FAMILY LAW NEWSLETTER

Published by the Family Law Section of the Oregon State Bar

Oregon State Bar

Vol. 35, No. 1 February 2016

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The Adoption Experience

By Jane Edwards

Since my reunion with my surrendered daughter 18 years ago, I've read many books and reports about adoption by both those who live it and those who study it. Here is some of the excellent material I'd like to share with those interested in putting adoption law in its larger context. .

Among the fine memoirs by adoptees are *Found* by Portland author Jennifer Lauck and *A Man and his Mother: An Adopted Son's Search* by novelist and former NFL player Tim Green, one of the few memoirs by a male adoptee. Lauck is also the author of the New York *Times* best seller, *Blackbird*. Both authors were adopted as infants in closed adoptions. They tell about growing up adopted, coming to the recognition that to understand themselves, they need to find their original families, and their reunions.

Sarah Saffian has a different perspective on reunion because she was found by her natural parents who married after she was given away. Their contact turned her world upside-down. Her memoir, *Ithaka*, is her journey to reconciling her two identities. Elyse Schein and Paula Bernstein shine a bright light on nature versus nurture in *Identical Strangers*. Schein and Bernstein are identical twins who were placed at birth into separate families as part of an experiment. They learned of the other only when Schein began searching for her natural parents as an adult.

The authors of these memoirs were placed during the post World War II/pre-*Roe v Wade* period, often referred to as the Baby Scoop Era[1], when white unwed pregnant "girls" went into hiding and gave up their babies in closed adoptions. The first memoir by one of these mothers is Lorraine Dusky's 1979 *Birthmark*. Dusky found her 15 year old daughter two years after *Birthmark* was published. She has recently published *A Hole in My Heart: A Memoir and Report from the Fault Lines of Adoption*, a narrative which reads like a novel, about her search, her years with her daughter, and her life outside of adoption. Dusky includes substantial information about adoption practices in the U.S., past and present. Dusky is also the author of *Still Unequal: The Shameful Truth About Women and Justice in America*.

Other fine memoirs by natural mothers from the Baby Scoop Era include *Following the Tambourine Man* by University of Oregon graduate Janet Mason Ellerby, *The Other Mother: A Women's Love for the Child She Gave Up for Adoption* by Carol Schaefer, and *Waiting to Forget: A Mother Opens the Door to her Secret Past* by Margaret Moorman.

For a historical perspective on the pre-*Wade v. Roe* period, see *The Girls Who Went Away* by adoptee Ann Fessler and *Wake Up Little Susie: Single Pregnancy and*

1 https://en.wikipedia.org/wiki/Baby_Scoop_Era

Race before Roe v. Wade by Ricki Solinger. Solinger is also the author of *The Abortionist: A Woman Against the Law* about Portland abortionist Ruth Barnett.

Adoption practices have changed dramatically in the past 40 years in response to research about the damaging effects of closed adoptions and the scarcity of adoptable infants. *God and Jetfire* by Amy Seek, published in 2015 with favorable reviews[2] is the memoir of a natural mother in the "modern" era. She and her baby's father chose their son's adoptive parents after an exhaustive search. They have a fully open adoption and see their son, 12 years old at the time of the writing, frequently. Nonetheless, Seek's regret and grief parallel that of Baby Scoop Era mothers.

Intercountry adoptees too have written of their experiences. These adoptees, like those of the Baby Scoop Era, are burdened with secrecy. Among the excellent memoirs are *The Language of Blood* by Korean born adoptee Jane Jeong Trenka and *Outer Search Inner Journey* by German born adoptee Peter Dodds. Another worthwhile read is *Adoptionland: From Orphans to Activists* edited by Korean born adoptee Janine Myung Ja, her adoptive father Allen L. Vance, and American born adoptee Michael Allen Potter. It is a complilation of narratives by adoptees from countries throughout the world who are working to reform adoption practicies.

As adoptees in open adoption come of age, we can anticipate more memoirs. Soon too will be a crop of books by persons created through assisted reproduction which is fast replacing infant adoption as a method of family formation. I note that laws governing assisted reproduction dominated the ABA 2015 Fall Conference in Portland. While much of the technology is new, questions of identity which drove openness in domestic adoption are present in children conceived artificially. Social workers Annette Baran and Reuban Pannor recognized this back in 1989 when they wrote *Lethal Secrets: The Psychology of Donor Insemination: Problems and Solutions*.

