate Counsel Association: 2005-2009

Member and Secretary, Shu Ren Board: 2003-2008

Member of Council, ABA Family Law Section: 1999-2000

ABA Family Law Section Fall 2008 Meeting Host Committee Chair, 1998

Co-Vice Chair (Publications Development Board), ABA Family Law Section: 1997-2000

Appeared on NBC's "Today" show regarding death penalty defendant Charles Rodman Campbell: 1993

PUBLICATIONS

Paul DeBast and Kimberly Quach, "Business Valuation Issues in Marital and Other Equitable Distribution Cases," OSB Legal Publications, Family Law (2013 rev.), Chapter 7

Kimberly A. Quach, "How to Draft a Persuasive Closing Argument in Five Easy Steps," *Family Lawyer Magazine (*October 31, 2011)

Contributor, "101+ Practical Solutions for the Family Lawyer, ABA Family Law Section (2003)

Albert A. Menashe and Kimberly A. Quach, "Fairness Requires Flexibility: Making the Case for Modification," *Family Advocate* (1996)

CONTINUING LEGAL EDUCATION PRESENTATIONS

Co-Presenter with Michael Yates, "Spousal Support Modifications: Special Cases, Retirement," Oregon Academy of Family Law Practitioners, Tualatin, Oregon (November 13, 2014)

Co-Presenter with Mark Kramer, "Traversing The Changing Landscape In Third Party Custody and Visitation Cases," Oregon State Bar Family Law Section Meeting (October 12, 2013)

Co-Presenter with Saville Easley, "Separate But Not Equal: Current Insights Into The Criteria For Establishing and Modifying Spousal Support," Oregon State Bar Family Law Section Meeting (October 14, 2011)

Co-Presenter with Paul DeBast, "Guided Tour of the New OSB Family Law CLE Deskbook: What Every Good Divorce Lawyer Needs To Know About Business Valuation," Oregon AAML CLE (April 27, 2012)

Moderator, "Understanding Oregon Child Custody Laws: Eight Cases To Bring With You On A Desert Island," Oregon State Bar CLE (February 24, 2012)

"Developmentally Appropriate Parenting Plans: Fact Gathering," OSB Family Law Section CLE (April 2011)

Co-Presenter with Dan Margolin, "Appellate Review," Oregon State Bar CLE (2009)

KIMBERLY A. QUACH

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☎ 503.224-1650 503.750.6344 ✉ Kimberlyq@quachfamilylaw.com

Co-Presenter with Bradley C. Lechman-Su, "Current Developments In International Family Law," Oregon State Bar CLE (February 27, 2009)

Michael A. Yates

Michael A. Yates, of Yates Family Law, PC, has more than thirty-three years of legal experience and is recognized as one of Portland's preeminent family law attorneys. He has been included in the annual editions of *The Best Lawyers in America* for the past 14 years, and received recognition as the "*Best Lawyers' 2011 Portland, OR Family Lawyer of the Year.*" Mr. Yates has also been selected to the *"Oregon Super Lawyers"* since 2006. Only 5% of practicing attorneys in the state are selected for the list, and are determined by a rigorous peer review process. Additionally, in 2017 Mr. Yates was selected to the *"Oregon Super Lawyers'"* Top 10 list. In 2016, he was the recipient of the Oregon State Bar Family Law Section's Professionalism Award.

Mr. Yates obtained his undergraduate degree from Kent State University, and graduated from The Ohio State University College of Law with honors. He is a member of the Multnomah, Washington, and Clackamas County Bar Associations, and the Oregon State Bar.

Mr. Yates currently sits as a Judge *pro tem* for the recently established Multnomah County Circuit Court Settlement Conference Program. He serves on the Board of Directors of the Oregon Academy of Family Law Practitioners (OAFLP) and was its 2003 board president, and also volunteers for the Legal Aid Services of Oregon's Pro Se Assistance Project (ProSAP). Mr. Yates is a frequent speaker on family law related topics.

Kate Cooper Richardson
Director, Oregon Child Support Program
Oregon Department of Justice

Kate Cooper Richardson is the administrator of the Oregon Department of Justice Division of Child Support and the director of the Oregon Child Support Program, Oregon's federal Title IV-D program. Kate joined the Program in 2010, and was appointed by Attorney General Ellen Rosenblum in January 2013 as director. A graduate *cum laude* of Willamette University School of Law, Kate has served in all three branches of Oregon state government: as a senior legislative aide in the state legislature, as a judicial clerk at the Court of Appeals, eight years as Chief of Staff to State Treasurer Randall Edwards, and as an administrator of the federal stimulus program for Governor Ted Kulongoski. Kate sits on the board of directors of NCSEA, a national child support professional organization, chairing its Policy & Government Relations Committee. She is a member of Oregon Women Lawyers, and has served as a mentor for law students for 17 years. Kate is currently leading the Oregon Child Support Program through a multi-year $130 million replacement of Oregon's legacy child support system.

Michael Ritchey
Sr. AAG & General Counsel, Oregon Child Support Program
Oregon Department of Justice

Mike Ritchey is a Senior Assistant Attorney General with the Oregon Department of Justice. During law school, Mike worked as a legislative aide to state Representative Kip Lombard. Following graduation from Willamette University College of Law, Mike spent two years working as a judicial clerk for the Oregon Court of Appeals. He spent 20 years in private practice as an attorney and partner with Bricker Zakovics and Querin in Portland from 1985 to 2005, representing injured railroad workers in state and federal court throughout the western United States. From 2005 to 2009, Mike remodeled houses, served as a mediator for the Oregon Court of Appeals, and had a private mediation practice. He has served as general counsel for the Oregon Child Support Program since 2009.

Landon Poppleton, PhD, JD

Landon Poppleton, PhD, JD, is a licensed clinical psychologist in the state of Oregon (1999) and Washington (PY 60041144). Since 2001 he has worked with adults, families, and children in divorce and separation. He is trained in the "scientist-practitioner model", where his assessment and clinical practice is informed by social science research. In his practice he provides empirically based psychological assessment, bilateral custody evaluations, mediation, parenting coordination, and reunification counseling. He is often called on to provide consultation on cases in preparation for trial, peer review of the work of other experts, and education to the court on issue of child development in child custody and parenting time disputes.

WILLIAM J. HOWE, III

SHORT BIOGRAPHY

William J. ("Bill") Howe, III, after a general civil practice for 20 years, has practiced exclusively family law with Gevurtz, Menashe, Larson & Howe, P.C., of Portland, Oregon since 1995. He was named in *Best Lawyers in America* as the "2009 Lawyer of the Year—Family Law, Portland, Oregon," and he is one of 10 family law lawyers from Oregon included in the 2005 and subsequent *Best Lawyers*. He has also been honored in *Super Lawyers* and *Portland Monthly* and in many other publications for many years. In addition to his private practice of over 40 years, Bill has devoted enormous time and energy to family court reform issues. He was appointed by a succession of Oregon Chief Justices to serve as the vice-chair of the Statewide Family Law Advisory Committee from1997 to the present; he currently serves on the advisory committee of the Honoring Families Initiative of the Institute for the Advancement of the American Legal System; has served as president and member of the board of directors and is currently president of the Oregon Family Institute and has served as president on a board member the Oregon Academy of Family Law Practitioners; served on the board of directors of the Association of Family and Conciliation Courts; and was chair of the Oregon Task Force on Family Law from 1993 to 1997, having been appointed by Governor Barbara Roberts in 1993 and reappointed by Governor Kitzhaber in 1995; and serves as an Oregon Court of Appeals Mediator. He has also served as pro tem judge and mediator, and he was awarded the 2003 Pro Bono Challenge Award for donating the Highest Number of Pro Bono Public Service Hours by the Oregon State Bar. In addition, he has made over 150 presentations at family law conferences and at other venues in the United States, Canada, Australia, Europe and South Africa and has authored several articles on family law-related matters, and consulted with several jurisdictions regarding family law reform. In his spare time Bill and his wife produced the play *Recognition*, which was awarded the PMTA award for Best Ensemble in 2012 and *Zombie Strippers* which was chosen to play on Broadway in July 2014, as part of the New York Musical Festival.

WESLEY D. FITZWATER

Wes Fitzwater is a partner in the law firm of Fitzwater Meyer Hollis & Marmion, LLP, a 10-attorney firm emphasizing estate planning and elder law. Wes focuses upon the crisis issues faced by the elderly and their families, including incapacity, guardianship and conservatorship, long-term care, and end-of-life concerns.

Wes is a frequent speaker to senior groups as well as Oregon attorneys. He is an author and instructor on topics including long-term care, incapacity, guardianships and conservatorships, legal ethics and professionalism. He is the co-editor of the **Oregon State Bar publication** entitled ***The Elder Law Handbook***, a reference book for Oregon attorneys.

Born and raised in Oregon, Wes comes from a family of attorneys, with both his father and grandfather serving in the profession. He holds a B.S. from Willamette University in Salem (1977) and a J.D. from the University of Puget Sound, School of Law in Tacoma, Washington (1981).

Organizations

Past Chair: Oregon State Bar Elder Law Section
Past Chair: Oregon State Bar Estate Planning and Administration Section
Member: Multnomah County Interagency Committee for Abuse Prevention
Member: National Academy of Elder Law Attorneys

Awards

In 1988, Wes received the **Firm Award** from the **Multnomah County Senior Law Project** for "outstanding demonstration of leadership and commitment to ensuring legal redress for the low-income elderly."

In 1989, Wes received the **OSB President's Public Service Award**, given by the President of the Oregon State Bar for "outstanding volunteer law-related service to the public."

In 1993, Wes received an Award from the **Multnomah County Board of Commissioners** for his work with senior citizens in Multnomah County.

In 2000, Wes and his law partner, Donna R. Meyer, received the **Volunteer of the Year** award from the **Alzheimer's Association** for several years of speaking to and providing training to Alzheimer's support groups.

In 2006, Wes received the **OSB President's Membership Service Award**, given by the President of the Oregon State Bar for "volunteer law-related services on behalf of Oregon's lawyers."

Wes was selected as a **2012, 2013, 2014, 2015, 2016 and 2017 "Oregon Super Lawyer**" by superlawyers.com.

SAUCY SAUCY P.C.
ATTORNEYS AT LAW

Shannon Snow
(503) 362-9330 *tel*
(503) 362-3908 *fax*
Shannon@YourAtty.com

Education

- J.D., Willamette University College of Law, Salem, Oregon, 2008
- B.A., Pacific University, Forest Grove, Oregon, 2004, Major: Business

Associations/Leadership

- *Member*, Oregon State Bar
- *Member,* Marion County Bar Association
- *Member*, Oregon Academy of Family Law Practitioners
- *Executive Committee,* Marion County Bar Association (2015-present)
- *Vice President,* Marion County Bar Association (2017)
- *Executive Committee,* Oregon State Bar Family Law Section (2017)
- *Member*, Marion County Family Law Advisory Committee, (2017)

Awards

- Arno Denecke New Lawyer of the Year, Marion-Polk County Legal Aid (2013)

Randall Snow - Harris, Wyatt & Amala, LLC

Randall Snow concentrates his practice in the areas of criminal defense, driving under the influence of intoxicants (DUII), and personal injury. He graduated from Claremont McKenna College in 2001 with a degree in Philosophy, Politics, and Economics, and then earned his Juris Doctor from Willamette University College of Law in 2007, where he served as an Associate Editor of the Willamette Law Review. He is a member of the Oregon State Bar, Marion County Bar Association, American Bar Association, and Oregon Criminal Defense Lawyers Association. Randall has been with the law firm Harris, Wyatt & Amala since 2007, and Martindale-Hubbell distinguishes Mr. Snow as an AV rated attorney.

Elizabeth Christy Taylor

Elizabeth has practiced family law exclusively for ten years. For those ten years, she has owned her own practice which has grown to a three-attorney law firm. Elizabeth was elected to the Washington State Bar Association's Family Law Executive Committee in 2013 and served on that committee for three years; two of those years she was the Secretary. She was also Co-Chair for the 2016 Washington State Bar Association's Family Law Section Midyear three-day CLE. Locally, Elizabeth is a Pro Tempore Commissioner for the Clark County Superior Court and has served as President of the Clark County Bar Association's Family Law Section for two years and as Secretary for one year. Elizabeth is NITA (National Institute of Trial Advocacy) trained and she was selected as a Rising Star by Super Lawyers for the year 2016.

Collin McKean

Collin is a graduate of Lewis and Clark School of Law, has practiced family law for 11 years in Oregon and 6 years in Washington. Collin currently serves as Treasurer of the Oregon Chapter of the Association of Family and Conciliation Courts, as a Board member the Oregon Association of Collaborative Law Professionals and a Board member of the Washington Law Clerk Program. Collin has also served on several local family law related committees, statewide committees and American Bar Association committees for the advancement of the practice of family law. Collin is a member of the firm McKean Smith which has several attorneys licensed and practicing in both Oregon and Washington.

Tracey RH Naumes

Originally from Redmond, Washington. Received BA in English/Political Science from Macalester College, St. Paul, MN. Graduated from Lewis & Clark Law School cum laude with honors May 2012. Began legal career at Southern Oregon Public Defense Inc. (SOPD) in 2012. Entered private practice in 2015 with primary focus on family/dependency law. New parent to beautiful baby boy and currently spends all free time devoted to midnight feedings, smelly diapers, and occasional smooches from exhausted husband.

Dan Margolin

Dan has worked as a lawyer since 2002. He is a founding partner of Stephens & Margolin LLP and a Portland, Oregon native. He limits his practice to family law, including appeals, litigation and collaborative law.

Dan received his law degree from the nationally acclaimed New York University School of Law. After graduating he worked at the Oregon Court of Appeals for the Honorable Rex Armstrong. In 2005, Dan formed the Law Office of Daniel Margolin, which, like Stephens & Margolin LLP, focused on family law representation.

He is a member of the Oregon State Bar and American Bar Association Family Law Sections. He also belongs to the family law section of the Oregon Trial Lawyers Association.

Arden J. Olson Bio

Arden J. Olson is a shareholder in Harrang Long Gary Rudnick PC and practices from its offices in Eugene, Portland, and Salem. He handles matters involving health law, insurance law, legal ethics, and complex litigation, including coverage matters, bad faith claims and regulatory matters. After stints in Seattle and Philadelphia law firms, he served as an Assistant Attorney General in the Special Litigation Unit of the Oregon Department of Justice, handling complex litigation for the State when, in 1989, he became General Counsel and Legal Division Director to SAIF Corporation. Arden also served as General Counsel to a regional health maintenance organization from 1993 through 1997 and currently serves as General Counsel to one of Oregon's Coordinated Care Organizations. He helped draft the Oregon Rules of Professional Conduct, was the chair of the OSB Legal Ethics Committee, and currently serves on the OSB's Discipline System Review Committee. He is on the Board of Directors of the Association of Professional Responsibility Lawyers, and has served on the ABA Standing Committee on Ethics & Professional Responsibility and on the ABA Standing Committee on Professionalism.

Lorelei Craig Bio

Lorelei Craig is a lawyer with Harrang Long Gary Rudnick PC and practices from its offices in Eugene and Portland. She handles matters involving employment, business, and regulatory advice and litigation for health care entities, providers and insurers. Her practice regularly involves advising clients on federal and state health care and insurance related laws, including HIPAA, ERISA, and the Affordable Care Act. Before moving to Oregon, she was a senior litigation associate at the San Francisco office of Morgan Lewis & Bockius LLP, serving clients in business disputes, complex litigation and class actions with an emphasis on health care, financial services and technology litigation. Previously, she was with Dewey & LeBoeuf LLP, in San Francisco and New York City, on their litigation and insurance teams. She is a member of the Association of Professional Responsibility Lawyers, among her other bar involvements. She graduated from Georgetown University Law Center, where she was senior editor for The Georgetown International Environmental Law Review, after obtaining her B.A. in Rhetoric from the University of California at Berkeley.

Justice Rebecca Duncan

Justice Rebecca Duncan was appointed to the Oregon Supreme Court in July 2017. Prior to that, she served on the Oregon Court of Appeals, beginning in 2010. Before becoming a judge, she worked as a trial attorney for Metropolitan Public Defenders in Washington and Multnomah Counties and as an appellate attorney for the statewide Office of Public Defense Services. Justice Duncan received her law degree from the University of Michigan and her undergraduate degree from the University of Wisconsin-Madison. She has been a speaker at the Oregon State Bar's Family Law Section's annual conference since 2012.

SAUCY SAUCY P.C.
ATTORNEYS AT LAW

Ryan Carty
(503) 362-9330 *tel*
(503) 362-3908 *fax*
Ryan@YourAtty.com

Education

- J.D., Willamette University College of Law, Salem, Oregon, 2009
- B.A., Willamette University, Salem, Oregon, 2004, Major: Theatre

Associations

- *Member*, Oregon State Bar, Family Law Section
- *Member*, Oregon Academy of Family Law Practitioners
- *Court-Certified Civil Mediator -- Small Claims & FED*, Marion Co. Circuit Court (2014-present)

Leadership *(selected)*

- *Member*, State Family Law Advisory Committee, (2013-present; appointed by Chief Justice Thomas Balmer in December 2013)
- *Chair*, State Family Law Advisory Committee, Legis. Subcomm. (2013-present)
- *Chair,* Oregon State Bar, Family Law Sec., Legis. Subcomm. (2012-present; Co-Chair 2010-12)
- *Co-Chair*, Boys & Girls Club, Teen Court Committee (2012-present)
- *Member*, Oregon State Bar, OSB/OJD Task Force on Oregon eCourt Implementation (2013-15)
- *Membe*r, Oregon State Bar, Senate Bill 799 Task Force (2013-14)
- *Judges Panel*, American Bar Assn., Law Stdt. Div. Region 10 Negotiation Competition (2010, 2014)
- *President,* Board of Directors, Historic Elsinore Theatre (2014-present; Member 2012-present)
- *Board Member*, Rotary Club of South Salem (2011-15)
- *Youth Sports Coach*, Boys & Girls Club, Salem-Keizer Ed. Fndn., YMCA (2012-13, 2016-present)

Awards

- Rising Star, Super Lawyers Magazine (2012-17)
- Arno Denecke New Lawyer of the Year, Marion-Polk County Legal Aid (2010)

Publications

- *2015 Oregon Legislation Highlights (Family Law)*, Oregon State Bar CLE publication
- *2013 Oregon Legislation Highlights (Family Law)*, Oregon State Bar CLE publication
- *2011 Oregon Legislation Highlights (Family Law)*, Oregon State Bar CLE publication

Speaking Engagements *(selected)*

- *Proposed Legislation and Family Law*, SFLAC Family Law Conference (2017)
- *Depositions 101*, Oregon Family Law Practice, Willamette University College of Law (2017)
- *2015 Legislative Update (Family Law)*, Oregon State Bar, Family Law Section CLE (2015)
- *Advanced Child Support: Rebuttals*, Oregon State Bar, Family Law Section CLE (2014)
- *Family Law Practice Panel*, Willamette University College of Law (2011-14, 2016)
- *2013 Legislative Update (Family Law)*, Oregon State Bar, Family Law Section CLE (2013)
- *Oregon Legislative Updates (Family Law)*, Polk Co. Mediators Assoc. (2012)
- *Spousal Support Reform*, Multnomah Co. Family Law Group (2012)

William A. Boaz
william@boazlaw.com

BOAZ LAW FIRM

DIVORCE & FAMILY LAW

Salem | 280 Court Street NE, Suite 220
Eugene | 440 East Broadway, Suite 300
Phone: (503) 400-9513
WWW.BOAZLAW.COM

Practice Emphasis

William Boaz started his own law firm immediately after passing the bar in 2011. Since its inception, The Boaz Law Firm has focused exclusively on divorce, custody, child support, and other family law matters. Thanks to the generosity of mentors and colleagues in the local attorney community, William was able to quickly get up to speed on this difficult area of the law and begin effectively helping clients through these difficult transitions. Due to his interest in practice management, William continually works to make his firm more efficient to serve more people without compromising individual attention to each client. William enjoys being actively involved in the legislative subcommittees for both the Oregon State Bar Family Law Section and the State Family Law Advisory Committee (SFLAC), and hopes to continue promoting changes to further improve the practice of family law in Oregon.

Education

J.D., Willamette University College of Law, Salem, Oregon 2011

Honors & Memberships

Rising Star, Super Lawyers Magazine, 2015-2017

Legislative Subcommittee, State Family Law Advisory Committee (SFLAC), 2016 – Present

Legislative Subcommittee, Oregon State Bar, Family Law Section, 2013 – Present

Member, Oregon Academy of Family Law Practitioners (OAFLP), 2013 – Present

Member, Oregon State Bar, 2011- Present

Speaking Engagements

OAFLP Family Law Practice Panel, Willamette University College of Law, 2015 & 2016

Oregon Family Law Practice, Willamette University College of Law, 2014 – Present

Setting-Up a Law Practice, Willamette University College of Law, 2013 – Present

NOTES

Collaborative Law—What It Is and What It Is Not

Nancy Retsinas, *Retsinas Collaborative Law Center, Vancouver, Washington*

Laura Rackner, *Gearing Rackner & McGrath LLP, Portland, Oregon*

NOTES

Collaborative Law: What It Is and What It Isn't

Oregon State Bar Family Law Conference
October 13, 2017

Presented by
Laura Rackner
&
Nancy Retsinas

NOTES

Collaborative Law: What It Is and What It Isn't

Oregon State Bar
Family Law Conference
October 13 & 14, 2017

Presented by
Laura Rackner
&
Nancy Retsinas

Collaborative Law: What It Is and What It Isn't. This presentation focuses on introducing the family law practitioner to Collaborative Practice so the lawyer has an overview of:

- *What is Collaborative Law?* An overview of the practices and techniques for settlement that offer an alternative to court-processed resolution of conflict.

- H*ow does Collaborative Law work?* An overview of the preparation and conduct of the lawyer in a collaborative process, and how it differs from traditional lawyering.

- *When will Collaborative Law work?* An overview of the circumstances that make collaborative law an attractive mode of conflict resolution, and the circumstances making court-based decision-making the more appropriate alternative.

- *Why Collaborative Law?* An overview of the benefits and risks of collaborative law to both the client and the professional, including an introduction to some of the science underlying how individuals in conflict process decisions.

Laura E. Rackner is a founding partner at Gearing, Rackner & McGrath, LLP and is licensed to practice law in the state of Oregon. She practices all areas of family law and collaborative divorce, with special emphasis on complex child custody and parenting time issues. Laura is a frequent lecturer on litigation and settlement issues involving custody and parenting time and is co-author of the Oregon State Bar Family Law chapter on custody and parenting time. Additionally, she regularly provides pro bono services to minor children. Laura was recognized by Super Lawyers as one of the "Top 25 Women and the Top 50 Oregon Attorneys". She holds the "AV Preeminent" peer review rating by Martindale Hubbell. She has earned additional recognition by Washington Law and Politics magazine as one of Oregon's "Super Lawyers". Laura serves as a member of the Multnomah County, Clackamas County and Washington County Bar Associations; the Oregon Academy of Family Law Practitioners; the Oregon State Bar – Family Law Section; the Portland Collaborative Divorce professional group; and the University of Oregon Law School Dean's Advisory Council. She is also on the Board of the Oregon Academy of Family Law Practitioners and the Board of the Association of Family and Conciliation Courts, Oregon Chapter. She has practiced law since 1984.

Nancy Retsinas is a collaborative lawyer and mediator in Washington and Oregon, representing clients who seek out-of-court solutions to conflict. As a settlement advocate, she has extensive experience guiding clients through alternative dispute resolution processes. She is a frequent speaker and trainer on the difference in roles between traditional advocacy and settlement advocacy, collaborative law, mediation, client-centered dispute resolution, and legal ethics, and is a contributing author of the Washington Practice Manual, 2017 edition. Nancy co-founded Two Rivers Institute for Dispute Resolution and serves as its Executive Director. Her professional associations include: Association of Family and Conciliation Courts, Oregon Mediation Association, Washington Mediation Association, Oregon Association of Collaborative Professionals, Collaborative Professionals of Washington (board member), Global Collaborative Law Council (Northwest Regional Chair, board of directors) and the International Academy of Collaborative Professionals. Active in her community, Nancy serves as a board member with numerous community organizations, including: Children's Center – a mental health agency serving children and families in Southwest Washington; and, Cappella Romana (Board President) – an internationally-recognized choral ensemble based in Portland. She has practiced law since 1991.

A. INTRODUCTION

1. Divorce Statistics
2. Four Areas of Divorce
3. Impact on Children
4. What Happens When Parents Resolve Conflict

B. What is Collaborative Law?

An overview of the practices and techniques for settlement that offer an alternative to court-processed resolution of conflict.

1. **Collaborative Law Defined** – A set of specific protocols established to encourage and empower the clients to resolve their respective and joint interests through a non-adversarial, non-court process.

    a. Empowers and educates clients in such a way that they can make informed decisions for themselves and their family

    b. Supports the resiliency and inherent capability of each individual in the family system

    c. Settlement by agreement intentionally pursued as the positive outcome of legal representation

    d. Attorneys for both parties assist in resolving conflict using problem-solving strategies, rather than adversarial techniques and litigation

    e. Parties actively participate in all negotiations necessary for resolution

    f. Interest-based, collaborative practices replace adversarial techniques and litigation "Paradigm shift"

From	**To**
1. Adversarial	1. Cooperative
2. Past	2. Future oriented
3. Facts	3. Relationships
4. Blame	4. Impact
5. Win/Lose	5. Win/win - restructuring relationships

2. Essential Elements

a. Each client has their own lawyer; Limited Scope Representation – lawyer does not go to court for these clients

b. Clients delay litigation in favor of the collaborative settlement process

c. Discovery is willing, complete and timely – all pertinent information is shared

d. Clients remain flexible and open to other alternatives (no holding a fixed position; proceed in good faith)

e. Decision-making is cooperative and never unilateral

f. Subject-matter experts may assist within the settlement process; they are jointly retained and do not go to court for these clients

3. Foundational Premise

a. There is an emotional process underlying most substantive facts in a divorce case

b. With the necessary information, clients are capable of making decisions about issues pertinent to them and their families – "Client Driven Process"

i. Challenges the notion of "client resistance" or needing to "control the client"
ii. Client experiences the process as their own rather than having to "fight" or "resist" an outside "agenda"
iii. Client experiences their work with the practitioner as one of partnership or co-authorship
iv. Lawyer paces the client rather than leads
v. Lawyer promotes empowerment and responsibility of client to continually "own" their process to promote self-determination

4. Differences between litigation and cooperation and collaboration

a. Litigation

i. Involves telling a problem-saturated story with victims and villains

ii. Promotes thinking and interactions that are strategic and reactive
iii. Offers solutions that are limited to coercive settlement techniques, and/or rights-based statutes and guidelines, that may include court process if agreements cannot be reached
iv. Encourages lawyers to act as "Gladiators"
v. Presumes that the ultimate responsibility for problem-solving rests in a third-party arbiter
vi. Encourages one-sided goals – silos the parties into their own mind-set – versus mutual, holistic problem-solving approach

b. Cooperation

i. Involves civility between opposing sides, where settlement is achieved by means of positional bargaining that may include court process if agreements cannot be reached
ii. Involves being a strong advocate for your client's best deal without regard for the opposing side(s) needs or interests
iii. Sanctions unilateral actions/decision making through the negotiation
iv. Involves practitioner's commitment to settlement on terms acceptable to practitioner, with client input
v. Promotes lawyer's role in driving the process toward settlement

c. Collaboration

i. Involves practitioner's commitment to settlement on terms acceptable to client, driven by client goals and values, with practitioner input
ii. Establishes rapport between attorneys and clients to promote transparency and creativity in problem-solving
iii. Uses interest-based negotiation tools – curious questions, information gathering, client-centered solutions – to encourage creative problem solving
iv. Focuses on preserving relationships and future thinking
v. Promotes client responsibility for decisions they make toward final settlement, working in good faith with the professional team to understand the legal, financial, and psychological consequences for all parties and stakeholders to a dispute
vi. Co-creates resolution with the promise of no court intervention
vii. Promises lawyer role will focus on settlement only, with the lawyers hired as limited scope attorneys

viii. Requires that decisions be made jointly and not unilaterally

C. How does Collaborative Law work?

An overview of the preparation and conduct of the lawyer in a collaborative process, and how it differs from traditional lawyering.

1. Framework

a. Informed Consent

i. Clients jointly sign a Process Agreement, often called a "Participation Agreement"

1. Sets the ground rules and expectations
2. Explains the expectations about confidentiality, voluntary disclosure and "opting out" of the adversarial court system while in the collaborative process

ii. Each client signs a Professional Services Agreement with their attorney to confirm attorney's role in Limited Scope Representation

b. Process Roadmap

i. Develop interests, concerns, and goals
ii. Address immediate concerns
iii. Gather necessary information
iv. Brainstorm possible solutions
v. Select mutually acceptable solutions
vi. Draft Stipulated Judgment

2. Participatory meetings

a. Preparation

i. Agenda
ii. Place
iii. Food
iv. Attire

b. Conduct

    i. Modeling behavior
    ii. Interest-based conversations
    iii. Parties are central
    iv. Expecting and handling emotion

c. Follow up

    i. Homework
    ii. Meeting minutes
    iii. Professional team communications
    iv. Preparation for upcoming meeting(s)

d. Focused on envisioned futures

    i. Interests
    ii. Goals
    iii. Needs

e. Negotiating transparently

f. Managing the process

    i. Privacy
    ii. Pace

g. Working cooperatively

    i. Obtaining information
    ii. Exploring options
    iii. Problem solving

3. Subject-Matter "Experts" (referred to as "allied professionals")

a. Role and qualifications of allied professionals

b. Focused on needs

    i. Financial
    ii. Coaching
    iii. Consulting

c. Common purpose – Best results for all

d. Leveling the playing field

e. Supporting all participants and stakeholders

f. Achieving efficiencies

g. Acknowledging mutual interdependence

h. Modeling teamwork

i. Non-aligned team members

D. When will Collaborative Law work?

An overview of the circumstances that make collaborative law an attractive mode of conflict resolution, and the circumstances making court-based decision-making the more appropriate alternative.

1. When the clients:

    a. Prefer not to give control of the outcome to strangers (i.e. judge) and are willing to participate

    b. Are looking for the "best" resolution for both of them

    c. Have the ability to empathize

    d. Are committed to seeing it through

2. When a continuing a positive or working relationship is desired or required

3. When the parties are capable of listening to each other and have the flexibility to consider options

4. When resources matter

    a. Time

    b. Money

c. Energy

5. When timing matters

6. When privacy matters

7. When you can't get what you need in a court

8. Note: This process is not just for the highly cooperative clients – it is designed to handle high conflict

9. Red Flags:

    a. Addiction
    b. Mental health issues
    c. Domestic violence
    d. Rigid thinking
    e. The Four Horsemen – Criticism, Contempt, Defensiveness, Stonewalling

E. Why Collaborative Law?

An overview of the benefits and risks of collaborative law to both the client and the professional, including an introduction to some of the science underlying how individuals in conflict process decisions.

1. Physiology of Fear

    a. Fight or flight – the adrenal alarm

    b. Redistributes energy for protection

    c. Suppresses immune system

    d. Inhibits generativity (concern for people besides self and family)

2. Physiology of Growth

    a. Growth requires an open exchange – organism, environment

    b. Optimal physiological function in organism – energy-producing, creativity

3. The difference it can make

    a. Professionals as client witnesses, create safe container, provide information for *client* decision-making, flexibility to meet client's emotional stage of acceptance

    b. Professionals as model problem-solvers, settlement recognizing each person's needs, model for future problem-solving

4. Health Challenges of Stress

    a. Physiological effects of stress/arousal

        i. Sustained elevations in blood pressure
        ii. Enlarged and strained hearts
        iii. Cardiac arrhythmias
        iv. Lower threshold for pain
        v. Higher levels of anxiety, depression, anger

5. Health benefits of cooperation/collaboration

    a. Physiological effects of quiescence

        i. Slows metabolism
        ii. Less fuel needed to sustain body
        iii. Breathing slower and deeper
        iv. Muscles relax and require less blood
        v. Heat beats slower
        vi. Blood pumps less forcefully
        vii. Brain rhythm and pattern enhance mood

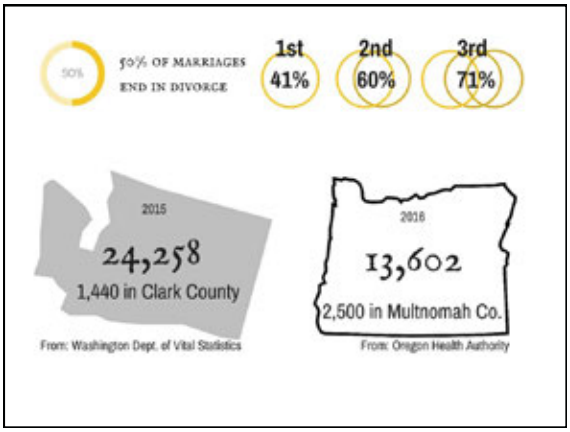
The End. Thank you!

Oregon State Bar
2017 Annual Family Law Conference

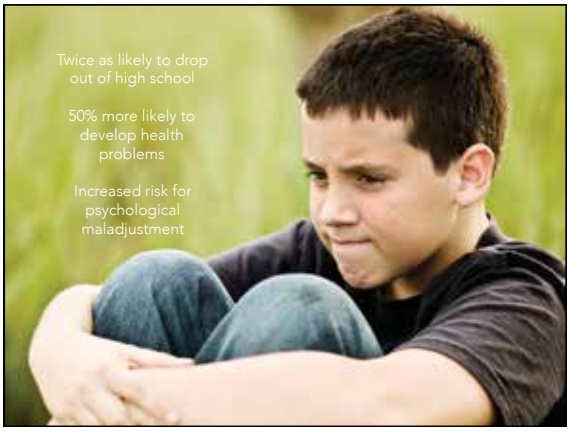
Collaborative Law: What It Is & What It Is Not

Sunriver, Oregon
October 13 & 14, 2017

Presenters:
Laura Rackner, JD
Nancy Retsinas, JD

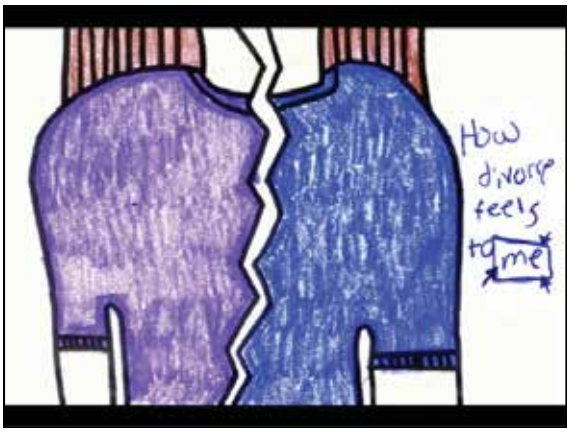


FOUR AREAS OF DIVORCE


Twice as likely to drop out of high school
50% more likely to develop health problems
Increased risk for psychological maladjustment


I feel sad when by mum and dad are fighting.


Please
just
STOP!



When parents resolve conflict, children are:

- More socially responsible
- More academically successful
- Show less aggression and depression

What is Collaborative Law?

Essential Elements

- Each party has their own lawyer
- The work is done at the settlement table
- All relevant information is shared voluntarily
- Clients and attorneys agree in advance that they will not take any contested issue to court

Foundational Premise

Emotions are normal

Jointly-created resolutions, based on interests, are superior

Clients are capable of self-determination

What's the Difference?

Litigation

Cooperation

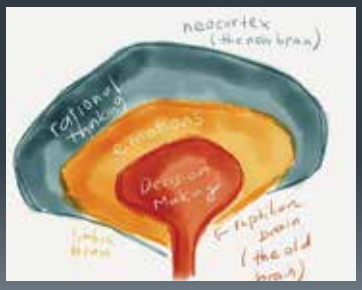
Collaboration

How Does It Work?

When Will it Work?

When Might it Not Work?

What Difference Does it Make?



Please reach out to us with your questions!

Laura Rackner
laura.rackner@grmfamilylaw.com
(503) 222-9116

Nancy Retsinas
nancy@nancy.retsinas.com
(360)816-2246

COLLABORATIVE PRACTICE PARTICIPATION AGREEMENT

Clients: _____ _____

1. **Choosing Collaborative Process.**

We choose the collaborative process to resolve the issues arising from our marriage. In doing so, we agree to be respectful in our negotiations and to work together to privately achieve a mutually beneficial resolution. We realize that we are responsible for the decisions we make. We understand that ending our marriage takes place on legal, financial and emotional levels. We recognize that achieving our goals may require the assistance of professionals other than our attorneys.

By choosing the collaborative process, we commit ourselves to resolving this matter without adversarial court involvement. We do not waive the right to seek the assistance of the court, but for so long as this Agreement is in effect we agree to devote all of our efforts to reach a negotiated settlement in an efficient, cooperative manner according to the terms of this Agreement.

2. **Guidelines for Participation**.
   a. We will work with each other in good faith with a sincere intention to be fair, open, and honest, regardless of the outcome of the interaction.
   b. Written and verbal communication will be respectful and constructive.
   c. We will express what is important to us and why, and seek to understand what's important to the other.
   d. We will acknowledge and attempt to understand the other's point of view, even if we do not agree with it.
   e. We will develop an array of options for settlement and use our best efforts to negotiate a mutually beneficial agreement.
   e. We will not use the threat to withdraw from the collaborative process or to go to court as a means of achieving a desired outcome or forcing a settlement.
   g. We will not take advantage of any mistakes, misunderstandings, inconsistencies or miscalculations of each other or any other participant, and shall disclose them and seek to have them corrected.
   h. We will agree in advance as to how the costs of this process will be paid, including attorney fees and the fees of any professionals engaged as part of this collaborative process, and make funds available for this purpose.

3. **Collaborative Attorneys**.
   a. We have each chosen an attorney to represent us in the collaborative process. We understand that we are hiring our collaborative attorneys to assist us in settlement negotiations, and that our collaborative attorney's representation is limited to the collaborative process.
   b. I have signed a retainer agreement with my collaborative attorney limiting my attorney's representation and that of his/her firm to non-litigation matters, except to file the final court documents that reflect our collaborative settlement agreement.
   c. We understand that while the attorneys share a commitment to the collaborative process and the well-being of our family, each attorney has a professional duty to represent their own client diligently and is not the attorney for the other.

4. **Exchange of Information/Communication**.
   a. We agree to exchange and provide to the attorneys, on an ongoing basis, all information which may affect any choices or decisions either of us may make in this process.
   b. We will decide together how to collect and exchange all information and documentation regarding our family, including our respective incomes, assets, and debts.
   c. We acknowledge that each of us has the right to request any additional information that we feel like we need at any time in order to be fully informed.
   c. When other professionals are engaged, we consent to the exchange of information between our collaborative attorneys and other professionals. We understand that it will be necessary for our collaborative attorneys and the other professionals to communicate in order to coordinate efforts on our behalf and we consent to that communication.

5. **Withdrawal of Party or Attorney from the Collaborative Process.**
   a. We may decide to engage in a different process together or separately. If either of us at anytime decides to engage in a different process without the agreement of the other, we will provide timely notice to the other and to our own attorney. Our collaborative attorneys may help us transition to another process.
   b. If either of us ends our professional relationship with our collaborative attorney, but wishes to continue with the collaborative process, we will provided written notice of this intention. The new collaborative attorney will sign a new Participation Agreement within 30 days of the date of the notice. If a new agreement is not signed within 30 days, the other person will be entitled to proceed as if the collaborative process was terminated as of the date notice was given.

6. **Termination of the Collaborative Process - Abuse of the Process.**
   a. We agree that our collaborative attorney(s) must terminate the collaborative process if his/her client has withheld or misrepresented important information and continues to do so.
   b. We agree that our collaborative attorney(s) may withdraw from the collaborative process and may recommend termination of the process if either of us persistently refuses to honor agreements, delays without reason, or otherwise acts contrary to the principles of the collaborative process.

7. **Admissibility**. All communication and information exchanged within the collaborative process is confidential. If subsequent litigation occurs, we agree that:
   a. We will not introduce as evidence in court any written or oral information or documents prepared or disclosed during the collaborative process, including e-mails, voice mails, letters, progress notes, session notes, meeting minutes, budgets and projections, and proposals for settlement, unless we both consent in writing or the documents are otherwise discoverable. (Under legal rules discoverable material is considered to be reasonably calculated to lead to admissible evidence in court.)
   b. We will not introduce as evidence in court nor require the production of any reports, opinions or notes of any professional prepared in the collaborative process, unless we both consent in writing.
   c. We will not compel either attorney or any other professional retained in the collaborative process to attend court to testify or attend for examination under oath in connection with this matter; nor will we will subpoena the production at any court proceedings of any notes, records, or documents in the attorney's possession or in the possession of any other professional retained in the collaborative process.
   d. We agree that any temporary or partial agreement may be introduced into evidence in court as a basis for a temporary order only if we agree in writing.

8. **Responsibilities Pending Settlement**. During the collaborative process, unless agreed otherwise in writing, we will:

a. Maintain assets and property, except for those transactions necessary in the normal course of business (i.e. paying bills and living expenses)
b. Maintain all existing insurance policies without change in coverage or beneficiary designations.
c. Maintain all existing health and dental insurance coverage.
d. Refrain from incurring any debts for which the other may be held responsible.
e. Honor the other's privacy, including belongings and living space.
f. Maintain the ordinary schedule and routine of the children, including where the children reside and where they attend school or childcare. Any changes to the schedule or routine will only be made with joint agreement.

9. **Cautions About the Process.** We understand that there are advantages as well as disadvantages to the collaborative process. I have taken into consideration the following cautions before agreeing to participate in the collaborative process:

a. Collaborative negotiation and the ability to reach agreement depends on our good faith participation and the skill of our team.
b. We must be able to participate in face-to-face meetings, communicate our needs and concerns honestly and openly, listen to the advice of our counsel, and consider the needs of our partner or spouse.
e. By agreeing not to go to court, we cannot use formal discovery procedures and therefore must trust in each other's good faith about exchanging relevant documents and information.
f. Without the ability to use the authority of the court to prevent the transfer or dissipation of marital assets, we must trust in each other's honesty with regard to those assets.
g. By agreeing not to go to court, there are no temporary court orders. Temporary arrangements are made by agreement, including agreements about parenting, and making funds available for paying bills and living expenses.
h. I may reach a point where I feel that there is no choice but to settle because of the investment we have made in the process.
c. Each of us has the unilateral right to terminate the process at anytime and force the other into litigation.
d. There will be some costs if the process breaks down and we are referred to new attorneys to complete the negotiations or to litigate the matter. We may be required to reproduce documentation or provide additional documentation. Since experts are disqualified and their work product is disqualified, unless we mutually agree otherwise, there may be the cost of duplicating expert services.
i. It does not feel good to fail at something where one has invested time, energy, hope of resolution and resources. If one of us blames the other for the failure to reach resolution, that anger can carry over into the next process.

10. **Instructions to Attorneys.** By signing this Agreement, we instruct our attorney to:

a. Help us honor the promises made in this Agreement.
b. Refrain from acting in a manner inconsistent with the promises made in this Agreement, and
c. Promote both the spirit and written word of this Agreement.

11. **Acknowledgement of Commitment to the Collaborative Process**. We have read this Agreement in its entirety, understand its contents and agree to its terms.

_____

Date

_____
Client

_____
Client

- Note to Collaborative Attorneys -
Collaborative Family Law/Divorce Limited Services Agreement

This is sample language to incorporate into your engagement/fee agreement. It is intended to work in conjunction with the "Oregon" Collaborative Practice Participation Agreement. Please modify accordingly to meet your needs and that of your firm.
It is important to remember to include the provisions of the Participation Agreement that need to be mirrored in your Unbundled - Limited Services Agreement. You are responsible for your use of this content. We recommend you conduct your own independent research of ethical rules and use your best judgment.

The text in blue is important to include (or some variation).
Remember to change the color blue back to black!

Her are additional resources for you to consider:

OSB Limited Services Fee Agreement Sample
https://www.osbar.org/secured/barbooksapp/#/section?doc=fee07_form_10-1

Unbundling Legal Services: Limiting the Scope of Representation
By Amber Hollister
https://www.osbar.org/publications/bulletin/11jul/barcounsel.html

Limited Scope Representation CLE Materials 2014
http://www.osbar.org/_docs/sections/family/FL14/2014FLCMaterial_LimitedScopeRepresentation.pdf

Oregon Rules of Professional Conduct
https://www.osbar.org/_docs/rulesregs/orpc.pdf

ABA Unbundling Resource Center
http://www.americanbar.org/groups/delivery_legal_services/resources.html

Collaborative Process

CLIENT-ATTORNEY AGREEMENT & INFORMED CONSENT

Unbundled - Limited Services Contract

Agreement: Please read carefully through the terms of this document. This Agreement will serve as a contract for our working relationship. It also asks you to waive certain rights that you may have under law.

General Provisions

1. Limited Services: The Collaborative process is different from traditional legal representation. Its goal is for you and your attorney to work collaboratively with your spouse/partner and his/her attorney to reach a fair settlement by utilizing non-adversarial processes. To facilitate this type of a process, I and the members of my firm will be providing limited legal services, also known as unbundled services. This means I will not be providing the full range of attorney services.

2. No Court: By choosing the Collaborative process you are agreeing that I and my firm are being hired to assist you in settlement negotiations, and that my representation and that of my firm is limited to non-litigation matters, except to file the final court documents that reflect the collaborative settlement agreement between you and your spouse/partner. This means I will not appear in court for you (except for filing final court documents).

If the unfortunate case arises where litigation becomes necessary, I will assist you to retain a trial attorney(s) or otherwise assist you in moving to a new process.

By signing this agreement you agree to refrain from pre-emptive maneuvers and adversarial legal proceedings while engaged in the collaborative process, except in the case of an emergency necessitating such action. In the event of an emergency, every effort should be made to contact me to work out a temporary solution before taking any court action.

3. Joint Effort and Success: The non-adversarial services we offer provide a process for working through your matter, and to help you create a plan for how you want your post-process relationship to be. Our services require joint effort between clients and professionals. Progress and success in the process may vary depending on many factors, including but not limited to:

   a. The particular issues being addressed and their complexity.
   b. Your and your spouse's motivation, effort and emotional state.
   c. The relationship between you and your spouse, including trust and conflict level.
   c. Influences outside the process, like interactions with friends, family, colleagues or others.
   d. The skill set of your collaborative professional team, and your rapport with each professional.

4. Information Disclosure and Reliance: You and your spouse/partner will be asked to provide all documents related to the issue in question and relevant to the outcome of your case. You must provide complete and accurate information as requested. By signing this agreement you are agreeing to exchange and provide, on an ongoing basis, all information which may affect any choices or decisions you and your spouse/partner will make in this process.

The professionals you will be working with must have all the facts to properly advise you and assist you through resolution. Be sure to keep us informed and up-to-date about anything which may affect your case. Please notify us promptly of any change of address, telephone number, email address, employment, plans to move or extra marital relationships.

We will rely on your representation regarding the extent of your assets and liabilities, and the facts of your case. We will not conduct formal discovery on your behalf, but will rely on the representations made and documents provided to assist you in arriving at a fair outcome.

Confidentiality

5. Waive Right to Subpoena: By signing this Agreement, you acknowledge that you cannot call me or my staff, or any professional working as part of the collaborative team as a witness, or subpoena or demand the production of any records, notes, work product or the like in any legal or administrative proceeding concerning this dispute. To the extent that you may have a right to call any such individual or demand these documents, by signing this Agreement you are waiving any such right.

6. Confidentiality Between Clients: It is our policy that information from individual client sessions and conversations between you and I may be shared with the your spouse/partner and his/her attorney. This is commonly referred to as a "no secrets policy." This means that I may use my professional judgment and choose to share such information at my discretion. If you specifically request that information not be shared, I will honor that request, but the confidential information may be of such a nature that I will have to withdraw from your case and terminate the collaborative process.

7. Confidentiality Between Professionals: By signing this Agreement, you are signing a confidentiality waiver to allow full communication between all of the professionals and staff working on your case. The purpose of having a signed waiver is to enable full communication among the team members to facilitate the team approach. This exchange of information may occur in electronic form.

8. Information From Other Professionals: In order to more effectively provide services, it may be important for the professionals on your team to obtain records from and/or communicate with previous or current professionals. To this end, I may ask you to sign a Release of Confidential Information form.

[Add other provisions of your Firm's Engagement and Fee Agreement]

ACKNOWLEDGMENT

I have reviewed and understand the information outlined in this Agreement.

I understand that my attorney will not be providing the full range of attorney services. This limitation includes a prohibition against my attorney appearing in court on by behalf, except to file the final court documents that reflect the collaborative settlement agreement between my spouse/partner and myself.

I understand that communications to any professional working in the collaborative process are not confidential and may be shared with my spouse and his/her attorney and with the other professionals and staff working on my case.

I understand that the terms of this Agreement will be an enforceable contract between myself and my attorney and his/her firm.

_____

Signature

_____
Print Name

Date _____

My Role as your Collaborative Lawyer

As your Collaborative Lawyer, I am committed to offering you all the professional obligations of competence and loyalty that you would have in any other lawyer engagement. In concrete terms, this means that I have a duty to pursue your objectives, protect you from financial harm and legal exposure, inform you of your legal rights, produce competent work, keep all attorney-client communications confidential, avoid conflicts of interest, and ensure that my fees are understood and are fair.

Although my approach may differ from the traditional lawyer model with which you may be familiar, I am still your lawyer. I pledge to give you the advice and professional support as lawyer while at the same time give you the benefit from my non-adversarial approach, values, and perspective. I am constantly walking the tightrope between being a conciliatory facilitator with your spouse and being your advocate.

What I Do As Your Collaborative Lawyer During the Process

Representative: I am your agent and I will convey your needs and concerns to the other party and professionals.

Advocate: I will advocate for your interests throughout the divorce process.

Coach: As you will often be talking for yourself in meetings and with your spouse, I will coach you with legal, parenting and financial issues, to help you communicate directly with your spouse, and address your emotional needs.

Educator: My job is to teach you about the various issues to be covered and during certain stages of the collaborative process I will often assign you homework such as asking you to contact the children's school for vacation dates, finish your budget, or contact life insurance companies for insurability and rates. As the process develops, I will explain and prepare you for each stage. For example, prior to the first joint session, I will go over the possible agenda, review the Participation Agreement, and make sure you are ready for unexpected twists and turns.

Manager of the Process: I will work with you and other team members in scheduling meetings, making sure legal and tax deadlines are met, and working through fact gathering and drafting assignments. If outside experts are needed, I might raise the need for the expert, help find the expert, and arrange for the engagement. In essence, I will make sure that the train runs on time gets to the station. You will also help choreograph communication among the various team members.

Counselor at Law: I will listen to your concerns and help frame the decisions that you need to make. Such decisions may be about particular issues (how spring break should be divided, who lives in the residence) or about the collaborative process (how often should we meet, who should be at the next session). I will present objective criteria (legal principles, financial viability, effect on future relationship) and other options so you can make sound decisions. Once decisions are reached, I will help carry out the plan and to monitor the situation to see if decisions need to be revisited or revised.

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Fact Gatherer: With more 250 potential issues in a comprehensive divorce, I will make sure all the issues are addressed, and that you have sufficient information to make informed decisions about them. I will provide information in many forms: legal and financial documents, emails, websites, conversations with experts and salespeople, and just looking around. For example, to determine where you might live if you should move out of the family residence, someone will need to find out availability and pricing of appropriate apartments and houses for rent. It is my job to determine – partnering with you and the other collaborative professionals – what information is needed, how it will be obtained, how it will be analyzed, and how it is to be utilized in decision-making. I will also work with you to prepare financial disclosures and to review the disclosures from the other party.

Legal Researcher: I am responsible for making sure you have up-to-date legal information from which to evaluate decisions and plan proposals. I will also use relevant statutes, cases, and reports to help your spouse and his/her lawyer gain reality in assessing possible bargaining range. I will be candid about the strengths and weaknesses of legal positions. However, I will never take advantage of possible ignorance of your partner or their attorney in any way, including in the use of legal authority.

Negotiator and Negotiation Coach: Since you and I will work as a team, we will discuss and resolve issues, both small and large. I will be your agent in negotiations with the other party's attorney and collaborative team. I will also prepare you to present your own proposals both in joint sessions and in meetings with your partner and professionals when I am not present. I may even have simulated role-playing practice sessions in which I could play the other party and give you a rehearsal. Or, you can play the role of your spouse so you can feel what it is like to have a different perspective that may refine or alter your negotiation strategy.

Drafter/Ghost Writer: It will be my responsibility to write and/or revise summary letters, interim or partial agreements, the full settlement agreement and/or court documents, real estate, business, and other documents that may be required. If I do not have the expertise to draft a particular document, it may be necessary to have another lawyer or expert do that work. For example, if there is a qualified retirement plan to divide, I will want a highly technical document such as a Qualified Domestic Relations Order to be drafted by an outside expert rather than by either collaborative lawyer. In addition to drafting documents, I can be "on-call" for you to review and edit letters, emails and other documents that you might wish to send to your spouse or third persons.

Preventive Legal Health Provider: Divorce can be one of life's most upsetting events. During the negotiation and afterward, my role may shift from dispute resolution to conflict prevention. In this preventive function, I can help you in several ways. I may recommend an expert to draft wills, trusts, durable powers of attorney, or living wills, recommend and draft future dispute resolution clauses, calendar and monitor future events provided in the agreement (e.g. buy-out of house, change of school in the 7th grade), or arrange for parenting or support update meetings.

As with all aspects of our relationship, please always feel free to contact me with any questions, concerns, or any way in which I can help you.

This article is provided with thanks to Forrest "Woody" Mosten

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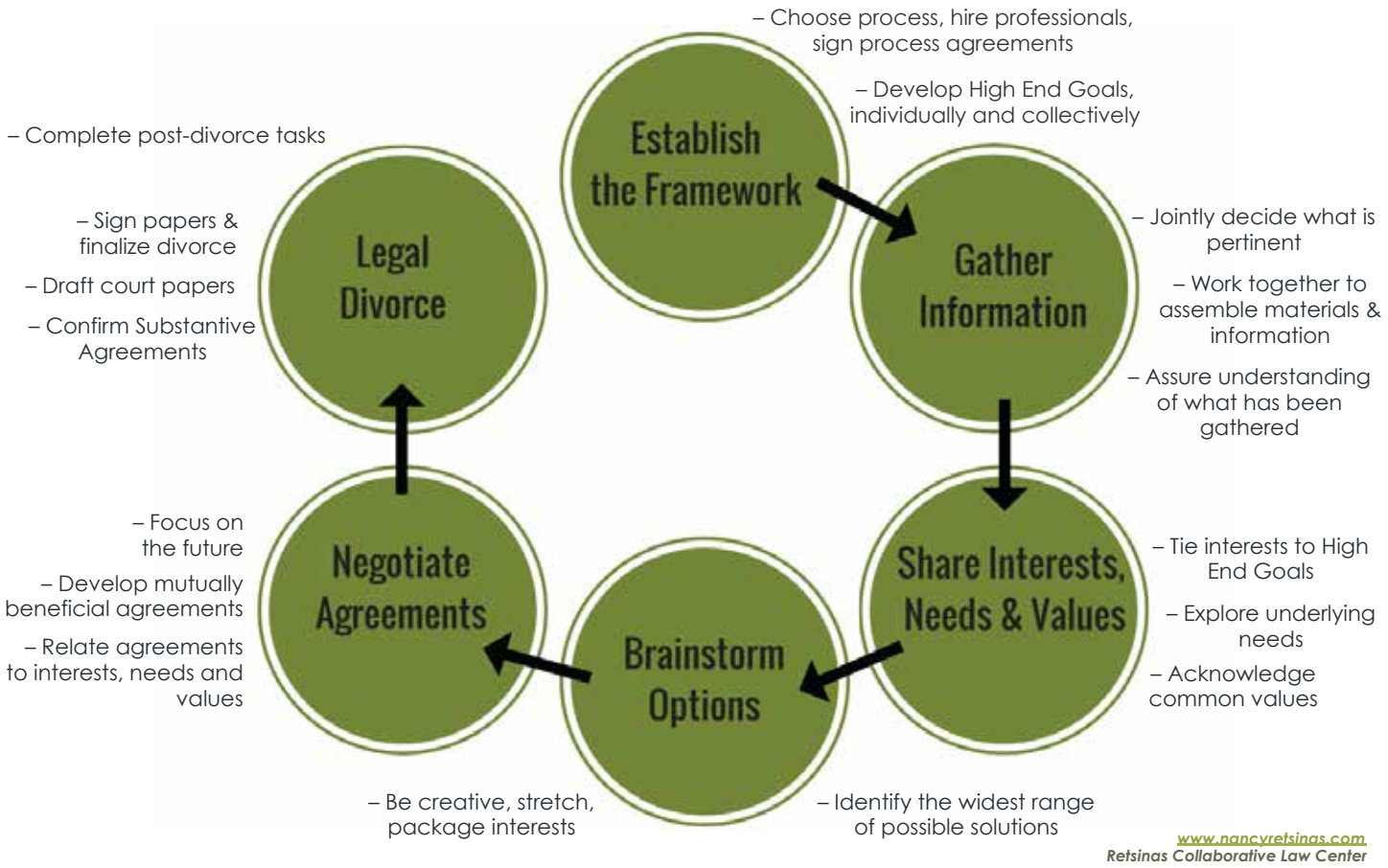
Professional Roles

When I'm an attorney representing a client in a **REGULAR FOUR WAY**	When I'm acting as a **MEDIATOR**	When I'm being a **COLLABORATIVE LAWYER**
I negotiate for my client (which may include interest-based negotiations IF I feel it's in his/her best interests)	I reframe to create interest-based negotiations by the spouses	I help create interest-based negotiations by both spouses and the other lawyer, believing my client will be best served by this process
I speak for my client (except when it's helpful for him/her to talk)	I let the spouses speak for themselves	I prepare my client to do much of the speaking, having first helped him/herunderstand effective negotiationwith process anchors
I am bound to get the "most" for my client, regardless of fairness	I leave what is acceptable up to the spouses and disregard my own sense of fairness	I try to understand my client's view of "fair" and assist by teaching him/her how to negotiate for this while taking into account the other side's view of "fair"
If I think of a brilliant solution to an issue that favors the other client, I keep my mouth shut	I try not to view solutions as favoring one side or the other but will assist by creating options	All possible solutions are on the table. I help my client evaluatethe consequences if any particular solution is accepted
My primary loyalty is to my client	My loyalty is to providing a safe process so that each spouse can feel as if his or her needs have been met	I have loyalty to my client and the process. If I perceive a conflict between the two, I discuss it with my client. My conflict may not be his
With some limited execptions, I must keep my client's confidences	Confidences revealed to me in caucus must be kept but I may encourage their release	I am still required to maintain confidentiality but try to teach my client that openness is more likely to be in his/her best interests
I will posture or take strategic positionson behalf of my client if that's what he/she needs/wants	I have no client for whom I have to posture or strategize	Collaborative four-ways are to be open and honest. There should be no need for anyone to posture or strategize.
I will do everything ethically possible to protect my client's interests	My obligation is to protect the neutrality of the process	My client's interests are being protected if I am a skillful collaborative lawyer and don't focus on the result

Thanks to Bob Collins, Barry Berkman and Brian Florence

NOTES

INTEREST-BASED DECISION-MAKING PROCESS FLOW



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Retsinas Collaborative Law Center

NOTES

Rules of Good Faith

In order to increase trust and reduce stress during a Collaborative Law Process, the following rules support a foundation for an effective, efficient and less distressing transition for the Parties.

- The Parties agree to proceed in "Good Faith". "Good Faith" means to abide by the rules of common courtesy, to keep an open mind, be willing to explore options without holding a fixed position, and share all pertinent information; financially, emotionally and regarding the children.

- The Parties agree to voice any concerns or questions that may arise during the Collaborative Law Process about the overall process, direction or any interactions between the Parties and any collaborative team members – Lawyers, Divorce Coach/Facilitator, Financial Specialist or Child Specialist.

- The Parties agree to convert complaints into neutral requests, and to refrain from blaming and negative assumptions based on the past behavior of the other. The Parties will work productively in the "here and now" keeping the future in mind, while refraining from bringing up past hurts, challenges or situations.

- The Parties agree to maintain the confidentiality of all content (written or oral) of the sessions and understand that under no circumstances will any of this content be used in any future adversarial process.

- The Parties agree to share their most important priorities, goals, and concerns, so that they can be considered and addressed. The Parties agree to take the priorities, goals, and concerns of their partner into account.

- In communications outside of joint sessions, the Parties agree to communicate respectfully, and to honor any requests to defer a discussion to a later time.

- The Parties agree not to threaten to withdraw from the Collaborative Law Process or to go to court as a means of achieving a desired outcome or forcing a settlement.

- The Parties agree not to destroy any documents or data that could be relevant.

- The Parties agree not to remove a minor child or children from the state without prior Agreement in writing.

- The Parties agree not to dispose of any assets without prior Agreement in writing.

- The Parties agree not to incur additional debt without prior Agreement in writing.

- The Parties agree not to harass or disturb the peace of the other.

- The Parties agree to maintain available insurance coverage without change in coverage or beneficiary designation without an Agreement in writing.

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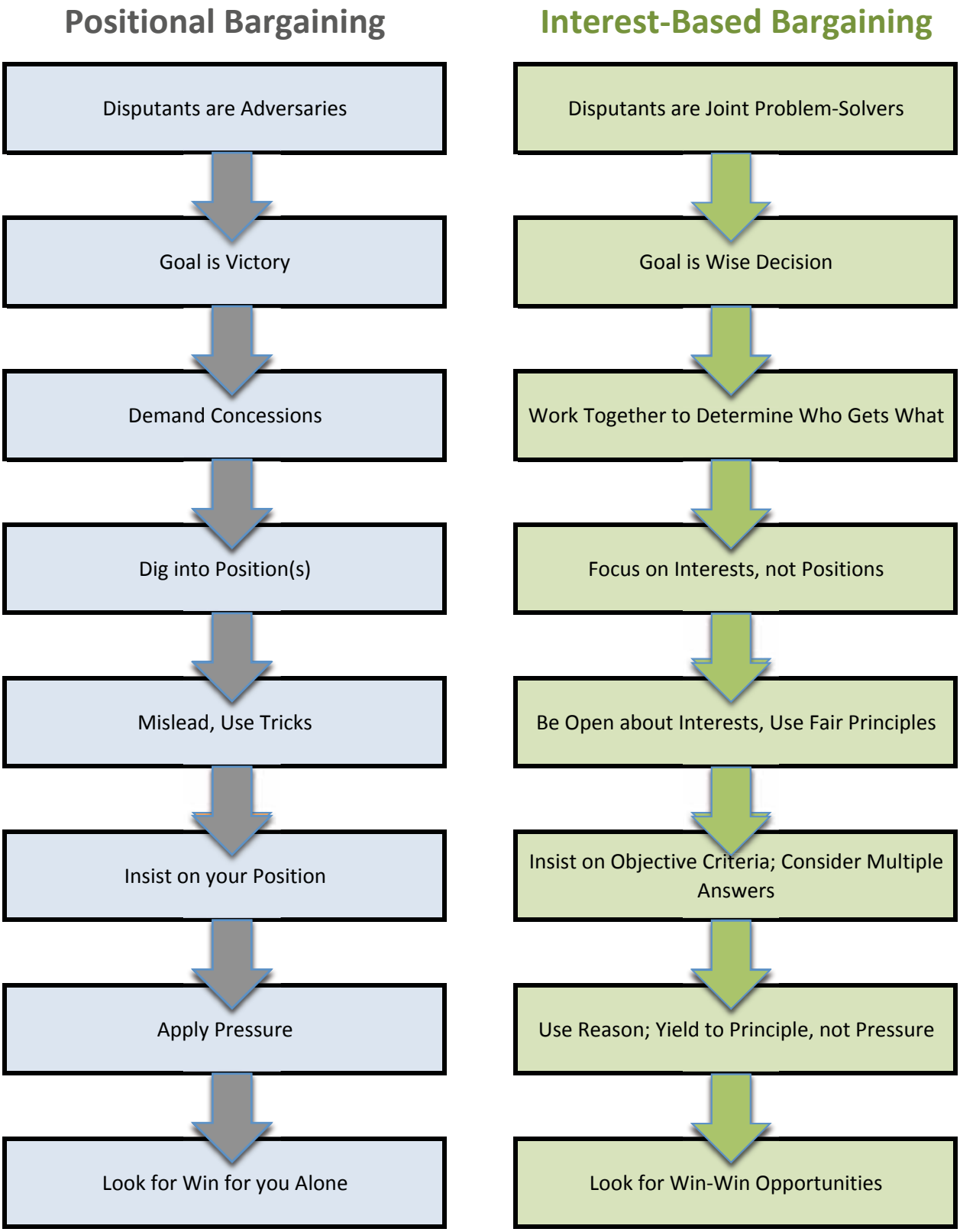
NOTES



This chart was derived from a more complex chart in Getting to Yes, Fisher and Ury

NOTES

Divorce: Collaborative vs. Litigation

	Collaborative	**Litigation**
Who Controls the Process	You and your spouse control the process and make final decisions	Judge controls process and makes final decisions
Degree of Adversity	You and your spouse pledge mutual respect and openness	Court process is based on an adversarial system
Cost	Costs are manageable, usually less expensive than litigation; team model is financially efficient in use of experts	Costs are unpredictable and can escalate rapidly including frequency of post-judgment litigation
Timetable	You and your spouse create the timetable	Judge sets the timetable; often delays given crowded court calendars
Use of Outside Experts	Jointly retained specialists provide information and guidance helping you and your spouse develop informed, mutually beneficial solutions	Separate experts are hired to support the litigants' positions, often at great expense to each
Involvement of Lawyers	Your lawyers work toward a mutually created settlement	Lawyers fight to win, but someone loses
Privacy	The process and discussion or negotiation details are kept private	Dispute becomes a matter of public record and, sometimes, media attention
Facilitation of Communication	Team of collaborative practice specialists educate and assist you and your spouse on how to effectively communicate with each other	No process designed to facilitate communication
Voluntary vs. Mandatory	Voluntary	Mandatory if no agreement
Lines of Communication	You and your spouse communicate directly with the assistance of members of your team	You and your spouse negotiate through your lawyers
Court Involvement	Outside court	Court-based

NOTES

Roles of the Collaborative Professionals

The Collaborative Attorney

- All participants in a collaborative process must have their own lawyer
- A collaboratively trained lawyer who advocates for the client in support of a durable out-of-court settlement, helping the client articulate her interests and reach agreements that meet the client needs while promoting the goals of mutual interest
- Cross-trained in facilitative/transformative mediation
- Advocates for the client in a non-polarizing, non-adversarial manner so the client can author his own settlement
- Educates and counsels the client about legal issues and settlement options
- Prepares legal documents and settlement agreement, facilitates entry of legal pleadings

The Neutral Financial Specialist – at the option of the parties

- A collaboratively trained financial planner, generally with a CDFA (Certified Divorce Financial Advisor) designation, who assists the clients in a neutral manner to provide them a safe and comfortable setting to better facilitate making financial decisions
- Provides information needed for the clients to become educated about the financial consequence of various settlement options
- Unpacks underlying financial needs with each respective client and assists each in the creation of individualized and joint financial settlement scenarios

The Facilitator/Coach – at the option of the parties

- A collaboratively trained mental health practitioner who does not evaluate or treat, but works with client(s) (either individually or as a neutral couple's coach, depending on needs), to address and move past difficult emotional issues that could become roadblocks to progress in settlement
- Empowers the couple to choose different behaviors so that they can make thoughtful decisions outside of emotional reactivity, thereby avoiding impasse
- Briefs other team members about how to proceed in a way that will promote progress toward a durable settlement
- Addresses the psychological, social, or cultural pressures associated with separation and divorce.
- Assists with issues of entitlement, blaming and negativity, reinforces information gleaned in other allied sessions

The Child Specialist – at the option of the parties

- A collaboratively trained mental health practitioner who does not evaluate for custody, but works to support the inherent strength of each parent, while educating them about their areas of concern.
- An independent and neutral representative of the child(ren's) needs, who serves as a listener to help the children deal with their fears about divorce, and assesses how children are dealing with and adapting to changes in the household. Shares with parents how they can each help their children cope.

Other Potential Allied Professional Roles – at the option of the parties – all working as neutrals

- Real estate agent
- Business valuator
- Appraiser
- QDRO specialist
- Estate Planning specialist

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NOTES

Collaborative Divorce Team Process

Step 1.

Informational Meeting

With a Divorce Coach or Attorney to answer questions and plan your first steps.

Step 2.

Meet and Hire Team Professionals

- Attorneys
- Child Specialist
- Divorce Coach(es)
- Financial Specialist

Step 3.

1st Joint Meeting w/Attorneys, Coach(es), and other team professionals as needed

- Sign Paperwork
- Plan Goals
- Make Initial Agreements

Step 4.

Attorneys	Coach(es)	Child Specialist	Financial Specialist
LEGAL PLAN	RELATIONAL PLAN	PARENTING PLAN	FINANCIAL PLAN

Meet with professionals separately to complete divorce tasks

Step 5.

Follow-up: Joint Meetings with attorneys and coach(es) to solidify agreements and draft paperwork. Additional team members may be invited as needed.

REPEAT STEPS 4 AND 5 AS NEEDED…

Step 6.

Final Joint Meeting with Attorneys and Coach(es) To **Sign Paperwork** and **Complete the Process**

Final Step:

ATTORNEYS FILE PAPERWORK, NO COURT NECESSARY!

NOTES

SAMPLE AGENDA FOR FIRST JOINT SESSION

AGENDA

John and Ginny Ann Michaels

4-Way Joint Session

DATE

LOCATION

1. Welcome and introduction to Collaborative Process
2. Review of Collaborative Process Participation Agreement, Good Faith Rules in the Collaborative Process
3. High End Goals of Ginny Ann and John
4. Collaborative Process "Roadmap" and phases
5. Professional Team Members and teamwork
6. Legal process (if parties desire, otherwise defer)
    a. Legal overview – substantive areas for discussion in the future
    b. Dissolution process
7. Attorneys' and Professionals' Fees (if parties desire, otherwise defer)
8. Priorities Identified by John and Ginny Ann
9. Future Meetings
    a. Schedule upcoming meeting(s)/location(s) (it would be helpful for all to have their calendars)
    b. Develop agenda for next meeting
    c. Assign homework

NOTES

SAMPLE AGENDA FOR LAST JOINT SESSION

AGENDA

John and Ginny Ann Michaels

4-Way Joint Session

DATE

LOCATION

1. Assess parties' well-being
2. Discuss how long this joint session is expected to last
3. Present and review closing documents and make necessary revisions
4. Assess status of neutral professionals, including payment of fees and necessity of future meetings with neutral professionals
5. Commend parties for successful resolution of the matter through collaborative process
6. Schedule entry with court
7. Schedule return of client documents, if any
8. Address any other issues requested by parties

NOTES

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-447 **August 9, 2007**

Ethical Considerations in Collaborative Law Practice

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution processes still is bound by the rules of professional conduct, including the duties of competence and diligence.[1]

In this opinion, we analyze the implications of the Model Rules on collaborative law practice.[2] Collaborative law is a type of alternative dispute resolution in which the parties and their lawyers commit to work cooperatively to reach a settlement. It had its roots in, and shares many attributes of, the mediation process. Participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, develop a full range of options, and then choose options that best meet the needs of the parties. The parties structure a mutually acceptable written resolution of all issues without court involvement. The product of the process is then submitted to the court as a final decree. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment.[3]

Since its creation in Minnesota in 1990,[4] collaborative practice[5] has spread

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1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

2. We do not discuss the ethical considerations that arise in connection with a lawyer's participation in a collaborative law group or organization. *See* Maryland Bar Ass'n Eth. Op. 2004-23 (2004) (discussing ethical propriety of "collaborative dispute resolution non-profit organization.")

3. *See generally* Sherri Goren Slovin, "The Basics of Collaborative Family Law: A Divorce Paradigm Shift," 18 Amer. J. of Family Law 74 (Summer 2004), available at http://www.mediate.com/pfriendly.cfm?id=1684.

4. Minnesota Collaborative Family Law FAQs, available at http://www.divorcenet.com/states/minnesota/mnfaq01.

5. The terms "collaborative law," "collaborative process," and "collaborative resolution process" are used interchangeably with "collaborative practice." Although col-

rapidly throughout the United States and into Canada, Australia, and Western Europe. Numerous established collaborative law organizations develop local practice protocols, train practitioners, reach out to the public, and build referral networks. On its website, the International Academy of Collaborative Professionals describes its mission as fostering professional excellence in conflict resolution by protecting the essentials of collaborative practice, expanding collaborative practice worldwide, and providing a central resource for education, networking, and standards of practice.[6]

Although there are several models of collaborative practice, all of them share the same core elements that are set out in a contract between the clients and their lawyers (often referred to as a "four-way" agreement). In that agreement, the parties commit to negotiating a mutually acceptable settlement without court intervention, to engaging in open communication and information sharing, and to creating shared solutions that meet the needs of both clients. To ensure the commitment of the lawyers to the collaborative process, the four-way agreement also includes a requirement that, if the process breaks down, the lawyers will withdraw from representing their respective clients and will not handle any subsequent court proceedings.

Several state bar opinions have analyzed collaborative practice and, with one exception, have concluded that it is not inherently inconsistent with the Model Rules.[7] Most authorities treat collaborative law practice as a species of limited scope representation and discuss the duties of lawyers in those situa-

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laborative practice currently is utilized almost exclusively by family law practitioners, its concepts have been applied to employment, probate, construction, real property, and other civil law disputes where the parties are likely to have continuing relationships after the current conflict has been resolved.

6. *See* http://www.collaborativepractice.com/t2.asp?T=Mission.

7. Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007), "Ethical Considerations in the Collaborative and Cooperative Law Contexts," available at http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth, is the only opinion to conclude that a non-consentable conflict arises in collaborative practice. Other state authorities analyze the disqualification obligation under Rules 1.2, 1.16, or 5.6. *See e.g.*, Kentucky Bar Ass'n Op. E-425 (June 2005), "Participation in the 'Collaborative Law' Process," available at http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf; New Jersey Adv. Comm. on Prof'l Eth. Op. 699 (Dec. 12, 2005), "Collaborative Law," available at http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html; North Carolina State Bar Ass'n 2002 Formal Eth. Op. 1 (Apr. 19, 2002), "Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation," available at http://www.ncbar.com/ethics/ethics.asp?page=2&from=4/ 2002&to=4/2002; Pennsylvania Bar Ass'n Comm. on Legal Eth. & Prof'l Resp. Inf. Op. 2004-24 (May 11, 2004), available at http://www.collaborativelaw.us/articles/Ethics_Opinion_Penn_CL_2004.pdf. Several states have special rules for collaborative law practice. *See, e.g.*, CAL. FAM § 2013 (West 2007); N.C. GEN. STAT. § 50-70 to 50-79 (2006); TEX. FAM. CODE ANN. §§ 6.603 & 153.0072 (Vernon 2005).

tions, including communication, competence, diligence, and confidentiality. However, even those opinions are guarded, and caution that collaborative practice carries with it a potential for significant ethical difficulties.[8]

As explained herein, we agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

Rule 1.2(c) permits a lawyer to limit the scope of a representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. Nothing in the Rule or its Comment suggest that limiting a representation to a collaborative effort to reach a settlement is per se unreasonable. On the contrary, Comment [6] provides that "[a] limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives."

Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation.[9] The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.[10]

The one opinion that expressed the view[11] that collaborative practice is impermissible did so on the theory that the "four-way agreement" creates a non-waivable conflict of interest under Rule 1.7(a)(2). We disagree with that result because we conclude that it turns on a faulty premise. As we stated earlier, the four-way agreement that is at the heart of collaborative practice includes the promise that both lawyers will withdraw from representing their respective clients if the collaboration fails and that they will not assist their clients in ensuing litigation. We do not disagree with the proposition that this contractual obligation to withdraw creates on the part of each lawyer a "responsibility to a third party" within the meaning of Rule 1.7(a)(2). We do disagree with the view that such a responsibility creates a conflict of interest under that Rule.

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8. *Supra* note 6.

9. Rule 1.0(e).

10. *See also* Rule 1.4(b), which requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

11. Colorado Bar Ass'n Eth. Op.115, *supra* note 7.

A conflict exists between a lawyer and her own client under Rule 1.7(a)(2) "if there is a significant risk that the representation [of the client] will be materially limited by the lawyer's responsibilities to … a third person or by a personal interest of the lawyer." A self-interest conflict can be resolved if the client gives informed consent, confirmed in writing,[12] but a lawyer may not seek the client's informed consent unless the lawyer "reasonably believes that [she] will be able to provide competent and diligent representation" to the client.[13] According to Comment [1] to Rule 1.7, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." As explained more fully in Comment [8] to that Rule, "a conflict exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer's other responsibilities or interests…. The conflict in effect forecloses alternatives that would otherwise be available to the client."

On the issue of consentability, Rule 1.7 Comment [15] is instructive. It provides that "[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."

Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client.[14] We disagree, because we view participation in the collaborative process as a limited scope representation.[15]

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation. A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence, notwithstanding that the contours of the requisite competence and diligence are limited in accordance with the overall scope of the representation. Thus, there is no basis to conclude that the lawyer's representation of the client will be materially limited by the lawyer's obligation to withdraw if settlement cannot

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12. Ru1e 1.7(b)(4).

13. Rule 1.7(b)(1).

14. Colorado Bar Ass'n Eth. Op.115, *supra* note 7 (practice of collaborative law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful).

be accomplished. In the absence of a significant risk of such a material limitation, no conflict arises between the lawyer and her client under Rule 1.7(a)(2). Stated differently, there is no foreclosing of alternatives, i.e., consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement.[16]

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15. See *Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force*, 2003 A.B.A. SECTION OF LITIGATION, at 27-29, available at http://www.abanet.org/litigation/taskforces/modest/report.pdf.

16. *See* Lerner v. Laufer, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div.), *cert. denied*, 827 A.2d 290 (N.J. 2003) (stating that "the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them," court rejected malpractice claim against lawyer who used carefully drafted limited scope retainer agreement); Alaska Bar Ass'n Eth. Op. No. 93-1 (May 25, 1993) (lawyer may ethically limit scope of representation but must notify client clearly of limitations on representation and potential risks client is taking by not having full representation); Arizona State Bar Ass'n Eth. Op. 91-03 (Jan. 15, 1991) (lawyer may agree to represent client on limited basis as long as client consents after consultation and representation is not so limited in scope as to violate ethics rules); Colo. Bar Ass'n Ethics Comm. Formal Op. 101 (Jan. 17, 1998) (noting examples of "commonplace and traditional" arrangements under which clients ask their lawyers "to provide discrete legal services, rather than handle all aspects of the total project").

NOTES

MEMORANDUM

To: Susan Evans Grabe, Director of Public Affairs

CC: Amber Hollister, General Counsel

From: Mark Johnson Roberts, Deputy General Counsel

Re: Uniform Collaborative Law Act (UCLA)

Date: August 11, 2016

The Uniform Collaborative Law Rules/Act is a product of the Uniform Law Commission (ULC). It is a proposed statute, or a court rule, designed to implement a system of "collaborative law" as an alternative form of dispute resolution. In collaborative law, the parties agree not to seek a judicial resolution, but instead to rely on negotiation alone as a means of resolving their dispute. Either party can terminate the collaborative process at any time, but the cost of doing so is high. If the collaborative process does not succeed, the parties must begin the process of dispute resolution anew in a traditional context. Neither the lawyers nor any of the knowledge obtained during the collaborative process can be used in any subsequent litigation.

Procedural History of the UCLA before the ABA House of Delegates

The UCLA began life in a series of conferences held by a ULC drafting committee starting in February 2007. The commission approved it in its initial form in July 2009. It was first presented to the ABA House of Delegates as Report 111C at its midyear meeting in February 2010. It was supported by the Section of Dispute Resolution, the Section of Family Law, and the Section of Individual Rights and Responsibilities (now the Section on Civil Rights and Social Justice). The Section of Litigation opposed it, as did the Young Lawyers Division and the Judicial Division. On the floor of the house, the resolution that would have approved the UCLA was withdrawn by the sponsors and did not proceed to a vote.

Following the 2010 ABA midyear meeting, the ULC drafting committee prepared amendments to the Act, and a proposed model court rule, and the

Commission approved those in June 2010. The entire package was submitted to the ABA House as Report 109F at its midyear meeting in February 2011. On the floor, the sponsors once again withdrew it from consideration rather than allowing it to go to a vote. This time, it was done at the request of the Section of Family Law, which wanted more time to study it.

Finally, the revised package was presented to the ABA House as Report 110B at its annual meeting in August 2011. The House rejected it on a vote of 154–298, 10 votes short of a two-to-one margin. The ULC subsequently submitted it to the Board of Governors of the American Academy of Matrimonial Lawyers in November 2011, where it was likewise rejected.

Adapting the ULCA for Use in Oregon

Central to the practice of collaborative law is the signing of a "participation agreement" between the parties that sets forth the parameters for their negotiation. Based on the proposed law, parties to a collaborative participation agreement could—and, under the preferred collaborative model, would—agree to disqualification of their lawyers and law firms in the event that negotiation proved fruitless, and to confidentiality of all the information exchanged during the collaborative process. These provisions create an artificial barrier for either party to terminating the negotiations. If negotiation fails, both parties must incur a penalty in the form of hiring new counsel and "rediscovering" all of the information exchanged during collaboration.

That such an agreement might be signed raises a couple of concerns for lawyers under Oregon's Rules of Professional Conduct (RPCs). First, there is a lawyer self-interest conflict under RPC 1.7(a)(2), in that a lawyer advising a client in a collaborative law process is undertaking a responsibility, favoring the opponent, to withdraw from representation under circumstances where, by definition, withdrawal will not be in the client's best interest. Second, the nature

of a collaborative law agreement is to limit the lawyer's ability to represent a client as a part of settling that client's case, implicating RPC 5.6(b).[1]

The ULC's answer to these concerns was to draft a set of court rules that was identical in virtually all respects to its proposed legislation. Whatever may be the merits of such an approach in other jurisdictions, in Oregon, we need a two-pronged approach. Under the theory of collaborative law, in which the participation agreement is defined to be in the client's best interest because it is what the client wants, the RPC 1.7 conflict is waivable based upon informed consent. But the RPC 5.6 concern must be addressed by an amendment if collaborative law is to be practiced ethically in our state. Passing a statute that purported to authorize lawyer conduct prohibited by the RPCs would violate the separation of powers by intruding upon the exclusive province of the judiciary to regulate lawyer conduct.

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[1] Interestingly, the formal ethics opinion of the American Bar Association, widely cited as approving the practice of collaborative law, defined the RPC 1.7 concern out of existence and ignored the RPC 5.6 issue. *Ethical Considerations in Collaborative Law Practice,* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op 07-447 (2007). It did this by ignoring the language of RPC 1.7 and concluding that a participation agreement created no conflict of interest, simply because it was what the client wanted.

NOTES

This is a discussion draft and is not the policy of the American Bar Association or the Section of Dispute Resolution. Please direct any comments on this draft to the co-chairs of the Collaborative Law Committee, David A. Hoffman (DHoffman@BostonLawCollaborative.com) and Lawrence R. Maxwell, Jr. (lmaxwell@adr-attorney.com).

AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION

COLLABORATIVE LAW COMMITTEE

ETHICS SUBCOMMITTEE[1]

SUMMARY OF ETHICS RULES GOVERNING COLLABORATIVE PRACTICE

TABLE OF CONTENTS

1. Sherrie R. Abney (Texas), Jeanne M. Fahey (California), Karen S. Fasler (Washington), Lawrence R. Maxwell, Jr. (Texas), Paula H. Noe (Massachusetts), Ruth L. Rickard (Texas); John M. Lande (Missouri), ex officio; David A. Hoffman (Massachusetts), ex officio.

I. INTRODUCTION

The practice of Collaborative Law has become a major addition to the field of alternative dispute resolution in the United States, Canada, and other countries. In the U.S., three states (California, North Carolina, and Texas) have enacted statutes authorizing the use of Collaborative Law, and in 2007 the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws),[2] created a Drafting Committee to promulgate a uniform law authorizing the use of Collaborative Law. In the same year, the American Bar Association ("ABA") Section of Dispute Resolution created a Collaborative Law Committee. The ABA has also published the leading text on Collaborative Practice—Pauline Tesler's COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION. In 2002, the ABA Section of Dispute Resolution awarded Pauline and the founder of the Collaborative Law movement, attorney Stuart Webb, the ABA's first "Lawyer as Problem Solver" Award. The International Academy of Collaborative Professionals, the leading organization in the Collaborative Practice field with more than 3,000 members, estimates that more than 10,000 lawyers and other professionals throughout the world have received Collaborative Practice training.

Collaborative Law (also known as Collaborative Practice, because it includes the use of not only lawyers but also other professionals, such as mental health professionals and financial planners) is a process in which all parties attempt to settle matters without resorting to litigation. All parties are represented by counsel and agree to keep discovery informal and cooperative, to hire joint experts if needed, to maintain the confidentiality of the negotiation process, and to engage in good faith, interest-based negotiation. If any party seeks intervention from a court on a contested matter, the Collaborative Practice attorneys must withdraw from representation and the parties then hire new counsel. One of the purposes of the Collaborative Practice Participation Agreement (the "Participation Agreement"), signed by the parties and acknowledged or signed by counsel, is to align everyone's incentives in the direction of settlement and to promote constructive problem-solving.

Empirical research has found that a problem-solving negotiation approach is often more effective than an adversarial approach.[3] Stud-

2. This is the organization responsible for drafting such uniform laws as the Uniform Commercial Code, Uniform Arbitration Act, and Uniform Mediation Act.

3. *See* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 167 (2002). This survey of lawyers revealed that 54% rated opposing counsel using a problem-solving approach as effective and 4% as ineffective compared with 9% of lawyers who rated an adversarial approach as effective and 53% as ineffective. *Id.* at 195.

ies have also shown that in traditional negotiations attorneys often have difficulty using more effective interest-based negotiation strategies because of mistrust in the other side's good faith.[4] Collaborative Practice provides a structure and process that maximizes an attorney's ability to develop an atmosphere of trust and to safely engage in a more effective form of negotiation.

Numerous law review articles and state ethics opinions have addressed the question of whether Collaborative Practice is consistent with ABA Model Rules of Professional Conduct (and the various versions of those rules in the fifty states).[5] The predominant view is that Collaborative Practice is consistent with the Model Rules. Ethics opinions in Minnesota (1997), North Carolina (2002), Maryland (2004), Pennsylvania (2004), Kentucky (2005), New Jersey (2005), and Missouri (2008), have approved the use of Collaborative Practice. Only one state, Colorado (2007), has said otherwise about one form of Collaborative Practice. (The Colorado Opinion states, in a footnote, that nothing prohibits the *parties* from signing an agreement that is not signed by their lawyers, in which the *parties* agree to hire new counsel if either party initiates litigation.) In August 2007, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 (the "ABA Opinion"),[6] which rejects the conclusions reached in the Colorado Opinion and squarely supports the use of Collaborative Practice so long as clients are well informed about the process. It is significant to note that the Missouri Opinion supporting the use of the Collaborative Practice was issued in 2008, after the Colorado Opinion and the ABA Opinion.

The purpose of this paper is to address ethical issues considered in the above-mentioned opinions, including: (1) limited scope representation, informed consent, and restriction on practice; (2) conflict of interests; (3) competence and diligence; (4) mandatory withdrawal provisions, including withdrawal due to client behavior and withdrawal requiring the court's permission; (5) zealous representation; (6) confidentiality and disclosure; (7) communications and advertising; and (8) collaborative non-profit organizations.

This Article shows that, for the reasons set forth below, Collaborative Practice is consistent with the rules of ethics for lawyers and provides an important method for clients and attorneys to achieve fair

4. *See* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 673–74 and n.247 (2007); *see also* Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 483 and nn.22–24 (2005).

5. Many references are made to the ABA Model Rules of Professional Conduct, but it is important to note that the laws, regulations, Rules of Professional Conduct, court rules, and Opinions promulgated in the individual jurisdictions are controlling.

6. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007), *available at* http://www.Collaborativelaw.us/articles/Ethics_Opinion_ABA.pdf.

settlements without the expense, delay, and acrimony that are, unfortunately, all too common when disputes are resolved in the litigation process.

II. LIMITED SCOPE REPRESENTATION

The ABA Committee on Ethics and Professional Responsibility has concluded that Collaborative Practice allows an attorney to limit the scope of his or her representation under ABA Model Rule 1.2(c),[7] which states "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[8] Ethics opinions from New Jersey,[9] North Carolina,[10] Kentucky,[11] Pennsylvania,[12] Minnesota,[13] and Missouri[14] have all addressed limited scope representation as an integral component of Collaborative Practice. Even Colorado, which deemed Collaborative Practice impermissible on other grounds, has agreed that advance agreements to limit representation are ethical.[15]

The requirements for Collaborative Practice are the same limitations of the scope of other types of legal representation. The obligations concerning limited scope representation and informed consent are not new considerations for attorneys. It is well established that

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7. *Id.* at 3.

8. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2008), *available at* http://www.abanet.org/cpr/mrpc/rule_1_2.html.

9. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 699, at 6 (2005), *available at* https://www.collaborativepractice.com/lib/Ethics/NJ.op.pdf (lawyers are permitted to impose some limitations on the nature of their practice).

10. N.C. State Bar Ass'n Formal Ethics Op. 1, at 2 (2002), *available at* http://www.ncbar.gov/ethics/ethics.asp?page=2&from=4/2002 ("Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation").

11. Ky. Bar Ass'n Ethics Op. KBA E-425, at 7 (2005), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e-425.pdf (under the Collaborative Law agreement, the parties agree to a limited representation. Rule 1.2 recognizes limited representations).

12. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Ethics Op. (2004), *available at* https://www.collaborativepractice.com/lib/Ethics/PA.op.pdf (the version of Rule 1.2 now pending would permit a lawyer and client to agree on a limited scope of representation, provided the limitation is reasonable and the client gives informed consent).

13. Advisory Opinion Letter from Patrick R. Burns, Senior Assistant Director, Office of Lawyers Professional Responsibility, Minnesota Judicial Center to Laurie Savran, Collaborative Law Institute (Mar. 12, 1997), *available at* http://bostonlawCollaborative.com/documents/Minnesota_Ethics_Opinion.doc.

14. Advisory Comm. of the Sup. Ct. of Mo. Formal Op. 124 (2008), *available at* http://www.courts.mo.gov/page.asp?id=11696 (follow "Formal Opinion 124" hyperlink).

15. Colo. Bar Ass'n Ethics Op. 115, at 6 (2007), *available at* http://www.cobar.org/index.dfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24/07/ ("[A] lawyer may also provide a client with some, but not all, of the work normally involved in litigation. . . . Thus, an advance agreement with the client to terminate or limit the representation is ethical.").

attorneys must always act with diligence and in the best interests of their clients, no matter what the scope of representation entails. Attorneys are required to consider the facts of each case to determine whether a particular process is appropriate for a client and whether they, as attorneys, are competent to handle the issues at hand.

A two-pronged analysis is needed to ascertain whether a limited scope of representation is appropriate for a particular situation. The first prong involves a determination of whether the proposed limitation in scope is *reasonable under the circumstances*. The second prong addresses whether *informed consent* has been properly obtained.

A. *Is the Scope Reasonable Under the Circumstances?*

The state ethics opinions are cautionary and provide extensive guidance in determining if a limited scope of representation is appropriate. The New Jersey Opinion suggests that whether a limitation is "reasonable" is a determination that must be made in the first instance by the lawyer exercising sound professional judgment in assessing the needs of the client.[16] The limitation is deemed reasonable if the lawyer believes his or her client's needs are well-served by participation in the Collaborative process. The Opinion goes on to state, however, that given the harsh outcome in the event of failure, limited representation is clearly not reasonable if the lawyer believes there is a significant possibility that an impasse will result. The Pennsylvania Opinion recommends attorneys use case-specific and fact-specific analysis to determine whether the proposed limited scope of representation is reasonable under the circumstances and whether it will permit an attorney to deliver competent representation.[17]

B. *Has Informed Consent Been Obtained?*

The second prong of the analysis is whether the client has given informed consent. ABA Model Rule 1.0(e) defines informed consent as that which "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[18]

Model Rule 1.2(a) provides that the client has the right to make certain decisions regarding his or her case, and a lawyer shall abide by the client's decision concerning the objectives of representation.[19]

16. N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 699, at 7–8.

17. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Op. 2004-24, at 8.

18. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2008).

19. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008) ("(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on

This, of course, includes the right to retain a lawyer for a limited purpose such as pursuing settlement.

The ABA Opinion states that, as long as a limitation is reasonable under the circumstances and a client has given informed consent, nothing in Rule 1.2(c) suggests that limiting representation to a Collaborative effort is per se unreasonable. On the contrary, a limited representation may be entirely appropriate when a client has limited objectives for representation.[20]

The New Jersey Opinion notes that clients must be made fully aware of both the significant limitations of the Collaborative Practice process, as well as the full range of alternatives, including the possibility of litigation. Additionally, the attorney must clearly explain to the client the consequences if the process fails and the attorney withdraws.

