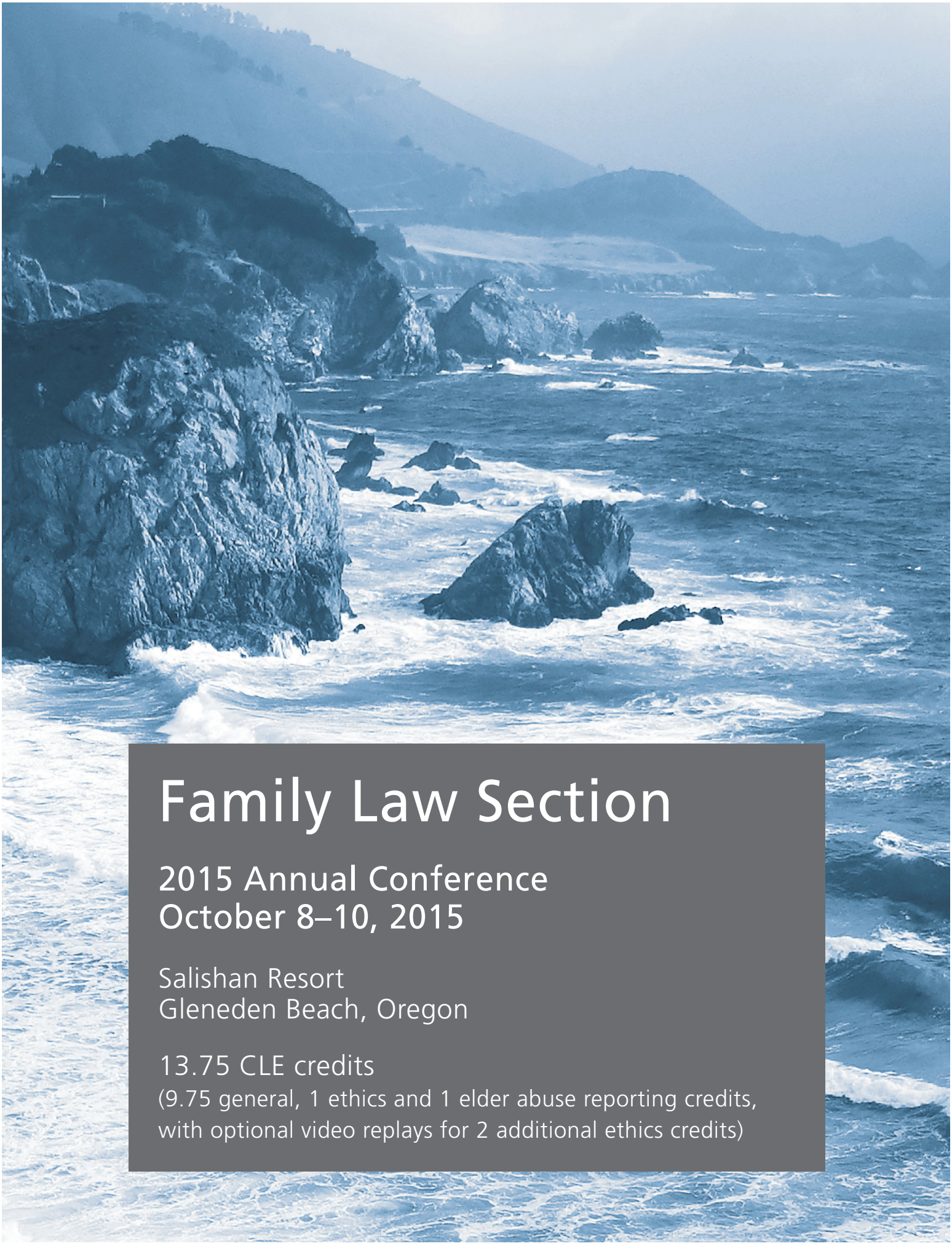


Family Law Section

2015 Annual Conference
October 8–10, 2015

Salishan Resort
Gleneden Beach, Oregon

13.75 CLE credits
(9.75 general, 1 ethics and 1 elder abuse reporting credits, with optional video replays for 2 additional ethics credits)

Table of Contents

2015 Family Law Annual Conference

All CLE presentations in the Long House unless otherwise stated.
Live video for overflow seating available in other rooms.