A number of books delve into the impact of being adopted. Among the most discussed are adoptee Betty Jean Lifton's *Journey of the Adopted Self*, adoptive mother Nancy Verrier's *The Primal Wound*, and *Being Adopted: The Lifelong Search for Self* by psychologists David Brodzinsky, Marshall Schechter, and Robin Henig.

An absorbing history of American adoption practices is E. Wayne Carp's *Family Matters: Secrecy and Disclosure in the History of Adoption* which ncludes a detailed discussion on how adoption records came to be closed. (Spoiler alert: Records were *not* closed to protect the reputations of fallen women.) Carp is also the author of *Adoption Politics: Bastard Nation and Ballot Initiative 58*, about the landmark measure passed by Oregon voters in 1998 allowing adult adoptees to access their original birth certificates.

Two valuable resources for understanding adoption practices today and how we got here are The Donaldson Adoption Institute (DAI)[3] and *The Adoption History Project* by University of Oregon professor and adoptive mother Ellen Herman.[4] DAI has published reports on a variety of topics including open adoption, adoption by gays and lesbians, adoption from foster care, intercountry adoption, and the impact of the Internet on adoption. *The Adoption History Project* is a website with links to a huge amount of information on adoption including research reports, histories, and people and organizations.

Jane Edwards is a graduate of the University of Oregon School of Law and an inactive member of the Oregon Bar. She is a reunited natural mother and writes for First Mother Forum, www.firstmotherforum with Lorraine Dusky. She also serves on the Oregon Law Commission Adoption Work Group.

2 *The New Yorker,* Briefly Noted, 9/7/15

3 http://adoptioninstitute.org/impact/issue-areas/

4 http://pages.uoregon.edu/adoption/index.html

Insuring Divorce Settlement Payments Against Disability

by William Pollock

When a divorce is settled and the terms have been agreed to, there are three circumstances that can undo everyone's hard work… the person paying support (the Payor) loses his/her job, dies, or becomes disabled.

1. There is little anyone can do if the Payor loses his or her job. Under these circumstances, if unable to find comparable employment, the Payor would file for a "change in circumstances" and the court would address the issues based on the Payor's situation.
2. Life insurance can be purchased to ensure if either party dies the survivor is protected financially.
3. If the Payor becomes disabled, which is three times more likely than dying prior to age 65, historically there have been two options:

- Some decrees write in disability provisions requiring the Payor to continue paying the Recipient a percentage of the support or a percentage of any disability income benefits received by the Payor.
    1. If the parties have negotiated a reduced payment in the event the Payor is disabled, the Recipient is forced to live on substantial less money and the Payor is forced to continue making payments out of whatever disability income benefits he/she is receiving. This is a terrible solution for both parties.
- Many Divorce Decrees do not address what happens if the Payor is disabled. This results in the Payor having to file for a "change in circumstances". Going through a "change in circumstances trial" is expensive and stressful for both divorcees, and the outcome is unknown.

1. The Payor has suffered a major health issue and is in no condition, physically or mentally, to deal with the stress of going back to court and renegotiating the financial aspects of the settlement agreement, which is what happens during a "change in circumstances trial."
2. If the Payor has disability income insurance, it counts as income for purposes of paying support. The very best disability products only insure 60% of the insured's earnings. With a 40% income reduction, the Payor will have serious issues trying to pay his/her own expenses. Being required to pay a percentage of the disability benefits to the Recipient will turn the Payor's financial issues into a financial crisis.
3. Whether the Payor has disability insurance or not, if the Payor is affluent, the Recipient's attorney is going to file for discovery hoping to find other resources that can be used to pay support. All of this documentation will be reviewed by both attorneys and argued in court or through a mediator, which can take months and legal fees can easily run into low to mid 5 figures.
4. If the court approves a reduction in or the elimination of spousal support, on top of a reduction of child support, the Recipient and children have a massive, potentially life changing financial dilemma to deal with, especially if the Recipient is a stay at home parent.

- If the Divorce Decree stipulates "non-modifiable spousal support," the Payor is obligated to make the payments regardless of his/her financial circumstances. While the Payor can plead his/her case to the court, it's unlikely "non-modifiable" spousal support will be lowered.

Negotiating reduced support payments if the Payor is disabled or going through a Change in Circumstances Trial are terrible options for BOTH the Payor and the Recipient. Now there is a solution that benefits both parties equally, if the Payor is disabled.

The Divorce Settlement Disability Policy

There is a new disability product available that can continue the remaining obligations stipulated by the Divorce Decree (e.g., spousal support, child support, children's medical insurance premiums, private school and college expenses, activity costs, payments for a business/property buyout, etc.) if the Payor becomes disabled.