The Kentucky Opinion notes that the kind of information and explanation essential to informed decision-making must include the differences between the adversarial process and Collaborative Practice, the risks and advantages of each, any reasonably available alternatives, and the consequences of failure to reach a settlement agreement.[21] The Opinion goes on to note that the Participation Agreement may touch on these concerns, but the Participation Agreement is unlikely on its own to meet the requirements needed to satisfy the informed decision-making process. The agreement should serve as a starting point but be amplified by fuller explanation and discussion. The Opinion notes, as well, that clients must be provided information about the possibility that additional time and costs may be associated with obtaining new counsel, or that one might feel pressured to settle in order to avoid having to seek new representation, and the potential for an opponent to effectively disqualify both counselors.[22]

The Missouri Opinion notes the potential tension that may be created in Collaborative Practice between the client's interests and the attorney's interests due to the requirement that the attorney withdraw if the matter is not settled. The Opinion notes similar tension exists in many other attorney-client relationships, such as contingent fee cases. The Opinion concludes that the tension that may develop between the interests is not unreasonable, since the vast majority of attorneys will

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behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

20. ABA Formal Op. 07-447, at 3.

21. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4 (noting that the Collaborative Law agreement may touch on these concerns but is unlikely on its own to meet the requirements related to informed decision making. The agreement should serve as a starting point but be amplified by fuller explanation and discussion).

22. *Id.* at 7.

fulfill their ethical obligation to put their client's interests ahead of their own personal interests.[23]

In order to encourage lawyers to take the steps necessary to explain Collaborative Practice to clients, at least one ethical opinion recommends that the exact scope of the representation be reduced to writing.[24] Another suggests that lawyers confirm in writing any explanations of Collaborative Practice, along with the client's consent to its use.[25] These recommendations comport with ABA Model Rule 1.5(b), which recommends that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible, shall be communicated to the client, preferably in writing.

The various concerns cited in these opinions emphasize the need to proceed carefully, as is of course required in any attorney-client relationship. The ABA Opinion makes it clear that an agreement to provide limited scope representation does not eliminate the duty of an attorney to represent his or her client with diligence and competence.[26] Similarly, the Pennsylvania Ethics Opinion stresses that a limitation must not interfere with the ability of an attorney to comply with Rule 1.1 and its obligation to provide competent representation.[27]

C. *Rule 5.6 Restrictions on Practice Distinguished*

The limitations in scope of representation that are contemplated under Model Rule 1.2 are distinct from those contemplated under Model Rule 5.6. Model Rule 5.6 addresses restrictions on the right to practice law such as a non-compete agreement restricting the practice of law by a lawyer departing from a firm.[28] The Kentucky Opinion notes that agreements contemplated under its Rule 5.6 are meant to apply to lawyers practicing together and settlement agreements between parties to litigation.[29] Thus, ABA Model Rule 5.6 does not ap-

23. Advisory Comm. of the Sup. Ct. of Mo. Formal Op. 124, at 1.

24. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Op. 2004-24, at 9. (although the Pennsylvania proposed version of 1.5(b) does not require a writing at this point, it is preferable to specify in writing the scope of representation).

25. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4.

26. ABA Formal Op. 07-447, at 4.

27. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Ethics Op. 2004-24, at 6.

28. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2008) ("A lawyer shall not participate in offering or making:

> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

29. Ky. Bar Ass'n Ethics Op. KBA E-425, at 7.

ply to the agreement that Collaborative Practice attorneys make in a four-way (or multi-party) agreement with the parties in a Collaborative Practice case.

III. CONFLICT OF INTEREST

Rule 1.7(a)(2) states that an impermissible conflict exists between a lawyer and client if there is a significant risk that the representation will be materially limited by a lawyer's responsibilities to a third person or by a personal interest of the lawyer. The ABA Opinion notes that representation is permissible where there is a conflict of interest if the client gives informed consent and the lawyer believes he or she is able to provide competent and diligent representation. Responsibilities towards third parties constitute conflicts if there is a significant risk that these responsibilities will materially limit the lawyer's representation of the client.

The ABA Opinion states that the contractual obligation to withdraw contained in the Participation Agreement creates a "responsibility to a third party" on the part of each lawyer, but states that this does not necessarily create a conflict of interest under Rule 1.7(a)(2).[30] The Opinion directly refutes the Colorado Opinion, which states that Collaborative Practice using a four-way (or multi-party) agreement is inherently impermissible because it creates a non-waivable conflict of interest under Rule 1.7(a)(2).[31] The ABA Opinion rejects this conclusion of the Colorado Opinion because it views the limited-scope representation as consistent with the client's goal of Collaborative settlement.[32] That is, no conflict arises from the foreclosing of the litigation alternative because the client has chosen to limit the Collaborative attorney's representation to negotiating a settlement.[33] The parties to the dispute may end the process at any time and continue their case in litigation, mediation, arbitration, or any other form of dispute resolution that the parties choose.

The Pennsylvania Opinion states that a conflict would exist under Rule 1.7(a)(2) if a lawyer concludes there is a significant risk the representation will be materially limited by the lawyer's own interests. The Opinion suggests, for example, a conflict might arise because the

30. *See* ABA Formal Op. 07-447, at 3.

31. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008) ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

32. *See* ABA Formal Op. 07-447, at 4.

33. The Committee agrees and further notes that litigation is at all times an alternative to the Collaborative process.

lawyer is interested in serving only as a Collaborative Practice attorney.[34] However, it is not obvious that simply being engaged for the limited purpose of Collaborative Practice would impair the lawyer's judgment or ability to advise a client to consider terminating the Collaborative process and proceed to litigation. Moreover, the Committee notes this consideration is not unique to Collaborative Practice. The desire to limit one's practice to a specific area is a consideration for all attorneys when accepting employment. Like any other lawyers, Collaborative Practice lawyers must reasonably believe they can provide competent and diligent representation to each client they agree to represent, just as trial attorneys must be cautious when accepting clients who wish to settle their disputes rather than move to the courtroom where trial attorneys' talents and interests lie.

IV. COMPETENCE

The Pennsylvania Opinion on Collaborative Practice considered the competence of the Collaborative Practice attorney under Pennsylvania Rule of Professional Conduct 1.1, which states that, "a lawyer owes a duty of competence to each of the lawyer's clients." The Opinion continues by stating, "Although many of the Rules of Professional Conduct permit client waivers, Rule 1.1[35] contains no such exception." The Opinion goes on to agree with the conclusion:

> Anyone considering collaborative family law should have the necessary experience and knowledge to handle any family law matter and has a duty to seek the services of, or associate with, another lawyer or professional who is competent to handle those areas for which he may not be fully prepared.

The Pennsylvania Opinion is in keeping with the common understanding of the rule that lawyers must be competent in a particular area of the law or, if they are not, they must properly educate themselves or engage the assistance of another attorney who is competent to assist them in their representation of a client.

In this respect, Collaborative Practice attorneys are under the same ethical requirements as any other member of the Bar. There is no reason to believe that Collaborative practitioners will assume there is less of a duty of competence placed upon them than attorneys in any other type of attorney-client relationship. Collaborative attorneys, like all others, must have the legal knowledge, skill, thoroughness and preparation necessary to provide competent representation.

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34. *See* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Informal Op. 2004-24, at 8.

35. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

A Collaborative Practice lawyer can obtain subject matter competence the same way as any other attorney—through experience, special training, study or association with another lawyer with the necessary expertise.[36] The skill of Collaborative negotiation is also an area in which the practitioner must be competent, since it represents a "paradigm shift"[37] from adversarial, positional bargaining. However, as the Rule contemplates, there are many ways for an attorney to attain the necessary skills and even a newly admitted lawyer can be as competent as an attorney with long experience.[38] Collaborative Practice groups throughout the United States and overseas require specialized training in Collaborative Practice in order to qualify for membership in those organizations.

To further define competent representation, the Pennsylvania Opinion makes clear that in representing a client, competence should not necessarily be equated with a maximum dollar settlement. The client may have other considerations, as set out in Rule 2.1, "such as moral, economic, social and political factors that may be relevant to the client's situation." These factors may include concerns regarding ongoing family or business relationships that could possibly be destroyed by the rigors of deposition or cross-examination in an adversarial setting. Moreover, these factors are precisely the reason the Collaborative process was originally developed. In many situations, the parties place higher importance on non-material interests, such as the welfare of the parties' children in a divorce case. Open discussions between participants in the Collaborative process explore the interests and goals of the parties and create opportunities to consider and resolve

36. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 ("[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.").

37. For a discussion of this paradigm shift, see PAULINE TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2002) and SHERRIE ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW (2005).

38. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 ("[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

issues that might become secondary or completely ignored if the emphasis of the dispute remains solely on "how much is the case worth?"

There is no evidence that the Collaborative process compromises a client's right to competent representation.[39] Parties who have no desire to resolve their problems in court should be given the opportunity to use Collaborative Practice for the limited purpose of settling their dispute. By retaining collaboratively trained lawyers, clients employ attorneys that are better equipped to guide the parties through the settlement process with the use of interest-based negotiations rather than positional bargaining.[40]

V. WITHDRAWAL

A. *Mandatory Withdrawal – i.e., Limited Representation*

The term "mandatory withdrawal" refers to withdrawal by the attorneys pursuant to the withdrawal provision in the Participation Agreement. The duty to withdraw in a Collaborative case generally arises when an impasse is reached or when any party wishes to terminate the Collaborative process. The term "withdrawal" is actually somewhat of a misnomer since the process is more accurately described by the term "limited-scope representation."

There are some basic factors that must be considered as an attorney disengages from the process. Clients should always be informed regarding all reasonably available options for resolving disputes during any initial interview with an attorney. For the collaborative process to be successful, collaborative practitioners should screen potential participants. The process should be thoroughly explained, emphasizing the necessity of honesty and good faith, voluntary disclosure by the

39. *See* Julie Macfarlane, The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases (2005), *available at* http://www.nysba.org/Content/NavigationMenu58/ResourceLibrary/CommitteeonCollaborativeLaw/Emerging_Phenomenon_Collaborative_Family_Law.pdf. The Collaborative Practice community has grown in such a way as to assist attorneys to obtain and refine their skills. For instance, the IACP minimum standards for Collaborative attorneys provide that an attorney wishing to hold himself out as Collaborative obtain at least 12 hours of basic Collaborative training, at least one 30 hour training in client centered, facilitative conflict resolution training, and 15 aggregate hours of further skills training. *See* INT'L ACADEMY OF COLLABORATIVE PROF'LS MINIMUM STANDARDS §§ 2.2–.4 (2004). Many local practice groups impose similar initial and ongoing training requirements.

40. Collaborative Practice attorneys are not faced with the dual tasks of adversarial behavior one week and attempts to settle the next. The Collaborative lawyers' focus is one hundred percent on settlement. Forcing Collaborative attorneys to continue to represent their clients at trial could, in many instances, be a disservice to clients since some Collaborative lawyers are either not experienced in serious litigation or have simply lost the desire to be adversarial to the extent required to competently try a case. For some Collaborative lawyers the continued representation of a client would make no more sense than employing extremely adversarial trial lawyers to settle all client disputes through interest-based negotiation or telling a transactional lawyer, "You wrote the contract, so now you have to litigate the law suit."

parties and counsel of information relevant to the negotiation, and mandatory requirement that counsel withdraw in the event that the dispute does not settle.

If these requirements are not fully explained by counsel during the screening process, the clients will have a second opportunity to become informed when they read the contract they must sign before the Collaborative process commences. Collaborative Practice requires the use of a contract referred to as the Participation Agreement. Collaborative Practice groups throughout the United States and overseas have developed several versions of the Participation Agreement, but they are all basically similar in content.[41] These agreements plainly state the Collaborative Practice attorney will not continue to represent the client if the dispute goes to litigation.

The Collaborative process has been criticized for the possibility of leaving clients in a precarious position due to the withdrawal of their Collaborative counsel.[42] For example, the Colorado Opinion notes that, "Where the client is of relatively meager means, the lawyer's withdrawal may be materially adverse to the client. Under such circumstances, the lawyer's withdrawal may be unethical." As discussed elsewhere, careful screening by the Collaborative Lawyer to determine if the dispute is a candidate for the Collaborative process will reduce the likelihood of taking on the client's dispute and then failing to settle it.[43] Furthermore, if the client is of very modest means, it is

41. This document may be equated to the "instructions" or a "manual" describing the operation of the Collaborative process. One such Agreement may be viewed on the Texas Collaborative Law Council (TCLC) website at www.Collaborativelaw.us. Texas Collaborative Law Council, Inc., Participation Agreement 1 (revised 2007). Page one of TCLC's Agreement lists the "Essential Elements of the Collaborative Process." *Id.* at 1. This list includes, "Full and Complete Disclosure of Relevant Information." *Id.* The requirements for disclosure of relevant information are discussed in detail on page three of the Agreement. *Id.* at 3. Page two of the Agreement addresses "Understandings" which explains that Collaborative lawyers must withdraw if the dispute goes to litigation: A Lawyer and any lawyer associated in the practice of law with that Lawyer may not serve as a litigation lawyer in the Dispute or in any other adversarial proceedings among any of the Parties; and this prohibition may not under any circumstances be modified. *Id.* at 2–3. All other terms of this Agreement may be modified by written agreement signed by all Parties and Lawyers. *Id.* at *passim*. Page four reiterates "The Lawyers' representation of the Parties is limited to the Collaborative process. Once the process is terminated, the Lawyers cannot participate in any manner in an adversarial proceeding. . . ." *Id.* at 4.

42. Concern regarding the parties being able to obtain new representation is addressed in the TCLC Participation Agreement on page seven. Upon notice to all Lawyers of termination of the Collaborative process, the Parties will observe a thirty day waiting period, unless there is an emergency, before requesting any court hearing, to permit all Parties to engage other lawyers and make an orderly transition from the Collaborative process to litigation or any other adversarial proceeding.

43. The mandatory withdrawal provision places a greater burden on both Collaborative lawyers and clients to settle. When a Collaborative lawyer's case does not settle, and therefore new counsel must be hired, the situation is similar to that of a litigator who is prepared to try a case but the client decides to settle it. In both situations, the lawyer's involvement in the case ends. This potential situation has given

highly unlikely the client is in a position to finance litigation, whether or not the client attempted to resolve the dispute in the Collaborative process. Moreover, the Colorado Opinion fails to account for the potential economic benefit of starting collaboratively. The process requires voluntary disclosure of all information relevant to settling the dispute. This eliminates much of the cost that accompanies traditional discovery, a process that is often financially and emotionally costly.

B. *Withdrawal Due to Client Behavior*

The Kentucky Opinion notes "the lawyer is encouraged to withdraw from the Collaborative process if his or her client fails to comply with the provisions of the agreement by withholding or misrepresenting information or otherwise acting in bad faith." The Opinion then examines this question in light of Rule 1.16, which permits withdrawal if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent" or if "other good cause for withdrawal exists." The Kentucky Opinion concludes that if the client is in violation of one of the core provisions of the Collaborative agreement, "which both the lawyer and the client have signed," then the lawyer has the right to withdraw. The Committee agrees that under these circumstances withdrawal would be the correct action on the part of the lawyer. By withdrawing, the lawyer would prevent the client from committing a breach of contract and possibly fraud while seemingly being aided by the client's lawyer.[44]

The Kentucky Opinion also discusses the sudden withdrawal of a Collaborative Practice attorney without explanation, noting, "If the Collaborative Law agreement, signed by the parties and lawyers, requires full disclosure by all, the withdrawal without explanation may violate the spirit of the agreement, unless the agreement also makes clear that the withdrawal may be 'silent.'"[45] The Committee notes that silent withdrawal involves two responsibilities that must be recon-

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rise to the question, "Will the Collaborative lawyer attempt to force the client to settle to prevent losing the case?" That possibility exists just as there is the possibility that a litigation lawyer will encourage a client to try a case that could be settled on reasonable terms. However, in the Collaborative situation, the client has been involved in each step of the process, participated in all settlement discussions, actively gathered information, and as a result is better informed to make decisions regarding whether or not settlement is reasonable or affordable.

44. In regard to the Colorado Opinion's concern that "withdrawal would have a 'material adverse effect' on the client," withdrawal appears to be a two-edged sword. On the one hand, withdrawal has the potential to harm the client's interests; on the other hand, withdrawal to prevent a client from committing fraudulent acts, may prevent an adverse effect on the client's interests.

45. Ky. Bar Ass'n Ethics Op. KBA E-425, at 5. For a detailed analysis demonstrating that Collaborative Practice does not violate a supposed duty of zealous advocacy, see John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1331–38 (2003).

ciled. Collaborative Practice attorneys have a duty of full disclosure, but they also must not violate the duty of confidentiality. It is highly unlikely that a client who is acting in bad faith will give the Collaborative attorney permission to explain the reason for withdrawal. The very act of a silent withdrawal should signal the other Collaborative attorney that good cause exists. This situation is similar to withdrawal by litigation counsel when the motion for withdrawal states that the attorneys and clients have irreconcilable differences. No one asks what those differences might be. Moreover, in the Collaborative process the parties are not communicating only by letter, e-mail, fax, and telephone. They sit in face-to-face meetings directly discussing their dispute. If one party is not acting in good faith, the other participants may realize this much more readily than they would in a litigated dispute, and the withdrawal of the other lawyer may be less of a surprise.

C. *Withdrawal with the Court's Permission*

The Kentucky, Pennsylvania, and Minnesota Opinions address Rule 1.16(c), which protects the clients' interests by requiring lawyers to seek the courts' permission to withdraw if the lawyers are attorneys of record in a Collaborative case that does not settle. As noted above, the Participation Agreement generally provides protection for the Collaborative participants by allowing a thirty-day moratorium on court intervention unless an emergency exists. This waiting period is designed to give the parties sufficient opportunity to obtain litigation counsel.

VI. Zealous Representation and the Lawyer's Duty of Diligence

The Kentucky Opinion addresses the issue of whether a lawyer's participation in the Collaborative process may be inconsistent with the duty of zealous representation.[46] The current Kentucky Rules of Professional Conduct no longer impose a duty of zeal, but rather impose duties of competence and diligence. The Opinion notes that although many current rules focus on the litigation aspects of lawyering and even mention "zeal" in their comments, this does not mean that the rules must be read to preclude non-adversarial representation. The Opinion cites Rule 2.1 as describing the attorney as an advisor and states that a lawyer may refer not only to the law, but also to other considerations such as moral, economic, social and political factors that may be relevant to a client's situation.

The Kentucky Opinion goes on to cite a recent article on collaborative family law[47] that stresses that the Collaborative Practice attorney

46. Ky. Bar Ass'n Ethics Op. KBA E-425, at 4.

47. *Id.* at 5 (citing Sheila M. Gutterman, *Collaborative Family Law – Part II*, Colo. Law., Dec. 2001).

has the same ethical obligations to a client as any other lawyer to represent clients competently and diligently. Diligence includes consideration of a client's best interests, including (in a divorce case) the well-being of the children, family peace, and economic stability. If the Collaborative process is not in the client's best interests, the attorney is charged to advise the client to choose a different process tailored to his or her needs.[48]

In many states, the duty to represent a client with zeal has been modified as a result of changes in the ABA Model Rules. The 1969 ABA Code of Professional Responsibility called on lawyers to represent clients "zealously" within the bounds of law (DR 7-101(A)). The ABA Model Rules of Professional Conduct, adopted in 1983, depart from this approach and emphasize competent and diligent representation. The term "zeal" appears in the preamble, but only in reference to litigation.[49] Although some states still employ elements of the Code of Professional Responsibility, most states have adopted some version of the Model Rules.

VII. CONFIDENTIALITY OF INFORMATION AND THE DUTY OF DISCLOSURE

The North Carolina Opinion raises the issues of client confidentiality and voluntary disclosure with regard to providing information about topics such as the finances of divorcing parties or information about adultery. The Opinion notes that attorneys must take these factors into consideration when advising clients about whether to choose Collaborative Practice as a process, and then use professional judgment to analyze the risks and benefits for each individual client.[50] The Opinion goes on to state that a lawyer may represent a client in the collaborative process if it is in the best interest of the client, the client has an opportunity to make informed decisions about the representation, the disclosure requirements do not involve dishonesty or fraud, and all parties understand and agree to the specific disclosure requirements. The lawyer must examine the totality of the situation and advise the client of the benefits and risks of participation in the process, including the benefits and risks of making and receiving certain disclosures (or not receiving those disclosures).[51] The Committee notes that disclosure in the Collaborative process is limited to information that is relevant to settling a dispute.[52] If there is other information that a party does not want to share during the Collaborative

48. *Id.*

49. MODEL RULES OF PROF'L CONDUCT preamble cmt. 2 (2008) ("As advocate, a lawyer zealously asserts the client's position. . .").

50. N.C. State Bar Ass'n Formal Ethics Op. 1, at 3.

51. *Id.* at 4.

52. This limitation on discovery requests will often eliminate searching many boxes of documents that normally would be exchanged during the litigation process.

process, the person receiving the request may refuse to disclose the information, but he or she must be truthful as to the existence of the information. A refusal to disclose may result in the requesting party terminating the process or deciding to continue without the requested information.

The considerations described above are particularly important when lawyers are engaged in client intake. It is also worth noting that the contractual duty of disclosure created by the Participation Agreement typically turns on the question of what information is "pertinent" or "relevant" to the case, and the question of what is pertinent or relevant may vary from one jurisdiction to the next.

VIII. COMMUNICATIONS AND ADVERTISING

ABA Model Rule 7.1 mandates that lawyers not make false or misleading communications about themselves or the specific legal services they will provide. The Maryland,[53] North Carolina[54] and Kentucky[55] Opinions address various issues related to communications, advertising, and direct contact with prospective clients as applied to the Collaborative process. The ABA Opinion makes clear that providing limited scope representation carries with it duties related not only to diligence and competence, but also to communication.[56] A lawyer must communicate adequate information about the rules and terms governing the Collaborative process, including advantages, disadvantages, alternatives, and the requirement that the Collaborative Practice attorney must withdraw if settlement does not occur and litigation is filed.[57] This is important not only to obtain informed consent, but also to comport with Model Rule 7.1.

The North Carolina Opinion applies Rule 7.1 to written communications. The Opinion assesses the propriety of brochures that describe the Collaborative process and its differences from litigation and other methods of dispute resolution. The Opinion notes that it is appropriate to include the names of lawyers along with a description of their training and commitment to the process as long as brochures comply with the Rules of Professional Conduct, including the duty to be truthful and not misleading.[58]

The Kentucky Opinion defers to its Advertising Commission to evaluate whether specific content and methods of dissemination are

53. Md. State Bar Ass'n Ethics Op. 2004-23, at 1–3 (2004), *available at* http://www.abanet.org/dch/committee.cfm?com=DR035000 (follow "Maryland Ethics Opinion on Collaborative Law" hyperlink).

54. N.C. State Bar Ass'n Formal Ethics Op. 1, at 1–3.

55. Ky. Bar Ass'n Ethics Op. KBA E-425, at 8.

56. ABA Formal Op. 07-447, at 3.

57. *Id.*

58. N.C. State Bar Ass'n Formal Ethics Op. 1, at 2.

appropriate in communications with the public.[59] Similarly, the Maryland Opinion does not address advertising head-on, but recommends that attorneys review a corresponding ethics opinion and Maryland Rules 7.1 through 7.5 to ensure that their activities do not run afoul of these specific requirements.[60]

Because the rules regarding lawyer advertising differ substantially from one state to the next in the United States, lawyers are well advised to review the advertising rules in their jurisdictions. The ABA Model Rules cited here may differ significantly from those adopted by individual states. The ABA recently released a 118-page document outlining these differences.[61]

IX. COLLABORATIVE NON-PROFIT ORGANIZATIONS

The Kentucky Opinion discusses Rule 6.2 concerning membership in legal services organizations. It notes that lawyers are free to join law-related organizations that advance their professional development as long as activities do not violate the Rules of Professional Conduct.[62] This Opinion is consistent with ABA Model Rule 6.3, which permits lawyers to serve in public or charitable organizations such as Legal Aid and the Public Defender.[63]

The Maryland Opinion addresses the potential for formation of Collaborative dispute resolution non-profit organizations that also include mental health professionals and investment advisers. The Maryland ethics committee approves of non-profit organizations that include professionals other than lawyers where the purpose is to educate the public and promote the use of Collaborative Practice. However, the Opinion advises caution when it comes to the "marketing activities" of such organizations. The Maryland committee expresses concern about the potential to use this type of organizational structure purely as a means to feed one's own law practice. It also cautions about the potential to become a referral service, particularly if the organizational set-up does not fall within Maryland's safe harbor provisions that permit certain types of legal referral organizations so long

59. Ky. Bar Ass'n Ethics Op. KBA E-425, at 8.

60. Md. State Bar Ass'n Ethics Op. 2004-23, at 2.

61. See Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (Apr. 15, 2009), *available at* http://www.abanet.org/cpr/professionalism/state-advertising.pdf.

62. Ky. Bar Ass'n Ethics Op. KBA E-425, at 8 (noting that it is impossible to assess whether activities are permissible without knowing what the organization plans to do).

63. *Id.* In Section 8 of the draft Uniform Collaborative Law Act ("UCLA") (as of August 2008), drafted by a committee of the Uniform Law Commission, an exception to the "imputed disqualification" rule is created for non-profit organizations that provide Collaborative legal services for low-income people – in other words, under the UCLA, a lawyer in such an organization could represent an individual without disqualifying the entire organization from representing that individual if litigation was necessary. UNIF. COLLABORATIVE LAW ACT § 8 (Discussion Draft 2008).

as the fees charged by the organization are solely for membership and not based on the number of cases referred.[64]

The North Carolina Opinion states that it is possible for an attorney member of a Collaborative family law organization to send brochures and information about the Collaborative process to an unrepresented spouse, provided that the lawyer complies with the limitations on communications with unrepresented persons set forth in its Rule 4.3.[65] The communication is not considered a prohibited solicitation under Rule 7.3(a) if a lawyer will receive no financial benefit from the Collaborative Practice organization as a result of the other spouse's employment of another Collaborative family law organization lawyer.[66] However, the Opinion cautions that lawyers must not give advice to unrepresented spouses other than general descriptions of the process and advice to secure a lawyer. They may also provide a list of lawyers who ascribe to the process, but may not refer the spouse to a specific lawyer. Additionally, a lawyer may not give an unrepresented spouse specific advice about the risks or benefits as they apply to his or her situation.

X. CONCLUSION

The ethical Opinions issued to date arise from Collaborative Practice in the area of family law. Most of the ethical questions raised by Collaborative Practice are the same as those in the more traditional practice of family law and other areas of civil law practice.

The Collaborative process is expanding into other areas of law, and undoubtedly other ethical considerations will surface. The Committee believes that the analysis of the ethical opinions issued to date should provide a framework for ethical considerations that may arise in the future in various areas of law practice.

Although Collaborative Practice requires the application of the ethics rules to new circumstances and a new dynamic, applying the ethics rules consistently with their underlying principles has presented no insurmountable conflicts in Collaborative Practice.

In sum, the clear consensus of ethics opinions to date in the United States is that Collaborative Practice is consistent with the canons of

64. Md. State Bar Ass'n Ethics Op. 2004-23, at 1–3.

65. N.C. State Bar Ass'n Formal Ethics Op. 1, at 1. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2008) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.")

66. N.C. State Bar Ass'n Formal Ethics Op. 1, at 3.

ethics and offers clients and their attorneys an efficient, cost-effective, and for those who prefer it, a potentially more satisfying method for resolving disputes.

NOTES

LEGAL ETHICS AND COLLABORATIVE PRACTICE ETHICS

*Robert F. Cochran, Jr.**

I. INTRODUCTION

Collaborative Practice ("CP") is an important new process for the resolution of legal disputes. It emerged in the early 1990s as a response by legal, financial, and mental health professionals who had grave concerns about the impact of traditional divorce practice on the family. CP is still most frequently used in the family law area, but can be applied to any substantive area of law in which the parties want to reach a mutually beneficial settlement and avoid litigation. It has the potential to transform law practice at a time when law practice is in need of transformation.

In CP, the clients and their attorneys (and other professionals in the case, if any) contract to resolve the issues presented in a structured process without litigation. Both sets of clients and lawyers agree to:

- Negotiate a mutually acceptable settlement without having courts decide issues;
- Maintain open communication and information sharing; and
- Create shared solutions, acknowledging the highest priorities of all affected persons.

In addition, they agree that the lawyers (and other professionals, if any) will withdraw from the case if the matter proceeds to contested litigation.

Lawyers who engage in CP are governed by the legal professional rules in their state. However, CP differs greatly from traditional adversarial practice. It challenges lawyers and other professionals in ways not necessarily addressed by the ethics of their disciplines. Therefore, collaborative professionals have developed additional standards to provide guidance for their members.

This Article describes the legal and ethical standards under which professionals engage in CP in the United States. It considers the ethics of CP under the American Bar Association ("ABA") Model Rules of Professional Conduct[1] (the most common set of ethical rules governing the legal profession) and under the International Association of Collaborative Professionals' ("IACP") Ethical Standards for Collaborative Practitioners[2] (the most common set of ethical guidelines for collaborative professionals). Both sets of rules set standards for client autonomy, competence, diligence, confidentiality, candor, and loyalty.

Part II provides an introduction to CP. Part III evaluates CP in light of the ABA and IACP ethical standards. It provides guidance to CP lawyers as to how they might comply with both sets of guidelines. In addition, it considers other ABA Model Rules that might impact CP. This examination demonstrates that CP falls squarely within the ethical behavior parameters for lawyers.

II. AN INTRODUCTION TO COLLABORATIVE PRACTICE

CP arose as a response to several factors. In part, it was a response to the increasingly litigious and adversarial nature of legal cases in the early 1990s.[3] Litigation in general became more costly, complex, and

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* Louis D. Brandeis Professor of Law and Director of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics. This Article was supported by a grant from the International Academy of Collaborative Professionals. I would like to thank Nancy Cameron, Diane Diel, David Hoffman, Talia Katz, John Lande, and Pauline Tesler for their suggestions. I would also like to thank Jeff Hassler, Kelsey Stapler, and Jeff Wyss for their assistance in research.

1. *See generally* MODEL RULES OF PROF'L CONDUCT (2009).

2. *See generally* ETHICAL STANDARDS FOR COLLABORATIVE PRACTITIONERS (IACP 2008), *available at* http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf [hereinafter ES]. For additional information about IACP, see *infra* notes 37-40 and accompanying text.

3. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 52-53 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 316-17, 319-22 (1993); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 23-25, 48-49, 56-58 (1991); *see also* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 4 (2002) ("[C]omparative research has shown that the United States relies more than any other nation on lawyers, rights, and courts to address social issues.").

> In 1960 there was one lawyer for every 627 people in the United States. By 1995 the ratio had doubled to 1:307. Between 1960 and 1987, *expenditures* on lawyers in the United States grew *sixfold*, from $9 billion annually to $54 billion (in constant 1983 dollars), almost tripling the share of GNP consumed by legal services. . . . Medical malpractice suits, rare in 1960, reached 4.3 per 100 insured physicians in 1970 and 18.3 per 100 in 1986.

ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 36-37 (2001) (citations omitted). Former federal judge Marvin E. Frankel has said:

time-consuming, and court dockets became backed up. Mediation, which was initially a response to the adversarial nature of litigation became more adversarial.[4] A 1992 study, commissioned by the ABA, found that the reputation of the bar had plummeted to new depths.[5] The ABA President cast the problem in public relations terms: "[W]e should view [the study's] findings as a challenge for us to reach out to the public and increase the public's understanding about the role of lawyers and the wide range of valuable, but often overlooked public service activities we perform."[6] But the study suggested that the problem was not the public's lack of information about lawyers. Indeed, those who had the most contact with lawyers had the lowest opinion of lawyers and those who had learned what they knew about lawyers from watching televisions had the highest opinion of lawyers.[7]

The adversarial nature of litigation and other existing dispute resolution mechanisms was particularly troubling in family law, the area of CP's primary growth. There was a growing recognition that children are collateral damage in many divorces, especially high conflict divorces.[8] Family lawyers and parents[9] sought a better way to resolve disputes.

> The discovery process itself, with rules that frequently are (or are made to be) intricate and abstruse, becomes the occasion for expensive contests, producing libraries full of opinions. Where the object always is to beat every plowshare into a sword, the discovery procedure is employed variously as weaponry. A powerful litigant, in a complex case, may impose costly, even crushing, burdens by demands for files, pretrial testimony of witnesses, and other forms of discovery.

MARVIN E. FRANKEL, PARTISAN JUSTICE 17-18 (1980).

4. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3, 35-36 (1991).

5. *See* Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 60, 65.

6. *See* R. William Ide III, *What the ABA Plans to Do*, A.B.A. J., Sept. 1993, at 60, 65.

7. *Id.* at 61.

8. *See* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-38, 45-50 (1980); E. Mavis Hetherington et. al., Family Interaction and the Social, Emotional, and Cognitive Development of Children Following Divorce 6-7 (unpublished manuscript, on file with the Hofstra Law Review) (paper presented at the Symposium on The Family: Setting Priorities, May 1978); Doris S. Jacobson, *The Impact of Marital Separation/Divorce on Children: II. Interparent Hostility and Child Adjustment*, 2 J. DIVORCE 3, 17 (1978) (finding that interparent hostility after separation is destructive to children, and "the greater the amount of interparent hostility, the greater the maladjustment of the child"). "The luckier children watch helplessly from the sidelines as the legal process turns their parents into combatants; the truly unlucky are enlisted as warriors by one or both parents in custody battles against the other." Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 971 n.13 (1999).

> Despite a child's overriding need for conflict management, the prevalent adversarial model of courtroom confrontation rewards parental conflict. . . .
>
> . . . Precisely when children need parents to lessen the degree of hostility and behave

In addition, lawyers came to accept the notion of "unbundled" legal services—providing less than the full range of legal services in recognition that clients might not want or be able to afford all that a lawyer might do.[10] CP can be thought of as an example of unbundled services—the lawyer does not provide litigation services—though the primary justification for limiting the lawyers' services to the negotiation of the dispute is the positive effect that such a limitation can have on the negotiations.

Finally, CP can also be seen as another step in increased specialization within law practice. CP lawyers focus on negotiation of the dispute and leave litigation to other lawyers. Many CP lawyers are willing to represent non-CP clients in litigation, but CP opens up the possibility that a lawyer might only practice CP and develop a specialty in interest-based negotiation.

CP differs dramatically from traditional legal dispute resolution. It provides a structured process for the settlement of legal problems. American lawyers have historically fallen into two categories—litigators and transactional lawyers. CP addresses the cases traditionally handled through adversarial negotiation and litigation in a more transactional manner.

The CP provision requiring lawyers and other professionals to withdraw if the parties do not reach settlement is the most important

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> cooperatively, the specter of courtroom combat—and especially the conflict over the vague legal standard of the "best interests of the child"—encourages conflict. . . .
> . . . The adversarial process encourages parents to denigrate one another, rather than to cooperate on the essential task of post-divorce child rearing. . . . The custody dispute also drains resources from limited marital assets at a time when those assets could better be used to preserve the family's standard of living.

Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131, 145-47 (1993). One commentator has observed:

> The litigation itself is often demeaning, as litigants attempt to exaggerate each other's flaws and reopen old wounds in order to win points for themselves. Further, the process is disempowering as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcome for the child or the parents.

Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997) (footnote omitted).

9. Three-fourths of parents who adopt collaborative law ("CL") do so because of concern for their children. William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 378 (2004).

10. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 1-4 (2000). Clients who use "unbundled" legal services may want to save money or to be actively involved in handling their cases. *Id.* 3-4. They may merely want the lawyer to give them advice, research, drafting assistance, negotiation assistance, a review of legal papers, or a court appearance. *Id.* at 1.

element distinguishing CP from other lawyer representation and negotiation. It removes from lawyers the opportunity and temptation to pursue the means of dispute resolution known best by most lawyers, the one many have studied and honed their skills for throughout their professional life: the trial. Moreover, in the CP process, teams of professionals, including one or more mental health professionals and financial specialists, may join the lawyers and clients in seeking to resolve the dispute. All agree to work honestly and respectfully toward a negotiated settlement as their sole purpose.

It is helpful to contrast CP with traditional pre-litigation negotiation. Traditional legal representation generally yields a settlement,[11] but "it often involves contentious negotiations with litigation looming in the background."[12] The term "litigotiation" has been coined to denote negotiation in the shadow of litigation.[13] Cases usually settle through the process of offers and counter-offers, often combined with the escalation of time pressures as court dates approach. Added to the time pressure are escalating transaction costs and the fear that if the parties end up in court, a judge or jury will impose a "winner-take-all" solution. The danger in traditional negotiation is that much of the parties' and lawyers' effort goes into preparing for litigation, and negotiation is an afterthought. Pre-litigation posturing distorts the negotiation process. Escalating negotiation strategies may lead to increased conflict between the parties. Such representation can poison the relationships between the parties and is unlikely to generate the best

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11. The limited studies that have been done so far indicate that settlement rates for CP cases are about the same as those of other processes. A 2003 study of 367 collaborative lawyers found an overall settlement rate of 87.4%. Schwab, *supra* note 9, at 367, 375. Statistics assembled by IACP in a current study continue to show a settlement rate of 86%. IACP, PRACTICE SURVEY: ALL CASES 7 (2009), https://www.collaborativepractice.com/lib/Surveys/IACP_Ttl.pdf. These rates are similar to those found in studies of traditional negotiation and mediation. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) ("[T]here is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.") (citing Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983)); *see also* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 82 (2005) (reporting "an overall settlement rate of 87.4% with recent cases settling at a rate of 92.1%"). It appears therefore that whether through traditional adversary negotiation or CP, most cases settle without going to trial. The great strength of CP is not that it is more likely to generate settlement, but that it is likely to lead to settlement terms that best meet the goals of the parties.

12. Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 291 (2008).

13. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

settlement terms. As conflict increases, free sharing of information often decreases. People tend to share only information that they are required to share and to control the timing of sharing this information so as to maximize their negotiating benefit.

Under CP, lawyers and clients focus their energy on the likely outcome of the conflict—the settlement. CP's structure provides the vehicle for both lawyers and clients to focus on and identify the most mutually advantageous settlement of a case. Lawyers and clients work in a structured process to disclose information, identify goals and priorities, explore interests, expand settlement possibilities, and design settlement options that are in the best interests of all parties. The CP lawyer's primary job at all times is to insure that his or her client's interests, as defined and identified by the client, are protected. Practiced this way, CP generates satisfying and durable resolutions that benefit all clients.

In traditional forms of representation, the client gets the benefit of lawyer advocacy, but loses control of the process and the outcome. In litigation, the lawyers and judge control the process; the judge and/or jury control the outcome. In traditional legal negotiation, the client also loses control of most aspects of the case. Negotiations generally take place between the lawyers alone. In theory, the client sets the goal of the representation and must approve any settlement offers, but studies of negotiation practices suggest that in fact lawyers are in control all the way through.[14] In Austin Sarat and William Felstiner's studies of divorce lawyers' client interviews, they found that the common pattern was for lawyers to manipulate clients.[15] They manipulate clients toward settlement by exaggerating the risks of loss if a matter is litigated.[16] They maintain control of cases by portraying law as an "insiders'" game where they have the necessary connections with public authorities.[17] The lawyers portray simple concepts of law in complex, unclear terms that are beyond the understanding of the client.[18] When trying to persuade clients, "[t]hey construct meanings in the service of [their own] power."[19] In contrast, CP avoids the risk of lawyer manipulation since so

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14. *See* Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 797 (1998) (discussing studies indicating lawyer control).

15. AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 56-57 (1995).

16. *See id.* at 57.

17. *Id.* at 90-91.

18. *Id.* at 146.

19. *Id.* Pauline Tesler describes the real world of traditional settlement:

> [S]uddenly, clients and lawyers appear at the courthouse for settlement negotiations. Frequently, this event represents the first time that settlement has been discussed,

much of it takes place in four-way meetings. The two attorneys provide a check on each other. To the extent that there is an "insiders' game" in CP, the clients are on the inside. CP elevates clients to the position of co-participants in the negotiation and gives them the ability to control the outcome. CP clients are an active part of the resolution of their disputes. Whereas in traditional negotiation, clients, like traditional fathers at the birth of their children, sit in a waiting room—actually separate waiting rooms—while the lawyers work out some of the most important details of the clients' future lives; in CP the clients shape and take ownership of their futures.

CP tends to generate a different form of negotiation than traditional pre-litigation negotiation. In traditional negotiation, once offers are put forward, offers go back and forth in "a predetermined linear scale of compromise."[20] These offers and counter offers divide what is at stake, while ignoring or de-emphasizing each person's preferences and interests. Creativity decreases. The competitive nature of the traditional negotiation structure generates a "split the difference" approach. In traditional adversarial negotiation, even parties and lawyers who genuinely desire an out-of-court settlement cannot disregard the prospect of litigation. The prospect of litigation defines the framework for traditional negotiation and disclosure and shapes the bargaining strategies. Lawyers must engage in a precarious balancing act between litigation and negotiation.

> because it is often the first time that both lawyers have been fully prepared regarding all the issues of the case. The lawyers now suddenly shift gears, for settling the case inevitably involves persuading the client that his or her case may not be so strong after all and that compromise may be the wiser course. Clients often respond with confusion, fear, or anger. "Why," they ask, "did you spend all this time and money preparing for trial if our case is so weak? Why have you been telling me all these many months how strong our position is and that I should hold out for more, when now you are telling me I could lose?" Yet this is exactly how litigation-driven settlements work. Both sides prepare vigorously for trial and are ready for battle when the court-supervised settlement conference takes place. After months or even years of preparation, the client is pushed in the course of a morning or a day to make a deal quickly. Negotiations take place in private caucuses (lawyer-lawyer, lawyers-judge, lawyer-client) and the client—who often had expected that at last, the time may have come when he or she can finally tell the true story of the divorce—speaks only to the lawyer, not even to the spouse. Worse yet, the lawyer now sounds less like a champion and more like the voice of doom. Clients do often settle their cases under the intense pressure of the judicial settlement conference but often emerge baffled and angry.

Tesler, *supra* note 8, at 969 n.8.

20. This phrase was coined by Carrie Menkel-Meadow, in the article *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 829 (1984).

In contrast, CP encourages problem-solving[21] or interest-based negotiation. Interest-based negotiation became an important aspect of legal representation, beginning with the path-breaking book *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury.[22] First published in 1981, and now translated into twenty-five languages, *Getting to Yes* popularized the ideas of separating the people from the problem and focusing on the parties' underlying interests, rather than their positions, so that mutually advantageous exchanges can occur.[23] The sophistication that lawyers can bring to their professional work as negotiators is increased when that role does not need to be simultaneously balanced with the role of lawyer in an adversarial system. When clients enter into CP, they engage their lawyers as advisors and negotiators. This allows the lawyers to focus their professional skills on problem solving, improving communication, de-escalating conflict, and working steadily towards resolution of all issues. CP can assist in achieving the aspiration suggested by Paul Brest and Linda Krieger: "At their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering."[24]

The practical result of the disqualification agreement is that lawyers are freed from the strategic maneuvering-for-advantage associated with preparing a case for trial. This alteration of the lawyers' role, purpose, and focus allows them to harness the efforts of all participants from the start in an agreed, congruent set of steps aimed at a common goal. When coupled with direct, supported negotiations between the clients, rather than bargaining through their attorneys, the process encourages creativity that does not arise in conventional negotiation.

The most extensive qualitative study of CP to date found that it "reduces the posturing and gamesmanship of traditional lawyer-to-lawyer negotiation, including highly inflated and lowball opening proposals," "fosters a spirit of openness, cooperation and commitment to finding a solution that differs qualitatively from solutions achieved through conventional lawyer-to-lawyer negotiations," and produces

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21. "Creative Problem-Solving" was first coined as a descriptor for an experimental law school course in February 1962 at the University of Buffalo. Gordon A. MacLeod, *Creative Problem-Solving—for Lawyers?!*, 16 J. LEGAL EDUC. 198, 198 (1963).

22. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 10 (Bruce Patton ed., 1981).

23. *Id.* at 10-55.

24. Paul Brest & Linda Krieger, *On Teaching Professional Judgement*, 69 WASH. L. REV. 527, 529 (1994).

results "that are both fair within a legal standard and satisfactory to the parties."[25]

As noted previously, in many cases CP lawyers have joined with mental health and financial professionals to coordinate services that clients often need in family law matters. Of course, it is not new that clients retain these professionals at the same time that they retain lawyers. What is new in the CP model is that these professionals work as a team and coordinate their client services. The use of professionals other than lawyers in the CP model is marked by flexibility. In some cases, where there is limited conflict or limited resources, CP is conducted by the lawyers and clients alone. In other cases, each side will have its own financial advisor and mental health counselor/coach. In child custody cases, the parties will often hire a single neutral children's mental health expert to advise both parties. In cases involving financial issues, they may hire a single neutral financial counselor to advise both sides.[26] All professionals in the interdisciplinary model enter into the participation agreement with clients and agree that their involvement ends if the matter proceeds to court. All professionals work to develop processes within CP that support client communication and work to de-escalate conflict between clients.

An advantage of CP over litigation is that it protects the parties' privacy. One side effect of litigation is that many details about the litigants and their lives become a matter of public record via court documents and testimony. These details may involve sensitive personal or financial information that is embarrassing or otherwise harmful. CP avoids this pitfall by eschewing the formal court process and limiting disclosure of the parties' information to the clients, the lawyers, and the other professionals, all of whom are bound by a commitment to confidentiality.[27]

One of the most troubling aspects of the current state of family law litigation is that many children are exposed to ongoing conflict as their parents return to the adversarial system for post-judgment modification orders. The experience of trial courts running "problem solving" or

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25. JULIE MACFARLANE, DEP'T OF JUSTICE CAN., THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES, at ix, x, 77 (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf (presented to the Family, Children and Youth Section, Department of Justice Canada).

26. The IACP's Ethical Standards address the unique role played by neutral advisors and assign a high value to the continuation of neutrality beyond the granting of a divorce. *See* ES §§ 10-11 (IACP 2008). Thus, ES sections 10 and 11 provide that a practitioner who serves as a neutral must "adhere to that role" and "shall not" engage in any continuing client relationship that would compromise the practitioner's neutrality. *Id.*

27. See the discussion of confidentiality and CP, *infra* Part III.C.

"collaborative" courts suggests that CP will reduce the number of such cases.[28] CP's professionals and conflict-resolving resources are available to clients to work through any subsequent conflicts that may arise. Many CP practitioners discuss with their clients post-agreement dispute resolution processes that are designed to continue clients' commitment to consensual dispute resolution. Many agreements build in the use of divorce coaches and/or child specialists to help parents with post-agreement modifications to parenting plans. Agreements also build in a commitment to either mediation or CP for post-agreement disputes over spousal or child support. Many CP professionals hope that the process of CP will enable the parties to avoid post-agreement disputes. They seek to make CP a transformative process, not merely a dispute resolving process. They endeavor to assist clients in developing new communication patterns and models of negotiation with each other, with the aim of enabling them to work together, independent of professionals, in the future.

III. THE ABA AND IACP RULES GOVERNING COLLABORATIVE PRACTICE LAWYERS

This section considers the rules that govern most CP lawyers, both the ABA Model Rules of Professional Conduct ("MRs") that regulate most lawyers and the IACP Ethical Standards for Collaborative Practitioners ("ES") that are held up as aspirations for legal, financial, and mental health CP professionals. First, here is an introduction to both sets of rules.

Lawyers are subject to the lawyers' professional rules of the state in which they practice. Lawyers need to check the rules of their particular states,[29] but the vast majority of states pattern their rules after the MRs.[30]

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28. Mary Davidson, Circuit Court Judge, Hennepin County, Minnesota, asserted in her 2001 presentation to the Collaborative Family Law Council of Wisconsin that her collaborative problem-solving court virtually eliminated such problems. Mary Davidson, Circuit Court Judge, Hennepin County, Minn., Presentation to Collaborative Family Law Council of Wisconsin (2001).

29. Each state's ethics rules are set forth at Cornell Univerity Law School, Legal Information Institute: American Legal Ethics Library, http://www.law.cornell.edu/ethics/ (last visited May 25, 2010).

30. Fairman, *supra* note 11, at 116. *See generally* MODEL RULES OF PROF'L CONDUCT (2009). The rules in a handful of states are patterned after the earlier ABA Model Code of Responsibility. LINDA L. EDWARDS & J. STANLEY EDWARDS, INTRODUCTION TO PARALEGAL STUDIES AND THE LAW: A PRACTICAL APPROACH 38 (2002). California, as in so many respects, sets its own rules, not patterned after any of the other sets of rules. *Id.*

Violations of state professional rules can subject lawyers to various forms of discipline, including reprimands, suspension, and disbarment.[31]

The rules of the legal profession govern lawyers who engage in a wide variety of practice areas—prosecutors, criminal defense lawyers, civil litigators, family lawyers, corporate lawyers, tax lawyers, and government lawyers. Within a jurisdiction, all practice areas are governed by the same code of ethics, with occasional variations for particular types of lawyers.[32] In my view, CP operates well within the parameters created for the legal profession, and no new ethics rules are needed for CP.[33]

The rules govern lawyers in the variety of roles that lawyers play. As the Preamble to the MRs notes, lawyers perform a variety of functions:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.[34]

As we shall see, the CP lawyer serves in each of these roles in the CP process.

All of the rules of the legal profession and all of the professional duties that flow to clients from that work (competence, diligence,

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31. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SUR. AM. L. 45, 77 (2005).

32. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8; *id.* R. 1.11; *id.* R. 1.12 (setting limits on advocacy for prosecutors and special rules for government lawyers and judges switching to firms).

33. *Accord* John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 678-88 (2007). A few commentators have advocated new legal ethics rules to address CP. *See* Fairman, *supra* note 11, at 116-21; Zachery Z. Annable, Comment, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157, 168 (2005); Elizabeth K. Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 1001 (2006); *see also* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 156 (2004). In my view, the current rules requiring client informed consent to limited representation provide all of the protection that clients need regarding CP. The development of a Uniform Collaborative Statute creating a statutory privilege for CP and giving explicit protection to the confidentiality of information shared in CP, and adoption by states of such a statute will enhance the current confidentiality provisions relegated to the participation agreement.

34. MODEL RULES OF PROF'L CONDUCT pmbl. § 2.

communication, confidentiality, efficiency, loyalty, and advocacy) apply to lawyers in their CP work. This section examines the way those duties bear upon CP lawyers. At some points, CP lawyers need to be particularly diligent to take appropriate steps to comply with the rules. In some areas, we will see that CP may do a better job of meeting the underlying concerns of the Rules than traditional law practice.

As of 2008, the relevant legal professional authorities in several states had specifically approved of lawyers engaging in CP.[35] Only one, Colorado, had rendered an unfavorable opinion.[36] In August 2007, the ABA's Standing Committee on Ethics and Professional Responsibility issued a formal opinion approving the use of CP,[37] and addressing many of the concerns raised by the Colorado ethics opinion. ABA formal opinions do not have the force of law, but are influential in many jurisdictions.

IACP is a non-profit, international community of legal, mental health, and financial professionals working to transform the way in which conflict is resolved worldwide through CP.[38] It provides a central resource for CP education, networking, and standards of practice.[39] The IACP published its ES in 2005.[40] They were amended in January 2008.[41] IACP is not a disciplinary body, and thus, the ES are aspirational and not binding. They form a starting point for professionals from each CP discipline in understanding the ethics of CP, and are designed to provide a framework to assure best interdisciplinary practices. The goals of the ESs are to provide CP professionals with a common set of values and process understanding, to help guide collaborative practitioners in

35. Global Collaborative Law Council, Ethics Opinions on Collaborative Law, http://www.collaborativelaw.us/resources.html (last visited May. 25, 2010) (Minnesota (1997), North Carolina (2002), Pennsylvania (2004), Maryland (2004), Kentucky (2005), New Jersey (2005), Colorado (2007), Washington (2007), Missouri (2008)).

36. See opinions cited at PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 132-33 (2d ed. 2008) and Lande, *supra* note 33, at 682-88. Colorado found that for a lawyer to sign a four-way disqualification agreement created an improper responsibility to a third party which might materially limit the lawyer's advocacy for the client, but it stated that a two-way agreement to the same limitation, signed only by the clients, would not create such a problem. Colo. Bar Ass'n Ethics Comm., Formal Op. 115 (2007), http://www.cobar.org/index.cfm/ID/386/subID/10159/Ethics-Opinion-115:-Ethical-Considerations-in-the-Collaborative-and-Cooperative-Law-Contexts,-02/24//; *see also* Schneyer, *supra* note 12, at 311-15 (2008) (discussing in detail Colorado Ethics Opinion 115).

37. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) (discussing ethical considerations in CP).

38. IACP, About IACP, http://www.collaborativepractice.com/_t.asp?M=3&T=About (last visited May 25, 2010).

39. *Id.*

40. IACP, Standards, Ethics, and Principles, http://www.collaborativepractice.com/_t.asp?M=8&MS=5&T=Ethics (last visited May 25, 2010).

41. *Id.*

making decisions and conducting cases, and to identify the responsibilities of collaborative professionals to their clients, to other collaborative professionals in the process, and to the public.[42]

ES 1.1 states specifically that in the event of a conflict between the IACP standards and the ethical code pertinent to a professional, the individual professional's code must be followed.[43] The ES do not override but rather compliment the disciplinary ethics rules of the professionals engaged in CP. They create an overlay to the individual professional's code that ensures conscious adherence to both the professional ethical rules and the unique structure of the collaborative process. Both the MRs and the ES address the core lawyer values of client autonomy, lawyer competency, confidentiality, and loyalty.[44]

Each of the sets of rules is at times more specific than the other. Stated another way, at times the MRs set a general standard and the ES fill in the details, and at times the ES set a general standard and the MRs fill in the details. For example, as we shall see, MR 1.1 merely states that the lawyer must be "competent";[45] the provisions of ES 2 identify some of the requirements for CP competence.[46] ES 3.1 defers to the professional codes of the various CP professionals for a definition of conflicts of interest;[47] MR 1.7 defines the lawyer's conflicts of interest.[48]

Each of the sets of rules is at times more demanding than the other. At times the MRs are more demanding. For example, MR 1.7 prohibits lawyers from engaging in representation unless there is client consent and "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation";[49] ES 3.1 merely requires client consent to a conflict of interest.[50] On the other hand, at times the ES are more demanding. For example, ES 5.2 requires that the lawyer enable the client to "make an informed decision about choice of process."[51] MR 1.2 merely requires that the lawyer "consult" with the client about alternative means of pursuing his objectives and obtain "informed consent" to the lawyer's choice about limitations on "the

42. *See* ES pmbl. (IACP 2008).

43. *Id.* § 1.1 ("Any apparent or actual conflict between the Ethical Standards governing the practitioner's discipline and these Standards should be resolved by the practitioner consistent with the Ethical Standards governing the practitioner's profession.").

44. *See* MODEL RULES PROF'L CONDUCT R. 1.1-1.2; *id.* R. 1.4; *id.* R. 1.6-1.9 (2009); ES pmbl., §§ 2-5, 8.

45. MODEL RULES PROF'L CONDUCT R. 1.1.

46. *See* ES §§ 2.1-2.3.

47. *Id.* § 3.1.

48. MODEL RULES PROF'L CONDUCT R. 1.7.

49. *Id.*

50. ES § 3.1 cmt.

51. *Id.* § 5.2.

scope of the [legal] representation."[52] Of course, where one set of rules is more demanding than the other, the lawyer can comply with each set of rules by complying with the more strict rule.

A. Client Autonomy

Several portions of both the MRs and the ES promote one of the key objectives of modern American legal representation—client autonomy. The MRs' focus on client autonomy starts with MR 1.2(a), which requires a lawyer to "abide" by the client's decisions concerning the objectives of the representation.[53] MR 1.4(a)(2) requires lawyers to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[54] In addition, MR 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[55]

ES 5.2 requires lawyers to give clients "a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process."[56] ES 5.3 provides further:

> A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.[57]

Both sets of rules address the importance of informing clients about all of the available dispute resolution options. Comment 5 to MR 2.1 notes that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[58] ES 5.1 requires CP professionals to inform clients of "the full spectrum of process options available for resolving disputed legal issues in their case."[59]

It is important that CP lawyers inform clients of other dispute resolution processes, but it is also important that other lawyers inform clients of CP. Indeed, if client autonomy is one of the key objectives of

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52. MODEL RULES PROF'L CONDUCT R. 1.2.
53. *Id.* R. 1.2(a).
54. *Id.* R. 1.4(a)(2).
55. *Id.* R. 1.4(b).
56. ES § 5.2.
57. *Id.* § 5.3.
58. MODEL RULES PROF'L CONDUCT R. 2.1 cmt. 5.
59. *Id.*

legal representation, it makes sense for all lawyers to ensure that all clients are provided with information about *all* process options. When lawyers present all options to clients, client autonomy is expanded. Conversely, if lawyers do not present all options to clients, they limit client autonomy. For example, as the Kentucky CP ethics opinion states, if the client's objective is to "obtain a divorce in the most amicable way possible, then it is incumbent upon the lawyer to help the client find the means to accomplish that goal."[60]

As noted previously, the defining element of CP is the disqualification agreement—the lawyers and the parties agree that these lawyers will not represent these clients if the matter goes to litigation. MR 1.2(c) specifically allows the scope of the legal representation to be limited.[61] It provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[62] Note that this rule imposes two requirements for CP: 1) The client must give informed consent; and 2) CP must be reasonable under the circumstances.[63]

How does a client make an informed decision about CP? "Informed consent" is defined by MR 1.0(e) as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate

60. Ky. Bar Ass'n Ethics Comm., Formal Op. E-425, at 5 (2005).

61. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). Some commentators have argued that CP lawyers must find in MR 1.16(b) (listing situations in which a lawyer may withdraw from representation) a basis for withdrawing from representation when negotiation fails. *See* Fairman, *supra* note 11, at 91-92. *Cf.* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1345-46 (2003). However, the lawyer may not need a justification for withdrawing in these circumstances. *See* Pa. Bar Ass'n Comm. on Leg. Ethics and Prof'l Responsibility, Informal Op. 2004-24, at 14 (2004). The relationship ends under the terms of the disqualification agreement if settlement is not reached. *But see id.* at 14-16 (recommending that CL lawyers take a conservative approach and comply with Rule 1.16 when terminating representation if settlement is not reached). As is clear from the discussion in the text, MR 1.2(c) clearly contemplates that lawyers can represent clients for limited purposes. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). If so, the relationship must end if the lawyer has completed his or her limited responsibility. *See id.* R. 1.2(c), 1.3 cmt. 4.

62. MODEL RULES OF PROF'L CONDUCT R. 1.2(c). The Ethics 2000 Commission made a significant change to this provision. Before its amendment in 2002, the rule read: "A lawyer may limit the *objectives* of the representation if the client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2000) (emphasis added). The change of "objectives" to "scope" in the MRs clearly establishes that limited scope representation is acceptable. For a discussion on how to break down ethical and malpractice barriers to "unbundling" legal services, including how to limit the scope of representation, see MOSTEN, *supra* note 10, at ch. 6.

63. MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

> information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.[64]

The client must determine whether he prefers CP to its alternatives in light of the advantages and disadvantages of each.[65] The lawyer should discuss the facts that might cut in favor of and against the use of CP in the particular case. The great advantage to CP is that it is likely to yield a value-adding resolution of the dispute that addresses the interests of both parties. As noted in the previous section, CP also can give clients the advantages of lawyer advocacy, control of the process, privacy, and the coordinated use of mental health and financial professionals.

If CP successfully yields an agreement settling the differences between the parties, that process will likely save the parties a substantial amount of time, money, and emotional expense over what they would have paid if they had litigated.[66] In addition, because CP and the other alternative dispute resolution processes can yield a creative, value-adding settlement, they can provide great benefit to the client in the long run. The use of lawyers, mental health professionals, and financial experts in CP may yield the most beneficial and enduring resolution of the dispute.

However, like other means of alternative dispute resolution—including traditional negotiation—CP can add to the parties' expenses if it fails. If an alternative means of dispute resolution fails, the client must pay both for it and the expense of litigation. The costs of a failed collaborative attempt may be greater than a failed mediation or traditional negotiation attempt. If mediation or traditional negotiation fails, the lawyer may proceed to litigation, whereas if CP fails, the lawyer must withdraw and the client must obtain another attorney to handle the litigation. Obtaining new counsel will involve start-up costs, both financial and emotional.

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64. *Id.* R. 1.0. Comment 6 to MR 1.0 describes informed consent as follows:

> The lawyer must make reasonable efforts to ensure that the client . . . possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes . . . any explanation reasonably necessary to inform the client . . . of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's . . . options and alternatives.

Id. R. 1.0 cmt. 6.

65. For an example of full discussion of the advantages and disadvantages of CP, see David A. Hoffman et al., *Collaborative Family Law*, *in* MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL 4-i (2008).

66. In one survey, clients who participated in CP reported spending an average of 6.3 months and $8777 in attorneys' fees in the process. Schwab, *supra* note 9, at 376-77. Of course the time involved will vary substantially, depending on the nature of the issues and the cooperativeness of the parties. *See id.*

MR 2.1 provides that throughout the process of counseling clients about CP, lawyers must "exercise independent professional judgment and render candid advice."[67] "[L]awyer[s] may refer not only to law but [also] to . . . moral, economic, social and political factors, that may be relevant to the client's situation."[68] CP is designed to address the broad range of client needs and may involve counseling about any and all of these factors. In a divorce context, "moral, economic, [and] social" factors[69] are likely to be especially important. Moral concerns for the other members of the family are likely to be relevant and divorce is likely to have a greater impact on a client's financial future and social relations than any other event in his or her life.[70] These matters should be the subject of continuing discussions with the client, so that the lawyer's actions will reflect the wishes of the client.

The Comment to ES 5 specifically mentions MR 2.1:

> As the Comment to Rule 2.1 explains, the attorney's advice can properly include moral, ethical, and practical considerations, and may indicate that there is more involved in resolving a particular dispute or even the client's entire case than strictly legal considerations. In Collaborative practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s).[71]

As noted above, the lawyer may not engage in CP where CP is not a reasonable option.[72] The lawyer and client should weigh the possibility

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67. *Id.* R. 2.1. Some have suggested that the ideological commitment of some lawyers to CL clouds their objectivity when advising clients. *See* MACFARLANE, *supra* note 25, at 25-27. Obviously this is a risk, but compared to what? It could as well be said that the ideological commitment of some lawyers to courtroom advocacy clouds their objectivity. There is a risk that lawyers who prefer litigation will push their clients toward litigation. In fact, in the client solicitation cases, the U.S. Supreme Court concluded that lawyers' temptations to solicit and overcome client preferences in profit-generating cases is greater than in ideological-commitment cases. *Compare In re* Primus, 436 U.S. 412, 434, 436, 439 (1978) (prohibition on lawyer solicitation rejected in law change case), *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978) (prohibition on lawyer solicitation upheld in profit-generating personal injury case). All lawyers need to recognize that clients may have different preferences than they have and that clients should exercise informed control over the most important aspects of their cases.

68. MODEL RULES OF PROF'L CONDUCT R. 2.1.

69. *See id.*

70. See Pauline Tesler's description of the CP lawyer as "an engaged moral agent," in PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 160-61 (2001).

71. ES § 5 cmt. (IACP 2008).

72. John Lande and Forrest Mosten note that CP books have identified the following factors that lawyers should consider in determining the suitability of a case for CP: personal motivation, suitability of the parties, trustworthiness, domestic violence, mental illness, substance abuse,

of the success or failure of CP, in light of what the lawyer and client know about the dispute, the other party, and the other lawyer. CP requires willing lawyers and willing clients on both sides. CP would not be a reasonable option if it is clear that it would fail. But so long as there is a reasonable possibility that it would succeed, the lawyer should allow the client to determine whether it is worth the risk.

Cases involving domestic violence raise special considerations when assessing whether or not to pursue CP. The practitioner should frankly discuss the risks of CP with a client who has experienced physical or emotional violence. There is a danger that an abusing spouse will control the client during negotiations. Special care must be taken in such situations to assure that the client can be autonomous in decision making. In such a situation, the lawyer must have the ability to counsel the client about the special risks that the client confronts.[73]

B. Competence and Diligence

Under the ABA MRs, CP lawyers, like all lawyers, must be competent[74] and diligent.[75] The IACP ES require that a CP "shall practice within the scope of the Collaborative practitioner's training, competency, and professional mandate of practice."[76] In addition, the ES establish minimum training requirements for CP professionals.[77]

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suitability of the lawyers, fear or intimidation of parties, and risks of disqualification. *See* John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. DISP. RESOL. 347, 369 (2010).

73. *See* STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE & NEGLECT CASES R. 11 & cmt. (2006), *available at* http://www.abanet.org/child/legalrep-1.pdf; STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES R. A-1 (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf; ABA COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 134-35 (2007), *available at* http://www.abanet.org/domviol/docs/StandardsCommentary.pdf.

74. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009). The ES require adherence to the competence requirements of the individual's profession and further impose requirements of specialized education in CP and mediation. ES § 2.

75. MODEL RULES OF PROF'L CONDUCT R. 1.3.

76. ES § 2.3.

77. ES section 2.2 requires a twelve-hour course in CP before a professional begins practice. ES § 2.2. In addition, the IACP requires a thirty-hour course in mediation skills and another fifteen hours of course work in skills relied on in the practice of CP. MINIMUM STANDARDS FOR COLLABORATIVE PRACTITIONERS § 2 (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP_Practitioner_Standards.pdf. The IACP maintains aspirational standards for Trainers, Trainings, and Practitioners. *See id.*; MINIMUM STANDARDS FOR COLLABORATIVE BASIC TRAINING (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP_TrningStds_Adptd_407_13_Corctd.pdf; MINIMUM STANDARDS FOR

Competence initially requires that the lawyer effectively engage the client in a discussion about whether the dispute is one which is appropriate for CP. As discussed in the previous section, the competent lawyer will present CP as an option to the client if the client's circumstances suggest that CP might yield a successful result. The decision whether to pursue CP may turn on the facts of the case, as well as the characteristics of the other lawyer and client. If a settlement is unlikely to be negotiated, CP may be a waste of the client's time, money, and emotional energy.

CP lawyers must be competent in the law of the subject matter relevant to the case. They must advise the client of the likely result if the matter goes to court. As one of the clients in Macfarlane's study said, "I want my lawyer to give legal advice, [so that I] know my rights."[78] This is important both at the preliminary stage when the client is determining whether to pursue CL and at the final stage when the client is determining whether to settle. At the preliminary stage, such information will enable the client to determine whether pursuing CP would be advantageous. During the process of negotiation, such information will enable the client to determine whether various settlement options are to his advantage.

CP lawyers must also be competent advocates. This role is necessarily reframed from advocacy in more traditional representation. The CP lawyer is hired to pursue a process that differs from the positional bargaining that is most common under the adversarial system. To attain the highest level of skill in CP advocacy is often a difficult transition for lawyers. To engage effectively in CP advocacy, lawyers must develop their client interview skills, ask open-ended questions, and elicit information from clients that is more comprehensive than information about the legal issues alone. The CP lawyer may find herself spending much more time listening intently to clients than she did in her work as an advocate within the adversarial process. Discussing the law and giving legal advice in a manner that does not escalate conflict and that avoids the positional entrenchment that is common in adversarial advocacy is one of the new advocacy skills necessary for CP lawyers.[79]

Not only does CP's new advocacy require the lawyer to have different client-counseling skills, it also requires both collaborative lawyers to exercise different skills in their working relationship.

COLLABORATIVE TRAINERS (IACP 2004), *available at* https://www.collaborativepractice.com/lib/Ethics/IACP-TrnerStds-Adptd-40713-Corctd.pdf.

78. MACFARLANE, *supra* note 25, at 38.

79. For a discussion of advocacy within CP, see NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 121-44 (2004).

Competence for the collaborative lawyer requires the ability to facilitate negotiations with clients and lawyers in the room together, in a respectful and non-confrontational manner. For clients to be able to fully participate in the CP process, the lawyers need to be able to work together to provide an atmosphere conducive to client negotiation. The participation agreement begins to create the negotiating environment, both with the disqualification provision and with the contractual promise of confidentiality, but the lawyers also have an obligation to transform the contractual elements of the participation agreement into a safe, working, four-way environment for clients.

Another aspect of competence for the collaborative lawyer is the ability to engage in interest-based bargaining. In CP, parties commit themselves to interest-based bargaining, the form of bargaining that is likely to lead to the best settlement for all of the parties.[80] This skill is at the heart of the service that the lawyer gives to the client in CP.

In addition to acting competently, collaborative lawyers must "act with reasonable diligence and promptness in representing a client."[81] The competent CP lawyer will carefully manage client preparation so that negotiation sessions will bear the most fruit for the client and all involved. The CP process includes the creation of meeting agendas and work assignments for lawyers, clients and the other professionals engaged in the case. As noted previously, in many cases, CP resolves disputes faster than traditional processes.[82] Litigation delays may occur due to congested court schedules and negotiation is often based on the chance availability and interest of the lawyers and clients in settlement at the same time. This is not to say that the CP process always proceeds rapidly or more rapidly than other processes. In CP, much attention is given to the clients being ready both emotionally and with the necessary factual background before proceeding with the negotiation. CP's scheduled negotiations avoid the tendency in traditional representation for all negotiations to occur at the time of scheduled court hearings.

Some have suggested that CP is inconsistent with lawyer diligence, because under CP the client gives up the option of having the lawyer litigate the matter. But giving up this option is not unlike any other concession that a client makes during legal representation. Each side has laid down one possible weapon (his lawyer's participation in litigation), in exchange for the other party laying down his or her corresponding weapon. It is not unlike the parties agreeing to engage in binding

80. *See supra* notes 21-24 and accompanying text.
81. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2009). The lawyer must also act promptly. *Id.*
82. *See supra* note 66 and accompanying text.

arbitration or agreeing that neither will appeal the decision of a trial court—each party gives up a future procedural option in exchange for the other party doing the same. In fact, CP represents a more modest concession than agreeing to binding arbitration or agreeing not to appeal. In CP, the parties only give up the right to their current attorney, should the case proceed to the next level. Viewed simply as a result of linear bargaining, there is an equal concession on each side. The hope of each side, and the experience of many who have engaged in CP, is that the agreement to enter into it will be a win-win arrangement—that it will lead to agreements that are better suited to both of the parties than those they were likely to get through other dispute resolution processes. The agreement that CP counsel will not litigate is like any other bargaining concession—it is made by both parties in the hope that it will benefit them. It should be done if it appears that it will benefit the client and is an expression of the client's values.

Diligence on the part of a CP lawyer may be somewhat different than the aggressive representation practiced by some lawyers in traditional practice. Indeed, the IACP rules dictate that collaborative practitioners "shall encourage parents to remain mindful of the needs and best interests of their child(ren)"[83] and "avoid contributing to the conflict of the [parties]."[84] Consideration of the interests of all who might be affected by representation and avoiding conflict are important aspects of CP. Assuming that the client has been effectively informed of the nature of CP, these will be important aspects of diligence on the part of the lawyer. The competent CP lawyer will determine how high a priority the client places on preserving relationships with the opposing party and protecting third parties (such as the children of a marriage in the family dispute context). If the client places a high priority on these factors, they are the client's interests. These factors will guide the lawyer in client counseling and advocacy during the representation.

Both the MRs and the ES note that lawyers should recognize when a matter is beyond their expertise. Comment 4 to MR 2.1 notes:

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself

83. ES § 5.4 (IACP 2008).
84. *Id.* § 5.5.

> something a competent lawyer would recommend, the lawyer should make such a recommendation.[85]

As noted previously, collaborative lawyers have been among the leaders in recognizing the value to clients of expert advisors from fields other than law.[86] In many cases, CP draws together lawyer, mental health, child development, and financial advisor teams to counsel the clients. ES 2.3 provides that the lawyer should discuss with the client the possibility of engaging an interdisciplinary CP team in order to be sure the proper competencies are at the table in the collaborative process.[87]

C. Confidentiality and Candor

All of CP's primary professional disciplines (law, mental health, and finance) share a core value of confidentiality. One of the basic understandings a client has of such advisors is that they will not divulge confidential information. How does CP reconcile the basic value of confidentiality with CP's requirements of full disclosure and transparency?

MR 1.6(a) prohibits a lawyer from "reveal[ing] information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation."[88] MR 4.1 prohibits the lawyer from knowingly "mak[ing] a false statement of material fact or law to a third person," but does not impose on the lawyer an affirmative obligation to provide information to third parties.[89] CP participation agreements impose a greater duty to disclose than provided by these rules. Under CP participation agreements, the parties and lawyers pledge to be forthcoming to the opposing party and lawyer with financial and other relevant information.[90]

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85. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4.

86. *See supra* notes 25-26 and accompanying text.

87. ES § 2.3. The comment to ES section 2.3 states:

> [T]he Collaborative practitioner must be willing to turn to other professionals both within and outside of the Collaborative process, such as mental health professionals, medical professionals, financial professionals, vocational specialists and possibly rehabilitation counselors in the areas of physical disability, substance abuse, and domestic violence.

Id. § 2.3 cmt.

88. MODEL RULES OF PROF'L CONDUCT R. 1.6(a). In addition, Rule 1.6(b)(3) permits lawyers, in some circumstances, to disclose information to prevent other people from suffering substantial financial loss or personal injury. *Id.* R. 1.6(b)(3).

89. *Id.* R. 4.1.

90. *See, e.g.*, TESLER, *supra* note 70, at 149 (providing a sample participation agreement that includes the timely disclosure and discovery of relevant information).

As noted, under MR 1.6 the lawyer can disclose information if "the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation."[91] In order to meet the informed consent requirement of MR 1.6, the CP lawyer must inform the client of the type of information that they will be required to disclose to the opposing side.[92] If the agreement provides that the lawyer will withdraw if the client fails to provide full information, the lawyer must gain the client's informed consent to such a provision.[93] It is important that the attorney fully explain to the client that CP mandates voluntary disclosure of all relevant information. If the client has any reservations about this imperative, then CP is not the dispute resolution means for him.

The ES require that discrete steps be taken to assure the client's understanding of and informed consent to CP's limits on confidentiality. ES 4.1 directs the collaborative professional to "inform the client(s) about confidentiality requirements and practices" of the practitioner's profession, and ES 4.2 requires the professional to secure in the participation agreement the clear written consent of the client to the disclosure of information material to the process.[94] In addition, the ES require that if a client refuses to disclose pertinent information, the attorney and other professionals will withdraw from the process.[95] If

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91. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

92. *See* ES § 5.2.

93. *Id.* § 7.1(A)(2).

94. *Id.* § 4.1-4.2. In its entirety, ES section 4 (Confidentiality) provides:

> 4.1 A Collaborative practitioner shall fully inform the client(s) about confidentiality requirements and practices in the specific Collaborative process that will be offered to the clients.
>
> 4.2 A Collaborative practitioner may reveal privileged information only with permission of the client(s), according to guidelines set out clearly in the Collaborative practitioner's Participation Agreement(s) or as required by law.
>
> Comment
>
> The rules of confidentiality are among the most important core values of the legal and mental health professions. Those standards may be modified by the terms of the Collaborative practitioner's fee and/or participation agreement with the client(s), so long as the modifications are consistent with the ethical standards of the practitioner's discipline.

Id. § 4.

95. *Id.* §§ 7.1, 9.1-9.3. ES section 7.1(A)(1)-(2) provides:

> 7.1. A Collaborative Participation Agreement and/or Fee Agreement shall be in writing, signed by the parties and the Collaborative practitioners, and must include provisions containing the following elements:
>
> A. Pertaining to Full Disclosure of Information
>
> 1. No participant in a Collaborative case, whether a Collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the Collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process;

professionals on both sides adhere to these steps, the parties and professionals can be assured that the parties and lawyers will be engaged in the steps that ensure the open communication and candor that are so essential to the process.

Under the participation agreement's provision that the parties will be forthcoming in CP, the parties merely agree to what some rules of civil procedure require and to disclosure of what the parties could find through discovery anyway. Just as a lawyer has a duty to respond honestly to discovery requests under MR 3.4[96] and many civil procedure rules, the CP lawyer has a duty to disclose information agreed to in the participation agreement. To fail to do so, in violation of the client's commitment, may assist the client in committing fraud, in violation of MR 4.1.[97]

> 2. If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative Practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative Process.

Id. § 7.1(A)(1)-(2). ES section 9 (Withdrawal/Termination) provides:

> 9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:
>
> A. Such conduct is contrary to the principles of Collaborative Practice; and
>
> B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.
>
> 9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:
>
> A. Withdraw from the Collaborative case; and
>
> B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.
>
> 9.3 Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

Id. §§ 9.1-9.3. ES section 8.1 also requires the practitioner to secure the client's written consent to "share information as appropriate to the process with all other collaborative professionals in the case." *Id.* § 8.1.

96. MODEL RULES OF PROF'L CONDUCT R. 3.4.

97. MR 4.1 provides that the lawyer may not disclose information if "prohibited by Rule 1.6," but MR 1.6 itself provides that the lawyer can disclose information "to prevent the client from

What happens if a fully informed client in the midst of a collaborative process refuses to permit disclosure of material information? The ES provide that even when care is taken to secure informed consent, a lawyer should not disclose confidential information if the client revokes the general waiver and instructs the lawyer not to divulge information. In this circumstance, the duty of the lawyer is spelled out in ES 9.[98] A lawyer who learns that the client is withholding or misrepresenting material information is required to clearly counsel the client that such conduct is contrary to the principles of CP and the written participation agreement and that continuation of that conduct will mandate the withdrawal of the lawyer.[99] ES 9.2 provides that if the client continues in violation of the principles of disclosure and/or good faith, then the practitioner shall withdraw from the case.[100] Of course, withdrawal from the process is likely to be seen by the other side as an implied disclosure that the client is withholding material information.

CP raises two additional confidentiality issues: whether all of the lawyers, parties, and experts are required by law to keep information shared during the collaborative process confidential from outside sources and whether such information is protected from disclosure as an evidentiary matter. Collaborative participation agreements generally provide that all information shared during CP and documents prepared for the collaborative case will be kept in confidence by all lawyers, parties, and experts, and are inadmissible in court. It is likely that both courts and legislatures will protect the confidentiality of information shared in CP, just as they have done for information shared in mediation.[101] Some courts will issue a court order at the commencement of a collaborative case, mandating the confidentiality of information disclosed during the collaborative case.[102] In a few states, confidentiality

committing . . . a fraud that is reasonably certain to result in substantial injury to the financial interests . . . of another." *Id.* R. 4.1, 1.6(b)(2).

98. *See* ES § 9.

99. *Id.* § 9.1.

100. *Id.* § 9.2.

101. *See* sources cited in Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1419 n.1 (2006) (citing cases and statutes and arguing that "mediation communications should be privileged . . . and that confidentially is the key to ensuring that mediation programs are successful").

102. In some jurisdictions, the participation agreement is filed in court as a stipulation and includes confidentiality provisions. Wisconsin is one of these jurisdictions and its Stipulation and Order for CL contains the following language:

> Statements made by either party during any meeting shall be protected as if the statements were made in mediation, and no such communications shall be deemed a waiver of any privilege by any party. However, statements that indicate an intent or disposition to do any of the following actions are not privileged: to endanger the health or safety of the other party, or of the children of either party; to conceal or change the

of information disclosed during a collaborative case is mandated by statute.[103] Section 16 of the Uniform Collaborative Law Act ("UCLA"), enacted in 2009, provides that communications in CP are confidential if the parties so provide.[104]

A separate issue is whether information revealed during a collaborative case is admissible in a later court case. The duty of confidentiality is often confused with the attorney-client privilege. The duty of confidentiality is an ethical responsibility and, with some exceptions, prohibits disclosure of any information obtained during representation.[105] The attorney-client privilege is a rule of evidence that prohibits the lawyer from testifying to information conveyed in confidence by the client to the lawyer.[106] In general, the attorney-client privilege does not apply to communications that take place in the presence of other persons, such as communications during CP negotiation sessions.[107] Some states have passed collaborative statutes, which create a statutory privilege for information exchanged during the collaborative process.[108] Section 17 of the UCLA creates a statutory privilege for collaborative cases.[109]

D. Loyalty and Conflicts of Interest

MR 1.7(a) prohibits lawyers from representing a client if the representation "will be materially limited by the lawyer's responsibilities to" the lawyer or another person.[110] This conflict can be waived if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the client, and the client

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residence of any child; to commit irreparable economic damage to the property of either party; or to conceal income or assets.

State of Wisconsin, Circuit Court, Family Court Branch, Stipulation and Order for Collaborative Law, at 3 (2007), *available at* http://www.afccnet.org/pdfs/Innovations%20Pubs/INNOV%20FLP%20Chapter%202%20Appendix%20B.pdf.

103. For example, the North Carolina Collaborative statute provides: "All communications and work product of any attorney or third-party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties." N.C. GEN. STAT. ANN. § 50-77 (2008).

104. UNIF. COLLABORATIVE LAW ACT § 16 (2009), *in* 38 HOFSTRA L. REV. 421, 485 (2010) [hereinafter UCLA].

105. Robert H. Aronson et al., *Attorney-Client Confidentiality and the Assessment of Claimants Who Allege Posttraumatic Stress Disorder*, 76 WASH. L. REV. 313, 322-23 (2001).

106. *Id.*

107. The traditional rules preventing the admission of offers of settlement and documents made for purposes of settlement will presumably apply to CP. By definition, anything prepared for purposes of collaborative negotiations would have been prepared for purposes of settlement.

108. *See* TEX. FAM. CODE ANN. § 6.603(h) (Vernon 2006); UCLA § 16, at 485.

109. UCLA § 17, at 485-86.

110. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009).

consents.[111] The ES require the lawyer to obtain informed consent to a conflict of interest,[112] but do not have a separate requirement of reasonableness. Since the ES require professionals to comply with the provisions of their own professional rules, if there is a conflict of interest, CP lawyers must: (1) reasonably believe that they can provide competent and diligent representation; and (2) obtain informed consent. It has been alleged that CP creates a few types of conflicts of interest.

It might be argued that some lawyers' interest in pursuing CP conflict with the client's interest in pursuing another means of dispute resolution. A lawyer who develops expertise in CP and not in litigation might be tempted to steer a client toward CP and away from litigation. But this temptation is no different than the temptation that all lawyers face to steer clients toward their areas of expertise. In fact, there may be less temptation for lawyers to steer clients toward CP than litigation, because litigation is likely to generate more lawyer hours and income than CP. If anything, CP is *against* the lawyer's interest. As noted in the earlier section on client autonomy, at the beginning of the representation, all lawyers should present all of the reasonable alternatives and the advantages and disadvantages of each to clients.[113]

John Lande at one time argued that when the lawyer and client enter CP the disqualification agreement "creates incentives for lawyers to pressure their clients to settle inappropriately and leave clients without an effective advocate to promote their interests and protect them from settlement pressure."[114] But what is the source of the CP lawyer's alleged "incentive" to pressure parties into a settlement? It is not money. The CP lawyer gets no more money if a settlement is reached than if it is not. Unlike lawyers in traditional negotiation (who can represent the client if the matter goes to litigation) the CP lawyer will not be influenced by the incentive to obtain additional work from the client. The CP lawyer might have an incentive to generate a settlement in order to maintain a high settlement record or to maintain a reputation as a "team player" among CP professionals, but a lawyer who pressures clients would be likely to get a bad reputation from a dissatisfied client who feels that she was pushed into settlement.

Here again, the lawyers' pressures to settle a CP case are no different from the sorts of pressures that lawyers must resist all of the

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111. *Id.* R. 1.7(b).

112. *See* ES § 3.1 & cmt. (IACP 2008).

113. *See supra* Part III.A.

114. *See* Lande, *supra* note 61, at 1328-29; *see also* Gary M. Young, *Malpractice Risks of Collaborative Divorce*, WIS. LAW., May 2002, at 14, 16, 54-55 (discussing additional malpractice concerns of CL).

time. Lawyers who bill on an hourly basis are tempted to do extra work for a client; lawyers who handle a case on a flat fee or contingent fee basis are often tempted to pressure clients to settle. Some conflicts of interest are a way of life for lawyers and the conflicts that a CP lawyer might face to pressure clients toward settlement are much like those faced by lawyers all of the time.

The Colorado CP ethics opinion, written prior to the ABA opinion approving of CP and prior to the adoption by Colorado of the relevant ABA MR, found that the withdrawal agreement creates a conflict of interest.[115] It found that the CP lawyer's representation of the client is "materially limited" by the opposing party, because it allows the opposing party to prohibit the lawyer from going to court by refusing to settle.[116] This is pure formalism. It is certainly an odd thing to call a conflict of interest. The lawyer's refusal to go to court is better viewed as the lawyer complying with the client's instructions. One might as well say that a lawyer and client create a conflict of interest for the lawyer when they make an offer of settlement to the opposing party, because the opposing party can control the lawyer by accepting the settlement offer.

In fact, CP removes a significant conflict of interest that arises in traditional negotiation, where the lawyer often has a significant incentive *not* to settle a case. In traditional lawyer negotiation, the lawyer who fails to settle the case will generally litigate it and receive additional money. I do not mean to suggest that lawyers are unable to handle the conflict of interest that accompanies traditional negotiation. However, CP probably removes a greater conflict of interest from the lawyer than it allegedly creates.

The key to avoiding conflicts of interest problems in CP is the care taken in explaining CP to the client. A lawyer and a well-informed CP client will have the same interests. As the ABA opinion on CP notes:

> When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.[117]

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115. Colo. Bar Ass'n Ethics Comm., *supra* note 36.

116. *Id.*; *see* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 37, at 4 & n.14. *But see* THE IACP ETHICS TASK FORCE, THE ETHICS OF THE COLLABORATIVE PARTICIPATION AGREEMENT: A CRITIQUE OF COLORADO'S MAVERICK ETHICS OPINION, https://www.collaborativepractice.com/lib/Ethics/EthicsTFArticle ColoradoOpinion.pdf (refuting the Colorado Opinion's assertion that CL materially limits the lawyer's responsibility to the client).

117. ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 37, at 4.

In CP the lawyer's commitment is to the client. The lawyer's commitment to attempt a settlement and withdraw if one is not reached *flows from* his or her commitment to the client who has chosen CP because the client wants to pursue an amicable settlement.[118]

E. Other Ethics Rules and the CP Lawyer

In addition to the legal ethics rules discussed previously, there are several additional rules that might raise issues related to CP.

1. Fees

MR 1.5(a) prohibits the lawyer from charging an unreasonable fee.[119] Whereas MR 1.5(b) recommends that the fee agreement be in writing, ES 6.1 requires that CP professionals' fees be in writing.[120]

2. Partnerships With Other CP Professionals

In many collaborative cases, CP lawyers work with financial and mental health professionals, and some CP professionals might consider establishing more permanent business relationships with each other. The legal ethics rules provide significant restrictions on such relationships. Under the MRs, lawyers may not share legal fees with, form a partnership with, or submit to the direction of a non-lawyer,[121] including, in the CP context, one of the other specialists that may be involved in a case. To my knowledge and that of those in the leadership of the IACP, CP practitioners have not founded interdisciplinary firms.[122]

3. Other CP Professionals as the Lawyer's Employees

Though under the previously described MR, lawyers cannot work for non-lawyers, they can employ non-lawyers and offer non-legal services. MR 5.7(a)(2) provides that a lawyer is bound by the legal profession's rules when providing such services unless she takes reasonable measures to see that the client knows that these are not legal

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118. *See id.* at 2.

119. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

120. *Id.* R. 1.5(b); ES § 6.1(IACP 2008).

121. MODEL RULES OF PROF'L CONDUCT R. 5.4.

122. Some collaborative professionals have created "collaborative centers" in which one or more professionals purchase or lease a building or office space and other collaborative professionals become tenants in the space. This kind of arrangement, assuming all professionals adhere to the requirements of confidentiality and file security within the space, seems without question to be ethically appropriate.

In addition, many CP professionals have created CP professional groups. These are generally non-profit or educational organizations formed to advance CP and to ensure educational opportunities in CP. Those organizations have not been engaged in the practice of CP.

services and do not have the lawyer-client relationship protections.[123] I do not know of CP lawyers who have employed other CP professionals, but if they did so, it appears that the lawyer and the other professionals could represent the same client. However, it is clear under the ES that such a professional could not be shared by the parties as a neutral expert (as contrasted with a client representative) in a case. ES 10 emphasizes the importance of the neutrality of financial and psychological specialists who are engaged as neutrals (advise both parties) in the process.[124]

4. Out-of-State Practice

Under the MRs, a lawyer can engage in CP in a jurisdiction in which she is not admitted "if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[125] Given the increasing mobility of society, and the strong possibility that in the divorce setting one of the parties will have moved to another state, this feature may enable clients to have the CP lawyers of their choice, without unauthorized practice of law concerns in a foreign state.

5. Restrictions on Practice

Finally, CP lawyers should be aware that MR. 5.6(b), which precludes a lawyer from making "an agreement in which a restriction on the lawyer's right to practice is a part of the settlement of a client controversy,"[126] does not apply to a CP participation agreement. The CP participation agreement is not "the settlement of a client controversy."[127] The comment to MR 5.6 makes it clear that the rule is designed to prohibit "a lawyer from agreeing not to represent other persons."[128]

IV. CONCLUSION

CP not only falls squarely within the ethical boundaries of the legal profession, it also encourages lawyers to move beyond the simple prescriptions of the MRs; to think about transforming the quality of justice in a time when the public is demanding a more timely, personally

123. MODEL RULES OF PROF'L CONDUCT R. 5.7(a)(2).

124. *See* ES § 10 (discussing rules to ensure neutrality of the financial and psychological specialists).

125. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3).

126. *Id.* R. 5.6(b).

127. *Id.*

128. *Id.* R. 5.6 cmt. 2; *see also* Ky. Bar Ass'n Ethics Comm., *supra* note 60, at 7 (noting that the disqualification agreement "is not the kind of restrictive covenant contemplated by Rule 5.6").

responsive, system of justice. As Brest and Krieger have argued, "[a]t their best, lawyers serve as society's general problem solvers, skilled in avoiding as well as resolving disputes and in facilitating public and private ordering."[129] CP creates strong incentives for lawyers to fit this goal.

CP has grown steadily in the last two decades because those most affected by legal conflict (clients) and those most knowledgeable about legal conflict (lawyers)[130] want something different. Many lawyers have embraced it, despite the fact that it seems to be contrary to their financial interests. It may be that CP will influence the way that all law is practiced. It could shift the lawyer norm from thinking primarily about "winning" for a client at the expense of the other party, to thinking about reaching a settlement from which all can benefit. Such changes move in the direction sought by clients who complain that legal fees are too high and that lawyers create conflict.

As early as 1984, United States Supreme Court Chief Justice Warren Burger spoke of lawyers as healers of conflict:

> The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. . . . Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[131]

CP is moving the legal profession in that direction.

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129. Brest & Krieger, *supra* note 24, at 529.

130. Macfarlane found that many lawyer CP proponents "have a highly litigious past." MACFARLANE, *supra* note 25, at 6.

131. Warren E. Burger, *The State of Justice*, 70 A.B.A. J., May 1984, at 62, 66.

NOTES

COLLABORATIVE PRACTICE

International Academy of Collaborative Practitioners

Standards and Ethics

(as of February 2015)

Contents:

International Academy of Collaborative Professionals
Definition of Collaborative Practice

Collaborative Practice is a voluntary dispute resolution process in which parties settle without resort to litigation. In Collaborative Practice:

1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;

2. The parties voluntarily disclose all information which is relevant and material to the matter that must be decided;

3. The parties agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement;

4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;

5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and

6. The parties may jointly engage other experts as needed.

INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

IACP Ethical Standards for Collaborative Practitioners

Preamble Collaborative Practice differs greatly from adversarial dispute resolution practice. It challenges practitioners in ways not necessarily addressed by the ethics of individual disciplines. The standards that follow:

1) Provide a common set of values, principles, and standards to guide the Collaborative practitioner in his or her professional decisions and conduct,

2) Create a framework of basic tenets for ethical and professional conduct by the Collaborative practitioner, and

3) Identify responsibilities of Collaborative practitioners to their clients, to Collaborative colleagues, and to the public.

GENERAL STANDARDS

1. Resolution of Conflicts between ethical standards.

1.1 Any apparent or actual conflict between the Ethical Standards governing the practitioner's discipline and these Standards should be resolved by the practitioner consistent with the Ethical Standards governing the practitioner's profession.

2. Competence.

2.1 A Collaborative practitioner shall maintain the licensure or certification required by the practitioner's profession in good standing and shall adhere to the Ethical Standards governing the practitioner's discipline.

2.2 A Collaborative practitioner shall have completed a minimum of twelve hours of Collaborative Practice/ Collaborative Law training or Interdisciplinary Collaborative training consistent with IACP Minimum Standards for Collaborative practitioners, prior to commencing a Collaborative case or engaging in Interdisciplinary Collaborative Practice.