Moderator: The Honorable Jack Landau

THURSDAY, OCTOBER 8, 2015

6:00 to 8:30 p.m.	Registration Table Open *(Council House)*
6:00 to 9:00 p.m.	Vendors Available *(Council House)*
7:00 to 9:00 p.m.	President's Reception (No-Host Bar) *(Council House)*

FRIDAY OCTOBER 9, 2015 - MORNING

6:30 to 8:00 a.m.	Lap Swimming Available *(Pool)*
7:00 to 10:30 a.m.	Registration Table Open *(Council House)*
7:00 to 8:25 a.m.	Vendors Available *(Council House)*
7:00 to 8:25 a.m.	Breakfast Buffet Available *(Cedar Tree Restaurant and Council House)*
7:00 to 8:00 a.m.	Ethics – Staying in Business for Fun and Profit *(CLE Video Replay in Pine Room)*

8:00 to 9:00 a.m.	Effective Use of Vocational Experts: A Review of Credentials, Standard Methods, and Review of Common Potential Barriers to Employment *Scott T. Stipe MA, CRC, CDMS, LPC, IPEC, ABVE-D;* *Career Direction Northwest, Portland*
9:00 to 10:15 a.m.	Deconstructing the Process of Conflict: How to Support Clients Without Losing Yourself *Joseph Shaub, MA, JD; Bellevue, WA*
10:15 to 10:30 a.m.	Morning Break *(Beverages and Snacks in Council House)*
10:30 to 11:30 a.m.	QDROphenia: The WHO, What, When, Where & How of QDROs/DROs: Indispensable Basics for General Divorce Practitioners – Case Inception to General Judgment *Stacey D. Smith; Spinner Law Group, Eugene* *Kevin Burgess; Watkinson Laird Rubenstein, Eugene*
11:30 to 12:00 p.m.	Legalization of Marijuana and the Impact on Family Law *Amy Margolis; Emerge Law Group, Portland*

FRIDAY OCTOBER 9, 2015 - AFTERNOON

12:00 to 1:15 p.m.	Professionalism and the Family Law Practitioner *The Honorable Richard C. Baldwin; Oregon Supreme Court* Presentation of Professionalism Award to Paul DeBast
1:15 to 2:15 p.m.	Elder Abuse: New Mandatory Reporting Requirements *Amber Hollister; Oregon State Bar, Tigard* *Ellen Klem; Department of Justice Attorney General's Office, Salem*
2:15 to 3:00 p.m.	Social Media: Hit the "Like" Button for Use of Social Media in Your Cases *Matthew Levin; Markowitz Herbold PC, Portland*

3:00 to 3:15 p.m.	Afternoon Break *(Beverages and Snacks in Council House)*
3:15 to 4:00 p.m.	Making "Them" Pay: Enforcing Judgments and Collecting on Fee Agreements *Christopher N. Coyle; Vanden Bos & Chapman LLP, Portland*
4:00 to 5:00 p.m.	Addressing Taxes Throughout a Dissolution Case *Jessica McConnell; Greene & Markley PC, Portland* *Donald Grim; Greene & Markley PC, Portland*
5:00 to 5:20 p.m.	Family Law Section Business Meeting *(Long House)* *Debra Dority, Chair, Oregon State Bar Family Law Section*

FRIDAY, OCTOBER 9, 2015 - EVENING

5:45 to 7:00 p.m.	Buffet Reception (No-Host Bar) *(Council House)*
5:45 to 7:00 p.m.	Vendors Available *(Council House)*