Policy Payment Structure

The policy has a 90 day elimination period and then begins paying the monthly obligation, as dictated by the Divorce Decree, for a maximum period of 60 months.

If the obligation to pay continues after 60 monthly payments have been made, the total of the remaining payments stipulated by the Divorce Decree will be paid in a lump sum.

Sample Case Study: Divorce with 2 minor children ages 8 and 5

The Divorce Decree requires:

- Spousal Support: $6,000 × 36 months = $216,000
- Spousal Support: $4,000 × 24 months = $ 96,000
- Child 1: $1,250 × 120 months = $150,000
- Child 2: $1,250 × 156 months = $195,000
- $500 (medical insurance premium) × 156 months = $78,000
- Total college obligation $160,000 ($20,000 per year, for 4 years, for each child)
- Total obligation: $895,000

Since the policy doesn't begin making payments until the insured has been totally disabled for 90 days, the first benefit payment is made 4 months after the insured is disabled. Benefits are paid monthly for a maximum period of 60 months. If the unpaid obligations of the Payor continue beyond the 60 month payout period, the balance of the payments owed are paid in a lump sum when the monthly benefit payout stops (64 months after the onset of disability).

The policy benefit is reduced each month as the Payor makes payments to the Recipient. The sample illustration below shows the payout if the insured is disabled in months 1, 2, or 3 after the policy is issued.

- If the insured is disabled the first month after the policy is issued:
  1. The initial payout is $9,000 per month, months 4 through 36.
  2. In month 37, the alimony decreases from $6,000 to $4,000 per month. The monthly payout is reduced by $2,000 per month, to $7,000, in months 37 through 60.
  3. In months 61 through 63 the policy pays child support and medical insurance, totaling $3,000 per month.
  4. In month 64 the unpaid obligations total $394,000, which is paid in a lump sum.
- If the insured is disabled the second month after the policy is issued:
  1. The policy pays $9,000 per month for one month less, months 4 through 35, to account for the $9,000 payment the Payor made to the recipient before being disabled.
  2. The $7,000 monthly payment still pays for 24 months, months 36 through 59.
  3. The $3,000 payment pays for 4 months, months 60 through 63 (instead of 3 months).
  4. The lump sum benefit is reduced to $391,000 since the $3,000 monthly benefit pays for 4 months instead of 3.

A full policy illustration showing the payout for each month of the 60 month term of the policy is provided with every premium quote and included with each policy issued. Below is a

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

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The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

Layout and technical assistance provided by Creative Services at the Oregon State Bar.

Publication Deadlines

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

Deadline	Issue
April	3/15/16

sample showing the payout for disabilities occurring in months 1, 2 or 3.

Schedule of Benefits, based on Month of Term in which Disability Occurs

Divorce Settlement — Accident & Sickness Temporary and Permanent Total Disability

Benefit Schedule for Month 1	
Months 4 through 36	$9,000/mo
Months 37 through 60	$7,000/mo
Months 61 through 63	$3,000/mo
then lump sum at 64 mos	$394,000

Benefit Schedule for Month 2	
Months 4 through 35	$9,000/mo
Months 36 through 59	$7,000/mo
Months 60 through 63	$3,000/mo
then lump sum at 64 mos	$391,000

Benefit Schedule for Month 3	
Months 4 through 34	$9,000/mo
Months 35 through 58	$7,000/mo
Months 59 through 63	$3,000/mo
then lump sum at 64 mos	$388,000

Renewing the Policy

Hanleigh/Lloyd's of London cannot issue a policy for longer than a 5 year term. This means 5 years after the policy is issued, the policy would be rewritten and would insure the remaining obligations of the Payor. The policy would have a new premium based on age, health, and outstanding obligations at the time of renewal. The insurance carrier cannot refuse to issue a renewal policy. However, they can waive specific medical conditions and/or rate (charge extra premium) based on changes in medical history from the original application date.

Divorce Settlement Disability Policy — Sample Annual Premiums

The annual premiums illustrated in the table below are for the coverage described in the example above, assuming the insured is age 45 when the policy is purchased. The premium schedule is guaranteed not to change for the 5 year term of the policy. The premium actually decreases every year because the policy's benefit reduces as the Payor's total obligation is reduced with each payment he/she makes to the Recipient.

The Surplus Lines taxes are a tax the insurance company must pay to the state insurance department, in the state where the policy was sold. These taxes vary from state to state but not significantly.