2.3 A Collaborative practitioner shall practice within the scope of the Collaborative practitioner's training, competency, and professional mandate of practice, as specified by the IACP Minimum Standards for Collaborative practitioners. The practitioner shall be mindful of the client's individual circumstances and the over-all circumstances of the case that may require the involvement of other professionals, both within and outside of the Collaborative process.

Comment

As Collaborative practitioners experience a greater diversity in their client population they become confronted by more complexity in physical, psychological and emotional factors affecting the client. It is important for the practitioner to be able to recognize these factors, as they will necessarily influence the Collaborative process and the client's decision making. It is even more important for the practitioner to recognize the limits of his or her ability to effectively deal with these factors and with the client's response to them. In fully addressing the client's needs, interests and goals, the Collaborative practitioner must be willing to turn to other professionals both within and outside of the Collaborative process, such as mental health professionals, medical professionals, financial professionals, vocational specialists and possibly rehabilitation counselors in the areas of physical disability, substance abuse, and domestic violence.

3. Conflicts of Interest.

3.1. A Collaborative practitioner shall disclose any conflicts of interest as defined by the practitioner's respective professional guidelines and Ethical Standards.

Comment

Upon full disclosure of a conflict of interest, the client(s) affected may waive the conflict in writing consistent with the practitioner's professional guidelines.

4. Confidentiality.

4.1 A Collaborative practitioner shall fully inform the client(s) about confidentiality requirements and practices in the specific Collaborative process that will be offered to the clients.

4.2 A Collaborative practitioner may reveal privileged information only with permission of the client(s), according to guidelines set out clearly in the Collaborative practitioner's Participation Agreement(s) or as required by law.

Comment

The rules of confidentiality are among the most important core values of the legal and mental health professions. Those standards may be modified by the terms of the Collaborative practitioner's fee and/or Participation Agreement with the client(s), so long as the modifications are consistent with the ethical standards of the practitioner's discipline. A competent Collaborative practitioner will be knowledgeable regarding the requirements of his/her professional standards pertaining to the necessity of obtaining a client's informed consent, and shall provide sufficient information to enable the client to give informed consent.

5. Scope of Advocacy.

5.1 A Collaborative lawyer shall inform the client(s) of the full spectrum of process options available for resolving disputed legal issues in their case.

5.2 A Collaborative practitioner shall provide a clear explanation of the Collaborative process, which includes the obligations of the practitioner and of the client(s) in the process, so that the client(s) may make an informed decision about choice of process.

5.3 A Collaborative practitioner shall assist the client(s) in establishing realistic expectations in the Collaborative process and shall respect the clients' self determination; understanding that ultimately the client(s) is/are responsible for making the decisions that resolve their issues.

5.4 A Collaborative practitioner shall encourage parents to remain mindful of the needs and best interests of their child(ren).

5.5 A Collaborative practitioner shall avoid contributing to the conflict of the client(s).

Comment

This section highlights the special obligations undertaken by the Collaborative practitioner that specifically result from the unique nature of Collaborative Practice. Psychologists and social workers are free to recommend outcomes to their client(s) believed to be in the client(s') (or the clients' family's) best interest, provided that they take care to do no harm. The traditional model of lawyering includes advocacy by the lawyer for the client's position so long as that position is legally supportable. Thus, this section has particular impact for lawyers because it reflects the considerations underlying law society and bar association rules in a number of jurisdictions. For example, Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct recognizes that the role of the attorney encompasses more than providing purely technical legal advice. As the Comment to Rule 2.1 explains, the attorney's advice can properly include moral, ethical, and practical considerations, and may indicate that there is more involved in resolving a particular dispute or even the client's entire case than strictly legal considerations. In Collaborative Practice, the practitioner specifically contracts with the client(s) to provide advice that recognizes a full range of options for dispute resolution and takes into consideration relationship and family structures when looking at the possible outcomes for the client(s).

6. Disclosure of Business Practices.

6.1. A Collaborative practitioner shall fully disclose to the client(s) in writing his/her respective fee structure, related costs, and billing practices involved in the case.

6.2 A Collaborative practitioner shall be truthful in advertising his/her Collaborative Practice and in the solicitation of Collaborative clients.

7. Minimum Elements of a Collaborative Participation and/or Fee Agreement.

7.1. A Collaborative Participation Agreement and/or Fee Agreement shall be in writing, signed by the parties and the Collaborative practitioners, and must include provisions containing the following elements:

A. Pertaining to Full Disclosure of Information

1. No participant in a Collaborative case, whether a Collaborative practitioner or a client, may knowingly withhold or misrepresent information material to the Collaborative process or otherwise act or fail to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process;

2. If a client knowingly withholds or misrepresents information material to the Collaborative process, or otherwise acts or fails to act in a way that undermines or takes unfair advantage

of the Collaborative process, and the client continues in such conduct after being duly advised of his or her obligations in the Collaborative process, such continuing conduct will mandate withdrawal of the Collaborative practitioner and if such result was clearly stated in the Participation and/or Fee Agreement, the conduct shall result in termination of the Collaborative process.

3. In the event of a withdrawal from or termination of the Collaborative process, the Collaborative practitioner shall notify the other professionals in the case.

B. Prohibiting Contested Court Procedures

1. Undertaking any contested court procedure automatically terminates the Collaborative process;

2. A Collaborative practitioner shall not threaten to undertake any contested court procedure related to the Collaborative case nor shall a Collaborative practitioner continue to represent a client who makes such a threat in a manner that undermines the Collaborative process.

3. Upon termination of the Collaborative process, the representing Collaborative practitioners and all other professionals working within the Collaborative process are prohibited from participating in any aspect of the contested proceedings between the parties.

PRACTICE PROTOCOLS

8. Consent.

8.1 Each Collaborative practitioner shall obtain written permission from his/her client(s) to share information as appropriate to the process with all other Collaborative professionals working on the case.

9. Withdrawal/Termination.

9.1 If a Collaborative practitioner learns that his or her client is withholding or misrepresenting information material to the Collaborative process, or is otherwise acting or failing to act in a way that knowingly undermines or takes unfair advantage of the Collaborative process, the Collaborative practitioner shall advise and counsel the client that:

A. Such conduct is contrary to the principles of Collaborative Practice; and

B. The client's continuing violation of such principles will mandate the withdrawal of the Collaborative practitioner from the Collaborative process, and, where permitted by the terms of the Collaborative practitioner's contract with the client, the termination of the Collaborative case.

9.2 If, after the advice and counsel described in Section 9.1, above, the client continues in the violation of the Collaborative Practice principles of disclosure and/or good faith, then the Collaborative practitioner shall:

A. Withdraw from the Collaborative case; and

B. Where permitted by the terms of the Collaborative practitioner's contract with the client, give notice to the other participants in the matter that the client has terminated the Collaborative process.

9.3 Nothing in these ethical standards shall be deemed to require a Collaborative practitioner to disclose the underlying reasons for either the professional's withdrawal or the termination of the Collaborative process.

9.4 A Collaborative practitioner must suspend or withdraw from the Collaborative process if the practitioner believes that a Collaborative client is unable to effectively participate in the process.

9.5 Upon termination of the Collaborative process, a Collaborative practitioner shall offer to provide his/her client(s) with a list of professional resources from the Collaborative practitioner's respective discipline from whom the client(s) may choose to receive professional advice or representation unless a client advises that he or she does not want or need such information.

ETHICAL STANDARDS SPECIFIC TO PARTICULAR COLLABORATIVE ROLES

10. Neutral Roles.

10.1 A Collaborative practitioner who serves on a Collaborative case in a neutral role shall adhere to that role, and shall not engage in any continuing client relationship that would compromise the Collaborative practitioner's neutrality. Working with either or both client(s) or with their child(ren) outside of the Collaborative process is inconsistent with that neutral role.

A. A Collaborative practitioner serving as a neutral financial specialist in a Collaborative case shall not have an ongoing business relationship with a Collaborative client during or after the completion of the Collaborative case, but may assist the clients in completing the tasks specifically assigned to them by the clients' written, final agreement. Such assistance may not include the sale of financial products or other services.

B. A Collaborative practitioner serving as a child specialist may assist the family in divorce related matters for the child(ren). Such assistance may not include becoming the child(ren)'s therapist.

C. A Collaborative practitioner serving as a neutral coach may assist the family in divorce related matters. Such assistance may not include acting as a therapist for one or both parties.

11. Coaches/Child Specialists.

11.1 A Collaborative practitioner who serves in the role of coach on a Collaborative case shall not function as a therapist to the Collaborative practitioner's client after the case has ended. Coaches should remain available to continue to help the clients/family address specific divorce issues after the divorce is final. A therapist for a client shall not serve in the role of coach or child specialist on a Collaborative case involving a client with whom the therapist has acted in a therapeutic role.

11.2 A Collaborative practitioner serving as a child specialist shall inform the child about the child specialist's role and the limits of confidentiality as appropriate, taking into account the child's age and level of maturity.

INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

IACP Minimum Standards for Collaborative Practitioners (Adopted July 13, 2004; Revised October 22, 2014)

The IACP Standards for Trainers, Trainings, and Practitioners are drafted with an awareness of the aggregate nature of learning. Knowledge comes from the interface between education and practical experience. Skill is acquired from the successive application of education to experience. With those principles in mind, these Standards should be understood as a point of departure in a continuing journey of education and practice for Collaborative practitioners and trainers.

The IACP sets the following basic requirements for a professional to hold herself/himself out as a practitioner who satisfies IACP Standards for Collaborative Practice in family related disputes.

1. General Requirements:

1.1 The Collaborative practitioner is a member in good standing of:
IACP; and
A local Collaborative Practice group.

1.2 The Collaborative practitioner accepts the IACP Mission Statement.

1.3 The Collaborative practitioner diligently strives to practice in a manner consistent with the:
IACP Principles of Collaborative Practice; and
IACP Ethical Standards for Collaborative practitioners.

1.4 The trainings referred to in 2.2, 3.3 and 4.3 must be trainings that meet the IACP Minimum Standards for trainings delivered by trainers who meet the IACP Minimum Standards for Collaborative Trainers.

2. IACP Minimum Standards for Collaborative Lawyer Practitioners:

2.1 Membership in good standing in the administrative body regulating and governing lawyers in the lawyer's own jurisdiction.

2.2 Completion of an Introductory Collaborative Practice Training or an Introductory Interdisciplinary Collaborative Practice Training that meets the requirements of IACP Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings. For practitioners who commenced Collaborative Practice prior to January 1, 2015, completion of training that met the requirements of the IACP Minimum Standards for a Collaborative Basic Training then in effect.

2.3 At least one thirty hour training in client centered, facilitative conflict resolution, of the kind typically taught in mediation training (interest-based, narrative or transformative mediation programs).

2.4 In addition to the above, an accumulation or aggregate of fifteen further hours of training in any of the following areas:
Interest-based negotiation training
Communication skills training
Collaborative training beyond minimum twelve hours of Initial Collaborative training
Advanced mediation training
Basic professional coach training

3. IACP Minimum Standards for Collaborative Mental Health Practitioners:

3.1 Mental Health professional license in good standing in
one of the following:
PhD - Doctor of Philosophy
Psy D - Doctorate of Psychology
LCSW - Licensed Clinical Social Worker
RSW - Registered Social Worker
MFT - Marriage and Family Therapist
RCC - Registered Clinical Counsellor
CCC - Canadian Clinical Counsellor
R Psych - Registered Psychologist
C Psych - Chartered Psychologist
Psychiatrist
LEP - Licensed Educational Psychologist

LPC - Licensed Professional Counsellor

or equivalent in state, province or country.

3.2 Background, education and experience in:

Family systems theory
Individual and family life cycle and development Assessment of individual and family strengths Assessment and challenges of family dynamics in separation and divorce
Challenges of restructuring families after separation

For child specialists: expertise in child development, clinical experience with a specialty focus on children and an in-depth understanding of children's unique issues in divorce

3.3 Completion of an Introductory Collaborative Practice Training or an Introductory Interdisciplinary Collaborative Practice Training that meets the requirements of IACP Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings. For practitioners who commenced Collaborative Practice prior to January 1, 2015, completion of training that met the requirements of the IACP Minimum Standards for a Collaborative Basic Training then in effect.

3.4 At least one thirty hour training in client centered, facilitative conflict resolution, of the kind typically taught in mediation training (interest-based, narrative or transformative mediation programs).

3.5 In addition to the above, an accumulation or aggregate of fifteen hours of training in any or all of the following areas:

Basic professional coach training
Communication skills training
Collaborative training beyond minimum twelve
hours of initial Collaborative training
Advanced mediation training

3.6 A minimum of three hours aimed at giving the mental health professional a basic understanding of family law in his/her own jurisdiction.

4. IACP Minimum Standards for Collaborative Financial Practitioners:

4.1 Professional license or designation in good standing in one of the following:

CFP – Certified Financial Planner
CPA – Certified Public Accountant
CA – Chartered Accountant
CMA – Certified Management Accountant
CGA – Certified General Accountant
ChFC – Chartered Financial Consultant

or such other equivalent license or designation in a state, province or country that requires a broad-based financial background and continuing education, and that is regulated by a governing body under a code of ethics.*

4.2 Background, education and experience in:

Financial aspects of divorce
Cash management and spending plans
Retirement and pension plans
Income tax
Investments
Real estate
Insurance
Property division
Individual and family financial planning concepts

4.3 Completion of an Introductory Collaborative Practice Training or an Introductory Interdisciplinary Collaborative Practice Training that meets the requirements of IACP Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings. For practitioners who commenced Collaborative Practice prior to January 1, 2015, completion of training that met the requirements of the IACP Minimum Standards for a Collaborative Basic Training then in effect.

*Revised June 2012

4.4 In addition to the above, an accumulation or aggregate of twenty hours of education in the financial fundamentals of divorce giving the financial professional a basic understanding of family law in his/her own jurisdiction, including:

- Divorce procedures
- Property - valuation and division
- Pensions and retirement plans
- Budgeting - income and expenses
- Child and spousal support
- Future income projections
- Financial implications of different scenarios for settlement

4.5 At least one thirty hour training in client centered, facilitative conflict resolution, of the kind typically taught in mediation training (interest-based, narrative or transformative mediation programs).

4.6 In addition to the above, an accumulation or aggregate of fifteen hours of training in any or all of the following areas:

- Communication skills training
- Collaborative training beyond minimum twelve hours of initial Collaborative training
- Advanced mediation training
- Basic professional coach training

INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

Interim Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings

Adopted by the Board of Directors on October 22, 2014

1. Introduction. These standards are established with an awareness of the aggregate nature of learning. Skill is acquired from actual application of education to experience over time and continuing education to enhance skill.

A trainer must be familiar with the following definitions, principles and standards adopted by the International Academy of Collaborative Professionals (IACP):

Definition of Collaborative Practice
Ethical Standards for Collaborative Practitioners
Minimum Standards for Collaborative Practitioners
Minimum Standards for an Introductory Collaborative Practice Training
Minimum Standards for Collaborative Practice Trainers

A training in the Collaborative Practice process satisfies the Minimum Standards for an Introductory Collaborative Practice Training or an Introductory Interdisciplinary Collaborative Practice Training when it complies with the requirements prescribed herein. This training will introduce the Collaborative Practice process while recognizing that proficiency or skill cannot be attained from this training alone.

Trainers will familiarize participants with the theories, practices and skills so participants can begin to develop the self-awareness and understand the core requirements for effective Collaborative Practice.

2. Core Curriculum. Trainers will provide instruction to the participants on the following subjects:

(a) Process. The training will include the following subjects concerning process:

(1) The Collaborative Practice process as a structure to create working relationships to reach agreements and resolve disputes;

(2) The range of process options and Collaborative Practice professional team configurations available to clients given their situation;

(3) Organizational considerations in managing a Collaborative Practice matter, including—

(i) providing a structure, options, and protocols for the process;
(ii) managing the case within the structure established by the professionals;
(iii) setting expectations for clients and professionals;

(iv) defining issues and determining tasks; and
(v) planning, conferring and coordinating among professionals including pre-meeting and post-meeting briefings with the professionals and clients.

(4) Considerations when working as a team, including as an interdisciplinary team, and the contribution and role of each professional;

(5) Recognition of the emotional, financial, and legal elements of the clients' conflict in all cases and how each element might impact the process; and

(6) The applicability of local law to the process.

(b) Skills Required for the Collaborative Practice Professional. The training will include the following subjects concerning skills:

(1) The professional's responsibility to maintain a safe and productive environment for all;

(2) The professional's responsibility to educate clients how to engage in productive behavior;

(3) The impact of professional language and modeling behavior to improve the clients' ability to effectively participate in the Collaborative Practice process;

(4) The professional's duty to assist the client in developing effective communication skills to enhance the prospects for reaching agreements during the Collaborative Practice process and in the future;

(5) The professional's ability to effectively assess the capacity of the client for effective participation in the Collaborative Practice process;

(6) The professional's awareness of power dynamics and imbalances that may exist in the Collaborative Practice process, the impact on the process, and how the professionals can address such issues; and

(7) The professional's awareness of the need for assessment of coercive and violent relationships.

(c) Theory and Ethics. The training will include the following subjects concerning theory and ethics:

(1) Dynamics of interpersonal conflict. For trainings focused on domestic relations matters, divorce as a life transition and the dynamics of divorce, and for other family matters the impact of transitions on interpersonal dynamics and relationships;

(2) The future-focused decision-making orientation of Collaborative Practice. For trainings focused on domestic relations matters, concepts related to restructuring families;

(3) The difference between facilitative negotiation, including interest-based theory and methods as contrasted with positional negotiation, including rights-based theory and methods;

(4) Ethical considerations including the need to discuss carefully the available process options with the client, informed consent, integrity, professionalism, diligence, competence, advocacy, and confidentiality;

(5) Recognition that each professional has different ethical considerations;

(6) The role of the law as one of multiple reference points for decision-making. Other reference points include the interests and needs of each client, each client's sense of fairness, practical and economic realities, prior agreements, the goals of the clients, and cultural, emotional, and other factors; and

(7) IACP standards that are applicable to practitioners, including Minimum Standards for Collaborative Practitioners and Ethical Standards for Collaborative Practitioners.

(d) Process Value and Costs. The training will include the following subjects concerning process value and costs:

(1) Understanding the broader interests which can be addressed in Collaborative Practice, including the long-term benefits of client self- determination, reaching a durable agreement, preserving relationships, and the comparative economic and relational consequences of process choices;

(2) Conveying to clients the value of Collaborative Practice including, where applicable, the value of an interdisciplinary professional team, as distinct from and together with consideration of professional fees and financial cost variables of process choices;

(3) Making realistic statements to clients about financial realities of dispute resolution processes, and the clients' contributions to cost containment throughout the process; and

(4) Awareness that individual professional choices and behavior can have a significant impact on the efficiency, value, and cost of the process.

(e) Professional Teamwork. As used herein, a "team" can be any configuration of professionals, whether lawyers-only or interdisciplinary. The training will include the following subjects concerning professional teamwork:

(1) Professional team development, formation, configuration, and dynamics and the responsibility of each professional to establish and maintain a collaborative environment;

(2) The professional and interpersonal differences between working as an independent professional and working as part of a Collaborative Practice team, including a team with members from different disciplines;

(3) The nature of the roles and work performed by each professional discipline in an interdisciplinary Collaborative Practice matter, and how to maximize the knowledge and skills of each team member, both individually and together, in order to effectively work on a matter; and

(4) For professional team members from different disciplines, the specific boundaries and ethics common to each profession, and the unique considerations these pose when working together as a team.

(f) Practice Development and Practice Groups. The training will include the following subjects concerning practice development and practice groups:

(1) Initiation of Collaborative Practice matters in the professional's unique communities, and the responsibility for each professional to develop his/her own practice;

(2) The benefits, structure and role of practice groups, and the individual responsibility for involvement in practice group activities;

(3) The importance of developing and expanding Collaborative Practice skills through additional trainings, experience, and interactions with experienced practitioners, and how an Introductory Collaborative Practice Training serves solely as a foundation; and

(4) The role of IACP as the international organization that promulgates standards and advances Collaborative Practice, and the resources IACP makes available to support practitioners.

3. Introductory Interdisciplinary Collaborative Practice Training.

(a) An Introductory Interdisciplinary Collaborative Practice Training shall meet all requirements of an Introductory Collaborative Practice Training plus the requirements of this Section 3. The core curriculum for an Introductory Interdisciplinary Collaborative Practice Training is the same as the core curriculum for an Introductory Collaborative Practice Training.

(b) In an Introductory Interdisciplinary Collaborative Practice Training in the area of domestic relations, the faculty will be composed of a minimum of 1 professional from each of the legal, mental health, and financial disciplines. Otherwise, the faculty will be composed of those interdisciplinary professionals appropriate to the subject matter.

(c) An Introductory Interdisciplinary Collaborative Practice Training should include instruction of participants from each discipline by members of each of the other disciplines.

4. Training Organization and Procedures

(a) Duration. An Introductory Collaborative Practice Training will be a minimum of 14 hours of classroom time (excluding break times) completed over no more than 90 days, and preferably over 2 or 3 consecutive days. Participants will attend in person.

(b) Methods. An Introductory Collaborative Practice Training should include multiple learning modalities – interactive, experiential, and lecture elements. Examples include demonstrations, role plays, small group exercises, interactive dialogues, fish bowls, and educational games.

(c) Materials. An Introductory Collaborative Practice Training should include written materials that are useful for reference and practice by the Collaborative Practice practitioner after the training and will include the IACP Minimum Standards for Collaborative Practitioners and IACP Ethical Standards for Collaborative Practitioners.

(d) Evaluations. An Introductory Collaborative Practice Training should include evaluations of the training and trainer(s) by the participants.

INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS

Interim Minimum Standards for Collaborative Practice Trainers

Adopted by the Board of Directors on October 22, 2014

These standards are established with an awareness of the aggregate nature of learning. Skill is acquired from the successive application of education to experience over time and continuing education to enhance skill. The IACP sets the following minimum standards for trainers after January 1, 2015, to conduct a training that meets IACP Minimum Standards for an Introductory Training:

1. Minimum Experience for Trainers:

1.1 A trainer will have completed at least 10 different Collaborative Practice matters of which at least 6 will have been in the interdisciplinary model, accumulating at least 50 hours of practice in Collaborative Practice. For trainings that are focused solely on practice areas other than domestic relations, trainers will have completed at least 8 different Collaborative Practice matters, accumulating at least 50 hours of practice in the Collaborative Practice.

1.2 During the 5 years prior to first conducting trainings, a trainer will have taken primary responsibility for preparing and making educational presentations that total at least 15 hours in presentation time, with 1 presentation lasting no less than 3 hours and each other presentation lasting no less than 45 minutes.

1.3 Prior to conducting trainings, a trainer will have attended a minimum of two Introductory Collaborative Practice trainings. At least one such training will be introductory training in the interdisciplinary model to provide the trainer the experience of observing the principles, methodology and practice of teaching.

2. Minimum Training for Trainers:

2.1 A trainer will have satisfied all training requirements set forth in the Minimum Standards for Collaborative Practitioners.

2.2 A trainer will have completed at least 10 hours of client-centered facilitative conflict resolution training beyond those set forth in the Minimum Standards for Collaborative Practitioners. If a trainer is conducting trainings in the domestic relations area, such training completed will include a substantial amount pertinent to domestic relations dispute resolution.

2.3 A trainer will have a minimum of 9 additional hours of relevant education on advanced Collaborative Practice topics.

3. Licensing/Certification: A trainer will be licensed or certified for his/her field of practice, and be in good standing and not restricted in practice or subject to any conditions or monitoring of his or her conduct by the licensing board governing the trainer's field of practice. A trainer will have no public record of discipline of any nature within the last 5 years.

4. IACP Training Standards: A trainer will be familiar with the Minimum Standards for an Introductory Training and have the skills to conduct that training.

5. Skills Training: A trainer shall be qualified by education, training, and experience to inform and educate about skills relative to communication, problem-solving, facilitative dispute resolution, mediation, interpersonal relationships, conflict management and resolution, interest-based negotiation, teamwork, and process.

A trainer should attend educational courses or workshops that emphasize adult learning principles. A trainer should be able to teach adults through meaningful dialogue and didactic presentations, set up demonstrations, structure role plays, and employ other experiential learning models.

6. Knowledge about Area of Dispute: A trainer will have an appropriate understanding of the general area to which the dispute relates, including, a recognition that financial decisions may have far-reaching and long-term financial and tax implications and, when training in the domestic relations area, knowledge of the grief process, child development, and the dynamics of the divorcing/restructuring family.

7. Particular Professions: In addition to the above, those offering training in particular disciplines as part of the Collaborative Practice process will satisfy the following:

7.1 Attorney:

- A minimum of 5 years in active practice, including 5 years of experience in the particular discipline which is the subject of the training (e.g., 5 years of domestic relations experience for Collaborative Practice trainings dealing with divorce and separation).

7.2 Child Specialist:

- A minimum of 5 years clinical experience with specialty focus on children.
- In-depth understanding of children's unique issues in domestic relations.

7.3 Financial:

- A minimum of 5 years in financial consulting with significant experience in the financial and tax aspects of the general area to which the dispute relates.

7.4 Divorce Coach:

- A minimum of 5 years of clinical experience focusing on couples and families, and in-depth knowledge of: 1) short-term therapy and coaching models, 2) divorce and the psychosocial impact of divorce on families, and 3) basic elements and guidelines for creating parenting plans.
- In depth knowledge of family dynamics and systems theory and child development.

7.5 Other Professionals:

- A minimum of 5 years experience in their field.

8. Trainers in the Interdisciplinary Model of Collaborative Practice: The interdisciplinary model of Collaborative Practice for domestic relations matters includes the mental health, financial, and legal disciplines as part of the Collaborative team. In addition to the requirements above, each trainer in the interdisciplinary team model will have knowledge of team interactions and specific issues unique to the interdisciplinary model.

9. Checklist. To assist potential trainers in assessing whether they meet the requirements, the following checklist is provided as a convenience:

Summary of IACP Trainer Requirements

- ☐ 50 hours of Collaborative Practice work.
- ☐ 10 completed Collaborative matters, 6 of which are interdisciplinary. For trainings focused solely on non-domestic relations areas, 8 completed Collaborative matters.
- ☐ 15 hours of educational presentations in last 5 years of which one is at least 3 hours in duration, and the remainder at least 45 minutes each.
- ☐ Attend at least 2 Introductory trainings, at least one of which is an Interdisciplinary Introductory Collaborative Practice training.
- ☐ 10 additional hours of facilitative dispute resolution training in addition to the 30 hours required for all Collaborative Practice professionals.
- ☐ 9 hours additional education on relevant advanced Collaborative Practice topics.
- ☐ A trainer should attend educational courses or workshops that emphasize adult learning principles.

NOTES

Table of Contents

Model Collaborative Participation Agreement
(For use under the Uniform Collaborative Law Act)

The undersigned parties, _____ and _____, hereby agree that it is their
NAME OF PARTY NAME OF PARTY

intention to resolve through a collaborative law process under the Uniform Collaborative Law Act the following collaborative matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]
[Add additional provisions not inconsistent with the Uniform Collaborative Law Act that the parties agree to include.]

In the collaborative law process hereunder _____ will be represented by
NAME OF PARTY

_____ , and _____ will be represented by _____.
NAME OF LAWYER NAME OF PARTY NAME OF LAWYER

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the
NAME OF LAWYER NAME OF PARTY

Collaborative law process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative
NAME OF LAWYER NAME OF PARTY

name of lawyer name of party law process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

Guide to the Collaborative Participation Agreement
(For use under the Uniform Collaborative Law Act)

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement. The section references are to the Uniform Collaborative Law Act (Act) approved by the Uniform Law Commission.

LAWYER'S OBLIGATIONS PRIOR TO PROSPECTIVE PARTY'S SIGNING AGREEMENT

Before a prospective party to a collaborative law participation agreement signs the agreement, the Act requires the lawyer to:

(1) assess with the prospective party whether a collaborative law process is appropriate for attempting to resolve the matter(s) at issue [Section 14(1)and(2)];

(2) advise the prospective party that participation in a collaborative law process is voluntary and that any party has the right unilaterally to terminate the process with or without cause [Section 14(3)(B)];

(3) advise the prospective party that the collaborative law process will terminate if after signing an agreement a party initiates a proceeding in a court or other tribunal [Section 14(3)(A)];

(4) advise the prospective party that except in limited circumstances the lawyer will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the agreement [Section 14(3)(C)]. The Act also requires that the lawyer make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes that to be the case, the lawyer may not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes the safety of the party can be protected during the process [Section 15].

REQUIRED PROVISIONS OF THE AGREEMENT

The Act lists in Section 4 the minimum requirements for a collaborative law participation agreement to be valid. Section 4(a)(1) and (2) require the agreement to be in a signed "record" (which is defined in Section 2(12) and which will customarily be a writing). Section 4 also lists several required provisions of the agreement. It is critical that these required provisions be included in the agreement. An agreement that fails to meet the requirements of Section 4 is not a valid collaborative law participation agreement under the Act, creating the risk that important substantive provisions of the Act will be held inapplicable if they come into issue in later proceedings (e.g., the disqualification rules of Section 9 and the privilege rules of Section 17).

The agreement must "state the parties' intention to resolve a collaborative matter through a collaborative process under this [act]" [Section 4(a)(3)]. Individual enacting states would substitute the appropriate statutory sections of that state for the bracketed word "act". The purpose of this requirement of the collaborative law participation agreement is to insure that the parties are making a deliberate

decision to opt into a collaborative law process under the Act, and to differentiate a collaborative law process under the Act from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

The agreement must describe the nature and scope of the collaborative matter. [Section 4(a)(4)] It is important that this description be specific since it circumscribes the lawyer disqualification provision of Section 9, which applies to proceedings "related to the collaborative matter." The description of the "matter" is also central to the privilege provisions of Section 17, which apply to collaborative law communications. A "collaborative law communication" is defined in Section 2(1) as a statement made for purposes of conducting a "collaborative law process", which is defined in Section 2(3) as a procedure intended to resolve a "matter" without intervention by a tribunal.

Also important to the lawyer disqualification provision of Section 9 is the identification of the collaborative lawyer who represents each party, which is a required provision under Section 4(a)(5). Each collaborative lawyer must sign a statement confirming the lawyer representation of a party in the collaborative law process. [Section 4(a)(6)]

ADDITIONAL PROVISIONS OF THE AGREEMENT

Section 4(b) of the Act provides that the parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act. Thus collaborative lawyers may continue to include any provisions that they have customarily used in their participation agreements, so long as they are not inconsistent with the Act.

The Act explicitly refers to a number of additional provisions that the parties may wish (but are not required) to include in their collaborative law participation agreement. The following sections of the Act include such references.

(1) Section 16 provides that communications made in the collaborative law process are confidential to the extent agreed by the parties. The Act (in Section 17) creates evidentiary privilege for collaborative law communications but leaves it to the parties to reach by agreement any broader confidentiality limits they wish to establish. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies (not by the Act).

(2) Section 19(f) provides that the privileges under Section 17 do not apply if the parties have agreed in advance in a signed record (usually a writing) that all or part of a collaborative law process is not privileged. Such an opt out agreement of the parties will not apply to collaborative law communications made by nonparty participants (e.g., experts) unless they received actual notice of the agreement before the communications were made.

(3) Section 12 provides that during the collaborative law process, on request of another party, a party shall make disclosure of information related to the collaborative matter. However, the section permits the parties to define the scope of disclosure, which could be done by an additional agreement in the collaborative law participation agreement.

(4) Section 5(i) provides that a collaborative law participation agreement may provide methods of concluding a collaborative law process additional to those methods specified in Section 5(c) (resolution of all or part of the collaborative law matter; termination).

(5) Sections 10(b)(2) and 11(b)(1) contemplate that a collaborative law participation agreement may provide that, in the case of a low income party or a government entity party, after a collaborative law

process concludes, another lawyer in a law firm with which a collaborative lawyer is associated may continue to represent the party in a matter related to the collaborative matter. Such an agreement, among other requirements, is necessary in order that the exceptions to the disqualification of lawyers in an associated firm which are provided in Sections 10(b) and 11(b), shall apply.

As noted above, the Uniform Collaborative Law Act requires only a limited number of provisions to be included in the collaborative law participation agreement. Important consequences of entering into the agreement are provided by substantive law provisions of the Act. A prime example is Section 9, which provides the disqualification requirement for collaborative lawyers, which is a fundamental defining characteristic of collaborative law. A substantive law provision of the Act (e.g., lawyer disqualification) may, if the parties wish, also be included as a provision of the collaborative law participation agreement so long as it is not inconsistent with the substantive law provision.

The parties are also free to supplement the required provisions under the Act with any additional provisions that meet their particular needs and circumstances, so long as they are not inconsistent with the Act. [Section 4(b)] Collaborative parties and their lawyers today cover a wide range of topics in their participation agreements. Discussed below are a sampling of some of the subjects that are often addressed by provisions in participation agreements.

Goals

Many participation agreements identify goals of the collaborative process, such as avoiding litigation and the likely negative economic, social and emotional consequences therefrom. Collaborative parties sometimes identify values they intend to employ in pursuing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The Act requires the parties to state in the collaborative law participation agreement their intention to resolve the matters at issue through a collaborative process. The parties' commitment is often elaborated near the end of participation agreements by a statement to the effect that the parties understand the terms of the agreement and commit themselves to using the process to resolve their differences fairly and equitably.

Collaborative Process

It is common practice for participation agreements to describe the structure of meetings that will be utilized in the collaborative process. Joint face-to-face meetings are commonly provided for, but participation agreements sometimes include alternative venues, such as conference calls or video conferencing, in appropriate circumstances. The participation agreement might describe the interest-based negotiation process by which goals and issues are identified, facts are gathered, options are developed and analyzed, and agreements are negotiated. Also included might be negotiation principles, such as agreements to negotiate in good faith, to take reasonable positions, to be willing to compromise, to refrain from using threats of litigation, and the like.

Communications

To promote effective communications, the participation agreement might state that communications should be respectful and constructive. To promote resolution of the issues acceptable to both parties, the agreement might state that each party is encouraged to speak freely and to express his or

her needs and desires. Participation agreements sometimes include "ground rules" that apply to discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Children

When children are involved, participation agreements often include agreements by the parties to attempt to reach amicable solutions that promote the children's best interests and to refrain from inappropriately discussing legal issues in the presence of or with their children.

Lawyers' Role and Fees

To clarify the role of lawyers, participation agreements sometimes state that the respective lawyers are employed by and represent only the party who retained them. The agreement may also describe the basic functions of lawyers in the collaborative process, such as advising and assisting client in gathering and understanding relevant documents, informing client of the applicable law, assisting client in preparing for collaborative meetings, facilitating interest-based negotiations. While each party will have a separate contract with his or her lawyer regarding fees, sometimes the participation agreement contains an agreement by the parties to make funds available to pay both lawyers.

Role of Professionals

Participation agreements sometimes include a statement of the role of professionals who may be called on to assist in the collaborative process. These might include financial professionals, coaches, mental health professionals, child specialists, mediators or experts in other fields. In such cases the participation agreement may reference separate agreements or other arrangements made by the parties for the services of such professionals.

Under the Act a professional who assists in the collaborative law process is called a "nonparty participant." The Act does not require nonparty participants to confirm their participation by a signed statement in the collaborative law participation agreement. If the parties and their lawyers think it desirable, professionals could confirm their participation by a signed statement, in much the same manner as the lawyers are required by the Act to confirm their representation of the parties.

Neutral Experts

Frequently the parties and their lawyers prefer that experts participating in the collaborative process be jointly hired and neutral. The participation agreement may specify that experts are to be jointly retained unless otherwise agreed by the parties. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all the parties and their lawyers. The participation agreement might also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties.

Preservation of Status Quo

Participation agreements often include a commitment that neither party will unilaterally make significant changes regarding finances, insurance or children. Examples of such agreements are provisions that neither party will unilaterally dispose of property, change beneficiaries on a life insurance policy, alter other insurance provisions, move the children or incur additional debts for which the other party may be responsible.

Withdrawal by Collaborative Lawyer for Abuse of Process

Participation agreements sometimes provide that a lawyer may withdraw if his or her client withholds relevant information, misrepresents important facts, or otherwise acts in a way that could result in an abuse of the collaborative process. Such a provision does not obviate applicable ethics standards, such as rules that require confidential lawyer-client communications to be protected and withdrawal of representation to be done in such a way as to avoid prejudicing a client's interests.

Discharge or Withdrawal of Collaborative Lawyer / Moratorium on Conclusion of Collaborative Process

The Act provides that the collaborative process is not terminated upon a lawyer's discharge or withdrawal if, within 30 days, a successor collaborative lawyer is retained and the collaborative law participation agreement is amended accordingly.[Section 5(g)] Parties may wish to provide in the participation agreement what may and may not be done during the 30 day period. For example, the parties might agree to maintain the status quo, to refrain from commencing any court action (other than in emergency circumstances), or to maintain the agreements already reached unless explicitly rejected by a party.

Cautions

Participation agreements commonly include cautionary statements to try to insure that the parties understand the collaborative process. Cautions might include statements that there are no guaranteed results from the collaborative process; that each party is expected to participate actively in the process by asserting his or her interests and considering the interests of the other party; and that while the process is designed to assist in communication and in reaching an amicable settlement, it will not necessarily eliminate the underlying issues between the parties.

Model Collaborative Participation Agreement
(For use in jurisdictions that have not adopted the Act)

Commitment
The undersigned parties, _____ and _____, hereby agree that it is their
NAME OF PARTY NAME OF PARTY

intention to resolve through a collaborative process, without the intervention of a court or other tribunal,

the following matter(s):

[List the nature and scope of each matter that the parties will attempt to resolve.]

Beginning and Concluding the Collaborative Process

The parties agree that the collaborative process under this collaborative participation agreement begins when the parties sign this agreement and that it concludes (1) upon resolution of the collaborative matter(s) as evidenced by a signed writing, or (2) upon termination of the collaborative process.

The parties agree that a party may request a court or other tribunal to approve a resolution of all or part the collaborative matters, as evidenced by a signed writing. It is agreed that such a request, if made with the consent of the parties, does not conclude the collaborative process.

Termination of Collaborative Process

The parties agree that participation in the collaborative process is voluntary and that any party has the unilateral right to terminate the process, with or without cause, at any time. Termination of the collaborative process occurs (1) when a party gives written notice to other parties that the process is ended, or (2) when a party begins a judicial or other adjudicative proceeding related to a collaborative matter without the agreement of all parties, or (3) when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

Notwithstanding the previous provision, the parties agree that the collaborative process continues if not later than 30 days after a discharge or withdrawal of a collaborative lawyer, the unrepresented party engages a successor collaborative lawyer and the parties consent in writing to continue the process and amend this agreement to identify the successor collaborative lawyer and the successor collaborative lawyer confirms in writing his or her representation of a party in the collaborative process.

Disclosure of Information

The parties agree that during the collaborative process the parties shall make timely, full, candid, and informal disclosure of information related to the collaborative matter(s) without formal discovery. The parties further agree that they shall promptly update information that has materially changed.

Lawyer Disqualification

The parties agree that a collaborative lawyer who represented a party under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated, shall be disqualified from representing a party in a court or other proceeding related to the collaborative matter(s) under this collaborative process. The parties agree that they will not engage for such purpose a collaborative lawyer under this collaborative process, or any lawyer in a law firm with which a collaborative lawyer is associated.

Notwithstanding the collaborative lawyer disqualification provision, the parties agree that a collaborative lawyer, or a lawyer in a law firm with which the collaborative lawyer is associated, may represent a party to request a tribunal to approve an agreement resulting from the collaborative process, or to seek or defend an emergency order to protect the health, safety, welfare or interest of a party, if a successor lawyer is not immediately available to represent that person. However, when that party is represented by a successor lawyer, or when reasonable measures are taken to protect the health, safety, welfare or interest of that party, the collaborative lawyer disqualification provision shall apply.

Collaborative Communications

The parties agree that in any court or other proceeding they will not request, subpoena or summons a collaborative lawyer, a collaborative party, or a nonparty participant in the collaborative process to make disclosure or to testify as a witness regarding a communication made during the collaborative process, unless during the proceeding the agreement under this paragraph is expressly waived by all parties in writing. In the case of communications by a nonparty participant in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the nonparty participant also expressly agrees to the waiver. A nonparty participant is a person, other than a party and the party's collaborative lawyer, that participates in the collaborative law process, including any person retained by the parties for professional services during the collaborative process or any person who is present at a collaborative process session.

Additional Provisions

[Add additional provisions not inconsistent with the provisions hereunder that the parties agree to include in the agreement.]

In the collaborative law process hereunder _____ will be represented by
NAME OF PARTY

_____, and _____ will be represented by _____.
NAME OF LAWYER NAME OF PARTY NAME OF LAWYER

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

_____ _____
SIGNATURE OF PARTY DATE OF SIGNATURE

I, _____, confirm that I will represent _____ in the collaborative process
NAME OF LAWYER NAME OF PARTY
hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

I, , confirm that I will represent in the collaborative
NAME OF LAWYER NAME OF PARTY

process hereunder.

_____ _____
SIGNATURE OF LAWYER DATE OF SIGNATURE

Guide to the Collaborative Participation Agreement
(For use in jurisdictions that have not adopted the Act)

INTRODUCTION

This GUIDE is intended to assist in the use of the accompanying model Collaborative Participation Agreement (AGREEMENT) in jurisdictions that have not adopted the Uniform Collaborative Law Act (Act). Although the Act itself will not be applicable, an agreement based on the carefully considered provisions of the Act might be a useful model for Collaborative practitioners in jurisdictions that have not adopted the Act.

Under the Act the required provisions of a collaborative participation agreement are few in number. However, important consequences of entering into a collaborative participation agreement as defined in the Act are provided as substantive law provisions and do not depend on the agreement of the parties. Since the model AGREEMENT is intended for use in jurisdictions that have not adopted the Act, these substantive law provisions of the Act are included in the AGREEMENT as agreements of the parties. The evidentiary privileges for collaborative communications established by the Act, however, are dependent on legislative action and cannot be created by agreement. One of the principal arguments in support of the Act (or other statutory provisions establishing evidentiary privileges) is that the evidentiary privileges promote candor in the collaborative process and thereby increase its chances of success in resolving the issues.

INFORMED CONSENT

Before parties enter into a collaborative participation agreement it is important that they understand the distinctive features of the collaborative process and consider whether it is appropriate for them in attempting to resolve their issues. The Act requires the lawyers to make certain disclosures about the collaborative process and to discuss its appropriateness with prospective parties to a collaborative participation agreement. Although the Act will not be in force in jurisdictions in which the model AGREE MENT under discussion is intended for use, the Act's requirements (summarized below) are a useful guide to good practices designed to insure that there is informed consent by parties about to enter into a collaborative process.

Before a prospective party signs a collaborative participation agreement the lawyer should:

(1) provide the prospective party with information about the benefits and risks of a collaborative process as compared with other issue resolution alternatives, and assess with the prospective party the appropriateness of a collaborative process for resolving the prospective party's issues;
(2) advise the prospective party that the AGREEMENT provides that participation in a collaborative process is voluntary and that any party has the right unilaterally to terminate the process with or without cause;
(3) advise the prospective party that the AGREEMENT provides that collaborative process will terminate if after signing the agreement a party initiates a proceeding in a court or other tribunal;

(4) advise the prospective party that the AGREEMENT provides that the lawyer, or any lawyer in a law firm with which the collaborative lawyer is associated, will be disqualified from representing the party in any subsequent proceeding related to a collaborative matter covered by the AGREEMENT. The lawyer should also make reasonable inquiry into whether the prospective party has a history of a coercive or violent relationship with another prospective party. If the lawyer reasonably believes that there is such a history, the lawyer should not begin the collaborative process unless the prospective party so requests and the lawyer reasonably believes that the safety of the party can be protected during the process.

PROVISIONS OF THE AGREEMENT

Included in the AGREEMENT are both provisions that the Act requires to be in the collaborative participation agreement and provisions that the Act states as substantive law, not dependent on the agreement of the parties.

The following features of the AGREEMENT track the required provisions under the ACT:

Signed writing

The AGREEMENT is in a writing signed by the parties. The collaborative lawyers are not parties and should not join in the AGREEMENT as parties. By simply confirming their representation of the parties, as the AGREEMENT directs, the collaborative lawyers avoid questions about their professional obligations to their clients which have sometimes arisen when they have signed a collaborative participation agreement as parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. By agreeing to use a collaborative process to attempt to resolve their differences, the parties are committing to try to avoid adversarial legal proceedings.

The AGREEMENT directs that the nature and scope of each matter at issue be described. It is important that this description be specific since it will circumscribe the lawyer disqualification provision of the AGREEMENT, which is applicable to subsequent proceedings "related to the collaborative matter(s)". The description of the matter(s) will also be important to the scope of an agreement that communications related to collaborative matter(s) made during the collaborative law process will not be offered in evidence in any proceeding, as well as to the scope of any agreement that such communications shall be confidential.

Identification of collaborative lawyers

The AGREEMENT identifies the collaborative lawyers who will represent the parties in the collaborative process. This provision is important for purposes of the application of the lawyer disqualification provision.

Confirmation of representation by collaborative lawyers

The AGREEMENT directs each collaborative lawyer to sign a statement confirming that he or she is representing a party (designated by name) in the collaborative process.

The AGREEMENT tracks important substantive law provisions which under the ACT do not depend on the agreement of the parties. Remedies that may be available for breach of these agreements

are the usual remedies for breach of contract, including damages and the equitable remedy of specific performance. Resort to remedies for breach of contract will not be likely in the case of agreements relating to the conduct of the collaborative process, such as agreements concerning how conferences are to be conducted and the disclosure of information. If a party is concerned that such agreements are not being complied with, the party is free to terminate the collaborative law process, which may be the most effective deterrent to breach of the agreements. In the case of agreements relating to the conduct of the parties following conclusion of the collaborative process, however, contract remedies may be the only recourse, but may not be as efficacious as the substantive law provisions of the Act. (See discussion below of agreements regarding collaborative lawyer disqualification and agreements about the offer of evidence regarding collaborative communications in a court or other proceeding.)

The following provisions of the AGREEMENT track important substantive law provisions of the Act that do not depend on the agreement of the parties:

Beginning and concluding the collaborative process

The AGREEMENT includes an agreement by the parties that the collaborative process begins when the parties sign the AGREEMENT and concludes upon resolution of the collaborative matter(s), evidenced by a signed writing, or upon termination. This provision is included in the Act as a matter of substantive law and is designed to make it administratively easy for parties and tribunals to determine when a collaborative process begins and ends. Establishing with certainty the beginning and ending of a collaborative process is important for purposes of application of agreements for confidentiality of communications made during the collaborative process, and agreements not to seek disclosure or testimony regarding such communications in a court or other proceeding related to the collaborative matter(s).

The requirement of a signed writing to define the conclusion of the collaborative process allows parties to consent to have court orders entered resolving a portion of the matters without concluding the collaborative process for resolution of the remaining matters. For example, presenting uncontested settlement agreements to the court for approval in divorce proceedings would not conclude the collaborative process, and thus an agreement to keep collaborative communications confidential, or an agreement not to offer collaborative communications in evidence in any proceeding, would continue to cover communications made while additional matters are negotiated. The term "signed writing" is broad and would include a letter stating that that the process is concluded sent to all parties after a judgment is entered and all of the necessary follow-up to finalize the matters is concluded.

The parties, if they wish, may provide in their collaborative participation agreement additional methods of concluding a collaborative process. The Act so provides as a matter of substantive law.

Termination of the collaborative law process

The AGREEMENT provides that the parties agree that participation in the collaborative law process is voluntary and that a party may unilaterally terminate the process, with or without cause, at any time. The right to terminate is one of the fundamental defining characteristics of collaborative law, and it is provided in the Act as a matter of substantive law that does not depend upon agreement of the parties. In jurisdictions that have not adopted the Act, the right to terminate must be expressly agreed to in the collaborative law participation agreement.

The AGREEMENT states three ways in which termination of the collaborative law process may occur. These methods of termination are included as substantive law provisions in the Act but, again, must be provided by way of agreement in jurisdictions that have not adopted the Act.

The AGREEMENT allows for continuation of the collaborative process even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged within 30 days under conditions and with documentation which indicate that the parties want the collaboration to continue.

Disclosure of Information

The AGREEMENT provides that the parties shall make timely, full, candid disclosure of information related to the collaborative matter(s), without formal discovery. Voluntary informal disclosure of information related to the matters at issue is a defining characteristic of collaborative law and is included as a substantive law provision of the Act.

The parties may, if they wish, limit or otherwise define the scope of required disclosure in their collaborative participation agreement. The Act so provides as a matter of substantive law.

Lawyer Disqualification

The requirement that a collaborative lawyer is disqualified from representing a collaborative party after the collaborative process concludes is a fundamental defining characteristic of collaborative law. In the Act the lawyer disqualification is stated as a matter of substantive law. In a jurisdiction that has not adopted the Act or otherwise enacted the disqualification requirement by statute, collaborative lawyer disqualification must be established by agreement. In case of breach the party relying on the lawyer disqualification agreement will be limited to the remedy of damages unless the court, in its discretion, will specifically enforce the disqualification agreement.

In the AGREEMENT, as in the Act, the lawyer disqualification provision is extended (so-called "imputed disqualification") to lawyers in a law firm with which the collaborative lawyer is associated. The Act allows the parties in the collaborative law participation agreement to modify the imputed disqualification for lawyers in a law firm which represents low income clients without a fee. If the parties to the AGREEMENT wish to include such a modification of the lawyer disqualification provision, they should do so in advance by an explicit provision in the AGREEMENT. In drafting the provision collaborative lawyers may find it helpful to refer to the Act's provision designed to isolate the collaborative lawyer from participation in the proceeding in which a member of that lawyer's law firm is representing the collaborative party.

In the AGREEMENT, as in the Act, exceptions to the lawyer disqualification provision are made that allow a collaborative lawyer (or a lawyer in a law firm with which the collaborative lawyer is associated) to continue to represent a party to (1) seek or defend an emergency order to protect the health, safety, welfare or interest of a party and (2) to request a tribunal to approve an agreement resulting from the collaborative law process. Because the AGREEMENT provides that requesting a tribunal to approve a resolution of all or part of the collaborative matters does not conclude the collaborative law process, the latter exception to the lawyer disqualification provision is necessary to allow the collaborative lawyer to continue to represent the party in that proceeding.

Collaborative Communications (Communications made during the Collaborative Process)

The Act creates evidentiary privileges against disclosure of collaborative law communications in legal proceedings. Protection of confidentiality of communications is central to collaborative law, since parties may otherwise be fearful that what they say or do during collaborative sessions may be used to their detriment in later judicial proceedings. Without protection of confidentiality, parties (as well as collaborative lawyers and nonparty participants such as professional experts) may be reluctant to speak frankly and to freely exchange information during the collaborative process.

The evidentiary privileges for collaborative law communications established by the Act are dependent on legislative action and cannot be created by agreement. As an alternative, the AGREE MENT attempts to protect the confidentiality of collaborative communications by agreement. It includes a provision that in any proceedings related to the collaborative matter(s) the parties agree that they will not require disclosure of, or offer as evidence, communications made during the collaborative process. To the extent that a court or other tribunal is willing to treat the parties as bound by this provision of their agreement, the effect is similar to that of an evidentiary privilege. However, in some situations, such as litigation between persons who were not parties to the collaborative process, a collaborative party may be called to testify as to collaborative communications and may not be allowed to refuse to testify on the ground of the agreement between the collaborative parties.

The AGREEMENT provides that during a proceeding related to the collaborative matter(s), the parties may waive their agreement not to require disclosure of, or offer in evidence, communications made during the collaborative process. This provision is equivalent to the waiver of privilege provision of the Act. In the case of communications by nonparty participants in the collaborative process the AGREEMENT, like the Act, provides that the waiver must also be expressly agreed to by the nonparty participant. Requiring waiver by nonparties as to their own communications is designed to facilitate the candid participation by experts and others who might be reluctant to take part in the collaborative process if they are subject to being called as witnesses in later proceedings.

If one party seeks to call his or her collaborative lawyer as a witness in later proceedings between the parties, it is likely that the other party would see this as a possible disadvantage and would refuse to waive the agreement on this subject. Some commentators have suggested that in some states it might be a violation of the Rules of Ethics for a lawyer to refuse to testify contrary to the wishes of his or her client who, together with the other collaborative party, has waived the agreement not to offer the testimony of the collaborative lawyer. In states in which it would not be a violation of the Rules of Ethics, collaborative lawyers may wish to include a waiver provision regarding their collaborative communications similar to that regarding collaborative communications of nonparty participants. Such a provision could be added at the end of the Collaborative Communications paragraph in the AGREEMENT, as follows: “In the case of communications by a collaborative lawyer in the collaborative process, the waiver of the agreement under this paragraph shall be effective only if the collaborative lawyer also expressly agrees to the waiver.”

ADDITIONAL PROVISIONS

The Act recognizes that after enactment of the Act collaborative lawyers will probably wish to continue to use in, their collaborative law participation agreements provisions that they have customarily

included. Thus the Act expressly provides that parties may include in a collaborative law participation agreement additional provisions not inconsistent with the Act.

Parties in jurisdictions that have not adopted the Act are free, of course, to include any provisions they wish. Collaborative lawyers who choose to utilize the model AGREEMENT, will want to avoid creating questions of interpretation by insuring that any additional provisions included are not inconsistent with provisions of the AGREEMENT.

Collaborative parties and their lawyers today cover a wide range of topics in their participation agreements. Discussed below are a sampling of some of the subjects that are often addressed in provisions included in collaborative participation agreements.

Goals

Many participation agreements identify goals of the collaborative process, such as avoiding litigation and the likely negative economic, social and emotional consequences there from. Collaborative parties sometimes identify values they intend to employ in pursing their goals, including honesty, cooperation, integrity, dignity and respect for the other parties.

Commitment

The AGREEMENT states the parties' intention to attempt to resolve the matters at issue through a collaborative process. This commitment is often elaborated near the end of the participation agreement by a statement to the effect that the parties understand the terms of the agreement and commit themselves to using the process to resolve their differences fairly and equitably.

Collaborative process

It is common practice for participation agreements to describe the structure of meetings that will be utilized in the collaborative process. Joint face-to-face meetings are commonly provided for, but participation agreements sometimes include alternative venues, such as conference calls or video conferencing, in appropriate circumstances.

The participation agreement might describe the interest-based negotiation process by which goals and issues are identified, facts are gathered, options are developed and analyzed, and agreements are negotiated. Also included might be negotiation principles, such as agreements to negotiate in good faith, to take reasonable positions, to be willing to compromise, to refrain from using threats of litigation, and the like.

Communications

To promote effective communication, the participation agreement might state that communications should be respectful and constructive. To promote resolution of the issues acceptable to both parties, the agreement might state that each party is encouraged to speak freely and to express his or her needs and desires. Participation agreements sometimes include "ground rules" that apply to discussions between the parties outside of joint meetings, such as prohibiting unannounced telephone calls or surprise visits.

Confidentiality of Collaborative Communications

It is sometimes agreed by the parties that communications related to collaborative matters made during the collaborative process are confidential and may not be disclosed to third parties. It should be noted that such an agreement is different from the evidentiary agreement included in the AGREE MENT (and the evidentiary privilege in the Act), which apply to attempts to introduce collaborative law communications in evidence in a court or other proceeding. Those provisions do not apply to discussion of collaborative communications with third parties, which the parties may wish to limit by a separate confidentiality agreement. In case of breach, such confidentiality agreements would be enforceable by usual contract remedies.

Children

When children are involved, participation agreements often include agreements by the parties to attempt to reach amicable solutions that promote the children's best interests and to refrain from inappropriately discussing legal issues in the presence of or with their children.

Lawyers' Roles and Fees

To clarify the role of lawyers, participation agreements sometimes state that the respective lawyers are employed by and represent only the party who retained them. The agreement may also describe the basic function of lawyers in the collaborative process, such as advising and assisting client in gathering and understanding relevant documents, informing client of the applicable law, assisting client in preparing for collaborative meetings, facilitating interest-based negotiations. While each party will have a separate contract with his or her lawyer regarding fees, sometimes the participation agreement contains an agreement by the parties to make funds available to pay both lawyers.

Role of Professionals

Participation agreements sometimes include a statement of the role of professionals who may be called on to assist in the collaborative process. These might include financial professionals, coaches, mental health professionals, child specialists, mediators or experts in other fields. In such cases the participation agreement may reference separate or other arrangements made by the parties for the services of such professionals. Under the Act a professional who assists in the collaborative process is called a "nonparty participant." The Act does not require nonparty participants to confirm their participation by a signed statement in the collaborative law participation agreement. In the AGREEMENT, if the parties and their lawyers think it desirable, professionals could confirm their participation by a signed statement, in much the same manner as the lawyers confirm their representation of the parties.

Neutral Experts

Frequently the parties and their lawyers prefer that experts participating in the collaborative process be jointly hired and neutral.

The participation agreement may specify that experts are to be jointly retained unless the parties otherwise agreed. Such agreements will customarily provide that reports, recommendations and other documents generated by the neutral experts shall be shared with all parties and their lawyers. The participation agreement may also state whether the experts' communications and work product will be subject to a confidentiality agreement of the parties and/or to an agreement by the parties not to offer communications in evidence in a court or other proceeding.

Preservation of Status Quo

Participation agreements often include a commitment that neither party will unilaterally make significant changes regarding finances, insurance, or children. Examples of such agreements are provisions that neither party will unilaterally dispose of property, change beneficiaries on a life insurance policy, alter other insurance provisions, move the children or incur additional debts for which the other party may be responsible.

Withdrawal by Collaborative Lawyer for Abuse of Process

Participation agreements sometimes provide that a lawyer may withdraw if his or her client withholds relevant information, misrepresents important facts, or otherwise acts in a way that could result in an abuse of the collaborative process. Such a provision does not obviate applicable ethics rules, such as rules that require the confidentiality of lawyer client communications be protected and that withdrawal of representation be done in such a way as to avoid prejudicing a client's interests.

Discharge or Withdrawal of Collaborative Lawyer / Moratorium on Conclusion of Collaborative Process

Both the Act and the AGREEMENT provide that the collaborative process is not terminated upon a lawyer's discharge or withdrawal if, within 30 days, a successor collaborative lawyer is retained and the participation agreement is amended accordingly. Parties may wish to provide in the participation agreement what may and may not be done during the 30 day period. For example, the parties might agree to maintain the status quo, to refrain from commencing any court action (other than in emergency circumstances), or to maintain any agreements already reached unless explicitly rejected by a party.

Cautions

Participation agreements commonly include cautionary statements to try to insure that the parties understand the collaborative process. Cautions might include statements that there are no guaranteed results from the collaborative process; that each party is expected to participate actively in the process by asserting his or her interests and considering the interests of the other party; and that while the process is designed to assist in communication and in reaching an amicable settlement, it will not necessarily eliminate the underlying issues between the parties.

Technology and the Family Law Practice

Julie Gentili Armbrust, *Mediation Northwest, Eugene, Oregon*

NOTES

Technology and the Family Law Practice

Presented by:

Julie Gentili Armbrust, Attorney-Mediator
Mediation Northwest & SupportHound
911 Country Club Road, Suite 290, Eugene, OR 97401
Email: Julie@MediationNorthwest.com
MediationNorthwest.com | SupportHound.com

I am not a technophile. I do not covet gadgets and gizmos. However, I am always searching for ways to make my life easier and my clients' experiences better. If it takes more time, takes too many steps, takes too long to learn, isn't cost-effective, isn't ethical, isn't safe, or if it provides a lesser quality product, I am not interested in it. I demand that my technology is easy-to-use and safe! On the whole, I tend to have extremely high standards (my staff would say too high) for incorporating new technology into my practice. So, if I am suggesting it, it has passed my test to learn it and incorporate it.

My mantra is more integration and automation, less duplication. I have better things to do with my life (and so does my staff) than to duplicate tasks or information.

Although I am a solo practitioner, I have four other employees working at my companies Mediation Northwest and SupportHound. So, although I am a solo, my firm's work load is more similar to a small firm. Additionally, since I only mediate matters, and do not litigate matters, I have no experience with technology used specifically for trial.

Technology changes every day. These materials are accurate up to July 15, 2017, which is when written materials for this presentation were required to be submitted. I reserve the right to amend the contents of these materials during my presentation.

Updated Materials and PowerPoint Slides

Materials: https://web.tresorit.com/l#IC_8KwEB3W4jupUaCibiWQ

Slides: https://web.tresorit.com/l#M4_ZNtecSiD8lmEqTX06UA

1. **Security**

    a. **Passwords**. In order to have secure passwords, each password must be unique and if possible, utilizing capital letters, lower-case letters, numbers, and symbols. Password cracking software, such as John the Ripper, is available free on the internet and can crack non-unique and/or non-complex passwords in about an hour. If you use the same password over multiple sites, and one site is hacked, history (Heartbleed, Target, Carbonite, Yahoo) tells us that you will not be advised of the breach for many months (or years) after the hack, which means your "use-across-multiple-sites" password has already been sold and used across multiple sites. The solution is to create secure passwords, unique to each site, and install a password keeper to keep your life easy. One of the best tips I've heard to create unique passwords came from the PLF: Use a favorite phrase or song lyric and use the first letter of each word, combined with numbers that are meaningful to you. If you don't know if your password is secure, check it at www.HowSecureIsMyPassword.net.

    b. **Password Keepers**. In order to maintain the Goliath amount of unique passwords, you should utilize a password keeper. A password keeper is downloaded to your desktop and mobile devices and maintains every password through a continual sync. You only need to memorize one password, to the password keeper program, and the password keeper program remembers all the other passwords. It works like this: if you change the password to Amazon while using your desktop or mobile device, the password keeper will ask you if you want it to update your password. If you say, "yes," then the password keeper will automatically update all your devices. Most password keepers utilize end-to-end encryption without the password keeper program or staff having access to your passwords.

        i. **Dashlane.** My personal favorite.

        ii. **LastPass**. PC Magazine ranks this the top password keeper in 2016.

        iii. **1Password**.

    c. **Two-Factor Authentication**. Two-factor authentication is an extra layer of security to access a web site after you enter your user name and password. So, if someone hacks your user name and password, they still cannot access your account without imputing the two-factor authentication. Generally, two-factor authentication is an instant one-time use code from another source, but it can also be your fingerprint or a special computerized key. For instance, when trying to access your Amazon account,

if you have two-factor authentication enabled, you enter your user name, password, and then an additional screen (or box) pops-up that requires a special code (the two-factor authentication code). Most web sites will email or text you the two-factor code. My preferred method of two-factor authentication is using an authenticator app, which you download to your smart phone. A two-factor authenticator app maintains **all** your two-factor authentication codes and continually syncs with the specific web sites. The codes generally change every 30 seconds. Why do you want two-factor authentication? It prevents a Russian robot from hacking into your accounts while you are asleep. Yes, that has happened to me prior to enacting two-factor authentication and, yes, it was scary. Two-factor authentication also prevents someone from using your less-than-secure password from accessing your account.

i. **Two-Factor Authenticator Apps**:

1. **Google Authenticator**. This is my favorite. Available on both android and iPhone.

2. **LastPass Authenticator**. This is an excellent product, too. Available on both android and iPhone.

ii. **Types of accounts to enable**.

1. Password keeper.

2. Email.

3. Practice management.

4. Cloud-based storage.

d. **Virtual Private Network**. A virtual private network (VPN) encrypts your internet traffic while you are accessing public wifi away. Public wifi is very tempting because it doesn't require data usage from your cell phone plan and it is much faster. However, the hazards of using public wifi are many. The public wifi administrator and tricky users can see your key strokes (i.e. see your passwords). As I write these materials, I am in the process of changing my VPN. I will update you at the conference.

e. **Whole-Disk Computer Encryption**. Encryption is a necessary component of a secure law firm. Whole disk encryption goes beyond your computer's pin code /

passcode upon login. Rather, it scrambles the computer's data into 1's and 0's unless you enable the encryption key. I take the perspective that most individuals, including those who are sophisticated enough to get my data, may not also be knowledgeable enough to hack through encryption software. So, having encryption is better than not having encryption. Consider this, if I remove your hard drive from your desktop and it only contains the Windows pin or password, I can access all the data. If, however, that hard drive is also encrypted, all I can see are 0's and 1's. Some services include:

i. **Windows BitLocker** (built into your Ultimate and Enterprise editions of Windows 7, Pro and Enterprise editions of Windows 8, Pro, Enterprise, and Education editions of Windows 10, and Windows server systems)

ii. **Mac FileVault** (built into your macOS system). PC users, let's be honest. Mac's encryption is top notch! Even the FBI couldn't crack it, so they paid a hacker $900,000.00 to hack the system.

iii. **Other Encryption Options.** As I write these materials, I am testing a monthly encryption option. I will update you at the conference.

f. **Document Encryption**. If you are not encrypting your computers, you may want to encrypt information at the document level, such as:

i. **Acrobat:** Tools → Protection → Encrypt → With Password

ii. **Nuance:** Security → Manage Security Settings → Modify → Security Method → Password (much simpler than this process suggests)

iii. **Word**: File → Info → Protect Document

iv. **WordPerfect**: Save As → Password protect (select the password protect box under the file type).

2. Favorite Chrome Extensions

a. **PrintFriendly**. This extension allows you to print websites (or save into a PDF) without the pictures or extraneous information. It's awesome!

b. **Dashlane**. This is my password keeper and allows me to login to websites in one click. This is a must have for me!

3. **Cloud Services**. I love the cloud, but have insanely high standards for working in the cloud. For my office, I require the following: zero knowledge, end-to-end in-transit encryption, sync to each computer's hard drive, accurately reflects conflicted files, doesn't slow down computers, and safe server locations. The only current service that meets my criteria is Tresorit. As attorneys, we have an ethical obligation to keep our client information confidential. Our client file can extend to the cloud, too. RPC 1.6; 1.15-1(a). We need to be certain that our cloud service will "reliably secure client data and keep information confidential." OSB Formal Ethics Opinion No. 2011-188; RPC 5.3. It is my personal opinion that if your cloud based provider is not zero-knowledge, you cannot ensure that your client's data is confidential. However, OSB Formal Op. 2011-188 advises that if your cloud service is complying with industry standards relating to confidentiality and security, then you are meeting your ethical obligation. Additionally, other law firm technology experts disagree with me and believe that a service's assurance that the service will only look at the data if they have a reason to look at the data meets the required ethical standards. After almost an entire year of vetting a new cloud service, I probably tried every cloud and/or syncing service available. I have a spreadsheet three pages long telling me why I didn't select a particular product. In the end, I can fully recommend the following cloud services:

    a. **Solos**. If you are the only one working on your files (i.e. no assistant), then I recommend SpiderOak.

    b. **Small to Medium-Sized Firms**. If you have a small to medium-sized firm, then I fully recommend Tresorit.

    c. **Large Firms**. If you are a large firm, I was very impressed with NetDocuments.

4. **Back-Up**. Your back-up needs to be (1) secure, (2) automatic, and (3) regularly checked for functionality. Consider the following:

    a. **Ransomware**. Ransomware is computer malware (i.e. evil software) that covertly installs on a device and locks-up the victim's data, thereby holding the data hostage until the victim pays the ransom through BitCoin (an internet currency exchange). Most recently, Ransomware infects computers when individuals unwittingly click on a link, visit an unsecure website, or by downloading an infected Word document (WordPerfect looks better and better, doesn't it?). You need to back-up your data so that if you are hit with Ransomware, your office is safe.

    b. **Best practice**. It is considered best practice to back-up your system both in the cloud and through a physical system, such as an encrypted portable hard drive or a network-attached storage (NAS) system.

i. **Cloud**.

1. **Carbonite, Mozy, Dell Backup, etc**. These are great backup services, but they are not zero-knowledge. These programs have the encryption key to your data, which means they are as secure as if you gave your property manager the key to your office and did not lock your file cabinets.

2. **SpiderOak**. If you want a secure, zero-knowledge, automatic backup, you should consider SpiderOak. SpiderOak does not have the encryption key. It works best for solos.

3. **Cloud Network Systems.** Many cloud network systems (i.e. Tresorit) have built-in cloud back-up.

ii. **Portable hard drives or Networked-Attached Storage (NAS).** Make sure your portable hard drive or NAS is encrypted. If it is not encrypted and it goes missing, the PLF's Excess Fund Coverage will automatically assume a breach has occurred.

5. **Templates**. A properly formatted template can save you and your staff hours of time, prevent malpractice, and create value to your business. **My staff believes that a properly formatted template is the biggest time saver of any technique/tip in this presentation.**

a. **Word Processing**. Each word processing template should be a one-stop-shop of options (i.e. one General Judgment of Dissolution that includes provisions for parties with children and provisions for parties without children). Why? When comparing a GJ that contains provisions related to children to a GJ that does not contain provisions related to children, more information is duplicative than is not duplicative. When it is time to update language, you are less likely to duplicate across templates and more likely to update in one spot, thereby keeping your language up-to-date. If you are looking for the best suggestion to improve your businesses functions and rate of return, invest in a word processing course and learn templates and formatting. Schedule it for January when business is slow. You and your staff… not just your staff.

b. **Email**. You should using templates (i.e. canned response) for regularly sent emails, too. This way, when you receive an inquiry for regularly provided information, you can easily and quickly respond without looking-up the requested information. For business purposes, if you bill in six minute increments and are using email templates,

you can easily touch several files in six minutes and bill a minimum six minute increment to each file, which after ten files is one hour for a few minutes work!

6. **Word Help.** If you ever encounter a Word formatting problem, Affinity Consulting offers a "Word ER" service that bills a flat fee of $200 (as of the writing of these materials) to fix your entire Word document for formatting errors. Affinity also offers a Word "Monthly Maintenance" plan to fix problems any time you have them. Considering how much wasted time attorneys and staff spend on Word problems, I believe this is an excellent service. If you are moving into creating templates as discussed above, consider hiring Affinity to clean-up your document before moving the document into a template. In full disclosure, I am a WordPerfect geek. I do not use Word, so I have never needed this service.

7. **Metadata**. In a word processing document, metadata is embedded data that you cannot easily see. Too many attorneys send each other Word documents without the metadata removed. This is a horrible idea. If you have ever copy and pasted from one client matter to another client matter, all that data is sitting within the metadata. If you are not using a template (or other document) that is clean of metadata, you are sending former client's confidential client information to third parties!

    a. **Word**. Word calls metadata "hidden data." To remove metadata from Word, Word insists you "Save As" to a new file name to protect you from removing wanted metadata. Then, in the original document, select "File" and then click "Info." Select "Check for Issues" and then click "Inspect Document." Then, check all the boxes of the metadata you want removed.

    b. **WordPerfect**. To remove metadata from WordPerfect, simply click "File" and select "Save Without Metadata." This is yet another reason why the technology gods will have to pry WordPerfect from my cold dead hands!

    c. **Acrobat**. To remove metadata, you will be "sanitizing" your PDF. From the "Tools" panel select the "Protection" panel. Select "Sanitize Document."

    d. **Nuance**. To remove metadata, select the "Security" panel and then select "Remove Elements."

8. **PDF Software.** I have always been a big fan of Nuance's PDF software. It does everything Adobe Acrobat does for a fraction of the cost. PDF software can make your life much easier if you know a few tricks.

a. **Electronic Signature.** Having a way to sign electronic forms without printing, signing, and re-scanning, is a huge time-saver. There are three ways to electronically sign your documents through PDF software.

    i. **Uploaded Handwritten Signature**. Having your actual signature uploaded into your PDF software allows you to sign electronic documents with a real color signature. It also allows your staff to sign documents, at your direction, when you are away from the office. Of course, you can password protect it so that it cannot be used without your knowledge.

    ii. **Digital Signature**. PDF programs allow for a digital signature that is essentially a typed signature with data to support the signature. It may look like, "Digitally signed by: Julie Gentili Armbrust on January 1, 2017."

    iii. **Real-Time Handwritten Signature** Many programs allow users to use their mouse (or finger for touch sensitive devices) to sign documents to create a real-time handwritten signature.

    iv. **Document Signing Products** (i.e. not PDF, but since we are on the subject matter). Document signing products, such as RightSignature, generally use two simultaneous techniques for signatures: real-time handwritten signatures coupled with a digital signature.

b. **Shrink Your PDF.** PDF's can become quite large. If you want to reduce the size of a PDF:

    i. **Nuance:** Advanced Processing → Reduce → Reduce Current File.

    ii. **Acrobat:** File → Save As Other → Reduce Size PDF

c. **Lock Your PDF.** If your PDF is not locked, anyone can edit it. However, even if it is locked, those in the know can still edit. (See the *PDFUnlock* section).

d. **PDFUnlock.com.** When a PDF (i.e. PERS forms) is locked-down and not allowing you to edit or type onto a document (i.e. to indicate an exhibit number), simply upload the (non-confidential) file to PDFUnlock.com. This is a free site, so you will need to avoid the advertisements to "download" random software. From the PDFUnlock.com, click "My Computer" and locate the file you want from your computer. Then select "Unlock." Poof, you can add an exhibit number and extra text!

You can also purchase this software for $25 if you are concerned about uploading a document to a site and then downloading the converted file.

e. **Best Tip:** My best PDF tip is to incorporate a real property's legal description into a GJ (or exhibit) by simply opening the legal description in PDF, selecting the legal description, copying it, and pasting it right into your word processor. I don't suggest converting the PDF into text because I have seen too many incorrect conversions to feel comfortable. I am suggesting copying and pasting the image into your word processing document. No duplication of work and it is the exact same as the deed! I also suggest that you should invest an afternoon (or have your staff do it) to learn how to make fillable forms in your PDF creator. Fillable forms are easy to make and clients are much happier when you email them fillable forms.

f. **Converting**. Both Nuance and Acrobat's Pro software allow a user to convert a file from PDF to word processing. I've noticed that conversions are better than in the past, but (from my humble perspective) are not quite reliable enough for me to always trust the conversion, especially in legal descriptions. So, my advice here is user beware.

9. **Scanners.** Many scanners are set to factory settings or an assistant has made a unilateral, well-intentioned, choice. We scan a lot of documents, so size matters. I recommend using the black and white setting (not the grey scale setting or the color setting) as your default scanning setting because the file size difference between black and white or color or grey scale is huge. For instance, a black and white 300 dpi PDF is only 200 KB, but a color or grey scale 300 dpi PDF is 2,000 KB! You can always select the color scan for the documents that require a color scan and then the machine should default back to your preferred settings.

10. **Email**. I am beginning to see (too) many attorneys using free email (Gmail, Yahoo, Hotmail, etc.) Free email services routinely scan your email and data mine it. In 2013 legal filings, Google stated that its Gmail users have no reasonable expectation that their communications are confidential. That means it isn't secure. Furthermore, model RPC 1.6 comment 19 advises that an attorney should only communicate client communications using a method that affords the client a reasonable expectation of privacy. I am not suggesting you need to use encrypted email. Email encryption services are a great concept, but at present they are clunky and require either the sender, the receiver, or both to take extra steps with each email. If you have a web site, then you have a domain (i.e. MediationNorthwest.com). You can host your domain's email through your domain registration service (i.e. Go Daddy) or you can use many other services such as Microsoft's Exchange, Google's G Suite, etc. I would like to clear-up an urban myth. Google's G Suite (formerly Google Apps) does **NOT** data mine. Google data mines their free Gmail service, but not their enterprise level G Suite service. I

am a big G Suites fan. It is relatively easy to use, the calendar, contacts, and tasks integrate with Clio, you can easily block access to your recently terminated staff's email, and it is available across devices.

11. **Task Lists**. I love task lists! I am not talking about your calendaring tickling systems. A task list is a checklist for every possible step taken on a given matter. Task lists save me time by remembering the next step and they save my staff time by giving them automatic direction. I have tasks lists built into my practice management software that we use in my firm. So, when I finish a dissolution mediation, my practice management software automatically tells my assistant to send the clients the Mediation Case Details, send the clients homework, and to bill for the time. Task lists save you from forgetting about a matter or from forgetting a step in a case. They also keep your billable time up-to-date.

12. **Cookbooks**. There is nothing I hate more than not knowing how to complete a task at my own office. I require every staff member to maintain a cookbook for every task they complete. So, if that staff member is on vacation, either myself or another staff member can complete any task in the office. Each cookbook is detailed and step-by-step. I review the cookbooks in December and January when business is slower and I make new employees use the cookbooks to find the mistakes while learning the tasks and to correct any mistakes. I electronically keep all the cookbooks so I can access them from home, too.

13. **Practice Management Software**. I am a Clio user. I love it! I was an early adopter; they call me a "legacy user." It really doesn't matter what practice management system you use… so long as you use a system. For the solos, my experience is that even after paying for a software-as-a-service practice management system, such as Clio, I earned more money because I was capturing more time. It's worth its weight in gold and it will keep all your client matters accurate with reminders. Your accounting software should integrate with your practice management software so that you are not duplicating tasks. Your client contacts should integrate with your practice management software and your email service, too. Also, most practice management software allows third party apps to plug-into your practice management system thereby making your life easier with less duplication. For instance, Clio has a Ruby Reception plug-in and a Right Signature plug-in, which are popular services among the legal community.

14. **WiFi Visitor Access**. Most attorneys misunderstand their office's wifi access. You should have both a public and a private portal for wifi, which doesn't require two wifi accounts. It requires your office to use a router that includes both a public and private portal that are configured so that 'never the two shall meet.' Your private portal should be password protected with a unique and secure password. Your public portal should also have a password, but it can be a relatively easy password. I make my employees use the public

system for their private phones and devices because if they are not utilizing a virus protection program, then my private network is not affected or infected. I suggest you create a password for your public portal and post your public wifi name and password in your reception and conference rooms.

15. **Phone Apps.** Phone apps should make our lives easier, not harder. I also believe in boundaries for personal and professional time. I do not download too many professional apps to my phone because I want a barrier from working too much from home. I like to use the following apps to save time.

    a. **Ruby Reception.** I can change my call settings from this app, listen to my voice mails, and call a receptionist to connect me to another number with my law firm's caller ID, which is quite handy when you need to call a client, but do not want your client to have your cell phone number.

    b. **Clio.** I use the Clio app to capture billable time, tickle a client matter, and add notes to the file.

    c. **Google Authenticator.** See description above.

    d. **Dashlane**. See description above.

16. **Print Screen.** I don't know about you, but my "print screen" button on my keyboard is obnoxious. The solution is to use the Snipping Tool, which is awesome (and not obnoxious)! It allows you to take screen shots without any drama. It is provided within Windows (sorry Mac users, I am sure you have something similar or better). If you click on the Windows Explorer icon  and then type "Snipping Tool" into the search window (i.e. "search programs and file"), the Snipping Tool will appear in your menu. Right click on the Snipping Tool and select "pin to task bar." Now, your Snipping Tool will be easy to find and whenever you need to show someone something on your screen (i.e. weird warning) or quickly capture a screen shot from a program or web site, simply engage the Snipping Tool.

17. **Join.Me**. Recently, I learned the art of screen sharing and found it extremely helpful with my clients when discussing assets and liabilities. Join.Me has a free service and a paid service. Both services allow you to simply send someone a link, they accept the link, and then *poof* they can see your screen. GoToMeeting is another service, too. I have found GoToMeeting to be less user friendly than Join.Me.

18. **Web Sites**. On my journey to create SupportHound.com, I learned many web site tips and tricks. I know you do not create or maintain your websites, so why do you need to know this?

I have learned, in too many painful lessons (lessons that make you hit your head on your desk and say, "When am I going to learn this lesson?!"), that if you do not specifically direct your web site guru, you should NOT assume it will magically happen. Web site coders aren't good at business, creating future tasks, and/or anticipating needs. Treat them as you would your staff and direct them on what you want accomplished. You need to know ***what*** needs to happen to your site, they need to know ***how*** to do it. So, if you want your web site to be current, you need to specifically request for the following:

a. **Security**. Google search will be adding warnings to web sites that are not using HTTPS. So, if your site says, http://www.YourLawFirm.com, then Google will add a warning to visitors saying your site is not secure. To solve this problem, ask your website guru to add the https security protocol to your site, which will make your web site look like this: https://www.YourLawFirm.com.

b. **Updates**. Unless your website is hosted by a company that automatically provides software updates, the software that runs your website (most likely WordPress) needs to be updated. Your web site also has plug-ins (i.e. additional software running in the background of your web site that is added to the web site software) that need to be updated, too. Before you dismiss this suggestion, keep in mind your web site guru doesn't tickle calendars like you do. My past two web site hosting providers did not provide automatic updates. My new web site hosting provider automatically updates and sends notices when security issues are being address. Unless you are paying your web site guru every month to check your web site (not just host your web site), s/he isn't looking at your web site. If your website software is out-of-date, or your plug-ins are out-of-date, your web site is vulnerable to viruses, hackers, and potentially not rendering to the user as intended (i.e. something funky could happen and your web site fails to display a key component. It just happened to me last week! And I routinely look at my web sites… do you?).

c. **Mobile**. In November 2016, mobile and tablet use on the internet exceeded desktop use. In response to this new normal, Google changed their search algorithm to give greater weight to web sites that are mobile friendly. How does this affect you? If your web site is not mobile-friendly, your web site's Google search ranking will be lower than your competitor with a mobile-friendly site.

d. **Photos**. The larger the photo, the longer the page load. The longer the page load, the less likely your site is optimized for mobile use, which decreases your search engine ranking. This is another example of, "Oh, my web site guru knows this." Yes, they know it, but they won't think to check each photo unless you tell them to do it. Here is how you can check your web site photo's size:

i. Chrome doesn't have a quick way to see a picture's size. If you have the FireFox internet browser, open it. You can download it for free if you do not have it. On the photo, right click and select "View Background Image." Right click on the newly displayed photo, select "View Image Info" and click the "General" tab. Then, you can see the size of the photo under "Size." Om4.com says, "For most 'full page' web images, you want the image to be 80Kb-100Kb at most. If the image is only part of a page (e.g. half the width of a blog post), then 20Kb-30Kb is usually fine."

e. **Speed**. Your web site's speed, or lack thereof, can be a problem for the user and for the search engine ranking. To check your site's speed, I've found the following sites helpful:

i. **Pingdom** (tools.Pingdom.com)

ii. **Google PageSpeed Insights** (developers.google.com/speed/pagespeed/insights/)

f. **SEO**. Search Engine Optimization (SEO) is the act of organizing your web site (and possibly other social media) to work together with the goal of increasing your search engine ranking (i.e. how high you rank on search engine sites such as Google). You likely receive one or two emails per week offering to optimize your website's SEO. These services are a dime a dozen and many charge through the roof for a small bit of work. Here's the down and dirty, if you aren't ranking on Google's first page, your SEO needs help. Find an SEO specialist that doesn't require a monthly fee and specializes in law firms. Here is my two cents: $450/mo is too much money (unless you are a large firm) for SEO. However, a $450 per month fee for two months to gain traction is worth it.

g. **Headers**. Attorneys are great at organizing. A header is the first heading introducing the page. Subheaders are subsequent, less important headings on the page. Headers on your website not only organize for your potential clients, but they also help Google analyze your web site and rank it. Too many web designers forget to include headers and simply rely upon the page name, which makes it difficult for Google to search you and rank you.

h. **Credit Card Processing**. If you do not need to sell anything on your web site… DON'T! Please do not misunderstand this section. I am not suggesting you should not use credit card processing in your law firm. I am suggesting not having credit card processing on your web site. If you have a merchant account (i.e. credit card

processing) on your web site, your web site is then required to be PCI compliant. A law firm's PCI compliance burden and obligation is an annoying gnat, but a web site's PCI compliance burden and obligations is a gargantuan gorilla!

i. **Back-Up**. Your web site is likely not backed-up. Your web site guru can easily add a plug-in to automatically back-up your site to DropBox or other cloud storage. If your site is simply pretty pictures and text and does not contain confidential information, back it up to DropBox. If it contains confidential information, you likely have an IT support team on speed dial and should be backing-up to a secure service.

j. **Favicon**. If you are looking at your browser, you will have tabs at the top of each page indicating which pages are open. The little icon that sits at the top left of each tab is called a favicon. If you don't have a favicon, your potential user will think you are not current.

k. **Copyright**. This is a quirky problem and it directly impacts attorneys in a unique way. Make sure the copyright on your website is current. If your web site guru's web site contains an out-of-date copyright, you should assume your copyright is out of date, too, because if they don't care enough about their own web site, they surely aren't caring about your site. Potential clients notice out-of-date copyrights and judge your abilities as an attorney (i.e. if you can't keep your own copyright up-to-date, why should I trust you to handle my legal matter?). Here's the funny part… code exists to automatically update copyright dates. So, you can easily have your website guru add the code and never think about it again.

l. **How to Access Your Website's Backend**. Your website's content is exceptionally valuable to you. However, too many professionals do not know how to access their website in the case of an emergency (i.e. a Russian robot trolling your site while you are asleep; web site guru dying or disappearing). Most website coders work alone and do not keep good records; and the ones who work in teams, tend to lack communication skills to the other team members. What if something happens to your coder or what if something happens to your site and you can't reach your coder? You need to know this information to give to someone who can help you. Without this information, your potential helper is likely to be very unhelpful. I suggest keeping an encrypted electronic file (see the section on Security, Password Keepers below) with the following information:

    i. **Domain Registration Service** (i.e. GoDaddy.com)
        1. Site name
        2. User name

3. Password
4. Customer service number

ii. **Website Hosting Service** (i.e. Amazon, WP Engine, etc/)
    1. User name
    2. Password
    3. Customer service number

iii. **If Your Site is a WordPress Site**
    1. Site's administrative URL
    2. Administrative user name
    3. Administrative password

iv. **Website Coder (i.e. website guru)**
    1. Name
    2. Email
    3. Telephone number

v. **Stock Photo Account**
    1. Site name
    2. User name
    3. Password

vi. **Font Account**
    1. Site name
    2. User name
    3. Password

vii. **Plug-Ins** (likely, you will have several different plug-in accounts, including a back-up plug-in)
    1. Plug-in name and site name
    2. User name
    3. Password

19. **Additional Tech Access.** We maintain additional technology in our offices that require user names and passwords to access. Yes, your current IT firm probably has this information. What happens when you want to terminate their services? I suggest keeping an encrypted electronic file (see the section on Security, Password Keepers below) with the following information:

a. **Router and/or Modem** (many are a combination)
    i. User name
    ii. Password

b. **Wifi**
    i. Private Network
        1. Network Name
        2. User Name
        3. Password
    ii. Public
        1. Network Name
        2. User Name
        3. Password

c. **Firewall** (hardware firewall)
    i. User name
    ii. Password
    iii. Enable Password

d. **Network**
    i. Administrator's User name
    ii. Administrator's Password
    iii. Administrator's Enable Password

20. **Social Media.** I have a few social media accounts, but I am not an expert. However, as an attorney, I fully recommend having a LinkedIn profile. A venture capitalist explained LinkedIn to me in a way I never previously understood: LinkedIn is your on-line resume. I have attached an excellent article following these materials on how to manage your LinkedIn account.

21. **SupportHound.com.** As many of you know, I created SupportHound.com, which is a spousal support calculator that uses spousal support cases, parties' information, and a proprietary algorithm to calculate a suggested spousal support award. Technology is changing the practice of law. We need to adopt technologies that make us more efficient, save us money, and give us an advantage over our adversaries. Come see me. I would love to show you how SupportHound is a technology you want to add to your family law practice.

5 LinkedIn Profile Features You Need to Get Right

lawyerist.com/5-linkedin-profile-features-need-get-right/

7/11/2017

LinkedIn is the largest professional networking social platform. With more than 467 million users, and a little over two new users signing up every minute, it is the place to be to build your professional brand and expand your network of influence.

Give yourself a good foundation on LinkedIn by creating a complete, custom profile tailored to your target audience. This means taking advantage of the following five profile features that most users overlook or do not think through properly.

1. Professional Picture

Putting a face to a name is one of the greatest features of social media. It's wonderful to be able to see who you are speaking with via email or phone. LinkedIn says that members with a profile photo get up to 14 times more profile views.

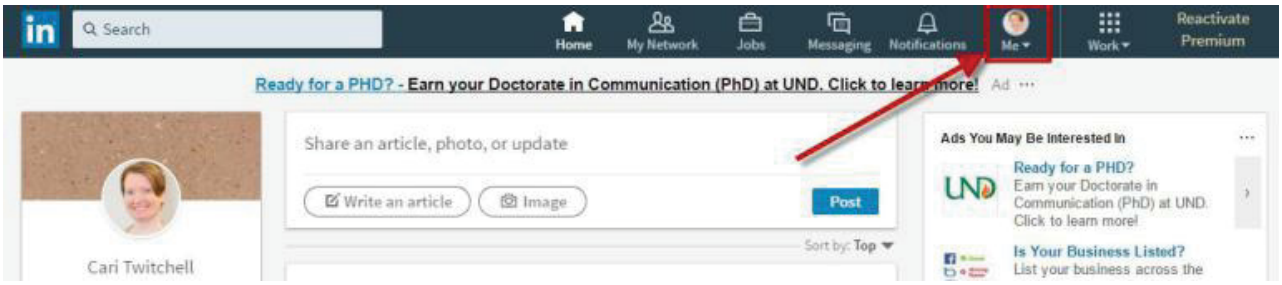
Adding a photo to your profile is simply a no-brainer. But the type of photo you add is not. Here are a handful of tips to help you choose an image that will make a good first impression:

- **Use a professional photograph.** LinkedIn is not the place to show off your latest vacation or goofiest smile. It is the place to make professional connections, build your brand, and grow your business. You can only do this with a photograph that captures who you are as a professional.
- **Look like someone people would like to meet.** Dress as you would on a normal business day, make sure you are looking straight at the camera, and give a warm, genuine smile. A serious, stern, or skeptical look will turn away most users.
- **Use a high-resolution image.** You want your picture to show clearly no matter the size of the device being used to access it. Ask your professional photographer to provide you with high-resolution images for you to use freely.
- **Crop your photograph.** The picture should show a clear image of your face. You can either pre-crop your image before uploading it, or you can use LinkedIn's built-in editing tools.
- **Don't break LinkedIn's photo rules.** LinkedIn will remove your photo if it does not include your photo or a likeness of you. Photos will also be removed if they include a logo, landscape, animal, or image of words or phrases.

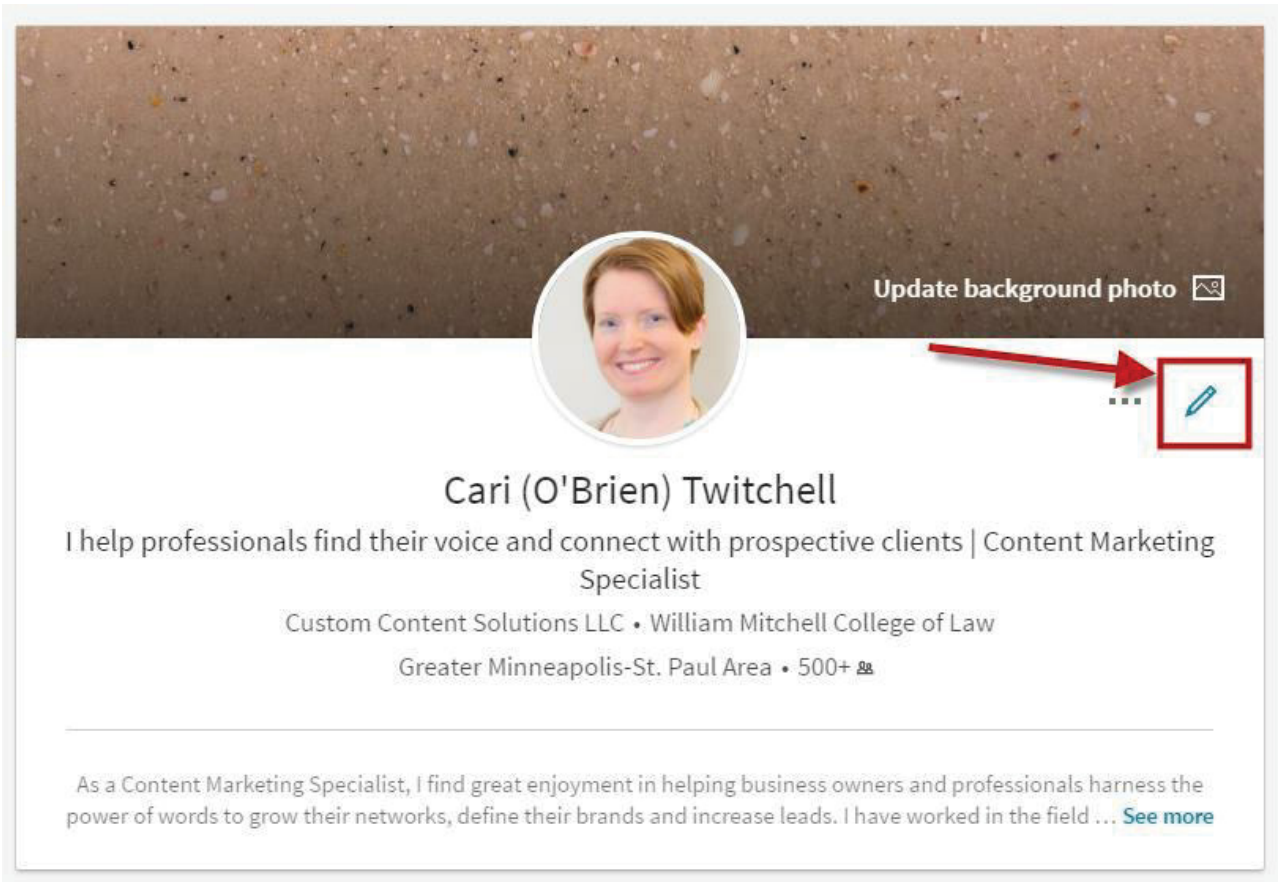
PRO TIP: Update your photo often. This is incredibly important for in-person networking. Folks who have never met you before may pull up your profile to see your face in anticipation of spotting you in a crowded coffee house. If you have lost a lot of weight, completely changed your hair, or got a new pair of glasses, your picture should reflect the current you.