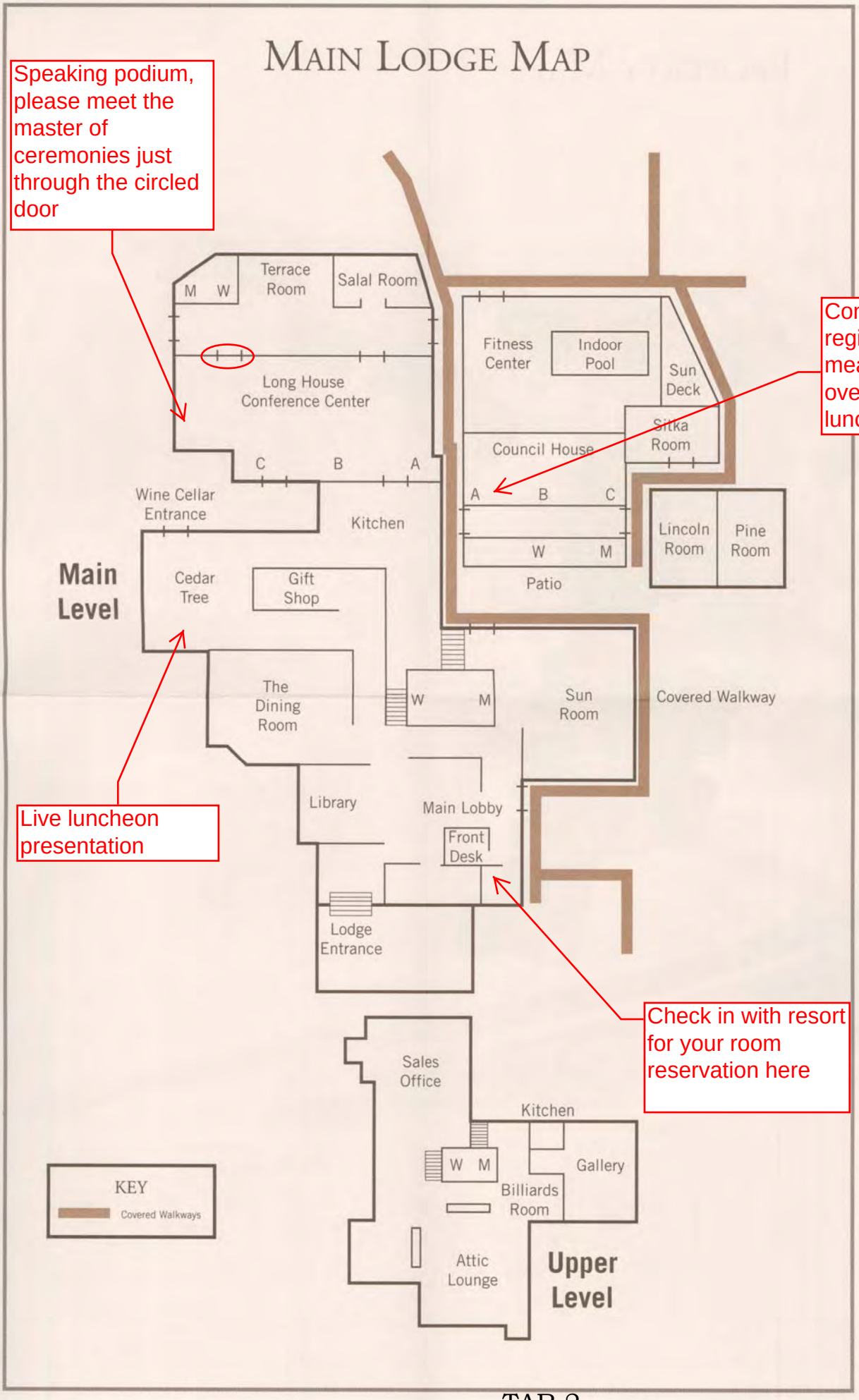
SATURDAY, OCTOBER 10, 2015 - MORNING

6:00 to 8:00 a.m.	Lap Swimming Available *(Pool)*
7:00 to 8:25 a.m.	Registration Table Open *(Council House)*
7:00 to 8:25 a.m.	Vendors Available *(Council House)*
7:00 to 8:25 a.m.	Executive Committee Meeting *(Sitka Board Room)* *(Committee Members Only Please)*