The policy fee is a fee that is charged by the insurance company for the issuance and maintenance of the policy. These also vary from state to state.

The illustration below assumes the policy was issued in Oregon. Premiums vary based on the state of issue, age, and health of the insured.

This is the first 5 years of premium
if the policy was issued at age 45

Policy Year	Base Premium	Surplus Lines Taxes/Fees	Total Premium
1	$2,095.00	$267.79	$2,362.79
2	$1,827.00	$261.62	$2,088.62
3	$1,542.00	$255.07	$1,797.07
4	$1,293.00	$249.34	$1,542.34
5	$1,080.00	$244.44	$1,24.44

Premiums were run for the state of Oregon; occupation class Executive. The base premium is the same for all states; the taxes and policy fees vary by state.

This premium illustration is to give you an idea of the pricing of the policy. In this example the total payout is a maximum of $868,000 and the first year annual premium is only $2,362.79. If the insured buys the coverage and is older than 45, all 5 years' premiums will be higher. If the insured is younger than 45 the premiums will be lower.

A few more facts about the policy

- The coverage can be purchased in addition to all other disability insurance insuring the Payor. The benefits from this policy are not reduced by any other disability benefits received and are not an offset against other disability income insuring the Payor.
- The coverage can be negotiated as part of the settlement agreement and its terms written into the decree or purchased after the divorce is final.
- Premiums can be shared or paid by either party.
- The owner and beneficiary of the policy can be either party.
- Each party can own and be the beneficiary of a policy (i.e., the Payor buys a policy insuring Child Support and the Recipient buys a policy insuring Spousal Support).
- The first $1,000,000 of total benefit is available "modified guaranteed issue" (MGI), if the Payor is under age 65. This means a medical exam, blood test, and full medical history are NOT required.

Whether you are a Family Law Attorney, Mediator, CDFA, or CPA, it's your responsibility to educate your clients and help them make sound financial decisions regarding their divorce. This coverage offers a way for both the Payor and Recipient to protect themselves from the financial devastation that results if the Payor is disabled. There's no downside to the coverage…it's affordable, protects both parties, eliminates the need to go back to court, is not coordinated with or offset by any other disability insurance owned by the Payor, and it's flexible enough to be weaved into the Divorce Decree any way the divorcees and/or their advisors desire. Even if the divorce is already over, the policy can be purchased to cover the remaining obligations.

People can find out about this coverage from their friends, the internet, advertisements, their financial planners, or their insurance agent. You are the expert in divorce and your clients should hear about this option from you. For more information visit DSI's website www.gotodsi.com/divorce or contact Bill Pollock, President of Disability Specialists, at 800-279-8304 ext. 2003, or email wpollock@gotodsi.com.

This summary is not intended to be nor should be construed as legal or tax advice. You should consult with the appropriate legal or tax professional regarding all legal and tax questions.

William Pollock, President Disability Specialists Inc. (DSI), founded DSI in 1987. DSI worked financial advisors on a national basis helping them design disability programs for their high income clients. DSI is also the plan administrator for the Financial Services Institute (FSI) CoveredAdvisor Disability Program. FSI is an association of over 100 of the largest independent Broker Dealers in the country. DSI manages the disability program that is offered to the financial advisors licensed with these broker dealers. DSI is also

TAXES AND MILITARY PENSIONS: THE LONG AND SHORT OF IT

by Mark E. Sullivan

Direct Payments When Possible

In a military divorce case, the nonmilitary spouse will often be concerned about pension share payments and taxes. She will invariably want to receive pension division payments direct from the retired pay center. For the Army, Navy, Air Force and Marine Corps, this is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

In the usual case, attempts to get the hypothetical servicemember, Colonel John Doe, to write a monthly pension share check to his ex-wife once he has retired may be an exercise in futility. Suppose he retires in another state. What if his retirement residence is in Germany or Japan? If he retires elsewhere, or if he insists on moving around from place to place, it will be virtually impossible for the former spouse to collect her share each month.

Direct pension payments by garnishment benefit COL Doe as well as his ex-wife. He needs to know that, with a garnishment, the military does the appropriate withholding before sending out checks. The ex-wife's share of his military pension is automatically excluded from his taxable income. He receives (as

she does) a Form 1099-R each January showing what the taxable income is for the prior tax year. He doesn't need to keep track of writing a check every month to send it to his former spouse.