How to Update Your Profile Photo

LinkedIn recently underwent a design update, which changed how you access your profile. To get to your profile, you must now click on the **Me** icon in the top navigation, which will then allow you to choose **View profile**.

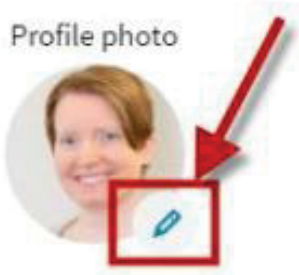


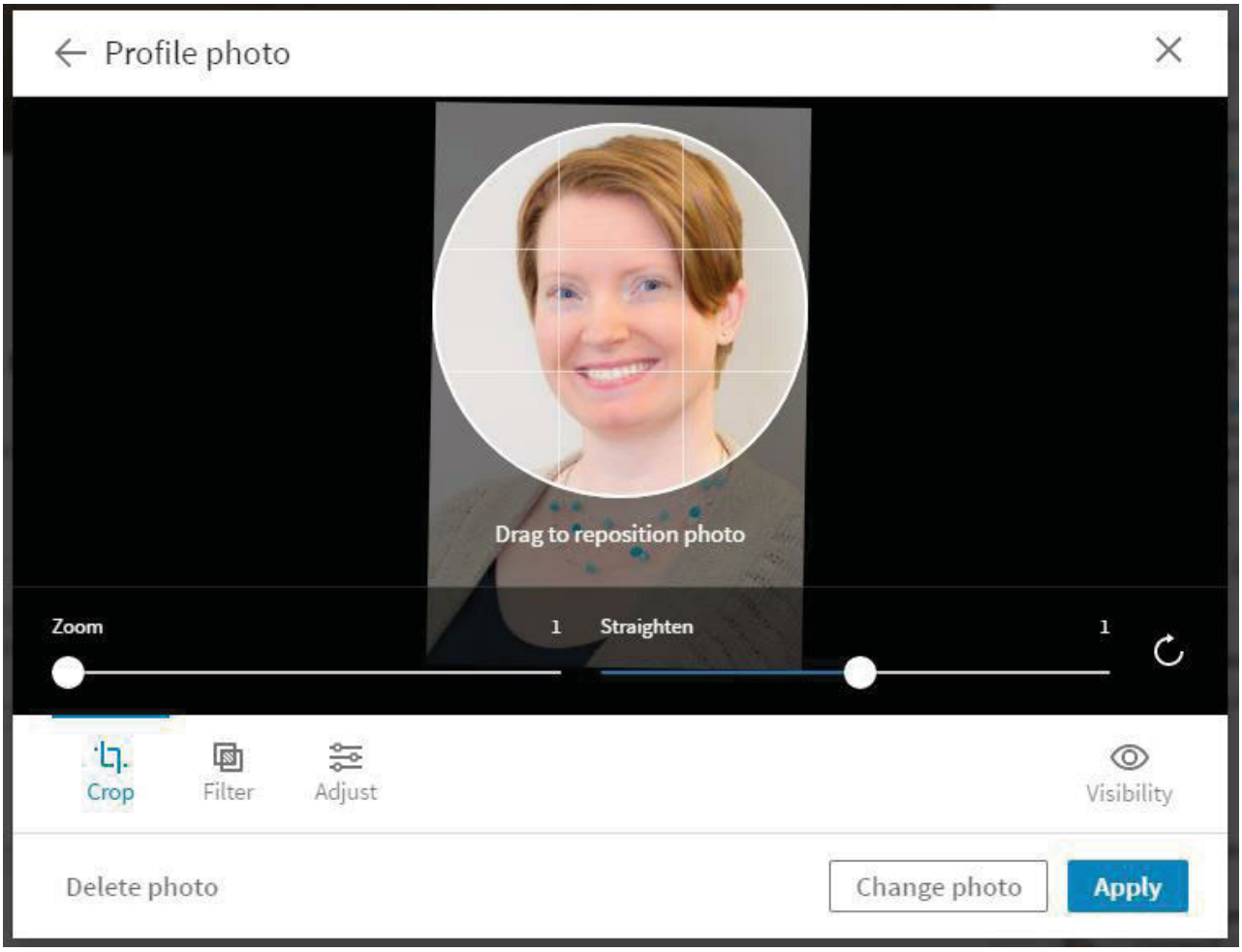
Once on your profile, click the pencil icon to edit your picture:



You'll need to once again click on the pencil icon to add or update your image:

Once in the image editing window, you can remove, update, re-center, and otherwise edit your profile image.





Click **Apply** in that window and then click **Save**.

2. Engaging Headline

The headline, usually used as a job title field by the uninitiated, is arguably the most important feature of your LinkedIn profile. Next to your name and picture, it is the most viewed item of your profile. People see this whether they are connected to you or not—in their news feeds, in a search, or in comments in shared groups.

When you first create your LinkedIn profile, LinkedIn auto-populates this field with your current position, which is often “Attorney (or Lawyer) at [Law Firm].” This doesn’t tell anyone how you can help them or why they should click on your profile to learn more. Use those 120 characters to tell a story that captures attention and encourages LinkedIn users to visit your full profile.

Keep these tips in mind when writing your engaging headline:

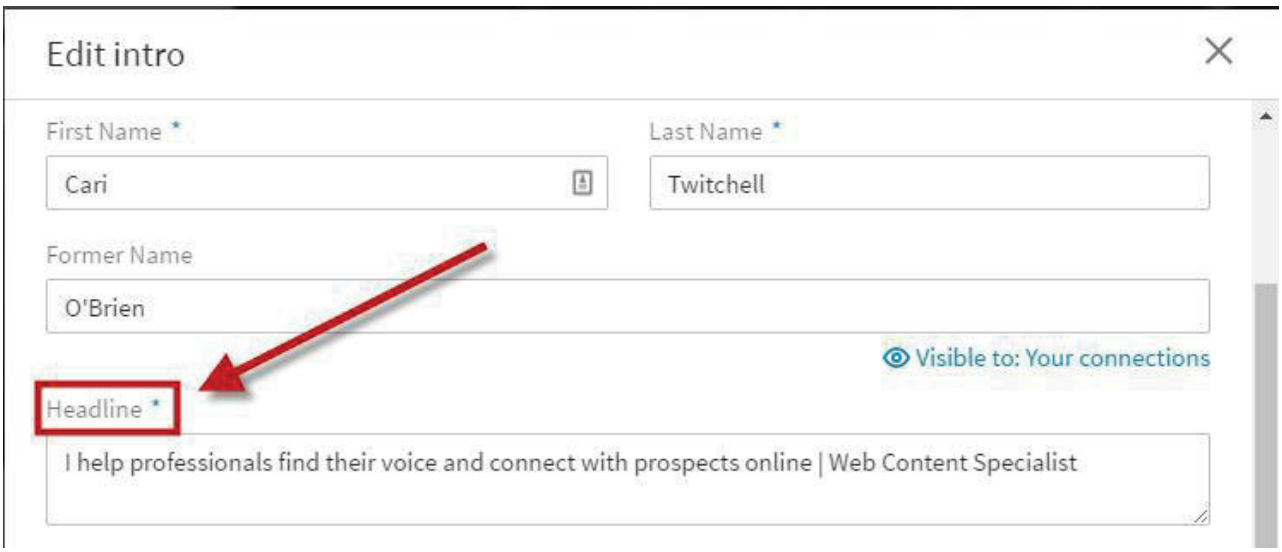
- **Use keywords.** If you want to be found on LinkedIn for more than just your name, you want to incorporate keywords that apply to your practice and clients.
- **Say what you do.** Instead of solely using “attorney” or “lawyer,” consider what type of legal help a person may be seeking when on LinkedIn. If you file patents, talk about protecting entrepreneurs’ copyrights and trademarks. If you handle bankruptcies, talk about helping homeowners get out of debt.
- **Say who you do it for.** You aren’t here to help everyone—there’s only one of you! Speak to your ideal client in your headline.

PRO TIP: Use dashes, pipes, or other punctuation marks to allow you to call out certain features or separate distinct

thoughts. These visuals will help attract the eye in search result listings.

How to Update Your Headline

Follow the same steps you did for updating your profile picture to update your headline. The Headline section falls directly after your name:



Update the section (with no more than 120 characters), scroll down to the bottom of the window, and click **Save**.

3. Targeted Summary

The Summary is the highest visibility space within your profile where you can write specifically about your area of specialty or niche practice. But you want to be smart here—even though this is your profile, the Summary is the perfect place for you to speak to your target audience. Focus on your prospects, saying “you” wherever you can to show you are speaking directly to your audience. Leave the “I” statements for your Experience section.

With 2,000 available characters, you have a fair amount of room. Here are a few ideas to help you optimize what you include in your Summary:

- **Laser focus your copy.** Your Summary is not the place to provide a

Stop Running from the Alimony Man—Everything You Need to Know About Spousal Support Modifications

Kimberly Quach, *Quach Family Law PC, Portland, Oregon*

Michael Yates, *Yates Family Law PC, Portland, Oregon*

NOTES

"Stop running from the alimony man,
or everything you need to know about spousal support (alimony) modifications"

Michael A. Yates of YATES FAMILY LAW, PC
Kimberly A. Quach of QUACH FAMILY LAW, P.C.

I. General Orienting Principles

A. Movant Must Demonstrate A Substantial, Unanticipated Change In Circumstances

1. ORS 107.135 governs post-judgment modifications of spousal support. It permits modification of such awards when the movant demonstrates a "substantial change in economic circumstances of a party." ORS 107.135(3)(a).

2. While not specified in ORS 107.135, the substantial change in circumstances required by ORS 107.135(3)(a) must have been unanticipated at the time of the governing judgment. *In re Marriage of Tomos*, 165 Or App 82, 87, 995 P2d 576 (2000).

3. Defining "Economic Circumstances".

> "ORS 107.135 authorizes a court to modify an award of spousal support if the economic circumstances of a party have substantially changed. Pertinent circumstances include 'income opportunities and benefits of the respective parties from all sources.' ORS 137.135(4)(a) (emphases added). See *Albrich and Albrich*, 162 Or App 30, 35, 987 P2d 542 (1999) (interpreting 'all sources' in ORS 107.135(3)(a) to 'plainly imply[ ] no limits," thus "the breadth of the court's consideration of the parties' income is without limits' (emphasis in original))."

Marriage of Vanlaningham and Vanlaningham, 280 Or App 472, 476, 380 P3d 1043 (2016).

B. Spousal Support's Limitations

1. Spousal support is not intended to constitute an indefinite lien on the obligor's estate. *Matter of Marriage of Hoag*, 122 Or App 230, 233, 857 P2d 208 (1993). The Court's objective is to end the support-dependency relationship within a reasonable time if that can be accomplished without injustice or undue hardship. *Marriage of Grove*, 280 Or 341, 353, 571 P2d

477, modified on other grounds, 280 Or 769, 572 P2d 1320 (1977).

2. "It is manifest that this statutory obligation for support and maintenance should not be so interpreted as to continue the rights of the former [payee spouse] just as though no divorce had been granted. The statute does not contemplate a continuing right in [the payee spouse] to share in future accumulations of wealth by [the] divorced [payor spouse], to which [the payee spouse] contributes nothing."

In re Marriage of Weber, 337 Or 55, 66, 91 P3d 706 (2004) (*quoting Feves v. Feves*, 198 Or 151, 164, 254 P2d 694 (1953)).

C. Determine Purpose For The Original Award. If the Court finds there has been the requisite change in circumstances, it must then determine what the purpose for the original support award was. *In re Marriage of Beebe*, 244 Or App 44, 48, 260 P3d 601 (2011).

D. Determine the Parties' Relative Income Opportunities And Benefits.

"Once an obligor demonstrates the requisite change in circumstances, the court then is tasked, pursuant to ORS 107.135(4)(a)(A) and -(4)(a)(B), with determining the parties' new relative income opportunities and benefits, including retirement benefits. *Albrich*, 162 Or App at 35. After comparing the parties' relative positions, the court must finally determine the appropriate level of spousal support (based upon the totality of the circumstances.)"

In re Marriage of Halsey, 180 Or App 169, 177, 41 P3d 1119 (2002).

E. There Must Be A Nexus Between The Adjudicated Change And The New Support

1. "That additional change in circumstance warranted further adjustment in wife's monthly support. See *Thomas*, 181 Or App at 134, 45 P3d 954 (in modifying a support award, the court must consider what amount is necessary to adjust to any unanticipated circumstances that the court has found)."

Matter of Marriage of Aaroe, 287 Or App 57, 65, ___ P3d ___ (2017)

2. There must be a rational relationship between the modified award and the substantial change of circumstances. In *Matter of Marriage of Maier*, 137

Or App 15, 19, 902 P2d 1214 (1995), *rev. den*., 322 Or 644, 912 P3d 375 (1996), this Court reversed a judgment increasing the obligor's support from $700 to $2,000, and extending the duration from seven years to an indefinite award. The Court initially observed that an "adjustment made in a modification proceeding must be limited to allowing the parties to adjust to the unanticipated change of circumstances." *Id.* at 19. Ultimately, the Court noted that the substantial change was delay in the obligee's retraining, and it simply extended the $700 monthly award from seven years to thirteen years to accommodate a retraining period rather than awarding an indefinite term. *Id*. at 19-20.

F. "A termination or reduction of spousal support is proper when the purpose of the initial award has been met. *Frost and Frost*, 244 Or App 16, 23, 260 P3d 570 (2011). *When the award does not provide any guidance as to its purpose, the court's 'task is to maintain the relative positions of the parties as established in the initial decree[.]' Bates and Bates*, 303 Or 40, 47, 733 P2d 1363 (1987). The ultimate inquiry, however, "in setting the appropriate amount of spousal support[,] is what is just and equitable, taking into account all of the circumstances that have changed since the dissolution." *Harless and Harless*, 276 Or App 49, 57, 366 P3d 402 (2016)."

Marriage of Vanlaningham and Vanlaningham, 280 Or App 472, 477, 380 P3d 1043, 1047 (2016)(emphasis supplied).

II. Number Of Written Opinions Regarding Spousal Support Since 2009 Limitation On *De Novo* Review

A. In 2009, the Oregon legislature amended ORS 19.415 so that the Court of Appeals is not obliged to undertake *de novo* review of family law cases. This amendment applied to all appeals filed after June 4, 2009. *In re Custody of M.T.*, 237 Or App 192, 194, 238 P3d 1003, 1004–05 (2010); ORS 19.415(3)(b).

B. Eight Reported Post-Amendment Spousal Support Modification Cases – The Court of Appeals has written opinions in eight spousal support modification cases following the limitation on *de novo* review. Four were affirmed, two were vacated and remanded, one was reversed and remanded and the last was reversed in part. The Court granted *de novo* review in only one of the eight cases.

;

1. *In re Marriage of Frost*, 244 Or App 16, 260 P3d 570 (2011) – affirmed on *de novo* review;

2. *In re Marriage of Tilson*, 260 Or App 427, 371 P3d 319 (2013) – affirmed;

3. *In re Marriage of Hall and Buth-Hall*, 263 Or App 429, 328 P3d 808 (2014) – affirmed;

4. *Moyer v. Moyer*, 271 Or App 853, 353 P3d 48 (2015) – reversed in part;

5. *In re Marriage of Harless*, 276 Or App 49, 366 P3d 402 (2016) – vacated and remanded;

6. *Marriage of Vanlaningham and Vanlaningham*, 280 Or App 472, 380 P3d 1043 (2016) – vacated and remanded;

7. *Matter of Marriage of Aaroe*, 287 Or App 57, ___ P3d ___ (2017) – affirmed;

8. *Matter of Marriage of Davis and Lallement*, 287 Or App 323, ___ P3d ___ (2017) – reversed and remanded;

III. Best Practices Model: Mode of Analysis

A. Has The Movant Established A Substantial And Unanticipated Change In Circumstances? The trial court determines whether a substantial change in circumstances has occurred. ORS 107.135(3)(a);

B. If So, What Adjustment Is Warranted Based On The Change? If such a change has occurred, it determines the purposes for the original award and decides what adjustment is warranted based on the change in circumstances. *In re Marriage of Beebe*, 248 Or App 271, 275-76, 273 P3d 263 (2012); and

C. What Is Just And Equitable Based On The Totality Of The Circumstances? Based upon the totality of the circumstances, the trial court determines whether the modified amount is just and equitable. *In re Marriage of Harless*, 276 Or App 49, 53–54, 366 P3d 402 (2016) (citing *In re Marriage of McArdle*, 186 Or App 672, 677, 64 P3d 1178 (2003)).

D. The Court has sometimes expressed this approach as a two-step analysis:

> "Our analysis is governed by a two-part framework. First, as a threshold matter, a court must determine 'whether there has been a substantial, unanticipated change in [economic] circumstances since the time of the earlier award.' *Tilson*, 260 Or App at 432, 317 P3d 391 (internal quotation marks omitted; emphasis added; brackets in original). In reviewing the court's determination as to that issue, we 'review the trial court's implicit and explicit findings of historical fact regarding the parties' economic

> circumstances to determine whether those findings are supported by any evidence in the record.' *Id*. at 431, 317 P3d 391. We then 'review the court's determination that those facts constitute a substantial change in economic circumstances of a party under ORS 107.135(3)(a) for legal error.' Id. at 431-32, 317 P3d 391. Second, if the court concludes that there has been a substantial, unanticipated change in economic circumstances, 'then the trial court must determine what amount of support is 'just and equitable under the totality of the circumstances.'' *Id*. at 432, 317 P3d 391 (*quoting Frost and Frost*, 244 Or App 16, 23, 260 P3d 570 (2011)).

Matter of Marriage of Davis and Lallement, 287 Or App 323, ___ P3d ___ (2017).

IV. Best Practices Model: Preparation and Presentation

A. Need comparative UTCR 8.010 Statements – one from the last Judgment and one from the Modification;

B. Need reliable evidence of prospective earnings, including interest earned on investments. Must segregate between the earnings and principal components, especially in retirement cases;

C. Include specific findings regarding the purpose of the original award, citing the statutory provisions in ORS 107.105(1). These findings might state that the objective is to provide the obligee with 35% of the combined gross monthly incomes, the obligee sacrificed career opportunities and therefore requires to support indefinitely, etc. The findings will help frame the inquiry on modification.

D. If you represent the obligee:

1. If s/he is cohabiting or remarried, a cohabitation or premarital agreement is essential to protect that client's interests; *****

2. Discretionary expenditures must be commensurate with standard of living during the marriage;

3. If his/her estate is worth less than at the time of the dissolution, must justify expenditures that depleted the estate;

E. If you represent the obligor:

1. To a lesser extent that with the obligee, if s/he is cohabiting or remarried, a cohabitation or premarital agreement is important to protect the client's interests;

2. If the obligor's estate has increased in value post-divorce, demonstrate this is the product of industry or thrift, and not because of the nature of the asset awarded to him/her in the divorce;

3. Ensure that there are findings in any Judgment regarding what might or might not be anticipated in regard to, for example, the obligee's cohabitation with a potential future spouse, expected earnings increases/decreases, etc. *See, e.g., Boni and Boni*, 208 Or App 592, 145 P3d 331 (2006) (marriage to pre-judgment cohabitant was unanticipated).

V. An Obligee's Post-Judgment Failing Health Can Constitute A Basis For Increasing Or Extending Support.

A. *In re Marriage of Paresi*, 234 Or App 426, 228 P3d 642, *rev. den.,* 348 Or 523, 236 P3d 151 (2010), the Court found that the obligee's post-judgment worsening rheumatoid arthritis, and onset of other significant health problems (including compression fractures, acid reflux, high cholesterol and severe dental conditions), all of which prevented her from working, constituted a change in circumstances. *Id.* at 429, 433-435. Her monthly income therefore reduced by $1,600 while her medical expenses increased by $900 excluding additional medically-necessary charges. *Id.* at 434. As a result, she was forced to sell her residence and was homeless for a time. *Id.* at 430, 432. In contrast, the obligor's income had increased from $9,100 to $24,400 from the date of the last modification. *Id.* at 436. The Court affirmed the trial court's award of $4,000 per month in spousal support, increasing it from $1,500 per month. *Id.*

B. In *Matter of Marriage of Aaroe*, 287 Or App 57, 64 (2017), the Court found that Wife's post-judgment "engulfing mental illness" made it unrealistic that Wife would earn "at least" $5,000 a month. It affirmed an increase in support from $7,000 monthly to $17,000 monthly, and from a definite to an indefinite award, even though Wife's reasonable expenses were found to be unchanged at $17,000 monthly from the divorce to the modification. Noting the Wife had spent beyond her reasonable needs, the Court observed that she required a $10,000 increase because she was depleting her estate, ostensibly due to her mental illness.

VI. Totality Of The Circumstances – The Court can consider any factors it deems relevant when it engages in this aspect of the analysis.

A. Ultimately, the trial court must decide whether a modification of support is "just and equitable under the totality of the circumstances." *In re Marriage of Harless*, 276 Or App 49, 53, 366 P3d 402 (2016) (*citing McArdle*, 186 Or App at 677).

B. "[E]ven though the court's objective in fashioning a modification is to maintain the parties' relative positions, the overriding concern remains what is just and equitable under the totality of the circumstances. *Harp and Harp*, 214 Or App 520, 524, 167 P3d 457 (2007). In determining what is just and equitable, a court must consider the various factors listed in ORS 107.105(1)(d)(C), most of which the court expressly referenced here . . . And, of particular relevance here, that provision also directs the court to consider '[a]ny other factors the court deems just and equitable.'"

Matter of Marriage of Aaroe, 287 Or App 57, 64, ___ P3d ___ (2017).

VII. Termination of Spousal Support

A. Termination of spousal support is warranted when the obligee's "present circumstances . . . are such that the reasons for the original award no longer exist." *Matter of Marriage of Carter*, 54 Or App 86, 89, 634 P2d 265, rev. den., 292 Or 109, 642 P2d 311 (1981).

B. "Thus, when determining whether to terminate support, the first question is what the purpose of the support was, and the second question is whether the changes satisfy that purpose."

In re Marriage of Barron, 240 Or App 391, 397, 246 P3d 500 (2011) (*citing In Re Marriage of Rubey*, 165 Or App 616, 621, 996 P2d 1006 (2000)).

C. Narrowing The Discrepancy In The Parties' Earnings – The Rule Of Proportionality.

1. When income disparity is the justification for an award of spousal support, the Court is required to compare the parties' relative incomes at the time of divorce and the time of trial when deciding whether to terminate the support. *In re Marriage of McArdle*, 186 Or App 672, 676-77, 64 P3d 1178 (2003).

2. *In re Marriage of Frost*, 244 Or App 16, 23, 260 P3d 570, 574 (2011), found a $3,000 per month spousal support award "was intended to narrow the discrepancy between the parties' incomes" where husband, a pharmacist, earned $12,000 per month and the wife earned $3,200 per month.

3. *In re Marriage of Gibson*, 217 Or App 12, 174 P3d 1066 (2007), the court reduced the retiring obligor's spousal support obligation from $500 per month to $250 per month largely because the original award provided

39% of the parties' combined gross incomes to Wife and 61% to Husband, and the reduced award effectively replicated that pro rata division of income. 217 Or App at 16, 23.

4. *In re Marriage of Halsey*, 180 Or App 169, 179, 41 P3d 1119 (2002) -- "That support level roughly preserves – at least on an after-tax basis – the overall percentage division of income between the parties that was provided by the initial award." (footnote omitted).

5. *Matter of Marriage of Bates*, 303 Or 40, 733 P2d 1363 (1987), the trial court terminated husband's spousal support award upon wife's remarriage noting that wife had $1,117 more per month available to her, thereby providing her with "significantly more money than the trial judge originally found to represent an equitable distribution of income." 303 Or 47.

6. *In re Marriage of Hutchinson*, 187 Or App 733, 742, 69 P3d 815 (2003) ("Although the correlation is not talismanic, that amount, as did the initial support award, stands at 30 percent of husband's pretax earning capacity.")

7. Where the purpose of the original award is not clear, the Court must attempt to "maintain the relative positions of the parties as established in the initial [judgment] in light of their changed circumstances." *Matter of Marriage of Bates,* 303 Or 40, 47, 733 P2d 1363 (1987).

   Based upon these principles, the Court on modification attempts to replicate the same proportion of incomes on modification as was awarded in the original judgment. "The original support award presumptively reflects the most equitable distribution of income between the parties." Id.

8. Most recently, in *In re Marriage of Harless*, 276 Or App 49, 56, 366 P3d 402 (2016), the court remanded a supplemental judgment modifying support with instructions to the trial court to begin its analysis by replicating the net incomes available to each party.

9. “In *McArdle*, we explained that a court may depart from “pure proportionality” in modifying a support award when doing so is just and equitable under the totality of the circumstances:

   > “[M]aintaining the parties' positions relative to each other is where we ‘begin’ our analysis. For example, in both *Moser and Gilmore*, 184 Or App 377, 56 P3d 417 (2002), and *Hoag and Hoag*, 152 Or App 288, 954 P2d 184 (1998), we departed from pure proportionality. Our duty to do what is just and equitable under the

totality of the circumstances overrides mathematical precision. We may accomplish that objective without doing violence to the mandate of Bates by focusing on all of the circumstances that have changed since the dissolution, including the noneconomic ones." 86 Or App at 677, 64 P3d 1178 (some citations omitted).

In re Marriage of Harless, 276 Or App 49, 54, 366 P3d 402 (2016).

D. Be Cautious Not To Divide Parties Property Again In the Guise Of Support.

"Among other equitable considerations at play is the notion that, having divided their existing assets at the time of dissolution, parties generally expect to separately retain and acquire assets after dissolution without automatically subjecting them to further division in the guise of spousal support."

In re Marriage of Gibson, 217 Or App 12, 21, 174 P3d 1066 (2007).

VIII. ORS 107.407 (The 10 Year Rule) – Probably not a good mechanism to terminate or reduce support.

A. "ORS 107.407 provides, in relevant part:

"If an individual has paid an amount of money in installments for more than 10 years for the support of a former spouse under a judgment of annulment or dissolution of marriage that ordered such payment, and when the former spouse has not made a reasonable effort during that period of time to become financially self-supporting and independent of the support provided under the judgment, the individual paying the support may petition the court that issued the judgment to set aside so much of the judgment as may provide for the support of the former spouse."

B. "ORS 107.407 does not require a supported spouse to become financially self-supporting within 10 years, only that the spouse makes 'a reasonable effort during that period of time.' *Porter and Porter*, 100 Or App 401, 406–07, 786 P2d 740, *rev. den.*, 310 Or 281, 796 P2d 1206 (1990) (affirming trial court's denial of motion to terminate spousal support when wife's health problems interfered with her efforts to become self-sufficient). Unless the supporting spouse satisfies the burden of persuasion to show that the supported spouse has not made reasonable efforts to become financially self-supporting and independent of the support, the court may not set aside the support provision. *Alley and Alley*, 98 Or App 450, 455, 779 P2d 210 (1989). However, 'if the court finds that

the party receiving support has not made a reasonable effort during the previous 10 years to become financially self-supporting and independent of the support provided under the judgment, the court shall order that support terminated.' ORS 107.412(2) (emphasis added)."

In re Marriage of Hall and Buth-Hall, 263 Or App 429, 437–38, 328 P3d 808 (2014).

IX. Modification On Good Faith Retirement

A. A change in circumstances is established when a party retires in good faith. *See* ORS 107.135(4)(b). Such retirement is deemed a substantial change because, while retirement is foreseeable, spousal support determinations predicated on future retirement are unduly speculative. *In re Marriage of Wilson*, 186 Or App 515, 522, 63 P3d 1244 (2003); *In re Albrich*, 162 Or App 30, 36, 857 P2d 208 (1999) (use of retirement and investment accounts as source of income for spousal support unanticipated).

B. In some jurisdictions, retirement can be deemed anticipated, and therefore bars modification. In this sense, Oregon's law is more flexible and adaptable because it allows the parties to evaluate appropriate support levels based on the actual circumstances at the time.

C. "[W]e find that it was not anticipated at the time of the dissolution that husband would have no income from employment or that his retirement and investment accounts would be a necessary source of income to fund his spousal support obligation. In that same vein, we find it significant that husband's retirement and investment accounts were originally the subject of the property division in which wife also received a substantial share. *See Tiley v. Tiley*, 147 Or App 262, 266, 936 P2d 367, *rev. den.* 325 Or 491, 941 P2d 1021 (1997) (retirement benefits that accrue during the marriage are assets that are subject to division as marital property)."

In re Marriage of Albrich, 162 Or App 30, 37, 987 P2d 542 (1999).

D. When a party retires, the determination of the parties' "relative economic circumstances" becomes more difficult because the line between income and principle is not distinct:

"[W]here the parties have retired at the time of a modification trial and the obligor has begun to deplete his or her retirement funds for living expenses, the goal of maintaining the relative positions of the parties can lead to a blurring of the distinction between the income and principal components of a retirement account."

* * *

> ". . . [A] meticulous consideration of retirement benefits should, if the record permits, distinguish between the income and principal components of such benefits."

In *In re Marriage of Gibson*, 217 Or App 12, 21, 174 P3d 1066 (2007), 217 Or App at 21.

E. It is axiomatic that retirement benefits are divisible upon divorce, and this division is non-modifiable. *Matter of Marriage of Tiley*, 147 Or App 262, 266, 936 P2d 367, rev. den., 325 Or 491, 941 P2d 1021 (1997). The trial court must be able to assess the retirement assets' "future grown potentials or the role that a party's [post-divorce] industry and thrift may have played in the growth of the accounts." *Gibson*, 217 Or App at 21.

F. *In re Marriage of Reaves*, 236 Or App 313, 323, 236 P3d 803 (2010), the Court noted that "taking potential retirement benefits into consideration does not necessarily mean that those benefits are counted as income." Consider, for example:

1. Required minimum distributions from retirement accounts at age 70.5 – are these all income, or are they part income and part principal?

2. Should the Court assume that a retiree will spend his estate down to “0" during his life expectancy, suggesting that his entire retirement portfolio is income? Or should he be entitled to pass some of his estate to other targets?

3. In *Albrich*, 162 Or App 30, 37, 987 P2d 542 (1999), the Court concluded:

> "Although . . . husband's retirement and investment accounts are a potential source of income that must be ‘considered,' we nevertheless conclude that consideration of those accounts does not . . . mandate that husband's support obligation remain at the level set in the original dissolution judgment."

G. Notably, ORS 107.135(4)(a)(B) requires the trial court to consider the parties' "retirement benefits," not retirement assets. The statute employs the broader term "asset" to describe everything the parties own. See, i.e., ORS 107.135(4)(a)(A), ORS 107.135(4)(c)(B),-(c)(C) and -(c)(D). Because ORS 107.135(4)(a) distinguishes between "retirement benefits" and "retirement assets," does this suggest that retirement benefits include income generated from the retirement assets or the parties' actual use of retirement assets? *See Portland Gen. Elec. Co.*

v. Bureau of Labor and Indus., 317 Or 606, 611, 859 P2d 1143 (1993).

H. *In re Marriage of Harless*, 276 Or App 49, 56–57, 366 P3d 402 (2016), the Court of Appeals remanded for determination of the original support award, a comparison of the parties' relative positions at divorce and modification, and finally a new analysis regarding whether support should be modified:

> "On remand, the trial court's analysis should be guided by whether, in light of the parties' changed circumstances, modification or termination of support would be consistent with maintaining the relative positions of the parties, as set out by the MSA. *Reaves*, 236 Or App at 319, 236 P3d 803; see also *Gibson,* 217 Or App at 21–23, 174 P3d 1066 (a modified support award that closely approximated the overall percentage division of cash flow between the parties as set out in the judgment of dissolution was just and equitable). That determination requires the court to ascertain what those relative positions are; the court should determine the proportionality of the division effectuated by the MSA, as well as the "nature and amount of the resources that are now available to each of the parties." *Reaves*, 236 Or App at 319–20, 236 P3d 803. Husband, as the party seeking the termination, bears the burden of showing that termination of the support is warranted. *Id.* at 319, 236 P3d 803. However, as noted, the overriding consideration in setting the appropriate amount of spousal support is what is just and equitable, taking into account all of the circumstances that have changed since the dissolution. *McArdle*, 186 Or App at 677, 64 P3d 1178."

X. Modification on Remarriage

A. "Remarriage is not, by itself, grounds for termination of spousal support. Id. at 620, 996 P2d 1006. That is because '[s]ome of the purposes behind spousal support * * * are not altered or ended by remarriage.' **574 *Bates*, 303 Or at 44, 733 P2d 1363."

In re Marriage of Frost, 244 Or App 16, 23, 260 P3d 570 (2011).

B. Potential Shared Income/Marriage of Frost

1. "[T]he first factor in evaluating spousal support after remarriage is the 'potential shared income' of the obligee spouse." *Lenhart and Lenhart*, 213 Or App 480, 487, 162 P3d 292 (2007) (citing *Bates*, 303 Or. at 47, 733 P2d 1363). The potential shared income is then weighed against the standard of living that the initial award was

intended to ensure for the obligee spouse. *Id*. If, as a result of remarriage, an obligee's means of support have increased to the point where, without the spousal support, they are equal to or greater than the income the support was intended to ensure, the support should be terminated, unless it would be inequitable to do so. *Bates*, 303 Or. at 47–48, 733 P2d 1363 (terminating support); *Barron and Barron*, 240 Or App 391, 246 P3d 500 (2011) (same)."

In re Marriage of Frost, 244 Or App 16, 24, 260 P3d 570 (2011).

2. "[W]ife's remarriage has increased her potential shared income. The dissolution judgment was intended to ensure wife a monthly income of $6,200 ($3,200 in employment income and $3,000 in spousal support). After wife remarried, her potential shared monthly income, excluding spousal support, was $44,866 ($3,200 in employment income and $41,666 in Johnson's income). If, as in Hall, we presume that one-half of that potential shared income is available to wife, her income has increased from $6,200 to $22,433."

In re Marriage of Frost, 244 Or App 16, 24–25, 260 P3d 570, 574 (2011).

3. "In his trial testimony, Johnson candidly acknowledged that the prenuptial agreement was structured to terminate with husband's spousal support obligation. After December 2011, that agreement required Johnson to pay all of his and wife's joint living expenses. Although, before that date, the agreement required wife to pay one third of their housing expenses and one half of their remaining joint living expenses, in fact Johnson clearly paid the lion's share of overall family expenses. The sum of $4,000 per month that Johnson was required to pay toward joint housing expenses represented only 10 percent of his monthly income, and it merely scratched the surface of Johnson's actual contribution to wife's economic support. That contribution consisted of a substantial **575 residence and lifestyle, including expensive vacations. As indicators of his extra-contractual largesse, Johnson previously had paid wife $50,000 in return on a short-term investment, and he had cosigned a home equity loan that enabled wife to loan hundreds of thousands of dollars to her son.

"The persuasive weight of the evidence showed that, irrespective of the expense sharing formula set out in the prenuptial agreement, after her remarriage to Johnson, wife was able to lead a lifestyle that substantially exceeded her lifestyle during her marriage to

husband."

In re Marriage of Frost, 244 Or App 16, 25, 260 P3d 570 (2011).

C. Availability Of New Spouse's Income

1. "[W]ith respect to whether the unanticipated remarriage substantially changed wife's economic circumstances, the key question is the extent to which Prucha's [the new spouse's] income was, in fact, available to the new marital household. *Rubey and Rubey*, 165 Or App 616, 622, 996 P2d 1006 (2000)."

In re Marriage of Tilson, 260 Or App 427, 433, 317 P3d 391 (2013).

2. The trial court is required to make findings regarding income *actually available* to the obligee spouse when evaluating a modification case.

"The trial court's task was to determine whether and to what extent Davis's income was actually available to wife, which is not a matter of discretion. Rather, the overall record must support the court's factual findings as to what amount of income is, in fact, available to wife. In this case, because the court did not take into consideration the ways in which Davis's independent obligations might limit the availability of his income to wife, we cannot conclude that $3,718 is actually available to wife."

Matter of Marriage of Davis and Lallement, 287 Or App 323, ___ P3d ___ (2017).

D. Remarriage May Not Imply Purposes Of Original Award Were Satisfied

"[T]he court permissibly concluded that most of the original purposes behind the award of spousal support were not satisfied by wife's remarriage. The dissolution judgment stated that the purposes of the award were to support wife because of the length of the marriage, because wife had sacrificed her own career to advance husband's career and to care for husband's son, because of the difference in the parties' incomes, and because wife did not have the same benefits from employment that husband did. Wife's remarriage did not satisfy most of those purposes. It did not change the length of her prior marriage, it did not alter the career sacrifices that she made to advance husband's career and to care for husband's son, and it did not result in wife receiving full benefits from employment (or through Prucha).

In re Marriage of Tilson, 260 Or App 427, 435, 317 P3d 391, 397 (2013) (potential shared income remained below $3,600 threshold contemplated in the Judgment).

XI. Life Insurance

A. Support obligors are required to maintain life insurance to secure those obligations pursuant to ORS 107.810, which provides as follows:

> "It is the policy of the State of Oregon to encourage persons obligated to support other persons as the result of a dissolution or annulment of marriage or as the result of a legal separation to obtain or cooperate in the obtaining of life insurance adequate to provide for the continued support of those persons in the event of the obligor's death."

B. The amount of required life insurance must be commensurate with the total amount of support ordered. Thus, an obligor was not required to maintain between $150,000 and $200,000 in life insurance for a $22,000 remaining obligation. *Moyer v. Moyer*, 271 Or App 853, 353 P3d 48 (2015). The Court found that oversecuring spousal support would result in a windfall to the obligee. 271 Or App 855 n2.

NOTES

Extreme Makeover: Child Support Edition—What's Changed and Changing in the Oregon Child Support Program

Kate Cooper Richardson, *Director Division of Child Support and Oregon Child Support Program*

Michael Ritchey, *Oregon Division of Child Support*

NOTES

Enrolled
Senate Bill 512

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with presession filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary)

CHAPTER .....

AN ACT

Relating to parentage; creating new provisions; and amending ORS 25.020, 25.075, 25.082, 25.650, 25.750, 107.179, 107.425, 109.012, 109.030, 109.070, 109.072, 109.073, 109.092, 109.094, 109.096, 109.098, 109.103, 109.124, 109.125, 109.145, 109.155, 109.175, 109.239, 109.243, 109.247, 109.251, 109.252, 109.254, 109.259, 109.264, 109.315, 109.321, 109.326, 109.704, 112.105, 163.565, 180.320, 180.380, 192.535, 192.539, 416.400, 419A.004, 419B.395, 419B.839, 419B.875, 432.088, 432.098, 432.103 and 432.245 and ORCP 4 K.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS chapter 109.

SECTION 2. (1) Parentage may be established between a person and a child by:

(a) The person having given birth to the child;

(b) An unrebutted presumption of parentage under ORS 109.070;

(c) An adjudication of the person's maternity or paternity;

(d) Adoption of the child by the person;

(e) An effective acknowledgement of paternity by the man under ORS 109.070 or pursuant to the laws of another state, unless the acknowledgement has been rescinded or successfully challenged;

(f) Establishment of paternity by an administrative order issued pursuant to ORS chapter 416;

(g) Filiation proceedings; or

(h) Parentage being established or declared by another provision of law.

(2) A person is the mother of a child to whom the person gives birth.

SECTION 3. ORS 109.070, as amended by section 42, chapter 106, Oregon Laws 2016, is amended to read:

109.070. (1) The [*paternity*] **parentage** of a person [*may be established as follows*] **is rebuttably presumed if**:

(a) [*A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other*] **The person is married to the birth mother** at the time of the child's birth, without a judgment of separation, regardless of whether the marriage is void.

(b) [*A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other*] **The person is married to the birth mother** and the child is born within 300 days after the marriage is terminated by death, annulment or dissolution or after entry of a judgment of separation.

[*(c) By the marriage of the parents of a child after the birth of the child, and the parents filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.098.*]

[*(d) By filiation proceedings.*]

[*(e) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.098. Except as otherwise provided in subsections (4) to (7) of this section, this filing establishes paternity for all purposes.*]

[*(f) By having established paternity through a voluntary acknowledgment of paternity process in another state.*]

[*(g) By paternity being established or declared by other provision of law.*]

(2) The [*paternity*] **parentage** of a child established under subsection (1)(a) or [*(c)*] **(4)(a)** of this section may be challenged in an action or proceeding by [*the husband or wife*] **either spouse**. The [*paternity*] **parentage** may not be challenged by a person other than [*the husband or wife*] **a spouse** as long as the [*husband and wife*] **spouses** are married and **are** cohabiting, unless [*the husband and wife*] **both spouses** consent to the challenge.

(3) If the court finds that it is just and equitable, giving consideration to the interests of the parties and the child, the court shall admit evidence offered to rebut the presumption of [*paternity*] **parentage** in subsection (1)[*(a) or (b)*] of this section.

(4) The paternity of a person may be established by a voluntary acknowledgement as follows:

(a) By the marriage of the parents of a child after the birth of the child, and the parents filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgement of paternity form as provided by ORS 432.098.

(b) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgement of paternity form as provided under ORS 432.098. Except as otherwise provided in subsections (5) and (8) of this section, a filing under this paragraph establishes paternity for all purposes.

(c) By establishment of paternity through a voluntary acknowledgement of paternity in another state.

[*(4)(a)*] **(5)(a)** A party to a voluntary acknowledgment of paternity may rescind the acknowledgment within the earlier of:

(A) Sixty days after filing the acknowledgment; or

(B) The date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party. For the purposes of this subparagraph, the date of a proceeding is the date on which an order is entered in the proceeding.

(b) To rescind the acknowledgment, the party shall sign and file with the State Registrar of the Center for Health Statistics a written document declaring the rescission.

[*(5)(a)*] **(6)(a)** A signed voluntary acknowledgment of paternity filed in this state may be challenged and set aside in circuit court at any time after the 60-day period referred to in subsection [*(4)*] **(5)** of this section on the basis of fraud, duress or a material mistake of fact.

(b) The challenge may be brought by:

(A) A party to the acknowledgment;

(B) The child named in the acknowledgment; or

(C) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B and the department or the administrator reasonably believes that the acknowledgment was signed because of fraud, duress or a material mistake of fact.

(c) The challenge shall be initiated by filing a petition with the circuit court. Unless otherwise specifically provided by law, the challenge shall be conducted pursuant to the Oregon Rules of Civil Procedure.

(d) The party bringing the challenge has the burden of proof.

(e) Legal responsibilities arising from the acknowledgment, including child support obligations, may not be suspended during the challenge, except for good cause.

(f) If the court finds by a preponderance of the evidence that the acknowledgment was signed because of fraud, duress or material mistake of fact, the court shall set aside the acknowledgment unless, giving consideration to the interests of the parties and the child, the court finds that setting aside the acknowledgment would be substantially inequitable.

[*(6)*] **(7)** Within one year after a voluntary acknowledgment of paternity form is filed in this state and if blood tests, as defined in ORS 109.251, have not been completed, a party to the acknowledgment, or the department if the child named in the acknowledgment is in the care and custody of the department under ORS chapter 419B, may apply to the administrator for an order for blood tests in accordance with ORS 416.443.

[*(7)(a)*] **(8)(a)** A voluntary acknowledgment of paternity is not valid if, before the party signed the acknowledgment:

(A) The party signed a consent to the adoption of the child by another individual;

(B) The party signed a document relinquishing the child to a child-caring agency as defined in ORS 418.205;

(C) The party's parental rights were terminated by a court; or

(D) In an adjudication, the party was determined not to be the biological parent of the child.

(b) Notwithstanding any provision of subsection [*(1)(c) or (e)*] **(4)(a) or (b)** of this section or ORS 432.098 to the contrary, an acknowledgment signed by a party described in this subsection and filed with the State Registrar of the Center for Health Statistics does not establish paternity and is void.

SECTION 4. ORS 109.239 is amended to read:

109.239. **(1) As used in ORS 109.239 to 109.247, "assisted reproduction" means a method of causing pregnancy other than sexual intercourse. "Assisted reproduction" includes, but is not limited to:**

(a) Artificial insemination as defined in ORS 677.355;

(b) Donation of eggs;

(c) Donation of embryos;

(d) In vitro fertilization and transfer of embryos; or

(e) Intracytoplasmic sperm injection.

(2) If the donor of [*semen*] **gametes** used in [*artificial insemination*] **assisted reproduction** is not the mother's [*husband*] **spouse**:

[*(1)*] **(a)** [*Such*] **The** donor shall have no right, obligation or interest with respect to [*a*] **any** child [*born*] **conceived** as a result of the [*artificial insemination*] **assisted reproduction**; and

[*(2)*] **(b)** [*A*] **Any** child [*born*] **conceived** as a result of the [*artificial insemination*] **assisted reproduction** shall have no right, obligation or interest with respect to [*such*] **the** donor.

SECTION 5. ORS 109.243 is amended to read:

109.243. The relationship, rights and obligation between a child [*born*] **conceived** as a result of [*artificial insemination*] **assisted reproduction** and the mother's [*husband*] **spouse** shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's [*husband*] **spouse** if the [*husband*] **spouse** consented to the performance of [*artificial insemination*] **assisted reproduction**.

SECTION 6. ORS 109.247 is amended to read:

109.247. Except as may be otherwise provided by a judicial decree entered in any action filed before October 4, 1977, the provisions of ORS 109.239 to 109.247, 677.355 to 677.365 and 677.990 (3) apply to all persons conceived as a result of [*artificial insemination*] **assisted reproduction**.

SECTION 7. ORS 416.400 is amended to read:

416.400. As used in ORS 416.400 to 416.465, unless the context requires otherwise:

(1) "Administrator" has the meaning given that term in ORS 25.010.

(2) "Court" means any circuit court of this state and any court in another state having jurisdiction to determine the liability of persons for the support of another person.

(3) "Court order" means any judgment or order of any Oregon court that orders payment of a set or determinable amount of support money by the subject parent and does not include an order or judgment in any proceeding in which the court did not order support.

(4) "Department" means the Department of Justice of this state or its equivalent in any other state from which a written request for establishment or enforcement of a support obligation is received under ORS 416.415.

(5) "Dependent child" means any person under the age of 18 who is not otherwise emancipated, self-supporting, married or a member of the Armed Forces of the United States. "Dependent child" also means a child attending school as defined in ORS 107.108.

(6) "Office" means the office of the Division of Child Support or the office of the district attorney.

(7) "Parent" means**:**

(a) The natural or adoptive father or mother of a dependent child or youth offender[.]**;**

(b) A person whose parentage has been established under section 2 of this 2017 Act; or

(c) [*"Parent" also means*] **A** stepparent when the person has an obligation to support a dependent child under ORS 108.045.

(8) "Past support" means the amount of child support that could have been ordered and accumulated as arrears against a parent for the benefit of a child for any period of time during which the child was not supported by the parent and for which period no support order was in effect.

(9) "Public assistance" means any money payments made by the state that are paid to or for the benefit of any dependent child or youth offender, including but not limited to payments made so that food, shelter, medical care, clothing, transportation or other necessary goods, services or items may be provided, and payments made in compensation for the provision of the necessities. "Public assistance" does not include money payments made by the state to or for the benefit of a dependent child as the result of the child's removal from the parent's home against the wishes of the parent, if the Department of Human Services determines after completion of a child protective services assessment that the report of abuse is unfounded according to rules adopted by the Department of Human Services.

(10) "Youth offender" has the meaning given that term in ORS 419A.004.

SECTION 8. ORS 25.020 is amended to read:

25.020. (1) Support payments for or on behalf of any person that are ordered, registered or filed under this chapter or ORS chapter 107, 108, 109, 110, 416, 419B or 419C, unless otherwise authorized by ORS 25.030, shall be made to the Department of Justice as the state disbursement unit:

(a) During periods for which support is assigned under ORS 412.024, 418.032, 419B.406 or 419C.597;

(b) As provided by rules adopted under ORS 180.345, when public assistance is provided to a person who receives or has a right to receive support payments on the person's own behalf or on behalf of another person;

(c) After the assignment of support terminates for as long as amounts assigned remain owing;

(d) For any period during which support enforcement services are provided under ORS 25.080;

(e) When ordered by the court under ORS 419B.400;

(f) When a support order that is entered or modified on or after January 1, 1994, includes a provision requiring the obligor to pay support by income withholding; or

(g) When ordered by the court under any other applicable provision of law.

(2)(a) The Department of Justice shall disburse payments, after lawful deduction of fees and in accordance with applicable statutes and rules, to those persons and entities that are lawfully entitled to receive such payments.

(b) During a period for which support is assigned under ORS 412.024, for an obligee described in subsection (1)(b) of this section, the department shall disburse to the obligee, from child support collected each month, $50 for each child up to a maximum of $200 per family.

(3)(a) When the administrator is providing support enforcement services under ORS 25.080, the obligee may enter into an agreement with a collection agency, as defined in ORS 697.005, for assistance in collecting child support payments.

(b) The Department of Justice:

(A) Shall disburse support payments, to which the obligee is legally entitled, to the collection agency if the obligee submits the completed form referred to in paragraph (c)(A) of this subsection to the department;

(B) May reinstate disbursements to the obligee if:

(i) The obligee requests that disbursements be made directly to the obligee;

(ii) The collection agency violates any provision of this subsection; or

(iii) The Department of Consumer and Business Services notifies the Department of Justice that the collection agency is in violation of the rules adopted under ORS 697.086;

(C) Shall credit the obligor's account for the full amount of each support payment received by the department and disbursed to the collection agency; and

(D) Shall develop the form referred to in paragraph (c)(A) of this subsection, which shall include a notice to the obligee printed in type size equal to at least 12-point type that the obligee may be eligible for support enforcement services from the department or the district attorney without paying the interest or fee that is typically charged by a collection agency.

(c) The obligee shall:

(A) Provide to the department, on a form approved by the department, information about the agreement with the collection agency; and

(B) Promptly notify the department when the agreement is terminated.

(d) The collection agency:

(A) May provide investigative and location services to the obligee and disclose relevant information from those services to the administrator for purposes of providing support enforcement services under ORS 25.080;

(B) May not charge interest or a fee for its services exceeding 29 percent of each support payment received unless the collection agency, if allowed by the terms of the agreement between the collection agency and the obligee, hires an attorney to perform legal services on behalf of the obligee;

(C) May not initiate, without written authorization from the administrator, any enforcement action relating to support payments on which support enforcement services are provided by the administrator under ORS 25.080; and

(D) Shall include in the agreement with the obligee a notice printed in type size equal to at least 12-point type that provides information on the fees, penalties, termination and duration of the agreement.

(e) The administrator may use information disclosed by the collection agency to provide support enforcement services under ORS 25.080.

(4) The Department of Justice may immediately transmit to the obligee payments received from any obligor without waiting for payment or clearance of the check or instrument received if the obligor has not previously tendered any payment by a check or instrument that was not paid or was dishonored.

(5) The Department of Justice shall notify each obligor and obligee by mail when support payments shall be made to the department and when the obligation to make payments in this manner shall cease.

(6)(a) The administrator shall provide information about a child support account directly to a party to the support order regardless of whether the party is represented by an attorney. As used in this subsection, "information about a child support account" means the:

(A) Date of issuance of the support order.

(B) Amount of the support order.

(C) Dates and amounts of payments.

(D) Dates and amounts of disbursements.

(E) Payee of any disbursements.

(F) Amount of any arrearage.

(G) Source of any collection, to the extent allowed by federal law.

(b) Nothing in this subsection limits the information the administrator may provide by law to a party who is not represented by an attorney.

(7) Any pleading for the entry or modification of a support order must contain a statement that payment of support under a new or modified order will be by income withholding unless an exception to payment by income withholding is granted under ORS 25.396.

(8)(a) Except as provided in paragraphs (d) and (e) of this subsection, a judgment or order establishing [*paternity*] **parentage** or including a provision concerning support must contain:

(A) The residence, mailing or contact address, final four digits of the Social Security number, telephone number and final four digits of the driver license number of each party;

(B) The name, address and telephone number of all employers of each party;

(C) The names and dates of birth of the joint children of the parties; and

(D) Any other information required by rule adopted by the Chief Justice of the Supreme Court under ORS 1.002.

(b) The judgment or order shall also include notice that the obligor and obligee:

(A) Must inform the court and the administrator in writing of any change in the information required by this subsection within 10 days after the change; and

(B) May request that the administrator review the amount of support ordered after three years, or such shorter cycle as determined by rule of the Department of Justice, or at any time upon a substantial change of circumstances.

(c) The administrator may require of the parties any additional information that is necessary for the provision of support enforcement services under ORS 25.080.

(d)(A) Upon a finding, which may be made ex parte, that the health, safety or liberty of a party or child would unreasonably be put at risk by the disclosure of information specified in this subsection or by the disclosure of other information concerning a child or party to a [*paternity*] **parentage** or support proceeding or if an existing order so requires, a court or administrator or administrative law judge, when the proceeding is administrative, shall order that the information not be contained in any document provided to another party or otherwise disclosed to a party other than the state.

(B) The Department of Justice shall adopt rules providing for similar confidentiality for information described in subparagraph (A) of this paragraph that is maintained by an entity providing support enforcement services under ORS 25.080.

(e) The Chief Justice of the Supreme Court may, in consultation with the Department of Justice, adopt rules under ORS 1.002 to designate information specified in this subsection as confidential and require that the information be submitted through an alternate procedure to ensure that the information is exempt from public disclosure under ORS 192.502.

(9)(a) Except as otherwise provided in paragraph (b) of this subsection, in any subsequent child support enforcement action, the court or administrator, upon a showing of diligent effort made to locate the obligor or obligee, may deem due process requirements to be met by mailing notice to the last-known residential, mailing or employer address or contact address as provided in ORS 25.085.

(b) Service of an order directing an obligor to appear in a contempt proceeding is subject to ORS 33.015 to 33.155.

(10) Subject to ORS 25.030, this section, to the extent it imposes any duty or function upon the Department of Justice, shall be deemed to supersede any provisions of ORS chapters 107, 108, 109, 110, 416, 419A, 419B and 419C that would otherwise impose the same duties or functions upon the county clerk or the Department of Human Services.

(11) Except as provided for in subsections (12), (13) and (14) of this section, credit may not be given for payments not made to the Department of Justice as required under subsection (1) of this section.

(12) The Department of Justice shall give credit for payments not made to the department:

(a) When payments are not assigned to this or another state and the obligee and obligor agree in writing that specific payments were made and should be credited;

(b) When payments are assigned to the State of Oregon, the obligor and obligee make sworn written statements that specific payments were made, canceled checks or other substantial evidence is presented to corroborate their statements and the obligee has been given prior written notice of any potential criminal or civil liability that may attach to an admission of the receipt of assigned support;

(c) When payments are assigned to another state and that state verifies that payments not paid to the department were received by the other state; or

(d) As provided by rule adopted under ORS 180.345.

(13) An obligor may apply to the Department of Justice for credit for payments made other than to the Department of Justice. If the obligee or other state does not provide the agreement, sworn statement or verification required by subsection (12) of this section, credit may be given pursuant to order of an administrative law judge assigned from the Office of Administrative Hearings after notice and opportunity to object and be heard are given to both obligor and obligee. Notice shall be served upon the obligee as provided by ORS 25.085. Notice to the obligor may be by regular mail at the address provided in the application for credit. A hearing conducted under this subsection is a contested case hearing and ORS 183.413 to 183.470 apply. Any party may seek a hearing de novo in the circuit court.

(14) Nothing in this section precludes the Department of Justice from giving credit for payments not made to the department when there has been a judicially determined credit or satisfaction or when there has been a satisfaction of support executed by the person to whom support is owed.

(15) The Department of Justice shall adopt rules that:

(a) Direct how support payments that are made through the department are to be applied and disbursed; and

(b) Are consistent with federal regulations.

SECTION 9. ORS 25.075 is amended to read:

25.075. (1) Notwithstanding the provisions of ORS 25.080, the Department of Justice may enter into cooperative agreements with Indian tribes or tribal organizations within the borders of this state, if the Indian tribe or tribal organization demonstrates that the tribe or organization has an established tribal court system or a Court of Indian Offenses with the authority to:

(a) Establish [*paternity*] **parentage**;

(b) Establish, modify and enforce support orders; and

(c) Enter support orders in accordance with child support guidelines established by the tribe or organization.

(2) The agreements must provide for the cooperative delivery of child support enforcement services and for the forwarding of all child support collections pursuant to the functions performed by the tribe or organization to the department, or conversely, by the department to the tribe or organization, which shall distribute the child support collections in accordance with the agreement.

SECTION 10. ORS 25.082 is amended to read:

25.082. (1) When services are being provided under Title IV-D of the Social Security Act, the enforcing agency of this or any other state may subpoena financial records and other information needed to establish [*paternity*] **parentage** or to establish, modify or enforce a support order. The subpoena may be served on a party or on a public or private entity. Service of the subpoena may be by certified mail.

(2) A party or public or private entity that discloses information to the enforcing agency in compliance with a subpoena served under subsection (1) of this section is not liable to any person for any loss, damage or injury arising out of the disclosure.

(3) Upon request of an enforcing agency of another state, only a court or enforcing agency of Oregon may enforce a subpoena issued by the enforcing agency of the other state.

(4) Notwithstanding ORS 192.600, a party or public or private entity that fails without good cause to comply with a subpoena issued under this section is subject to a civil penalty not to exceed $250. A civil penalty under this section must be imposed in the manner provided by ORS 183.745.

(5) The Department of Justice shall adopt rules to implement the provisions of this section.

SECTION 11. ORS 25.650 is amended to read:

25.650. (1) As used in this section, "consumer reporting agency" means any person that, for monetary fees or dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and that uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(2)(a) Notwithstanding any other law, and subject to rules established by the Department of Justice, for cases in which there is past due support, the department shall:

(A) Report periodically to consumer reporting agencies the name of any obligor who is delinquent in the payment of support and the amount owed by the obligor; and

(B) Otherwise make available to a consumer reporting agency upon its request information regarding the amount of past due support owed by an obligor.

(b) The department shall provide advance notice to both the obligor and the obligee concerning the proposed reporting of information to the consumer reporting agencies. The notice must inform both parties:

(A) Of the amount of the past due support the department will report to the consumer reporting agencies;

(B) That the department will continue to report the past due support amount owed without sending additional notice to the parties;

(C) Of the obligor's right to request an administrative review within 30 days after the date of the notice; and

(D) Of the issues that may be considered on review.

(c) If an obligor requests an administrative review, the department may not report the past due support amount until the review is complete.

(d) A party may appeal a decision from the administrative review under ORS 183.484. An appeal of the decision does not stay the department from making reports to consumer reporting agencies.

(3)(a) If [*paternity*] **parentage** has been established and a consumer report is needed for the purpose of establishing or modifying a child support order, the administrator may request that a consumer reporting agency provide a report.

(b) At least 10 days prior to making a request under paragraph (a) of this subsection, the administrator shall notify the obligor or obligee whose report is requested, by certified or registered mail, that the report will be requested.

(4) The department shall report information under subsection (2) of this section only to a person that has furnished evidence satisfactory to the department that the person is a consumer reporting agency.

(5) When the department has made a report to a consumer reporting agency under subsection (2) of this section, the department shall promptly notify the consumer reporting agency when the department's records show that the obligor no longer owes past due support.

SECTION 11a. If Senate Bill 513 becomes law, section 11 of this 2017 Act (amending ORS 25.650) is repealed.

SECTION 12. ORS 25.750 is amended to read:

25.750. (1) All licenses, certificates, permits or registrations that a person is required by state law to possess in order to engage in an occupation or profession or to use a particular occupational or professional title, all annual licenses issued to individuals by the Oregon Liquor Control Commission, all driver licenses or permits issued by the Department of Transportation and recreational hunting and fishing licenses, as defined by rule of the Department of Justice, are subject to suspension by the respective issuing entities upon certification to the issuing entity by the administrator that a child support case record is being maintained by the Department of Justice, that the

case is being enforced by the administrator under the provisions of ORS 25.080 and that one or both of the following conditions apply:

(a) That the party holding the license, certificate, permit or registration is in arrears under any child support judgment or order, in an amount equal to the greater of three months of support or $2,500, and:

(A) Has not entered into an agreement with the administrator with respect to the child support obligation; or

(B) Is not in compliance with an agreement entered into with the administrator; or

(b) That the party holding the license, certificate, permit or registration has failed, after receiving appropriate notice, to comply with a subpoena or other procedural order relating to a [*paternity*] **parentage** or child support proceeding and:

(A) Has not entered into an agreement with the administrator with respect to compliance; or

(B) Is not in compliance with such an agreement.

(2) The Department of Justice by rule shall specify the conditions and terms of agreements, compliance with which precludes the suspension of the license, certificate, permit or registration.

SECTION 13. ORS 107.179 is amended to read:

107.179. (1) When either party to a child custody issue, other than one involving temporary custody, whether the issue arises from a case of marital annulment, dissolution or separation, or from a determination of [*paternity*] **parentage**, requests the court to grant joint custody of the minor children of the parties under ORS 107.105, the court, if the other party objects to the request for joint custody, shall proceed under this section. The request under this subsection must be made, in the petition or the response, or otherwise not less than 30 days before the date of trial in the case, except for good cause shown. The court in such circumstances, except as provided in subsection (3) of this section, shall direct the parties to participate in mediation in an effort to resolve their differences concerning custody. The court may order such participation in mediation within a mediation program established by the court or as conducted by any mediator approved by the court. Unless the court or the county provides a mediation service available to the parties, the court may order that the costs of the mediation be paid by one or both of the parties, as the court finds equitable upon consideration of the relative ability of the parties to pay those costs. If, after 90 days, the parties do not arrive at a resolution of their differences, the court shall proceed to determine custody.

(2) At its discretion, the court may:

(a) Order mediation under this section prior to trial and postpone trial of the case pending the outcome of the mediation, in which case the issue of custody shall be tried only upon failure to resolve the issue of custody by mediation;

(b) Order mediation under this section prior to trial and proceed to try the case as to issues other than custody while the parties are at the same time engaged in the mediation, in which case the issue of custody shall be tried separately upon failure to resolve the issue of custody by mediation; or

(c) Complete the trial of the case on all issues and order mediation under this section upon the conclusion of the trial, postponing entry of the judgment pending outcome of the mediation, in which case the court may enter a limited judgment as to issues other than custody upon completion of the trial or may postpone entry of any judgment until the expiration of the mediation period or agreement of the parties as to custody.

(3) If either party objects to mediation on the grounds that to participate in mediation would subject the party to severe emotional distress and moves the court to waive mediation, the court shall hold a hearing on the motion. If the court finds it likely that participation in mediation will subject the party to severe emotional distress, the court may waive the requirement of mediation.

(4) Communications made by or to a mediator or between parties as a part of mediation ordered under this section are privileged and are not admissible as evidence in any civil or criminal proceeding.

SECTION 14. ORS 107.425 is amended to read:

107.425. (1) In suits or proceedings described in subsection (4) of this section in which there are minor children involved, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties for the purpose of protecting the children's future interest. The court may defer the entry of a general judgment until the court is satisfied that its judgment in such suit or proceeding will properly protect the welfare of such children. The investigative findings shall be offered as and subject to all rules of evidence. Costs of the investigation may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

(2) The court, on its own motion or on the motion of a party, may order an independent physical, psychological, psychiatric or mental health examination of a party or the children and may require any party and the children to be interviewed, evaluated and tested by an expert or panel of experts. The court may also authorize the expert or panel of experts to interview other persons and to request other persons to make available to the expert or panel of experts records deemed by the court or the expert or panel of experts to be relevant to the evaluation. The court may order the parties to authorize the disclosure of such records. In the event the parties are unable to stipulate to the selection of an expert or panel of experts to conduct the examination or evaluation, the court shall appoint a qualified expert or panel of experts. The court shall direct one or more of the parties to pay for the examination or evaluation in the absence of an agreement between the parties as to the responsibility for payment but shall not direct that the expenses be charged against funds appropriated for public defense services. If more than one party is directed to pay, the court may determine the amount that each party will pay based on financial ability.

(3)(a) In addition to an investigation, examination or evaluation under subsections (1) and (2) of this section, the court may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans. The services provided to the court and to parents under this section may include:

(A) Gathering information;

(B) Monitoring compliance with court orders;

(C) Providing the parents, their attorneys, if any, and the court with recommendations for new or modified parenting time provisions; and

(D) Providing parents with problem solving, conflict management and parenting time coordination services or other services approved by the court.

(b) Services provided under this section may require the provider to possess and utilize mediation skills, but the services are not comprised exclusively of mediation services under ORS 107.755 to 107.795. If only mediation services are provided, the provisions of ORS 107.755 to 107.795 apply.

(c) The court may order one or more of the parties to pay for services provided under this subsection, if the parties are unable to agree on their respective responsibilities for payment. The court may not order that expenses be charged against funds appropriated for public defense services.

(d) The presiding judge of each judicial district shall establish qualifications for the appointment and training of individuals and panels and the designation of programs under this section. In establishing qualifications, a presiding judge shall take into consideration any guidelines recommended by the statewide family law advisory committee.

(4) The provisions of this section apply when:

(a) A person files a domestic relations suit, as defined in ORS 107.510;

(b) A motion to modify an existing judgment in a domestic relations suit is before the court;

(c) A parent of a child born to [*an unmarried woman*] **a person who is not married** initiates a civil proceeding to determine custody or support under ORS 109.103;

(d) A person petitions or files a motion for intervention under ORS 109.119;

(e) A person or the administrator files a petition under ORS 109.125 to establish [*paternity and paternity*] **parentage and parentage** is established; or

(f) A habeas corpus proceeding is before the court.

(5) Application of the provisions of subsection (1), (2) or (3) of this section to the proceedings under subsection (4) of this section does not prevent initiation, entry or enforcement of an order of support.

(6) The court, on its own motion or on the motion of a party, may appoint counsel for the children. However, if requested to do so by one or more of the children, the court shall appoint counsel for the child or children. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

(7) Prior to the entry of an order, the court on its own motion or on the motion of a party may take testimony from or confer with the child or children of the marriage and may exclude from the conference the parents and other persons if the court finds that such action would be likely to be in the best interests of the child or children. However, the court shall permit an attorney for each party to attend the conference and question the child, and the conference shall be reported.

SECTION 15. ORS 109.012 is amended to read:

109.012. (1)(a) The expenses of a minor child and the education of the minor child are chargeable upon the property of either or both parents who have not married each other. The parents may be sued jointly or separately for the expenses and education of the minor child.

(b) This subsection applies to a [*man*] **person** who is asserted to be a parent of the minor child only when:

(A) A voluntary acknowledgment of paternity form has been filed in this or another state and the period for rescinding or challenging the voluntary acknowledgment on grounds other than fraud, duress or material mistake of fact has expired; or

(B) [*Paternity*] **Parentage** has been established pursuant to an order or judgment entered under ORS 109.124 to 109.230 or 416.430.

(c) As used in this subsection, "expenses of a minor child" includes only expenses incurred for the benefit of a minor child.

(2) Notwithstanding subsection (1) of this section, a parent is not responsible for debts contracted by the other parent after the separation of one parent from the other parent, except for debts incurred for maintenance, support and education of the minor child of the parents.

(3) For the purposes of subsection (2) of this section, parents are considered separated if they are living in separate residences without intention of reconciliation at the time the debt is incurred. The court may consider the following factors in determining whether the parents are separated, in addition to other relevant factors:

(a) Whether the parents subsequently reconciled.

(b) The number of separations and reconciliations of the parents.

(c) The length of time the parents lived apart.

(d) Whether the parents intend to reconcile.

(4) An action under this section must be commenced within the period otherwise provided by law.

SECTION 16. ORS 109.072 is amended to read:

109.072. (1) As used in this section:

(a) "Blood tests" has the meaning given that term in ORS 109.251.

(b)**(A)** "[*Paternity*] **Parentage** judgment" means a judgment or administrative order that:

[*(A)*] **(i)** Expressly or by inference determines the [*paternity*] **parentage** of a child, or that imposes a child support obligation based on the [*paternity*] **parentage** of a child; and

[*(B)*] **(ii)** Resulted from a proceeding in which blood tests were not performed and the issue of [*paternity*] **parentage** was not challenged.

(B) "Parentage judgment" does not include a judgment or administrative order that determines paternity or parentage of a child conceived by assisted reproduction as defined in ORS 109.239.

(c) "Petition" means a petition or motion filed under this section.

(d) "Petitioner" means the person filing a petition or motion under this section.

(2)(a) The following may file in circuit court a petition to vacate or set aside the [*paternity*] **parentage** determination of a [*paternity*] **parentage** judgment, including any child support obligations established in the [*paternity*] **parentage** judgment, and for a judgment of [*nonpaternity*] **nonparentage**:

(A) A party to the [*paternity*] **parentage** judgment.

(B) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B.

(C) The Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the [*paternity*] **parentage** judgment have been assigned to the state.

(b) The petitioner may file the petition in the circuit court proceeding in which the [*paternity*] **parentage** judgment was entered, in a related proceeding or in a separate action. The petitioner shall attach a copy of the [*paternity*] **parentage** judgment to the petition.

(c) If the ground for the petition is that the [*paternity*] **parentage** determination was obtained by or was the result of mistake, inadvertence, surprise or excusable neglect, the petitioner may not file the petition more than one year after entry of the [*paternity*] **parentage** judgment.

(d) If the ground for the petition is that the [*paternity*] **parentage** determination was obtained by or was the result of fraud, misrepresentation or other misconduct of an adverse party, the petitioner may not file the petition more than one year after the petitioner discovers the fraud, misrepresentation or other misconduct.

(3) In the petition, the petitioner shall:

(a) Designate as parties:

(A) All persons who were parties to the [*paternity*] **parentage** judgment;

(B) The child if the child is a child attending school, as defined in ORS 107.108;

(C) The Department of Human Services if the child is in the care and custody of the Department of Human Services under ORS chapter 419B; and

(D) The Administrator of the Division of Child Support of the Department of Justice if the child support rights of the child or of one of the parties to the [*paternity*] **parentage** judgment have been assigned to the state.

(b) Provide the full name and date of birth of the child whose [*paternity*] **parentage** was determined by the [*paternity*] **parentage** judgment.

(c) Allege the facts and circumstances that resulted in the entry of the [*paternity*] **parentage** judgment and explain why the issue of [*paternity*] **parentage** was not contested.

(4) After filing a petition under this section, the petitioner shall serve a summons and a true copy of the petition on all parties as provided in ORCP 7.

(5) The court, on its own motion or on the motion of a party, may appoint counsel for the child. However, if requested to do so by the child, the court shall appoint counsel for the child. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceeding, but may not be charged against funds appropriated for public defense services.

(6) The court may order the mother, the child and the [*man*] **person** whose [*paternity*] **parentage** of the child was determined by the [*paternity*] **parentage** judgment to submit to blood tests. In deciding whether to order blood tests, the court shall consider the interests of the parties and the child and, if it is just and equitable to do so, may deny a request for blood tests. If the court orders blood tests under this subsection, the court shall order the petitioner to pay the costs of the blood tests.

(7) Unless the court finds, giving consideration to the interests of the parties and the child, that to do so would be substantially inequitable, the court shall vacate or set aside the [*paternity*] **parentage** determination of the [*paternity*] **parentage** judgment, including provisions imposing child support obligations, and enter a judgment of [*nonpaternity*] **nonparentage** if the court finds by a preponderance of the evidence that:

(a) The [*paternity*] **parentage** determination was obtained by or was the result of:

(A) Mistake, inadvertence, surprise or excusable neglect; or

(B) Fraud, misrepresentation or other misconduct of an adverse party;

(b) The mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct was discovered by the petitioner after the entry of the [*paternity*] **parentage** judgment; and

(c)**(A)** Blood tests establish that the [*man*] **person** is not the biological [*father*] **parent** of the child **and the parentage determination was based on biological parentage; or**

(B) The parentage determination was not based on biological parentage.

(8) If the court finds that the [*paternity*] **parentage** determination of a [*paternity*] **parentage** judgment was obtained by or was the result of fraud, the court may vacate or set aside the [*paternity*] **parentage** determination regardless of whether the fraud was intrinsic or extrinsic.

(9) If the court finds, based on blood test evidence, that the [*man*] **person** may be the biological [*father*] **parent** of the child and that the cumulative paternity **or parentage** index based on the blood test evidence is 99 or greater, the court shall deny the petition.

(10) The court may grant the relief authorized by this section upon a party's default, or by consent or stipulation of the parties, without blood test evidence.

(11) A judgment entered under this section vacating or setting aside the [*paternity*] **parentage** determination of a [*paternity*] **parentage** judgment and determining [*nonpaternity*] **nonparentage**:

(a) Shall contain the full name and date of birth of the child whose [*paternity*] **parentage** was established or declared by the [*paternity*] **parentage** judgment.

(b) Shall vacate and terminate any ongoing and future child support obligations arising from or based on the [*paternity*] **parentage** judgment.

(c) May vacate or deem as satisfied, in whole or in part, unpaid child support obligations arising from or based on the [*paternity*] **parentage** judgment.

(d) May not order restitution from the state for any sums paid to or collected by the state for the benefit of the child.

(12) If the court vacates or sets aside the [*paternity*] **parentage** determination of a [*paternity*] **parentage** judgment under this section and enters a judgment of [*nonpaternity*] **nonparentage**, the petitioner shall send a court-certified true copy of the judgment entered under this section to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit. Upon receipt of the court-certified true copy of the judgment entered under this section, the state registrar shall correct any records maintained by the state registrar that indicate that the [*male*] party to the [*paternity*] **parentage** judgment is the [*father*] **parent** of the child.

(13) The court may award to the prevailing party a judgment for reasonable attorney fees and costs, including the cost of any blood tests ordered by the court and paid by the prevailing party.

(14) A judgment entered under this section vacating or setting aside the [*paternity*] **parentage** determination of a [*paternity*] **parentage** judgment and determining [*nonpaternity*] **nonparentage** is not a bar to further proceedings to determine [*paternity*] **parentage**, as otherwise allowed by law.

(15) If a [*man*] **person** whose [*paternity*] **parentage** of a child has been determined by a [*paternity*] **parentage** judgment has died, an action under this section may not be initiated by or on behalf of the estate of the [*man*] **person**.

(16) This section does not limit the authority of the court to vacate or set aside a judgment under ORCP 71, to modify a judgment within a reasonable period, to entertain an independent action to relieve a party from a judgment, to vacate or set aside a judgment for fraud upon the court or to render a declaratory judgment under ORS chapter 28.

(17) This section shall be liberally construed to the end of achieving substantial justice.

SECTION 17. ORS 109.073 is amended to read:

109.073. Except as otherwise provided in ORS 25.020, the final four digits of the Social Security number of a parent who is subject to a [*paternity*] **parentage** determination pursuant to ORS [*109.070 (1)(d), (e), (f) or (g) or*] 416.400 to 416.465 **or section 2 (1)(e) or (g) of this 2017 Act** shall be included in the order, judgment or other declaration establishing paternity.

SECTION 18. ORS 109.092 is amended to read:

109.092. When it is determined that a woman is pregnant with a child, the woman and any man to whom she is not married and with whom she engaged in sexual intercourse at approximately the time of conception have an obligation to recognize that the man may be the other person responsible for the conception. During the months of pregnancy, the man may join the woman in acknowledging paternity and assuming the rights and duties of expectant parenthood. If the man acknowledges paternity of the expected child and the woman denies that he is the father or refuses to join him in acknowledging paternity, the man may seek relief under ORS 109.125. If the woman wants the man to join her in acknowledging his paternity of the expected child and the man denies that he is the father or refuses to join her in acknowledging paternity, the woman may seek relief under ORS 109.125. If after the birth of the child the mother decides to surrender the child for adoption and paternity has not been acknowledged as provided in [*ORS 109.070 (1)(e)*] **section 2 (1)(e) of this 2017 Act** or the putative father has not asserted his rights in filiation proceedings, the mother has the right without the consent of the father to surrender the child as provided in ORS 418.270 or to consent to the child's adoption.

SECTION 19. ORS 109.094 is amended to read:

109.094. Upon the [*paternity*] **parentage** of a child being established in the proceedings, [*the father*] **a parent** shall have the same rights as a [*father*] **parent** who is or was married to the mother of the child. The clerk of the court shall certify the fact of [*paternity*] **parentage** to the Center for Health Statistics of the Oregon Health Authority, and the Center for Health Statistics shall amend a record of live birth for the child and issue a new certified copy of the record of live birth for the child.

SECTION 20. ORS 109.096 is amended to read:

109.096. (1) When the [*paternity*] **parentage** of a child has not been established under [*ORS 109.070*] **section 2 of this 2017 Act**, the putative father is entitled to reasonable notice in adoption or other court proceedings concerning the custody of the child, except for juvenile court proceedings, if the petitioner knows, or by the exercise of ordinary diligence should have known:

(a) That the child resided with the putative father at any time during the 60 days immediately preceding the initiation of the proceeding, or at any time since the child's birth if the child is less than 60 days old when the proceeding is initiated; or

(b) That the putative father repeatedly has contributed or tried to contribute to the support of the child during the year immediately preceding the initiation of the proceeding, or during the period since the child's birth if the child is less than one year old when the proceeding is initiated.

(2) Except as provided in subsection (3) or (4) of this section, a verified statement of the mother of the child or of the petitioner, or an affidavit of another person with knowledge of the facts, filed in the proceeding and asserting that the child has not resided with the putative father, as provided in subsection (1)(a) of this section, and that the putative father has not contributed or tried to contribute to the support of the child, as provided in subsection (1)(b) of this section, is sufficient proof to enable the court to grant the relief sought without notice to the putative father.

(3) The putative father is entitled to reasonable notice in a proceeding for the adoption of the child if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Center for Health Statistics of the Oregon Health Authority prior to the child's being placed in the physical custody of a person or persons for the purpose of adoption by them. If the notice of the initiation of filiation proceedings was not on file at the time of the placement, the putative father is barred from contesting the adoption proceeding.

(4) Except as otherwise provided in subsection (3) of this section, the putative father is entitled to reasonable notice in court proceedings concerning the custody of the child, other than juvenile court proceedings, if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Center for Health Statistics prior to the initiation of the proceedings.

(5) Notice under this section is not required to be given to a putative father who was a party to filiation proceedings under ORS 109.125 that were dismissed or resulted in a finding that he was not the father of the child.

(6) The notice required under this section shall be given in the manner provided in ORS 109.330.

(7) No notice given under this section need disclose the name of the mother of the child.

(8) A putative father has the primary responsibility to protect his rights, and nothing in this section shall be used to set aside an act of a permanent nature including, but not limited to, adoption or termination of parental rights, unless the father establishes within one year after the entry of the final judgment or order fraud on the part of a petitioner in the proceeding with respect to matters specified in subsections (1) to (5) of this section.

SECTION 21. ORS 109.098 is amended to read:

109.098. (1) If a putative father of a child by due appearance in a proceeding of which he is entitled to notice under ORS 109.096 objects to the relief sought, the court:

(a) May stay the adoption or other court proceeding to await the outcome of the filiation proceedings only if notice of the initiation of filiation proceedings was on file as required by ORS 109.096 (3) or (4).

(b) Shall, if filiation proceedings are not pending, inquire as to the paternity of the child, the putative father's past endeavors to fulfill his obligation to support the child and to contribute to the pregnancy-related medical expenses, the period that the child has lived with the putative father, the putative father's fitness to care for and rear the child and whether the putative father is willing to be declared the father of the child and to assume the responsibilities of a father.

(2) If after inquiry under subsection (1)(b) of this section the court finds:

(a) That the putative father is the father of the child and is fit and willing to assume the responsibilities of a father, it shall have the power:

(A) Upon the request of the putative father, to declare his paternity and to certify the fact of paternity in the manner provided in ORS 109.094; and

(B) To award custody of the child to [*the mother or the father*] **either parent** as may be in the best interests of the child, or to take any other action which the court may take if the parents are or were married to each other.

(b) That the putative father is not the father of the child, it may grant the relief sought in the proceeding without the putative father's consent.

(c) That the putative father is the natural father of the child but is not fit or willing to assume the responsibilities of a father, it may grant the relief sought in the proceeding or any other relief that the court deems to be in the best interests of the child, notwithstanding the father's objection.

(3) If a putative father of a child is given the notice of a proceeding required by ORS 109.096 and he fails to enter due appearance and to object to the relief sought therein within the time specified in the notice, the court may grant the relief sought without the putative father's consent.

SECTION 22. ORS 109.103 is amended to read:

109.103. (1) If a child is born to an unmarried [*woman and paternity*] **person and parentage** has been established under [*ORS 109.070*] **section 2 of this 2017 Act**, or if a child is born to a married [*woman by a man*] **person by a person** other than [*her husband*] **the birth mother's spouse** and [*the man's paternity*] **parentage between the person and the child** has been established under [*ORS 109.070*] **section 2 of this 2017 Act**, either parent may initiate a civil proceeding to determine the custody or support of, or parenting time with, the child. The proceeding shall be brought in the circuit court of the county in which the child resides or is found or in the circuit court of the county in which either parent resides. The parents have the same rights and responsibilities regarding the custody and support of, and parenting time with, their child that married or divorced parents would have, and the provisions of ORS 107.094 to 107.449 that relate to custody, support and parenting time, the provisions of ORS 107.755 to 107.795 that relate to mediation procedures, and the provisions of ORS 107.810, 107.820 and 107.830 that relate to life insurance, apply to the proceeding.

(2) A parent may initiate the proceeding by filing with the court a petition setting forth the facts and circumstances upon which the parent relies. The parent shall state in the petition, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the child, including one brought under ORS 109.100, 109.165, 125.025, 416.400 to 416.465, 419B.400 or 419C.590 or ORS chapter 110; and

(b) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.503, involving the child.

(3) The parent shall include with the petition a certificate regarding any pending support proceeding and any existing support order. The parent shall use a certificate that is in a form established by court rule and include information required by court rule and subsection (2) of this section.

(4) When a parent initiates a proceeding under this section and the child support rights of one of the parents or of the child have been assigned to the state, the parent initiating the proceeding shall serve, by mail or personal delivery, a copy of the petition on the Administrator of the Division of Child Support or on the branch office providing support services to the county in which the suit is filed.

(5)(a) After a petition is filed under this section and upon service of summons and petition upon the respondent as provided in ORCP 7, a restraining order is issued and in effect against the petitioner and the respondent until a final judgment is issued, until the petition is dismissed or until further order of the court, restraining the petitioner and the respondent from:

(A) Canceling, modifying, terminating or allowing to lapse for nonpayment of premiums any policy of health insurance that one party maintains to provide coverage for the other party or a minor child of the parties, or any life insurance policy that names either of the parties or a minor child of the parties as a beneficiary; and

(B) Changing beneficiaries or covered parties under any policy of health insurance that one party maintains to provide coverage for a minor child of the parties, or any life insurance policy.

(b) Either party restrained under this subsection may apply to the court for further temporary orders, including modification or revocation of the restraining order issued under this subsection.

(c) The restraining order issued under this subsection shall include a notice that either party may request a hearing on the restraining order by filing a request for hearing with the court.

(d) A copy of the restraining order issued under this subsection must be attached to the summons.

(e) A party who violates a term of a restraining order issued under this subsection is subject to imposition of remedial sanctions under ORS 33.055 based on the violation, but is not subject to:

(A) Criminal prosecution based on the violation; or

(B) Imposition of punitive sanctions under ORS 33.065 based on the violation.

SECTION 23. ORS 109.145 is amended to read:

109.145. If a respondent fails to answer or fails to appear at trial, the court shall have the power to proceed accordingly. In such case, the court may make a determination of [*paternity*] **parentage** and may impose such obligations on the respondent as it deems reasonable. In all such cases corroborating evidence in addition to the testimony of the parent or expectant parent shall be required to establish [*paternity*] **parentage** and the court may, in its discretion, order such investigation or the production of such evidence as it deems appropriate to establish a proper basis for relief. The testimony of the parent or expectant parent and the corroborating evidence may be presented by affidavit.

SECTION 24. ORS 109.155 is amended to read:

109.155. (1) The court, in a private hearing, shall first determine the issue of [*paternity*] **parentage**. If the respondent admits the [*paternity*] **parentage**, the admission shall be reduced to writing, verified by the respondent and filed with the court. If the [*paternity*] **parentage** is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required.

(2) If the court finds, from a preponderance of the evidence, that the petitioner or the respondent is the father of the child who has been, or who may be born out of wedlock, the court shall then proceed to a determination of the appropriate relief to be granted. The court may approve any settlement agreement reached between the parties and incorporate the agreement into any judgment

rendered, and the court may order such investigation or the production of such evidence as the court deems appropriate to establish a proper basis for relief.

(3) The court, in its discretion, may postpone the hearing from time to time to facilitate any investigation or the production of such evidence as it deems appropriate.

(4) The court may order either parent to pay such sum as the court deems appropriate for the past and future support and maintenance of the child during the child's minority and while the child is attending school, as defined in ORS 107.108, and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, which may include expert witness fees, and reasonable attorney fees at trial and on appeal. The provisions of ORS 107.108 apply to an order entered under this section for the support of a child attending school.

(5) An affidavit certifying the authenticity of documents substantiating expenses set forth in subsection (4) of this section is prima facie evidence to establish the authenticity of the documents.

(6)(a) It is the policy of this state:

(A) To encourage the settlement of cases brought under this section; and

(B) For courts to enforce the terms of settlements described in paragraph (b) of this subsection to the fullest extent possible, except when to do so would violate the law or would clearly contravene public policy.

(b) In a proceeding under this section, the court may enforce the terms set forth in a stipulated judgment of [*paternity*] **parentage** signed by the parties, a judgment of [*paternity*] **parentage** resulting from a settlement on the record or a judgment of [*paternity*] **parentage** incorporating a settlement agreement:

(A) As contract terms using contract remedies;

(B) By imposing any remedy available to enforce a judgment, including but not limited to contempt; or

(C) By any combination of the provisions of subparagraphs (A) and (B) of this paragraph.

(c) A party may seek to enforce an agreement and obtain remedies described in paragraph (b) of this subsection by filing a motion, serving notice on the other party in the manner provided by ORCP 7 and, if a remedy under paragraph (b)(B) of this subsection is sought, complying with the statutory requirements for that remedy. All claims for relief arising out of the same acts or omissions must be joined in the same proceeding.

(d) Nothing in paragraph (b) or (c) of this subsection limits a party's ability, in a separate proceeding, to file a motion to set aside, alter or modify a judgment under ORS 109.165 or to seek enforcement of an ancillary agreement to the judgment.

(7) If [*a man's paternity of a child*] **parentage between a person and a child** has been established under [*ORS 109.070*] **section 2 of this 2017 Act** and the [*paternity*] **parentage** has not been disestablished before proceedings are initiated under ORS 109.125, the court may not render a judgment under ORS 109.124 to 109.230 establishing [*another man's paternity of the child*] **parentage between another person and the child** unless the judgment also disestablishes the [*paternity*] **parentage** established under [*ORS 109.070*] **section 2 of this 2017 Act**.

SECTION 25. ORS 109.175 is amended to read:

109.175. (1) If [*paternity*] **parentage** of a child born out of wedlock is established pursuant to a petition filed under ORS 109.125 or an order or judgment entered pursuant to ORS 109.124 to 109.230 or ORS 416.400 to 416.465, or if [*paternity*] **parentage** is established by the filing of a voluntary acknowledgment of paternity as provided by [*ORS 109.070 (1)(e)*] **section 2 (1)(e) of this 2017 Act**, the parent with physical custody at the time of filing of the petition or the notice under ORS 416.415, or the parent with physical custody at the time of the filing of the voluntary acknowledgment of paternity, has sole legal custody until a court specifically orders otherwise. The first time the court determines who should have legal custody, neither parent shall have the burden of proving a change of circumstances. The court shall give primary consideration to the best interests and welfare of the child and shall consider all the standards set out in ORS 107.137.

(2) In any proceeding under this section, the court may cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist parents in creating and implementing parenting plans under ORS 107.425 (3).

SECTION 26. ORS 109.251 is amended to read:

109.251. As used in ORS 109.250 to 109.262, "blood tests" includes any test for genetic markers to determine [*paternity*] **parentage** of a type generally acknowledged as reliable by accreditation bodies designated by the Oregon Health Authority in compliance with the United States Secretary of Health and Human Services, and performed by a laboratory approved by such accreditation body. "Blood tests" includes but is not limited to the Human Leucocyte Antigen Test, the deoxyribonucleic acid test and any test that extracts genetic material from any human tissue.

SECTION 27. ORS 109.252 is amended to read:

109.252. (1) Unless the court or administrator finds good cause not to proceed in a proceeding under ORS 109.125 to 109.230 and 416.400 to 416.465, in which [*paternity*] **parentage** is a relevant fact, the court or administrator, as defined in ORS 25.010, upon the court's or administrator's own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly shall, order the mother, child, alleged father and any other named respondent who may be the father to submit to blood tests. If any person refuses to submit to such tests, the court or administrator may resolve the question of [*paternity*] **parentage** against such person or enforce the court's or administrator's order if the rights of others and the interests of justice so require.

(2) When child support enforcement services are being provided under ORS 25.080, the Child Support Program shall pay any costs for blood tests subject to recovery from the party who requested the tests. If the original test result is contested prior to the entry of an order establishing [*paternity*] **parentage**, the court or administrator shall order additional testing upon request and advance payment by the party making the request.

SECTION 28. ORS 109.254 is amended to read:

109.254. (1) The tests shall be made by experts qualified as examiners of genetic markers who shall be appointed by the court or administrator, as defined in ORS 25.010. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of genetic markers, perform independent tests under order of the court or administrator, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court or administrator.

(2) The blood test results and the conclusions and explanations of the blood test experts are admissible as evidence of [*paternity*] **parentage** without the need for foundation testimony or other proof of authenticity or accuracy, unless a written challenge to the testing procedure or the results of the blood test has been filed with the court and delivered to opposing counsel at least 10 days before any hearing set to determine the issue of [*paternity*] **parentage**. Failure to make such timely challenge constitutes a waiver of the right to have the experts appear in person and is not grounds for a continuance of the hearing to determine [*paternity*] **parentage**. A copy of the results, conclusions and explanations must be furnished to both parties or their counsel at least 20 days before the date of the hearing for this subsection to apply. The court for good cause or the parties may waive the time limits established by this subsection.

(3) An affidavit documenting the chain of custody of the specimens is prima facie evidence to establish the chain of custody.

SECTION 29. ORS 109.259 is amended to read:

109.259. Notwithstanding the objections of a party to an order that seeks to establish [*paternity*] **parentage**, if the blood tests conducted under ORS 109.250 to 109.262 result in a cumulative paternity index of 99 or greater, the evidence of the blood tests together with the testimony of a parent is a sufficient basis upon which to presume paternity for establishing temporary support. Upon the motion of a party, the court shall enter a temporary order requiring the alleged father to

provide support pending the determination of parentage by the court. In determining the amount of support, the court shall use the formula established under ORS 25.275.

SECTION 30. ORS 109.264 is amended to read:

109.264. In any action under ORS 109.250 to 109.262, the mother, **the** putative father**, if any, the alleged parent** and the state are parties.