7:00 to 8:25 a.m.	Breakfast Buffet *(Council House)*
7:00 to 8:00 a.m.	Ethics – Conflicts and Confidentiality After a Death *(CLE Video Replay in Pine Room)*
8:00 to 8:45 a.m.	The Road To and From Third Party Custody: ORS 109.119 or Guardianships? Modifications and Terminations *Mark Kramer; Kramer & Associates, Portland*
8:45 to 9:45 a.m.	Your Ethics Wake-Up Call *John Barlow; Barnhisel Willis Barlow Stephens & Costa, P.C., Corvallis*
9:45 to 10:00 a.m.	2016 Family Law Conference Section Update and Preview
10:00 to 10:15 a.m.	Break *(Beverages and Snacks in Council House)*
10:15 to 11:00 a.m.	Introducing the Birth Through Three Bench Card *The Honorable Paula Brownhill; Clatsop County Circuit Court, Astoria* *Dr. Adam L. Furchner, Ph.D; Portland*
11:00 to 11:30 a.m.	Legislative Update *Ryan Carty; Saucy and Saucy, P.C., Salem*
11:30 to 12:30 p.m.	Family Law Appellate Case Review *The Honorable James C. Egan; Oregon Court of Appeals*
12:30 p.m.	**Conference Adjourns**

Conference Chair: Stephanie F. Wilson
Conference Committee Members: Lauren Saucy, Laura Rufolo, Jennifer Brown

Main Lodge Map



CURRICULUM VITAE

SCOTT T. STIPE MA, CRC, CDMS, LPC, IPEC, D/ABVE

1425 SE 46th Avenue
Portland, Oregon 97215
(503) 234-4484 - Office
(503) 234-4126 - Fax
(503) 807-2668 - Cell

EDUCATIONAL BACKGROUND

Master of Arts - Rehabilitation Counseling
University of Northern Colorado
Granted 1979 (4.0 GPA)
Commission on Rehabilitation Education (CORE) accredited
Vocational Rehabilitation Counselor Education Program

Post-Graduate Coursework
Oregon Graduate School of Professional Psychology
Pacific University

Bachelor of Science - Psychology
Portland State University - Portland, OR
Granted 1977

Undergraduate Coursework
Whitman College-Walla Walla, WA
1972-73. Economics/Psychology

LICENSURE

LICENSED PROFESSIONAL COUNSELOR
State of Oregon - Board of Licensed Professional
Counselors and Therapists

CERTIFICATIONS

DIPLOMATE, AMERICAN BOARD OF VOCATIONAL EXPERTS
American Board of Vocational Experts (D/ABVE)

CERTIFIED REHABILITATION COUNSELOR
Commission on Rehabilitation Counselor Certification (CRC)
Chicago, IL
Certified Since 1980

INTERNATIONAL PSYCHOMETRIC EVALUATION CERTIFICATION
American Board of Vocational Experts (IPEC)

CERTIFIED DISABILITY MANAGEMENT SPECIALIST)
Certification of Disability Management Specialists Commission
Chicago, IL (CDMS)
Certified since 1984

CERTIFIED VOCATIONAL EXPERT
Social Security Administration
Office of Disability Adjudication and Review
Certified Since 1984

REHABILITATION COUNSELOR CERTIFICATION
United States Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Vocational Rehabilitation (1987-2000)
Authorized for vocational testing services only to OWCP (2005-present)

VOCATIONAL ASSISTANCE COUNSELOR CERTIFICATION
State of Oregon
Workers' Compensation Division
Certified since 1979

VOCATIONAL ASSISTANCE PROVIDER
State of Oregon
Workers' Compensation Division
Authorized since 1981

CERTIFIED ADMINISTRATOR AND INTERPRETER GENERAL APTITUDE TEST BATTERY by:
U.S. Employment Service Standards
State of Oregon
Certified 1977

AWARDS

PRESIDENTIAL CITATION: AMERICAN BOARD OF VOCATIONAL EXPERTS: 2009.

- **REHABILITATION PROFESSIONAL OF THE YEAR** – 1992
For outstanding service to the Oregon rehabilitation community
Oregon Association of Rehabilitation Professionals in the Private Sector

- **DISTRICT 14 – USDOL/OWCP PLACEMENT (1984)**
Responsible for most placements of approximately 27 counselors in this 4 state USDOL region

- **REHABILITATION SERVICES ADMINISTRATION TRAINEESHIP**
U.S. Department of Health and Human Services - 1977-1979

VOCATIONAL EXPERIENCE

April 1981 - Present — CAREER DIRECTIONS NORTHWEST

Portland, Oregon

President

Manage a professional staff of vocational counselors in up to three offices throughout Oregon. Involved in personnel, marketing, planning and finance. Write proposals for projects and contracts. Provide staff training and evaluation.