When Direct Payments Are Not Possible

But sometimes it is not possible to obtain payments through the military retired pay center. Pension garnishment payments for property division cannot be made through the pay center when there is not a 10-year overlap of the marriage and the period of creditable service.[1] In addition, there will be another gap of up to 90 days at the start of the pension garnishment process, to account for review and processing of the military pension division order (MPDO).[2] What good guidance can be given to Colonel Doe and his former wife in these situations?

Good Guidance Needed

Don't expect that guidance from most lawyers. Few of them know a lot about the tax consequences of periodic payments from the former employee to the alternate payee in regard to division of a deferred compensation program. One premier family law attorney, when asked why she'd told her client there were no taxes due as to the receipt of monthly pension share payments from a Navy retiree, replied to this author, "because the payments are part of property division, not alimony, and everyone knows that property division payments are not taxed under Section 1041 of the Internal Revenue Code." It is, of course, true that property transfers between spouses under 26 U.S.C. 1041 are not subject to capital gains taxes, but this has no relationship to the issue at hand, which is pension-share payments from a military retiree to a former spouse.

Don't expect guidance from appellate decisions in domestic cases involving pension division either. When higher courts mention tax aspects of pension division payments, which is rarely, they usually get it wrong. Two state court decisions, from the highest court in each state, approved of the division of the pension payment received by the retiree *less taxes* for the proper distribution of marital retirement benefits upon divorce.[3] The Utah Court of Appeals in 2012 ruled that the military pension should be divided after the deduction of federal and state taxes.[4] In 1995 the Superior Court of New Jersey, Appellate Division, reviewed without criticism or comment a trial-level judgment for military pension division that allocated "the Husband's retirement pension less only Federal, State, or local Income Taxes properly withheld required by law…."[5] In a 2011 decision, the Kentucky Court of Appeals affirmed a trial-level order which required the retiree to "withhold from the retirement benefits otherwise payable to [the former spouse]… a sum sufficient to pay all taxes imposed on [the retiree]… for that portion of his retirement…."[6] A rare exception is found in *Brown v. Brown*, a 2010 trial-level decision from Connecticut.[7] At the end of the decision, the judge wrote that "the court is under the assumption that the plaintiff [the retiree] will be able to deduct the full amount of that payment from his 2010 income tax return and the defendant [the former spouse] will be required to pick up that full payment on her 2010 income tax return."[8]

How to Do It

The *Brown* decision illustrates the correct approach. When the pension is divided in a written instrument and the payments end no later than the death of the payee, the military retirement payments are includable in the gross income of the payee, and they are excludable from the payor's income.

A Tax Court case in 2000 confirms this. In *Baker v. Commissioner*,[9] the ex-husband was a military retiree. He was ordered in the divorce decree to pay his ex-wife 50% of his military retired pay each month as part of property division. He made payments to her and deducted these as alimony on his Form 1040; his ex-wife did not report the payments as income, claiming that "the payments she received … were in furtherance of a division of property and should be excluded from her income" under IRC Section 1041. The Tax Court ruled against her, stating that:

1. IRC Section 61 defines gross income as all income from whatever source, including alimony;
2. Whether a payment is alimony is determined by reference to Section 71;
3. Section 71(a) states that any amount received as alimony is included as income;
4. Sec. 71(b)(1) defines alimony as payment under the following terms –
    a. Any cash payment
    b. Received by a spouse under a divorce or separation instrument
    c. Which doesn't designate the payment as *non-includable* within gross income under Section 71 and *non-deductible* under Section 215
    d. And the parties are not members of the same household when the payment is made, and
    e. There is no liability to make any payment after death of the payee spouse;

Thus if a payment satisfies all these factors, it is alimony. Here the Tax Court found that the direct payments from the retiree to his ex-wife were alimony (as the tax rules define it), even though intended as property division, and they were includable in the ex-wife's gross income.

The *Baker* case is not unique. Numerous other cases make the same point – the periodic pension-share payments made

1 10 U.S.C. § 1408 (d)(2).

2 Id.

3 *Hodgins v. Hodgins,* 126 N.H. 711, 716, 497 A.2d 1187, 1190 (1985); *Majauskas v. Majauskas,* 61 N.Y.2d 481, 487-88, 474 N.Y.S.2d 699, 702, 463 N.E.2d 15, 18 (1984).

4 *Johnson v. Zoric,* 2012 UT App. 22, ¶22-23, 270 P.3d 556 (2012), aff'd in part *Johnson v. Zoric,* 2014 UT 21, 330 P.3d 704 (2014).