SECTION 31. ORS 109.315 is amended to read:

109.315. (1) A petition for adoption of a minor child must be signed by the petitioner and, unless stated in the petition why the information or statement is omitted, must contain the following:

(a) The full name of the petitioner;

(b) The state and length of residency in the state of the petitioner and information sufficient to establish that the residency requirement of ORS 109.309 (2) has been met;

(c) The current marital or domestic partnership status of the petitioner;

(d) An explanatory statement as to why the petitioner is of sufficient ability to bring up the minor child and furnish suitable nurture and education sufficient for judgment to be entered under ORS 109.350;

(e) Information sufficient for the court to establish that the petitioner has complied with the jurisdictional and venue requirements of ORS 109.309 (4) and (5);

(f) The full name, gender and date and place of birth of the minor child;

(g) The marital or domestic partnership status of the biological mother at the time of conception, at the date of birth and during the 300 days prior to the date of birth of the minor child;

(h) A statement that the minor child is not an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. 1901 et seq.) or, if the Indian Child Welfare Act applies:

(A) A statement of the efforts to notify the appropriate Indian tribe or tribes of the adoption; and

(B) A statement of the efforts to comply with the placement preferences of the Indian Child Welfare Act or the placement preferences of the appropriate Indian tribe;

(i) The name and relationship to the minor child of any person who has executed a written release or surrender of parental rights or of rights of guardianship of the minor child as provided by ORS 418.270 and the date of the release or surrender;

(j) The name and relationship to the minor child of any person who has given written consent as required under ORS 109.321, and the date the consent was given;

(k) The name and relationship to the minor child of any person or entity for whom the written consent requirement under ORS 109.321 is waived or not required as provided in ORS 109.322, 109.323, 109.324, 109.325, 109.326 and 109.327 or whose written consent may be substituted for the written consent requirement under ORS 109.321 as provided in ORS 109.322, 109.323, 109.324, 109.325, 109.326, 109.327, 109.328 and 109.329;

(L) The name and relationship to the minor child of all persons who have signed and attested to:

(A) A written certificate of irrevocability and waiver as provided in ORS 109.321 (2); or

(B) A written certificate stating that a release or surrender under ORS 418.270 (4) shall become irrevocable as soon as the child is placed for the purpose of adoption;

(m) A statement of the facts and circumstances under which the petitioner obtained physical custody of the minor child, including date of placement with the petitioner for adoption and the name and relationship to the minor child of the individual or entity placing the minor child with the petitioner;

(n) The length of time that a minor child has been in the physical custody of the petitioner and, if the minor child is not in the physical custody of the petitioner, the reason why, and the date and manner in which the petitioner will obtain physical custody of the minor child;

(o) Whether a continuing contact agreement exists under ORS 109.305, including names of the parties to the agreement and date of execution;

(p) A statement establishing that the requirements of ORS 109.353 regarding advisement about the voluntary adoption registry and the registry's services have been met;

(q) A statement establishing that the requirements of ORS 109.346 regarding notice of right to counseling sessions have been met;

(r) A statement that the information required by the Uniform Child Custody Jurisdiction and Enforcement Act under ORS 109.701 to 109.834 has been provided in the Adoption Summary and Segregated Information Statement under ORS 109.317;

(s) A statement that the Interstate Compact on the Placement of Children does or does not apply and, if applicable, a statement of the efforts undertaken to comply with the compact;

(t) Unless waived, a statement that a current home study was completed in compliance with ORS 109.309 (7); and

(u) A declaration made under penalty of perjury that the petition, and the information and statements contained in the petition, are true to the best of the petitioner's knowledge and belief and that the petitioner understands the petition, and information and statements contained in the petition, may be used as evidence in court and are subject to penalty for perjury.

(2) A petition filed under ORS 109.309 must, if applicable, request the following:

(a) Entry of a general judgment of adoption;

(b) That the petitioner be permitted to adopt the minor child as the child of the petitioner for all legal intents and purposes;

(c) A finding that the court has jurisdiction over the adoption proceeding, the parties and the minor child;

(d) With respect to the appropriate persons, the termination of parental rights or a determination of [*nonpaternity*] **nonparentage**;

(e) Approval of a change to the minor child's name;

(f) A finding that a continuing contact agreement entered into under ORS 109.305 is in the best interests of the minor child and that, if the minor child is 14 years of age or older, the minor child has consented to the agreement, and that the court incorporate the continuing contact agreement by reference into the adoption judgment;

(g) That the court require preparation of and certify a report of adoption as provided in ORS 432.223;

(h) That all records, papers and files in the record of the adoption case be sealed as provided under ORS 109.319; and

(i) Any other relief requested by the petitioner.

(3) A petition filed under ORS 109.309 must, if applicable, have the following attached as exhibits:

(a) Any written release or surrender of the minor child for adoption, or a written disclaimer of parental rights;

(b) Any written consent to the adoption;

(c) Any certificate of irrevocability and waiver;

(d) Any continuing contact agreement under ORS 109.305;

(e) The written disclosure statement required under ORS 109.311; and

(f) Any other supporting documentation necessary to comply with the petition requirements in this section and ORS 109.309.

(4) The petition and documents filed as exhibits under subsection (3) of this section are confidential and may not be inspected or copied except as provided under ORS 109.305 to 109.410 and 109.425 to 109.507.

(5)(a) Within 30 days after being filed with the court, the petitioner shall serve copies of the petition, the documents filed as exhibits under subsection (3) of this section and the Adoption Summary and Segregated Information Statement described in ORS 109.317, including any amendments and exhibits attached to the statement, on the Director of Human Services by either registered or certified mail with return receipt or personal service.

(b) In the case of an adoption in which one of the child's [*biological or adoptive*] parents retains parental rights **as established under section 2 of this 2017 Act**, the petitioner shall also serve the petition by either registered or certified mail with return receipt or personal service:

(A) On all persons whose consent to the adoption is required under ORS 109.321 unless the person's written consent is filed with the court; and

(B) On the parents of the party whose parental rights would be terminated, if the names and addresses are known or may be readily ascertained by the petitioner.

(c) When a parent of the child is deceased or incapacitated, the petitioner shall also serve the petition on the parents of the deceased or incapacitated parent, if the names and addresses are known or may be readily ascertained by the petitioner. As used in this paragraph:

(A) "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person lacks the capacity to meet the essential requirements for the person's physical health or safety.

(B) "Meet the essential requirements for the person's physical health or safety" means those actions necessary to provide health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.

(d) Service required by this subsection may be waived by the court for good cause.

SECTION 32. ORS 109.321 is amended to read:

109.321. (1) Except as provided in ORS 109.323 to 109.329, consent in writing to the adoption of a minor child pursuant to a petition filed under ORS 109.309 is required to be given by the following:

(a) The parents of the child, or the survivor of them.

(b) The guardian of the child, if the child has no living parent.

(c) The next of kin in this state, if the child has no living parent and no guardian.

(d) Some suitable person appointed by the court to act in the proceeding as next friend of the child to give or withhold consent, if the child has no living parent and no guardian or next of kin qualified to consent.

(2)(a) A person who gives consent to adoption under subsection (1) of this section may agree concurrently or subsequently to the giving of such consent that the consent shall be or become irrevocable, and may waive such person's right to a personal appearance in court, by a duly signed and attested certificate. The certificate of irrevocability and waiver shall be in effect when the following are completed:

(A) The child is placed for the purpose of adoption in the physical custody of the person or persons to whom the consent is given;

(B) The person or persons to whom consent for adoption is given have filed a petition to adopt the child in a court of competent jurisdiction;

(C) The court has entered an order appointing the petitioner or some other suitable person as guardian of the child pursuant to ORS 109.335;

(D) The Department of Human Services, an Oregon licensed adoption agency or an attorney who is representing the adoptive parents has filed either a department or an Oregon licensed adoption agency home study with the court approving the petitioner or petitioners as potential adoptive parents or the department has notified the court that the filing of such study has been waived;

(E) Information about the child's social, medical and genetic history required in ORS 109.342 has been provided to an attorney or the department or an Oregon licensed adoption agency by the person giving consent to the adoption; and

(F) The person signing the certificate of irrevocability and waiver has been given an explanation by an attorney who represents the person and who does not also represent the adoptive family, by the department or by an Oregon licensed adoption agency of the consequences of signing the certificate.

(b) Upon the fulfillment of the conditions in paragraph (a) of this subsection, the consent for adoption may not be revoked unless fraud or duress is proved with respect to any material fact.

(3) Consent to the adoption of an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. 1901 et seq.) shall not be valid unless the requirements of the Indian Child Welfare Act are met. In accordance with the Indian Child Welfare Act, a certificate of irrevocability is not valid for the adoption of an Indian child.

(4) As used in this section, "parent" means a person whose parentage has been established pursuant to section 2 of this 2017 Act.

SECTION 33. ORS 109.326 is amended to read:

109.326. (1) If the mother of a child was married at the time of the conception or birth of the child, and it has been determined pursuant to [*ORS 109.070*] **section 2 of this 2017 Act** or judicially determined that [*her*] **the mother's** [*husband*] **spouse** at such time or times was not the [*father*] **parent** of the child, the [*husband's*] **spouse's** authorization or waiver is not required in adoption, juvenile court or other proceedings concerning the custody of the child.

(2) If [*paternity*] **parentage** of the child has not been determined, a determination of [*nonpaternity*] **nonparentage** may be made by any court having adoption, divorce or juvenile court jurisdiction. The testimony or affidavit of the mother or the [*husband*] **spouse** or another person with knowledge of the facts filed in the proceeding constitutes competent evidence before the court making the determination.

(3) Before making the determination of [*nonpaternity*] **nonparentage**, the petitioner shall serve on the [*husband*] **spouse** a summons and a true copy of a motion and order to show cause why a judgment of [*nonpaternity*] **nonparentage** should not be entered if:

(a) There has been a determination by any court of competent jurisdiction that the [*husband*] **spouse** is the [*father*] **parent** of the child;

(b) The child resided with the [*husband*] **spouse** at any time since the child's birth; or

(c) The [*husband*] **spouse** repeatedly has contributed or tried to contribute to the support of the child.

(4) When the petitioner is required to serve the [*husband*] **spouse** with a summons and a motion and order to show cause under subsection (3) of this section, service must be made in the manner provided in ORCP 7 D and E, except as provided in subsection (6) of this section. Service must be proved as required in ORCP 7 F. The summons and the motion and order to show cause need not contain the names of the adoptive parents.

(5) A summons under subsection (3) of this section must contain:

(a) A statement that if the [*husband*] **spouse** fails to file a written answer to the motion and order to show cause within the time provided, the court, without further notice and in the [*husband's*] **spouse's** absence, may take any action that is authorized by law, including but not limited to entering a judgment of [*nonpaternity*] **nonparentage** on the date the answer is required or on a future date.

(b) A statement that:

(A) The [*husband*] **spouse** must file with the court a written answer to the motion and order to show cause within 30 days after the date on which the [*husband*] **spouse** is served with the summons or, if service is made by publication or posting under ORCP 7 D(6), within 30 days from the date of last publication or posting.

(B) In the answer, the [*husband*] **spouse** must inform the court and the petitioner of the [*husband's*] **spouse's** telephone number or contact telephone number and the [*husband's*] **spouse's** current residence, mailing or contact address in the same state as the [*husband's*] **spouse's** home. The answer may be in substantially the following form:

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

_____,	)	
Petitioner,	)	NO._____
	)	
	)	ANSWER
and	)	
	)	

_____,)
Respondent.)

[ ] I consent to the entry of a judgment of [*nonpaternity*] **nonparentage**.

[ ] I do not consent to the entry of a judgment of [*nonpaternity*] **nonparentage**. The court should not enter a judgment of [*nonpaternity*] **nonparentage** for the following reasons:

_____

_____

_____

_____

_____

_____

Signature
DATE:_____
ADDRESS OR CONTACT ADDRESS:
_____
_____
TELEPHONE OR CONTACT TELEPHONE:
_____

_____

(c) A notice that, if the [*husband*] **spouse** answers the motion and order to show cause, the court:

(A) Will schedule a hearing to address the motion and order to show cause and, if appropriate, the adoption petition;

(B) Will order the [*husband*] **spouse** to appear personally; and

(C) May schedule other hearings related to the petition and may order the [*husband*] **spouse** to appear personally.

(d) A notice that the [*husband*] **spouse** has the right to be represented by an attorney. The notice must be in substantially the following form:

_____

You have a right to be represented by an attorney. If you wish to be represented by an attorney, please retain one as soon as possible to represent you in this proceeding. If you meet the state's financial guidelines, you are entitled to have an attorney appointed for you at state expense. To request appointment of an attorney to represent you at state expense, you must contact the circuit court immediately. Phone _____ for further information.

_____

(e) A statement that the [*husband*] **spouse** has the responsibility to maintain contact with the [*husband's*] **spouse's** attorney and to keep the attorney advised of the [*husband's*] **spouse's** whereabouts.

(6) A [*husband*] **spouse** who is served with a summons and a motion and order to show cause under this section shall file with the court a written answer to the motion and order to show cause within 30 days after the date on which the [*husband*] **spouse** is served with the summons or, if service is made by publication or posting under ORCP 7 D(6), within 30 days from the date of last publication or posting. In the answer, the [*husband*] **spouse** shall inform the court and the petitioner of the [*husband's*] **spouse's** telephone number or contact telephone number and current address, as

defined in ORS 25.011. The answer may be in substantially the form described in subsection (5) of this section.

(7) If the [*husband*] **spouse** requests the assistance of appointed counsel and the court determines that the [*husband*] **spouse** is financially eligible, the court shall appoint an attorney to represent the [*husband*] **spouse** at state expense. Appointment of counsel under this subsection is subject to ORS 135.055, 151.216 and 151.219. The court may not substitute one appointed counsel for another except pursuant to the policies, procedures, standards and guidelines adopted under ORS 151.216.

(8) If the [*husband*] **spouse** files an answer as required under subsection (6) of this section, the court, by oral order made on the record or by written order provided to the [*husband*] **spouse** in person or mailed to the [*husband*] **spouse** at the address provided by the [*husband*] **spouse**, shall:

(a) Inform the [*husband*] **spouse** of the time, place and purpose of the next hearing or hearings related to the motion and order to show cause or the adoption petition;

(b) Require the [*husband*] **spouse** to appear personally at the next hearing or hearings related to the motion and order to show cause or the adoption petition; and

(c) Inform the [*husband*] **spouse** that, if the [*husband*] **spouse** fails to appear as ordered for any hearing related to the motion and order to show cause or the adoption petition, the court, without further notice and in the [*husband's*] **spouse's** absence, may take any action that is authorized by law, including but not limited to entering a judgment of [*nonpaternity*] **nonparentage** on the date specified in the order or on a future date, without the consent of the [*husband*] **spouse**.

(9) If a [*husband*] **spouse** fails to file a written answer as required in subsection (6) of this section or fails to appear for a hearing related to the motion and order to show cause or the petition as directed by court order under this section, the court, without further notice to the [*husband*] **spouse** and in the [*husband's*] **spouse's** absence, may take any action that is authorized by law, including but not limited to entering a judgment of [*nonpaternity*] **nonparentage**.

(10) There shall be sufficient proof to enable the court to grant the relief sought without notice to the [*husband*] **spouse** provided that the affidavit of the mother of the child, of the [*husband*] **spouse** or of another person with knowledge of the facts filed in the proceeding states or the court finds from other competent evidence:

(a) That the mother of the child was not cohabiting with [*her*] **the mother's** [*husband*] **spouse** at the time of conception of the child and that the [*husband*] **spouse** is not the [*father*] **parent** of the child;

(b) That the [*husband*] **spouse** has not been judicially determined to be the [*father*] **parent of the child**;

(c) That the child has not resided with the [*husband*] **spouse**; and

(d) That the [*husband*] **spouse** has not contributed or tried to contribute to the support of the child.

(11) Notwithstanding ORS 109.070 (1)(a), service of a summons and a motion and order to show cause on the [*husband*] **spouse** under subsection (3) of this section is not required and the [*husband's*] **spouse's** consent, authorization or waiver is not required in adoption proceedings concerning the child unless the [*husband*] **spouse** has met the requirements of subsection (3)(a), (b) or (c) of this section.

(12) A [*husband*] **spouse** who was not cohabiting with the mother at the time of the child's conception has the primary responsibility to protect the [*husband's*] **spouse's** rights.

(13) Nothing in this section shall be used to set aside an act of a permanent nature, including but not limited to adoption, unless the [*father*] **parent** establishes, within one year after the entry of the order or general judgment, as defined in ORS 18.005, fraud on the part of the petitioner with respect to the matters specified in subsection (10)(a), (b), (c) or (d) of this section.

SECTION 34. ORS 109.704 is amended to read:

109.704. As used in ORS 109.701 to 109.834:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) “Child custody determination” means a judgment or other order of a court providing for the legal custody, physical custody, parenting time or visitation with respect to a child. “Child custody determination” includes a permanent, temporary, initial and modification order. “Child custody determination” does not include an order relating to child support or other monetary obligation of an individual.

(4) “Child custody proceeding” means a proceeding in which legal custody, physical custody, parenting time or visitation with respect to a child is an issue. “Child custody proceeding” includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, [*paternity*] **parentage**, termination of parental rights and protection from domestic violence in which the issue may appear. “Child custody proceeding” does not include a proceeding involving juvenile delinquency, contractual emancipation or enforcement under ORS 109.774 to 109.827.

(5) “Commencement” means the filing of the first pleading in a proceeding.

(6) “Court” means an entity authorized under the law of a state to establish, enforce or modify a child custody determination.

(7) “Home state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, “home state” means the state in which the child lived from birth with any of the persons mentioned. Any temporary absence of any of the mentioned persons is part of the period.

(8) “Initial determination” means the first child custody determination concerning a particular child.

(9) “Issuing court” means the court that makes a child custody determination for which enforcement is sought under ORS 109.701 to 109.834.

(10) “Issuing state” means the state in which a child custody determination is made.

(11) “Modification” means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) “Person” means an individual, corporation, public corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or a governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(13) “Person acting as a parent” means a person, other than a parent, who:

(a) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) “Physical custody” means the physical care and supervision of a child.

(15) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(16) “Tribe” means an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state.

(17) “Warrant” means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

SECTION 35. ORS 112.105 is amended to read:

112.105. (1) For all purposes of intestate succession, full effect shall be given to all relationships as described in ORS 109.060, except as otherwise provided by law in case of adoption.

(2) For all purposes of intestate succession and for those purposes only, before the relationship of [*father*] **parent** and child and other relationships dependent upon the establishment of [*paternity*] **parentage** shall be given effect under subsection (1) of this section[,]**:**

(a) The [*paternity*] **parentage** of the child shall have been established under [*ORS 109.070*] **section 2 of this 2017 Act** during the lifetime of the child[.]**; and**

(b) The parent must have acknowledged being the parent of the child in writing, signed by the parent during the lifetime of the child.

SECTION 36. ORS 163.565 is amended to read:

163.565. (1) Proof that a child was born [*to a woman*] during the time a [*man*] **person** lived and cohabited with [*her*] **the child's mother**, or held [*her*] **the child's mother** out as [*his*] **that person's** spouse in a marriage, is prima facie evidence that [*he*] **the person** is the [*father*] **parent** of the child. This subsection does not exclude any other legal evidence tending to establish the parental relationship.

(2) No provision of law prohibiting the disclosure of confidential communications between spouses in a marriage apply to prosecutions for criminal nonsupport. A spouse is a competent and compellable witness for or against either party.

SECTION 37. ORS 180.320 is amended to read:

180.320. (1) All state agencies, district attorneys and all police officers of the state, county or any municipality, university or court thereof, shall cooperate with the Division of Child Support of the Department of Justice in furnishing and making available information, records and documents necessary to assist in establishing or enforcing support obligations or [*paternity*] **parentage**, in performing the duties set out in ORS 25.080 and in determining the location of any absent parent or child for the purpose of enforcing any state or federal law regarding the unlawful taking or restraint of a child or for the purpose of making or enforcing a child custody determination. Notwithstanding the provisions of ORS 109.225 or 416.430 or ORS chapter 432, records pertaining to the [*paternity*] **parentage** of a child shall be made available upon written request of an authorized representative of the Division of Child Support. Any information obtained pursuant to this subsection is confidential, and shall be used only for the purposes set out in this subsection.

(2) Information furnished to the Division of Child Support by the Department of Revenue and made confidential by ORS 314.835 shall be used by the division and its employees solely for the purpose of enforcing the provisions of ORS 180.320 to 180.365 and shall not be disclosed or made known for any other purpose. Any person who violates the prohibition against disclosure contained in this subsection, upon conviction, is punishable as provided in ORS 314.991 (2).

SECTION 38. ORS 180.380 is amended to read:

180.380. (1) In addition to its other duties, powers and functions, the Division of Child Support may disclose confidential information from the Federal Parent Locator Service to an authorized person if the information is needed to:

(a) Enforce any state or federal law regarding the unlawful taking or restraint of a child;

(b) Make or enforce a child custody determination;

(c) Establish [*paternity*] **parentage**; or

(d) Establish, modify or enforce a child support order.

(2)(a) If the request for information is made for a purpose described in subsection (1)(a) or (b) of this section, the division may provide the most recent address and place of employment of the child or parent.

(b) If the request for information is made for a purpose described in subsection (1)(c) or (d) of this section, the division may provide the following information:

(A) The Social Security number and address of the parent or alleged parent;

(B) The name, address and federal employer identification number of the employer of the parent or alleged parent; and

(C) The wages or other income from and benefits of employment of the parent or alleged parent.

(c) If there is evidence of possible domestic violence or child abuse by the individual requesting information under subsection (1) of this section, the division may disclose information under this subsection only to a court in accordance with rules adopted by the division.

(3) As used in ORS 180.320 and this section:

(a) "Authorized person" includes:

(A) Any agent or attorney of any state who has the duty or authority under the law of such state to enforce a child custody determination;

(B) Any court or any agent of the court having jurisdiction to make or enforce a judgment of [*paternity*] **parentage**, a judgment of support or a child custody determination;

(C) Any agent or attorney of the United States or of a state who has the duty or authority to investigate, enforce or bring a prosecution with respect to the unlawful taking or restraint of a child;

(D) A state agency responsible for administering an approved child welfare plan or an approved foster care and adoption assistance plan; and

(E) A custodial parent, legal guardian or agent of a child, other than a child receiving temporary assistance for needy families, who is seeking to establish [*paternity*] **parentage** or to establish, modify or enforce a child support order.

(b) "Custody determination" means a judgment or other order of a court providing for the custody of, parenting time with or visitation with a child, and includes permanent and temporary orders, and initial orders and modifications.

SECTION 39. ORS 192.535 is amended to read:

192.535. (1) A person may not obtain genetic information from an individual, or from an individual's DNA sample, without first obtaining informed consent of the individual or the individual's representative, except:

(a) As authorized by ORS 181A.155 or comparable provisions of federal criminal law relating to the identification of persons, or for the purpose of establishing the identity of a person in the course of an investigation conducted by a law enforcement agency, a district attorney, a medical examiner or the Criminal Justice Division of the Department of Justice;

(b) For anonymous research or coded research conducted under conditions described in ORS 192.537 (2), after notification pursuant to ORS 192.538 or pursuant to ORS 192.547 (7)(b);

(c) As permitted by rules of the Oregon Health Authority for identification of deceased individuals;

(d) As permitted by rules of the Oregon Health Authority for newborn screening procedures;

(e) As authorized by statute for the purpose of establishing [*paternity*] **parentage**; or

(f) For the purpose of furnishing genetic information relating to a decedent for medical diagnosis of blood relatives of the decedent.

(2) Except as provided in subsection (3) of this section, a physician licensed under ORS chapter 677 shall seek the informed consent of the individual or the individual's representative for the purposes of subsection (1) of this section in the manner provided by ORS 677.097. Except as provided in subsection (3) of this section, any other licensed health care provider or facility must seek the informed consent of the individual or the individual's representative for the purposes of subsection (1) of this section in a manner substantially similar to that provided by ORS 677.097 for physicians.

(3) A person conducting research shall seek the informed consent of the individual or the individual's representative for the purposes of subsection (1) of this section in the manner provided by ORS 192.547.

(4) Except as provided in ORS 746.135 (1), any person not described in subsection (2) or (3) of this section must seek the informed consent of the individual or the individual's representative for the purposes of subsection (1) of this section in the manner provided by rules adopted by the Oregon Health Authority.

(5) The Oregon Health Authority may not adopt rules under subsection (1)(d) of this section that would require the providing of a DNA sample for the purpose of obtaining complete genetic information used to screen all newborns.

SECTION 40. ORS 192.539 is amended to read:

192.539. (1) Regardless of the manner of receipt or the source of genetic information, including information received from an individual or a blood relative of the individual, a person may not disclose or be compelled, by subpoena or any other means, to disclose the identity of an individual upon whom a genetic test has been performed or the identity of a blood relative of the individual, or to disclose genetic information about the individual or a blood relative of the individual in a manner that permits identification of the individual, unless:

(a) Disclosure is authorized by ORS 181A.155 or comparable provisions of federal criminal law relating to identification of persons, or is necessary for the purpose of a criminal or death investigation, a criminal or juvenile proceeding, an inquest, or a child fatality review by a county multidisciplinary child abuse team;

(b) Disclosure is required by specific court order entered pursuant to rules adopted by the Chief Justice of the Supreme Court for civil actions;

(c) Disclosure is authorized by statute for the purpose of establishing [*paternity*] **parentage**;

(d) Disclosure is specifically authorized by the tested individual or the tested individual's representative by signing a consent form prescribed by rules of the Oregon Health Authority;

(e) Disclosure is for the purpose of furnishing genetic information relating to a decedent for medical diagnosis of blood relatives of the decedent; or

(f) Disclosure is for the purpose of identifying bodies.

(2) The prohibitions of this section apply to any redisclosure by any person after another person has disclosed genetic information or the identity of an individual upon whom a genetic test has been performed, or has disclosed genetic information or the identity of a blood relative of the individual.

(3) A release or publication is not a disclosure if:

(a) It involves a good faith belief by the person who caused the release or publication that the person was not in violation of this section;

(b) It is not due to willful neglect;

(c) It is corrected in the manner described in ORS 192.541 (4);

(d) The correction with respect to genetic information is completed before the information is read or heard by a third party; and

(e) The correction with respect to DNA samples is completed before the sample is retained or genetically tested by a third party.

SECTION 41. ORS 419A.004, as amended by section 46, chapter 106, Oregon Laws 2016, is amended to read:

419A.004. As used in this chapter and ORS chapters 419B and 419C, unless the context requires otherwise:

(1) "Age-appropriate or developmentally appropriate activities" means:

(a) Activities or items that are generally accepted as suitable for children of the same chronological age or level of maturity or that are determined to be developmentally appropriate for a child, based on the development of cognitive, emotional, physical and behavioral capacities that are typical for an age or age group; and

(b) In the case of a specific child, activities or items that are suitable for the child based on the developmental stages attained by the child with respect to the cognitive, emotional, physical and behavioral capacities of the child.

(2) "Another planned permanent living arrangement" means an out-of-home placement for a ward 16 years of age or older that is consistent with the case plan and in the best interests of the ward other than placement:

(a) By adoption;

(b) With a legal guardian; or

(c) With a fit and willing relative.

(3) "CASA Volunteer Program" means a program that is approved or sanctioned by a juvenile court, has received accreditation from the National CASA Association and has entered into a contract with the Oregon Volunteers Commission for Voluntary Action and Service under ORS 458.581 to recruit, train and supervise volunteers to serve as court appointed special advocates.

(4) "Child care center" means a residential facility for wards or youth offenders that is licensed, certified or otherwise authorized as a child-caring agency as that term is defined in ORS 418.205.

(5) "Community service" has the meaning given that term in ORS 137.126.

(6) "Conflict of interest" means a person appointed to a local citizen review board who has a personal or pecuniary interest in a case being reviewed by that board.

(7) "Counselor" means a juvenile department counselor or a county juvenile probation officer.

(8) "Court" means the juvenile court.

(9) "Court appointed special advocate" means a person in a CASA Volunteer Program who is appointed by the court to act as a court appointed special advocate pursuant to ORS 419B.112.

(10) "Court facility" has the meaning given that term in ORS 166.360.

(11) "Current caretaker" means a foster parent who:

(a) Is currently caring for a ward who is in the legal custody of the Department of Human Services and who has a permanency plan or concurrent permanent plan of adoption; and

(b) Who has cared for the ward, or at least one sibling of the ward, for at least the immediately prior 12 consecutive months or for one-half of the ward's or sibling's life where the ward or sibling is younger than two years of age.

(12) "Department" means the Department of Human Services.

(13) "Detention" or "detention facility" means a facility established under ORS 419A.010 to 419A.020 and 419A.050 to 419A.063 for the detention of children, wards, youths or youth offenders pursuant to a judicial commitment or order.

(14) "Director" means the director of a juvenile department established under ORS 419A.010 to 419A.020 and 419A.050 to 419A.063.

(15) "Guardian" means guardian of the person and not guardian of the estate.

(16) "Indian child" means any unmarried person less than 18 years of age who is:

(a) A member of an Indian tribe; or

(b) Eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

(17) "Juvenile court" means the court having jurisdiction of juvenile matters in the several counties of this state.

(18) "Local citizen review board" means the board specified by ORS 419A.090 and 419A.092.

(19) "Parent" means the biological or adoptive mother and the legal [*father*] **parent** of the child, ward, youth or youth offender. As used in this subsection, "legal [*father*] **parent**" means:

(a) A [*man*] **person** who has adopted the child, ward, youth or youth offender or whose [*paternity*] **parentage** has been established or declared under ORS [*109.070 or*] 416.400 to 416.465 or **section 2 of this 2017 Act or** by a juvenile court; and

(b) In cases in which the Indian Child Welfare Act applies, a man who is a father under applicable tribal law.

(20) "Permanent foster care" means an out-of-home placement in which there is a long-term contractual foster care agreement between the foster parents and the department that is approved by the juvenile court and in which the foster parents commit to raise a ward in substitute care or youth offender until the age of majority.

(21) "Public building" has the meaning given that term in ORS 166.360.

(22) "Reasonable and prudent parent standard" means the standard, characterized by careful and sensible parental decisions that maintain the health, safety and best interests of a child or ward while encouraging the emotional and developmental growth of the child or ward, that a substitute care provider shall use when determining whether to allow a child or ward in substitute care to participate in extracurricular, enrichment, cultural and social activities.

(23) "Reasonable time" means a period of time that is reasonable given a child or ward's emotional and developmental needs and ability to form and maintain lasting attachments.

(24) "Records" means any information in written form, pictures, photographs, charts, graphs, recordings or documents pertaining to a case.

(25) "Resides" or "residence," when used in reference to the residence of a child, ward, youth or youth offender, means the place where the child, ward, youth or youth offender is actually living or the jurisdiction in which wardship or jurisdiction has been established.

(26) "Restitution" has the meaning given that term in ORS 137.103.

(27) "Serious physical injury" means:

(a) A serious physical injury as defined in ORS 161.015; or

(b) A physical injury that:

(A) Has a permanent or protracted significant effect on a child's daily activities;

(B) Results in substantial and recurring pain; or

(C) In the case of a child under 10 years of age, is a broken bone.

(28) "Shelter care" means a home or other facility suitable for the safekeeping of a child, ward, youth or youth offender who is taken into temporary custody pending investigation and disposition.

(29) "Short-term detention facility" means a facility established under ORS 419A.050 (3) for holding children, youths and youth offenders pending further placement.

(30) "Sibling" means one of two or more children or wards related:

(a) By blood or adoption through a common legal parent; or

(b) Through the marriage of the children's or wards' legal or biological parents.

(31) "Substitute care" means an out-of-home placement directly supervised by the department or other agency, including placement in a foster family home, group home, child-caring agency as defined in ORS 418.205 or other child caring institution or facility. "Substitute care" does not include care in:

(a) A detention facility, forestry camp or youth correction facility;

(b) A family home that the court has approved as a ward's permanent placement, when a child-caring agency as defined in ORS 418.205 has been appointed guardian of the ward and when the ward's care is entirely privately financed; or

(c) In-home placement subject to conditions or limitations.

(32) "Surrogate" means a person appointed by the court to protect the right of the child, ward, youth or youth offender to receive procedural safeguards with respect to the provision of free appropriate public education.

(33) "Tribal court" means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code of custom of an Indian tribe or any other administrative body of a tribe that is vested with authority over child custody proceedings.

(34) "Victim" means any person determined by the district attorney, the juvenile department or the court to have suffered direct financial, psychological or physical harm as a result of the act that has brought the youth or youth offender before the juvenile court. When the victim is a minor, "victim" includes the legal guardian of the minor. The youth or youth offender may not be considered the victim. When the victim of the crime cannot be determined, the people of Oregon, as represented by the district attorney, are considered the victims.

(35) "Violent felony" means any offense that, if committed by an adult, would constitute a felony and:

(a) Involves actual or threatened serious physical injury to a victim; or

(b) Is a sexual offense. As used in this paragraph, "sexual offense" has the meaning given the term "sex crime" in ORS 163A.005.

(36) "Ward" means a person within the jurisdiction of the juvenile court under ORS 419B.100.

(37) "Young person" means a person who has been found responsible except for insanity under ORS 419C.411 and placed under the jurisdiction of the Psychiatric Security Review Board.

(38) "Youth" means a person under 18 years of age who is alleged to have committed an act that is a violation, or, if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city.

(39) "Youth care center" has the meaning given that term in ORS 420.855.

(40) "Youth offender" means a person who has been found to be within the jurisdiction of the juvenile court under ORS 419C.005 for an act committed when the person was under 18 years of age.

SECTION 42. ORS 419B.395 is amended to read:

419B.395. (1) If in any proceeding under ORS 419B.100 or 419B.500 the juvenile court determines that the child or ward has [*no legal father*] **fewer than two legal parents** or that [*paternity*] **parentage** is disputed as allowed in ORS 109.070, the court may enter a judgment of [*paternity*] **parentage** or a judgment of [*nonpaternity*] **nonparentage** in compliance with the provisions of ORS 109.070, 109.124 to 109.230, 109.250 to 109.262 and 109.326 **and section 2 of this 2017 Act**.

(2) Before entering a judgment under subsection (1) of this section, the court must find that adequate notice and an opportunity to be heard was provided to:

(a) The parties to the proceeding;

(b) The [*man*] **person** alleged or claiming to be the child or ward's [*father*] **parent**; and

(c) The Administrator of the Division of Child Support of the Department of Justice or the branch office providing support services to the county in which the court is located.

(3) When appropriate, the court shall inform a [*man*] **person** before the court claiming to be the [*father*] **parent** of a child or ward that [*paternity*] **parentage** establishment services may be available through the administrator if the child or ward:

(a) Is a child born out of wedlock;

(b) Has not been placed for adoption; and

(c) Has [*no legal father*] **fewer than two legal parents**.

(4) As used in this section:

(a) "Administrator" has the meaning given that term in ORS 25.010.

(b) "Child born out of wedlock" has the meaning given that term in ORS 109.124.

(c) "Legal [*father*] **parent**" has the meaning given that term in ORS 419A.004 (19).

SECTION 43. ORS 419B.839 is amended to read:

419B.839. (1) Summons in proceedings to establish jurisdiction under ORS 419B.100 must be served on:

(a) The parents of the child without regard to who has legal or physical custody of the child;

(b) The legal guardian of the child;

(c) A putative father of the child who satisfies the criteria set out in ORS 419B.875 (1)(a)(C), except as provided in subsection (4) of this section;

(d) A putative father of the child if notice of the initiation of filiation or [*paternity*] **parentage** proceedings was on file with the Center for Health Statistics of the Oregon Health Authority prior to the initiation of the juvenile court proceedings, except as provided in subsection (4) of this section;

(e) The person who has physical custody of the child, if the child is not in the physical custody of a parent; and

(f) The child, if the child is 12 years of age or older.

(2) If it appears to the court that the welfare of the child or of the public requires that the child immediately be taken into custody, the court may indorse an order on the summons directing the officer serving it to take the child into custody.

(3) Summons may be issued requiring the appearance of any person whose presence the court deems necessary.

(4) Summons under subsection (1) of this section is not required to be given to a putative father whom a court of competent jurisdiction has found not to be the child's legal [*father*] **parent** or who has filed a petition for filiation that was dismissed if no appeal from the judgment or order is pending.

(5) If a guardian ad litem has been appointed for a parent under ORS 419B.231, a copy of a summons served on the parent under this section must be provided to the guardian ad litem.

SECTION 44. ORS 419B.875 is amended to read:

419B.875. (1)(a) Parties to proceedings in the juvenile court under ORS 419B.100 and 419B.500 are:

(A) The child or ward;

(B) The parents or guardian of the child or ward;

(C) A putative father of the child or ward who has demonstrated a direct and significant commitment to the child or ward by assuming, or attempting to assume, responsibilities normally associated with parenthood, including but not limited to:

(i) Residing with the child or ward;

(ii) Contributing to the financial support of the child or ward; or

(iii) Establishing psychological ties with the child or ward;

(D) The state;

(E) The juvenile department;

(F) A court appointed special advocate, if appointed;

(G) The Department of Human Services or other child-caring agency if the agency has temporary custody of the child or ward; and

(H) The tribe in cases subject to the Indian Child Welfare Act if the tribe has intervened pursuant to the Indian Child Welfare Act.

(b) An intervenor who is granted intervention under ORS 419B.116 is a party to a proceeding under ORS 419B.100. An intervenor under this paragraph is not a party to a proceeding under ORS 419B.500.

(2) The rights of the parties include, but are not limited to:

(a) The right to notice of the proceeding and copies of the petitions, answers, motions and other papers;

(b) The right to appear with counsel and, except for intervenors under subsection (1)(b) of this section, to have counsel appointed as otherwise provided by law;

(c) The right to call witnesses, cross-examine witnesses and participate in hearings;

(d) The right of appeal; and

(e) The right to request a hearing.

(3) A putative father who satisfies the criteria set out in subsection (1)(a)(C) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his [*paternity*] **parentage** or finds that he is not the legal or biological [*father*] **parent** of the child or ward.

(4) If no appeal from the judgment or order is pending, a putative father whom a court of competent jurisdiction has found not to be the child or ward's legal or biological [*father*] **parent** or who has filed a petition for filiation that was dismissed is not a party under subsection (1) of this section.

(5)(a) A person granted rights of limited participation under ORS 419B.116 is not a party to a proceeding under ORS 419B.100 or 419B.500 but has only those rights specified in the order granting rights of limited participation.

(b) Persons moving for or granted rights of limited participation are not entitled to appointed counsel but may appear with retained counsel.

(6) If a foster parent, preadoptive parent or relative is currently providing care for a child or ward, the Department of Human Services shall give the foster parent, preadoptive parent or relative notice of a proceeding concerning the child or ward. A foster parent, preadoptive parent or relative providing care for a child or ward has the right to be heard at the proceeding. Except when allowed to intervene, the foster parent, preadoptive parent or relative providing care for the child or ward is not considered a party to the juvenile court proceeding solely because of notice and the right to be heard at the proceeding.

(7)(a) The Department of Human Services shall make diligent efforts to identify and obtain contact information for the grandparents of a child or ward committed to the department's custody. Except as provided in paragraph (b) of this subsection, when the department knows the identity of and has contact information for a grandparent, the department shall give the grandparent notice of a hearing concerning the child or ward. Upon a showing of good cause, the court may relieve the department of its responsibility to provide notice under this paragraph.

(b) If a grandparent of a child or ward is present at a hearing concerning the child or ward, and the court informs the grandparent of the date and time of a future hearing, the department is not required to give notice of the future hearing to the grandparent.

(c) If a grandparent is present at a hearing concerning a child or ward, the court shall give the grandparent an opportunity to be heard.

(d) The court's orders or judgments entered in proceedings under ORS 419B.185, 419B.310, 419B.325, 419B.449, 419B.476 and 419B.500 must include findings of the court as to whether the grandparent had notice of the hearing, attended the hearing and had an opportunity to be heard.

(e) Notwithstanding the provisions of this subsection, a grandparent is not a party to the juvenile court proceeding unless the grandparent has been granted rights of intervention under ORS 419B.116.

(f) As used in this subsection, "grandparent" means the legal parent of the child's or ward's legal parent, regardless of whether the parental rights of the child's or ward's legal parent have been terminated under ORS 419B.500 to 419B.524.

(8) Interpreters for parties and persons granted rights of limited participation shall be appointed in the manner specified by ORS 45.275 and 45.285.

SECTION 45. ORS 432.088 is amended to read:

432.088. (1) A report of live birth for each live birth that occurs in this state shall be submitted to the Center for Health Statistics, or as otherwise directed by the State Registrar of the Center for Health Statistics, within five calendar days after the live birth and shall be registered if the report has been completed and filed in accordance with this section.

(2) The physician, institution or other person providing prenatal care related to a live birth shall provide prenatal care information as required by the state registrar by rule to the institution where the delivery is expected to occur not less than 30 calendar days prior to the expected delivery date.

(3) When a live birth occurs in an institution or en route to an institution, the person in charge of the institution or an authorized designee shall obtain all data required by the state registrar, prepare the report of live birth, certify either by signature or electronic signature that the child was born alive at the place and time and on the date stated and submit the report as described in subsection (1) of this section.

(4) In obtaining the information required for the report of live birth, an institution shall use information gathering procedures provided or approved by the state registrar. Institutions may establish procedures to transfer, electronically or otherwise, information required for the report from other sources, provided that the procedures are reviewed and approved by the state registrar prior to the implementation of the procedures to ensure that the information being transferred is the same as the information being requested.

(5)(a) When a live birth occurs outside an institution, the information for the report of live birth shall be submitted within five calendar days of the live birth in a format adopted by the state registrar by rule in the following order of priority:

(A) By an institution where the **birth** mother and child are examined, if examination occurs within 24 hours of the live birth;

(B) By a physician in attendance at the live birth;

(C) By a direct entry midwife licensed under ORS 687.405 to 687.495 in attendance at the live birth;

(D) By a person not described in subparagraphs (A) to (C) of this paragraph and not required by law to be licensed to practice midwifery who is registered with the Center for Health Statistics to submit reports of live birth and who was in attendance at the live birth; or

(E) By the father, the **birth** mother**, any other parent** or, in the absence **or inability of any parent** [*of the father and the inability of the mother*], the person in charge of the premises where the live birth occurred.

(b) The state registrar may establish by rule the manner of submitting the information for the report of live birth by a person described in paragraph (a)(D) of this subsection or a physician or licensed direct entry midwife who attends the birth of his or her own child, grandchild, niece or nephew.

(6) When a report of live birth is submitted that does not include the minimum acceptable documentation required by this section or any rules adopted under this section, or when the state registrar has cause to question the validity or adequacy of the documentation, the state registrar, in the state registrar's discretion, may refuse to register the live birth and shall enter an order to that effect stating the reasons for the action. The state registrar shall advise the applicant of the right to appeal under ORS 183.484.

(7) When a live birth occurs on a moving conveyance:

(a) Within the United States and the child is first removed from the conveyance in this state, the live birth shall be registered in this state and the place where it is first removed shall be considered the place of live birth.

(b) While in international waters or airspace or in a foreign country or its airspace and the child is first removed from the conveyance in this state, the birth shall be registered in this state but the report of live birth shall show the actual place of birth insofar as can be determined.

(8) For purposes of making a report of live birth and live birth registration, the woman who gives live birth is the [*live*] birth mother. If a court of competent jurisdiction determines that a woman other than the [*live*] birth mother is the biological or genetic mother, the court may order the state registrar to amend the record of live birth. The record of live birth shall then be placed under seal.

(9)(a) If the **birth** mother is married at the time of either conception or live birth, or within 300 days before the live birth, the name of the mother's spouse in a marriage shall be entered on the report of live birth as [*the*] **a** parent of the child unless parentage has been determined otherwise by a court of competent jurisdiction.

(b) If the **birth** mother is not married at the time of either conception or live birth, or within 300 days before the live birth, the name of the **other** parent shall not be entered on the report of live birth unless a voluntary acknowledgment of paternity form or other form prescribed under ORS 432.098 is:

(A) Signed by the **birth** mother and the person to be named as the **other** parent; and

(B) Filed with the state registrar.

(c) If the **birth** mother is a partner in a domestic partnership registered by the state at the time of either conception or live birth, or between conception and live birth, the name of the **birth** mother's partner shall be entered on the report of live birth as a parent of the child, unless parentage has been determined otherwise by a court of competent jurisdiction.

(d) In any case in which paternity **or parentage** of a child is determined by a court of competent jurisdiction, or by an administrative determination of paternity **or parentage**, the Center for Health Statistics shall enter the name of [*the*] **each** parent on the new record of live birth. The Center for Health Statistics shall change the surname of the child if so ordered by the court or, in a proceeding under ORS 416.430, by the administrator as defined in ORS 25.010.

(e) If a biological parent is not named on the report of live birth, information other than the identity of the biological parent may be entered on the report.

(10) A parent of the child, or other informant as determined by the state registrar by rule, shall verify the accuracy of the personal data to be entered on a report of live birth in time to permit submission of the report within the five calendar days of the live birth.

(11) A report of live birth submitted after five calendar days, but within one year after the date of live birth, shall be registered in the manner prescribed in this section. The record shall not be marked "Delayed."

(12) The state registrar may require additional evidence in support of the facts of live birth.

SECTION 46. ORS 432.098 is amended to read:

432.098. (1) The Director of the Oregon Health Authority shall adopt by rule a form of a voluntary acknowledgment of paternity that includes the minimum requirements specified by the United States Secretary of Health and Human Services. When the form is signed by both biological parents and witnessed by a third party, the form establishes [*paternity*] **parentage** for all purposes when filed with the State Registrar of the Center for Health Statistics, provided there is no [*male*] **second** parent already named in the report of live birth. Establishment of [*paternity*] **parentage** under this section is subject to the provisions and the requirements in ORS 109.070. When there is no [*other male*] **second parent** named [*as father*] on the child's record of live birth, the filing of such voluntary acknowledgment of paternity form shall cause the state registrar to place the name of the [*male*] parent who has signed the voluntary acknowledgment of paternity form on the record of live birth of the child or, if appropriate, establish a replacement for the record containing the name of the child's [*male*] parent, as that parent is named in the voluntary acknowledgment of paternity

form. When signed by both parents in the health care facility of the child's birth within five days after the birth, the voluntary acknowledgment of paternity form is not a sworn document. When thus signed, a staff member of the health care facility shall witness the signatures of the parents. In all other circumstances, the form is a sworn document. The filing of the voluntary acknowledgment of paternity form created by this section is subject to the payment of any fees that may apply.

(2) The voluntary acknowledgment of paternity form must contain:

(a) A statement of rights and responsibilities including any rights afforded to a minor parent;

(b) A statement of the alternatives to and consequences of signing the acknowledgment;

(c) Instructions on how to file the form with the state registrar and information about any fee required;

(d) Lines for the Social Security numbers and addresses of the parents; and

(e) A statement that the rights, responsibilities, alternatives and consequences listed on the acknowledgment were read to the parties prior to signing the acknowledgment.

(3) Upon request, the state registrar shall provide a copy of any voluntary acknowledgment of paternity form to the state agency responsible for administration of the child support enforcement program created under Title IV-D of the Social Security Act. The duty imposed upon the state registrar by this section is limited to records of live birth executed and filed with the state registrar after October 1, 1995.

SECTION 47. ORS 432.103 is amended to read:

432.103. A determination of paternity **or parentage** by another state is entitled to full faith and credit.

SECTION 48. ORS 432.245 is amended to read:

432.245. (1) For a person born in this state, the State Registrar of the Center for Health Statistics shall amend a record of live birth and establish a replacement for the record if the state registrar receives one of the following:

(a) A report of adoption as provided in ORS 432.223 or a certified copy of the judgment of adoption, with the information necessary to identify the original record of live birth and to establish a replacement for the record, unless the court ordering the adoption requests that a replacement for the record not be established;

(b) A request that a replacement record of live birth be prepared to establish parentage, as prescribed by the state registrar by rule or ordered by a court of competent jurisdiction in this state that has determined the [*paternity*] **parentage** of a person;

(c) A written and notarized request, signed by both parents, acknowledging paternity; or

(d) A certified copy of a judgment that indicates that an individual born in this state has completed sexual reassignment and that the sex on the record of live birth must be changed.

(2) To change a person's name under subsection (1) of this section, the request or court order must include the name that currently appears **on** the record of live birth and the new name to be designated on the replacement for the record. The new name of the person shall be shown on the replacement for the record.

(3) Upon receipt of a certified copy of a court order to change the name of a person born in this state as authorized by 18 U.S.C. 3521 et seq., the state registrar shall create a replacement for a record of live birth to show the new information as specified in the court order.

(4) When a replacement for a record of live birth is prepared, the city, county and date of live birth must be included in the replacement. The replacement for the record must be substituted for the original record of live birth. The original record of live birth and all evidence submitted with the request or court order for the replacement for the record must be placed under seal and is not subject to inspection, except upon the order of a court of competent jurisdiction in this state or as provided by rule of the state registrar.

(5) Upon receipt of an amended judgment of adoption, the record of live birth shall be amended by the state registrar as provided by the state registrar by rule.

(6) Upon receipt of a report of annulment of adoption or a court order annulling an adoption, the original record of live birth must be restored. The replacement for the record of live birth is

not subject to inspection, except upon the order of a court of competent jurisdiction in this state or as provided by rule of the state registrar.

(7) If there is no record of live birth for a person for whom a replacement for the record is sought under this section and the court issues an order indicating a date of live birth more than one year from the date submitted to the Center for Health Statistics, the replacement for the record of live birth shall be created as a delayed record of live birth.

(8) The state registrar shall prepare and register a record of foreign live birth for a person born in a foreign country who is not a citizen of the United States and for whom a judgment of adoption was issued by a court of competent jurisdiction in this state if the court, the parents adopting the child or the adopted person, if the adopted person is 18 years of age or older, requests the record. The record must be labeled "Record of Foreign Live Birth" and shall show the actual country of live birth. After registering the record of foreign live birth in the new name of the adopted person, the record must be placed under seal and is not subject to inspection, except upon the order of a court of competent jurisdiction in this state or as provided by rule of the state registrar.

(9) A replacement record of live birth may not be created under this section if the date and place of live birth have not been determined by the court order.

SECTION 48a. If House Bill 2673 becomes law, section 48 of this 2017 Act (amending ORS 432.245) is repealed.

SECTION 49. ORCP 4 K is amended to read:

K Certain marital and domestic relations actions.

K(1) In any action to determine a question of status instituted under ORS chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

K(2) In any action to enforce personal obligations arising under ORS chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this subsection in any such action.

K(3) In any proceeding to establish [*paternity*] **parentage** under ORS chapter 109 or 110, or any action for declaration of [*paternity*] **parentage** where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

SECTION 50. ORS 109.030 is amended to read:

109.030. The rights and responsibilities of the parents, in the absence of misconduct, are equal, and [*the mother*] **each parent** is as fully entitled to the custody and control of the children and their earnings as the [*father*] **other parent**. In case of the [*father's*] death **of one parent**, the [*mother*] **other parent** shall come into [*as*] full and complete control of the children and their estate [*as the father does in case of the mother's death*].

SECTION 51. ORS 109.124 is amended to read:

109.124. As used in ORS 109.124 to 109.230, unless the context requires otherwise:

(1) "Child attending school" has the meaning given that term in ORS 107.108.

(2) "Child born out of wedlock" means a child born to an unmarried [*woman*] **person** or to a married [*woman*] **person** by [*a man other than her husband*] **another person who is not the person's spouse**.

(3) "Respondent" may include, but is not limited to, one or more persons who may be the father of a child born out of wedlock, the [*husband*] **spouse** of a woman who has or may have a child born out of wedlock, the mother of a child born out of wedlock, the [*woman*] **person** pregnant with a child who may be born out of wedlock, or the duly appointed and acting guardian of the child or conservator of the child's estate.

SECTION 52. ORS 109.125 is amended to read:

109.125. (1) Any of the following may initiate proceedings under this section:

(a) A mother of a child born out of wedlock or a woman pregnant with a child who may be born out of wedlock;

(b) The duly appointed and acting guardian of the child, conservator of the child's estate or a guardian ad litem, if the guardian or conservator has the physical custody of the child or is providing support for the child;

(c) The administrator, as defined in ORS 25.010;

(d) A man claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or

(e) The minor child by a guardian ad litem.

(2) Proceedings shall be initiated by the filing of a duly verified petition of the initiating party. The petition shall contain:

(a) If the initiating party is one of those specified in subsection (1)(a), (b), (c) or (e) of this section:

(A) The name of the mother of the child born out of wedlock or the [*woman*] **person** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's [*husband*] **spouse** if the child is alleged to be a child born to a married [*woman by*] **person and** a man other than [*her*] **the mother's** [*husband*] **spouse**;

(C) Facts showing the petitioner's status to initiate proceedings;

(D) A statement that a respondent is the father;

(E) The probable time or period of time during which conception took place; and

(F) A statement of the specific relief sought.

(b) If the initiating party is a man specified in subsection (1)(d) of this section:

(A) The name of the mother of the child born out of wedlock or the [*woman*] **person** pregnant with a child who may be born out of wedlock;

(B) The name of the mother's [*husband*] **spouse** if the child is alleged to be a child born to a married [*woman by*] **and** a man other than [*her*] **the mother's** [*husband*] **spouse**;

(C) A statement that the initiating party is the father of the child and accepts the same responsibility for the support and education of the child and for all pregnancy-related expenses that he would have if the child were born to him in lawful wedlock;

(D) The probable time or period of time during which conception took place; and

(E) A statement of the specific relief sought.

(3) When proceedings are initiated by the administrator, as defined in ORS 25.010, the state and the child's mother and putative father are parties.

(4) When a proceeding is initiated under this section and the child support rights of one of the parties or of the child at issue have been assigned to the state, a true copy of the petition shall be served by mail or personal delivery on the Administrator of the Division of Child Support of the Department of Justice or on the branch office providing support services to the county in which the suit is filed.

(5) A [*man*] **person** whose [*paternity*] **parentage** of a child has been established under [*ORS 109.070*] **section 2 of this 2017 Act** is a necessary party to proceedings initiated under this section unless the [*paternity*] **parentage** has been disestablished before the proceedings are initiated.

SECTION 53. In addition to and not in lieu of any other appropriation, there is appropriated to the Oregon Health Authority, for the biennium beginning July 1, 2017, out of the General Fund, the amount of $52,812, which may be expended for carrying out the provisions of this 2017 Act.

SECTION 54. The amendments to ORS 25.020, 25.075, 25.082, 25.650, 25.750, 107.179, 107.425, 109.012, 109.030, 109.070, 109.072, 109.073, 109.092, 109.094, 109.096, 109.098, 109.103, 109.124, 109.125, 109.145, 109.155, 109.175, 109.239, 109.243, 109.247, 109.251, 109.252, 109.254, 109.259, 109.264, 109.315, 109.321, 109.326, 109.704, 112.105, 163.565, 180.320, 180.380, 192.535, 192.539, 416.400, 419A.004, 419B.395, 419B.839, 419B.875, 432.088, 432.098, 432.103 and 432.245 and ORCP 4 K by sections 3 to 52 of this 2017 Act apply to establishments and disestablishments of

parentage and parentage proceedings made or commenced on or after the effective date of this 2017 Act.

SECTION 55. If either Senate Bill 513 or House Bill 2673 becomes law, section 54 of this 2017 Act is amended to read:

Sec. 54. The amendments to [*ORS 25.020, 25.075, 25.082, 25.650, 25.750, 107.179, 107.425, 109.012, 109.030, 109.070, 109.072, 109.073, 109.092, 109.094, 109.096, 109.098, 109.103, 109.124, 109.125, 109.145, 109.155, 109.175, 109.239, 109.243, 109.247, 109.251, 109.252, 109.254, 109.259, 109.264, 109.315, 109.321, 109.326, 109.704, 112.105, 163.565, 180.320, 180.380, 192.535, 192.539, 416.400, 419A.004, 419B.395, 419B.839, 419B.875, 432.088, 432.098, 432.103 and 432.245*] **statutes** and ORCP 4 K by sections 3 to 52 of this 2017 Act apply to establishments and disestablishments of parentage and parentage proceedings made or commenced on or after the effective date of this 2017 Act.

Passed by Senate June 28, 2017

Repassed by Senate July 7, 2017

.....
Lori L. Brocker, Secretary of Senate

.....
Peter Courtney, President of Senate

Passed by House July 6, 2017

.....
Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2017

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.....M.,....., 2017

.....
Kate Brown, Governor

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Dennis Richardson, Secretary of State

Enrolled
Senate Bill 516

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CHAPTER .....

AN ACT

Relating to due dates for payment of support obligations.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) Any court order or administrative order issued or modified in a proceeding under ORS chapter 107, 108, 109, 110, 416, 419B or 419C that contains an order for the payment of child support or spousal support must specify an initial due date and year for the payment of support that is on the first day of a calendar month, with subsequent payments due on the first day of each subsequent month for which the support is payable.

(2) For purposes of support enforcement, any support payment that becomes due and payable on a day other than the first day of the month in which the payment is due shall be enforceable by income withholding as of the first day of that month.

(3) Any court order or administrative order that contains an award of child, medical or spousal support that accrues on other than a monthly basis may, for income withholding and administrative support billing purposes only, be converted to a monthly amount.

(4) Support payments become delinquent only if not paid in full within one month of the payment due date. A monthly child support obligation that is to be paid in two or more installments does not become delinquent until the obligation is not paid in full by the due date for the first installment in the next month.

(5) Subsections (2) and (3) of this section do not apply to the determination or issuance of support arrearage liens, installment arrearage liens, judgment liens, writs of garnishment or any other action or proceeding that affects property rights under ORS chapter 18.

Passed by Senate April 18, 2017

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House June 12, 2017

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Tina Kotek, Speaker of House

Received by Governor:

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Kate Brown, Governor

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.....M.,....., 2017

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Dennis Richardson, Secretary of State

Enrolled
Senate Bill 682

Sponsored by Senators DEMBROW, WINTERS; Senator MANNING JR

CHAPTER .....

AN ACT

Relating to support orders involving incarcerated obligors; creating new provisions; and amending ORS 416.425.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS chapter 25.

SECTION 2. (1) An obligor who is incarcerated for a period of 180 or more consecutive days shall be rebuttably presumed unable to pay child support and a child support obligation does not accrue for the duration of the incarceration unless the presumption is rebutted as provided in this section.

(2) The Department of Justice and the Department of Corrections shall enter into an agreement to conduct data matches to identify the obligors described in subsection (1) of this section or as determined by the court.

(3) Within 30 days following identification of an obligor described in subsection (1) of this section whose child support obligation has not already been modified due to incarceration, the entity responsible for support enforcement services under ORS 25.080 shall provide notice of the presumption to the obligee and obligor and shall inform all parties to the support order that, unless a party objects as provided in subsection (4) of this section, child support shall cease accruing beginning with the first day of the first month that follows the obligor becoming incarcerated for a period of at least 180 consecutive days and continuing through the support payment due in the last month prior to the reinstatement of the support order as provided in subsection (6) of this section. The entity shall serve the notice on the obligee in the manner provided for the service of summons in a civil action, by certified mail, return receipt requested, or by any other mail service with delivery confirmation and shall serve the notice on the obligor by first class mail to the obligor's last-known address. The notice shall specify the month in which the obligor became incarcerated and shall contain a statement that the administrator represents the state and that low-cost legal counsel may be available.

(4) A party may object to the presumption by sending an objection to the entity that served the notice under subsection (3) of this section within 30 days after the date of service of the notice. The objection must describe the resources of the obligor or other evidence that rebuts the presumption of inability to pay child support. The entity receiving the objection shall cause the case to be set for a hearing before a court or an administrative law judge. The court or administrative law judge may consider only whether the presumption has been rebutted.

(5) If no objection is made, or if the court or administrative law judge finds that the presumption has not been rebutted, the Department of Justice shall discontinue billing the obligor for the period of time described in subsection (3) of this section and no arrearage shall accrue for the period during which the obligor is not billed. In addition, the entity providing support enforcement services shall file with the circuit court in which the support order or judgment has been entered a copy of the notice described in subsection (3) of this section or, if an objection is made and the presumption is not rebutted, a copy of the court's or administrative law judge's order.

(6) An order that has been suspended as provided in this section will automatically be reinstated at 50 percent of the previously ordered support amount on the first day of the first month that follows the 120th day after the obligor's release from incarceration.

(7)(a) Within 30 days following reinstatement of the order pursuant to subsection (6) of this section, the Department of Justice shall provide notice to all parties to the support order:

(A) Specifying the last date on which the obligor was incarcerated;

(B) Stating that by operation of law, billing and accrual of support resumed on the first day of the first month that follows the 120th day after the obligor's release from incarceration; and

(C) Informing the parties that the administrator will review the support order for purposes of modification of the support order as provided in subsection (8) of this section within 60 days following reinstatement of the order.

(b) The notice shall include a statement that the administrator represents the state and that low-cost legal counsel may be available.

(c) The entity providing support enforcement services shall file a copy of the notice required by paragraph (a) of this subsection with the circuit court in which the support order or judgment has been entered.

(8) Within 60 days of the reinstatement under subsection (6) of this section, the administrator shall review the support order for purposes of modifying the support order.

(9) An obligor's incarceration for at least 180 consecutive days or an obligor's release from incarceration is considered a substantial change of circumstances for purposes of child support modification proceedings.

(10) Proof of incarceration for at least 180 consecutive days is sufficient cause for the administrator, court or administrative law judge to allow a credit and satisfaction against child support arrearages for each month that the obligor was incarcerated or that is within 120 days following the obligor's release from incarceration unless the presumption of inability to pay has been rebutted.

(11) Orders modified to zero prior to the effective date of this 2017 Act remain in force with reinstatement at the full amount ordered by the court occurring 61 days after release. Such orders are not subject to suspension and reinstatement as provided in this section.

(12) The provisions of subsections (1), (9) and (10) of this section apply regardless of whether child support enforcement services are being provided under Title IV-D of the Social Security Act.

(13) The Department of Justice shall adopt rules to implement this section.

(14) As used in this section, "support order" means a judgment or administrative order that creates child support rights and that is entered or issued under ORS 416.400 to 416.465, 419B.400 or 419C.590 or this chapter or ORS chapter 107, 108, 109 or 110.

SECTION 3. ORS 416.425 is amended to read:

416.425. (1) Any time support enforcement services are being provided under ORS 25.080, the obligor, the obligee, the party holding the support rights or the administrator may move for the existing order to be modified under this section. The motion shall be in writing in a form prescribed by the administrator, shall set out the reasons for modification and shall state the address of the party requesting modification.

(2) The moving party shall state in the motion, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the dependent child, including a proceeding brought under ORS 25.287, 107.085, 107.135, 107.431, 108.110, 109.100, 109.103, 109.165, 125.025, 416.415, 419B.400 or 419C.590 or ORS chapter 110; and

(b) Whether there exists in this state or any other jurisdiction a support order, as defined in ORS 110.503, involving the dependent child, other than the order the party is moving to modify.

(3) The moving party shall include with the motion a certificate regarding any pending support proceeding and any existing support order other than the order the party is moving to modify. The party shall use a certificate that is in a form prescribed by the administrator and include information required by the administrator and subsection (2) of this section.

(4) The moving party shall serve the motion upon the obligor, the obligee, the party holding the support rights and the administrator, as appropriate. The nonrequesting parties must be served in the same manner as provided for service of the notice and finding of financial responsibility under ORS 416.415 (1)(a). Notwithstanding ORS 25.085, the requesting party must be served by first class mail to the requesting party's last known address. The nonrequesting parties have 30 days to resolve the matter by stipulated agreement or to serve the moving party by regular mail with a written response setting forth any objections to the motion and a request for hearing. The hearing shall be conducted under ORS 416.427.

(5) When the moving party is other than the administrator and no objections and request for hearing have been served within 30 days, the moving party may submit a true copy of the motion to the administrative law judge as provided in ORS 416.427, except the default may not be construed to be a contested case as defined in ORS chapter 183. Upon proof of service, the administrative law judge shall issue an order granting the relief sought.

(6) When the moving party is the administrator and no objections and request for hearing have been served within 30 days, the administrator may enter an order granting the relief sought.

(7) A motion for modification made under this section does not stay the administrator from enforcing and collecting upon the existing order unless so ordered by the court in which the order is entered.

(8) An administrative order filed in accordance with ORS 416.440 is a final judgment as to any installment or payment of money that has accrued up to the time the nonrequesting party is served with a motion to set aside, alter or modify the judgment. The administrator may not set aside, alter or modify any portion of the judgment that provides for any payment of money for minor children that has accrued before the motion is served. However:

(a) The administrator may allow a credit against child support arrearages for periods of time, excluding reasonable parenting time unless otherwise provided by order or judgment, during which the obligor, with the knowledge and consent of the obligee or pursuant to court order, has physical custody of the child; and

(b) The administrator may allow a credit against child support arrearages for any Social Security or veterans' benefits paid retroactively to the child, or to a representative payee administering the funds for the child's use and benefit, as a result of a parent's disability or retirement.

(9) The party requesting modification has the burden of showing a substantial change of circumstances or that a modification is appropriate under the provisions of ORS 25.287.

(10) The obligee is a party to all proceedings under this section.

[*(11) An order entered under this section that modifies a support order because of the incarceration of the obligor is effective only during the period of the obligor's incarceration and for 60 days after the obligor's release from incarceration. The previous support order is reinstated by operation of law on the 61st day after the obligor's release from incarceration. An order that modifies a support order because of the obligor's incarceration must contain a notice that the previous order will be reinstated on the 61st day after the obligor's release from incarceration.*]

(11) An obligor's incarceration for a period of at least 180 consecutive days or an obligor's release from incarceration is considered a substantial change of circumstances for purposes of proceedings brought under this section.

(12)(a) Notwithstanding subsections (1) to (11) of this section, any time support enforcement services are being provided under ORS 25.080, upon request of a party to a support order or judgment or on the administrator's own motion, the administrator may move to suspend the order or judgment and issue a temporary modification order under this subsection when:

(A) There is a period of significant unemployment as that term is described in paragraph (b) of this subsection; and

(B) A party to the support order or judgment experiences an employment-related change of income as defined by rule in ORS 416.455.

(b) Proceedings under this subsection may be initiated only when there is a period of significant unemployment in Oregon. The Attorney General shall determine when a "period of significant unemployment" exists in Oregon and designate the beginning and ending dates thereof. In making the determination of when a period of significant unemployment exists in Oregon, the Attorney General may consider whether there is in effect an "extended benefit period" as that term is defined in ORS 657.321.

(c) Except as otherwise provided in this subsection, the provisions of subsections (1) to (11) of this section apply to a motion for an order of suspension and temporary modification under this subsection.

(d) A party's employment-related change of income during a period of significant unemployment is considered a substantial change of circumstances for purposes of proceedings brought under this section.

(e) The motion for an order of suspension and temporary modification must be in writing and must include, but need not be limited to:

(A) The amount of the existing support order or judgment;

(B) The amount of the obligor's and obligee's income immediately preceding the party's employment-related change of income, if known;

(C) The reason for the party's employment-related change of income;

(D) How the party's employment-related change of income affects the party's employment status, income and, if applicable, ability to pay support;

(E) The obligor's and the obligee's current sources of income, if known;

(F) The proposed amount of the temporary modification order;

(G) A statement that if a party objects to the motion for an order of suspension and temporary modification, then the party may request a hearing within 14 days of service of the motion as provided in paragraph (g) of this subsection;

(H) A statement that the preexisting support order or judgment will be reinstated as provided in paragraph (h) of this subsection; and

(I) A statement that a party may request a renewal of the order of suspension and temporary modification prior to its expiration as provided in paragraph (j) of this subsection.

(f) The administrator shall serve the motion filed under this subsection upon the parties by regular first class mail, facsimile or electronic mail unless a party signs a form agreeing to accept service of the motion.

(g) A party may request a hearing within 14 days of service of the motion. If a hearing is requested, the provisions of ORS 416.427 apply. When there has been no request for hearing, the administrator may enter an order of suspension and temporary modification under this subsection. The order must be consistent with the provisions of the motion filed under this subsection and be in substantial compliance with the formula established under ORS 25.275.

(h) An order of suspension and temporary modification issued under this subsection is temporary and remains in effect for six months from the date the order is filed under ORS 416.440 or until the date specified in the notice provided under paragraph (i) of this subsection informing of the party's reemployment, whichever is earlier, at which time the preexisting support order or judgment be-

comes immediately effective and payable on the first day of the following month unless an order of renewal is issued under paragraph (j) of this subsection.

(i) The administrator may issue a notice of reinstatement at any time during which an order of suspension and temporary modification is in effect under this subsection when a party obtains employment and receives income that is sufficient to reinstate support in an amount substantially similar to the amount in the preexisting support order or judgment. The notice shall be served as provided in paragraph (f) of this subsection and must state that, unless a request for hearing is received within 14 days of service of the notice, the administrator will enter an order terminating the order of suspension and temporary modification and reinstating the amount of the preexisting support order or judgment effective on a date to be specified in the notice. If a hearing is requested, the provisions of ORS 416.427 apply. When there is no request for hearing, the administrator may enter an order terminating the order of suspension and temporary modification and reinstating the preexisting support order or judgment effective upon the date specified in the notice.

(j) Prior to expiration of an order of suspension and temporary modification under this subsection and upon request of a party, the administrator may renew the order of suspension and temporary modification for additional six-month periods or until the party obtains employment as described in paragraph (i) of this subsection, whichever occurs first, if the circumstances under which the order was originally issued continue to exist unchanged.

SECTION 4. Sections 1 and 2 of this 2017 Act and the amendments to ORS 416.425 by section 3 of this 2017 Act apply to child support obligations of incarcerated obligors that accrue on or after the effective date of this 2017 Act.

Passed by Senate April 18, 2017

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House June 12, 2017

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Tina Kotek, Speaker of House

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Dennis Richardson, Secretary of State

NOTES

Enrolled
Senate Bill 765

Sponsored by COMMITTEE ON JUDICIARY

CHAPTER .....

AN ACT

Relating to child support; amending ORS 25.020, 25.321 and 25.323; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 25.323 is amended to read:

25.323. (1) Every child support order must include a medical support clause.

(2) Whenever a child support order that does not include a medical support clause is modified the modification must include a medical support clause.

(3) A medical support clause may require that medical support be provided in more than one form, and may make the requirement that medical support be provided in a particular form contingent on the availability of another form of medical support.

(4) A medical support clause must require that one or both parents provide [*private*] health care coverage for a child that is appropriate and available at the time the order is entered. If [*private*] health care coverage for a child is not appropriate and available at the time the order is entered, the order must:

(a) Require that one or both parents provide [*private*] health care coverage for the child at any time thereafter when such coverage becomes available; and

(b) Either require the payment of cash medical support, or include findings on why cash medical support has not been required.

(5) For the purposes of subsection (4) of this section, [*private*] health care coverage is appropriate and available for a child if the coverage:

(a) Is accessible, as described in subsection (6) of this section;

(b) Is reasonable in cost and does not require the payment of unreasonable deductibles or copayments; and

(c) Provides coverage, at a minimum, for medical expenses, hospital expenses, preventive care, emergency care, acute care and chronic care.

(6) [*Private*] Health care coverage is accessible for the purposes of subsection (5)(a) of this section if:

(a) The coverage will be available for at least one year, based on the work history of the parent providing the coverage; and

(b) The coverage either does not have service area limitations or the child lives within 30 miles or 30 minutes of a primary care provider who is eligible for payment under the coverage.

(7) A medical support clause may not order a providing party to pay cash medical support or to pay to provide health care coverage if the providing party's income is equal to or less than the Oregon minimum wage for full-time employment.

(8) Cash medical support and the cost of other medical support ordered under a medical support clause constitute a child support obligation and must be included in the child support calculation made under ORS 25.275.

SECTION 2. ORS 25.321 is amended to read:

25.321. As used in ORS 25.321 to 25.343:

(1) "Cash medical support" means an amount that a parent is ordered to pay to defray the cost of health care coverage provided for a child by the other parent or a public body, or to defray uninsured medical expenses of the child.

(2) "Child support order" means a judgment or administrative order that creates child support rights and that is entered or issued under ORS 416.400 to 416.465, 419B.400 or 419C.590 or this chapter or ORS chapter 107, 108, 109 or 110.

(3) "Employee health benefit plan" means a health benefit plan that is available to a providing party by reason of the providing party's employment.

(4) "Enforcing agency" means the administrator.

(5) "Health benefit plan" means any policy or contract of insurance, indemnity, subscription or membership issued by an insurer, including health care coverage provided by a public body, and any self-insured employee benefit plan that provides coverage for medical expenses.

(6) "Health care coverage" means providing and paying for the medical needs of a child through a policy or contract of insurance, indemnity, subscription or membership issued by an insurer, including medical assistance provided by a public body, and any self-insured employee benefit plan that provides coverage for medical expenses.

(7) "Medical support" means cash medical support and health care coverage.

(8) "Medical support clause" means a provision in a child support order that requires one or both of the parents to provide medical support for the child.

(9) "Medical support notice" means a notice in the form prescribed under ORS 25.325 (5).

(10) "Plan administrator" means:

(a) The employer, union or other provider that offers a health benefit plan; or

(b) The person to whom, under a written agreement of the parties, the duty of plan administrator is delegated by the employer, union or other provider that offers a health benefit plan.

[*(11) "Private health care coverage" means all health care coverage other than medical assistance provided by a public body.*]

[*(12)*] **(11)** "Providing party" means a party to a child support order who has been ordered by the court or the enforcing agency to provide medical support.

[*(13)*] **(12)** "Public body" has the meaning given that term in ORS 174.109.

SECTION 3. ORS 25.020 is amended to read:

25.020. (1) Support payments for or on behalf of any person that are ordered, registered or filed under this chapter or ORS chapter 107, 108, 109, 110, 416, 419B or 419C, unless otherwise authorized by ORS 25.030, shall be made to the Department of Justice as the state disbursement unit:

(a) During periods for which support is assigned under ORS 412.024, 418.032, 419B.406 or 419C.597;

(b) As provided by rules adopted under ORS 180.345, when public assistance is provided to a person who receives or has a right to receive support payments on the person's own behalf or on behalf of another person;

(c) After the assignment of support terminates for as long as amounts assigned remain owing;

(d) For any period during which support enforcement services are provided under ORS 25.080;

(e) When ordered by the court under ORS 419B.400;

(f) When a support order that is entered or modified on or after January 1, 1994, includes a provision requiring the obligor to pay support by income withholding; or

(g) When ordered by the court under any other applicable provision of law.

(2)(a) The Department of Justice shall disburse payments, after lawful deduction of fees and in accordance with applicable statutes and rules, to those persons and entities that are lawfully entitled to receive such payments.

(b) During a period for which support is assigned under ORS 412.024, for an obligee described in subsection (1)(b) of this section, the department shall disburse to the obligee, from child support collected each month, $50 for each child up to a maximum of $200 per family.

(3)(a) When the administrator is providing support enforcement services under ORS 25.080, the obligee may enter into an agreement with a collection agency, as defined in ORS 697.005, for assistance in collecting child support payments.

[*(b) The Department of Justice:*]

[*(A) Shall disburse support payments, to which the obligee is legally entitled, to the collection agency if the obligee submits the completed form referred to in paragraph (c)(A) of this subsection to the department;*]

[*(B) May reinstate disbursements to the obligee if:*]

[*(i) The obligee requests that disbursements be made directly to the obligee;*]

[*(ii) The collection agency violates any provision of this subsection; or*]

[*(iii) The Department of Consumer and Business Services notifies the Department of Justice that the collection agency is in violation of the rules adopted under ORS 697.086;*]

[*(C) Shall credit the obligor's account for the full amount of each support payment received by the department and disbursed to the collection agency; and*]

[*(D) Shall develop the form referred to in paragraph (c)(A) of this subsection, which shall include a notice to the obligee printed in type size equal to at least 12-point type that the obligee may be eligible for support enforcement services from the department or the district attorney without paying the interest or fee that is typically charged by a collection agency.*]

[*(c) The obligee shall:*]

[*(A) Provide to the department, on a form approved by the department, information about the agreement with the collection agency; and*]

[*(B) Promptly notify the department when the agreement is terminated.*]

[*(d)*] **(b)** The collection agency:

(A) May provide investigative and location services to the obligee and disclose relevant information from those services to the administrator for purposes of providing support enforcement services under ORS 25.080;

(B) May not charge interest or a fee for its services exceeding 29 percent of each support payment received unless the collection agency, if allowed by the terms of the agreement between the collection agency and the obligee, hires an attorney to perform legal services on behalf of the obligee;

(C) May not initiate, without written authorization from the administrator, any enforcement action relating to support payments on which support enforcement services are provided by the administrator under ORS 25.080; and

(D) Shall include in the agreement with the obligee a notice printed in type size equal to at least 12-point type that provides information on the fees, penalties, termination and duration of the agreement.

[*(e)*] **(c)** The administrator may use information disclosed by the collection agency to provide support enforcement services under ORS 25.080.

(4) The Department of Justice may immediately transmit to the obligee payments received from any obligor without waiting for payment or clearance of the check or instrument received if the obligor has not previously tendered any payment by a check or instrument that was not paid or was dishonored.

(5) The Department of Justice shall notify each obligor and obligee by mail when support payments shall be made to the department and when the obligation to make payments in this manner shall cease.

(6)(a) The administrator shall provide information about a child support account directly to a party to the support order regardless of whether the party is represented by an attorney. As used in this subsection, "information about a child support account" means the:

(A) Date of issuance of the support order.

(B) Amount of the support order.

(C) Dates and amounts of payments.

(D) Dates and amounts of disbursements.

(E) Payee of any disbursements.

(F) Amount of any arrearage.

(G) Source of any collection, to the extent allowed by federal law.

(b) Nothing in this subsection limits the information the administrator may provide by law to a party who is not represented by an attorney.

(7) Any pleading for the entry or modification of a support order must contain a statement that payment of support under a new or modified order will be by income withholding unless an exception to payment by income withholding is granted under ORS 25.396.

(8)(a) Except as provided in paragraphs (d) and (e) of this subsection, a judgment or order establishing paternity or including a provision concerning support must contain:

(A) The residence, mailing or contact address, final four digits of the Social Security number, telephone number and final four digits of the driver license number of each party;

(B) The name, address and telephone number of all employers of each party;

(C) The names and dates of birth of the joint children of the parties; and

(D) Any other information required by rule adopted by the Chief Justice of the Supreme Court under ORS 1.002.

(b) The judgment or order shall also include notice that the obligor and obligee:

(A) Must inform the court and the administrator in writing of any change in the information required by this subsection within 10 days after the change; and

(B) May request that the administrator review the amount of support ordered after three years, or such shorter cycle as determined by rule of the Department of Justice, or at any time upon a substantial change of circumstances.

(c) The administrator may require of the parties any additional information that is necessary for the provision of support enforcement services under ORS 25.080.

(d)(A) Upon a finding, which may be made ex parte, that the health, safety or liberty of a party or child would unreasonably be put at risk by the disclosure of information specified in this subsection or by the disclosure of other information concerning a child or party to a paternity or support proceeding or if an existing order so requires, a court or administrator or administrative law judge, when the proceeding is administrative, shall order that the information not be contained in any document provided to another party or otherwise disclosed to a party other than the state.

(B) The Department of Justice shall adopt rules providing for similar confidentiality for information described in subparagraph (A) of this paragraph that is maintained by an entity providing support enforcement services under ORS 25.080.

(e) The Chief Justice of the Supreme Court may, in consultation with the Department of Justice, adopt rules under ORS 1.002 to designate information specified in this subsection as confidential and require that the information be submitted through an alternate procedure to ensure that the information is exempt from public disclosure under ORS 192.502.

(9)(a) Except as otherwise provided in paragraph (b) of this subsection, in any subsequent child support enforcement action, the court or administrator, upon a showing of diligent effort made to locate the obligor or obligee, may deem due process requirements to be met by mailing notice to the last-known residential, mailing or employer address or contact address as provided in ORS 25.085.

(b) Service of an order directing an obligor to appear in a contempt proceeding is subject to ORS 33.015 to 33.155.

(10) Subject to ORS 25.030, this section, to the extent it imposes any duty or function upon the Department of Justice, shall be deemed to supersede any provisions of ORS chapters 107, 108, 109, 110, 416, 419A, 419B and 419C that would otherwise impose the same duties or functions upon the county clerk or the Department of Human Services.

(11) Except as provided for in subsections (12), (13) and (14) of this section, credit may not be given for payments not made to the Department of Justice as required under subsection (1) of this section.

(12) The Department of Justice shall give credit for payments not made to the department:

(a) When payments are not assigned to this or another state and the obligee and obligor agree in writing that specific payments were made and should be credited;

(b) When payments are assigned to the State of Oregon, the obligor and obligee make sworn written statements that specific payments were made, canceled checks or other substantial evidence is presented to corroborate their statements and the obligee has been given prior written notice of any potential criminal or civil liability that may attach to an admission of the receipt of assigned support;

(c) When payments are assigned to another state and that state verifies that payments not paid to the department were received by the other state; or

(d) As provided by rule adopted under ORS 180.345.

(13) An obligor may apply to the Department of Justice for credit for payments made other than to the Department of Justice. If the obligee or other state does not provide the agreement, sworn statement or verification required by subsection (12) of this section, credit may be given pursuant to order of an administrative law judge assigned from the Office of Administrative Hearings after notice and opportunity to object and be heard are given to both obligor and obligee. Notice shall be served upon the obligee as provided by ORS 25.085. Notice to the obligor may be by regular mail at the address provided in the application for credit. A hearing conducted under this subsection is a contested case hearing and ORS 183.413 to 183.470 apply. Any party may seek a hearing de novo in the circuit court.

(14) Nothing in this section precludes the Department of Justice from giving credit for payments not made to the department when there has been a judicially determined credit or satisfaction or when there has been a satisfaction of support executed by the person to whom support is owed.

(15) The Department of Justice shall adopt rules that:

(a) Direct how support payments that are made through the department are to be applied and disbursed; and

(b) Are consistent with federal regulations.

SECTION 4. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.

Passed by Senate April 18, 2017

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House June 12, 2017

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Tina Kotek, Speaker of House

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Oregon Revised Statutes

Chapter 18

SATISFACTION OF MONEY JUDGMENTS

18.228 Satisfaction of support awards payable to Department of Justice. (1) If a support award is paid to the Department of Justice, the judgment creditor may receive credit for satisfaction of the judgment only in the manner provided by this section. The department may provide judgment creditors with forms and instructions for satisfaction of support awards under this section.

(2) Any satisfaction document for a support award described in subsection (1) of this section must be mailed to or delivered to the Department of Justice, and not to the court administrator. The department shall credit the amounts reflected in the satisfaction document to the support award pay records maintained by the department. Except as provided in subsection (3) of this section, the department shall not credit amounts against the support award pay records to the extent that the judgment is assigned or subrogated to this or another state. The Department of Justice shall thereafter promptly forward the satisfaction document to the court administrator for the court in which the money award was entered, together with a certificate from the department stating the amounts reflected as paid in the support award pay records maintained by the department. The court administrator shall note in the register as paid only the amount stated in the certificate, and not the amount shown on the satisfaction document.

(3) If a support award has been assigned to this state, the Department of Justice may satisfy the support award to the extent of the assignment. The department may credit the amounts reflected in the satisfaction document to the support award pay records maintained by the department and file the satisfaction document with the court administrator for the court in which the money award was entered, together with a certificate from the department stating the amounts reflected as paid in the support award pay records. The court administrator shall note in the register and in the judgment lien record the amount of satisfaction shown on the certificate, and not the amount shown on the satisfaction document.

(4) Unless a judgment requires that payments under a support award be paid to the Department of Justice or enforcement services are provided pursuant to ORS 25.080, all satisfaction documents for a support award must be filed with the court administrator.

[2003 c.576 §26; 2007 c.339 §9]

NOTES

137-050-0715
Income

(1) “Income” means the actual or potential gross income of a parent as determined in this rule. Actual and potential income may be combined when a parent has actual income and is unemployed or employed at less than the parent’s potential.

(2) “Actual income” means a parent's gross earnings and income from any source, including those sources listed in section (4), except as provided in section (5).

(3) "Potential income" means the parent's ability to earn based on relevant work history, including hours typically worked by or available to the parent, occupational qualifications, education, physical and mental health, employment potential in light of prevailing job opportunities and earnings levels in the community, and any other relevant factors. A determination of potential income includes potential income from any source described in section 4 of this rule.[1] If a parent residing in Oregon is determined to be able to earn at the minimum wage, the hourly earning amount to be imputed as potential income will be based on the lowest minimum wage provided for in any area of Oregon.[2]

[1.] Commentary: Some employers will not allow an employee to work a full 40 hour week, which may not be customary to the occupation, but is customary to the employer. In these types of circumstances the fact-finder must determine whether to base the parent's earning ability on a regular 40-hour workweek, the customary work schedule for the parent's occupation, or work opportunities in the parent's current employment situation.

Example: A parent works 32 hours per week at a restaurant. Additional hours are unavailable. Other employment opportunities in the area for which the parent is qualified offer similar hours and wages. It would be inappropriate to base the parent's income on a 40 hour work week.

Other parents may have suffered reduced earning ability. For example, it would be inappropriate to attribute historical full-time income to a public school teacher who has been laid off and now works part-time as a substitute teacher – assuming there are limited employment opportunities in the area for a teacher of those credentials and work history.

On the other hand, it might be appropriate to attribute income based on historical earnings to a person who has left a lucrative professional career because, for example, a spouse earns sufficient income, or in order to work in a preferred field but at a lower rate of pay. Because the goal is to determine earning ability, this imputation should not simply apply the amount formerly earned. The review should include consideration of the currently available employment opportunities in that field in the parent's area, the condition of the parent's professional skills and/or equipment, and the time since the parent last worked in that occupation.

This provision also contemplates seasonal employment. A seasonally employed parent may have significant earnings for a portion of the year and then receive unemployment compensation for a portion of the year. Under those circumstances, the parent’s earning ability might be based on an annual review of their income, divided over a twelve-month period.

If a parent’s occupational history is known but the parent’s income is not, the Oregon Employment Department’s Oregon Labor Market Information System may be of use in assessing employment opportunities and potential earnings. See generally http://www.qualityinfo.org/olmisj/OlmisZine. For a statewide listing of earnings by profession, see http://www.olmis.org/olmisj/PubReader?itemid=00000053. For regional wage information tables, see http://www.qualityinfo.org/olmisj/PubReader?itemid=00003174.

(4) Actual income includes but is not limited to:

(a) Employment-related income including salaries, wages, commissions, advances, bonuses, dividends, recurring overtime pay,[3] severance pay, pensions, and honoraria;[4]

(b) Expense reimbursements, allowances,[5] or in-kind payments to a parent, to the extent they reduce personal living expenses;

(c) Annuities, trust income, including distribution of trust assets, and return on capital,[6] such as interest and dividends;

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[2] Commentary ORS 653.025, as amended by SB 1532 (2016), provides a three-tiered structure of minimum wages applicable to employers in different areas of Oregon. This provision is intended to ensure the fairest results and minimize the need for additional factual determinations by ensuring that any use of potential minimum wage earnings is based on the lowest of these figures.

Under ORS 653.025(3), the applicable wages will be: from July 1, 2016, to June 30, 2017, $9.50; from July 1, 2017, to June 30, 2018, $10; from July 1, 2018, to June 30, 2019, $10.50; from July 1, 2019, to June 30, 2020, $11; from July 1, 2020, to June 30, 2021, $11.50; from July 1, 2021, to June 30, 2022, $12; from July 1, 2022, to June 30, 2023, $12.50.

This provision does not restore the presumption in effect prior to July 1, 2013, that a parent is able to earn full-time minimum wage (though section 7 of this rule allows use of full-time minimum wage where there is insufficient information to make a finding of actual or potential income). Rather, it provides that where the court, administrative agency, or administrative law judge finds that a parent is able to earn minimum wage, the lowest Oregon minimum wage will be used to calculate income regardless of the parent's location in Oregon. This may apply to a parent found able to find work at the minimum wage but less than full-time, as may be common in some areas; that parent could be assessed potential income at the number of hours of work the parent is likely able to obtain, at the lowest Oregon minimum wage amount.

[3] Commentary: Overtime is included to the extent it is regularly occurring. Sporadic overtime is not generally included. Overtime is calculated based on an annual amount, prorated over a twelve month period. The calculation of annual overtime takes into consideration those occupations that customarily have seasonal overtime. With evidence of a recent voluntary reduction in overtime hours, a fact finder may determine an annual average of overtime based on historic accumulation of overtime.

[4] Commentary: Some employers contribute to medical benefits beyond the cost of health care coverage. This employer contribution should be included as gross income to the person. Any cash benefits a person may receive from not enrolling in, or "opting out" of, a health care coverage plan are considered income.

Employer contributions to profit sharing, such as unexercised stock options, should be treated as gross income only if such contributions are capable of ready conversion into cash (i.e., liquid).

[5] Commentary: Allowances, such as a car, home or cellular phone allowance provided by an employer, may be considered income to the extent they reduce living expenses consistent with section 4(f). Example: If an employer provides the employee a cellular phone subsidy of $100 per month, that amount could be included in income. If, however, the cellular phone were restricted to business use, it would not be considered in determining income. In calculating income for an active duty service member, income includes housing and subsidy allowances and special pay allowances.

[6] Commentary: A return on capital, including interest and dividends, can be considered regardless of whether the return is paid out to the party or reinvested to increase the value of the capital investment.

(d) Income replacement benefit payments including Social Security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, and Department of Veterans Affairs disability benefits;

(e) Inheritances,[7] gifts and prizes, including lottery winnings; and

(f) Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, minus costs of goods sold, minus ordinary and necessary expenses required for self-employment or business operation, including one-half of the parent's self-employment tax, if applicable. Specifically excluded from ordinary and necessary expenses are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses,[8] investment tax credits, or any other business expenses determined by the fact finder to be inappropriate or excessive for determining gross income.[9]

(5) Child support, food stamps, Social Security or Veterans benefits received on behalf of a child in the household, adoption assistance, guardianship assistance, and foster care subsidies are not considered income for purposes of this calculation.[10]

(6) If a parent's actual income is less than the parent's potential income, the court, administrator, or administrative law judge may impute potential income to the parent.[11]

(7) If insufficient information about the parent's income history is available to make a determination of actual or potential income, the parent's income is the amount the parent could

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[7] Commentary: Inheritances are separately listed beginning in 2013 based on *In re Marriage of Leif*, 246 Or App 511, 266 P3d 165 (2011).

[8] Commentary: The straight-line method (regular depreciation) deducts an equal amount of depreciation each year. Accelerated depreciation front-loads the depreciation, realizing less income. If the property is sold and new property purchased and accounted for using accelerated depreciation, lower income results on an ongoing basis for tax purposes. *See IRS Publication 936.*

[9] Commentary: Determining gross income for persons involved in the operation of a business can be difficult. The problem is best addressed by the discovery process and by the fact finding authority of the decision maker.

Undistributed corporate income is included in determining the gross income of the parties (*see Perlenfein and Perlenfein*, 316 Or 16 (1993)). However, the gross income thus calculated may be rebutted in whole or in part if there is evidence that such income is not actually available to the parent.

[10] Commentary: Adoption assistance, foster care, and guardianship subsidy payments are intended to cover the cost of care for children who may have extraordinary education, emotional or physical needs. The parents are still obligated to provide for the basic needs of the child.

[11] Commentary: Whether a person is receiving his/her potential income must be determined on a case-by-case basis. *See Matter of Marriage of LaFavor*, 151 Or App 257, 949 P.2d 313 (1997). The drafters also note that under ORS 107.135(3) as interpreted in *Hogue and Hogue*, 115 Or App 697 (1992), even a good-faith reduction in income may not constitute a substantial change in circumstance for purposes of modifying a support judgment where the parent fails to prove that the reduced income results in reduced ability to pay.

earn working full-time at the lowest[12] minimum wage in the state in which the parent resides.[13]

(8) Potential income may not be imputed to:

(a) A parent unable to work full-time due to a verified disability;

(b) A parent receiving workers' compensation benefits;

(c) An incarcerated obligor as defined in OAR 137-055-3300; or

(d) A parent whose order is being temporarily modified under ORS 416.425(13).

(9) To determine monthly income when the employee is paid:

(a) Weekly, multiply the weekly earnings by 52 and divide by 12.

(b) Every two weeks, multiply the bi-weekly earnings by 26 and divide by 12.

(c) Semimonthly (twice per month), multiply the semimonthly earnings by 2.[14]

(10) Notwithstanding any other provision of this rule, if the parent receives Temporary Assistance for Needy Families, the parent's income is presumed to be the amount which could be earned by full-time work at the lowest minimum wage in the state in which the parent resides. This income presumption is solely for the purposes of the support calculation and not to overcome the rebuttable presumption of inability to pay in ORS 25.245.[15]

(11) As used in this rule, "full-time" means 40 hours of work in a week except in those industries, trades or professions in which most employers, due to custom, practice or agreement, utilize a normal work week of more or less than 40 hours in a week.[16]

Stat. Auth.: ORS 25.270 – 25.290 & 180.345
Stats. Implemented: ORS 25.270 – 25.290
Effective date: July 1, 2016

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[12] Commentary: See Commentary note 2.

[13] Commentary: Where the parent's state of residence is unknown, use the lowest Oregon minimum wage.

[14] Commentary: Irregular income, such as seasonal, commission, or overtime work, or volatile investment income, may be computed based on a representative period, such as one or two years, with the goal of accurately estimating ongoing ability to pay support.

[15] Commentary: TANF recipients are presumed unable to pay support (ORS 25.245). However, it is necessary to impute some income to all parties (even parents who receive public assistance). Income is imputed for purposes of calculating the relative responsibility of each parent and not to order a TANF recipient to pay support.

[16] Commentary: This definition of "full time work" is adapted from that used by the Employment Department. This rule does not contemplate the term "underemployed."

Oregon Department of Justice

Ellen F. Rosenblum, Attorney General
Frederick M. Boss, Deputy Attorney General

Division of Child Support
1162 Court St NE
Salem OR 97301
Telephone: (503) 947-4388
FAX: (503) 947-2578
TTY: (800) 735-2900
oregonchildsupport.gov

$250 in children's ordinary medical expenses
no longer needs to be deducted from extraordinary medical expenses

- **No need to deduct the first $250 per child per year of medical expenses**
- **Ordinary expenses included in support amount**
- **Extraordinary unreimbursed expenses may be divided from first dollar**

In 2013, the DOJ Division of Child Support amended the Oregon Child Support Program guidelines rule OAR 137-050-0750 and its commentary to reflect this change. In light of reports of ongoing confusion around this issue, we are revising the commentary to further clarify the change. The revised commentary:

OAR 137-050-0750 ***and updated commentary***

Medical Support

(1) The basic support obligation (OAR 137-050-0725) includes ordinary unreimbursed medical costs of $250 per child per year. These costs represent everyday expenses such as bandages, non-prescription medication, and co-pays for doctor's well visits. The basic support obligation does not account for health care coverage costs or for extraordinary medical expenses.[1]

[1] **Commentary**: It is no longer appropriate to deduct the first $250 of unreimbursed medical expenses before dividing costs between the parents. Ordinary expenses are included in the support amount. Extraordinary unreimbursed expenses may be divided from the first dollar.