Responsible for hiring, training and supervising a total of over sixty five rehabilitation counselors, placement specialists and support specialists over many years. Acted as a qualified internship coordinator for several counseling students through Portland State University's Council on Rehabilitation Education Accredited graduate program in Rehabilitation Counseling.

Senior Rehabilitation Counselor

Provide all phases of vocational rehabilitation services to injured workers and others with physical and nonexertional limitations including eligibility assessment, vocational evaluation, early return to work services, work-site modification services, testing, placement, training plan development and implementation, progress monitoring, medical management, testimony, and follow-up.

Certified Vocational Expert

Provide vocational expert evaluation and testimony under contract to the U.S. Department of Health and Human Services, Social Security Administration. Provide expert testimony in State Workers' Compensation, Longshore, personal injury, divorce, employment, malpractice and other legal settings requiring an opinion as to employability, assessment of earning capacity, labor market issues and household service needs. Projections of future earning capacity, vocational/economic analysis.

Licensed Professional Counselor

Provide personal adjustment and private career counseling, specializing in psychological aspects of disability, work-life planning and improving relationships with co-workers.

June 1980 - April 1981 — INGRAM AND ASSOCIATES
Portland, Oregon

Rehabilitation Counselor

Provide the full range of vocational rehabilitation services to injured workers as is described above. Provide limited vocational expert testimony services. Assisted in development of marketing program. Acted as supervisor of intern counselor.

January 1979 - June 1980 — INTERNATIONAL REHABILITATION ASSOCIATES - Portland, Oregon

Rehabilitation Specialist

Provide full range of vocational rehabilitation services with injured workers and individuals on long-term disability programs. Provide supervisory services to new counselors. Provide vocational testimony services. Chosen by supervisor for recommendation to national offices Presidents Club for outstanding performance in Portland region.

August 1978 - December 1978 — STATE OF OREGON
VOCATIONAL REHABILITATION DIVISION
(Now OVRS) Portland, Oregon

Counselor Intern

Worked with state vocational rehabilitation counselors in eligibility determination. Assisted in evaluation services. Consulted with psychological and medical advisors. Referred clients for testing services, interpreted testing. Assisted with placement services. Authored independent research project in independent living for persons with disabilities. Participated in intensive training program for state VR counselors.

June 1977 - September 1977 — NOVA ENTERPRISES
Pendleton, Oregon

Group Home Manager

Supervised and managed activities of ten developmentally disabled adults in a group home for individuals attending a sheltered workshop program. Maintained behavioral and medication records. Provide counseling and behavior modification services. Teach Independent Living skills and pre-vocational skills.

March 1976 - June 1977 — PORTLAND HABILITATION CENTER
Portland, Oregon

Rehabilitation Aide

Provided instruction in pre-vocational skills to developmentally Disabled adults in this large training oriented sheltered workshop.

SPECIALIZED TRAINING

- Diagnostic and Statistical Manual of Mental Disorders DSM 5. Portland State University
- Continuing Education required to maintain multiple national Board certifications in diverse areas pertinent to:
- Vocational evaluation,
- Vocational testing
- Job development and placement
- Vocational rehabilitation training
- Medical and psychological aspects of disability
- Vocational-economic issues/analysis
- Vocational expert testimony techniques
- Labor market research
- Employment projections
- Analysis of employment/labor market data
- Transferable skills analysis,
- Loss of future earning capacity analysis
- Work life expectancy analysis
- Vocational assessment of minor children
- Valuation of household work
- Life care planning
- Adaptive technology/worksite modification
- Analysis of essential functions-job analysis
- Counseling theory and technique
- Counselor/evaluator ethics
- Cultural differences
- Human resources management
- Assessment of self-employment potential
- Related fields.
- Understanding and Applying Labor Market Information – Brenda Turner, Occupational Economist, Oregon Employment Department
- Vocational Arbiter Training – State of Oregon – Rehabilitation Review Unit
- Specialized training program on vocational rehabilitation of persons with Traumatic Brain Injury (TBI) - Neuropsychology/ Assessment and Counseling. David C. Clemmons, Ph.D. and Robert T. Fraser, Ph.D. University of Washington
- Diagnostic and Statistical Manual of Mental Disorders (DSM IV)- Diagnostic training, Portland State University and Pacific University