5 *Torwich v. Torwich,* 282 N.J. Super 524, 525, 660 A.2d 1214 (1995).

6 *Guest v. Smith,* 2011 Ky. App. Unpub. LEXIS 913 at *5, 2011 WL 6412065 (2011).

7 *Brown v. Brown,* 2010 Conn. Super. LEXIS 1348; 2010 WL 2698272 (2010)

8 *Id.* at *14.

9 *Baker v. Commissioner,* T.C. Memo 2000-164.

from retiree to former spouse are included in her income and excluded from his.[10]

When the retired pay center does not make direct payments to the former spouse, Colonel John Doe will need to make the payments to his ex-wife directly. He will have tax withheld on the entire amount that he received. He can exclude from his income any amount he paid her pursuant to the decree or agreement. His ex-wife is liable for taxes on the share of the pension that she received, and she should include the payments in her gross income.

How is this done? The payor's payment may be entered as a negative number on the face of Form 1040 at Line 21 as "Other income," as a negative at Line 16a, "Pensions and annuities" or at Line 31a, "Alimony paid."[11] He should, of course, attach to the tax return an explanatory note, along with appropriate documents to back up his position.

What about income for recipient? John Doe's ex-wife will complete her own Form 1040 and this would show the payments which she received from Colonel Doe, pursuant to a written instrument, which are the division of this defined benefit program. She would reflect the gross amount paid to her by John under "Pensions and annuities," which is line 16a.

To cover these contingencies, consider a clause in the court order or settlement document that says:

> Periodic payments made by Husband directly to the Wife which are not done by garnishment through the military retired pay center will be included in Wife's income under Sections 61 and 71 of the Internal Revenue Code, and these payments are likewise excluded for Husband from his gross income.

At the end of this paragraph, the drafting attorney may choose to insert the citations shown herein as authority for this clause.

State Income Taxes

While military retired pay is always subject to federal income taxation, one should not make the same conclusion in regard to state taxation. The states of Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming have no individual income tax, while New Hampshire and Tennessee only tax income derived from interest and dividends. Of the remaining states, about 16 have special rules for exemptions regarding military pensions. North Carolina, for example, grants a full exemption for retired military personnel who have five years of service as of August 12, 1989, and otherwise there is a deduction of up to $4,000 (for joint tax filers the limit is $8,000). The chart at Appendix 1 showing the special exemption rules is taken from www.military.com.

Attorney Fees

On a related tax note, a former spouse receiving or trying to get a share of military retired pay should always be advised about the possible deduction of legal fees for work done on obtaining a portion of the military pension. After all, the pension payments are taxable income for the former spouse. And the legal work was done, and fees paid, toward the production of taxable income.[12] The former spouse should be sure to ask her tax preparer as to whether this is a deductible expense and, if so, how much may legitimately be claimed as a deduction.

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

10 *Pfister v. Comm'r,* 359 F.3d 352 (4th Cir. 2004), aff'g. T.C. Memo. 2002-198; *Proctor v. Comm'r,* 129 T.C. 12 (2007); *Mitchell v. Comm'r,* T.C. Summary Opinion 2004-160; *Weir v. Comm'r,* 82 T.C.M. 281 (2001); *Mess v. Comm'r,* T.C. Memo 2000-37; *Eatinger v. Comm'r,* T.C. Memo 1990-310.; and *Lowe v Comm'r,* 42 T.C.M. 334 (1981).

11 *See,* e.g., Bruce M. Bird and Marcia Sakai, "Structuring Payments as Deductible Alimony" The CPA Journal (New York Society of CPAs), August 2008.

12 Reg 1.162-2(b)(7): "Generally, attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or the wife. However, the part of an attorney's fee and the part of the other costs paid [by the wife] in connection with a divorce, legal separation, written separation agreement, or a decree for support, which are properly attributable to the production or collection of amounts includible in gross income under section 71 are deductible by the wife under section 212."

CASENOTES

OREGON APPELLATE DECISIONS

February 2016 Edition, OSB Family Law Newsletter
Family Law Opinions: Dec. 2015 – Jan. 2016

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

SUPREME COURT

There were no family law decisionss from Supreme Court during this period.

OREGON COURT OF APPEALS

Child Support

In the Matter of the Marriage of Roy Mack MERRITT, Petitioner-Appellant and Shelly Ann ALTER, nka Shelly Ann Bernier, Respondent-Respondent, and STATE OF OREGON, Third Party, and Zachary Makiah MERRITT, Adult Child-Respondent, 275 Or App 853 (2015)

Marion County Circuit Court 01C30948; A153895 Vance D. Day, Judge

http://www.publications.ojd.state.or.us/docs/A153895.pdf

Nakamoto, J.