Prior to 2013, we did not differentiate between the types of medical expenses. Rather, the guidelines required parents to always deduct the first $250 in unreimbursed expenses before dividing any subsequent expenses. During the 2013 guidelines review, we realized that approach was not entirely consistent with the economic study on which our support scale is based. Also, it would be unreasonable to require a parent to painstakingly document small, routine costs like bandages and vitamins in detail before receiving reimbursement for the extraordinary expenses.

Ordinary expenses, such as bandages, non-prescription medication, and vitamins, are included in the basic support amount based on national economic data indicating an average amount of about $250 per child per year in ordinary expenses. Since these kinds of costs are already included in the scale and allocated between the parents based on parenting time, they should not be divided among the parties.

Extraordinary expenses are not included in the basic support obligation and are suitable for division between the parties from the first dollar. This includes uncovered costs of treatment of illness or injury; chronic medical conditions, like asthma or diabetes; orthodontia; medical equipment; and visits to the emergency room.

For more information, see the 2013 Guidelines Report and Recommendations.

NOTES

Parental Alienation

Dr. Landon Poppleton, Ph.D., J.D., *Vancouver, Washington*

NOTES

The Alienated Child

Presented by: Landon Poppleton, PhD, JD

Definition

"A child who expresses strong, negative feelings (such as anger, hatred, contempt and fear) and beliefs about his or her parent that do not accurately reflect the child's prior experiences with that parent" (see Stahl, 2011)[1].

Signs:

- Campaign of denigration
- Weak, frivolous rationalizations
- Lack of Ambivalence
- Independent thinking (child generated)
- Reflective support of aligned parent
- Absence of guilt
- Borrowed scenarios
- Generalization beyond the parent
- Re-writing of history

Disruption of the Internal Working Model (IWM) of a child (see Garber, 2010)[2].

Children anticipate care based on the past experience of **sensitivity and responsivity** of his or her caregivers. This develops into an internal working model (IWM) for each parent.

New information about a caregiver, through experience or communication will be either consistent or inconsistent with their IWM of that caregiver. If information is inconsistent with it, then it is either **assimilated** (disregarded, does not change the IWM) or **accommodated** (reshapes the IMW). In a normal, healthy family information communicated to a child, and the accommodation of that information help with safety and identification, especially when it has to do with real threats to a child outside of the family. New Information coming from the caregiver is accommodated by the child through self-reflection, and may be aligning or alienating. This can extend to the co-parenting relationships.

Co-parent ***alignment*** is the healthy, mutually supportive dynamic of parents reinforcing the security of the attachments of their child with each parent. Co-parent ***alienation*** occurs when a parent's words or actions decrease the security of attachment of a child and the other parent.

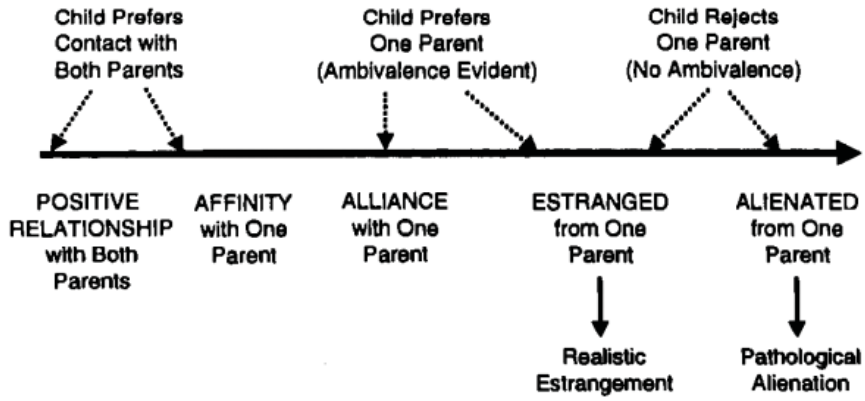
In a "pathological" family systems: 1) If accommodated information makes the child feel more secure with one parent, it is "***Aligning***." 2) If accommodated information makes the child feel less secure with another parent, it is "***Alienating***." Thus a given caregiver can affect the attachment relationship of their

[1] Stahl, P. M. (2011). Conducting Child Custody Evaluations, From Basic to Complex Issues. Sage.
[2] Garber, B.D. (2010). Developmental Psychology for Family Law Professionals, Springer

child with others or him or herself by their actions and words. Information from outside parties can also affect the IWM of the child, either to create greater security (alignment) or lesser security (alienation).

Accuracy of the message is important. If the message is accurate, the change in the IWM and subsequent relationship is appropriate, i.e. if a parent reassures a child about a sensitive parent, their security (and alignment) is enhanced. Similarly, if a parent discusses safety issues about an abusive parent, the child's "**estrangement**" (decreased security) is accurate.

Inaccurate messages create multiple problems. An inaccurate endorsement of an insensitive, abusive parent creates a misalignment. Inaccurate denigration of a sensitive, appropriate parent causes "**alienation**."



(Johnson and Kelly, 2001)[3]

Risk Factors for Disruption (see Johnson and Kelly, 2001)

1- Child triangulation and **intense marital conflict-** This can include a process of parentification, infantilization, and adultification. Under each of these relationship dynamics a child can be put in a position to provide conform to a parent, become a messenger between parents, or even put in a position to have to "overly" depend on a particular parent for his or her support. Each of these has a way of contributing to the alienation process.

2- Deeply **humiliating separation-** Discovery of an affair; emptying the house of possessions and the bank account of funds; discovery the divorce was planned for months with assistance from others; and a new relationship that challenges the family's existing notions of sexuality/morality are a few example of this. For example, the risk of a child resisting a parent increased if the child believes a new intimate relationship is responsible for the breakup of the family. Or even if re-partnering soon after the breakup the new partner makes a parenting misstep, such as using a harsh criticism or discipline, or disparages the other parent.

[3] Kelly, J.B., & Johnson, J.R. (2001). The alienated child: A reformulation of parental alienation syndrome. Family Court Review, 39(3), 249-263.

3- **Intense litigation-** The court process is burdensome for a family, and a child, for example, may view one parent as driving the court fight, which can make him or her angry at the parent thought to unnecessarily push the issue. Sometimes the child views one parent as having an unfair financial advantage and the child may sympathize with the disadvantaged parent.

4- **Beliefs of the parents-** Two major themes immerge most often:

1) The resisted parent is "***not safe***." There is a belief that the resisted parents has abused or neglected the child, or seems likely to do so. The preferred parent then "becomes stuck in" apprehension, and is torn between acting to protect the child, and letting the child be exposed to a "risky situation." Children can pick this up, and even amplify that the resistant parent is "unsafe." The preferred parent will then often stand behind the child's choice "until she is ready." The preferred parents might even suggest that the child needs "time away" from the resisted parent. Many go so far to argue that "based on the emotional reaction of the child" to the parents, that it "unhealthy" for the child to spend time with the other parent.

2) The theme towards the aligned parent is that the child resists due to "***alienation***" and deliberate brainwashing of the child to a belief that the aligned parents is "unsafe."

The arguments around "truth and evidence" for parent's beliefs play out ad nauseam, and can often fail to further clarify the source of the allegations of child maltreatment or confirm the presence of parenting skills deficits. They often lead to greater polarization, deeply entrenched anger, more stubbornly held oppositional beliefs, and stronger alignment of the child with the preferred parent.

5- **Child Vulnerabilities (8 to 16 typically)-** Children present with their own vulnerabilities to the process of alienation. This can include the disposition towards horizontal splitting of his or her parents (one parent is "all" good and the other as "all" bad), dependence, anxiety, and prior attachments.

Remedies

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CURRICULUM VITAE

Landon E. Poppleton, PhD, JD
Psychologist
landonp@nwfamilypsychology.com

10121 SE Sunnyside Road, Suite 300
Clackamas, OR 97015
(p) 503-454-6834
(f) 503-214-8486

814 NE 87th Ave
Vancouver, WA 98664
(p) 360-910-1522
(f) 360-326-1522

LICENSES

Oregon State
Psychologist (No. 1999)
Washington State
Psychologist (No. PY 60041144)

EDUCATION

J.D., Law
Northwestern School of Law of Lewis and Clark College; Portland, Oregon
American Bar Association Approved Law School
Graduated 2016

Ph.D., Clinical Psychology
Ph.D. Minor, Statistics
Brigham Young University; Provo, Utah
American Psychological Association approved program
Graduated 2008

Dissertation: Mediators and Moderators of Cognitive Behavioral Telephone Treatment of Depression
Emphasis: Child, Adolescent and Family & Clinical Research
Internship: Portland VA Medical Center; Portland, Oregon
American Psychological Association approved program

B.S., Psychology/B.A., Economics
B.A. Minor, Spanish
Brigham Young University; Provo, Utah
Graduated 2002

CLINICAL

NW Family Psychology; Portland, OR/Vancouver, WA Jan 2009- Present
Director/Psychologist
Work with children, adolescents, adults, and families to overcome the negative effects of divorce and other life challenges. Primarily provide bilateral custody evaluations, psychological assessments, parenting risk assessment, parenting coordination services, work product review, consultation, psychotherapy, and reunification services.

Virginia Garcia Memorial Health Center; Portland, OR Feb 2009–June 2010
Program Coordinator/Resident
Coordinated and supervised the behavioral health program in four clinics while providing treatment and consultation in behavioral medicine. Developed programs for chronic pain management, management of depression, violence risk assessment, and management of drug seeking and other behaviorally disordered clients. Provided services in both English and Spanish. Was part of a team to develop standards of care and program evaluation protocol.

Lifeworks NW; Portland OR Sept 2008 – Aug 2009
Resident
Provided psychological services to adults and families including individual adult psychotherapy, family psychotherapy, dialectical behavior group therapy for personality disorders, and group treatment for depression.

Portland VA Medical Center*;* Portland, OR Apr 2008 – Aug 2008
Internship
Provided a combination of psychotherapy, group psychotherapy, psychological assessment, neuropsychological assessment, and consultation in mental health, substance abuse, and neuropsychology clinics. This included a rotation at Doernbecher Children's Hospital doing child/adolescent neuropsychological evaluations in oncology. Was a member of the Disruptive Behavior Committee that met monthly to review threats and acts of violence, assessed for future violence risk, and made recommendations for intervention. Provided disruptive behavior assessment and management training.

Family Academy; Provo, UT Mar 2001 – Aug 2007
Externship
Worked with families of divorce in multiple capacities, including supervision, individual and conjoint psychotherapy, supervision training, and therapeutic reunification. Conducted psychological and parent time evaluations. Consulted family and juvenile courts, case managers, and parent coordinators/special masters on divorce cases.

Jay P. Jensen, PhD; **Provo UT** Jan 2005 – Aug 2007
Clerkship
Conducted child custody evaluations.

Assessment and Polygraph Associates; Draper, UT Sept 2006 – Aug 2007
Externship
Conducted psychological, risk, and psycho-sexual assessments on juvenile offenders. Provided consultation to probation officers regarding level of risk and treatment needs.

Mountain Lands Community Health; Provo, UT July 2004 – Aug 2006
Externship
Worked in primary care providing psychological services to children, adolescents, adults, and families for a variety of mental health problems. Consulted primary care physicians about treatment planning. Treated patients in both English and Spanish.

BYU Comprehensive Clinic; Provo, Utah Jan 2004 – Jun 2006
Practicum
Provided individual, family, group, and couples psychotherapy. Conducted neuro-psychological, developmental, and personality assessments on adults and children.

Erin Bigler, PhD; Provo, Utah May 2005 – Aug 2005
Practicum
Child neuropsychological assessments.

Utah State Prison; Salt Lake City, Utah Nov 2004
Clerkship
Evaluated inmates using a variety of methods (viz., record review, psychological testing, interviews, and collateral contacts) to determine malingering and/or treatment needs.

Utah State Mental Hospital; Provo, Utah July 2004 – Aug 2004
Clerkship
Provided treatment in cognitive-remediation.

RESEARCH AND PRESENTATIONS

Manuscripts:
Tutty, S. Spangler, D., & **Poppleton, L. E.**, (2010). Treatment Outcomes of Cognitive Behavioral Telephone Treatment for Depression on a Rural Adult Population. *Journal of Clinical and Consulting Psychology.*

Layne, C. M., Saltzman, W. R., **Poppleton, L. E.**, Burlingame, G. M., Pa'Ali, A., Durakovic, E., Music, M., Campara, N., Apo, N., Arslanagic, B., Steinberg., A. M., & Pynoos, R. S. (*2008*). Effectiveness of School-Based Group Psychotherapy Program for War-Exposed Adolescents: A Randomized Controlled Trail. *Journal of the American Academy of Child and Adolescent Psychiatry.*

Harris, M., Lauritzen, M., **Poppleton, L**., Bubb, R. R., and Brown, B. L. (2007). How many factors? A strategy for identifying latent structure in factor analysis. American Statistical Association 2007 Proceedings.

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Bishop, M. J., Bybee, T. S., Lambert, M. J., Burlingame, G. M., Wells, G., & **Poppleton, L. E.** (2005). Accuracy of a Rationally Derived Method for Identifying Treatment Failure in Children and Adolescents. *Journal of Child and Family Studies*.

Presentations:
Current Issues in Custody and Parenting Time Evaluation (May 2017). Presented with Annelisa Smith

Alienated Child: Theory and Interventions (October 2016). Presented to the Clark County Bar Association.

Child Development and Parenting Plan Development (March 2016). Presented to the Clark County Family Law Section

Parenting Coordination (April 2015). Presented to the Clark County Family Law Section

Meaning of Child Custody (October 2014). Presented to the Oregon Bar Family Law Section annual conference.

DSM-5 in Dependency Matters (December 2013). Presented to Vancouver, DSHS

Prevention and Management of Disruptive Behavior (October 2013). Presented to Longview DSHS.

Forensic Mental Health Assessment (June 2013). Presented to Clackamas DHS with Dr. Jeff Lee.

Joint Parenting-Time Schedules (May 2013). Presented to the Clark County Bar Association.

Dealing with Drug and Alcohol Affected Clients when Developing Parenting Plans (March 2013). Presented to The Oregon Academy of Family Law Practitioners.

Assessing Violence Risk in Youth in Child Custody Evaluation (April 2012). Presenter at the Washington Chapter Association of Family and Conciliation Courts Conference. With Dr. Steve Tutty

Utilizing and Critiquing Empirical Research in Custody Assessments (April 2012). Presenter at the Washington Chapter Association of Family and Conciliation Courts Conference. With Dr. Jeff Lee and Ms. Lyons, B.S.

Parenting Coordination (April 2012). Presented as panel of attorneys and psychologists to the Clark County Bar Association, Vancouver WA as a follow-up to that presented in February 2011. Model order, forms, and procedures provided that resulted from a work group that formed out of the prior meeting.

Fundamentals of Forensic Mental Health Evaluations in Child Dependency Cases (April, 2012). Presented to the Clark County DSHS.

Managing Difficult Clients in Dependency Matters (March 2012). Presented to Clark County DSHS.

Assessing Violence Risk in Youth in Child Custody Evaluation (October 2011). Workshop at the Regional Association of Family and Conciliation Courts Conference on Domestic Violence. Presented with Dr. Steve Tutty.

Parent Coordination (October 2011). Panel Member at the Washington Chapter Association of Family and Conciliation Courts Conference.

Managing Difficult Clients in Dependency Matters (September 2011). Clark County Bar.

Fundamentals of Forensic Parenting Evaluations (Sept 2011). Clark County CASA

Assessment of Parental Alienation (May, 2011). Presented to the Clark County Guardian Ad Litem group.

Fundamentals of Parenting Coordination (Feb 2011). Presented with Dr. Harry Dudley to the Clark County Bar Association, Vancouver WA.

Forensic Mental Health Evaluations and Child Development (Oct 2010). Presented to the Clark County CASA.

Psychological Testing in Family Law Matters (June 2010). Presented with Dr. Daniel Rybicki and Dr. Kirk Johnson. WA State Bar Association Mid-Year Conference, Vancouver, WA.

Integrating Behavioral Health in Primary Care. (March, 2009). Oyemaya, J., Poppleton, L.E. First Annual Primary Care Convention, Portland, Oregon

Parenting Behavior May Mediate the Link between Postwar Adversities and Adolescent Mental Health: Preliminary Evidence from Bosnian Youths (April, 2008). Packard, A., Poppleton, L. E., & Layne, C.M. Presented at the Rocky Mountain Psychological Association convention, Boise, Idaho.

Internecine Conflict and Recovery of War-Traumatized Adolescents in Bosnia-Herzegovina (February, 2008). In C. Maida (Chair), Global Ecologies of Danger: Living Through Extreme Times.Layne, C.M., Olsen, J., Land, A., Poppleton, L.E., Legerski, J.P., Isakson, B., Djapo, N., Saltzman, W.R., Burlingame, G.M., Pynoos, R.S. Symposium presented at the Annual Meeting of the American Academy for the Advancement of Science, Boston, Massachusetts.

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The Central Limit Theorem and Structural Validity in Factor Analysis (August 2007). Poppleton, L., Harris, M., Lauritzen, M., Bubb, R. R., & Brown, B. L. Paper presented at the Joint Statistical Meetings 2007: "Statistics: Harnessing the Power of Information" (American Statistical Association, International Biometric Society, Institute of Mathematical Statistics), Salt Lake City, Utah.

Measurement Error in Factor Analysis: The Question of Structural Validity (August 2007). Lauritzen, M., Poppleton, L., Harris, M., Hunsaker, N., Bubb, R. R., & Brown, B. L. Paper presented at the Joint Statistical Meetings 2007: "Statistics: Harnessing the Power of Information" (American Statistical Association, International Biometric Society, Institute of Mathematical Statistics), Salt Lake City, Utah.

Building Bridges Among Resilience-Related Theory, Research, and Practice: War Exposed Youths and Their Families (August 2007). Layne, C. M., Poppleton, L. E., Packard, A., & Land, A. APA Convention, San Francisco, California.

Links Between Childhood Physical Abuse and Psychosocial Adjustment in Adulthood (Novemer 2005). Killpack, J. T., Poppleton, L. E., Layne, C. M., Cloitre, M., Gordon, T., & Rosenberg, A. Poster presented at the 21st Annual Meeting of the International Society for Traumatic Stress Studies, Toronto, Canada.

Treatment of Traumatic Bereavement in Adolescents: Conceptualization, Assessment, and Intervention Strategies (June 2005). Layne, C. M., Saltzman, W. S., Turner, S., Anderson, A., Harty, S., Killpack, J. T., Nelson, J., Miles, N., Brown, R., Lynes, L., Bylund, J., Bigham, M., Lambert, K., Anderton, K., Queiroz, A., & Poppleton, L. E. Workshop presented at the 2nd Annual West Coast Child & Adolescent Therapy Conference, Los Angeles, California.

Grants:

Poppleton, L. E., Layne, C. M. (2007). Measuring Maladaptive Grief in Traumatically Bereaved Adolescents: Test Construction, Theory Building, Research Design, and Intervention. National Center for Child Traumatic Stress, University of California Los Angeles. $8,000, Provo, Utah

Poppleton, L. E., Layne, C. M. (2006). Evaluation of Formative Indicators of Traumatic Grief. National Center for Child Traumatic Stress, University of California Los Angeles. $3,500, Provo, Utah

Poppleton, L. E., Layne, C. M. (2006) Mechanisms of Change in a Randomized Control Trial of Bosnian Youth with Post-Traumatic Stress. National Center for Child Traumatic Stress, University of California Los Angeles. $3,000, Provo, Utah

Kilpack, J., Zenger, N.**, Poppleton, L. E.**, Layne, C. M. (2006) Links Between Childhood Physical Abuse and Psychosocial Adjustment in Adulthood. Family Studies Center, Brigham Young University. $5,000, Provo, Utah

Poppleton, L. E., Carter, B., Layne, C. M. (2005) A Bosnian Treatment Evaluation Study. National Center for Child Traumatic Stress, University of California Los Angeles. $5,000, Provo, Utah

Poppleton, L. E., Spangler, D. (2004) Evaluation of Mediators and Moderators in Cognitive Behavioral Telephone Treatment of Depression. Office of Graduate Studies, Brigham Young University. $1000, Provo, Utah

TEACHING

Pacific University; Hillsboro Campus, OR
Course Instructor- *Program Evaluation* Sept 2012- Dec 2012

Washington State University; Vancouver Campus, WA
Course Instructor- *Personality Theory* Sept 2009- April 2010

Brigham Young University; Provo, Utah
Course Instructor- Measurement and Psychometrics Sept 2004 – Aug 2007
Course Instructor- Statistics in Psychology May 2007 – Jun 2007

Brigham Young University; Provo, Utah
Teaching Assistant- Research Measurement Jan 2005 – April 2005
Teaching Assistant- Abnormal Psychology Jan 2002 – April 2002

RESEARCH CONSULTATION

Co-Director
Mensura Research Solutions, LLC Aug 2007 – Dec 2011
Research and statistical consultation.

Independent Consultant Nov 2008 – Dec 2009
Research Consultation Pros
Provided statistical, research and editing consultation for myriad of research questions on dozens of projects.

COMMUNITY INVOLVEMENT

Consortium Member 2011- 2012
Parent Coordination Clark County, WA
Part of a group of attorneys and psychologists to develop a standard parent coordination order to meet the needs of high conflict families of divorce/separation in Clark County

Consortium Member 2010
Alternative Dispute Resolution Clark County District Court, Vancouver, WA
Part of a group with the objective to develop a protocol to increase the utilization of alternative dispute resolution procedures in family law cases.

Consortium Member July 2006 – Dec 2006
Fourth District Juvenile Court, Provo, UT
Provided consultation on risk assessment and program evaluation as a member of a multidisciplinary team with the aim to efficiently reunify children with their parents

PROFESSIONAL MEMBERSHIPS

Association of Family and Conciliation Courts (Oregon and Washington Chapters)

Council on Contemporary Families (past member)

American Psychological Association (past member)

Washington State Psychological Association (past member)

American Statistical Association (past member)

American Group Psychological Association (past member)

NOTES

Drafting Prenups: The High Road to Perfection

William Howe III, *Gevurtz Menashe Larson & Howe PC, Portland, Oregon*

NOTES

DRAFTING PRENUPS: THE HIGH ROAD TO PERFECTION

William J. Howe, III
Vice-chair: Oregon Statewide Family Law Advisory Committee
Of Counsel: Gevurtz, Menashe, P.C., Portland, OR

2017 Oregon State Bar, Family Law Section Conference
October 13, 2017, Sunriver, Oregon

Presentation Goals

- Review risks of drafting prenups and how to avoid them
- Tips on drafting prenups in a way most likely to be enforced, regardless of jurisdiction
- Negotiating prenups in a way that recognizes the clients' fears and doesn't kill the romance
- In short: Avoiding embarrassment, getting paid and not sued

Prenups - History

- Earliest prenups in ancient Egypt
- Marriage contracts common in England until 1753 when couples required to be married in church
- In U.S. largely void as against public policy until 1960s
- *Unander v. Unander,* 265 Or. 102 (1973) – prenups valid if fair at time of enforcement
- Uniform Premarital Agreement Act (UPAA)- 1983

Prenups - A Growth Industry

- Clients seek autonomy – as when they make a will
- Trend in law favoring privatizing relationships: No fault divorce, domestic partnerships, prenups, same sex marriage
- Prenups reduce divorce probability
- Changing demographics: Only 50% married, more women as "have" spouse, marrying later, unmarrieds with children

Oregon's UPAA - ORS 108.700 to 108.740

- Agreement and any amendment in writing
- Can affect property and support, not children's issues
- Effective upon marriage, no consideration required
- Unenforceable if:
  - Not voluntary
  - Unconscionable = no reasonable disclosure, or waiver of disclosure, or adequate knowledge of finances
- Oregon has no "second look" provision

Problems With UPAA

- If voluntary = enforceable even if unfair
  - Favored predictability over fairness (but 14 states and one UPPA state had "second look" rules)
  - Commercial contracts unenforceable if unconscionable at execution
  - Invited legal contortions to avoid unfairness (See *Rudder)*
- No plain language or waiver of lawyer requirement
- Not Uniform – only 26 states adopted and many amended (Washington has not adopted UPAA)
- Does not include postnups

UPMAA CHANGES

- Uniform Premarital and Marital Agreements Act (UPMAA) adopted by Uniform Law Commission in 2012 - Colorado and North Dakota have adopted UPMAA
- Some changes from Uniform Premarital Agreement Act (see Linda Gavdin article)
  - Uncouples unconscionability from financial disclosure
    - Contract unconscionability at time of execution (grossly unfair terms or process) is now a defense (UPAA made enforceable if voluntary), as is financial non-disclosure, involuntariness, and lack of access to counsel
  - If no legal counsel need notice of waived rights
  - Includes postnups

International Enforceability Issues

- Varying rules on whether prenups are enforceable
- Where enforceable, topics that may be covered vary
  - Can spousal maintenance be waived?
  - Will choice of law provisions be enforced?
  - Many jurisdictions have some "fairness" type escape clause
- Where enforceable – different formalities and waiting periods apply – also see variations among U.S. states

Prenup Drafting 10 Commandments

1. **Full disclosure**: Assets, income, health issues, tax issues, other financial risks (e.g., threatened litigation, support promises, anticipated debts like student loans). NEVER WAIVE DISCLOSURE!
2. **Parties must understand agreement**: Have a lawyer (not just cursory review) and draft in as plain language as possible
   - "My rich fiancé's big shot lawyer drafted this agreement and I am supposed to spend a few minutes with a lawyer to review and sign it"
   - FORGET IT – Unless you enjoy testifying in the divorce cases for free and facing a possible malpractice claim

Prenup Drafting – 10 Commandments (cont.)

3. **No duress or undue influence –** recommend 14+ days before marriage, parties must embrace the agreement
4. **Not "unconscionable" –** no "scud missile" drafts!
   - *Rudder and Rudder:* Unconscionable vs. Involuntary
   - Involuntary = No lawyer, no access to lawyer, near wedding, unsophisticated party, lack of full disclosure or waiver of disclosure, failure to understand rights waived, lack of capacity, fraud or duress

Prenup Drafting – 10 Commandments (cont.)

5. **Clear choice of law provision** for both validity and interpretation
6. **Comply with formalities** of all likely jurisdictions
7. **Deal with death**, as well as divorce/separation
8. **Careful about waivers of spousal maintenance** or including children's or lifestyle issues = risks unenforceable

Prenup Drafting 10 Commandments (cont.)

9. **Negotiate using collaborative model**:
   - Generally meet with both parties and lawyers and all copied on emails
   - But review and check in separately with client
   - Benefits:
     - Vastly heightened client satisfaction
     - Usually less expensive
     - Insulates lawyer from most malpractice risks

Prenup Drafting 10 Commandments (cont.)

10. **Closing letter** – send one!
    - Outline risks to enforcement (e.g. Oregon *Grossman* issue)
    - Amendments must be in writing
    - Urge periodic review, especially if parties change jurisdictions
    - Comply with agreement (e.g., no commingling)
    - If represent "have-not" and agreement is onerous, warn to continue working, get disability insurance, fund an IRA and the like
    - RESIGN – "I am doing no more work" OR "I am doing only this task"

Specific Provisions

- Spousal support options:
  - Waive – not good plan with younger folks
  - Non-waiver – agreement does not affect spousal support but have's income from separate assets not considered but "have not's" is
  - Fixed payments tied to length of marriage
- Marital gift – sometimes used to provide safety net in the event of dissolution and for waiver of spousal support
- Residence – often best if marital, at least over time, define owner upon dissolution

Specific Provisions #2

- Carefully define "separate property" – include appreciation (see *Kunze)* and debts
- Dissolution property division options:
  - Separate property to owner
  - Marital property divided 50/50 or "just and proper"
  - May court consider "have's" wealth in division
  - Best to have some "safety net"

Specific Provisions #3

- Death provisions:
  - Does the agreement apply in the event of death?
  - Minimum distribution? Waiver of statutory share?
  - Marital property divided equally or all to survivor?
  - Life insurance or marital gift to provide safety net?
  - Preserve survivor's right to live in the family home and to receive support in the event of death? ORS 114.005 – 114.085
  - Unused estate tax exclusion

Specific Provisions #4

- Automatic termination provisions – risky
- Lifestyle provisions – likely unenforceable
- Younger parties
  - Consider reproductive assistance provision
  - Best to not waive spousal support if planning on children

Specific Provisions #5

- Older parties: Social security benefits, Medicare eligibility, liability for medical bills, income tax issues
  - Also, special care about capacity
  - Make prenup consistent with estate plans
- Carefully define how separate property converted to marital: joint account, joint title, written agreement
- Certain medical expense obligations cannot be waived

Postnups

Grossman and Grossman, 338 Or. 99 (2005)

- Married 1981, separated 1988-89 and sign "Post-Nuptial," divorce 1999
- DICTA questions whether postnuptial agreements are enforceable in Oregon because:
  - No statute on postnups
  - Higher fiduciary duty once you are married
- Postnups enforceable in Washington

Major Malpractice Risk Areas

- Failure to carefully define "separate property" (*DeCurtis),* RI*)*
- Failure to include appreciation as separate asset
- Failure to make full disclosure
- Duress claimed because agreement signed shortly before the wedding or inadequate legal representation of "have-not" (*Kemer,* MN)
- Failure to send closing letter outlining
  - Nothing more will be done by lawyer
  - Don't commingle

Random Comments

- If prenup not enforced, its existence is still a factor under the "just and proper" analysis
- Distinguish prenup from domestic partnership agreement (cohabitation) and settlement agreement
- Remember a prenup suspends application of statutory protocols, so preserve any you want (e.g., live in the family home and receive support in the event of death)
- In special circumstances consider video of execution or some suggest declaratory judgment action after honeymoon

Final Thoughts

- It is a privilege to be asked to draft a Prenup
- Risks are manageable – collaborative model is best
- Be realistic about the time required and the fee
- Allow the clients to drive the process

Resources

- *Prenups for Lovers: A Romantic Guide to Prenuptial Agreements* by Arlene Dubin, Random House, 2001
- *Premarital Agreements: Drafting and Negotiation* by Linda J. Ravdin, ABA, 2011
- Bill Howe – whowe@gevurtzmenashe.com – for form in Word email: srichardson@gevurtzmenashe.com

Thanks for your attention!

PREMARITAL AGREEMENTS

108.700 Definitions for ORS 108.700 to 108.740. As used in ORS 108.700 to 108.740:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. [1987 c.715 §1]

Note: 108.700 to 108.740 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 108 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

108.705 Agreement to be in writing; consideration not required. A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration. [1987 c.715 §2]

Note: See note under 108.700.

108.710 Subjects of agreement; child support not to be adversely affected. (1) Parties to a premarital agreement may contract with respect to:

(a) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(b) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of or otherwise manage and control property;

(c) The disposition of property upon separation, marital dissolution, death or the occurrence or nonoccurrence of any other event;

(d) The modification or elimination of spousal support;

(e) The making of a will, trust or other arrangement to carry out the provisions of the agreement;

(f) The ownership rights in and disposition of the death benefit from a life insurance policy;

(g) The choice of law governing the construction of the agreement; and

(h) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(2) The right of a child to support may not be adversely affected by a premarital agreement. [1987 c.715 §3]

Note: See note under 108.700.

108.715 Agreement effective upon marriage. A premarital agreement becomes effective upon marriage. [1987 c.715 §4]

Note: See note under 108.700.

108.720 Modification of agreement; consideration not required. After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the

parties. The amended agreement or the revocation is enforceable without consideration. [1987 c.715 §5]

Note: See note under 108.700.

108.725 Party may prove agreement unenforceable; when court may require support; determination of unconscionability. (1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(a) That party did not execute the agreement voluntarily; or

(b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(A) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(B) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(C) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(2) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(3) An issue of whether a premarital agreement is unconscionable shall be decided by the court as a matter of law. [1987 c.715 §6]

Note: See note under 108.700.

108.730 Effect of void marriage. If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. [1987 c.715 §7]

Note: See note under 108.700.

108.735 Statute of limitations; defenses. Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. [1987 c.715 §8]

Note: See note under 108.700.

108.740 Short title; construction; severability. (1) ORS 108.700 to 108.740 may be cited as the Uniform Premarital Agreement Act.

(2) ORS 108.700 to 108.740 shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

(3) If any provision of ORS 108.700 to 108.740 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of

ORS 108.700 to 108.740 which can be given effect without the invalid provision or application, and to this end the provisions of ORS 108.700 to 108.740 are severable. [1987 c.715 §9]

Note: See note under 108.700.

NOTES

Premarital Agreements and the Uniform Acts

BY **LINDA J. RAVDIN**

Historically courts refused to enforce premarital agreements at divorce, believing that such contracts made divorce too easy. That began to change in the early 1970s until every state, by statute or case law, permitted prospective spouses to predetermine in a premarital agreement their rights to property at divorce and, in the majority of states, to fix or waive the right to support. At the same time, courts and legislatures began to struggle with the proper standards for validity. Should the focus be solely on the fairness of the process or should courts also play a role in determining substantive fairness? If the latter, should fairness be judged as of execution or enforcement? And should the standard of fairness be unconscionablity or mere unfairness?

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws) approved the Uniform Premarital Agreements Act (UPAA) in 1983. Twenty-six states and the District of Columbia enacted it, although some made significant changes. The ULC adopted the Uniform Premarital and Marital Agreements Act (UPMAA) in 2012. To date, only two states (Colorado and North Dakota) have adopted it.

Criteria for Validity under the UPAA

The criteria for validity of a premarital agreement under the UPAA are set out in section 6:

Section 6. Enforcement.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Voluntariness is the essential element of a valid premarital agreement under the UPAA. Nothing more is required. Financial disclosure is optional; parties may waive financial disclosure as long as the waiver is voluntary. Even an agreement that was unconscionable at execution is enforceable as long as the parties executed it voluntarily and the party seeking to enforce made actual disclosure, or the other party had pre-existing knowledge, or the other party expressly and voluntarily waived disclosure. In choosing to permit enforcement of an unconscionable agreement, the ULC favored predictability of enforcement over fairness of terms.

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The UPMAA: A Worthy Replacement for the UPAA

The UPAA proved unsatisfactory. Though adopted in half of U.S. jurisdictions, a number of adopting states made significant changes. Thus, it did not succeed in creating uniformity. Many academics have criticized the UPAA because it permits enforcement of an agreement that was unconscionable at execution. By contrast, a commercial contract that was unconscionable at execution is unenforceable. Moreover, the minimal procedural safeguards of the UPAA allow a proponent to present an agreement close to the wedding date with little risk that a court will invalidate it on the ground of duress.

The ULC approved the UPMAA in 2012 with the intent that it replace the UPAA. Among other things, the UPMAA creates the same validity criteria for both premarital agreements and marital agreements, i.e., an agreement executed during an ongoing marriage and not incident to separation or divorce. Section 9 provides the criteria for validity:

> Section 9. Enforcement.
>
> (a) A premarital agreement or marital agreement is unenforceable if a party against whom enforcement is sought proves:
>
> (1) the party's consent to the agreement was involuntary or the result of duress;
>
> (2) the party did not have access to independent legal representation under subsection (b);
>
> (3) unless the party had independent legal representation at the time the agreement was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an explanation in plain language of the marital rights or obligations being modified or waived by the agreement; or
>
> (4) before signing the agreement, the party did not receive adequate financial disclosure under subsection (d).
>
> . . . .
>
> (f) A court may refuse to enforce a term of a premarital agreement or marital agreement if, in the context of the agreement taken as a whole[:]
>
> [(1)] the term was unconscionable at the time of signing[; or
>
> (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed].

Importantly, the UPMAA de-couples unconscionability from financial disclosure; unconscionability and failure of financial disclosure are separate grounds that permit a court to refuse enforcement. Section 9(f) authorizes a court to refuse enforcement of an unconscionable term; however, the Comment tells us that a court may strike down the entire agreement as unconscionable. The challenging party's lack of access to counsel is an independent ground upon which a court may refuse enforcement.

Voluntariness and the Uniform Acts

The essential requirement for validity of any contract is that it must be executed voluntarily and not under duress. Neither the UPAA nor the UPMAA define these terms. Rather, existing contract law principles govern. The execution of such an agreement is often either an implicit or an explicit condition for marriage. Conditioning marriage on an agreement may feel like duress, but, standing alone, it is insufficient to void an agreement. Other factors, such as pregnancy, emotional distress, unequal bargaining power, and the prospect of social embarrassment if the wedding is canceled, may create pressure on a recipient. Courts have generally not

found duress based solely on one of these factors. Many cases have dealt with a claim of duress where the proponent presented an agreement close to the wedding. A choice between signing a contract a party does not like and not getting married is still a choice, even when the choice must be made close to the wedding date. The UPMAA does not attempt to change the law as it relates to voluntariness and duress. However, its more robust process standards can significantly improve the recipient's opportunity for a meaningful negotiation.

Access to Counsel, the Unrepresented Party, and the Uniform Acts

The UPAA has nothing to say about the role of the lawyer for either party. Neither actual advice of independent counsel nor access to advice is a prerequisite to validity under the UPAA.

The most important innovation of the UPMAA is the requirement that the party receiving a proposed premarital agreement have access to independent counsel before execution. This is a significant departure from prevailing law. Access to legal representation necessarily means both the money to hire a lawyer and enough time to find one, get advice, and consider that advice. This requirement should make the process of entering into a premarital agreement more fair by forcing the party seeking the agreement to present it well in advance of the wedding date and, in some cases, to pay the legal fees of the recipient.

When the recipient elects not to retain counsel, the agreement must include either a "plain language" explanation of the marital rights or obligations that are modified or waived by the agreement, or a "notice of waiver of rights …, conspicuously displayed." The Act provides text that will fulfill the notice requirement.

Financial Disclosure and the Uniform Acts

Adequacy of financial disclosure is reflected in the content of the disclosure, the method of disclosure, its timing, and the efficacy of waiver. Both the UPAA and the UPMAA require that financial disclosure be made before execution, but they do not specify how long before. An otherwise adequate disclosure that comes late in the process appears to suffice.

The UPAA describes the content of the required financial disclosure as "fair and reasonable disclosure of the property [and] financial obligations" of the disclosing party. Section 9(d) of the UPMAA refines and expands the UPAA requirement for financial disclosure. It provides:

> (d) A party has adequate financial disclosure under this section if the party:
>
> (1) receives a reasonably accurate description and good-faith estimate of value of the property, liabilities, and income of the other party;
>
> (2) expressly waives, in a separate signed record, the right to financial disclosure beyond the disclosure provided; or
>
> (3) has adequate knowledge or a reasonable basis for having adequate knowledge of the information described in paragraph (1).

The UPAA requires disclosure of assets and liabilities but does not state expressly that the owner must provide valuations. The UPMAA fills in this gap, recognizing that the owner may only be able to provide an estimate. Some older cases say that a disclosure without values was sufficient. The UPMAA requires more.

The UPMAA also departs from the UPAA by expressly including income in the requirement for financial disclosure. Some older cases require disclosure of income only when the agreement includes a spousal support waiver. The UPMAA makes no distinction; parties must disclose income whether or not there is a support waiver.

Both the UPMAA and the UPAA permit parties to waive financial disclosure and do not require actual advice of counsel for an effective waiver. Both acts require a waiver to be in a separate writing. Both require the waiver to be executed before the agreement, though there is nothing in the text or comments that suggests the waiver must be signed on a different day. Both allow preexisting knowledge of a party's financial affairs to substitute for a formal disclosure.

Fairness of Terms and the Uniform Acts

In the years preceding the UPAA, courts struggled with the extent to which judges should be able to refuse enforcement of a premarital agreement on substantive fairness grounds. The UPAA rejected as paternalistic the prevailing approach that permitted a judge to relieve a party of a bad bargain. The UPMAA rejects a return to pre-UPAA paternalism. It retains the unconscionability standard and the majority rule that unconscionability is determined as of execution.

The unconscionability-at-execution standard creates a high bar for a party seeking to void an agreement. The challenging party must generally prove both substantive unconscionability—grossly unfair terms—and procedural unconscionability—a grossly unfair process. Under the UPMAA, persons seeking a premarital agreement can have a high degree of confidence that their agreement will be upheld as long as the process was fair under its more robust process standards. Parties who choose to strike a very hard bargain will have somewhat more risk under the UPMAA than under the UPAA that a court may invalidate the agreement because of unconscionability.

Fourteen states, including one UPAA state and one UPMAA state, permit a judge to take a second look at the substantive fairness of an agreement and to refuse enforcement at divorce if the result is unduly harsh. This is a difficult standard for any challenging party to meet; defending parties in these states, however, have somewhat more risk. The UPMAA includes alternative language for legislatures who wish to permit a second look at divorce.

Scope of Premarital Agreements and the Uniform Acts

Both the UPAA and the UPMAA permit contracting parties to predetermine property rights of a surviving spouse. A complete waiver of all marital rights is permissible. They also permit parties to predetermine disposition of property at dissolution (and again, a complete waiver of all marital rights is permissible) and to fix or waive spousal support. Parties may not use a premarital agreement to predetermine custody of or support for a minor child.

Parties may contract about other matters not in violation of public policy. For example, they can contract to use binding arbitration to resolve a dispute under the agreement, waive legal fees and provide for prevailing party fees, expand spousal rights at divorce, or oblige a spouse to make provisions for a surviving spouse that are not otherwise available under state law.

Qualified Retirement Plans and the Uniform Acts

The permissible scope of a premarital agreement includes a complete waiver of rights to share in retirement benefits at divorce, as well as spousal rights to death benefits. The Employee Retirement Income Security Act (ERISA), which preempts state contract law, does not permit enforcement against the plan administrator of a premarital waiver of surviving spouse rights under a qualified retirement plan. To be effective, the spouse must execute a new waiver after the marriage *and* the participant must file a beneficiary designation with the plan. A growing body of case law permits enforcement of a contractual waiver through state law remedies,

such as a constructive trust, once the plan benefits are in the hands of the surviving spouse. Nothing in ERISA prevents a court from enforcing a waiver of spousal rights at divorce.

The UPMAA and (Post) Marital Agreements

The UPMAA, for the first time, creates proposed uniform standards for marital agreements. Section 2(2) defines a marital agreement as an agreement that is executed by spouses who intend to stay married and that "affirms, modifies, or waives a marital right or obligation during the marriage or at separation, marital dissolution, [or] death of one of the spouses…." A marital agreement includes an amendment to a premarital agreement, as well as an agreement revoking a premarital agreement or a marital agreement.

The UPMAA proposes that marital agreements be governed by the same validity standards as premarital agreements, that parties to a marital agreement have the same freedom to contract regarding property and spousal support, and that they be subject to the same restrictions on their freedom to contract as parties to a premarital agreement.

The UPMAA and Domestic Violence

The UPMAA includes an important innovation to protect victims of domestic violence. Section 10(b)(2) provides that a term of either type of agreement is unenforceable insofar as it limits remedies available to a victim of domestic violence. **FA**

Linda J. Ravdin (lravdin@pasternakfidis.com) served as the ABA Family Law Section co-advisor to the ULC's Drafting Committee on Premarital and Marital Agreements. She is the author of Premarital Agreements: Drafting and Negotiation (Am. Bar Ass'n 2d ed. 2017) and Marital Agreements (Tax Management Portfolio 849) Estates, Gifts & Trusts Portfolio Library (BNA 2d ed. 2012). She is a shareholder in the Bethesda, Maryland, law firm, Pasternak & Fidis, P.C., where she practices family law exclusively.

NOTES

NOTICE: PLEASE USE THIS FORM AND ALTERNATIVE PROVISOINS AT YOUR OWN RISK AND AFTER MAKING APPROPRIATE ADAPTIONS TO YOUR CLIENT'S INDIVIDUAL SITUATION.

PREMARITAL AGREEMENT

THIS PREMARITAL AGREEMENT is entered into this ___ day of _____, 201__, between _____ ("____"), of _____, Oregon, and _____ ("_____"), of _____, Oregon.

RECITALS:

1. The parties intend to be married on _____, 201__. The parties contemplate a lasting marriage, but they recognize that their marriage will end either by the death of one of them or by annulment, separation or dissolution during their lifetime (sometimes referred to collectively as "dissolution"). Therefore they enter into this Premarital Agreement ("Agreement") in order to define their respective rights, and responsibilities arising out of the marriage should their marriage end.

2. _____ has ____ children, is ____ years old, is a U.S. citizen and is in good mental and physical health and has an annual income of approximately _____.

3. _____ has ____children, is ____ years old, is a U.S. citizen and is in good mental and physical health and has an annual income of approximately _____.

4. Each party has a certain income-earning potential and now owns or possesses an ownership interest in various kinds of property and owes certain debts and obligations. The parties have disclosed to each other their relevant past income history and the description, extent of their interest, market value and encumbrances of each of their material assets and debts. They have done so by a good faith disclosure expected of a fiduciary.

5. The parties acknowledge that either or both may receive in the future, gifts, inheritances, trust interests, trust benefits, and/or life insurance proceeds of undetermined value which they desire to keep separate.

6. Each of the parties is employed or has sufficient skills, experience and education to be employed. Each of the parties acknowledges sole responsibility for any future decisions regarding changes in his or her career or employment, regardless of whether the other party agreed or did not agree with such decisions or changes.

7. Each party has rendered a good faith disclosure to the other of all matters material to their situation bearing upon this Agreement.

8. Except as otherwise provided in this Agreement, each party desires to maintain his or her Separate Property after their marriage and they waive any interest in the Separate Property of the other party that might arise by virtue of their marriage.

9. Except as provided in Section 8 or in an estate plan executed after the date of this Agreement, the parties wish to be free of any obligation to leave the other spouse any of their Separate Property upon their death and wish to be able to make any estate plan they wish with respect to their Separate Property. They are aware that they may choose to leave Separate Property assets to their spouse in an estate plan but are not obligated to do so.

10. The parties have negotiated and determined the contents of this Agreement, each party having secured legal advice. They desire that this Agreement be enforced regardless whether their circumstances change in the future. They consider the terms of this Agreement to be fair, and

conscionable. Each party has been informed by independent legal counsel of the nature and extent of the rights being determined, modified or released by this Agreement. The parties recognize that, under existing Oregon court decisions and the provisions of ORS 108.700 to 108.740, they may enter into an agreement before their marriage concerning the disposition of their property if their marriage ends due to dissolution or due to death, and that this Agreement will be enforced unless, with respect to support, enforcement would cause a spouse to be eligible for public assistance.

11. Each party has had sufficient time to consider the provisions of this Agreement and enters into this Agreement voluntarily and free from fraud, undue influence, coercion or duress of any kind.

12. Both parties desire to define the interest that each shall acquire in the estate of the other during and after their marriage and their death.

13. Each party acknowledges that he or she has not only read and fully understands this Agreement but also acknowledges that: (a) He or she has been afforded full knowledge of all the rights waived, released or relinquished by this Agreement; (b) In the absence of this Agreement, the surviving spouse (in the event of the death of one spouse) may possess a number of rights in the property, assets and estate of the deceased spouse and that these rights vary from state to state; (c) In the absence of this Agreement, spouses may be entitled to alimony, spousal support and maintenance payments, both temporary and permanent, in the event of a divorce, separation or dissolution of marriage; (d) These statements of specific understanding do not purport to be exclusive of their knowledge and the disclosures made, but merely serve as particular examples; (e) Each party is releasing substantial legal rights of the property of the other in return for the right to keep separate and control his or her own property. Each party specifically acknowledges that he and she enters into the marriage in reliance upon the validity of this Agreement, and would not enter into the marriage relation in the absence of this Agreement.

AGREEMENT:

In consideration of their intended marriage and the mutual promises of each of them, which have pecuniary value to them, the parties agree as follows:

SECTION 1. RECOGNITION

It is recognized by the parties that:

1. Although there is no binding or enforceable agreement of marriage, the parties plan to be married and intend that this Agreement will be enforceable from the date of their marriage.

2. The parties intend to create two categories of property, “Separate Property” and “Marital Property,” both of which are defined in Section 2 below. The Separate Property of _____ is identified on Schedule “A” attached, and the Separate Property of _____ is identified on Schedule “B” attached. These schedules are incorporated as inseparable parts of this Agreement. By executing this Agreement, each party acknowledges receipt of the other party's list. Each list contains a description of substantially all of the material assets of the party delivering it with his or her best estimates of the values of the properties and assets identified as their Separate Property. Each party waives any requirement for independent appraisals and agrees that the disclosures made by the other party are fair and reasonable.

SECTION 2. DEFINITIONS

1. The term “Husband” shall refer to _____.

2. The term “Wife” shall refer to _____.

3. The term “Separate Property” shall refer to all of the following:

A. Except as otherwise expressly set forth in this Agreement, the property and assets of every kind or nature, real, personal or mixed, owned by either party at the time of the marriage, whether or not specifically described on Schedule “A” and Schedule “B.” Untitled personal property not designated in writing as Marital Property shall be Separate Property.

B. Property legally held in sole tenancy, as a tenancy in common, or as a joint tenancy with third party.

C. Any property that is acquired during the marriage by gift, bequest, devise or descent. Regarding gifts, any gift from a third party shall be the Separate Property of the party receiving the gift. Any gift from one party to the other party shall be considered the Separate Property of the recipient. Any gift given jointly to both parties shall be considered Marital Property.

D. Any property distributed to either party during the marriage that is either principal or income of any trust of which one of the parties is a beneficiary.

E. Any property acquired during the marriage as appreciation, gain or increment to any Separate Property.

F. Any property acquired during the marriage through exchange for Separate Property.

G. Any property acquired during the marriage with proceeds from the liquidation or sale of Separate Property.

H. The rents, profits, issues, interest and dividends that may from time to time accrue to any Separate Property, whether or not the result of either party’s labor and efforts during the marriage.

I. Funds received and the right to funds acquired as a result of or related to a personal injury to or disability of either party occurring during the marriage.

J. Any earnings of either party from either party’s labor, efforts and investments during the marriage, including, but not limited to, active and passive income, salaries, bonuses, stock options, fees, commissions and similar compensation together with all income from property acquired or derived therefrom.

K. Any child support or spousal support received by a party from a third party pursuant to court order or judgment.

L. Any professional degree, license, certificate or practice resulting from each spouse’s respective education, training and employment.

M. Any patents or other intellectual property developed by either party.

N. Any benefits and entitlements that arise either before or during the marriage in connection with any pension plan, retirement plan, individual retirement account, tax-deferred annuity, deferred compensation plan (“Plans”), including, but not limited to, 401(k) plans, Keogh plans, individual retirement accounts, 457 plans and 403(b) plans, that were funded either before or during the marriage or that benefits accrued during the marriage, including, but not limited to, survivorship rights that accrue at the time of the marriage for Plans that were funded prior to the marriage. In order to enforce the

provisions of this section, the parties further agree that if the spouse owning the Plan(s) requests in writing from the non-participating spouse a waiver of spousal rights, then the parties shall proceed as follows:

(1) The spouse agrees to execute any and all forms required by the Plans to waive the spouse's survivor rights under the provisions of 29 U.S.C. Section 1055(c)(1) to (c)(3) and any other applicable statute or rule. Any waiver of spouse's survivor rights shall include, but not be limited to, the right to be named as a beneficiary for any benefit under the other party's Plans, the right to a survivor annuity under any Plans, and the right to any death benefit as a spouse. It is further understood that the waivers required under this section will apply to Plans that existed both before and during the marriage.

(2) The term "waiver" shall be interpreted broadly and include spousal "consents" where a Plan requires a consent rather than a waiver.

(3) The parties agree that the provisions of this section may affect unique benefits or benefits that cannot be easily valued. Therefore, each party consents to the remedy of specific performance, where permitted by law, for enforcement of the provisions of this section. Specific performance shall not be used where prohibited by law.

(4) Since benefits under the Plans may be paid to a spouse before a waiver is executed, or in the event that a waiver is never executed, the spouse agrees to the following:

(a) For Plans that would provide the spouse with lump payments: The spouse will execute a disclaimer of the spouse's benefit under such Plans in the form required by state law within the time period required by federal and state law and timely delivered to the person(s) required by state law. In the event a disclaimer cannot be made or the spouse fails to properly execute and deliver a disclaimer of the Plan benefit(s), the spouse agrees to hold the proceeds of any Plan benefit that could have been waived under this section in a constructive trust for such person(s) or estate ("Proper Beneficiary") that would have received the benefit if the spouse predeceased the spouse that actually died first. The spouse shall, within ten (10) days of the receipt of any benefit that could have been waived, pay the Proper Beneficiary all sums received by the spouse, less any income taxes paid by the spouse or the spouse's estate.

(b) For Plans that only provide an annuity to the spouse, commonly known as defined benefit plans, the spouse agrees to hold the proceeds of any Plan Benefit that could have been waived under this section in a constructive trust for the Proper Beneficiary. The spouse shall, within ten (10) days of the receipt of any benefit that could have been waived, pay the Proper Beneficiary all sums received by the spouse, less any income taxes paid by the spouse or the spouse's estate.

(5) The parties agree to execute wills or codicils that direct their Personal Representatives to conform to the provisions of this section.

(6) If any court refuses to enforce any provision of this section the parties agree that the court shall reform this section so that the court will enforce it to the fullest extent permitted under the law.

(7) This section is not intended to prevent a party from designating the other party as beneficiary of a Plan.

4. The term "Separate Property" shall refer to either the Separate Property of the Husband or Separate Property of the Wife, as the context may require.

5. If the laws of a community property jurisdiction are or become applicable all of the Separate Property (as defined above) of each party, either now owned or hereafter acquired, and all active and passive income, rents, profits and increases in value derived or accruing from this property shall be and remain the Separate Property of each of them. Though the parties are now living in the state of Oregon at the time of their signing this Agreement, the parties, after marriage, may live in a community property jurisdiction; thus, the reference to both Marital Property and Community Property in this Agreement.

6. The terms "Marital Property" shall refer to:

A. Any property designated as "Marital" on Schedule "A" and Schedule "B."

B. Any Separate Property that either party deposits with any financial or similar institution during the marriage in a depository or brokerage account in the names of both Husband and Wife (whether denominated as a "joint tenancy account, with right of survivorship" or "as tenants in common" or otherwise).

C. Any real or personal property acquired during the marriage by either Husband or Wife, as tenants by the entirety, joint tenancy with right of survivorship, tenancy in common, or purchased using Marital Property.

D. Any Separate Property that either or both parties by express written agreement, deed, assignment or other instrument of transfer designate to be held in the names of both parties, whether as a form of joint tenancy, equal tenants in common or otherwise. However, any property held as tenants with unequal ownership interests shall be the Separate Property of each party to the extent of their ownership percentage.

E. Any property acquired during the marriage as gain or increment to other Marital Property.

F. Any property acquired during the marriage through exchange of other Marital Property.

G. Any property acquired during the marriage with proceeds from the liquidation or sale of other Marital Property.

H. All rents, profits, issues, interest and dividends that may from time to time accrue to Marital Property.

I. Any property transferred jointly to both parties.

J. Any lottery winnings arising out of lottery tickets or other gambling proceeds or prizes regardless of whose funds were used to place the wager.

K. Any benefits that arise during the marriage in connection with any pension plan, retirement plan, individual retirement account, tax-deferred annuity, or other deferred compensation plan ("Plans"), or for which benefits thereunder accrue during the marriage. (NOTE: IF INCLUDE THIS MODIFIY 2.3.n.)

7. Future investments. The parties may make joint investments in the future. Any down payment from a party shall remain the Separate Property of that party. Any appreciation shall be Marital Property. The parties may enter into further written agreements at the time of making any such investments in order to clarify their ownership interests. This provision shall override the provisions of Sections 2.3 and 2.6, if they conflict.

8. Living Together. During the marriage the parties may maintain a joint account to provide for their living expenses. Each party may, but is not required to, expend his or her Separate Property to pay for both parties' living expenses in order to achieve or maintain the standard of living desired by the parties. To the extent that either party does so expend his or her Separate Property (a) he or she will have no right thereafter to seek reimbursement for any expenditure (unless otherwise expressly agreed between the parties in writing); (b) such an expenditure will not otherwise affect the terms and conditions of this agreement; (c) such an expenditure will not change the character of the party's income or property; and (d) neither party will acquire any rights not otherwise provided for in this agreement in the other party's income or property by reason of such an expenditure.

SECTION 3. RELEASE OF SEPARATE PROPERTY OF EACH OTHER

Except as otherwise expressly set forth in this Agreement, each party hereby releases, relinquishes and discharges the other and the other party's heirs, devisees, legatees, or assigns any and all right, title, claim or interest that he or she may be entitled to claim or assert in the Separate Property of the other party. This release applies regardless of whether any claim arises as an heir at law or as surviving spouse or by way of dower, curtesy, statutory allowance, widow's allowance, homestead, intestate share, descent and distribution in intestacy or otherwise, election to take against his or her will or to act as Personal Representative of the other's will, or to renounce or to elect to take against or to contest the provisions of any trust in which the decedent may have an interest or a power, or the decedent's will or any codicil thereto, or a beneficiary designation under any Employee Benefit Plan or other "Plan" as defined herein, insurance policy or any other form of transfer or payment taking effect at the decedent's death. This release also applies regardless whether any claim arises as a claim for maintenance, support arising by reason of any cohabitation, domestic partnership or any other express or implied domestic partnership, joint venture, constructive or resulting trust, express or implied contract, lien, quantum meruit, unjust enrichment, contribution of services, or in any other form or in any other manner. As a result of this release in and to all the Separate Property of the other party, neither party, nor their heirs, devisees, legatees, Personal Representatives or assigns, or any person claiming by, through or under him or her shall have or may assert or claim any right, title or interest in and to the Separate Property of the other party. The parties expressly relinquish, rescind and waive any rights, perceived agreements, claims or remedies arising out of their relationship prior to marriage.

Except as otherwise provided herein, each party for themselves and their heirs, devisees, legatees, Personal Representatives and assigns sells, assigns, transfers, or grants and conveys to the other and to their heirs, devisees, legatees, Personal Representatives and assigns all right, title, claim or interest that either party, as spouse, may at any time hereafter be entitled to assert or claim under and by virtue of the laws of the United States or of any state or any territory or foreign country in the Separate Property of the other party.

Each party hereby releases any community or quasi-community interest in or claim to his or her Separate Property or any property acquired by them that is not Joint Property.

These waivers and releases do not apply to any spousal rights under applicable law to serve as guardian of the person or a healthcare representative, based on a properly executed Advance Directive or similar document.

SECTION 4. METHOD OF CONVERSION FROM SEPARATE TO MARITAL PROPERTY

1. The parties agree that at no time during their marriage shall Separate Property be converted into Marital Property or Community Property, other forms of co-ownership or into the Separate Property of the other party except by:

A. The deposit of Separate Property into a Marital Property account.

B. By an express written agreement signed by both parties.

C. A deed, assignment or other written legal instrument of transfer that transfers Separate Property to the other party or to both parties.

2. The following events shall not convert the Separate Property of either party into Marital Property, or to any other form of co-ownership or into the Separate Property of the other party:

A. The filing of joint tax returns.

B. The designation of one party by the other as a beneficiary of his or her estate.

C. Except as provided in Section 4.1, the commingling by one party of his or her Separate Property with Marital Property or Community Property or with the Separate Property of the other party. Each party shall have complete control of his or her Separate Property and may use and dispose of that property as if the marriage had not occurred. The parties anticipate that they may, from time to time, use portions of their Separate Property, including, but not limited to cash accounts, for the payment of living expenses, payment of taxes, vacation funds, and the like. Such action will not convert the remaining balance of funds in any separate account, or any Separate Property into Marital Property. Separate Property may be converted into Marital Property, or vice versa, only in the manner set forth in Section 4.1 above.

D. Any statement by either party, including any purported oral gift of Separate Property of either party to the other party. The parties acknowledge that they may occasionally use such expressions as “our property” or “our bank account” when referring to property that is by the terms of this Agreement actually one party’s Separate Property.

E. No written statement by either party other than a written instrument as provided in Section 4.1. above.

F. The joint occupation of residential or recreational real or personal property, which is the Separate Property of either party.

3. The parties hereby acknowledge there may be a statutory or legal presumption that the purchase of property by a Husband and Wife creates a tenancy by the entirety or joint tenancy with right of survivorship, unless this intent is specifically disclaimed. Anticipating they may neglect to make the disclaimer at the time title is created, the parties hereby declare that a tenancy by the entirety or joint tenancy with right of survivorship shall be created between them only if language creating that type of ownership estate is expressly contained within the deed, document of title, bill of sale, or the contract of purchase, including any contract relating to bank accounts, securities or other financial accounts.

4. Each of the parties at all times shall have the right to sell, assign, transfer, convey, mortgage, encumber, give or otherwise dispose of all or any part of his or her Separate Property without the consent of the other.

SECTION 5. OBLIGATIONS, MEDICAL AND LONG-TERM CARE EXPENSES

1. Any separate indebtedness of either party shall remain the separate indebtedness of the party who incurred the indebtedness and that party shall indemnify and hold the other party harmless therefrom. All indebtedness, obligations and liabilities of either party of every kind and description, direct or indirect, absolute or contingent, due or to become due, known or unknown, owing at the date of the

marriage of the parties, together with accruing interest thereon, and all indebtedness, obligations and liabilities incurred during the marriage in connection with the purchase or acquisition of Separate Property of either party, with accruing interest, shall be paid from the Separate Property of the party owing or incurring the debt. If either party voluntarily pays a separate debt of the other party, the party making the payment shall not accrue any ownership interest in any asset associated with the debt, unless the parties agree otherwise in writing.

2. Insofar as the law allows or the parties otherwise agree, the parties agree that neither party's separate assets shall be obligated as a source for the payment of the other party's hospital, surgery, dental, orthodontic, optical, prescription, office visits, mental health counseling or any other comparable professional health service or long-term care expenses, unless the party owning the separate assets consents. The person incurring these expenses shall cooperate and take any action necessary or helpful to accomplish this end, including, if necessary, cooperation in the filing of any legal action necessary to protect the other party's separate assets.

3. The parties acknowledge that by virtue of being married, certain third party creditors may hold both parties responsible for debts solely incurred by one party. Also, the parties understand that federal law may require a spouse to pay for the reasonable and necessary medical expenses of the other spouse.

SECTION 6. REPRODUCTIVE ASSISTANCE

If the parties attempt to have a child or children using an assisted reproductive technology, effort such as an in vitro fertilization process involving:

1. Each party's individual sperm and egg;

2. Either party's individual sperm or egg plus a donor's sperm or egg;

3. Neither party's individual sperm or egg but a pregnancy for which the parties have taken responsibility and which resulted from using a donor sperm or egg, or fertilized egg or embryo.

If, as a result of any of these processes, fertilized eggs or embryos are created and/or stored in frozen form, or unfertilized eggs and/or sperm are stored in frozen form, the parties agree that neither party will, at any time they are living separately and apart, or once a petition for annulment, separation or dissolution is filed by either party, whether or not the parties are living apart, or after the death of either party, such sperm, egg, fertilized egg or embryo, and/or any other like entity will not be used by either party. If the parties' marriage ends, whether by dissolution, death, annulment or separation or the death of either party, this genetic material shall be managed as follows:

A. In the event of divorce, any sperm shall be returned to husband, egg(s) to wife and any fertilized egg(s) or embryo(s) or any other like entity shall be destroyed unless the parties otherwise agree in writing.

B. In the event of the death of the first of the parties to die, the survivor may use any sperm, eggs, fertilized eggs embryos, or any other like entity however they wish. (Alternative: delete 6.3.B., and change 6.3.A. so it covers both death and divorce)

C. The parties agree that this provision shall be disclosed at the outset of any engagement to provide services to any persons and entities with which the parties are availing themselves of assisted reproductive technology efforts.

SECTION 7. INCOME TAXES

1. The parties may file federal and state income tax returns in the manner most advantageous to minimize their total income tax liability. The parties recognize that such laws typically provide that the spouses filing joint returns are jointly and severally liable for deficiencies in taxes, and penalties and interest assessed. Therefore, each party agrees, that if joint returns are filed, to indemnify and hold the other harmless from and against all liability for claims made by any taxing authority for taxes, penalties, and interest attributable to income that would have been taxable to the indemnifying party if the parties had filed separate income tax returns. Also, in the event of any tax audit of a joint income tax return, the parties shall each pay one half of any liability, including interest and penalties attributable to any marital income and hold the other harmless therefrom.

2. Either of the parties may elect to file separate income tax returns, in which case each shall be responsible for his or her own taxes. If any income tax arises from income generated by Marital Property, then each party may use Marital Property to pay this portion of the tax, but only to the extent of that person's share of ownership of the Marital Property used for this purpose.

SECTION 8. INHERITANCE AND THE RIGHT TO DISPOSE OF SEPARATE PROPERTY

1. All Separate Property shall pass, in trust or otherwise, to the heirs or devisees of the deceased party and not too the surviving spouse, unless the deceased party's estate plan, executed after the date of this Agreement, specifically provides for surviving spouse.

2. Upon the death of one of the parties during their marriage, the rights of the survivor in the Separate Property of the decedent and Marital Property are as follows:

A. Both parties may provide from their Separate Property for the benefit of the other by will, trust agreement, or beneficiary designation executed after the signing of this Agreement if he or she so desires, and nothing in this Agreement shall be construed to defeat or render ineffective any bequest, devise or distribution of Separate Property from one party to or for the benefit of the other expressly set forth in such party's will, trust agreement, or beneficiary designation made after the execution of this Agreement. Unless the decedent voluntarily provides otherwise, the decedent's Separate Property will be administered, descend and be distributed as if the survivor had predeceased the decedent.

B. Marital Property shall become the property of the surviving spouse. In addition, any furniture and furnishings contained in the parties' primary marital residence and acquired during the marriage shall become the property of the surviving spouse.

C. Both parties waive **[ALTERNATIVE]** Neither party waives his or her rights for "support of spouse and children," as codified in Oregon as ORS 114.005 (Occupancy of Family Home) and ORS 114.015 – 114.085 (support), or similar statutes should a will or estate be subject to probate in a jurisdiction other than the state of Oregon.

3. Both parties agree to provide to the other party copies of any of their estate planning documents or amendments within fifteen (15) days of execution, whether or not their spouse is a beneficiary. "Estate planning documents" include wills, trust agreements, powers of attorney or beneficiary designations made after the signing of this Agreement.

4. Deceased Spousal Unused Exclusion Amount. The parties agree that if one party dies during the marriage (regardless of whether dissolution, annulment or legal separation proceedings are pending), the Personal Representative of the deceased party's estate will, at the surviving party's request, timely file any and all documents necessary to make the election provided in § 2010(c)(5) of the Internal Revenue Code of 1986, as amended by § 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010,or any similar or corresponding law, for the deceased

spouse's unused exclusion amount with respect to the deceased party's estate to be available to be taken into account by the surviving party and such party's estate (the "Election"). These documents may include, but are not necessarily limited to, a federal estate tax return for the deceased party's estate, even if one would not otherwise be required. If the surviving party requests that the Election be made and the deceased party's estate would otherwise not be required to file a federal estate tax return or other necessary documents in order to make the Election (the "Return"), the surviving party shall make the arrangements for the preparation of the Return and pay the cost of preparing the Return and all other costs incurred in connection with the Election. The deceased party's Personal Representative shall fully cooperate with the preparation, execution and filing of the documents constituting the Return and shall promptly furnish all documents and information, as shall be reasonably requested for that purpose. If a Return is filed the surviving party shall be provided a copy within ten days of filing.

5. The parties may from time to time revise their estate plans and any such revision shall not give rise to an inference that this Agreement has been modified of rescinded.

SECTION 9. LIFE INSURANCE

1. Any life insurance on the life of either of the parties purchased from Marital Property shall name the other party as irrevocable beneficiary of the policy, unless the parties otherwise agree.

2. If either party purchases life insurance on his or her own life as the insured from his or her separate funds, that party may designate or change the named beneficiary under that policy, and the policy and any proceeds shall be the Separate Property of the owner of the policy.

SECTION 10. PROPERTY RIGHTS UPON ANNULMENT, SEPARATION AND DISSOLUTION

1. Each of the parties agrees that in the event of their separation for any reason, or the institution by either of an action for annulment, dissolution or separation, or in the event of their annulment, separation or dissolution neither shall have any right against the other to claim nor receive any portion of the Separate Property of the other party. In the event of any of these events:

A. Each party shall be entitled to all of his or her Separate Property, subject to any separate indebtedness or obligations, free and clear of any claim of the other party.

B. Any Marital Property shall be divided equally between the parties.

C. Any joint indebtedness will be divided in proportion to respective ownership interests, evidenced in writing, and, in the absence of any such designation, will be equally divided. Each party's separate indebtedness and portion of joint indebtedness will be the sole responsibility of that party. Each party will indemnify and hold the other party harmless therefrom.

2. The existence or value of Separate Property of either party shall not be considered when determining distribution of Marital Property. The amount of either party's Separate Property shall not be considered in the disposition of Marital Property or to any other relief that might be requested by either party.

SECTION 11. SPOUSAL SUPPORT AND DISSOLUTION COSTS

If the marriage is terminated by annulment, divorce, separation or dissolution, or if the parties should become separated and sign a written separation agreement or decree of separation entered by the court of any jurisdiction, each of the parties agrees to assume the costs of his or her own support and the support of his or her lineal descendants, other than any child or children of their marriage. Also,

except to the extent claims are made for fees, based on Section 22 of this Agreement, each party shall pay the costs of his or her own attorney fees and expenses of litigation.

Except as may be provided by ORS 108.725(2), each party expressly waives and releases any right he or she may possess to alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether pendente lite or after judgment) or to any other form of support, including, but not limited to, claims for life insurance, services rendered or performed, or labor expended by either of the parties during any period of cohabitation before the marriage and during the marriage, or to the award of attorney fees, expert witness fees and litigation costs or expenses of any kind in the event of annulment, divorce, dissolution or separation, pursuant to statute, common law or equitable rule.

Neither party shall have any obligation by law, statute, equity, or otherwise, to support and maintain the child(ren) of the other party unless they have adopted the child(ren).

SECTION 12. NECESSARY DOCUMENTS

Notwithstanding the provisions of Section 3, which the parties intend will eliminate the need of either of them joining in instruments or documents of conveyance, mortgages, deeds of trust, security agreements, pledges, assignments or other instruments or documents involving the Separate Property of each other, the parties recognize that third parties dealing with one party may require the signature of the other party or a properly executed and acknowledged instrument or document releasing or disclaiming any right, title or interest in the Separate Property of the other party.

Accordingly, the parties agree that the act of one party in joining with the other in the execution of any such instrument or document pertaining to the Separate Property of one party shall not be interpreted or have the effect of changing the ownership of that Separate Property or to give the other party any right, title, claim or interest therein not previously or held or owned and that the act of either party in joining in the execution of any such instrument or document shall not change or alter the agreements of the Husband and the Wife, as contained in this Agreement.

Upon request each party agrees to execute and deliver to the other party instruments or documents releasing, disclaiming or discharging any and all right, title, claim and interest in and to the Separate Property of the other.

SECTION 13. CONSIDERATION FOR AGREEMENT

The consideration for this Agreement is the intended marriage of the parties, the love and affection of the parties for each other and the mutual promises contained in this Agreement, including the provisions that preserve certain property as separate and waive certain property, support and inheritance rights. The parties would not enter this marriage contract without the existence and validity of this Agreement.

SECTION 14. EFFECTIVE DATE

This Agreement shall become effective only upon the marriage of the parties and then this Agreement shall inure to the benefit of and be binding upon the respective parties, their heirs, devisees, legatees, personal representatives and assigns.

SECTION 15. WAIVER OF DEFENSES AND AMENDMENT

1. This Agreement contains the entire understanding of the parties, and each, after discussion, signs this Agreement freely and voluntarily, neither relying upon any representations other than those expressly set forth. There are no representations, promises, warranties, covenants, or undertakings other than those contained herein.

2. This Agreement results from the parties' discussions over a significant period of time prior to the date of this Agreement. Therefore, both parties expressly waive the right to assert any defense to the validity of this Agreement based upon the amount of time between the signing of this Agreement and their marriage.

3. Each party specifically acknowledges that he or she is not acting under duress, undue influence, coercion or any physical or mental condition that might affect his or her ability to understand the terms and conditions of this Agreement at the time said party is executing this Agreement.

4. The parties agree that any financial statement or similar document that either delivers to a third party in connection with any application for extension of credit or renewal or refinancing of any existing indebtedness will disclose the existence and effect of this Agreement.

5. This Agreement may be modified only by (a) contract signed by both parties, dated and executed after the date and execution of this Agreement, or (b) court order from a court of appropriate jurisdiction. The destruction or physical alteration of this Agreement shall not be effective to terminate or modify this Agreement, nor may this Agreement be modified or revoked by any oral agreement, implication or conduct inconsistent with this Agreement. Each party waives the right to assert that this contract was waived, abandoned, modified or revoked by any means other than a subsequent writing, or that there were any other unwritten agreements of any kind regarding any of the terms set forth in this Agreement.

6. Each party will re-execute this Agreement in conformity with the requirements of any laws of any jurisdiction if required for the enforceability of any of this Agreement.

7. If one of the parties contests the validity of this Agreement in legal proceedings and this Agreement is held to be valid, any requirement of the non-contesting party to transfer Separate Property to the contesting party shall be deemed satisfied and unenforceable. The parties intend that this Agreement, subject to any amendments, shall be relied upon by both parties as the sole and exclusive entitlement of either party to any interest in the Separate Property of the other.

SECTION 16. CONFIDENTIALITY AND RECORDING

1. Confidentiality of Asset-Related Information. Husband and Wife agree to hold Schedules A and B and all other information concerning their respective assets, income, and liabilities and the source of that information in the strictest confidence. In the event that Husband and Wife are not legally married, as contemplated in this Agreement, each party agrees promptly to return to the other party such information concerning the other party.

2. Confidentiality of Agreement. The parties agree to make their best efforts to protect and maintain the confidentiality of this Agreement. If any court action is instituted concerning the subject matter of this Agreement or in connection with a separation or dissolution of marriage, the parties agree that they will use their best efforts to have this Agreement submitted to the court in camera with only the parties and their counsel present. The parties agree that they will use their best efforts to have this Agreement not made public and not made a part of any court, governmental, official, or other record of any kind which is or may be available to the public, provided that nothing contained herein shall prevent either party from taking all such steps, and introducing all such documents, as may be necessary to protect each of their rights. If the court directs that this Agreement be made a part of the records, then the parties agree to request the court to place this Agreement under seal and not allow it to be seen, read, reviewed, or copied by anyone without the agreement of the parties, except as may be necessary to enforce the rights of either of the parties. The parties further agree that the court shall be requested to approve this Agreement as fair and equitable and to make specific orders requiring each party to do all of the things provided for in this Agreement and further agree that any executory provisions of this Agreement shall be made a part of any interlocutory of final decree entered by the court in a marital separation of dissolution proceeding.

Notwithstanding the forgoing agreement to maintain confidentiality, the parties may share a copy of this Agreement with any professional advisors for the purpose of obtaining professional advice regarding this Agreement.

3. This Agreement shall not be recorded, but either party may cause a memorandum of this Agreement to be recorded or filed, as may be required by law or as otherwise necessary in the appropriate governmental office.

SECTION 17. SEVERABILITY

If any provision of this Agreement is declared void, invalid, inoperative, or otherwise unenforceable by any court of competent jurisdiction, the validity and enforceability of the remaining provisions of this Agreement shall not be affected and this Agreement shall be enforced as though the invalid provision had not been included.

SECTION 18. NON-WAIVER

Waiver by either party of strict performance of any of the provisions of this Agreement shall not waive that party's right to subsequently require strict performance of the same or any other provision of this Agreement.

SECTION 19. INTEGRATION

This Agreement constitutes the sole premarital agreement of the parties and integrates and supersedes any and all prior agreements, negotiations and understandings on these topics. This Agreement constitutes the entire agreement of the parties with respect to the property relations between the parties as a result of their cohabitation and marriage and supersedes all previous express or implied agreements, representations, or warranties with respect to the subject matter. The parties waive any rights either may have as a result of any cohabitation or domestic partnership prior to marriage. All prior and contemporaneous conversations, negotiations, agreements, representations, covenants and warranties with respect to the subject matter of this Agreement are waived, merged into and superseded by this Agreement.

SECTION 20. REPRESENTATION OF PARTIES BY COUNSEL

The parties both agree that each was represented by independent legal counsel of their choice in the preparation of this Agreement and that they fully understand the terms, provisions and legal consequences of this Agreement. Each party's legal counsel has signed the Attorney Certificates to this Agreement. Each party acknowledges that they understand that they are relinquishing rights, which may have great value, in return for the provisions of this Agreement, and each does so freely and voluntarily and not under duress or coercion.

_____'s attorneys initially drafted proposals for this Agreement. However, it has been thoroughly reviewed by _____'s attorneys and appropriate changes, where necessary, made by them with _____'s input. Therefore, the fact that the initial drafts of this Agreement were prepared by _____'s attorney shall not be used as a basis for creating a larger and more difficult burden of proof for _____ than otherwise provided for by law when and if _____ seeks to enforce the terms of this Agreement. Similarly, _____'s burden of proof shall not be enlarged beyond that otherwise provided by law because of _____'s attorney's modifications, which are included herein if and when _____ seeks to enforce the terms of this Agreement.

_____ has been represented by _____ of _____. _____ has been represented by _____. The parties have engaged in a process whereby both parties met with _____, who drafted this Agreement. The parties then

consulted with _____. The parties have used this method of proceeding in an effort to remain cooperative and to aid communication among the parties and their attorneys. The parties acknowledge that by using this method, they have waived any attorney-client privilege as to communications between themselves and their lawyers in the presence of the other party. The parties further acknowledge that they have been offered the opportunity to meet individually with their attorney. The parties further acknowledge that _____ is not represented by _____, and that _____ is not represented by _____.

SECTION 21. CAPTIONS

The paragraph captions in this Agreement are only for the convenience of the parties and must not be considered in construing the provisions of this Agreement.

SECTION 22. COSTS OF ENFORCEMENT OF THIS AGREEMENT

In the event either party does not fulfill his or her obligations strictly in accordance with the provisions of this Agreement, time being of the essence, the predominantly prevailing party, in addition to remedy provided by law or equity, shall be entitled to receive attorney's fees and costs if the matter is placed in the hands of an attorney for enforcement, even though no suit or action is filed hereon. However, if any suit, action or other proceeding (including any proceeding under the U.S. Bankruptcy Code) or appeal from a decision therein is instituted to establish, obtain or enforce any right resulting from this Agreement, including the indemnity and hold harmless obligations, the prevailing party shall be entitled to recover from the other party, in addition to costs and disbursements, such additional sums as the court may adjudge reasonable as attorney's fees, including paralegal and other experts' fees, both in the trial and the appellate courts.

SECTION 23. MEDIATION

Should a conflict develop concerning the interpretation or application of the terms of this Agreement, the parties intend, although are not obligated, to make reasonable efforts to resolve the conflict without adversarial court proceedings.

SECTION 24. BINDING UPON REPRESENTATIVES

All of the provisions of this Agreement shall be binding upon the respective heirs, next of kin, executors, administrators and assigns of the parties.

SECTION 25. RECITALS AND EXHIBITS

All recitals and exhibits referred to in this Agreement hereby incorporated, as if fully set forth herein.

SECTION 26. SURVIVAL

The representations contained in this Agreement shall survive any termination of this Agreement.

SECTION 27. GOVERNING LAW

1. The validity and interpretation of this Agreement shall be governed by Oregon law without regard to its principles of conflicts of laws, even though the parties' residence is from time to time outside the state of Oregon on a temporary or permanent basis, or all or a substantial portion of their respective property is located outside the state of Oregon. Unless otherwise agreed in writing, if either of the parties or any other person seeks to enforce or construe this Agreement in any jurisdiction, any such

proceeding will be brought before a court in Oregon. If a court in any other jurisdiction shall accept jurisdiction of any such proceeding, the parties intend that such court apply the principles of Oregon law without regard to its principles of conflicts of law to the proceeding, irrespective of such jurisdiction's laws. The resolution of any disputes relating to this Agreement or the parties' property or marriage, including disputes arising from this Agreement, shall be exclusively under the jurisdiction of the courts of the state of Oregon. The parties request that any other court in which any such proceeding may be brought respect their intentions in this regard.

2. Except as provided otherwise in this Agreement, neither party shall have any interest in the Separate Property of the other. The parties have agreed that the validity of this Agreement and the property division shall be decided under Oregon law, but in the event another jurisdiction determines that their law controls, the parties intend that this paragraph applies.

3. Each party understands that the laws of many states and countries give courts the power to require a husband or a wife, upon separation or divorce, to transfer a share of his or her property, whether Separate Property, premarital property, Marital Property or Community Property, to his or her spouse. This power is sometimes referred to as the power to require "equitable distribution." It may also be called the power of special equity. Neither party wishes a court to have these powers concerning their marriage or their rights upon separation or dissolution of their marriage. Therefore, each party hereby waives any right he or she would have had, in the absence of this Agreement, to receive a share of the Separate Property of the other upon separation, annulment or divorce wherever it may occur and agrees that, if the parties are separated or divorced, he or she will not assert any claim to receive a share of the Separate Property of the other, whether by way of equitable distribution, equitable powers of the court or otherwise, except as provided for in this Agreement.

4. Each party expressly waives any right to a trial by a jury regarding their rights under this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties.

DATED: _____ _____

DATED: _____ _____

STATE OF OREGON)
)ss.
County of)

The foregoing PREMARITAL AGREEMENT was acknowledged before me this ____ of _____, 201__, by _____ as his/her voluntary act and deed.

_____
Notary Public for Oregon
My Commission Expires: _____

STATE OF OREGON)
)ss.
County of)

The foregoing PREMARITAL AGREEMENT was acknowledged before me this ____ of _____, 201__, by _____ as his/her voluntary act and deed.

_____
Notary Public for Oregon
My Commission Expires: _____

CERTIFICATE OF ATTORNEY

I, _____, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Oregon; that I have consulted with _____, who is a party to the foregoing Agreement concerning the legal significance of the foregoing Premarital Agreement and the effect which it has upon the rights to which he or she would otherwise be entitled as a matter of law were this Agreement not signed; and that _____ has acknowledged his/her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed this Agreement.

_____

, OSB#

CERTIFICATE OF ATTORNEY

I, _____, hereby certify that I am a duly licensed attorney, admitted to practice law in the state of Oregon; that I have consulted with _____, who is a party to the foregoing Agreement concerning the legal significance of the foregoing Premarital Agreement and the effect which it has upon the rights to which he or she would otherwise be entitled as a matter of law were this Agreement not signed; and that _____ has acknowledged his/her full and complete understanding of the legal consequences and of the terms and provisions of the foregoing Agreement and has freely and voluntarily executed this Agreement.

_____

, OSB #

MARITAL GIFT

ANNUAL:

_____ agrees to gift to _____ each year on the anniversary of their wedding a gift in the amount of _____ with the first such gift to be made in_____. This gift shall be made from _____'s Separate Property and once transferred to _____shall become _____'s Separate Property unless _____ elects to convert all or part of these funds to Marital Property in the manner provided in Section 4. _____'s obligation to make these gifts shall be suspended in any year where his adjusted gross income for the previous year was less than _____.

ONE TIME:

_____ agrees to gift to _____ within _____ days of the parties' wedding a marital gift in the amount of _____. This gift shall be made from _____'s Separate Property and once transferred to _____shall become _____'s Separate Property unless _____ elects to convert all or part of these funds to Marital Property in the manner provided in Section 4.

JOINT ACCOUNT REQIURED FOR LIVING EXPENSES

The parties intend to open a joint bank account and _____ agrees that he shall transfer such sums into that account necessary to pay the parties' reasonable and necessary living expenses. Once funds are transferred into this joint account those funds shall be Marital Property.

GIFT OF RESIDENCE TO JOINT TENANCY

_____ owns real property commonly known as _____ in which the parties intend to live as their family residence. _____ agrees, unless prohibited by financing documents or otherwise, to convey this property by Quit Claim Deed to himself/herself and _____ as Tenants by the Entirety or Joint Tenants with the Right of Survivorship. _____ shall execute this deed at the time she/he signs this Agreement and the deed shall be held in escrow by _____ subject to an irrevocable escrow instruction that it be recorded upon notice of the parties' marriage. _____ shall pay any costs associated with this transfer. _____ understands that any interest that he/she receives will be subject to all liens and encumbrances outstanding at the date of transfer.

NON-WAIVER OF RIGHT TO "JUST AND PROPER" DIVISION OF MARITAL PROPERTY IN EVENT OF DIVORCE

All marital property shall be divided in a manner that is "just and proper" consistent with the then existing laws and procedures of the state of Oregon and subject to the provisions of the choice of law provisions below. Except for the return of separate property to each party, this agreement shall not dictate the division of property, including debts, if the parties' marriage ends because of dissolution. Likewise the parties make no agreement nor waive any rights to the award of attorney fees or costs in any legal proceedings initiated to terminate their marriage.

PROPERTY DIVISION SCHEDULE PER YEARS OF MARRIAGE

SECTION 10. ANNULMENT, SEPARATION AND DISSOLUTION

1. Each party agrees that in the event of their separation for any reason, or the institution by either of an action for annulment, dissolution or separation, or in the event of their annulment, separation or dissolution, neither shall have any right against the other to claim nor receive all or any portion of the Separate Property of the other party.

2. In the event of any of these events, each party shall be entitled to all of his or her Separate Property, subject to any and all obligations, and one-half (½) of all Marital Property or Community Property, subject to one-half (½) of marital or community indebtedness and any current or future tax liability attributable to the portion that a party receives. Also, in the event of any tax audit of a joint income tax return, the parties shall each pay that portion of any liability, including interest and penalties, which represents the tax on his or her separate income.

3. In addition to the provisions of paragraph 10.2 above, in the event of any of these events, ____ shall pay to _____ a sum equal to the following (each subparagraph refers to "If the parties' marriage lasts"):

A.	Less than one year:	$ 0
B.	Between one and two years:	$ 50,000
C.	Between two and three years:	$ 100,000
D.	Between three and four years:	$ 150,000
E.	Between four and five years:	$ 200,000
F.	Between five and six years:	$ 275,000
G.	Between six and seven years:	$ 350,000
H.	Between seven and eight years:	$ 425,000
I.	Between eight and nine years:	$ 500,000
J.	Between nine and 10 years:	$ 575,000
K.	Between 10 and 11 years:	$ 675,000
L.	Between 11 and 12 years:	$ 775,000
M.	Between 12 and 13 years:	$ 875,000
N.	Between 13 and 14 years:	$ 975,000
O.	Between 14 and 15 years:	$ 1,075,000
P.	Between 15 and 16 years:	$ 1,275,000
Q.	Between 16 and 17 years:	$ 1,475,000
R.	Between 17 and 18 years:	$ 1,675,000
S.	Between 18 and 19 years:	$ 1,875,000
T.	Between 19 and 20 years:	$ 2,075,000
U.	20 years or longer:	$ 2,075,000.

This sum shall be paid as follows: The entire sum owing upon entry of Judgment; provided, however, if the sum owing is larger than $500,000 then _____ may pay the sum of no less than $500,000 upon entry of Judgment of Dissolution, Annulment or Separation with the remaining balance to be paid in full no later than 180 days from the date of entry of this judgment. Any balance not paid upon entry of Judgment shall be adequately secured in a manner that the parties agree or the court orders.

These payments shall be as property division and not as spousal support and shall not be deductible for tax purposes to _____ nor income to _____.

4. The existence or value of Separate Property of either Party shall not be considered in any way when determining distribution of Marital or Community Property, and no argument

shall be heard on either side that the wealth manifest in Separate Property is in any way relevant to the disposition of Marital or Community assets or to any other relief that might be requested.

SECTION 11. SPOUSAL SUPPORT AND DISSOLUTION COSTS

Each party agrees to assume the costs of his or her own support and the support of his or her lineal descendants, other than any child of the proposed marriage, and the costs of his or her own attorneys' fees and expenses of litigation if the marriage is terminated by annulment, divorce, separation or dissolution, or if the parties should become separated pursuant to a written separation agreement or decree of separation entered by the court of any jurisdiction.

Each party expressly waives, releases and relinquishes any right he or she may possess to alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether pendente lite or after judgment), or to any other form of support, including, but not limited to, claims for services rendered or performed, or labor expended by either of the parties during any period of cohabitation before the marriage and during the marriage, or to the award of attorneys' fees, expert witness fees and litigation costs or expenses of any kind in the event of annulment, divorce, dissolution or separation, pursuant to statute, common law, or equitable rule. It is the express intention of the parties that _____ shall assume no obligation by law, statute, equity, or otherwise, to support and maintain the children of _____ listed at the outset of this Agreement, unless he/she shall formally and voluntarily adopt these children, or any of them.

SPOUSAL SUPPORT AND DISSOLUTION COSTS – NON-WAIVER

Neither party waives any right he or she may possess to alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether *pendente lite* or after judgment), or to the award of attorneys' fees, expert witness fees and litigation costs or expenses of any kind in the event of annulment, divorce, dissolution or separation, pursuant to statute, common law, or equitable rule. All issues of support and fees shall be determined by the court of competent jurisdiction over the matter and based upon the application of the then existing Oregon law consistent with Section ___ below. However, if a party makes a claim for spousal support, the Separate Property of that party shall be taken into account in evaluating the claim. The Separate Property of the potential payor of support shall not be taken into account in evaluating the claim.

SPOUSAL SUPPORT WAIVED FOR FIVE YEARS

Until the fifth anniversary of the parties marriage, each of the parties agrees to assume the costs of his or her own support and the support of his or her lineal descendants and expressly waives and releases any right he or she may possess to alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether *pendente lite* or after judgment), and also the costs of his or her own attorneys' fees and expenses of litigation if the marriage is terminated by annulment, divorce, separation or dissolution, or if the parties should become separated and sign a written separation agreement or decree of separation entered by the court of any jurisdiction.

After the fifth anniversary of the parties' marriage the parties agree that the court having jurisdiction may, in the event of dissolution, annulment or separation, order alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether *pendente lite* or after judgment) based on the then current legal standards in the state of Oregon (see Section 27) provided, however, that the income attributable to _____ upon which spousal support may be based is only his W-2 income and social security and shall not include any interest, dividends or other income generated by his separate assets.

Each party expressly waives and releases any right he or she may possess to alimony or spousal support except as provided above and to any other form of support, including, but not limited to, claims for services rendered or performed, or labor expended by either of the parties during any period of cohabitation before the marriage and during the marriage, or to the award of attorneys' fees, expert witness fees and litigation costs or expenses of any kind in the event of annulment, divorce, dissolution or separation, pursuant to statute, common law, or equitable rule.

DISABILITY INSURANCE IN LIEU OF SPOUSAL SUPPORT

In lieu of spousal support, _____ shall pay for a policy of disability insurance for _____ during the marriage, so that she will be provided with income in the event she is unable to work. _____ shall promptly cooperate in obtaining the policy, including taking a physical exam if required by the insurance company.

SPOUSAL SUPPORT SET AMOUNT

In the event that the parties' marriage is dissolved, _____ agrees to pay to _____ as non-modifiable maintenance spousal support the amount of _____. This obligation shall commence on the first day of the month following the entry of a judgment of dissolution and continue until the earlier of the following events:

1. Payments are made for one-half of the number of full months that the parties were married;

2. The death of either party;

3. _____'s remarriage or cohabitation as defined in the *Edwards* case.

These payments shall be deductible to _____ for federal and state tax purposes and includable in the taxable income of _____.

Except for these payments, each party agrees to assume the costs of his or her own support and the support of his or her lineal descendants, other than any child of their marriage, and also the costs of his or her own attorneys' fees and expenses of litigation if the marriage is terminated by annulment, divorce, separation or dissolution, or if the parties should become separated and sign a written separation agreement or decree of separation entered by the court of any jurisdiction.

Except as provided above, each party expressly waives and releases any right he or she may possess to alimony or spousal support (whether maintenance, transitional, compensatory or otherwise, whether pendente lite or after judgment), or to any other form of support, including, but not limited to, claims for services rendered or performed, or labor expended by either of the parties during any period of cohabitation before the marriage and during the marriage, or to the award of attorneys' fees, expert witness fees and litigation costs or expenses of any kind in the event of annulment, divorce, dissolution or separation, pursuant to statute, common law, or equitable rule.

_____ shall have no obligation by law, statute, equity, or otherwise, to support and maintain the children of _____ unless he/she adopts his/her children.

AMENDMENT OF PREMARITAL AGREEMENT

THIS AMENDMENT OF PREMARITAL AGREEMENT (Amendment) is entered into this ___ day of _____, 201_ by and between _____ ("_____") and _____ ("_____"), both of _____, Oregon.