- Training in Rehabilitation Services to workers covered under Federal Employees Compensation Act and Longshore and Harbor Workers' Act - U.S. Department of Labor, Seattle, Washington

- Life Care Planning Workshop - Dr. Roger Weed
- Labor Market Access and Wage Loss Analysis - Dr. Timothy Field
- Rational - Emotive Therapy Training -
- Americans with Disabilities Act (ADA) Training - OARPPS
- Marketing Professional Services - Pacific University, Portland, OR
- Back Pain Seminar - Oregon Health Sciences University
- General Aptitude Test Battery Recertification - State of Oregon Employment Division
- Alternatives to Sheltered Workshop Employment – Multnomah County Mental Health
- Reality Therapy - Dr. William Glasser
- Legal Lecture Series in Workers' Compensation - Oregon Self Insurers Association
- Continuing Education Symposium in Emergency Medicine, Occupational Emergencies - Good Samaritan Hospital - Portland, Oregon
- Expert Vocational Testimony - Center for Continuing Education

TESTING CERTIFICATIONS OR COMPETENCIES

- Ability Profiler-USDOL
- General Aptitude Test Battery
- USES Interest Inventory
- Raven Progressive Matrices
- Beck Depression Inventory
- Disability Limitations Checklist
- Slosson Intelligence Test
- Wechsler Adult Intelligence Scale
- Wide Range Achievement Test 3 and 4
- Gates-MacGinitie Reading Test
- California Psychological Inventory
- Myers-Briggs Type Indicator
- Career Orientation Placement and Evaluation Survey
- Self-Directed Search
- Purdue Pegboard
- Career Assessment Inventory
- Strong Interest Inventory
- Career Occupational Preference System
- Experience/training in interpretation of various other psychological, neuropsychological, and vocational testing, work sampling systems.
- Experience training other professionals in appropriate administration and utilization of vocational testing

AFFILIATIONS (Member)

- International Association of Rehabilitation Professionals (IARP)
- American Board of Vocational Experts (ABVE)
- Oregon Association of Rehabilitation Professionals (OARP)
- National Career Development Association (NCDA)
- American Academy of Economic and Financial Experts (AAEFE)
- Society for Human Resource Management (SHRM)

PROFESSIONAL INVOLVEMENT

-DIRECTOR AT LARGE- AMERICAN BOARD OF VOCATIONAL EXPERTS. CHAIR OF CONTINUING EDUCATION (2014-present)

- PRESIDENT - OREGON ASSOCIATION OF REHABILITATION PROFESSIONALS (2001 - 02)

-BOARD OF DIRECTORS MEMBER NARPPS (now INTERNATIONAL ASSOCIATION OF REHABILITATION PROFESSIONALS -IARP). Represented members in the State of Oregon, Washington, Alaska, and Idaho. (1994 – 1998)

- PRESIDENT - Oregon Association of Rehabilitation Professionals (1990-1991)

- **BOARD OF DIRECTORS MEMBER-IARP Social Security Vocational Expert Section. (2009-present)**

-COMMITTEE MEMBER- IARP Occupational Information Development Advisory Committee.

- **CHAIR–IARP Social Security Vocational Expert Taskforce 2004-2009**

- CO-FOUNDER of the IARP Social Security Vocational Expert Group

- CHAIR-Legislative Committee (OARP) (1999 – 2005)

- BOARD OF DIRECTORS - OARP (1988 -1994); (1999 – 2005)

- **CHAIR Conference Committee - OARP 1984**

- **REPRESENTATIVE, Continuing Education - IARP (1990-1994)**

-**COMMITTEE MEMBER**: **American Board of Vocational Experts Test Revision Committee 2008-2009**

-Speaker- 2013 Oregon Association of Defense Counsel (OADC) Fall Seminar: "Using a Vocational Expert"

-Speaker-IARP Forensic Conference: "Absence from Work: Is There an Acceptable Level of Absenteeism?" November 2010, New Orleans, LA. Summary available on website.

-Speaker- Occupational Information Development Advisory Panel
Social Security Administration
: "Perspectives from Vocational Experts
And Case Analysis". 4/28/09. Atlanta, Georgia.