In this domestic relations case, father appeals two supplemental judgments. Father obtained an order for mother and the state to show cause why the court should not, among other things, order mother to refund overpayments of child support that he allegedly had made. The court held an evidentiary hearing on that issue, and, after father rested, mother moved for a judgment of dismissal under ORCP 54 B(2). The trial court agreed with mother that father had failed to establish a prima facie case and entered a supplemental judgment. The court also awarded mother her attorney fees under ORS 107.135(8) in an additional supplemental judgment.

Held: (1) Father failed to establish a prima facie case of overpayment of child

support, and, therefore, the trial court did not err in granting mother's motion for a judgment of dismissal. (2) The trial court did not err in awarding mother attorney fees. Affirmed. COA 12.30.15

Custody; Psychological Parent

In the Matter of the Marriage of Adam Joseph SOUTHARD, Petitioner-Respondent, and Kirsten Robine LARKINS, Respondent-Appellant, and Jeffery LARKINS, Intervenor-Respondent, 275 Or App 538 (2015).

Multnomah County Circuit Court 120464547; A158190 Paula J. Kurshner, Judge.

http://www.publications.ojd.state.or.us/docs/A158190.pdf

DeVore, J.

Mother appeals a supplemental judgment that continued an earlier custody award to Southard of three children, H, S, and AR. With the supplemental judgment, the trial court denied mother's motion to modify custody and granted Southard's motion for custody of AR as a "psychological parent" pursuant to ORS 109.119.

Held: The trial court did not err in concluding that Southard had a parent-child relationship with

AR, that Southard had rebutted the presumption that mother acts in the best interest of the child, and that granting custody to Southard was in AR's best interest. Affirmed. COA 12.16.15

Jurisdiction; Personal

In the Matter of the Marriage of Katheryn J. VAUGHN, nka Shirley V. Vaughn, Petitioner-Appellant, and Donald J. VAUGHN, Respondent-Respondent, 275 Or App 533 (2015).

Lane County Circuit Court 159914910; A157678 Charles D. Carlson, Judge

http://www.publications.ojd.state.or.us/docs/A157678.pdf

DeVore, J.

Mother appeals a judgment entered after the circuit court dismissed her motion to modify a judgment of dissolution of marriage. She argues that the court erred in determining that it did not have personal jurisdiction over father, because the court maintained personal jurisdiction for the purpose of modifying an earlier child support order that was part of the judgment of dissolution of marriage.

Held: The trial court erred in determining that it did not have personal jurisdiction over father for a continued proceeding under the parties' dissolution of marriage caption. Reversed and remanded. COA 12.16.15

Jurisdiction; Void Marriage; Custody

In the Matter of the Marriage of Adam Joseph SOUTHARD, Petitioner-Respondent, and Kirsten Robine LARKINS, Respondent-Appellant. Jeffery LARKINS, Petitioner-Respondent, v. Kirsten Robine LARKINS, Respondent-Appellant, and Adam Joseph SOUTHARD, Respondent-Respondent, 275 Or App 89 (1915)

Multnomah County Circuit Court 120464547, 130565220; A155057 (Control), A156528 Amy Holmes Hehn, Judge. (General Judgment) Paula J. Kurshner, Judge. (Dissolution Judgment)

http://www.publications.ojd.state.or.us/docs/A155057.pdf

DeVore, P. J.

In this consolidated appeal, mother appeals a judgment that dissolved her marriage to Southard and granted him custody of AR and two other children. Mother also appeals the court's order denying her motion under ORCP 71 to set aside the dissolution judgment for lack of a valid marriage to Southard. Mother challenges the court's authority to have awarded custody in a dissolution of an allegedly invalid marriage as if in an ordinary dissolution. Mother also argues that the court abused its discretion in awarding custody of AR to Southard when he was the legal but apparently not the biological father.

Held: The trial court did not err in rendering its judgment of dissolution. The court had authority to issue the dissolution judgment and award custody because there was no timely evidence that the marriage was void. The court did not abuse its discretion in its determination of custody, and it did not err in denying mother's motion for relief from judgment. Affirmed. COA 12.02.15

Spousal Support

In the Matter of the Marriage of Wendi Rae CARLETON, Petitioner-Appellant, and Gregory George CARLETON, Respondent-Respondent, 275 Or App 860 (2015).