RECITALS:

1. The parties executed a Premarital Agreement (Agreement) on _____, and thereafter were married;

2. The parties now wish to amend their Agreement.

AGREEMENT:

IN CONSIDERATION of the mutual covenants of this Amendment and for other valuable consideration, the parties hereby amend their Agreement pursuant to Section _____ of their Agreement and the provisions of ORS 108.720 as follows:

1. The parties hereby ratify and reaffirm all of the provisions of the Agreement not amended herein and agree that the Agreement shall remain in full force and effect

DATED:_____ _____

DATED:_____ _____

STATE OF OREGON)
)ss.
County of)

This Amendment of Premarital Agreement was acknowledged before me this ___ of _____, by _____ and _____ as their voluntary act and deed.

_____
Notary Public for Oregon
My Commission Expires: _____

REPRESENTATION OF CLIENTS IN PRENUPTIAL NEGOTIATIONS: NEGOTIATING THE DIVORCE WITHOUT KILLING THE MARRIAGE

By William J. Howe III and Joshua D. Kadish

Negotiation of prenuptial and domestic partnership agreements is, for many family lawyers, an unwelcome task. The challenge is to help the clients negotiate the terms of the divorce while they are basking in the rosy glow of prenuptial bliss. Many of us have had experiences in this arena which have strained the couple's relationship and, in some cases, led to calling off the big event.

Several years ago, the authors began to experiment with a collaborative form of representing clients in the negotiation of prenuptial and domestic partnership agreements. We have had about 20 cases since then, and have found that this model has much to recommend it.

The Traditional Adversarial Model

First, a brief analysis of the traditional adversarial model and the problems it can create. Typically, the prenuptial topic is raised by the person we'll call Fred, who has greater assets to protect or who has been through an unpleasant divorce. Fred's motivations, at best, are to avoid the massive uncertainty and protracted wrangling he experienced during his first divorce. Fred's motivations, at worst, are to keep his hands entirely on his funds and to not have to share them in the event of divorce with his lovely intended, Wilma. At best, Wilma feels that a prenuptial agreement is a reasonable idea. Perhaps she has been through a divorce herself, or at least can empathize with Fred's feelings. At worst, Wilma feels that the mere suggestion of a prenuptial is a moral outrage which causes her to have deep second thoughts about the relationship she thought she was entering.

Into this delicate situation enter two lawyers. Each is mindful of the dictates of DR 7-101 (representing a client zealously within the bounds of the law). Typically, Fred will meet with his lawyer first. Fred's lawyer listens carefully to Fred and then gives Fred a copy of his tried and true form of prenuptial agreement. This is the one that says "what's mine is mine and what's yours is yours. We may create a marital estate, if we wish. We may provide for each other in our estate planning, if we wish. But we waive all marital rights, including spousal support." Fred takes the draft home and shares it with Wilma. Fred tells Wilma that she must retain her own lawyer, even though this is the last thing Wilma might want to do. When Wilma goes to her lawyer with the form, Wilma's lawyer gives her a long lecture about how grossly unfair the form is in protecting Wilma's interests. Discussions ensue between Fred and Wilma. Separate discussions ensue between the two lawyers. After the usual attenuated process, with enough skill, luck and good will, the parties reach agreement and go off to choose floral arrangements.

Although we have drawn a caricature, we suspect that the above description is depressingly accurate in many cases. The problems with the model are several. First, the negotiations are based upon a competitive, rather than a principled, model of bargaining. In other words, Fred's lawyer starts with a fairly extreme position. Wilma's lawyer counters, and the parties proceed toward a middle ground as if negotiating over the purchase of a used automobile. This should be contrasted with the model of principled negotiation more typical of the mediated approach in which the focus is placed on the interests of the parties and the production of mutually agreeable solutions which address the parties' interests.

Second, the communication in the above example is indirect. At worst, if Fred wants to say something to Wilma, he speaks to his lawyer. Fred's lawyer speaks to Wilma's lawyer. Wilma's lawyer speaks to Wilma, and back it goes. Communication becomes time-consuming, expensive, and frequently distorted.

A Collaborative Model

The collaborative model we propose is as follows. After raising the issue of a prenuptial agreement with Wilma, Fred calls his lawyer, Bill. Bill explains to Fred that he would be happy to assist Fred in formulating a prenuptial agreement, but would like to do it in a collaborative manner. He tells Fred that it will be necessary for Wilma to have her own lawyer and suggests that Wilma hire Josh. Bill then suggests the following procedure.

First, Fred and Wilma will come to visit Bill for an initial meeting. Bill will first make it clear that he represents only Fred, and Wilma will need her own lawyer. He will then explain to Fred that Wilma's presence means that the attorney/client confidentiality privilege will be waived and, further, ask Fred's permission to answer any questions that either party raises during the course of the meeting. Bill will then explain the collaborative approach to crafting prenuptial agreements which will include:

1. Generally, both parties will meet with both lawyers. The intent is for the agreement to be client-driven with the lawyers providing the menu of choices available for prenuptial agreements and helping the clients craft an agreement that meets their interests and objectives.

2. If the parties reach a fundamental or principled impass (which is usually over whether to have a prenuptial agreement at all), then the parties agree that they will resolve that through mediation rather than negotiation between the lawyers. The mediator would be someone other than the lawyer for either party.

3. If, during the course of the negotiation, there are minor issues to be resolved that cannot be resolved by a quick conversation between the parties or telephone calls between the lawyers, they will be resolved in a four-way meeting. Again, the model is that the lawyers are acting more as facilitators to help the parties construct the financial foundation of their relationship, rather than "hard negotiators" as

one would be representing the buyer or seller of a piece of real estate where parties have strong adverse interests.

4. Either party is free at any time to speak individually and confidentially with their lawyer.

After their initial consultation with Bill, Fred and Wilma will meet with Josh. Fred and Wilma will explain their interests at that meeting and share their current state of thinking after receiving Bill's feedback. They will then hear what Josh has to say about prenuptial agreements in general and their situation in particular.

Following that meeting, Bill and Josh will have a conversation, compare notes and discuss the merits of their respective party's interests, if there is disagreement. If appropriate and necessary, at this point, each lawyer can have some discussion with his individual client. At some point, usually by the time the parties meet with Josh or sometime after, Bill will produce a draft of a prenuptial agreement for consideration by the parties and Josh. After revisions of the agreement and further meetings as necessary, the draft will be reduced to final form and signed in a joint ceremony with all four participants present.

We have found in using this model, both between ourselves and with other lawyers, that virtually all recommendations for changes have been embraced by both of the parties and both of the lawyers. Indeed, the process seems to encourage investment by all concerned to produce the best possible agreement, having in mind the parties have, at the beginning of the process, agreed on their objectives.

We have found the above model to improve the tone of the negotiations. We believe that the principal features of this model are as follows:

1. ***Depolarizing***. The key feature of the model is the clients' meeting with each lawyer. If both clients meet with both lawyers, the atmosphere of the negotiations is much less polarized and adversarial. There is no demonizing of the other lawyer, who remains largely unknown to the opposite client under the traditional model. Both lawyers get to be helpful problem solvers, instead of the good guy and the bad guy.

2. ***Direct Communication***. Communications are much more direct under the collaborative model. The model contemplates a pair of initial 3-way discussions among the clients and each lawyer. These discussions can be followed with a 2-way, 4-way or additional 3-way conversations. There is no indirect discussion which depends on the lawyers to pass messages back and forth between the clients.

3. ***Interests, Not Positions***. The focus of the conversations is on the interests of the clients, not their positions. The lawyers and the parties try to develop a draft based upon the underlying interests of the parties, rather than their stated positions. The parties are encouraged to emphasize their non-financial interests (such as nurturing their relationship) as well as their financial interests. This produces agreements which are more likely to satisfy the interests of both parties.

Areas of Concern

We have identified the following areas of concern with our model.

Communication with Adverse Party

DR 7-104 prohibits communication with an adverse party who is represented by counsel. Obviously, in using a collaborative method one should obtain the consent of counsel for the adverse party prior to communicating with that party.

Waiver of Lawyer-Client Privilege

The collaborative model we propose clearly jeopardizes the lawyer-client privilege. If litigation later occurs, communications between lawyer and client are discoverable, and the clients should be so advised before substantive discussions take place. It is fair to question the magnitude of this. Because full disclosure of assets and liabilities is required by the statute governing prenuptial agreements, ORS 108.700 *et seq*., it is somewhat difficult to envision communications with a lawyer a client might legitimately wish to keep a secret from the other side in later litigation. The same arguably is true in the domestic partnership situation, due to the fiduciary relationship between the parties.

Failure to Adequately Advise Client

Another serious concern with our model is that lawyers could be reluctant to properly advise a client in the presence of the other client. There are certainly pieces of advice one might refrain from giving in the presence of the other client. One could also imagine one's client being less than forthcoming in the presence of the other client. Perhaps there is critical information that one would fail to discover due to the inhibiting effect of the fiancé's presence.

The solution to this problem is to offer each client the opportunity to meet individually with his or her separate counsel. In order to remove any stigma from such separate caucuses, it is arguable that a separate caucus between each lawyer and his or her client should be required. If such a meeting is optional, one could imagine that a client's desire to speak alone with his or her lawyer could be seen as a suspicious sign by the other party.

Role Confusion

Another possible objection to the model is that unsophisticated clients may understand that one lawyer is representing both clients. The separate role of each lawyer must be made painfully obvious to each client. This can be clarified in a fee agreement between each lawyer and his or her client. Moreover, we recommend placing language in the agreement itself spelling out the various relationships, as follows:

Wilma has been represented by Joshua Kadish of Meyer & Wyse LLP. Fred has been represented by William J. Howe III, of Gevurtz, Menashe, Larson & Howe, P.C. The parties have engaged in a process whereby both parties have met initially with Bill Howe, who drafted this agreement. The parties then met with Josh Kadish. The parties have used this method of proceeding in an effort to remain cooperative and to aid communication among the parties and their lawyers. The parties acknowledge that by using this method, they have waived any lawyer-client privilege as to communications between themselves and their lawyers. The parties further acknowledge that they have been offered the opportunity to meet individually with each of their lawyers. The parties further acknowledge that Fred is not represented by Joshua Kadish and that Wilma is not represented by Bill Howe.

Conclusion

Although we acknowledge that the collaborative method may not be appropriate in every case, our experience thus far is that the model proposes a positive alternative to the traditional adversarial model. The particular approach we have outlined is flexible, and can be altered to fit the clients. Perhaps an initial meeting between each client and his or her separate lawyer will help get at hidden interests. Perhaps using a mediator, with or without lawyers present, to help negotiate difficult issues will prove productive. Finally, another huge benefit of this model, though unintended during its initial development, is the protection of the lawyers against malpractice claims. It is hard to imagine how a client can contend that they were surprised, not well-informed, or knew little about what they were getting into in signing a prenuptial agreement after having gone through this collaborative approach. It seems, to the authors at least, to make the agreement virtually “bullet-proof” against any contention of duress or lack of knowledge. It would seem that the only basis to set the agreement aside would be an affirmative fraud committed by one of the parties, for which the lawyer would not be responsible.

As we are discovering with divorce, the traditional adversarial model may not best serve all of our clients. This would seem to be particularly true in the management of prenuptial negotiations which, after all, are about the creation and foundation building of relationships. The method of their negotiation should really serve as a positive metaphor for the future of the relationship.

NOTES

Elderly Clients and Legal Capacity

Wesley Fitzwater, *Fitzwater Meyer Hollis & Marmion, LLP, Portland, Oregon*

NOTES

Elderly Clients and Legal Capacity

Wes Fitzwater
Fitzwater Meyer Hollis & Marmion, LLP

With the aging of America's population and the significant transfer of wealth that will occur in the near future, the domestic relations practitioner will be required to acquire a completely different set of skills to deal with the elderly client on a personal level. The demographics suggest that legal practitioners will more frequently face the question of client capacity and possible elder abuse.

I. THE AGING DEMOGRAPHIC

The Census Bureau refers to the "human tidal wave" that will "change the face of America."

There are currently 44.2 million Americans in the 62-84 years age group. This group is expected to increase to 47.3 million in 2020, jumping up to 61.8 million in 2030 and to 65.8 million by 2050, an increase of 113%.

Every day, for the next 19 years, more than 10,000 Baby Boomers will reach age 65!

- **Population over 85 years:**
  Who the Census Bureau refers to as the "**oldest old"** is projected to be the **fastest growing part of the elderly population into the next century**. There are currently 6.1 million Americans over 85 years. This group is expected to increase to 9.6 million by 2030, 15.4 million by 2040 and 20.8 million by 2050, **an increase of 288%.** .

- **Prevalence of Dementia** - The National Institute on Aging reports finds that the "**prevalence of cognitive impairment is significant**" in older Americans, especially with advancing age. Symptoms of memory loss, language disturbance, decline in judgment and reasoning, and personality change increase with age. A national study has determined that **38 percent** (up to 45% in some racial groups) of **people age 85 and older** had **some degree of cognitive impairment** short of dementia.

- **Transfer of Wealth** – Many economists believe that America is sitting on the edge of what is expected to be the "**greatest transfer of wealth in our history.**" Today's retirees constitute one of the wealthiest segments of the U.S. population with more personal wealth than any previous generation. Economists believe that bequests of this wealth will significantly boost the resources of the 76 million Baby Boomers (1946-1961) (currently ages 47-62). That means **by the year 2052, an estimated $40.6 trillion will change hands** as Baby Boomers and their parents pass on their accumulated assets to their heirs. http://www.insurancejournal.com/magazines/west/2004/02/23/features/37126.htm

II. WHO IS YOUR CLIENT?

It is not uncommon for two or more members of the same family to consult an attorney for legal advice or to assist with a legal transaction. It is critical that the attorney establish from the very beginning which person the attorney will be representing. It is equally important that the attorney clearly inform all parties involved of the attorney's role in representing that person.

This issue is, arguably, even more important when working with an elderly client who may not comprehend the significance of a conflict of interest or, worse, be a victim of undue influence and/or possible elder abuse.

A. Oregon Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

"(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent … "

Rule 1.7 Conflict of Interest: Current Clients

"(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if…"

Rule 1.8(f) – Compensation from Someone Other than Your Client

"(f) *A lawyer shall not accept compensation for representing a client from one other than the client unless*:"

Rule 1.9 Duties to Former Clients

"(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing."

B. The "Reasonable Expectation" of the "Client."

A person may qualify as a client under the Oregon Rules of Professional Conduct even if the attorney never entered into an explicit agreement to represent that person, and even if the attorney never intended to represent that person. In re Weidener, 310 Or 757. 770, 801 P2d 828, 827 (1990); Also see OSB CLE *Problem Solving in Elder Law Practice*, Chapter 8, *Stumbling Blocks and Pitfalls, Spotting, Avoiding and Dealing with Ethical Problems*, Professor Jennifer L. Wright, September 22, 2000.

III. THE QUESTIONABLY COMPETENT CLIENT

A. Capacity is a Threshold Decision

Whenever an attorney comes in contact with a client regarding a transaction – a determination of capacity is being made. A client's legal capacity or competency to perform a particular act is a threshold question that must be one of the attorney's first considerations. The attorney should begin with the assumption that the client is competent. *Cloud v. U.S. Bank*, 280 Or 83, 90 570 P2d 350 (1977). That is to say a person is presumed to possess legal capacity unless it is shown that the person's capacity is compromised.

Interactions with your client that raise concerns about capacity generally seem self evident under an 'I know it when I see it' test. However, the attorney should key into specific areas of cognitive status and resulting conduct in order to address specific determinations of levels of capacity.

Practice Tip: A thorough examination of these issues is addressed in a joint publication by the American Bar Association in conjunction with the American Psychological Association entitled "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers." This publication is available free of charge at the APA's website (http://www.apa.org/pi/aging/programs/assessment/index.aspx) and includes helpful worksheets and other materials.

This author also strongly recommends Helen Hierschbiel, *Impaired Clients: Challenging and Unique Ethical Considerations*, OSB Bulletin (May 2004) and Janine Robben*, I'm OK, You're… What Lawyers Should Know About Their Clients' Capacity to Make Decisions*, OSB Bulletin, Vol. 71, No 10 (Aug/Sept. 2011).

B. Legal Standards of Capacity

Legal capacity is the determination that an individual possesses a certain cognitive ability to complete a transaction. In domestic relations transactions, these include the creation and execution of contracts, deeds, notes, gifts and power of attorneys. A person's capacity to be able to legally take these actions depends on the nature of the act in question. Different acts require different thresholds of capacity, thus making a determination of capacity "a sliding scale." Arguably testamentary capacity is at the lowest end of this scale and contractual capacity is at the top.

Whether a person has the capacity to perform a particular act is examined as of the time of the act. Even if several signs point to mental incompetence, it is possible for a person to have "lucid intervals" during which he or she has the requisite capacity to enter into a contract or make a disposition of property. *Uribe v. Olson*, 42 Or App 647, 651 (1979); *Gentry v. Briggs*, 32 Or App 45, 50 (1978). However, clear and convincing proof is required to show that the legal act was performed during a lucid interval. *Gentry v. Briggs,* 32 Or App at 50. Note also that some medical professionals believe that advancements in the current understanding of dementia and delirium bring the lucid interval analysis into question.

1. Testamentary Capacity

Testamentary capacity is typically referred to as the lowest level of capacity to perform a legal act. This form of capacity is primarily referring to the execution of a will or trust although the statutory law is a little less than precise here. To create a will you must be of "sound mind." *ORS 112.225.* To create a trust you must have capacity. *ORS 130.155(1)(a).* A person who has the capacity to make a will has the capacity to create or amend a revocable trust and the power to direct the actions of a trustee. *ORS 130.500.*

Oregon case law does define testamentary capacity. For a person to be considered as having sufficient mental capacity to make a valid testamentary transfer, the person must:

a. Be able to understand the nature of the act, [knowing generally what a will or trust does];
b. Know the nature and extent of the person's property;
c. Know, without prompting, the claims of people who are or might be the natural objects of the person's bounty; and
d. Be aware of the scope and reach of the provisions of the document, [knowing what *your* will or trust does].
Kastner v. Husband, 231 Or 133, 135-36 (1962).

Mental capacity to make a will is determined at the precise moment that the will is executed. *Gentry v. Briggs*, 32 Or App 45, 49, 573 P2d 322, *rev denied* 282 Or 189 (1978); Ingraham *v. Meindl*, 216 Or 373, 376, 339 P2d 447 (1959); *Whitteberry v. Whitteberry*, 9 Or App 154, 158, 496 P2d 240 (1972).

2. Capacity of Persons Subject to Guardianship and Conservatorship:

ORS 125.005 defines "**incapacitated**" as:
"*a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety"*

"Meeting the essential requirement for physical health and safety' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur."

ORS 125.005 defines "**financially incapable**" as:

"a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance."

"Manage financial resources,' means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income."

Incapacitated persons who are unable to make decisions about their health and safety may require a court-appointed **Guardian**. An inability to manage financial resources may require the appointment of a **Conservator**. Due to the nature of the acts in question, arguably a higher level of incapacity must be shown in a guardianship matter as opposed to a conservatorship only. *In The Matter of Schaefer*, 183 Or. App. 513, 52 P.3d 1125 (2002) (guardianship proof). *In The Matter Of Grimmett*, 193 Or. App. 427, 89 P.3d 1238 (2004) (conservatorship proof). In both Conservatorships and Guardianships the rights and the decision-making abilities of the protected person are substantially reduced. The incapacity must be shown by clear and convincing evidence. *Id.; ORS 125.305; ORS 125.400;*

3. Contracts, Deeds, Lifetime Gifts, and Power of Attorney

The capacity to enter into or execute contracts, deeds, lifetime gifts, and a power of attorney is substantially similar. A person must possess greater competency to execute a deed than to execute a will. *First Christian Church v. Mcreynolds*, 194 Or. 68*,* 72, 241 P.2d 135 (1952). Conveying an inter vivos gift requires the same degree of capacity as making a contract. *Kugel v. Pletz,* 22 Or App 249, 251 (1975). A person can enter into a valid contract if the person's reasoning ability enables the person to understand the nature and effect of the act. *Kruse v. Coos Head Timber Co.*, 248 Or 294, 306 (1967).

Lack of capacity is not proved simply because a person is easily influenced and is a dependent person, or because the person states that he or she does not understand a contract. A person of below average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act itself.
"The test of mental capacity to make a deed requires that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business which he is transacting. * * * [A] grantor must be able to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction." *First Christian Church v. Mcreynolds*, 194 Or. 68*, 72-3,* 241 P.2d 135 *(1952*) (internal citations omitted).

C. The Capacity to Marry or to seek Annulment or Divorce

This author wishes to thank OLI and Julia M. Hagan, of Gevurtz Menashe, for use of her material Chapter 6 entitled '***Til Death Do Us Part: Can a Protected Person Get Married or Divorced***?, OLI CLE *Estate Planning For Protected Persons and People with Disabilities,* dated December 1, 2006. A full copy of Julia's chapter is attached.

1. Marriage is **a personal relationship** subject to a state's power to impose certain rights or duties on the parties, and fix the conditions in which it may be terminated. Buchholz and Buchholz, 248 NW 2d 21, 23 (Nebraska, 1976)

2. US Constitutional Rights - Marriage is a **personal fundamental right** retained by a person under the Ninth Amendment and protected by Due Process First Amendment rights to privacy and association. The Fourteenth Amendment protects this fundamental right from infringement from the state.

3. "Marriage is a civil **contract** entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150."

4. An annulment or dissolution is allowed for "**want of sufficient understanding**." ORS 107.015 (1).

5. Voidable Marriages. When either party to a marriage **is incapable of making such contract or consenting thereto** for want of legal age or **sufficient understanding**, or when the consent of either party is obtained by force or fraud, such marriage shall be void from the time it is so declared by judgment of a court having jurisdiction thereof.. ORS 106.030.

6. In Oregon, there is a legal presumption that a person is competent, even if they are a protected person who has an appointed guardian. ORS 125.300 (2

7. The **protected person retains all legal and civil rights provided by law** unless those have been expressly limited by court order, or specifically granted to the Guardian by the court. ORS 125.300 (3).

8. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations. ORS 125.300(1).

9. In a guardianship proceeding, the presumption of an adult having capacity must be overcome by clear and convincing evidence. ORS 125.305 (1).

10. A protected person for whom **a conservator has been appointed cannot convey or encumber the estate** of the protected person **or make any contract** or election affecting the estate of the protected person.

D. The Attorney's Role in Assessing Capacity

The attorney can take steps to maximize the chances of finding the requisite capacity of elderly or infirm clients. One step is to use a functional approach to determine capacity. In this approach, the attorney assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken. This approach contrasts with the conventional objective tests of capacity that are unrelated to the act. One commentator identifies six factors that can be applied in using the functional approach:

1. The client's ability to articulate reasoning behind the decision;
2. The variability of the client's state of mind;
3. The client's ability to understand the consequences of the decision;
4. The irreversibility of the decision;
5. The substantive fairness of the transaction;
6. Consistency of the act or transaction with the client's lifetime commitments.

When capacity becomes an issue with a client, the attorney should consider the following when interacting with the client:

1. Meet privately with the client, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting.

2. Create a relaxing and comfortable interview environment; converse about a topic that interests the client.

3. Conduct the interview at the client's best time of day.

4. Encourage questions.

5. Reassure the client that one purpose of the meeting is for the attorney and the client to become acquainted. Remind the client that the client's decisions, and not those of a family member, will control the outcome of the meeting.

6. Use indirect questions to assess capacity. Asking questions such as the identity of the President of the United States can be intimidating and put the client on the spot. Asking other equally topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client.

7. Take verbatim notes.

8. When preparing written materials for elderly clients, the domestic relations practitioner should:
   a. Use short words, sentences, and paragraphs;
   b. Use active verbs; avoid passive voice;

c. Avoid technical legal terms as much as possible; where unavoidable, define terms in non-technical language when they first appear;
d. In a contract or other document, use the names of the parties. Do not use legal role names such as "trustee" or "settlor" to identify parties;
e. Avoid double negatives.
f. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily readable sections.

Gorn, *A Guide to Representing Older Clients*, *cited in* 1 *Serving Elderly Clients* 5 (LRP Publications 1995).

E. The Red Flags of Undue Influence

While most often discussed in the context of estate planning or outright gifting, a **confidential relationship** and **transfers under suspicious circumstances** can easily enter into the world of domestic relations transactions.

When there is a confidential relationship between the donor and the donee, and suspicious circumstances exist, there is a presumption of undue influence, and the donee must prove that the transaction was fair. *Penn v. Barrett,* 273 Or. 471, 541 P.2d 1282 (1975); In *re Ridgway's Estate,* 214 Or. 410, 329 P.2d 886 (1958). The Oregon courts have relied upon this presumption or inference to require a donee in a confidential relationship to rebut such an inference when certain "suspicious circumstances" are present.

Suspicious circumstances include:

1. Participation in the Procurement of the Transfer: This factor looks at the involvement of the donee in facilitating the actions necessary to affect the gift.

2. Lack of Independent and Disinterested Advice: This is one of the most significant factors on the list. The presence of an informed, independent and disinterested professional acting on behalf of a donor will go a long way to dispel any notion of undue influence. On the flip side, the lack of such advice will weigh heavily against a donee.

3. Secrecy and Haste: Secrecy will almost always be a factor in cases involving undue influence. It is not likely that heirs will just sit by if they are aware that all of mom's assets are being gifted away or the will has been changed to disinherit someone.

4. Unexplained Change in Attitude Toward Others: Circumstances showing a drastic change in the attitude towards people who used to be a major part of the donor's life raises suspicions.

5. Unexplained Change in Planning: A change in long- held planning desires and actions that render the plan ineffectual will weigh against a donee.

6. Unnatural or Unjust Gift: Our society has certain expectations of the propriety of who is entitled to receive gifts from another. Gifts outside these notions can raise suspicions.

7. The Donor's Susceptibility to Influence: A donor's advanced age, declining physical and cognitive status, coupled with a dependence for care, weighs against a donee claiming a donor was acting freely and voluntarily.

These seven factors set forth by the courts in Oregon are not an exclusive list. Any suspicious circumstance involving a gift or transfer between such parties should be scrutinized. No single factor listed is controlling under the case law. The importance of any single set of circumstances has to be reviewed on a case by case basis.

F. Cognitive Assessment by Professionals

Based on the interactions with the client, an attorney should be able come to some form of assessment of the cognitive abilities of their client. Most practitioners in this area are not generally qualified to attempt to undertake administering even simplified cognitive tests to their clients. Counsel may consider consulting with and referring a client to a medical professional in regard to further evaluate a client's cognitive functioning. Once counsel has an understanding of the client's cognitive abilities, such should be documented and applied to the legal definition of the capacity necessary to carry out a specific action.

G. The Impaired Client – ORCP Rule 1.14

If the attorney concludes that a client may lack the capacity required to take the desired action, the attorney should:

1. Endeavor to maintain a normal attorney-client relationship

*"When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer **shall**, as far as reasonably possible, maintain a normal client-lawyer relationship with the client*." ORPC 1.14(a). Emphasis added.

Because the attorney is obligated to maintain a normal relationship with the client, the attorney's duty of communication with an impaired clients is heightened. See Sylvia Stevens, *Representing the Impaired Client*, OSB Bulletin 31, (May 1995).

2. Contact others and/or seek Protective Proceedings

"*When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer **may** take reasonably necessary protective action, including consulting with individuals or entities that have the ability to*

take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." ORPC 1.14(b). Emphasis added.

The attorney should be aware of who the family members are, but also have a working knowledge of local mental health professionals or social services agencies that have the ability to protect the client. If not, the attorney should consider consulting an Elder Law attorney.

3. Continue to protect Client confidences

*"Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 (*Confidentiality of Information). *When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."* ORPC 1.14(c).

Whether you should reveal client confidences or secrets, and to what extent you should reveal them, in order to take protective action, must be examined on a case-by-case basis with an eye on whether the person or entity to whom disclosure is being made will act adversely to the client. Helen Hierschbiel, *Impaired Clients: Challenging and Unique Ethical Considerations*, OSB Bulletin (May 2004).

IV. GUARDIAN AD LITEM VS. GUARDIAN VS. CONSERVATOR

A. Fiduciaries Generally

A fiduciary is a person that has the legal right, and concurrent duties, to act upon the interests of another. This umbrella term includes several people appointed by a court in various legal proceedings. In Oregon a "**guardian"** has custody of the protected person and can make decisions generally regarding their health care and placement. *ORS 125.315*. A "**guardian ad litem**" is appointed within a filed action for an incapacitated party and has the authority to make decision for that party in the case only. *ORCP 27*. A "**conservator**" has the authority to administer most all aspects of a protected person's financial interests. *ORS 125.420.* Note that a person subject to a conservatorship cannot "convey or encumber the estate of the protected person or make any contract or election affecting the estate of the protected person." *ORS 125.455(2)*

B. Oregon Rules of Civil Procedure Rule 27B:

"Appearance of incapacitated person by conservator or guardian. When a person who is incapacitated or financially incapable, as defined in ORS 125.005, who has a conservator of such person's estate or a guardian, is a party to any action, the person shall appear by the **conservator** or **guardian** as may be appropriate or, if the court so orders, by a **guardian ad litem** appointed by the court in which the action is brought. If the person does not have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the person who is incapacitated or financially incapable, as defined in ORS 125.005, is plaintiff, upon application of a relative or friend of the person.

B(2) When the person is defendant, upon application of a relative or friend of the person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the person."

There is very little statutory or case law guidance on how to get a guardian ad litem appointed and what their authority and duties are. The appointment of a guardian ad litem is routinely done by an ex parte appearance of one of the parties' counsel and upon an affidavit.

A practitioner can run into many ethical and practical issues when seeking the appointment of a guardian ad litem. Recognize that while you may feel that the appointment of guardian ad litem is in your client's best interest, you will be facilitating a court order or judgment stating that your client is incapacitated; something that can be against your client's wishes. Issues regarding conflicts of interest can arise after the appointment of a guardian ad litem if the attorney for a party continues to represent the guardian ad litem. These issues should be addressed prior to seeking such an appointment for a client.

C. Restrictions on Conservators

A conservator is restricted in performing certain acts that very much touch on issues that arise in a family law context. Without court approval, a conservator cannot:

1. "Convey or release contingent or expectant interests of the protected person in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety."
2. "Create revocable or irrevocable trusts of property of the estate."
3. "Exercise rights of the protected person to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value." or
4. "Authorize, direct or ratify any annuity contract or contract for life care."

ORS 125.440.

V. WORKING WITH THE PROBATE COURT

In many counties in this State, a practitioner may find little difference in the way the probate court and staff operate in relationship to any other court function. This is likely because these persons will be one and the same. In other counties, there may be specific court staff or even judges that primarily deal with only probate matters. In these contexts, frustrations can be expressed from both the courts' and the parties' perspectives regarding court procedures. Aside from the general concerns about court funding and workloads that all staff are experiencing,

recognize that there can be a real difference on how the probate courts and probate practitioners routinely operate.

A basis of these differences may stem from the lack of adversary filings in the grand majority of probate matters. Most probate petitions and actions taken by an appointed fiduciary are done by a single party with no adverse filings. The probate courts cannot assume if something is amiss that an opposing party will catch it. The court, and its staff, does the review of all filed matters, auditing of accountings and monitoring of the fiduciaries actions. In this day of limited budgets and staff, this can push resources to their limit. While true in every corner of the courthouse, this can be even more daunting in the probate courts.

Anything that a practitioner can do to assist the probate court in doing their job effectively can only help the practitioner as well. Petitions and motions that clearly state what is happening and why, including case problems, will generally speed up the approval of requested relief. Remember that in many of these proceedings the probate court is looking to you to assist them to oversee the case and the actions of your client. Within the bounds of your ethical duties to your client, any assistance you can give the court in this regard will assist you in your dealing with the probate court and its staff.

VI. GENERAL ISSUES FAMILY LAW PRACTITIONERS SHOULD BE FAMILIAR WITH

A. Effect of Dissolution and Marriage in Estate Planning

Under Oregon law dissolution of marriage and a subsequent marriage can have very significant effects on the estate plan of the parties. These effects can be different depending on whether a party has a will or revocable trust in effect:

1. **Effect of Marriage, Divorce or Annulment on Wills:**

    ORS 112.305 Revocation by marriage. A will is revoked by the subsequent marriage of the testator if the testator is survived by a spouse, unless:

    (1) The will evidences an intent that it not be revoked by the subsequent marriage or was drafted under circumstances establishing that it was in contemplation of the marriage; or

    (2) The testator and spouse entered into a written contract before the marriage that either makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

    ORS 112.315 Revocation by divorce or annulment. Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former

spouse of the testator and any provision therein naming the former spouse as executor, and the effect of the will is the same as though the former spouse did not survive the testator.

2. **Effect of Marriage, Divorce or Annulment on Revocable Trusts:**

ORS 130.530 Effect of marriage. Unless otherwise provided by the terms of the trust instrument, a trust is not revoked by the marriage of the settlor after the trust instrument is executed.

ORS 130.535 Revocation by divorce or annulment. (1) Unless otherwise provided by the terms of the trust instrument, a settlor's divorce or the annulment of the settlor's marriage, after the trust instrument is executed:

(a) Revokes all provisions of the trust in favor of the former spouse of the settlor;

(b) Revokes all powers of appointment, general or non-general, in the trust that are exercisable by the former spouse; and

(c) Revokes any provision in the trust naming the former spouse as trustee.

(2) Unless otherwise provided by the terms of the trust instrument, a trust shall be construed as though the former spouse predeceased the settlor if, after the trust instrument is executed, the settlor divorces the spouse or the marriage of the settlor to the spouse is annulled.

3. **Effect of Marriage, Divorce or Annulment on Advance Directives and Financial Powers of Attorney**

ORS 127.002 to 127.045 governs financial Powers of Attorney.
ORS 127.505 to 127.660 governs the Oregon Advance Directive for healthcare decisions.

Unlike Wills and Revocable Living Trusts, there are no statutory provisions revoking (or not revoking) financial Powers of Attorney or Advance Directives in Oregon. Therefore, entry of a divorce judgment by the court does not necessarily revoke a power of attorney or advance directive unless the divorce decree does so specifically. Therefore, an ex-spouse can still act as a financial agent or as a healthcare agent. Good practice would dictate the need to discuss these documents as part of a settlement and/or decree of divorce.

Practical Note: It is not unusual to find ex-spouses acting as Powers of Attorney, as Health Care Decision-Makers, even as Successor Trustees of Revocable Living Trusts, Personal Representatives of Last Wills and as beneficiaries in both documents. In fact, I have had several cases where the ex-spouse was the full-time caregiver of the other ex-spouse. Families come in all shapes and sizes.

B. Where One Spouse is Subject to a Conservatorship

The appointment of a conservator in a marriage situation should be rarer than in other circumstances due to, hopefully, advance planning and unified goals. However, families and the courts are increasingly seeing cases where one spouse is incapacitated and issues arise regarding the division and use of marital assets. In most marriages and domestic partnerships, if the parties are not able to resolve their differences over the handling of finances they have legal recourse to address how to resolve such. However, how is this accomplished when one party to the relationship is unable to express or protect their interests? More and more this advocacy is falling to conservators appointed by the court.

These situations are rife with conflict just due to their nature. A non-incapacitated spouse can be extremely concerned about the couple's ability to pay for the incapacitated spouse's care, or children from a previous relationship may believe that the well spouse is taking advantage of the ill spouse. Issues come up in regard to the payment of expenses and the transfer of assets. These types of situations can lead to the appointment of a conservator. The appointment does not change the conflict issues; it only gives someone the authority to address them on behalf of the incapacitated spouse. Typically, you will see a child of the marriage, or a stepchild, or a professional fiduciary stepping into the role of negotiating with the well spouse over payment of expenses and the transfer of assets.

Resolution of these types of situations will always be a challenge. While a conservator can prosecute a dissolution action, *Ballard v. Ballard*, 93 Or. App. 46, 763 P.2d 1051 (1988), most conservators and courts may be hesitant to do so if there is little evidence that this is what the protected person would have wanted. Generally what is being done ranges from informal agreements on how finances will be handled and up to formal property division agreements and spousal support negotiated on behalf of the parties to separate their finances; **a "divorce by conservatorship."**

C. Long-Term Care and Medicaid Planning.

Few couples have enough income to pay for the high monthly cost of nursing home care ($3000-$9500). If no planning is done, the couple will often exhaust their savings before applying for Medicaid.

By utilizing the state and federal laws governing eligibility for Medicaid, much can be done toward preserving the estate and/or preventing impoverishment of the spouse remaining in the community.

1. Medicaid Eligibility and Benefits

The Medicaid program is the largest source of payment for long-term care in Oregon. Medicaid is a joint Federal and State program. Medicaid covers the full range of long-term care services, including skilled, intermediate and custodial care, adult foster home, and in-home services.

Medicaid eligibility is based upon a "*service*" (or health-related) need and upon a financial need. To be eligible for Medicaid, the applicant must meet three (3) criteria for eligibility: (a) a health need; (b) an income need; and (c) an asset or resource need. Generally, individuals with severe health issues, whose monthly incomes are at or below $2205 and whose assets are below $2,000 for an individual and $24,180 for a couple will be eligible. Couples with assets above $24,180 may be required to split their assets and spend down before eligibility.

2. Protecting the Spouse who Remains at Home

The Medicare Catastrophic Coverage Act of 1988 ("MCCA") commonly referred to as the *Spousal Impoverishment Rules*, provides protection to the income and resources available for the maintenance of the spouse who remains at home ("community spouse"). Prior to MCCA, a spouse's eligibility for Medicaid often resulted in the impoverishment of the community spouse.

The assets of both spouses are pooled together, regardless of how title is held. The equity value of pooled assets is "deemed" available to the institutionalized spouse subject to the spousal impoverishment rules, which include:

- The community spouse is allowed to keep the exempt assets (house, one car, personal possessions, burial fund) and some of the non-exempt assets. The amount of non-exempt assets which the community spouse is permitted to keep is subject to a limit referred to as the "*Community Spouse Resource Allowance*" or "CSRA."
- The community spouse may retain one-half of the couple's combined assets. The value of the assets is determined at the beginning of the "Continuous Period of Care." The amount allowed to the community spouse is subject to a minimum of currently $24,180 and a maximum of $120,900 (in 2017).
- Once the community spouse's resource allowance has been calculated, the excess resources must be spent down before the institutionalized spouse can be eligible for Medicaid benefits.
- Once the institutionalized spouse has been determined eligible for Medicaid benefits, there is no need for future assessment of the community spouse's resources. The community spouse may accumulate additional resources without affecting eligibility.

D. Disabled Parties and Special Needs Trusts

1. Parties or Children with a Disability

Persons experiencing a disability, as well as parents of children with disabilities, have special planning needs which need to be addressed if the parties are in the midst of a dissolution.

When a party in a dissolution action has a disability or has a child with a disability who is receiving Supplemental Security Income (SSI) and/or Medicaid or who may need these benefits in the future, the dissolution agreement or judgment needs to be structured so that the divorcing spouse or child does not lose his or her eligibility for SSI, Medicaid or other needs based benefits.

For example:

- SSI and Medicaid may be affected if the custodial parent receives spousal support or if the custodial parent receives cash child support for the benefit of the special needs child.
- In the case of minor disabled children, if the custodial parent receives spousal support in the form of a monthly cash payment, SSI may count the amount of the spousal support received in determining the allowable family income, which could have the effect of making the child ineligible for SSI or Medicaid.
- Spousal support paid to a spouse who is disabled counts as unearned income and may place the spouse who is disabled in a worse off position if critically needed government benefits (such as Medicaid) are reduced or lost as a result of the spousal support income.

2. **Special Needs Trusts**

One option for parties who are experiencing a disability or who have children who are experiencing a disability is to use a Special Needs Trust to receive funds that would ordinarily be distributed outright to the disabled spouse or to the custodial parent. As part of a settlement or hearing, the Court can approve of and direct funding to a Special Needs Trust. This may allow a party in a dissolution who is disabled to receive a split of assets and/or spousal support income without adversely affecting their SSI or Medicaid benefits.

This type of trust is different than the typical 3rd party Special Needs Trust which is often used to protect an inheritance or gift for a disabled individual. Not all persons with disabilities can use these types of Special Needs Trust. For those for whom it is appropriate, it may allow much greater flexibility in structuring a dissolution settlement agreement so that the spouse with a disability or custodial parent of a special needs child can better protect assets and income.

Many family law practitioners are not likely to be familiar with Special Needs Trusts. Lawyers drafting these trusts require knowledge in trust law, tax law, Medicaid law and guardianship law. When parties in a dissolution action are challenged with a disability or have a child with a disability, the family law attorney should consider consulting with an attorney who is familiar with disability issues and Special Needs Trusts.

Chapter 6

'TIL DEATH DO US PART: CAN A PROTECTED PERSON GET MARRIED OR DIVORCED?

Julia M. Hagan

Table of Contents

Page

NOTES

Chapter 6

'TIL DEATH DO US PART: CAN A PROTECTED PERSON GET MARRIED OR DIVORCED?

Julia M. Hagan

I. FUNDAMENTAL RIGHTS OF A PROTECTED PERSON TO MARRY OR DIVORCE. BASIC LEGAL CONCEPTS

> Marriage is a personal relationship subject to a state's power to impose certain rights or duties on the parties, and fix the conditions in which it may be terminated.
>
> *Buchholz and Buchholz,* 248 NW 2d 21, 23 (Nebraska, 1976)

A. US Constitutional Rights

Marriage is a personal fundamental right retained by a person under the Ninth Amendment and protected by Due Process First Amendment rights to privacy and association. The Fourteenth Amendment protects this fundamental right from infringement from the state.

Griswold v. Connecticut, 381 US 479, 85 S Ct 1678, 14 L Ed2d 510 (1965) in overturning convictions for person providing contraceptive information to married couples, court found First Amendment "penumbra" of privacy and rights of association, including "rights to marital privacy and to marry and raise a family." *Loving v. Virginia,* 388 US 1, 1287 S Ct 1817, 18 L Ed2d 1010 (1967) where court overturned conviction of interracial couple who moved to Virginia, a state that banned interracial marriage. *Zablocki v. Redhail,* 434 US 374, 98 S Ct 673, 54 L Ed2d 618 (1978) where court found unconstitutional a Wisconsin statute that required court permission to marry.

B. Oregon's Marriage Statute

Under ORS 106.010,

> "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150."

C. Rights of a Protected Person to Marry

1. In Oregon, there is a legal presumption that a person is competent, even if they are a protected person who has an appointed guardian. ORS 125.300 (2)

2. The protected person retains all legal and civil rights provided by law unless those have been expressly limited by court order, or specifically granted to the guardian by the court. ORS 125.300 (3)

3. A guardian may be appointed for an incapacitated adult only as is necessary to promote and protect the well being of the protected person. ORS 125.300 (1); 125.305(1)(a)

4. A guardianship for an adult person must be designed to encourage the development

of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations. ORS 125.300(1)

5. In a guardianship proceeding, the presumption of an adult having capacity must be overcome by clear and convincing evidence. ORS 125.305 (1)

6. There are no clear rules for determining capacity, however, the court in determining whether there is mental capacity sufficient to contract a valid marriage has focused on whether, at the time of the marriage, there was a capacity to understand the nature of the contract and the duties and responsibilities which it creates. *De La Montayne v. De La Montayne,* 131 OR 23, 26, 281 P 829 (1929)

7. An annulment or dissolution is allowed for "want of sufficient understanding." ORS 107.015 (1)

D. Declaring a Marriage "Void" in Oregon

1. Void Marriages. ORS 106.020

A prohibited marriage is "absolutely void" if:

a. Either of the parties had a spouse living at the time of the marriage or,

b. The parties are first cousins or nearer of kin to each other, whether of whole or half blood, whether by blood or adoption. ORS 106.020 (Exception for parties who are first cousins by adoption only.)

2. Voidable Marriages. ORS 106.030

When either party to a marriage is incapable of making such contract or contracting because:

a. Not of legal age, or

b. Insufficient understanding, or

c. Consent was obtained by fraud or force.

E. Ending a Marriage in Oregon

1. Annulment of a Marriage.

a. A marriage may be declared void from the beginning for any of the causes specified in ORS 106.020; and whether so declared or not, shall be deemed and held to be void in any action, suit or proceeding where it may come into question. ORS 107.005 (1)

b. When either husband or wife claims or pretend that the marriage is void or voidable under the provisions of ORS 106.020, it may at the suit of the other be declared valid or that it was void from the beginning or that it was void from the time of the judgment. ORS 107.005 (2)

c. A marriage once declared valid by judgment of the court having jurisdiction thereof, in a suit for that purpose, cannot afterwards be questioned for the same cause directly or otherwise.

2. Dissolution of a Marriage.

   a. A marriage is dissolved upon a judgment of dissolution of marriage when "irreconcilable differences between the parties have caused the irremediable breakdown of the marriage." ORS.107.025(1)

   b. Only one party to the proceeding need prove the evidentiary requirements of ORS 107.025 (1)

F. Power of Guardian, Conservator or Guardian Ad Litem to Prosecute and Defend Annulment and Dissolution Cases

1. There is a lack of uniformity among the states regarding the power of a guardian or conservator to bring an annulment. Most states allow an action to annul a marriage on grounds of mental incompetency, even if there is no explicit statue.

2. Oregon requires a party to the marriage to institute the suit for annulment. While a guardian may do so on behalf of a party, a third party may not institute a suit for annulment. ORS 107.005 (2)

3. There is significant conflict of authority among the states on the guardian's power to maintain a divorce action:

   a. Where no specific statutory authority authorizes suit for divorce, some states reason the guardian has the power to bring the action much like the parent to file a personal injury action on behalf of an unemancipated minor.

   b. Other jurisdictions find if there is no specific statutory authority, a guardian cannot prosecute a dissolution on behalf of a protected person because it is personal and volitional, and only a party to the marriage can bring it.

   c. However, most states, find that if a protected person is the Respondent in a divorce or annulment action, a guardian is authorized to answer and counterclaim in the proceeding.

   d. *In the Marriage of Ballard,* 93 Or App 463, 763 P2d 1051 (1988) a Petitioner (Husband) who became incompetent before the dissolution was complete, had the dissolution continued through the appointment of a guardian ad litem. (The *Ballard* court did not answer and no Oregon case addresses the issue of whether an incapacitated person, through their guardian ad litem, can file a petition alleging irreconcilable differences.)

   e. Under ORS 125.445 (26), a conservator may perform without court approval, an act reasonably to accomplish the purposes for which the conservator was appointed, including to prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets…

   f. In Oregon, ORCP 1 and ORCP 27 B allow a guardian ad litem to maintain or defend a dissolution action on behalf of an incapacitated person; no other statute or rules specifies a different procedure for dissolution actions.

ORCP 27 provides in pertinent part;

"B. When a person is incapacitated or financially incapable as defined by ORS 125.005, who has a conservator of such person's estate, is a party to any action, the person shall appear by the conservator or guardian, as may be appropriate, or if the court so orders, by a guardian ad litem, appointed by the court in which the action is brought. If the person does not have a conservator of a person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as a guardian ad litem.

B (1). When the person who is incapacitated or financially incapable as defined by ORS 125.005, is Plaintiff upon application of a relative or friend of the person"

B (2). When person is Defendant, upon application of a relative or friend of the person filed within the period of time specified by these rules, or other rules or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the person."

ORCP 1 provides, in part:

"These rules govern procedure and practice in all circuit of this state, except in the small claims department of district courts, for all civil actions * * * *except where a different procedure is specified by statute or rule.*" (Emphasis supplied)

II. PRACTICAL AND LEGAL CONSIDERATIONS IN DISSOLUTION PROCEEDINGS INVOLVING PROTECTED PERSONS

A. Consultations

1. In initial consultations, the counsel must form an opinion about the prospective client's capacity, separate and apart from statements of others. A person who presents with a limited guardianship should not be presumed to be incompetent. Legal capacity is a flexible concept that may change based on the tasks, and the person's ability to communicate and to understand communication.

2. Counsel must identify the client in the case. A protected person under a guardianship retains the right to retain counsel. ORS 125.300 (3) However, if a guardian, conservator, or guardian ad litem is the client, a retainer agreement should clarify that relationship and confidentiality under the attorney client privilege.

3. Realistic goals and costs should be discussed at the outset. The case may involve more fees and costs given the need to consult with medical experts, family members or other individuals with information necessary for adequate representation of the party.

B. Initial Pleadings

1. A guardian as representative of the protected person is the authorized signator of all pleadings and should be named in the caption with the protected person and identified as signator on behalf of the protected person.

2. Personal service in the manner required by ORCP 7 should be made on guardian.

3. If there is no guardian or other suitable person appointed by court yet to act as guardian ad litem, an application should be made under ORCP 27B(2) within the time period specified for answering after service of summons, or if an application is not so filed, upon application of any party other than the person (defendant). ORCP 27B(2)

C. Discovery

1. Under ORS 107.089 (2), each party to a dissolution has a duty to provide copies of documents in their possession or control to the other party, generally within 30 days after service of a copy of ORS 107.089 (9).

2. The discovery process may be expensive and time consuming for both guardian and the other party depending on their access to information, records, and ability to gather and provide discovery to counsel in a timely manner.

3. If the protected person was the spouse in charge of financial information, their incapacity may make this part of the process extremely difficult and costly.

D. Depositions and Requests for Admissions

1. If a party to the proceeding is mentally incapacitated, depositions may be fruitless; however, the guardian or conservator may be an important and practical deponent.

2. While the parties have a duty to investigate and provide discovery, this is subject to waiver. Because of time and expense, it may be impractical and unreasonable, to require full discovery. The guardian/conservator's time and attorney costs may make it prohibitive.

E. Settlement Conference, Mediation, Arbitration

1. Settlements are most likely when a guardian is informed, has clear client goals and an understanding of the options, as well as a functional relationship with the opposing party (spouse).

2. A guardian's understanding of the protected person's needs, the law, and potential result at trial may assist the parties in reaching compromise and settlement.

F. General Judgments of Dissolution of Marriage

1. Default General Judgments of Dissolution are generally rare given the necessity of the Petitioner's Affidavit or Declaration stating to the best knowledge and belief of the party seeking Judgment, the party against whom Judgment is sought is not incapacitated as defined in ORS 125.005… ORCP 69 B (1)(d)

2. Under ORCP 71 B, the court may relieve a party or such party's legal representative from a judgment. (Yet see *In the Matter of Davis,* 193 Or App 279___P3d___(2003) where the court denied Wife's Motion to set aside Stipulated Judgment under ORCP 7C, finding that under the "cognitive test she had the capacity to understand the nature of the act and to apprehend its consequences.")

3. A General Judgment of Dissolution of Marriage is final as to all property and debt distribution. Any orders for custody, parenting time, child support and spousal support are subject to modification as long as the court still has jurisdiction.

G. Evidentiary Grounds for Dissolution

1. Petitioner in the action has the burden of proving irreconcilable differences of the parties have caused the irremediable breakdown of the marriage. ORS 107.025. However, only one party need prove this element and such may be pled though counterclaim.

2. The incompetent party to the divorce may need to be evaluated by the court if evidence is not clear on this element using a "best interest of the ward standard" or substituted judgment standard.

3. Other evidentiary considerations for counsel: ORS 40.310 and ORS 44.545.

H. Issues Involving Children

1. Custody

a. The parties by agreement or order by the court, may decide their rights or responsibilities for the children, that is who has legal custody.

b. Custody may be awarded to one party (sole custody) or both parties (joint custody), the later only by agreement.

2. Parenting Time

a. Oregon policy is to assure minor children frequent and continued contact with their parents and encourage parents to share in the rights and responsibilities of raising their children. ORS 107.101(1) and (2)

b. The parenting time schedule is subject to modification, tailored to family need, the children's age and circumstances.

c. A parenting plan may need to accommodate parental capacity, i.e. set forth safety conditions and the involvement of a supervisor or care provider, if in the children's best interest.

d. Involvement by a child's therapist or a protected person's treatment team (i.e. psychologists, psychiatrists, guardian or care provider) may be essential to determine an appropriate parenting plan.

3. Child Support

a. A minor child's support is calculated under ORS Chapter 25

(1) Oregon Child Support Guidelines set the presumptive child support based on the gross monthly income or potential income of a party. A parent's social security and disability income are considered in the calculation.

(2) Child support is always modifiable if there is a substantial change in circumstances.

(3) Medical expenses of the children are allocated.

(4) Life insurance to secure a child support obligation is required.

b. "Children attending school" also have support calculated under ORS Chapter 25, and under ORS 107.108 have their own requirements to be eligible for continued support, between the ages of 18 and 21.

I. Spousal Support

1. There are three categories of spousal support: transitional, compensatory, and maintenance support, with required factual findings determinative of the amount, basis, and duration of support for each.

2. Spousal support is subject to modification. Protected persons (if receiving significant passive income) may be paying support for a community spouse. In other cases, a community spouse may have an indefinite spousal support obligation to an incapacitated spouse.

3. Spousal support is taxable to recipient and deductible to payer. A life insurance policy may be required to secure the support award.

J. Property Division

1. The court has the power to divide the real or personal property of both, or either spouse as may be "just and proper" in all of the circumstances. ORS 107.105(1)(f)

2. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage whether such property is jointly or separately held. In addition, the court can consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets.

3. *In the Matter of Kunze,* 337 Or 122, 92 P3rd 100 (2004) the court set forth its four step analysis:

   a. What is the separately acquired asset?

   b. Does the presumption of equal contribution apply?/ Is it a marital asset?

   c. Has the presumption of equal contribution been rebutted by a preponderance of the evidence?

   d. Has the foregoing analysis yielded a "just and proper" outcome?

4. If a party "commingles" their assets the court will look at that as one factor in the "just and proper" analysis. Titling of an asset alone does not determine what percentage a party may be awarded.

5. After a Petition for annulment or dissolution is filed, and upon service of summons and Petition upon the Respondent, a restraining order is in effect against both parties as to all assets until a final Judgment is issued. ORS 107.093 Parties restrained under

this section may apply to the court for Temporary Orders, including modification or revocation of the restraining order.

K. Temporary Orders under ORS 107.095

1. After the commencement of a suit for annulment or dissolution, and until a General Judgment is entered, the court may make temporary orders for:

   a. Payment of money as necessary for the other party to prosecute or defend the suit, or funds necessary to maintain the other party. ORS 107.095(1)(a)

   b. For the care, custody, and support of one party or jointly, of the minor children, and for parenting time rights of the parent not having custody; 107.095(1)(b)

   c. For the restraint of one party from interfering in any manner with the other party or the minor children; 107.095(1)(c)

   d. For the exclusive use and possession of the marital home if the court considers it necessary for the best interests of the minor children to do so; 107.095(1)(d)

   e. Restraining either party from encumbering or disposing of real or personal property except by court order; 107.095(1)(e)

   f. For the temporary use or control of real or personal property; 107.095(1)(f)

   g. For exclusive use and possession of the marital home if the other party assaults or threatens to assault the other. 107.095(1)(g)

L. Protective Proceedings

1. A Family Abuse Restraining Order under ORS 107.700 may be appropriate for one spouse to file against the other if the person is a victim of abuse within the proceeding 180 days and if the person is in imminent danger of further abuse.

2. The Elderly Persons and Persons With Disabilities Abuse Prevention Act, ORS 124.005 to 124.040 also provides protection for certain persons older than 65 years old or who have physical or mental disabilities.

3. Guardian friendly forms for the EPPDAPA are available on the OJD court improvement website.

Intersection of Criminal Law and Family Law

Shannon Snow, *Saucy & Saucy, Salem, Oregon*

Randall Snow, *Harris Wyatt & Amala LLC, Salem, Oregon*

NOTES

The Intersection of Criminal Law and Family Law

OBTAINING INFORMATION ON CRIMINAL CASES

1. *Question: How do I obtain a police report?*

Answer: Request it directly from the police department.

- **Online:** Most large police departments (including the Oregon State Police) have a website link for a police report request form. You simply fill out the form and mail it in.
    - Some police departments prefer to bill law firms instead of having payment up front because costs vary. Check with the particular agency before mailing the payment with the form.
- **By Letter:** If there is no online request form, call the police department and ask what information it needs to release a report. Send the necessary information by letter, fax or email. Again, ask about payment.

2. *Question: What information will I need when I make the request for a police report?*

Answer: That depends on what you are trying to obtain.

- **Incident Search**: If you want the police report for a specific incident, you need either the incident number, or some combination of the date/time, location and people involved.
- **Video or Photo Request.** You need the incident number.
- **Name or Address Search**: Police departments will perform a name or address search. These are helpful when you want a list of all incidents for a single person (as the caller, victim, suspect, etc.). You need the name and date of birth of the person or the address, depending on which search you are requesting. If you want the report, videos, or photos from a specific incident, you will have to follow up with an incident search or video or photo request.
- **911 Audio Calls**. Find the 911 service agency in your area. This is often on the city website (e.g. Willamette Valley Communication in Salem). Go to the agency website to obtain its request form or contact the agency by telephone to determine the information it needs. There will be a fee.

3. *Question:* *A police department will not release a report if the matter or investigation is pending. What other ways can I obtain information about a crime when the police report is unavailable?*

Option 1 - District Attorney: Contact the District Attorney's office.

A. *Question:* *Should I call or email?*

Answer: District attorneys may be more candid over the telephone.

B. *Question:* *What information can/will the District Attorney provide?*

Answer: That depends on the nature of the charge[s] and who you represent. For example is there a minor victim? Do victims rights laws that apply? Are there statements related to child abuse? These limit available information.

If none of those apply, it will depend on the district attorney assigned the case. A district attorney might be more cooperative if you represent someone adverse to the defendant.

The agent of a victim has rights to certain information.

Most district attorneys will tell you general facts and the status of negotiations. They may also tell you the strengths and weaknesses of the case, depending on who you represent.

C. *Question:* *Can I get information on a case that was dismissed?*

Answer: Probably. Call the district attorney and ask why they dismissed. Most will tell you if they remember or have notes in the file.

D. *Question:* *Can I get information on a case that was "no actioned?"*

Answer: That may depend on whether the district attorney remembers why they chose not to pursue the charges.

Most counties assign a district attorney to do intakes, but it rotates often. You may need to find out which attorney was doing intakes on the week in question and call them directly. Even if you are able to track down the attorney, they probably will not remember the circumstances of the case.

Option 2 - Call the Police Department: Call the police department and ask to speak to the officer.

A. *Question:* *Will the department direct my call to the officer involved?*

Answer: Generally yes. They might even give you the officer's cell phone number and tell you when the officer is next on shift.

B. *Question:* *Can I subpoena a police officer's file? Would I get more information than I get from a police report request?*

Answer: Yes, but you might also be able to get this information just by asking for it on your police report request. The additional information would include handwritten notes from in the field, photographs or videos. This will cost more than just a report.

C. *Question:* *Can I compel a police officer to testify in a divorce case?*

Answer: Yes, by subpoena.

Option 3 - Online Sex Offender Search: For sex offenders, look at the Sex Offender Inquiry System: http://www.oregon.gov/OSP/SOR/Pages/index.aspx

A. *Question:* *Are all sex offenders listed on the website?*

Answer: Previously, this list contained only those offenders designated as "predatory." Currently, this system is being transitioned to a classification system.

Classification

ORS 181.800 Risk assessment tool. The Department of Corrections shall adopt by rule a sex offender risk assessment tool for use in classifying sex offenders based on the statistical likelihood that an individual sex offender will commit another sex crime. Application of the risk assessment tool to a sex

offender must result in placing the sex offender in one of the following levels:

(1) A level one sex offender who presents the lowest risk of reoffending and requires a limited range of notification;

(2) A level two sex offender who presents a moderate risk of reoffending and requires a moderate range of notification;

(3) A level three sex offender who presents the highest risk of reoffending and requires the widest range of notification.

B. *Question:* *Can a person get relief from registration requirements*?

Answer: Yes, but it's complicated. Talk to a criminal defense attorney.

Option 4 - ECourts: Look on ECourt. There is a plethora of information available to the public.

However....

- This type of search will not reveal municipal violations/arrests. DUIs are a common arrest that will not show up on ECourt; and

- This type of search will not reveal ongoing criminal investigations for which a suspect has not yet been charged.

ARREST

1. *Question:* *I suspect an opposing party was arrested. Nothing is showing on ECourt and I cannot get information from the police or District Attorney. What do I do?*

   Answer: Look on the county jail website. If there is no website, call the county jail and ask. All jails have rosters, which will tell you names, charges and arrest dates.

2. *Question:* *My client was arrested. How can I get more information on what will happen next?*

   Answer: Look at the county website to see what they are being held on. You can do this even before the first court date.

3. *Question:* *What is the difference between a conditional release agreement and bail?*

   Conditional Release. If you are released under a conditional release agreement, you did not have to pay bail but you are subject to conditions imposed by the court. Common conditions are not having contact with the victim, not drinking alcohol, and not leaving the state.

   Bail. You must post (pay) 10% of the bail amount to be released.

   Hint: Many courts have pretrial release officers. They make the decision about whether a person is conditionally released or required to post bail. You can contact them to find out the status of your client or an opposing party. You can also contact them if you represent a victim to give them information that might make them more likely to require bail as opposed to a conditional release.

FAPA

1. *Question:* *I represent the respondent. What are the risks to my client if I request a hearing on the FAPA when there are pending criminal charges for the same incident?*

   Answer: The more times you have a person accused of a crime testify, the more opportunity the state has to use their own statements against them.

   Find out if your client has a criminal defense attorney and contact him or her to discuss the pros and cons of a FAPA hearing. It may be helpful for the criminal defense attorney to have under oath statements from the alleged victim. Ultimately, the client may have to make a decision about which case is most important to them before you can determine how to proceed.

2. *Question:* *Should I encourage my client to obtain a FAPA if there is already a criminal charge with a no contact order in place?*

   Answer: It is probably not necessary. A no contact order is enforceable. You and your client can call the district attorney (together) to notify him or her of a violation. The district attorney will probably file a motion to show cause about why the person's release agreement should not be revoked. In an emergency situation, the judge might sign an order within a day or two for an arrest warrant. That is not a lot slower, if at all, than an arrest on a FAPA violation.

   If contact with children needs to be addressed, a petition for a FAPA is warranted.

3. *Question:* *Should I request that the same judge preside over the FAPA case and the criminal case?*

   Answer: There will be overlap between the cases. It is usually a good idea to have the same judge, especially if you represent the defendant. In many counties this may be out of your control. Even in "one family, one judge" counties, they may not catch that this is the same family, so consider making the request yourself.

DEPOSITIONS

1. *Questions:* *Should I depose an opposing party in a divorce if they have criminal charges against them?*

   Answer: If you are interested in issues related to the divorce, absolutely. If you are just trying to get information about the criminal charges, probably not. Time and resources will be used and the opposing party will assert their right to not incriminate themself.

2. *Questions:* *Should I allow my client to be deposed in a divorce case if they have criminal charges pending against them*?

   Answer: You do not have a choice. But you should contact the client's criminal divorce attorney to see if they want to attend. If they do not have a criminal defense attorney, be prepared to object yourself to any question related to the criminal charges if there is a possibility your client might say something incriminating.

3. *Questions:* *Are there any detriments to filing a divorce case when the opposing party has criminal charges pending related to abuse of your client?*

   Answer: Yes. The criminal defense attorney cannot depose an alleged victim. Once a divorce is filed, the divorce attorney might depose your client intending to get information for the criminal case.

POLYGRAPHS

1. *Question.* *How can polygraphs be used in a divorce case?*

   Answer: Just like in a criminal case, you might have your client undergo a polygraph examination when allegations are made against them about sexual abuse, fraud, etc. You are not required to divulge that a test has been conducted because it is work product. You might choose to provide the results if they are favorable.

2. *Question:* *How do a find a reputable examiner?*

   Answer: If criminal charges are at issue, find a polygrapher who is a former employee of a police department or that was used by the district attorney.

   If you are making public that the test is occurring, ask the opposing attorney to agree to use a specific polygrapher in advance.

3. *Question:* *Can I write the questions myself?*

   Answer: No, but you can have a discussion with the examiner about what you are hoping to determine so they know how to create their questions.

4. *Question:* *What are the risks of a polygraph*?

   Answer:

   - Inadvertent disclosure of unfavorable report;
   - Incorrect result;
   - Others know a test was conducted (DHS);
   - Mental state of client; and
   - They are not admissible in court. You may spend money on the exam, get a favorable result, and not be able to use it.

5. *Questions:* *What are the benefits of a polygraph?*

   Answer:

   - They assist in negotiations;
   - They inspire client confidences; and
   - They are not admissible in court, even if it is an unfavorable result.

Oregon and Washington: So Close, Yet So Far Apart

Elizabeth Christy Taylor, *Elizabeth Christy Law Firm, PLLC, Vancouver, Washington*

Collin McKean, *McKean Smith, LLC, Portland, Oregon*

NOTES

OREGON STATE BAR ASSOCIATION
FAMILY LAW SECTION
2017 ANNUAL CONFERENCE
October 12-14, 2017
Sunriver Resort
17600 Center Drive, Sunriver, Oregon
Elizabeth Christy Taylor, Elizabeth Christy Law Firm PLLC, Vancouver, Washington; and,
Collin McKean, McKean Smith, LLC, Portland, Oregon

OREGON AND WASHINGTON; SO CLOSE, YET SO FAR APART

I. DIVORCE

A. Initiation of the Case

1. Oregon

a. In Oregon, one can file and be divorced the next day.

b. Non-mandatory forms available.

2. Washington

a. Initiated mostly the same way, Petition, etc. Must file a proposed Parenting Plan.

b. 90 day waiting period that must toll prior to finalizing the divorce. It begins tolling after filing *AND* service have been accomplished. It cannot be waived.

c. The Columbian newspaper publishes divorce Petitions.

d. The Final Divorce Order (Decree) is separate from the Findings and Conclusions About a Marriage; as is the Final Parenting Plan (if children), and Final Order of Child Support with Child Support Worksheet (if children).

Website for forms: http://www.courts.wa.gov/forms/.

e. New "Plain Language" forms as of July 1, 2016, created to allow self-represented litigants more ease in preparing their documents.

f. Legal Plus, Family Law Soft software available to draft forms.

g. In general – Oregon equitable division, Washington Community Property state.

B. Temporary Orders

1. Oregon

a. Statutory Ex Parte Orders: ORS 107.093; ORS 107.097; ORS 107.138; FAPA, EPPWDAPA and ORCP 79.

b. Relief under ORS 107.095. In minority of counties may obtain substantive temporary orders by declaration/affidavit. In majority of counties no substantive temporary orders without notice and opportunity for evidentiary hearing (usually Order to Show Cause setting hearing date).

2. Washington

a. For a combination of reasons typical for any family law case, coupled with our 90 day waiting period, there is often a need to get immediate relief.

b. Washington allows parties to seek immediate relief through a Motion for Temporary Orders. This is very common in divorces in Clark County.

c. The pleadings for this include (some mandatory some elective depending on the issues);

i. Motion for Temporary Family Law Order;
ii. Declaration in Support of Temporary Family Law Order;
iii. Financial Declaration;
iv. Proposed Parenting Plan;
v. Declaration in Support of Proposed Parenting Plan;
vi. Sealed Financial Source Documents for income and other financial information;
vii. Sealed Medical Information;
viii. Proposed Child Support Worksheets;
ix. Notice of Hearing.

d. Washington Civil Rules require at least 5 days notice for any motion hearing (unless local rule alters).

e. The local rules in Clark County allow two weeks' notice for temporary order hearings. The moving party selects the hearing date and "notices" the hearing onto assigned Commissioner's docket.

f. Washington allows Commissioners to make rulings with revision rights to a local Judge. Clark County has three family law Commissioners that hear the requests for temporary orders on Wednesday mornings at 9:00 a.m. These are called the show cause dockets. Each Commissioner has around 15-30 cases on their docket. Washington practice to send courtesy copies or bench copies the day of filing the materials.

g. Washington is a declaration based system for temporary orders and it is typical that we attach exhibits to be considered. It is possible to make objections by written response or in court. Parties do not need to be present at their hearing.

h. Any third party witnesses would write a declaration, not appear to give testimony on temporary order hearings, as well as contempt hearings.

i. The result is increased comparatively more posturing at the outset of a case for the temporary order phase. An entry of orders hearing is typically scheduled one week to two weeks after the substantive hearing.

j. In Clark County, issues that arise after the case is set for trial are heard by the Judge assigned to the case. Relocation matters also are only heard by the Judge assigned to the case.

C. Discovery Phase

1. Oregon

a. Statutory discovery exchange ORS 107.098.

b. Interrogatories not available in divorce.

c. Requests are continuing.

2. Washington

a. Once temporary orders are in place, we typically see discovery initiated. Typical format is Interrogatories and Requests for Production of Documents (in one document). Depositions less common but widely used.

b. Interrogatories available. Limited in scope by some local rules, but not in Clark County.

c. Interrogatories are not continuing unless specifically so stated.

D. Trial

1. Oregon

a. Trial by ambush.

b. Trial date generally set after case is at issue.

c. Judicial policy for trial to occur within 9 – 12 months.

2. Washington

a. When discovery is completed or close to completed, one party initiates the trial setting process by filing a Notice to Set for Trial telling the court discovery is completed (or will be completed) and the issues are ready for trial.

b. In divorce cases, after Notice to Set for Trial is filed, court clerk sets a mandatory pre-trial settlement conference. Any superior court Judge or Commissioner may preside. If no settlement reached, a trial date is issued.

c. Next you will be assigned a readiness hearing to discuss the trial, dates to disclose witness, and discovery, not trial by ambush like in Oregon.

d. Trial preparations are similar but in Washington we use an ER 904 which allows certain types of documents (records) be admitted prior to trial.

e. May use deposition transcript only if submitted to deponent with 30 days for corrections and statement from court reporter.

f . No judicial policy on timeline for setting trial unless a party files a motion to dismiss or otherwise requests a trial date.

II. FAPA/RESTRAINING ORDERS

1. Oregon

a. Family Abuse Protection Order (FAPA)

b. Elderly Persons and Persons with Disabilities Abuse Prevention Order (EPPWDAPA)

c. Statutory Financial Restraining Order (ORS 107.093)

d. Ex Parte Temporary Restraining Order and Preliminary Injunction (ORCP 79)

2. Washington

a. Ex Parte Restraining Order and Order to Show Cause for personal and/or financial restraints. Standard is irreparable harm.

b. Statutory Restraining Order requires Motion and signed Temporary Order. Covers personal restraints and financial restraints. RCW 26.09.060. Includes prohibition on removing child from state.

c. Domestic Violence Protection Order. RCW 26.50.

d. Antiharassment Protection Order. RCW 10.14.

III. CUSTODY

1. Oregon

a. Oregon law infused with “legal custody” to describe decision making rights.

b. Oregon uses physical custody and parenting time interchangeably.

c. Use of custody and parenting evaluators, child attorneys, and parenting coordinators.

2. Washington

a. Washington has revised their statutory scheme to replace "legal custody" with "decision making." Statutes include a presumption in favor of joint decision making for major decisions except where exceptions exist making joint decision making overly troublesome.

b. Washington law refers to "residential time" and "visitation."

c. Use of *guardian ad litems (GAL's)*, custody and parenting evaluators, child attorneys, and parenting coordinators.

IV. CHILD SUPPORT

1. Oregon

a. Oregon uses gross income figures as their main income reference

b. Oregon includes overnights in the calculation.

c. Child Attending School support continues until age 21.

2. Washington

a. Washington uses net income figures as their main income reference

b. Washington does not use overnights as a factor unless they are significantly over or under 90 overnights and a party specifically requests a deviation from the guideline support. 90 overnights is presumed in the calculator.

c. Post-secondary educational support continues until age 23. However, must petition for post-secondary educational support before child is 18.

V. SPOUSAL SUPPORT

1. Oregon

a. Generally referred to as spousal support.

b. Three categories of support under ORS 107.107 (maintenance, transitional support, and compensatory support), including separate factors for each.

c. Indefinite support available.

2. Washington

a. Generally referred to as spousal maintenance and awarded for period that is "just, without regard to misconduct" after considering relevant factors.

b. Maintenance Factors:

i. financial resources available to requesting party (including separate assets and child support);
ii. time necessary to acquire training or education to find appropriate employment;
iii. standard of living of the marriage;
iv. duration of marriage;
v. age, condition, and financial obligations of requesting spouse; and
vi. ability of the payor to meet own need while meeting the needs of the requesting spouse.

c. Different application based on the county and region of the state.

d. Indefinite support available.

e. Washington common law allows for a sort of "compensatory award" from community assets/funds where community funds were spent obtaining a professional degree/license and community earnings opportunities were lost by the supporting spouse and career opportunities were gained by the supported spouse. *In re Marriage of Fernau*, 39 Wn. App. 695, 694 P.2d 1092 (1984); *In re Marriage of Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984).

VI. RELOCTAION/MOVE AWAY

1. Oregon

a. Statutory provision requiring notice if a parent (either parent) moves greater than 60 miles. If the moving parent plans to move more than 60 miles further distant from the other parent they must give formal notice to the other parent and file notice with the court. Regardless of the distance, a custodial parent must continue to comply with any court order regarding parenting time unless and until that order is modified (changed). If the non-moving parent objects, they may file a motion for Temporary Status Quo Order under ORS 107.138, together with a motion to modify the parenting plan. Through that process legal custody and parenting time may be modified.

b. The inquiry when a parent relocates is focused on the best interests of the child. Where the non-relocating parent has a healthy relationship with the child, this can create a barrier to a custodial parent relocating while maintaining sole legal custody and primary physical custody. Common law in Oregon places the burden on the relocating parent to show the relocation would be in the child's best interests.

2. Washington

a. Relocation statute requires the *majority* parent to provide the other parent with 60 days' notice unless there is a special circumstance. Non-relocating parent has the opportunity to object to the relocating parent's request to move the child's residence within 30 days of receiving notice. The court may allow a temporary relocation while the objection is heard.

b. There is a presumption in favor of the "majority" parent. There are 11 factors the court must make findings on and in practice, the majority of relocations are granted to a majority parent. There is a high burden to overcome.

c. If there is no existing court order for custody and visitation the custodial parent is free to move away. However, the non-custodial parent can object, especially if the move will interfere with the ability to visit.

VII. DIVIDING MARITAL PROPERTY

1. Oregon

a. Equitable division

b. *Kunze* and progeny

c. *Slater* on professional goodwill

d. Court may not consider speculative liabilities, i.e. expectancies, taxes, etc., unless imminent and determinate. Exception is for taxes related to retirement assets (exception does not exist in Washington).

e. Statutory Judgment interest: 9%

2. Washington

a. Community Property plus "Just and Equitable"

b. A premarital home remains the separate property of that spouse, even if the party refinances and puts the other parties name on the title it is their separate property. Relatively new case law from *In re Estate of Borghi*, 167 Wn.2d 480, 487, 219 P.3d 932 (2009).

c. Washington holds to the principle that the character of property is determined under the law of the state in which the couple is domiciled at the time of its acquisition. *Rustad v. Rustad,* 61 Wash.2d 176, 179, 377 P.2d 414 (1963)

d. Improvements to separately held real property do change the character of property, they only create a right of reimbursement. An investment of separate cash into a separately help asset results in a dollar for dollar lien and does not share in the passive increase in value of the same.

e. However, there is a narrow exception to dollar for dollar liens where a community contribution of funds or labor causes an increase in value to separate property. In that case the community will have a lien for both the original investment and a proportionate share of appreciation thereon. *Connell v. Francisco*, 127 Wn.2d 339, 898 P.2d 831 (1995). However, this right of reimbursement is also subject to set off against the benefit to the community from the separate property, if any.

f. The mortgage rule looks to the source of funds used to purchase and retain a disputed asset by treating the initial down-payment according to the source of funds used to purchase the property originally and the looking to the character of the liability taken on in order to retain ownership of the disputed asset. If there is no continuing liability, then the character of the asset is retrospectively determined to be proportionate to the ratio of separate and/or community funds used to acquire the asset. It does not matter that funds of a different character are subsequently used to pay the obligation; the character of the asset is determined by the character of the cash and of the obligation at the time ownership is obtained.

g. Stock options acquired during the marriage but exercised with separate funds are divided according to the mortgage rule. The court would acknowledge a separate lien for the amount of separate funds used without appreciation.

h. Stock options granted prior to the marriage, but vesting during the marriage are generally considered community (with small exceptions).

i. The all-or-nothing rule says that a business interest will be considered entirely community or separate property. Where a spouse owns a separately held business the ownership interest will remain separate so long as the owner-spouse is adequately compensated. However, if the owner-spouse is undercompensated, then the business and its income become community property.

j Professional goodwill is an asset of the community. If the goodwill has value to the professional, it has a value to the community. This is not necessarily a value that can be sold. Washington courts must consider the "Fleege" factors in valuing professional goodwill: the practitioner's age, health, past demonstrated earning power, professional reputation in the community for judgment, skill, and knowledge and comparative professional success. *In re Marriage of Fleege*, 91 Wn.2d 324, 326 (1979).

k. Date of separation often the date of valuation for trial, unless a long term marriage and retirement is imminent, in which case it discretionary.

l. Statutory Judgment interest: 12%

VIII. ATTORNEY FEE REQUESTS/AWARDS

1. Oregon

a. ORCP 68

b. ORS 20.075 factors

2. Washington

a. No Civil Rule like ORCP 68

b. No statutory factors like ORS 20.075

c. Standards include generally disparity in income and/or intransigence.

IX. MODIFICATIONS

1. Oregon

Substantial change in economic circumstance that was *unanticipated*

at the time of entry of the last judgment.

2. Washington

Substantial change in circumstance.

X. UIFSA

1. Oregon

a. Choice of Law: Can only modify those portions of child support award which could be modified under the law of the originating tribunal. ORS 110.632(3).

c. Law of initiating state controls the duration of child support award. ORS 110.632(4).

d. Jurisdiction in Modification Actions: Jurisdiction to modify is retained by Oregon if one party resides in another state and the other party resides outside of the country. ORS 107.632(4).

2. Washington

a. Choice of Law (RCW 26.21A.515): The law of the issuing state or foreign country governs the nature, extent, amount, duration of payments, existence of satisfactions, and computation of interest/arrears under a registered support order. The longer statute of limitations will apply for collection purposes. Washington procedures and remedies for enforcement will be employed.

b. Jurisdiction in Modification Actions: Can modify child support order in Washington if 1) no one resides in issuing state and 2) the respondent is a resident of Washington state… OR a party or the child resides in Washington and all parties have filed consents in the issuing tribunal to allow Washington to modify. RCW 26.21A.550.

c. Jurisdiction to modify is retained by Oregon if one party resides in another state and the other party resides outside of the country. RCW 26.21A.550.

ORS 109.119: Defining the Child-Parent Relationship

Tracey RH Naumes, *Hamilton & Naumes, LLC, Medford, Oregon*

NOTES

Defining Child-Parent Relationships ORS 109.119

Presented By:
Tracey Naumes
Hamilton & Naumes, LLC
220 Laurel Street
Medford, OR 97501
(541) 494-0913

ORS 109.119:

(1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent, or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)

(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)

(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(10) As used in this section:

(a)"Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(e) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

Take Note:

3(a)

- Child-parent relationship
- Custody
- Presumption rebutted by PREPONDERANCE OF THE EVIDENCE

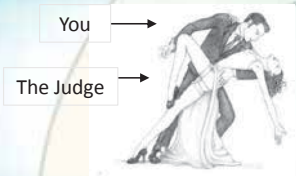
3(b)

- Ongoing personal relationship
- Visitation
- Presumption rebutted by CLEAR AND CONVINCING EVIDENCE

?

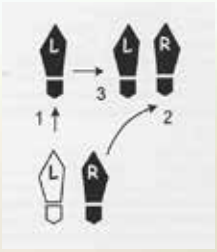
?

Wait a minute…



The Third-Party Custody Waltz:

- Step One: Whether a child-parent relationship exists between the petitioner and the child
- Step Two: If a child-parent relationship exists, whether the petitioner has rebutted the presumption
- Step Three: If the presumption has been rebutted, whether it is in the best interests of the child to grant custody to the petitioner



The Gatekeeper of Third-Party Custody Cases

Court MUST find child-parent relationship exists PRIOR TO assessing the rebuttal of the presumption OR the best interests of child.

No relationship? = End of story.

Judges are eager beavers and like to get to this first. Say "stop messing up my waltz silly beaver judge!"

The Evolution of the Definition:

Jensen v. Bevard, 215 Or App 215 (2007) = excellent review of legislative history behind the definition

- Pre-1987 Child-Parent Relationship:
  - "A relationship that continues on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfills the child's psychological need for a parent as well as the child's physical needs."
- Post-1987 Child-Parent Relationship:
  - "A child-parent relationship means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months."

*1999 and 2001: Other parts of the statute have been amended but the parent-child relationship definition has NOT changed

The Evolution of the Definition Continued:

What was the legislature thinking?

1. Universe Shrinkage

2. Create a NEW Universe

Where are we now?
The Day-to-Day Rule Rules

- Wanda Ramberg (1987 Senate Testimony) = No relationship
  - Grandparents had child every Friday night to Monday Night, provided child with all food, clothing, and necessities for over five years
- *Harrington v. Daum*, 172 Or App 188 (2001) = No relationship
  - Grandfather cared for children most evenings, had children most weekends at his apartment, altered home to accommodate children and usually picked up children from daycare
- *Jensen v. Bevard*, 215 Or App 215 (2007) = No relationship
  - Grandmother cared for child in her home for three consecutive days and nights per week
- *In Re Marriage of Hanson-Parmer*, 233 Or App 187 (2010) = No relationship
  - Psychological parent had child two days and one night per week

Pulling it Together

- Where's all the caselaw?
  - All the action has been on the rebuttable presumption factors
    - Why?
      - *Troxel v. Granville*, 530 US 57 (2000)
      - Lack of appellate focus

Practical Implications

1. Raise this issue first and raise it right

2. Educate your judge → my favorite quote:

   "[Our] conclusion is bolstered by the unacceptable implications of its opposite: that parents who, for employment or some other reason, need to be away from their children for regular extended periods are at risk of losing custody of their offspring to child care providers to whom the offspring have formed strong attachments." *Jensen*, 172 Or App at 225.

Practical Implications Continued

3. Advise your client of the possible outcomes

*Judges are human too and judges like to split babies

4. Like it, lump it, or appeal it!

THIS IS THE END

Thoughts on Evidence

Daniel Margolin, *Stephens & Margolin LLP, Portland, Oregon*

NOTES

Troublesome Family Law Evidence Issues

Daniel S. Margolin

1. The psychotherapist-patient privilege. ORS 40.230, Rule 504.

    a. Discovery of a parent's mental health records.

As we all know, the general rule is that there is a privilege in Oregon for confidential communications between a psychotherapist and his or her patient. Is the rule different in family law cases?

Some states have enacted laws that provide that privileges do not apply in domestic relations proceedings. For example, the laws in Louisiana and Massachusetts provide that there is no privilege when a patient is seeking custody or visitation with a child. The Oregon legislature has not done that.

Some courts in states that do not have a specific exception to evidentiary privilege in domestic relations cases have nonetheless found that alleging fitness in a petition or in a responsive pleading waives the privilege. These courts have reasoned that the information is essential to making a decision in the children's best interest and the court needs this essential information. Courts in Kentucky, Nebraska, and Indiana have held that that merely seeking custody of a child automatically waives the psychotherapist privilege.

There's no Oregon appellate decision evaluating the concept of waiver of the privilege in the family law context. A recent article in the *Journal of the American Academy of Matrimonial Lawyers* indicates that Oregon is one of only "six states [that] seem to place the parents' rights over the best interests of the children by retaining the psychologist-patient privilege in child custody disputes." The article cites to *State v. Evans*, 260 Or App 270 (2013) for support. Rather than putting "parents' rights over the best interests of children," it could be argued that states that allow a party to assert the psychotherapist-patient privilege do so to avoid discouraging a parent from seeking necessary mental health treatment. It seems likely that these jurisdictions believe that having a parent seek appropriate treatment is in the best interests of the child.

As a practical matter, OEC 511 provides that privileged communications cannot be disclosed unless there has been a "voluntary disclosure" of the communication. OEC 511 specifically provides "[v]oluntary disclosure does not occur with the mere commencement of litigation . . . ."

Under the circumstances, is it even relevant that a party suffers from a mental health condition if that mental health condition is being properly treated? Rather than delving into a specific diagnosis, isn't the more relevant inquiry into the "behaviors and limitations," to the extent there are any, that impact the patient's ability to safely parent? In other words, a lay person can describe things like the fact that a parent has expressed suicidal ideation, lacks impulse control and proper judgment, or that he or she is distracted by internal stimuli or hallucinations. If that is the case, why delve into communications between a patient and his or her mental health provider?

It's also important to note that in a domestic relations proceeding, a parent is not required to prove that he or she does not suffer from a mental illness. Moreover, if a party has a disability as defined by the ADA, the court "may not consider the party's disability in determining custody unless the court finds that behaviors or limitations" related to the disability endanger or will endanger the "health, safety or welfare of the child." ORS 107.137(3).

What does this mean for litigants? If you believe that mental health records or information are relevant to a custody or parenting time proceeding, you need to draw a clear nexus between the specific mental health issue and its impact on the child(ren)'s safety.

Note that there is a different statute regarding counselors and their patients. ORS 40.262, Rule 507. Make sure you identify which type of mental health provider is at issue as there are some different rules. One important consideration would be where spouses engage in martial therapy. In those instances, the therapist or counselor shall not be competent to testify in a domestic relations action other than child custody action concerning information acquired in the course of the therapeutic relationship unless both parties consent.

b. Discovery of a child's mental health records when there is an allegation of abuse.

ORS 419B.040(1) provides, "In the case of abuse of a child, * * * the psychotherapist-patient privilege * * * shall not be a ground for excluding evidence regarding a child's abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050."

Appellate courts in Oregon have indicated that this provision means that the psychotherapist-patient privilege does not apply to statements a child makes in relation to abuse and to statements denying that abuse occurred. *State v. Hansen,* 304 Or 169, *rev. den.,* 332 Or. 559 (1987). However, the court has held that "the absence of statements by the victim mentioning abuse by the defendant" was not admissible under ORS 419B.040(1). *State v. Reed,* 173 Or App 185 (2001).

Similarly, the court in *State v. Evans*, 260 Or App 270 (2013) reviewed whether therapist's notes are privileged. *Evans* was a criminal case involving allegations of sexual abuse of a 10-year-old by the defendant. The defendant wanted to present the girl's therapy records to attack her credibility and the trial court sustained the objection to the admissibility of the records based on the psychotherapist-patient privilege. The defendant argued that the privilege did not apply because the criminal proceeding arose out of a mandatory child abuse report. The *Evans* Court held that notes that the therapist made that might be relevant to the patients' credibility are not admissible under ORS 419B.040(1).

To the extent that a child's statements are admissible, you should still consider whether having the mental health therapist testify about whether he or she concluded that sexual abuse occurred is unduly prejudicial under OEC 403. *See State v. Southard*, 347 Or 127 (2009). Section 3 below. The court in *Southard* concluded that because the conclusion that the child had been abused was based upon the expert's credibility determination, allowing the expert to testify as to her ultimate

conclusion regarding abuse was unduly prejudicial since making a credibility determination is something the factfinder is fully capable of doing. Id. at 140.

This information can also be obtained from medical records as a child or patient's statements for purposes of treatment are not considered hearsay. See ORS 40.460(4). It is preferable to avoid forcing a child's treating medical providers to be involved in litigation. Such involvement can irreparably harm the medical provider's relationship with the child and the family.

See Section 3 below on "vouching" for the court's analysis of conclusions reached by lay witnesses regarding abuse of a child.

2. Text messages, social media, and email

    a. Authentication

The Oregon evidence code requires that before a writing can be admitted into evidence, it must be authenticated. The goal is to have proof that the document is what it is purported to be. The Code provides for a number of ways that a document can be authenticated including "testimony by a witness with knowledge that a matter is what it is claimed to be." OEC 901(2)(a). Authentication can be viewed as a subset of relevancy. For example, if a proponent of a particular text message or social media posting can't prove that a particular message or posting was written by the other party, then it is probably not relevant to the case.

When it comes to electronic communications, just like hard copies of documents, the principal authentication issue involves authorship of the writing – that is, whether the other party created the electronic writing. In some cases, proving authorship can be simple – " I know that it is a text from her because her number is saved on my phone under her name and the text came from that phone." In other cases, such as postings on social media, parties often rely on Evidence Rule 901(b)(4), which permits authentication by distinctive characteristics of the writing in conjunction with other circumstances.

Distinctive characteristics might include information that only the sender would know (for example, the details of a recent interaction between the sender and recipient). Other circumstances might include subsequent actions by the sender consistent with the electronic writing (for example, an assault by the sender following a message to the recipient threatening the assault).

The process of authentication does not require certainty as to authorship. For example, a proponent of a text message does not have to prove that only the declarant had access to the phone. Once a proponent makes a showing that it is likely that a particular message was sent by the other party, the message is admissible if it otherwise meets the evidentiary standards.

Social media posts can be authenticated by circumstantial evidence as well. The clearest evidence would be pictures on the account of the party whose social media account the account the proponent of the evidence is preferring the account to be. There may also be messaging within the account that is written to the holder of the account by name.

Most social media companies are very wary of court involvement and subpoenas due to privacy concerns. It is possible to subpoena such companies and obtain the IP address and other identifying information for the account.

b. Practical Matters

Take the time to make sure that you can authenticate your exhibits ahead of trial. Create a pocket brief with any relevant case law and arguments so that you are ready to respond to any objections. Always try to reach as many stipulations to authentication and admissibility of exhibits in advance of trial.

The judge is the person who has to read the exhibits. You need to make sure that the exhibit is clear and legible for the court. It is helpful to print out text message in a clear and orderly fashion for the court. Make sure you know which bubble is for which person so that you are not confused about who said what in the text. Consider whether it is helpful to include texts surrounding the important text for context.

When dealing with social media you want to make sure that you obtain the full source data in discovery. This also allows for you to put together clearer exhibits. My standard request for production includes the following:

> Your complete and unredacted Facebook profile, including but not limited to all family pictures, photos, communications, including communications with third parties. A complete copy of your Facebook profile can be accessed by clicking at the top right of any Facebook page and select "Settings." Then below your General Account Settings, click on "Download a copy of your Facebook data," then click on "Start my Archive." You will almost immediately receive an email from Facebook that states another email will follow with the link to download your archive. When you receive that email, click on the link to allow you to download the entire archive as a .zip file.

When creating email exhibits, make sure that you are using the actual email sent with the full correspondence details.

3. Vouching

> "The core principle is simple enough: '[I]n Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.' That rule applies 'whether the witness is testifying about the credibility of the other witness in relation to the latter's testimony at trial or is testifying about the credibility of the other witness in relation to statements made by the latter on some other occasion or for some reason

unrelated to the current litigation.'" *State v. Wilson*, 266 Or App 312 (2014) (internal citations omitted)

a. Examples of impermissible vouching:

Testimony by the victim's mother that she "`never doubted [the victim] for a second,'" *State v. Vargas-Samado,* 223 Or App 15, 17, 195 P.3d 464 (2008)

Testimony that the witness "didn't think that [the defendant] was being very honest and upfront,'" *State v. Lowell,* 249 Or App 364, 366, *rev. den.,* 352 Or 378 (2012).

Police officer's testimony that the defendant gave a "deceptive answer" because he paused before responding was an improper comment on credibility. *State v. Watts,* 259 Or App 560, 562-63 (2013)

b. Examples of permissible observation of demeanor:

Testimony about the physical appearance of a speaker, or testimony that is solely descriptive of the manner in which a communication is made – so-called demeanor evidence – is admissible and is not vouching evidence. *State v. Wilson*, 266 Or App 312 (2014).

Witness's description of a police officer witness as "100 percent kind, total gentleman, very friendly'" was a description of demeanor and not impermissible vouching. *Alcazar v. Hill,* 195 Or App 502, 510, *rev. den.,* 338 Or. 488 (2005).

An expert witness may assist a trier of fact by evaluating the credibility of a witness by testifying on "an unusual phenomenon bearing on credibility" but it is inappropriate if he or she "'connects the dots' explicitly by eliciting testimony relating that phenomenon's specific application to a particular witness's testimony." *State v. Remme*, 173 Or.App. 546 (2001).

It is permissible for a witness to testify to "general information regarding circumstances that indicate that a [general class of witnesses] is or is not suggestible." *State v. Preuitt,* 255 Or App 215, 223, *rev. den.,* 353 Or. 868 (2013).

c. Plain Error

It is plain error for a trial judge not to strike explicit (or true) vouching testimony sua sponte unless the record contains a competing inference that a party made a strategic purpose of not objecting. State v. Salas-Juarez, 264 Or App 57, 64 (2014).

But see **State v. Macias**, 282 Or App 473 (2016) Defendant appealed his conviction for assault because the court failed to sua sponte exclude the following testimony by the arresting officer: "I didn't feel like [defendant] was being honest with me." The court of Appeals affirmed the trial court because the Court found that it was plausible that defendant's attorney made a strategic decision not to object.