Klamath County Circuit Court 1000803CV; A154079 Dan Bunch, Judge

http://www.publications.ojd.state.or.us/docs/A154079.pdf

Nakamoto, J.

Wife appeals a dissolution judgment, assigning error to the trial court's failure to (1) include accelerated depreciation expensed by husband's partnership in determining husband's "actual income" for purposes of calculating child support, as required by a provision in the Oregon Child Support Guidelines and (2) award spousal support to wife as a result of the trial court's erroneous determination of husband's income.

Held: The trial court did not err in calculating husband's actual income, because it applied the formula in the guidelines for determining husband's child support obligation and correctly determined that the evidence did not establish what amounts of depreciation were accelerated. Accordingly, the trial court's decision not to award wife spousal support was not based on an erroneous determination of husband's income. Affirmed. COA 12.30.15

In the Matter of the Marriage of Keith W. HARLESS, Petitioner-Appellant Cross-Respondent, and Susan E. HARLESS, nka Susan E. Schneider, Respondent-Respondent Cross-Appellant, 276 Or App 49 (2016)

Deschutes County Circuit Court 98DO0545MA; A156577 Barbara Haslinger, Judge.

http://www.publications.ojd.state.or.us/docs/A156577.pdf

Garrett, J.

Husband appeals the denial of his motion to terminate an award of indefinite spousal support and the entry of a supplemental judgment that reduced but did not terminate that award. He contends that the trial court erred when it found that the "original purpose" of the spousal support award was to "equalize the parties' incomes," and that the trial court's modification of the award was premised on that erroneous finding. Wife cross-appeals, assigning error to the trial court's downward modification of the award.

Held: The trial court erred. On appeal, the parties agree that the trial court's finding that the purpose of the spousal support award was to "equalize the parties' incomes" is not supported by evidence in the record. That error explicitly formed the basis for the trial court's ultimate determination as to whether modification or termination of the award was just and equitable. Thus, the trial court abused its discretion in modifying the spousal support award. On appeal, vacated and remanded; cross-appeal dismissed as moot. COA 012116

Elderly Persons and Persons with Disabilities Abuse Prevention Act

James DECKER, Petitioner-Appellant, v. Nancy KLAPATCH, Respondent-Respondent, 275 Or App 992 (2015).

Josephine County Circuit Court 13DR0951RO; A155498 Lindi L. Baker, Judge

http://www.publications.ojd.state.or.us/docs/A155498.pdf

Tookey, J.

Petitioner appeals from an order dismissing a restraining order he obtained against respondent under the Elderly Persons and Persons with Disabilities Abuse Prevention Act, ORS 124.005 to 124.040. Petitioner assigns error to the trial court's denial of his motion to continue, which the trial court based on time constraints, and which deprived petitioner of the opportunity to present his only witness.

Held: The trial court abused its discretion by denying petitioner's motion to continue. Based on the record before the court, granting petitioner's motion for a continuance would have imposed a minimal burden on the court system while also ensuring that petitioner had a fundamentally fair opportunity to present his case. Reversed and remanded. COA 12.30.15

Note: this is a decision out of Kentucky. Although we do not usually publish notes on decisions outside Oregon this decision may be of particular interest. Here the Kentucky Supreme Court recognized "lethality factors" the court could consider when ruling on a protective order.

FAPA Proceedings

In the Supreme Court of Kentucky

Case 2013-CA-001347-ME

Jeffrey Pettingill v. Sara Pettingill, __ Ky __ (2015)

Opinion: Justice Keller

Jefferson Circuit Court decision affirmed. The court entered a "domestic violence order" (DVO) against Jeffrey Pettingill. In determining the threat of harm presented by Pettingill the court considered certain "lethality factors". Pettingill appealed to the Court of Appeals who affirmed. Pettingill appealed to the Supreme Court which affirmed.

The trial court found that 9 out of 12 top lethality factors in intimate partner violence occurred in this case including:

1. Offender abused a family pet;
2. Offender stalked the victim;
3. Offender threatened the victim's life;
4. Offender showed possessive-jealous behavior monitoring the victim's cell phone;
5. Offender damaged victim's property;
6. Offender made rules to control victim;
7. Offender purchased a firearm despite a felony conviction;
8. Offender has a felony conviction;
9. The parties had recently separated.

The Court found that the trial court could consider these factors based on the judge's knowledge of such risk factors and that there was no constitutional violation.

Note on Opinions Reviewed:

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