4. Hearsay Issues

   a. Definition

      - Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. OEC 801(3).
      - E.g. Wife testifies that Husband's new wife said, "You're a horrible, uncaring mother," in front of the children. Is this hearsay?

   b. Double Hearsay

      - Hearsay included within hearsay is not admissible unless an exception applies to each part of the combined statements. OEC 805.
        - E.g. witness statements in police reports.
        - E.g. Husband testifies that his child said that the child's mother said he is a bad parent.

   c. Exception for a declarant's state of mind or emotion

      - Statements to prove the child's then existing state of mind, emotion state, etc.
      - E.g. Father offers a child's statement, "I'm afraid to go to mom's house." Admissible? What about, "Mom's new boyfriend hit me"?

   d. Statements relating to child abuse or abuse as defined by ORS 107.705 (FAPA) (OEC 803(18)).

      - Laying a foundation
        - The statement is not admissible unless the proponent of the statement gave 15 days' notice to the other party or must show good cause for not doing so;
        - The statement is not admissible unless:
          - The witness testifies at the proceeding and is subject to cross examination; or
          - The witness is under 12 years of age, is "unavailable," and the "time, content and circumstances of the statement provide indicia of reliability. . ."
      - Establishing the reliability of the statements:

- OEC 803(18)(b) includes a number of factors the court is to consider.
- The factors include:
  - Credibility of the person testifying about the statement and any motive the person may have to falsify the statement;
  - Credibility of the declarant and any motive the person may have to falsify the statement;
  - Whether the declarant's young age or disability makes it unlikely that the declarant fabricated a statement that represents a graphic, detailed account beyond the knowledge or experience of the declarant;
  - Whether the statement was internally consistent or coherence and uses terminology appropriate to the declarant's age or to the extent of the person's developmental disability;
  - Whether the statement is spontaneous or directly responsive to questions; and
  - Whether the statement was elicited by leading questions.

e. Prior consistent statements

Generally speaking, a witness (including your client) testifying about a statement that your client made to them, if offered for the truth of the matter asserted, constitutes hearsay.

However, it is not hearsay if the statement is offered after your client testifies, it is consistent with your client's testimony, and is offered to rebut an express or implied charge of recent fabrication or improper influence or improper motive. OEC 801(4).

"Because the result of exclusion of prior consistent statements, where they are sought to be used for rebuttal purposes, would be to permit an implication of fabrication or falsification to stand without challenge, their admission should be favored to the extent that a generous view should be taken of the entire trial setting in order to determine if there was sufficient impeachment of the witness to amount to a charge of fabrication." *Powers v. Cheeley*, 93 Or App 294, 300 (1988). Appellate review if for an abuse of discretion.

But see. ***State v. Hernandez,*** 282 Or App 627, (2016). A witness's prior consistent statements are admissible under OEC 801(4)(a)(B) to rebut "an express or implied charge against the witness of recent fabrication." But the prior consistent statement must occur before the alleged motive to fabricate arose. In *Hernandez,* the victim's statement to the police that he did not know the victim and that the defendant was the only person in the room when his video poker ticket was stolen was admitted as a prior consistent statement. The Court of Appeals reversed the defendant's conviction because it found that the victim

made the statement at issue after his purported motive to fabricate – his desire to cover up a purported past affair with defendant – arose.

Ethics in Billing and Collection for Family Lawyers: How Not to Let Money Become the Root of Evil to Your Professional Life

Arden Olson, *Harrang Long Gary Rudnick PC, Eugene, Oregon*

Lorelei Craig, *Harrang Long Gary Rudnick PC, Eugene, Oregon*

NOTES

ETHICS IN BILLING AND COLLECTION FOR FAMILY LAWYERS:
How Not to Let Money Become the Root of Evil to Your Professional Life

Arden J. Olson, Lorelei Craig
Attorneys at Law
Harrang Long Gary Rudnick P.C.
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I. THE BASICS

a. RPC 1.5(c): Contingent Fees in Domestic Relations Cases - Mostly Not

RPC 1.5 addresses fees generally, and has a specific prohibition related to domestic relations cases:

> (c) A lawyer shall not enter into an arrangement for, charge or collect:
>
> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; … .

This rule is substantially identical to Model Rule of Professional Conduct 1.5(d)(1), the comments to which, other than restating the rule, read as follows:

> This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

MRPC 1.5, Comment [6] (emphasis added). So what are the "policy concerns" that caused the ABA to single out domestic relations cases for this kind of treatment?

The Reporters' Notes to the original 1981 draft of the Model Rules of Professional Conduct stated as follows:

> For public policy reasons, some courts have prohibited contingent fee contracts in a divorce or separation action. *E.g., Singleton v. Foreman,* 435 F.2d 962 (5th Cir. 1970); *Stroller v. Unusko,* 295 N.E.2d 118 (Ill. 1973); *In re Smith,* 254 P.2d 464 (Wash. 1953). *But see Coons v. Cary,* 263 Cal. App. 2d 650, 69 Cal. Rptr. 712 (1968).

The *Singleton* case did not articulate the policy concerns, but noted that Florida made contingent fee contracts in divorce cases "void and unenforceable," citing *Sobieski v. Maresco,* 143 So.2d 62 (Fla. App. 1962). The *Sobieski* decision also failed to discuss reasons, other than approving the rationale of decisions in "a number of other jurisdictions," citing among others the *Smith* case. The Washington Supreme Court in *In re Smith,* 42 Wn.2d 188, 254 P.2d 464 (1953) (en

banc), stated as follows in considering discipline of attorney Smith, whose fee agreement entitled him to "20% in addition to the amount the opposing side is willing to allow as attorney fees for his services" but that the client "shall not have to pay him any fees unless he makes a recovery or settlement" in a divorce proceeding:

> The reason why such contracts, wherein any or all of the fee is made contingent upon the securing of a divorce, are held to be contrary to public policy is because of their tendency to deter or prevent a reconciliation between husband and wife. It is the policy of the law … to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce.
>
> In Jordan v. Westerman, [62 Mich. 170, 28 N.W. 826 (1886),] which is generally regarded as the leading case on this subject, the reason behind this policy determination is stated as follows:
>
> '*** Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed; that families shall not be broken up for inadequate causes, or from unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demands a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed. ***' 62 Mich. at page 180, 28 N.W. at page 830.

Oregon adopted the same rule in *Hays v. Erwin,* 244 Or 488, 419 P2d 32 (1966), in which the court stated, after citing *Smith* and *Jordan*:

> Contingent fees are not a desirable means of paying for professional services because such arrangements tend to deteriorate professional objectivity for the reason that they inject a direct personal financial interest in the litigation. "*** [C]ontingent fees are sanctioned in proper cases in order to enable clients to secure a competent lawyer, where otherwise they would not, in all probability, be able to do so." Drinker, Legal Ethics, 176, n 6 (1953). A contingent fee is not necessary to secure a competent lawyer in a divorce proceeding. ORS 107.090(1)(a).[1]

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[1] As of 1966 when *Hays* was decided, ORS 107.090(1)(a) read as follows:

> After the commencement of a suit for dissolution of the marriage contract or to have a marriage declared void and before a decree therein, the court may, in its discretion, upon proper showing of the necessity therefore, provide by order as follows: (a) That the husband pay to the clerk of the court such amount of money as may be necessary to enable the wife to prosecute or defend the suit, as the case may be … ."

Other than noting that Oregon still follows this "public policy," the most interesting thing about this Rule is therefore that it stems from the decision in 1886 of a case in Michigan, which has not been fully reconsidered in light of the many changes in public attitudes or in the law since that time, including such innovations as no-fault divorce.

Returning to Comment [6] of the ABA Model Rules, the reason then that the "same policy concerns" are not "implicated" in the "post-judgment" situation is that the couple by that time has already been divorced, so a contingent fee agreement would not tend to incentivize a lawyer to disrupt the couple's chances at marital bliss. The Rule does not apply, therefore, in post-judgment disputes about payments, support collection, property matters, or contempt proceedings.

OSB Formal Opinion 2005-13, attached to these materials as Exhibit 2, discusses the Rule in a more modern context. Among other things, the opinion applies the same prohibition to a lawyer's assisting in dividing assets between unmarried couples.

b. Written Fee Agreements - Universally Yes

There is nothing lawyers can do that is more important to avoiding ethical trouble with respect to the financial relationship between the lawyer and her client than ensuring that every lawyer-client relationship is begun under a clear, lawful, written agreement specifying how and when the lawyer will be paid, if payment is expected. *See* OSB Formal Op. 2005-124 (an ambiguous fee agreement must be construed against the lawyer); *In re Potts,* 301 Or 57, 718 P2d 1363 (1986) (disciplinary proceeding arising out of failure to discuss fees at onset of matter, in which Potts "had no reasonable explanation for how his fee was fixed"). The Oregon Supreme Court has held that a lawyer who enters into a fee agreement with a client after the relationship was established, although "not per se void," will be "closely scrutinized" because of the "confidential nature of the relation." *Sabin v. Terrall,* 186 Or 238, 250-52, 206 P2d 100 (1949).

Of particular concern is the situation where the lawyer has a friendship or familial relationship with the client, which often both causes the client to come to the lawyer in the first place and causes the lawyer to do things other than legal services for the client in the course of the representation. It is critical to document the kinds of things that will entitle a lawyer to be paid, particularly if there is an element of business advice or friendly assistance involved in the manner of a lawyer's interactions with the client. Another topic worth considering in those situations is whether the lawyer has sufficient objectivity to act as counsel, as opposed to as a friend or relative.

In the Elder Law side of Family Law, these situations can be particularly dangerous, as clients' memories often fade and attitudes often evolve. In one case which resulted in the lawyer losing the right to practice entirely, the lawyer billed over $1 million over a five-year period for a high level of attentiveness at a similarly high hourly rate for two very demanding clients, believing that the clients were wealthy well beyond that number based on their representations, but without the benefit of a written fee agreement or written instructions. When their money was gone and their memories had faded, the lawyer had nothing with which to defend himself other than his

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The statute was repealed in 1971.

own testimony concerning oral agreements that had been made. That is almost never enough.

c. RPC 1.5(c)(3): Fees "Nonrefundable" or "Earned on Receipt" - Caution

There is much talk about the profession on how the "billable hour" is not always optimal either from the lawyer's or the client's standpoint. "Fixed fee" agreements have potential advantages to the client in planning the costs of a matter, and lawyers are increasingly seeking ways to accomplish "value billing" where they are not so tied to the need for exact timekeeping. (See discussion below.) RPC 1.5(c)(3) provides:

> (c) A lawyer shall not enter into an arrangement for, charge or collect: …
>
> (3) a fee denominated as "earned on receipt," "non-refundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:
>
> (i) the funds will not be deposited into the lawyer trust account, and
>
> (ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(Emphasis added). Note that this is the only express requirement of a "written agreement" in the Oregon Rules of Professional Conduct, and that it must be "signed by the client," which is the highest level of writing required by those Rules. Note also that, if the purpose of the "nonrefundable" fee is that it not be refundable, the Rule prohibits that from being so if justice requires otherwise.

These types of arrangements were discussed in detail in OSB Formal Op. 2005-151, attached as Exhibit 2. The delicate principle is that, although ordinarily an advance payment by a client *must* be placed into the lawyer's trust account, because the funds belong to the client until the lawyer earns the right to payment, if an agreement satisfying this exception is in place, the advance payment by the client *may not* be placed into the lawyer's trust account, because until such time (if any) as a refund is required the funds by contract belong to the lawyer, not to the client. As a consequence, if the lawyer's funds are placed into the lawyer trust account, the lawyer could be found guilty of comingling and disciplined accordingly. *See* RPC 1.15-1(a) (others' property must be held "separate from the lawyer's own property").

Use of the term "non-refundable," moreover, seems to be a very bad idea even if all else is in order. As stated in Opinion 2005-151, "designation of a prepaid fixed fee as 'nonrefundable' may be misleading, if not false, in violation of Oregon RPC 8.4(a)(3) (prohibiting conduct involving 'dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law')." (*See* Exhibit 3). Under the terms of RPC 1.16(d), furthermore, a lawyer upon termination of the relationship is expressly required to "refund[] any advance payment of fee or expense that has not been earned or incurred."

i. In re Fadeley

A perfect example of how a lawyer can invite trouble with "non-refundable" agreements involved a former Justice of the Oregon Supreme Court. In *In re Fadeley,* 342 Or 403, 153 P3d 682 (2007), the lawyer represented himself before his former colleagues to explain why it did not violate the disciplinary rules which became the RPCs discussed above when, in a domestic relations matter, he required payment of $10,000 to take the case, treated it as nonrefundable, and deposited it into his personal checking account. There was no written agreement, and the client understood the payment to have been a "retainer; that is, … that the accused would work on her case for the hourly fee he had described and would refund any unused portion of the retainer." 342 Or at 405. Citing *In re Biggs,* 318 Or 281, 293, 864 P2d 1310 (1994), the Court held that even if Fadeley and his client had made an oral agreement to treat the payment as non-refundable, "Without a clear written agreement … that fees paid in advance constitute a non-refundable retainer earned on receipt, such funds must be considered client property." *Id.* at 410. Justice Fadeley was therefore suspended from practice for 30 days. *See also In re Thomas,* 294 Or 505, 659 P2d 960 (1983) (any fee "collected for services that is not earned is clearly excessive regardless of the amount").

The moral of that story is that even lawyers who should know better can trip over these issues.

d. What Is "Clearly Excessive"

A fee is "clearly excessive" when:

> After a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

RPC 1.5(b). The Rule goes on to list eight "factors" to consider as "guides," including how complicated or time-intensive the matter may be, what the lawyer gave up to take on the matter, local customs, the amounts involved and results, any time pressures, the length of the client relationship, the lawyer's experience, reputation and ability, and whether the fee is fixed or contingent. In short, the test is a "reasonable lawyer" test, administered by judges.

There are *some* clear rules. A fee will be deemed "illegal or clearly excessive" if more than that to which the client agreed. OSB Formal Op. 2005-69. A fee will be clearly excessive if the lawyer includes in it time that the lawyer spent discussing or disputing the fee with the client, *In re Benett,* 331 Or 270, 278, 14 P3d 66 (2000), or billing client for time spent responding to client's Bar complaint, *In re Conduct of Paulson*, 335 Or 436, 71 P3d 60 (2003). A fee is clearly excessive if it includes charges for time not spent on the client's matter or fees in excess of the agreed hourly rate. *In re Miller,* 303 Or 253, 256-57, 735 P2d 591 (1987); *In re Wyllie,* 331 Or 606, 618-19, 19 P3d 338 (2001). Fees for nonlegal work at a rate higher than the prevailing rate for such work is "clearly excessive." *In re Potts,* 301 Or 57, 69 n.6, 718 P2d 1363 (1986). Charging a client for late fees in excess of the legal rate of interest, when there is no written agreement requiring payment of such fees, is "clearly excessive." *In re Conduct of Campbell*, 345 Or 670, 672, 202 P3d 871, 873 (2009). A fee is excessive when it includes charges for documents which are known to be invalid. *In re Conduct of Morin*, 319 Or 547, 559, 878 P2d

393, 399 (1994) (attorney disciplined for practice of taking wills and advance directives to the accused's office after they were signed by the clients off-site and directing the office staff to sign the documents as witnesses to the clients' prior execution).

The following fees have been found not to be "clearly excessive":

- *Matter of Marriage of Kathrens,* 47 Or App 823, 833, 615 P2d 1079 (1980) (attorney fee award of $38,306.02 to wife in connection with dissolution proceeding which involved twelve day trial and difficult questions surrounding the valuation of several active businesses and other investments and cash flow problems associated with structuring and paying a judgment of $2,394,835).

- *In re Eakin*, 334 Or 238, 257, 48 P3d 147, 157 (2002) (attorney's billing of "between $63,000 and $66,000 in attorney fees" for representation in connection with custody and child support dispute in Portland in 1992, with an hourly rate of $160, was not excessive).

    - This case speaks to the importance of documenting contemporaneously client authorization as to case strategy and work performed on the client's behalf. The state bar charged the attorney ("Eakin") with various violations of the Code of Professional Responsibility, including violation of DR 2-106(A), now RPC 1.5(a), for excessive fees in connection with her representation of a mother in a custody and child support dispute. During the dissolution mediation, the husband and wife agreed that they would both share joint legal custody of their two children, but the mother would have sole physical custody. Immediately following dissolution, however, the father petitioned for sole physical custody. Eakin was brought on after the dissolution specifically because the client wanted a more aggressive lawyer in the custody battle. The relationship between the mother and father was extremely hostile and contentions, and with the mother's approval and encouragement, Eakin "took a 'no stone unturned' approach to the litigation."

    - Eakin was successful in keeping custody with the mother and increasing the father's child support obligations. The court invited Eakin to file a request for attorney fees, but the father contested the application contended that the fees were too high and the court ultimately decided not to award any fees. Following that, Eakin and the mother fell into a disagreement about the fees, and the mother filed a bar complaint.

    - In the disciplinary proceeding, the Oregon Supreme Court found that the mother "had wanted, and in fact, approved [Eakin's] assertive representation and the legal activities in which [she] engaged," and that her testimony to the contrary was inconsistent with her contemporary correspondence to [Eakin]." The Court held that "[i]n light of the parties' hardened attitudes toward each other, the importance of the litigation to them, and the aggressive legal struggle that they precipitated, encouraged, and abetted, we conclude that the accused's fee was not clearly excessive."

- *Matter of Marriage of Weiner*, 118 Or App 466, 470, 848 P2d 122, 124 (1993) (attorney fee award of $30,000 increased to $45,000 to mother on appeal in connection with contentious custody and visitation proceeding in which father mounted a Herculean litigation effort where the depositions, the trial, pre-trial and post-trial hearings and motions consumed 28 days, nearly 50 witnesses, including 12 experts, and mothers total fees incurred for her two attorneys was $114,000).

- *Matter of Marriage of Simmons*, 138 Or App 230, 235, 907 P2d 1134, 1136 (1995) (Attorney fee award of $5,000 to husband in connection with motion to terminate or reduce spousal support obligation to former spouse was not excessive)

- *Stonecrest Properties, LLC v. City of Eugene*, 280 Or App 550, 563, 382 P3d 539, 547 (2016) (Award of $130,746.06 in attorney fees for defense of case to enforce performance bond in connection with agreement with developer for subdivision improvements).

The following fees have been found "clearly excessive":

- *Matter of Marriage of Paget*, 36 Or App 595, 602, 585 P2d 38, 42 (1978) (finding that attorney fees generated by wife's three attorneys in excess $11,000 was substantially in excess of the amount reasonably necessary to accomplish the dissolution).

- *In re Colbath's Marriage*, 15 Or App 568, 573, 516 P2d 763, 766 (1973) (attorney fee of $6,550 previously allowed reduced to $4,500).

- *Matter of Marriage of Anderson*, 102 Or App 169, 174, 793 P2d 1378, 1381 (1990), rev den, 310 Or 422 (1990) (concluding that the award of $7500 in attorney fees was excessive and reducing award to $2500).

- *Kahn v. Canfield,* 330 Or 10, 12, 998 P2d 651, 651 (2000) (request for $15,065.89 in attorney fees for efforts in filing a response to petition for review before Court of Appeals was deemed excessive and reduced to $11,651.15).

a. Illegal Fees

RPC 1.5(a) also prohibits an agreement for, a charge or the collection of illegal fees. *See In Re Conduct of Knappenberger*, 344 Or 559, 565, 186 P3d 272, 277 (2008). This case underscores the importance of not comingling matters in a client bill where some of the work requires prior agency approval before billing and collecting from the client.

In *Knappenberger*, the attorney represented the client in several legal matters, including a marital dissolution. The attorney and client agreed to pursue a claim for disability benefits from the Social Security Administration ("SSA"). Federal regulations provide that an attorney may not charge for work or receive a fee unless the SSA has given prior approval to the attorney to bill and collect for that work. 20 CFR § 404.1720(b)(3). The attorney's bills included entries for four separate legal matters, but the SSA matter was not listed as a separate matter, but rather entries for the SSA matter were listed under the dissolution matter heading. The summary pages

for the bills the attorney sent the client from November 2001 to April 2003 included the SSA matter charges in the total amount charged for the dissolution matter and in the total amount due.

The attorney claimed that although he billed and was paid for other legal work that he did for the client, he never "charged" or "collected" for the SSA claim because he had an oral agreement with the client that entries for the SSA matter on the monthly bills were not to be considered charges and were not to be paid. The attorney further claimed that because the outstanding balance was over $21,000, the client's monthly payments of approximately $2,000 were not applied to the SSA matter. The client testified that they were not informed that the attorney could not charge for the SSA matter until he received permission from the SSA and that they believed the attorney had been paid for that work. The Oregon Supreme Court held that the attorney charged an illegal fee in violation of RPC 1.5(a) because his bills included charges for work on the SSA matter without SSA approval, and because there was "no indication on any bill that the SSA matter billing was for informational purposes only or that the accused did not expect the [client] to pay the charges for the SSA matter." The Court also concluded that the attorney failed to prove the existence of an alleged oral agreement "to prove that his bills do not mean what they otherwise plainly indicate - that he charged his client for work on the SSA matter."

b. Referral Fees

Referral fees are permitted in Oregon,[2] but there are rules that must be followed. DR 2-107, now RPC 1.5(d), was amended in 1986 to remove any requirement that fees be divided among lawyers in proportion to services performed and responsibilities assumed. ORS 9.515 expressly provides that the statute prohibiting solicitation by attorneys does not prohibit dividing fees consistent with the RPCs. The Rule now provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client gives informed consent to the fact that there will be a division of fees, and
>
> (2) the total fee of the lawyers for all legal services they rendered to the client is not clearly excessive.[3]

"Informed consent" requires the communication of "adequate information and explanation about *the material risks of* and *reasonably available alternatives to* the proposed course of conduct." RPC 1.0(g) (emphasis added).

Among the material risks of a relationship where a lawyer who refers a client to another lawyer in exchange for money is that the lawyer's judgment is being compromised by that payment.

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[2] *See Landye Bennett Blumstein, LLP v. Mutnick,* 270 Or App 158, 162, 346 P3d 1265 (2015) (construing firm agreement allocating referral fees without comment as to any ethical issue).

[3] *But see* RPC 7.2(b)(1) (lawyers may not give "anything of value" to any "person" for "recommending the lawyer's services" absent exceptions not applicable to lawyers referring clients to another lawyer).

Among the reasonably available alternatives to splitting the fee is that the lawyer who performs the work charges only for the work that lawyer actually has performed, and does not pay the referring lawyer out of funds that otherwise would be payable to the current client in order to incentivize the referring lawyer to send another client to the lawyer receiving the referral.

Assume that the referring lawyer does not contemplate or expect a referral fee to be paid, but simply refers the client to the lawyer receiving the referral. Both lawyers have an obligation under the rule to ensure that "informed consent" to a division of fees has been obtained before they may divide the fee. Lawyers have a fiduciary duty to their clients. *Kidney Ass'n of Oregon v. Ferguson,* 315 Or 135, 843 P2d 442 (1992). Both because of that duty and because of the "informed consent" requirement, the disclosure must be unabridged and real, not perfunctory and formalistic. One might reasonably wonder how the conversation or conversations between the two lawyers and the client really happen in terms of whether all the "material risks" and "available alternatives" have actually been described to the client. It may be that those rules are most evident in their breach, at least in some cases.

Note that the "informed consent" is not required by the Rule to be confirmed in writing or signed by the client as required by some other rules. *Compare, e.g.,* RPC 1.7(b)(4) ("confirmed in writing"); RPC 1.4(c)(3) ("signed by the client"). A careful lawyer, however, should consider whenever money is involved putting all informed consents in writing so the lawyer can later prove that the consent was in fact given and was in fact "informed."

OSB Formal Op. 2007-180 states expressly, although with qualifications and under a statement that it is currently under consideration of revision, that a lawyer who receives a referral from a nationwide Internet-based lawyer referral service may ethically pay a fee based on the lawyer's being retained by a referred client. The opinion notes that substantive law, however, may limit the lawyer's ability to pay such a fee, including specifically certain bankruptcy rules. *See* 11 U.S.C. § 504.

II. VALUE BILLING

There is a goodly amount of interest in "value billing" these days. It calls to mind an interview of one of Oregon's prominent lawyers from the middle 1900s, who described his billing practices: each December he would lean back in his chair, consider the value that he had delivered to each of his clients in the preceding year, and send each client a bill for "services rendered" for the entire year. He made plain that the advent of the "billable hour" in legal finance was, to him, the beginning of the death of professionalism in the practice of law. He also contended that he never had a problem collecting his fees.

a. What Is "Value Billing" Today?

There are various descriptions of what lawyers call "value billing." Perhaps as good a general reference on the topic (for the corporate context) was published by the Association of Corporate Counsel entitled, "Handbook for Value-Based Billing Engagements." *See* http://www.acc.com/advocacy/valuechallenge/toolkit/loader.cfm?csModule=security/getfile&pageid=1309263&page=/legalresources/resource.cfm&qstring=show=1309263&title=Guide%20to%20Value%20Based%20Billing&recorded=1. That resource identifies fixed or flat fees, fixed

fees with "collars" (additional payments or refunds depending on the amount of work required), reverse contingent fees (entitling the lawyer to a percentage of the client's savings on a matter due to the lawyer's efforts), success fees (defined bonuses for reaching a particular result), and performance-based holdbacks (withholding a percentage of hourly rates pending meeting an agreed performance metric) as types of value billing mechanisms.

The considerations that corporate counsel may look for in "value billing" from ongoing relationships with outside counsel do not, of course, easily translate into a family law context. A survey of firms around the country will reveal that value billing is rarely done in family law or divorce cases, but there are a few firms out there who are trying the concept, generally using the fixed fee mechanism. *See e.g.,* http://hancelaw.com/our-practice/value-billing/ (Texas firm promoting itself as among the "small number of progressive family lawyers around the country" trying this technique). One of the problems to overcome is that, unlike corporate law, family lawyers do not generally have long-term relationships with most of their clients, but deal with "life-cycle" issues that mostly are not intended to occur or certainly not to recur. The challenge therefore is to develop a trust relationship around the amount of a bill at the same time as the client is dealing with crisis.

Among the more thoughtful, if idealistic, comments we found applicable to family law by searching the Internet was this comment by a lawyer in California:

> There is a common misconception that "value billing" is the same as "flat fee" billing. It's not. Flat fee billing CAN be value-based, but it doesn't have to be. If you estimate that a matter will take five hours and then quote a flat fee equal to 4-5 hours of your time, then you are quoting a fixed fee, not a value-based fee. True value billing is independent of the amount of time the work takes. It focuses on the actual value of the service to the client.
>
> It creates an incentive, arguably an imperative, that the attorney streamline his practice and make it more efficient. It also creates an incentive to innovate and offer additional features that clients want and are willing to pay for.
>
> In my opinion, we can learn a lot from the software industry. They spend money producing a product. But, once the product is developed, the actual cost of delivering each unit is very small. I recently paid several hundred dollars for a piece of software that probably cost the vendor less than 10 cents to deliver to me. I didn't care, because I WANTED the software more than I wanted the several hundred dollars.
>
> We can, and should, do the same thing in our practices. I have come to the conclusion that the best way to do this is to create law "products" - i.e. bundled packages of services that can be streamlined so we can efficiently provide a clearly-defined outcome for the client.
>
> Consider a family law practice. For people contemplating a divorce, the attorney could perform an "Divorce Options Assessment" that tells them what the divorce process entails, the strategic options available to them and what they can expect to

> get at the end of the process. Depending on the amount of assets involved, it makes sense to spend $2,000 to $20,000 for such an assessment. After all, a person considering divorce might decide that being married to that nogood so-and-so is better than the life they are signing up for by filing. Or, they might sigh in relief as they realize things will be okay. Either way, that has value. And, it can be streamlined so that the value far exceeds the time it takes to provide the service.
>
> You can take that approach to almost every aspect of what you do.

https://www.americanbar.org/content/dam/aba/publications/solosez/threads_2012_10_value_billing_v_flat_fee_v_hourly_rates.authcheckdam.pdf.

b. Ethical Issues in Pricing for "Value"?

When RPC 1.5, which is quoted in full in Exhibit 1, is distilled to its essence, it sets out a "I know it when I see it" standard for the "lawyer of ordinary prudence" practicing in Oregon on whether fees are "clearly excessive." The eight "factors" start with the "time and labor required," which runs contrary to the idea that you measure effort incurred, not value delivered. If, for example, an experienced lawyer has built a series of forms without which a newer lawyer would have to incur a lot more time to produce the same result, "time and labor required" for the 100th client may not be much, but the value may be well higher than what the lawyer produced for her first client.

Moving on to the "fee customarily charged," that in almost all family law practices in Oregon will not likely be "value billing." Only the "amount involved and the results obtained" invites consideration of value to the client, so that will be the "hook" upon which any notion of value billing will need to be defended.

Drilling down to the more practical level, a family lawyer is most likely to be in an ethical dispute about billings if the client decides that the lawyer has overcharged in the matter (usually after the results turned out not to match the client's unrealistic expectations), or if one of your competitors (perhaps who winds up representing the client after the client has fired you) draws such a conclusion. The question will then be what will be your tools to defend against the charge. Rule 1.5 is your "tool kit," and it is not particularly well suited to quantifying "results obtained," meaning "value."

As noted above, moreover, contingent fees are not permitted in Oregon based on obtaining a divorce, obtaining a property settlement, or establishing child or spousal support. Those are key "results obtained" in a divorce matter, and they are "off the table" with respect to the contingent fee type of "value billing."

In short, if pure value billing is a brave new world in some legal circumstances, it is even more so in family law. Those who venture into that thicket still must be willing to be pioneers.

III. FLAT FEES

Flat fees are not new, and can be a valuable way for a client to budget the cost of a legal engagement. The challenge from a lawyer's standpoint is to set the fee at a reasonable level that neither undercharges the client (from a business perspective) nor overcharges the client (from an ethical perspective) relative to the marketplace of non-flat fees.

a. OSB Formal Op. 2005-98

Opinion 2005-98 is attached as Exhibit 4. One of the first questions is how a lawyer and client look at the scope of a flat fee relationship. This opinion takes on the question whether a flat case rate for a series of similar cases is permissible, with counsel engaged by an Insurer for insureds, where the result will be that the lawyer gets more than a reasonable "hourly" basis on some cases and less on others.

The answer is that it is reasonable, unless the rate was "so low as to compel the conclusion that Insurer was seeking to shirk its duties to Insureds and to enlist Lawyer's assistance in doing so … ."

There was at least one workers' compensation insurer doing this in the 1990s, offering $500 per case to lawyers for a full caseload of workers' compensation defense. Whether the "law of large numbers" worked out in that circumstance is unclear. The carrier is no longer selling that insurance in Oregon.

The question in the case of a family lawyer seems a little more complicated, because each flat fee engagement will generally have to be separately negotiated. The principle does not appear to be different, but the risks are much larger. If, for example, a lawyer decided to charge $5,000 to any person who wanted a divorce, committing to do whatever was necessary between filing and a divorce decree for that sum. Consider:

- Client A comes in, agrees to the arrangement, the matter is filed, and two weeks later Client A reconciles with the spouse, and wants a refund.

- Client B's case generates a major conflagration with spouse over every conceivable issue, such that the lawyer realizes the equivalent of $23.75 an hour for the lawyer's services.

- Client C thinks the divorce will be contentious, but it turns out spouse had other ideas as well, and the matter is resolved amicably within four hours of legal time, for a net $1,250 an hour.

The concern, particularly in the case of Client C, is whether under RPC 1.5(b) our "lawyer of ordinary prudence" would be "left with a definite and firm conviction" that the equivalent of $1,250 an hour is "in excess of a reasonable fee" <u>for this client.</u>

There is no clear answer to that problem, but it needs consideration by the bar and those who advocate more flat fees. In the context of contingent fee personal injury litigation, we are accustomed to the idea that million-dollar contingent fees based on a percentage of recovery can be reasonable even when a matter settles early because liability is clear. The articulated

justification for that conclusion is that (a) otherwise the plaintiff might never get access to justice, and (b) in other cases the lawyer may recover nothing, so the access question can only be resolved by permitting larger than average fees in the successful cases.

Can this logic apply to family law cases?

A risk management question may drive the practical answer to that problem. The most important question a lawyer can ask herself that will drive risk with respect to trouble with fees is who the most likely complainant will be before the bar if the lawyer does X. If X is charging a $50,000 flat fee for divorces, the most likely complainant will be the one who thinks he overpaid the lawyer relative to what the lawyer did for him. Managing the politics of that is beyond the scope of an ethics presentation, but the politics will determine how much time you spend talking to disciplinary defense counsel and how much time you spend practicing law.

b. OSB Formal Op. 2005-151

This opinion (*see* Exhibit 3) is the closest thing to a template for fixed fee questions that the Oregon State Bar offers. Principles:

- Fixed fee agreements are acceptable in general.

- Whether prepaid fixed fees may be deposited in the trust account depends on whether they have been earned.

- If the agreement provides that the fee was earned on receipt, subject to any refund right that may arise, the fee cannot be placed in the trust account, because it belongs to the lawyer.

- If the agreement does not so provide, or there is no agreement satisfying RPC 1.5(c)(3), then the fee must be deposited in the trust account until such time as it has been earned.

- There are no nonrefundable fees.

IV. CREDIT CARDS AND TRUST ACCOUNTS

Some ethics rules are not ambiguous. Perhaps first among those is the rule that depositing client funds into a lawyer's general business account is absolutely prohibited. As noted above, until they are earned, fees which are paid to a lawyer belong to the client.

a. OSB Formal Op. 2005-172

Opinion 2005-172 (*see* Exhibit 5) deals with the fact with which most family lawyers deal on a daily or weekly basis, which is that clients often seem more willing (or are more able) to make payments to their credit card companies than to their lawyers. As a result, credit card merchant accounts are a popular way for lawyers to deal with cash flow and with clients who have insufficient cash flow to their domestic relations needs.

Credit cards raise a series of potential problems in the context of keeping client funds and lawyer funds separate. Credit card companies charge fees, usually two percent or more, which generally cannot be charged to the client. Credit card companies permit chargebacks, such that if a client disputes a charge, the credit card company will withdraw the amount of a disputed charge from the lawyer's account. If that account was the trust account and the lawyer has already removed the money from the account, the card company will effectively have taken other clients' money out of the trust account, a very bad result for the lawyer.

Using credit cards for "advance deposits" or "retainers," moreover, can be ineffective to the lawyer's desired outcome, which is to guard against disputes with the client about money after services have been rendered. If the client disputes the retainer, and the credit card company charges the disputed amount back against the account, the lawyer is no better off (perhaps worse off) than if no retainer had been collected.

The opinion clarifies that RPC 1.15-1 "does not prohibit all 'commingling' of funds," contrary to what you may have heard. The "plain language" of the rule "contemplates some mixing of lawyer and client funds in the trust account" (N.B. - not in the business account) by permitting deposits into the trust account of funds to pay service charges or to meet minimum balance requirements.

Although "better practice" may be to have separate accounts for credit card retainers and merchant fees, "if a lawyer's bank insists on a single merchant account, it should be a trust account." It is "not a violation of Oregon RPC 1.15-1 to deposit all credit card transactions into a trust account, if the portion representing earned fees is promptly transferred to the lawyer's business account."

On the chargeback issue, the best solution is to have the bank take all chargebacks from the lawyer's business account. If that cannot be arranged, the lawyer will be "on the hook" for making sure that the trust account is immediately replenished by the lawyer's own funds.

V. COLLECTING OVERDUE ACCOUNTS

Among the highest risk times in a client-lawyer relationship from the standpoint both of client relations and of potential ethics complaints is after the client's needs have been managed, or not, the client no longer wants to be sitting at the lawyer's desk, and the client wishes it hadn't cost so much. So what is a lawyer to do when that occurs, and the client has not paid the bill?

a. When *Can* You Stay on a Case, When Not?

There is no requirement, to have a client-lawyer relationship, that the lawyer must be paid for the privilege. You are therefore ethically permitted to represent any person without requiring that the client meet her obligation to pay you, on one condition.

The condition is that it not bother you sufficiently to affect the quality and independence of the representation you are providing. If your client's failure to keep that "end of the bargain" does affect your ability to serve the client, you have a "personal interest" conflict of interest under RPC 1.7(a)(2), and must withdraw under RPC 1.7(b)(1) and RPC 1.16(a)(1). Indeed, that

is true even if there is only a "significant risk" that the client's representation will be affected by your unhappiness with the client. And whether there is such a risk will depend on what a reasonable lawyer might think, not on what you believe.

b. When *Should* You Withdraw?

From a lawyer's perspective, this is another question of risk management, not of legal ethics. You should withdraw as soon as you see the relationship going to a place where nothing good is going to come from continuing to act as lawyer to the client. Too many lawyers wait way too long to come to that conclusion.

From the client's perspective, you should withdraw when you cannot provide competent and independent representation to the client, which is the ethical issue noted above.

If there is a proceeding underway, moreover, you should withdraw well before the time is growing short, because if withdrawal is optional you cannot withdraw unless you can do so "without material adverse effect on the interests of the client" under RPC 1.16(b)(1).

c. What the PLF Says About Suing Your Client

In short, the PLF says "please don't":

> Don't sue your clients for fees. Suing a client for unpaid fees causes that client to look for a reason not to pay. Use the OSB fee arbitration service or a similar alternative to suing for fees, or avoid the problem altogether by getting your money up front.

M. Green, *A Common Sense Approach to Avoiding Malpractice Claims*, 100 PLF IN BRIEF at 2 (March 2007).

It might be tempting to disregard this advice because your interests as a lawyer in getting paid and the PLF's interests as your insurer are not necessarily precisely aligned. But this is an ethics talk, and suing your client also makes it more likely that you will get a bar complaint in response. Your client has an absolute immunity against liability for filing such a complaint, so go slow.

d. Attorney Fee Clauses in Your Fee Agreements

In Oregon, any contract that contains an attorney fee clause is deemed to be reciprocal. The first question, therefore, in putting such a clause in your fee agreements is whether it will more likely hurt your client, or hurt you.

There is no ethical prohibition against putting such a clause in your agreements, and some circumstances may make having such an agreement both appropriate and helpful to avoiding disputes. It is worth considering, however, when the client is less financially solvent than the lawyer may be, whether such a clause is wise.

e. Increasing Your Fee in Case of a Dispute: OSB Formal Op. 2005-78

In short, don't.

The opinion (*see* Exhibit 6) makes plain that attempting to punish a client for protesting the amount of a bill, whether expressly or by refusing to pay, will be deemed an attempt to collect an unreasonable fee. *See also In re Boothe,* 303 Or 643, 740 P2d 785 (1987) (lawyer's failure to account to client for funds withheld as "war chest" in order to defend against anticipated claim by client held to violate RPCs).

f. Interest Charges: OSB Formal Op. 2005-97

You may agree in a fee agreement to an interest charge, and this opinion states that 18% is not per se unreasonable (and therefore is acceptable under RPC 1.5). Absent an agreement, the 9% statutory rate is all you could support based on billing legends or the like. *See In re Campbell,* 345 Or 670, 202 P3d 871 (2009) (lawyer charging "late fee" of more than statutory rate suspended for charging clearly excessive fee).

g. Is It *Ever* a Good Idea to Refuse to Surrender the Client's File?

Oregon statute (ORS 87.445) permits an "attorney's possessory lien" over the "papers, personal property and money of the client in the possession of the attorney for services rendered to the client." The lien is enforceable, and has generated one Supreme Court case in this century. *See Potter v. Schlesser Co., Inc.,* 335 Or 209, 63 P3d 1172 (2003).

The ethics question arises when a client asks for his file, and the lawyer refuses. RPC 1.16(d) requires, upon termination of a representation, that "to the extent reasonably practicable," a lawyer protect the client's interest by, among other things, "surrendering papers and property to which the client is entitled," although the lawyer "may retain papers, personal property and money of the client to the extent permitted by other law." So the question is, when is it and when is it not a good idea to withhold a client file pending payment?

OSB Formal Op. 2017-192 (Exhibit 7) addresses these issues. As a "general proposition," the client is entitled to "the entire client file" at the end of a representation. That includes electronic and paper aspects of the material. Material related to other clients, notes about the attorney-client relationship (perhaps including ethical consultations about duties to the client), internal firm administrative communications, computer metadata, and in rare cases confidentiality obligations to third parties may be withheld. In general, copies which the lawyer wants to retain may be made at the lawyer's expense. The PLF recommends retaining a copy for ten years to avoid malpractice exposure. The lawyer may not charge the client for segregating the lawyer's information from the client's information.

In our opinion, withholding the client file as a means of securing against payment is almost never a prudent idea. The file has no intrinsic value to a lawyer who no longer represents the client, so the only basis for withholding the file is to pressure the client, who is ordinarily under some pressure already. Pressuring clients who are in distress is a formula for generating a bar complaint, whether or not the lawyer has a good faith belief that she has rights under the attorney

lien statute. Clients are immune from liability for making bar complaints, even if they are brought in bad faith or merely to harass the lawyer. ORS 9.537 (persons who complain to the bar are "absolutely immune from civil liability").

For those who have not been through the process of a bar complaint, a short primer on what that will mean to you when you receive such a complaint will be useful. The following will occur, *even if the complaint is false or ungrounded in reality*:

1. The Client Assistance Office will require you to explain yourself in writing, a process that ordinarily extends over some months as the CAO goes back and forth between you and your client until it is satisfied that it has all the facts. If the CAO dismisses, your client will have a right to appeal the dismissal to OSB's General Counsel, which extends the problem further.

2. At some point you may decide that you want assistance in responding to the complaint. Defense counsel are generally not inexpensive, and liability insurance in Oregon does not cover the cost of disciplinary defense counsel.

3. In any case in which liability is plausible, the matter will then be forwarded to the Office of Disciplinary Counsel, and the process begins anew, to fill in any gaps in information which may appear to the disciplinary counsel assigned to your case.

4. After the foregoing has gone on for some months, a significant fraction of matters are forwarded to the State Professional Responsibility Board for their evaluation, both in some cases where disciplinary counsel recommends dismissal and in all cases where disciplinary counsel recommends that proceedings be commenced. You won't know whether your case is one or the other type of case.

5. Assuming that the SPRB dismisses your case, that is generally the end of the matter, but that is also generally months after the process began. Under Bar Rule 2.6(e), however, your client can in some circumstances seek reconsideration even if the SPRB sides with you.

Obviously, if the SPRB sides with your client, you will have deeper problems. Hopefully no one in this room ever sees the inside of those problems.

Exhibit 1

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Family Law Appellate Case Review

Honorable Rebecca Duncan, *Oregon Supreme Court, Salem*

NOTES

RECENT APPELLATE DECISIONS

FAMILY LAW CASE SUMMARIES

AUGUST 2016 – AUGUST 2017

JUSTICE REBECCA A. DUNCAN
OREGON SUPREME COURT

NOTES

Table of Contents

I. Property Division

A. *Celano and Celano*, 287 Or App 173 (Aug 2, 2017)

Wife appeals a general judgment of dissolution, arguing, among other things, that the trial court erred in its property division award, because the court awarded husband half of the value of wife's separately owned property in California. Specifically, wife takes issue with the trial court's finding that both parties paid the tax liability incurred as a result of wife's withdrawal from her late-father's IRA.

Held: The trial court's findings are supported by evidence in the record, and, as a result, the trial court did not abuse its discretion in concluding that the California property was a marital asset, subject to equal division. Affirmed.

B. *Code and Code*, 280 Or App 266 (Aug 17, 2016)

In this marriage dissolution case, husband argues that the trial court erred in calculating the value of his podiatry practice that was subject to marital division and in awarding attorney fees to wife.

Held: The trial court's determination of the enterprise goodwill value of husband's practice was supported by evidence in the record; the trial court did not abuse its discretion in concluding that it was "just and proper" to equally divide that entire value between the parties. And the trial court did not abuse its discretion in awarding attorney fees to wife based on the parties' disparate incomes. Affirmed.

C. *Johnson and Price*, 280 Or App 71 (Aug 3, 2016)

Husband appeals a general judgment of dissolution, challenging the spousal support award and property division.

Held: As to the spousal support award, it was legal error for the court to provide for spousal support in the manner that it did. As to the property division, it was proper for the court to dispose of the revocable trust's marital assets; however, the court erred by discounting the anticipated tax liabilities from wife's share of the property division and by not crediting wife with $22,000 in proceeds from the sale of her piano. Spousal support award reversed; property division vacated and remanded; otherwise affirmed.

D. See also:

Kotler and Winnett, 282 Or App 584 (Nov 30, 2016) (under enforcement of agreements);
***Porter and Porter*,** 281 Or App 169 (Sep 21, 2016), *rev allowed*, 360 Or 851 (2017) (under enforcement of agreements).

II. Spousal Support

A. Initial Award of Spousal Support

1. *Skinner and Skinner*, 285 Or App 788 (June 1, 2017)

Wife appeals a general judgment of dissolution, raising two assignments of error. In her first assignment of error, wife argues that the trial court erred in its award of spousal maintenance support; wife raises two arguments concerning the amount and timing of the award. In her second assignment of error, wife argues that the trial court erred in setting child support based upon her imputed income. Husband cross-appeals, raising two assignments of error.

Held: In determining spousal maintenance support, the trial court misapplied the factors specified in ORS 107.105(1)(d)(C). First, the trial court erred when it denied wife spousal maintenance support for the first five years following dissolution, because that denial was contrary to the court's express and implied findings that at the time of dissolution wife was a full-time student with little to no financial resources and that it would take at least four years for wife to obtain her master's degree and earn a reasonable income. Second, in awarding spousal maintenance support, the trial court incorrectly imputed wife's estimated future income in calculating the amount of the spousal maintenance support award. Similarly, the trial court erred in setting wife's child support obligation because the court incorrectly imputed to wife a speculative future income--an income that wife estimated she could make after obtaining her master's degree--that did not relate to wife's present earning capacity at the time of dissolution. Husband's assignments of error on cross-appeal are rejected without discussion. On appeal, awards of spousal maintenance support and child support reversed and remanded; otherwise affirmed. Affirmed on cross-appeal.

2. *Norberg and Norberg*, 282 Or App 730 (Dec 14, 2016)

Husband appeals a general judgment of dissolution, challenging the trial court's award of indefinite spousal support. Husband contends that the court erred by awarding spousal support to wife in an amount and duration different from what the parties had agreed. Alternatively, he argues that the spousal support award is not supported by the record.

Held: Because the Court of Appeals inferred from the record that the trial court determined that there was no agreement between the parties as to spousal support, the court's obligation to evaluate the terms of any agreement for whether it was just and equitable was not triggered. Further, the court did not abuse its discretion in ordering the spousal support award that it did. Affirmed.

3. *See also*:

***Porter and Porter*,** 281 Or App 169 (Sep 21, 2016), *rev allowed*, 360 Or 851 (2017) (under enforcement of agreements);
Haggerty and Haggerty, 283 Or App 200 (Dec 29, 2016), *rev den*, 361 Or 645 (June 29, 2017) (*Haggerty III*) (under enforcement of agreements);
Johnson and Price, 280 Or App 71 (Aug 3, 2016) (under property division)

B. Modification of Spousal Support

1. *Davis and Lallement*, 287 Or App 323 (Aug 23, 2017)

Wife appeals the trial court's supplemental judgment granting husband's motion to modify spousal support. The court concluded that there was a substantial change in wife's economic circumstances and terminated husband's spousal-support and life-insurance obligations. On appeal, wife argues that the court erred by determining that she had access to her new husband's gross monthly income and by failing to make an express finding that termination of the spousal support award was just and equitable under the circumstances.

Held: The trial court's factual findings regarding wife's access to her new husband's income are unsupported by the record. Accordingly, it cannot be determined whether wife's remarriage constituted a substantial change to her economic circumstances. Reversed and remanded.

2. *Aaroe and Aaroe*, 287 Or App 57 (July 26, 2017)

Wife appeals a judgment modifying her spousal support and awarding her indefinite maintenance in the amount of $17,000 per month. Husband cross-appeals and assigns error to both the amount and duration of the award. The Court of Appeals rejects wife's assignments of error without discussion and writes only to address husband's cross-appeal. On cross-appeal, husband argues that the trial court abused its discretion because the change in circumstances that the court relied on did not justify modifying the spousal support from a limited duration award of $7,000 per month to an indefinite award of $17,000 per month. Wife argues that the evidence supported modifying the amount and duration of the award.

Held: The trial court did not abuse its discretion in modifying wife's spousal support to an indefinite award in the amount of $17,000 per month. Affirmed on appeal and cross-appeal.

3. *Vanlaningham and Vanlaningham*, 280 Or App 472 (Aug 31, 2016)

Husband appeals a supplemental judgment modifying spousal support. Husband sought a reduction or termination of indefinite maintenance spousal support due to wife's receipt of an inheritance and husband's reduced income after their divorce. The trial court modified the judgment, reducing the indefinite maintenance spousal support award to wife from $5,500 per month to $4,700 per month. On appeal, husband assigns error to the amount and duration of the modification.

Held: The trial court erred when it only considered a portion of wife's inherited assets and when it found that wife's financial decision to invest the inherited funds to earn two to three percent is reasonable as the basis on which it relied to modify the spousal support award. Vacated and remanded.

4. See also:

Sheil and Sheil, 286 Or App 34 (June 7, 2017) (under enforcement of agreements)

III. Children

A. Custody, Parenting Time, and Visitation

1. *Kness and Kness*, 281 Or App 577 (Oct 12, 2016)

Mother appeals from a supplemental judgment modifying the custody and parenting time of her nine-year-old daughter, E. Mother challenges the trial court's determination that it is in E's best interest for mother to have sole legal custody only if mother continues to live in the Klamath Falls area.

Held: The trial court erred when it failed to properly consider the factors of ORS 107.137(1). When making a determination of the "best interests" of a child under ORS 107.137, the trial court was required to consider all of the factors in ORS 107.137(1). The trial court's "best interests" determination in this case demonstrated that it did not give preference to the primary caregiver of the child, as required by the statute. Vacated and remanded for reconsideration.

2. *Department of Human Services v. S. E. K. H.*, 283 Or App 703 (Feb 15, 2017)

This consolidated juvenile dependency appeal arises from a jurisdictional and dispositional judgment over parents' two children. ORS 419A.200. In that judgment, the juvenile court took dependency jurisdiction over the children under ORS 419B.100(1)(c) on the ground that their conditions and circumstances endangered them and placed them in the legal custody of the Department of Human Services (DHS). In so doing, the court denied children's request to order DHS to place them with their paternal great-grandmother, who intervened in the case under ORS 419B.116, concluding that it lacked the authority to direct DHS to make a specific placement. Father, mother, and children appeal. Father and mother assign error to the juvenile court's jurisdictional determination, claiming that the evidence is insufficient to support the finding that the children were endangered. Mother and children additionally assign error to the juvenile court's dispositional determination that it lacked authority to order DHS to place the children with great-grandmother.

Held: There was legally sufficient evidence in the record to permit a finding that the children were endangered, therefore the juvenile court did not err when it found that jurisdiction over the children was warranted. Additionally, the court did not err when it concluded that it lacked the authority to order DHS to place the children with great-grandmother. Affirmed.

3. *Chokey and Chokey*, 280 Or App 347 (Aug 24, 2016)

Father appeals a general judgment of dissolution of marriage that granted mother's request to move to the United Kingdom with child. That judgment also provided that all of father's parenting time would be in the United Kingdom until child turned eight, at which point father would be entitled to have half of his parenting time in the United States (if father had not opted to move to the United Kingdom himself). Father contends that the trial court erred by approving the move, and by imposing the geographic restriction on father's parenting time.

Held: The trial court correctly applied the applicable law in approving the relocation, and did not abuse its discretion in determining that the move to the United Kingdom was in child's best interests. The trial court did, however, abuse its discretion by requiring that father exercise all of his parenting time in the United Kingdom until child turns eight; although the record would

permit the imposition of a geographic restriction of a more limited duration, nothing in it permits the conclusion that it is in child's best interests for the restriction to extend until she reaches age eight. Reversed and remanded for reconsideration of Parenting Plan Provision 2.1.1; otherwise affirmed.

B. ORS 109.119

1. *Husk v. Adelman*, 281 Or App 378 (Oct 5, 2016)

Adelman, the legal parent of child, G, appeals a judgment awarding Husk (Adelman's former partner) visitation with G. The court determined that Husk had established an "ongoing personal relationship" with G and ordered visitation as allowed by ORS 109.119. Adelman challenges the visitation plan, arguing that the court erred by concluding that Husk rebutted the statutory presumption that Adelman acted in the best interest of G. She further argues that the court erred by ordering the extensive visitation that it did and by granting Husk access to G's medical and education records.

Held: There was sufficient evidence to support the court's findings of fact which, when taken together, support the court's ultimate determination that Husk rebutted, by clear and convincing evidence, the presumption that Adelman acted in G's best interest. Further, the extent of the visitation ordered by the court was within the range of legally permissible choices. However, the court abused its discretion in ordering that Husk receive access to G's medical and education records. Judgment provision granting Husk access to child's medical and education records reversed; otherwise affirmed.

2. *Kennison v. Dyke*, 280 Or App 121 (Aug 3, 2016)

Mother appeals from the trial court's judgment granting grandmother's petition for visitation with mother's child, arguing that the court erred in failing to make a finding that grandmother rebutted the statutory presumption, under ORS 109.119(3)(b), that mother acted in the best interest of the child when she denied grandmother visitation with the child.

Held: The trial court failed to make the requisite finding that grandmother rebutted, by clear and convincing evidence, the statutory presumption that mother acted in the best interest of the child. Vacated and remanded.

C. Child Support

1. *Jones v. Mears*, 285 Or App 799 (June 1, 2017)

Husband appeals a supplemental judgment modifying his child support obligation. Husband argues that the trial court erred in imputing to him potential income of $80,000. Before the trial court entered the supplemental judgment that husband now appeals, husband withdrew his objection to the trial court's imputation of potential income.

Held: Because husband withdrew his objection to the trial court's imputation of potential income, husband invited the purported error. As a result, the Court of Appeals declined to consider the merits of his assignment of error. Affirmed.

2. *State ex rel Department of Justice v. Robert W. Akins, Jr.*, 285 Or App 217 (May 3 2017)

Father appeals a judgment establishing a child support arrearage against him. He asserts that the trial court should have given him a credit against the arrearage based on mother's acknowledgement that father had 50 percent parenting time with the child for the entire period that the arrearage covered.

Held: Under ORS 107.135(7)(a), a trial court cannot give a credit against a child support arrearage for reasonable parenting time. Because father sought a credit only for his reasonable parenting time with the child, the trial court did not err. Affirmed.

3. *Handley and Handley*, 282 Or App 255 (Nov 16, 2016)

Father appeals the trial court's supplemental judgment regarding custody, parenting time, and child support. He assigns error to the trial court's denial of his request for an increase in mother's child support obligation.

Held: The trial court erred in concluding that there had not been a change in circumstances sufficient to justify modification. The trial court reasoned that, because, under the parties' parenting time plan, the child could change her residence on a flexible basis, it could not tell how much time the child would spend with each parent, and, therefore, it could not conclude that there had been a substantial change in circumstances justifying modification of mother's child support obligation. That reasoning was erroneous, because, since the last child support order, the child had come to live with father full time (increasing his parenting time from 41% to 100%), and, at the time of the modification hearing, there was no indication that the child was going to change her residence. Reversed and remanded.

4. See also:

Skinner and Skinner, 285 Or App 788 (June 1, 2017) (under spousal support)

D. Paternity

1. *Department of Human Services v. A. I. W.*, 283 Or App 89 (Dec 21, 2016)

Appellant, A's biological father, appeals the juvenile court's dismissal of Department of Human Services' petition, pursuant to ORS 109.070(5)(b)(C), to disestablish legal father's paternity as to A. The court declined to set aside legal father's Voluntary Acknowledgement of Paternity (VAP) as to A because it concluded that it would be "substantially inequitable." Appellant argues that the court erred because it failed to make a record sufficient to permit review of that decision.

Held: The juvenile court erred. When a trial court exercises discretion it must describe the reasons for its decision so as to enable meaningful appellate review. On the record presented, the juvenile court's explanation was insufficient for the Court of Appeals to determine what factors the court relied on to conclude that it would be "substantially inequitable" to set aside the VAP. Reversed and remanded.

E. Adoption

1. *A.M. v. N.E.D.*, 287 Or App 36 (July 26, 2017)

Mother appeals a trial court order under ORS 109.324 determining that the adoption of her child, A, can proceed without mother's consent. Mother assigns error to the court's determination that she willfully neglected A and its ensuing conclusion that the adoption "shall proceed" without mother's consent. Mother also asserts that her court-appointed trial counsel rendered inadequate assistance of counsel by failing to present evidence favorable to mother.

Held: Under ORS 19.205 and Gastineau v. Harris, 121 Or App 67, 853 P2d 1338, rev den, 317 Or 583 (1993), the order that mother appealed, an interlocutory order under ORS 109.324, was not appealable because it did not conclusively resolve the adoption proceeding or preclude the final resolution of the proceeding. Appeal dismissed.

IV. Enforcement of Agreements

A. *Sheil and Sheil*, 286 Or App 34 (June 7, 2017)

Wife appeals from a supplemental judgment modifying the parties' stipulated judgment of dissolution to terminate spousal support. Wife contends that the trial court erred in failing to enforce a provision in the parties' stipulated judgment stating that the spousal support obligation is nonmodifiable. Husband responds that the trial court correctly concluded that the provision is not enforceable because it deprives the trial court of its authority to modify spousal support awards.

Held: The Court of Appeals declined to interpret the parties' agreement as expressing an intention to deprive the trial court of its authority to modify spousal support awards. Rather, the court concluded, the parties expressed an intention not to seek modification of spousal support. Under ORS 107.104, the court was required to enforce the provision and therefore erred in terminating husband's spousal support obligation. Reversed.

B. *Kotler and Winnett*, 282 Or App 584 (Nov 30, 2016)

Husband and wife entered into a premarital agreement that provided for the disposition of the parties' property upon divorce. Following dissolution proceedings, the trial court determined that that agreement was enforceable and distributed the parties' property in accordance with its terms, attributing to each party costs incurred during the marriage in connection with that party's separate home and awarding to husband a retirement account holding what the court concluded was his premarital property, not subject to division. Wife appeals from the resulting judgment of dissolution and raises two assignments of error. Second, wife argues that the trial court miscalculated the marital expenditures made toward husband's home, because the court failed to consider the costs of improvements. Second, wife argues that the court erred in awarding the retirement account to husband and contends that the account was subject to equitable distribution.

Held: The Court of Appeals concluded that there is evidence in the record to support the trial court's finding that the retirement account was husband's separate property. With regard to the expenditures made toward husband's home, the Court of Appeals was unable to discern whether

the trial court found wife's evidence of improvements unpersuasive or, instead, overlooked wife's evidence of those costs entirely. Therefore, the Court of Appeals remanded for the trial court to clarify its ruling and amend it if necessary. Vacated and remanded for reconsideration of net costs paid toward husband's home and award of net costs to wife; otherwise affirmed.

C. *Porter and Porter*, 281 Or App 169 (Sep 21, 2016), *rev allowed*, 360 Or 851 (2017)

Husband appeals from a dissolution judgment that included an award of spousal support to wife and a division of property, asserting that the trial court erred in concluding that the parties' prenuptial agreement was unenforceable because wife signed it involuntarily. Wife cross-appeals, contending that the trial court did not make a just and proper division of the marital assets.

Held: Writing only to address husband's contentions on appeal, the Court of Appeals concluded that the trial court correctly ruled that the prenuptial agreement was unenforceable because wife signed it involuntarily. Affirmed on appeal and on cross-appeal.

D. *Haggerty and Haggerty*, 283 Or App 200 (Dec 29, 2016), *rev den*, 361 Or 645 (June 29, 2017) (*Haggerty III*)

Wife petitions for reconsideration of an opinion, *Haggerty and Haggerty*, 280 Or App 733, 380 P3d 1176 (2016), concluding that the trial court erred in the standard that it applied to determine whether wife assented to a marital settlement with husband and concluding that, if wife had assented to the agreement, that agreement would be just and equitable. In her petition, wife contends that a $4,000 monthly spousal support would result in a shortfall of her stated financial needs. Wife further argues that the former opinion erroneously relied upon "antecedent remarks" from the trial court.

Held: Wife's expert testified to tax consequences that assumed a $4,000 monthly spousal support; however, the spousal support with available income remained within the range of what was just and equitable under the circumstances. Further, an appellate court may rely on the record before judgment to determine whether the trial court applied an incorrect principle of law. The former opinion did not stray from proper review of the record for legal error. Reconsideration allowed; former opinion modified and adhered to as modified.

E. *Haggerty and Haggerty*, 280 Or App 733 (Sep 8, 2016), *adh'd to on recon*, 283 Or App 200 (Dec 29, 2016), *rev den*, 361 Or 645 (June 29, 2017) (*Haggerty II*)

Husband appeals a judgment awarding spousal support. During a rehearing on remand, the trial court was required to determine whether the parties had reached a settlement agreement and, if so, whether the terms of that settlement were within the range of agreements that are just and equitable under the circumstances. The trial court ruled that the parties had not reached a settlement agreement and that, even if they had reached an agreement, the agreement was outside the range of permissible agreements. On appeal, husband contends that the court erred in those determinations because, in light of the evidence adduced at the rehearing, the parties had reached a settlement agreement and that agreement was enforceable and permissible. Wife denies that she unambiguously agreed to a settlement and asserts that any agreement was only the result of duress or unilateral mistake and that any agreement is not enforceable because it is outside the range of permissible agreements.

Held: The trial court erred in the standard that it applied to determine assent to the agreement; whether wife assented to the settlement requires the trial court to make a determination using an objective, not subjective, standard of assent, based on the evidence already in the record. The putative agreement is within the range of agreements that are just and equitable. As a matter of law, wife's defenses of duress and unilateral mistake are unavailing on this record. Supplemental judgment for spousal support reversed and remanded; supplemental judgment for attorney fees vacated and remanded.

V. Restraining Orders

A. *M. D. D. v. Alonso*, 285 Or App 620 (May 17, 2017)

Respondent in a proceeding under the Family Abuse Prevention Act (FAPA) appeals an order prohibiting contact with petitioner. Respondent contends that the issuance of the FAPA restraining order was inappropriate for three reasons. First, respondent contends that the record does not support the trial court's finding that abuse occurred. Second, respondent asserts that the court erred by failing to make two findings that were essential to the issuance of a FAPA restraining order, specifically, that petitioner was in imminent danger of further abuse, and that respondent represented a credible threat to petitioner's safety. Third, respondent argues that the court could not have made those findings, because the record does not support them. In response, petitioner argues that respondent failed to preserve each of those contentions, but that, to the extent that the Court of Appeals considers them, the record supports the trial court's findings and the restraining order as a whole.

Held: As to respondent's first argument, evidence in the record supports the trial court's finding of abuse. The Court of Appeals did not consider the merits of respondent's second and third arguments, because it concluded that they were unpreserved. Affirmed.

B. *J. V.-B. v. Burns*, 284 Or App 366 (Mar 15, 2017)

Petitioner obtained a temporary restraining order against respondent pursuant to the Family Abuse Prevention Act, ORS 107.700 to 107.735. After a contested hearing, the trial court continued the restraining order. On appeal, respondent asserts that the order was not supported by legally sufficient evidence.

Held: The restraining order was not supported by legally sufficient evidence because the record lacks evidence that respondent presented a credible threat to petitioner's physical safety. Reversed.

C. *T. K. v. Stutzman*, 281 Or App 388 (Oct 5, 2016)

Respondent appeals an order continuing a temporary restraining order that petitioner obtained against her under the Family Abuse Prevention Act. ORS 107.700-107.735. Respondent asserts that petitioner failed to present sufficient evidence that (1) respondent had abused petitioner, (2) there was an imminent danger of further abuse to petitioner, and (3) respondent presented a credible threat to the physical safety of petitioner.

Held: The evidence was insufficient to show that respondent posed an imminent danger and a credible threat to petitioner's physical safety. Reversed.

D. *K. L. D. v. Daley*, 280 Or App 448 (Aug 31, 2016)

Respondent appeals an order continuing a restraining order that petitioner obtained against him under the Family Abuse Prevention Act. ORS 107.700 - 107.735. Respondent contends that petitioner failed to present sufficient evidence to support continuance of the order and that one of the factual findings underlying the order was unsupported by any evidence in the record.

Held: The evidence, viewed objectively, is legally insufficient to establish that respondent's conduct put petitioner at imminent risk of further abuse or credibly threatened her physical safety. Reversed.

VI. Attorney Fees

A. *Hoffman and Hoffman*, 285 Or App 675 (May 24, 2017)

Wife appeals from a dissolution of marriage judgment, assigning error, in part, to the trial court's award of attorney fees to husband.

Held: The trial court erred in awarding attorney fees to husband because it did not comport with the procedural requirements of ORCP 68. Attorney fee award vacated and remanded; otherwise affirmed.

B. *C. R. v. William Gannon*, 281 Or App 1 (Sep 14, 2016)

Respondent appeals a supplemental judgment denying him attorney fees and costs, asserting that the trial court "*Held* a hearing pursuant to" ORS 107.718(10), and, therefore, erred in concluding that it lacked authority under ORS 107.716(3) to award attorney fees and costs. Petitioner sought and received an ex parte restraining order against respondent under ORS 107.710. Respondent requested a hearing under ORS 107.718(10) to contest the factual basis for issuing the restraining order. On the day set for that hearing, petitioner's counsel appeared before the court and asked the court to dismiss her petition and restraining order without prejudice. After the court dismissed the restraining order without prejudice, respondent sought attorney fees and costs under ORS 107.716(3), which authorizes a fee award "[i]n a hearing *Held* pursuant to" ORS 107.718(10). The court concluded that, because it had not *Held* a "contested" hearing regarding the merits of petitioner's petition and restraining order, it had not *Held* a hearing pursuant to ORS 107.718(10) and, therefore, it was not authorized to award attorney fees to respondent.

Held: A hearing is *Held* pursuant to ORS 107.718(10) for purposes of an attorney fee award under ORS 107.716(3) when the parties involved have an opportunity to be heard on issues of law or fact that are related to relief available under ORS 107.718, and the court is asked to make a determination on those issues. The court did not reach the issues of law or fact implicated by respondent's request for a hearing under ORS 107.718(10), and the court therefore correctly concluded that it lacked statutory authority under ORS 107.716(3) to award attorney fees and costs. Affirmed.

C. See also:

Code and Code, 280 Or App 266 (Aug 17, 2016) (under property division)

NOTES

Legislative Update

Ryan Carty, *Saucy and Saucy P.C., Salem*

William A. Boaz, *Boaz Law Firm PC, Salem, Oregon*

NOTES

2017 Oregon Legislation Highlights

Domestic Relations Law

Ryan Carty (Saucy & Saucy, P.C.) and
William Boaz (Boaz Law Firm, P.C.)
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The authors acknowledge Susan Grabe and the Oregon State Bar Public Affairs staff for their invaluable assistance throughout the 2017 legislative session.

NOTES

I. INTRODUCTION

II. CUSTODY AND PARENTING TIME

A.	SB 1055 (ch 534)	Permits court to enter temporary order allowing or requiring reasonable visitation between child of deployed parent and stepparent, grandparent or other family member related to child with whom child has ongoing relationship.
B.	SB 241 (ch 447)	Establishes a bill of rights for children of incarcerated parents and directs the Department of Corrections to adopt guidelines for policy and procedure decisions that impact incarcerated individuals with children.
C.	SB 830 (ch 351)	Expands definition of foster parent who is "current caretaker."

III. CHILD AND SPOUSAL SUPPORT

A.	SB 492 (ch 457)	Allows informal exchanges of certain financial documents between parties to a judgment containing an award of spousal support.
B.	SB 510 (ch 486)	Amends law to require insurance companies to enter into agreements with DOJ to conduct data matches to identify obligors with pending insurance claims who are delinquent in their support obligations.
C.	SB 511 (ch 459)	Expands the DOJ’s ability to collect overpayments of child support from only obligees or other agencies. New authority expands to overpayments made to an obligor, caretaker, or child attending school.
B.	SB 512 (ch 651)	Revises the rebuttable presumption language of ORS 109.070 to ensure a woman’s spouse, regardless of gender, is established as the child's parent.
C.	SB 516 (ch 462)	Requires child and spousal support orders to use specified initial and subsequent due dates for payments.
D.	SB 522 (ch 341)	Authorizes person specified in family law judgment as court-ordered life insurance beneficiary to recover against third-party beneficiary named by obligor in separate civil action.

E. SB 682 (ch 464) Establishes process to automatically suspend child support obligation for certain incarcerated obligors.

F. SB 765 (ch 467) Removes distinction between private and public health care coverage for determining appropriate health care coverage for a child under ORS 25.323.

IV. DOMESTIC VIOLENCE ISSUES

A. SB 261 (ch 321) Creates a "rape shield" law for civil proceedings preventing evidence about a victim's sexual behavior or alleged predisposition except under certain narrow circumstances.

B. SB 714 (ch 689) Provides court authority to include reasonable residence restrictions as a special condition of parole or probation if an individual is released following a conviction of stalking or violating a court's stalking protective order.

C. SB 719 (ch 737) Creates Extreme Risk Protection Order (ERPO) to allow a family or household member of a person, or law enforcement officer, to petition the court for an order prohibiting the person from possessing firearms or ammunition, if the court finds by clear and convincing evidence that the person presents a risk in the near future of suicide or of causing physical injury to another person.

D. HB 2621 (ch 108) Expands access to and coverage of crime victims' compensation awards for all victims, and further specifically reduces the requirements to report crimes or cooperate with law enforcement for victims of domestic or sexual violence.

E. HB 2988 (ch 430) Increases penalty for crime of harassment from a Class B misdemeanor to a Class A misdemeanor if offense consists of subjecting another person to offensive personal contact, is committed against a family or household member, and is committed in the immediate presence of or witnessed by a minor child.

V. OTHER DOMESTIC RELATIONS BILLS

A. SB 131 (ch 240) Modifies court's authority to allow for remote location testimony in civil and juvenile dependency proceedings.

B. SB 489 (ch 252) Eliminates obsolete terms and procedures in statutes relating to court records.

C.	HB 2673 (ch 100)	Creates a centralized process to change a gender marker on a birth certificate, and eliminates public posting requirements formerly applicable to the court process. Makes additional changes to administrative handling of gender marker changes and corrections.

NOTES

I. INTRODUCTION

The 2017 legislative session continued historical trends in that it resulted in numerous significant statutory changes impacting the family law practice area. Courts have new authority and added flexibility to craft appropriate visitation plans to accommodate the needs of deployed military servicemembers and their families. Children of incarcerated parents are recognized as a unique class of individuals with specific needs and essential rights that should be addressed through future policies and procedures. Significant changes were implemented throughout the child and spousal support process -- from allowing extra-judicial exchanges of certain financial documents between parties in spousal support proceedings to streamlining the timing of payments and withholdings in child support cases. Oregon trial courts gained new authority to entertain actions by support obligees to recover life insurance proceeds from a third-party beneficiary when the obligor fails to designate the correct court-ordered beneficiary. A rebuttable presumption was created in Oregon law that a child support obligor who is incarcerated for a period of 189 days or longer is unable to pay child support and the Department of Child Support is directed to suspend support obligations during this time. Victims of domestic violence gained a "rape shield" law in the civil proceeding context that largely prevents introduction of evidence about a victim's past sexual behavior. The legislature created a new form of protective order designed to assist law enforcement officers and family and household members in prohibiting the possession of firearms by persons who present risks of suicide or physical injury to others. The process for gender marker and related name changes has been streamlined and legal barriers were removed. And the state continued its push to update statutes where appropriate to accommodate the implementation of e-Court.

All bills are effective January 1, 2018, unless stated otherwise.

II. CUSTODY AND PARENTING TIME

A. SB 1055 (ch 534) Permits court to enter temporary order allowing or requiring reasonable visitation between child of deployed parent and stepparent, grandparent or other family member related to child with whom child has ongoing relationship.

SB 1055 addresses the issue of delegated visitation for military personnel and their children. Oregon courts recognize the primary importance of fostering relationships between parents and children, yet prior to implementation of SB 1055 there has been a gap in how to deal with promoting contact between children and a deployed servicemember parent. SB 1055 provides the court with authority to enter temporary orders to include provisions allowing for or requiring reasonable visitation between the child of a deployed parent and a stepparent, grandparent or other family member related to the child with whom the child has an ongoing personal relationship as defined by ORS 109.119. In crafting any such relief, the court must consider the factors set forth in ORS 109.119(4), including:

- Whether the relative is or recently has been the child's primary caretaker;
- Whether circumstances detrimental to the child exist if visits for the relative are denied;
- Whether the objecting parent (i.e., the non-deployed parent) has fostered, encouraged, or consented to the relative's relationship with the child;
- Whether granting the relative visits would substantially interfere with the custodial relationship;
- Whether the objecting parent (i.e., non-deployed parent) has unreasonably denied or limited contact between the child and the relative; or
- Any other factor the court finds relevant.

Additionally, the statute mandates that the court must consider prior to granting relief under its new authority whether awarding visitation to the relative will facilitate the child's contact with the deployed parent. Of significance is that the court does not need to make a finding rebutting the presumption that the legal parent acts in the best interest of the child. The

court is required to apply a preponderance of the evidence standard when crafting orders pursuant to this new statutory authority.

SB 1055 also includes a statutory preference for priority scheduling of family law matters involving a deployed parent or a parent whose deployment is imminent. While the statutory framework falls short of mandating expedited hearings for such cases, it goes on to suggest that courts should avoid unnecessary delays or continuances in order to ensure that deployed parents are not denied access to their children because of their deployment.

B. SB 241 (ch 447) Establishes a bill of rights for children of incarcerated parents and directs the Department of Corrections to adopt guidelines for policy and procedure decisions that impact incarcerated individuals with children.

SB 241 addresses the reality that children of incarcerated parents are a unique class of individuals with specific needs and essential rights that should be addressed through future state policies are recognized as a unique class of individuals with specific needs and essential rights that should be addressed through future policies and procedures. This legislation sets forth a specific bill of rights for children of incarcerated parents, including:

- To be protected from additional trauma at the time of parental arrest.
- To be informed of the arrest in an age-appropriate manner.
- To be heard and respected by decision makers when decisions are made about the child.
- To be considered when decisions are made about the child's parent.
- To be cared for in the absence of the child's parent in a way that prioritizes the child's physical, mental and emotional needs.
- To speak with, see and touch the incarcerated parent.
- To be informed about local services and programs that can provide support to the child as the child deals with the parent's incarceration.
- To not be judged, labeled or blamed for the parent's incarceration.
- To have a lifelong relationship with the incarcerated parent.

SB 241 then goes further to mandate that the Department of Corrections develop guidelines for policy and procedure decisions that are guided by those specific rights.

Practice Tip #1

SB 241 is tantamount to a policy statement for how the State of Oregon ought to engage with children of incarcerated parents and promote relationships between those children and their parents. This is significant step forward in this arena from the policy statement set forth in ORS 107.101 that is the policy of the State of Oregon to:

1. Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child; and

2. Encourage such parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage.

The difficult part of ORS 107.101 is that it does not provide guidance to the State (or our courts) as to what sort of relationship ought to be fostered between minor children and parents who have not shown the ability to act in the best interests of the child. There is typically some connection between the act resulting in incarceration and a demonstrated ability to act in a child's best interest. SB 241 helps push the conversation past that barrier.

C. SB 830 (ch 351) Expands definition of foster parent who is "current caretaker."

The current definition of "current caretaker" in the guardianship context is a foster parent who:

1. Is currently caring for a ward who is in the custody of the Department of Human Services; and
2. Has a permanency plan or concurrent permanent plan of adoption; and
3. Has cared for the ward, or at least one sibling of the ward, for at least the immediately prior 12 consecutive months or one-half of the ward's or sibling's life where the ward or sibling is younger than two years of age.

SB 830 expands that definition to provide that the 12 months of care may be a cumulative calculation instead of a consecutive one. This change removes an unnecessary burden that might prevent otherwise competent and preferable foster parents from being excluded simply because their periods of involvement in a child's life have not necessarily run consecutively.

III. CHILD AND SPOUSAL SUPPORT

A. SB 492 (ch 457) Allows informal exchanges of certain financial documents between parties to a judgment containing an award of spousal support.

Under current law, in order to modify an award of spousal support in a final judgment the moving party must show a "substantial change" in either or both parties' economic circumstances. An inherent problem with this system is that neither payors nor payees have any realistic way of knowing whether the other party's economic circumstance has changed since entry of the most recent support judgment. Parties are often placed in situations where they must file formal modification proceedings in order to formally request relevant financial documents from the other party.

SB 492 provides a no-cost mechanism for either party to a judgment containing a spousal support award to request the first and second pages of the other party's most recently filed state and federal tax returns without the need to file a modification. If the other party has not filed income tax returns for the last calendar year, SB 492 requires that party to provide all year-end records showing income earned or received during the last calendar year (e.g., W-2 statements, year-end payroll statements, interest and dividend statements, etc.).

A party can only make this request once every two years. In making the request, however, the requesting party must also simultaneously provide the other party with the same

financial documents. If the requesting party does not provide his or her own documents, the other party has no obligation to provide the requested documents.

Practice Tip #2

While SB 492 imposes a new obligation on parties to a spousal support judgment to engage in post-judgment document exchanges, failure to comply with the statute does not create a cause of action for contempt. ORS 30.015 provides that contempt of court means the following acts, done willfully:

(a) Misconduct in the presence of the court that interferes with a court proceeding or with the administration of justice, or that impairs the respect due the court.

(b) Disobedience of, resistance to or obstruction of the court's authority, process, orders or judgments.

(c) Refusal as a witness to appear, be sworn or answer a question contrary to an order of the court.

(d) Refusal to produce a record, document or other objection contrary to an order of the court.

(e) **Violation of a statutory provision that specifically subjects the person to the contempt power of the court**. Emphasis added.

In other words, failure to comply with the document exchange provisions set forth in SB 492 in not, on its face, an act of contempt because there is no express wording in the statute subjecting the non-complying party to the court's contempt power. An example of statutory drafting that creates a cause of action for contempt can be found in ORS 107.093 (i.e., statutory restraining order). That statute provides that "a party who violates a term of a restraining order issued under this section is subject to imposition of remedial sanctions under ORS 33.055."

With that in mind, practitioners should carefully consider whether to include wording in their support judgments that captures the statutory requirement to exchange documents post-judgment. By doing so, practitioners can (if so desired) create a more powerful enforcement mechanism down the road (i.e., contempt) in the event that a party fails to comply with the terms of the statute.

Mandatory post-judgment exchange of financial documents

Order Section

7.5 **Exchange of documents.** Either party may submit a written request to the other party for copies of the first and second pages of the other party's most recently filed state and federal income tax returns. If the other party has not filed income tax returns for the last calendar year, the other party shall instead provide copies of his or her W-2 statements, year-end payroll statements, interest and dividend statements, and all other records of income earned or received by that party during the last calendar year.

7.5.1 A written request under this section may be made once every two years.

7.5.2 Neither party shall be required to file a request for modification of this judgment in order to make a written request under this section.

7.5.3 A party providing documents under this section may redact all account numbers, personally identifying information, and contact information, including but not limited to personal addresses and employer addresses, from the documents provided, except for the name of the party.

7.5.4 A party making a request under this section shall simultaneously provide to the nonrequesting party copies of the requesting party's same documents. The nonrequesting party shall have no obligation to provide documents under this section unless the request is accompanied by copies of the requesting party's same documents.

B. SB 510 (ch 486) Amends law to require insurance companies to enter into agreements with DOJ to conduct data matches to identify obligors with pending insurance claims who are delinquent in their support obligations.

Most insurance companies currently provide information of pending insurance claims through the federal Office of Child Support Enforcement through a system of data matches. By doing so, individual states can identify delinquent child support obligors and then garnish insurance proceeds that would otherwise be paid out to them. Some insurers, however, refuse to provide relevant data without a mandate at the state level. SB 510 provides that mandate and requires that insurance companies participate in data matching in order to allow the State of Oregon to identify claims that could be garnished to pay child support.

C. SB 511 (ch 459) Expands the DOJ's ability to collect overpayments of child support from only obligees or other agencies. New authority expands to overpayments made to an obligor, caretaker, or child attending school.

ORS 25.125 currently allows the Department of Justice to collect an overpayment of support made to an obligee or agency. The specific wording of the statute deprives the DOJ with authority to collect overpayments of support made to any other person, such as a Child Attending School or a caretaker of the minor child. SB 511 addresses this issue by expanding the scope of the Department's authority to collect overpayments made to any person or entity.

D. SB 512 (ch 651) Revises the rebuttable presumption language of ORS 109.070 to ensure a woman's spouse, regardless of gender, is established as the child's parent.

At present, ORS 109.070 contains wording that only allows "paternity" to be rebuttably presumed if a "man" is married to the mother at the time of the birth or if a child is born to the mother within 300 days after the marriage is terminated. SB 512 revises the rebuttable presumption wording from "paternity" to "parentage;" and from "man" to "person" in

recognition of same sex marriage. This bill makes no impact on Oregon filiation proceedings or voluntary acknowledgments of paternity, which rely on the need to establish a biological relationship to the child.

E. SB 516 (ch 462) Requires child and spousal support orders to use specified initial and subsequent due dates for payments.

There are no current requirements in Oregon law for child or spousal support to begin (or for subsequent payments to become due) on any specific day of the month. SB 516 requires all child and spousal support orders to specify that the initial due date shall be on the first day of a calendar month, with subsequent payments on the first day of each subsequent month for which the support is payable.The bill also operates to streamline payment and collection of orders in a number of ways, including:

- Current support payments that become due and payable on a day other than the first day of the month in which the payment is due become enforceable by income withholding on the first day of that month.
- Any support order that contains an award of child, medical, or spousal support that accrues on something other than a monthly basis may (for income withholding and administrative support billing purposes only) be converted to a monthly amount.
- Support payments become delinquent only if not paid in full within one month of the payment due date. For example, a monthly child support obligation that is to be paid in two or more installments does not become delinquent until the obligation is not paid in full by the due date for the first installment in the next month.

F. SB 522 (ch 341) Authorizes person specified in family law judgment as court-ordered life insurance beneficiary to recover against third-party beneficiary named by obligor in separate civil action.

ORS 107.810 through 107.830 provides authority for the court to order a child or spousal support obligor to secure the support obligation with life insurance, naming the obligee as beneficiary, in the event of the obligor's death. However, current law does not provide a remedy for the obligee (i.e., court-ordered beneficiary) to recover any life insurance proceeds in cases

where the obligor maintained life insurance but named a third-party beneficiary other than the obligee.

SB 522 allows a court to grant equitable relief to an obligee, previously designated by the court to be the beneficiary of obligor's life insurance proceeds, up to the extent specified in the judgment, an equitable amount if no amount was specified in the judgment, or the amount of any arrears plus interest if there isn't a current support obligation at the time of the obligor's death. Entry of a judgment requiring obligor to obtain a life insurance policy will now constitute constructive notice of the life insurance provision to any named third-party beneficiary. An affirmative defense exists if the third-party was the purchaser of the life insurance policy.

G. SB 682 (ch 464) Establishes process to automatically suspend child support obligation for certain incarcerated obligors.

ORS 416.425(11) only allows a child support modification, for reason of a obligor's incarceration, to apply beginning when the non-requesting party is served with a modification until 60 days after the obligor's release from incarceration. On the 61st day after release, the previous support order is then reinstated.

SB 622 establishes a process to automatically suspend child support obligations for obligors incarcerated for at least 180 consecutive days under a rebuttable presumption of inability to pay. Within 30 days after an obligor is incarcerated for 180 consecutive days, support enforcement must provide notice of the rebuttable presumption to the obligee and obligor and must inform all parties that, unless a party objects within 30 days, child support will cease accruing retroactively to first day of the first month following the obligor being incarcerated for 180 consecutive days and continuing until the first day of the first month after the obligor has been release for 120 days. At that time, the support obligation is automatically reinstated at 50% of the previously ordered support amount until the child support administrator modifies the

support order within 60 days of the reinstatement. Additional rules implementing this process with be forthcoming from the Department of Justice.

H. SB 765 (ch 467) Removes distinction between private and public health care coverage for determining appropriate health care coverage for a child under ORS 25.323.

Previously, ORS 25.323 mandated all child support orders to contain a medical support clause requiring one or both parties to provide ***private*** health care coverage for a child if it was appropriate and available at the time the order is entered; or, if not appropriate or available, requiring one or both parents to provide ***private*** health care coverage when such coverage become available ***and*** the payment of cash medical support (or include findings why cash medical has not been required).

Effective June 22, 2017, SB 765 eliminated the need for health care coverage to be ***private***, due to updated federal regulations recognizing that ***public*** health care coverage may be the most appropriate type of coverage to meet a child's health care needs. Therefore, if health care coverage (private or public) is appropriate and available at the time of the order, one or both parents must be ordered to provide it. This also eliminates the "cash medical issue" (having to enter a money award for cash medical on behalf of the state as a creditor to reimburse for public health care coverage) in cases where a child is covered by public health insurance because cash medical is no longer ordered in cases where ***public*** health insurance is available.

IV. DOMESTIC VIOLENCE ISSUES

A. SB 261 (ch 321) Creates a "rape shield" law for civil proceedings preventing evidence about a victim's sexual behavior or alleged pre-disposition except under certain narrow circumstances.

Oregon law presently generally prohibits introduction of a victim's past sexual behavior or alleged-pre-disposition in criminal proceedings. Those protections for victims of sexual

assault did not, however, extend to civil proceedings. This distinction in the law operated as a significant barrier for victims who might have otherwise brought civil suits against their perpetrators. SB 261 operates to extend the "rape shield" protections afforded to victims in criminal proceedings to victims who choose to file civil actions against their perpetrators.

B. SB 714 (ch 689) Provides court authority to include reasonable residence restrictions as a special condition of parole or probation if an individual is released following a conviction of stalking or violating a court's stalking protective order.

SB 714 provides new authority to Oregon courts to include reasonable residency restrictions as a special condition of parole or probation if an individual is released on probation following conviction of stalking or violating a court's stalking protective order. The bill contains an important caveat, however, that the court ***may not*** require the probationer to change his or her residence in order to comply with this special condition of probation if the victim moves to a location that causes the probationer to be in violation.

C. SB 719 (ch 737) Creates Extreme Risk Protection Order (ERPO) to allow a law enforcement officer or a family or household member of a person to petition the court for an order prohibiting the person from possessing firearms or ammunition

SB 719 creates a new form of order (i.e., Extreme Risk Protection Order) available through the court system in an effort to promote public safety. An Extreme Risk Protection Order (ERPO) is available to either a law enforcement offider or a family or household member of a person if the court finds by clear and convincing evidence that the person presents a risk in the near future of suicide or of causing physical injury to another person. The court must determine whether to grant the order within one judicial day of when the petition is submitted.

The specific factors the court must consider in determining whether to issue an ERPO include whether there has been:

- A history of suicide threats or attempts or acts of violence by the respondent direct against another person;
- A history of use, attempted use, or threatened use of physical force by the respondent against another person;
- A previous conviction for:
    - A misdemeanor involving violence;
    - A stalking offense (or a similar offense in another jurisdiction);
    - An offense constituting domestic violence;
    - Driving under the influence of intoxicants; ***or***
    - An offense involving cruelty or abuse of animals;
- Evidence of recent unlawful use of controlled substances;
- Previous unlawful and reckless use, display, or brandishing of a deadly weapon by the respondent;
- A previous violation by the respondent of a FAPA order;
- Evidence of an acquisition or attempted acquisition within the previous 180 days by the respondent of a deadly weapon; ***and***
- Any additional information the court finds to be reliable, including a statement by the respondent.

Similar to the requirements for FAPA restraining order proceedings, a respondent who is the subject of an ERPO must be personally served with a copy of the order and a hearing request form. A respondent has 30 days following service within which to request a hearing. Once requested, however, the hearing must take place with 21 days of the date the request was made. If no request for a hearing is submitted, the order is automatically confirmed and remains effective for one year.

Unlike a FAPA restraining order proceeding, the ERPO process is set up to allow either the petitioner or respondent to submit a written request for a hearing to terminate the order during the period it is in effect. The person requesting the hearing bears the burden of providing by clear and convincing evidence that the respondent no longer presents a risk in the near future of suicide or causing physical injury to another person.

SB 719 provides an option for a one-year renewal of the order within 90 days of the order's expiration. Any renewal request must be submitted to the court in writing and must be provided to all parties no less than 14 days before a hearing on the issue of whether to renew the ERPO. In the renewal hearing, the burden falls once again on the person requesting renewal to demonstrate by clear and convincing evidence that the respondent continues to present a risk in the near future of suicide or causing physical injury to another person.

Violation of an ERPO is a Class A misdemeanor, as is filing a petition for an ERPO with the intent to harass the respondent or knowing that the information in the petition is false.

D. HB 2621 (ch 108) Expands access to and coverage of crime victims' compensation awards for all victims, and further specifically reduces the requirements to report crimes or cooperate with law enforcement for victims of domestic or sexual violence.

Oregon created a Crime Victims' Compensation program in 1978 to provide victims of violent crime with financial support to cover medical, counseling, and other expenses incurred as a result of the crime. In order for a victim to be eligible for that compensation, ORS 147.015 currently requires, amongst other things, that the victim notify the appropriate law enforcement officials within 72 hours after the crime occurred.

HB 2621 authorizes an exception to this notification requirement if the Department of Justice finds good cause for failing to notify law enforcement within 72 hours. The bill also allows a victim to satisfy the notification requirement by obtaining a stalking protective order, sexual abuse restraining order, an abuse prevention order, or a medical assessment for sexual assault. Finally, the bill requires the Department of Justice to establish rules for limited counseling awards for victims of domestic violence and sexual assault who don't otherwise qualify under ORS 147.015.

This bill became effective October 6, 2017.

E. HB 2988 (ch 430) Increases penalty for crime of harassment from a Class B misdemeanor to a Class A misdemeanor if offense consists of subjecting another person to offensive personal contact, is committed against a family or household member, and is committed in the immediate presence of or witnessed by a minor child.

Under ORS 166.065(1)(a)(A), the crime of harassment is committed when a person intentionally harasses or annoys another person by subjecting the other person to offensive physical contact. The crime of harassment is usually a Class B misdemeanor, which is punishable by a maximum of six months' imprisonment and a $2,500 fine. HB 2988 increases the offense to a Class A misdemeanor, which is punishable by a maximum of one year's imprisonment and a $6,250 fine, when the crime constitutes domestic violence ***and*** is committed in the immediate presence of, or is witnessed by, a minor child or stepchild of (or a minor residing with) the defendant or the victim.

V. OTHER DOMESTIC RELATIONS BILLS

A. SB 131 (ch 240) Modifies court's authority to allow for remote location testimony in civil and juvenile dependency proceedings.

At present, ORS 45.400 provides the court authority to permit telephonic or other remote testimony for good cause, but prohibits it under a number of specific rules. For example, the court is prohibited from allowing telephonic testimony when the testimony is "so determinative of the outcome that face-to-face cross-examination is necessary." See *Department of Human Services v. K.A.H.*, 278 OR App 284 (2016); ORS 45.400(3)(b). That prohibition essentially disallows telephonic or other remote testimony in many situations, as most witnesses offer testimony with the potential to be determinative of the outcome.

SB 131 provides the court with expanded authority to consider a number of factors in determining whether there is good cause to allow remote testimony and whether that good cause

outweighs any prejudice to a party. A party seeking to utilize telephonic testimony must still demonstrate a compelling need before the court will allow it.

SB 131 requires that the court consider the safety of the victim or a witness in determining whether to allow telephonic or other remote testimony in SPO or FAPA proceedings.

B. SB 489 (ch 252) Eliminates obsolete terms and procedures in statutes relating to court records.

ORS 33.055(3) required a remedial contempt proceeding be filed in the same proceeding in which the contempt was related. However, due to the limitations in the court electronic filing system, we have already been required to initiate a remedial contempt proceeding as a separate case (in the criminal docket) and consolidate it with the related domestic relations civil case.

SB 489 eliminated the language in ORS 33.055(3) requiring the remedial contempt proceeding to be filed in the related proceeding, and, instead, now requires it to be filed in accordance with ORS 33.145, which is the general rule-making statute authorizing the Oregon Supreme Court to adopt rules to carry out the purposes of the contempt statutes.

This bill became effective June 6, 2017.

C. HB 2673 (ch 100) Creates a centralized process to change a gender marker on a birth certificate, and eliminates public posting requirements formerly applicable to the court process. Makes additional changes to administrative handling of gender marker changes and corrections.

Under current law, a transgender person seeking to update a birth certificate must first go through a court in order to request a legal name or gender marker amendment. The transgender person must then take the court order to the Oregon Health Authority's Vital Records Department in order to update the birth certificate. Court processes can be difficult for individuals to navigate and lack consistency from county to county.

HB 2673 creates a centralized process for individuals in Oregon to change a name and gender marker on a birth certificate and eliminates public posting requirements. The bill also allows the State Registrar of the Center for Health Statistics to amend or correct a vital record upon receipt of a certified court order ***or*** upon request from an applicant that includes sufficient documentation and a signed statement from the applicant that the purpose of the request is to affirm the applicant's gender identify. An applicant is limited to a single use of this streamlined process and must seek a court order for subsequent changes to be made.

NOTES