-Speaker-Occupational Information Development Advisory Panel
Social Security Administration: "Occupational Information User
Panel". 4/28/09. Atlanta, Georgia

-Speaker – Social Security Vocational Experts Roundtable. IARP
Forensic Conference 11/01/08. Westin, Florida

- Speaker "Employment and Earnings Data in Relation to Specific
Occupations: Problems and Possible Solutions" Oregon Assoc. of
Rehabilitation Professionals Fall Conference. 10/17/08.

- Speaker, "Special Topics in Vocational Testimony" 17th Annual
Educational Conference. Association of Administrative Law Judges
Portland, Oregon. 08-14-08

- Speaker, "An Update to Vocational Experts- SSA review of Experts"
IARP Forensic conference Scottsdale, AZ 11/3/06.

-Speaker, "Opportunities for Vocational Professionals in the Future with
Social Security Administration. OARP Fall Conference 10/13/06

- Speaker, "An Introduction to the U.S. Department of Labor's O*NET
Ability Profiler". National Rehabilitation Association, Pacific Regional
Conference. June 22, 2004 Boise, ID.

- Speaker, "Forensic Section: Vocational Expert Task Force Review".

IARP 2004 Annual Conference, May 15, 2004 Scottsdale, AZ.

- Speaker, “Vocational Assistance to Injured Workers: A View From Providers” Workers Compensation Management-Labor Advisory Committee, Department of Consumer and Business Services, State Of Oregon. December 16, 2003.

- Speaker, “Social Security Vocational Expert Task Force Update” Task Force meeting at IARP Forensic Section Conference, 2003, San Antonio, TX

- Speaker, OARP 2003 fall conference: “Ability Profiler: An introduction To the “new GATB” with O*NET Overview”

- Speaker, OARP 2003 spring conference: “National Trends in Rehabilitation”

- Speaker- IARP Annual Conference, 2003 Baltimore, Md.: “The Mysterious Life of Vocational Experts in Social Security Administration Hearings”

- Speaker,-IARP Social Security VE Task Force Roundtable, IARP 2002 Annual Conference, San Diego, California

- Speaker- IARP 2002 Forensic Conference “Updates on Vocational Experts in Social Security” Orlando, Florida

- Speaker,-OARP Spring Conference 2001 “The Present State of Vocational Rehabilitation”

- Speaker,-Clackamas Family Lawyers group “Effectively utilizing The Vocational Expert in Determining Employability and Earning Capacity”

- Speaker – Northwest Longshore Administrators Association (NWLAA) Conference 1997. Seattle, Washington “Labor Market Surveys and Ethical Pit Falls”

- Speaker - NARRPS National Conference, Washington, DC: "Current Issues Facing Private Rehabilitation Providers in Oregon" 1991

- Speaker - Longshore & Harbor Workers' Claims Administrators Association - 1990 Conference: "The Role of the Rehabilitation Counselor in Longshore"

- Guest - KOAP-TV Real Time Program: "Discussion of Rehabilitation Issues" 1990

- Guest - KGW Radio: "A Career Counselors View of Career Planning and Salary Issues" 1990

- Guest Interview - KGW-TV: Profile of Career Counseling "How to Deal with Tough Economic Times" series 1991

- Guest Interview KGW-TV regarding Career Change Strategies 1992

- Guest Lecturer - Rehabilitation Counseling 1991 to present. Topics Including "An overview of the private rehabilitation field in Oregon" And "Forensic Vocational Services". Approved by the department as Qualified internship supervisor.

- Interview - Career Marketplace Special Section-The Oregonian 1992

- Guest Lecturer, Drake University - "The Vocational Expert"

- Proctor (Test Administrator) Board for Rehabilitation Certification (CRC, CIRS exam).

- Committee Member, ORCA Certification Maintenance Program-1982

PUBLICATIONS

-Stipe, Scott (In process) "Is There an Acceptable Level of Absence? A Review Of Absence Data and its Impact upon Employability".

- Stipe, Scott T., Dunleavy, Thomas, Broadbent, Emer, Schiro-Geist, Chrisann (2008). An Analysis of Key Characteristics and Practices of Vocational Experts Contracted by the Social Security Administration. *The Rehabilitation Professional* Volume 16 Number 1.

- Stipe, Scott and Dunleavy, Thomas (2006). SSA VE Survey Preliminary Findings. *The Rehabilitation Professional* July/August /September 2006.

- Stipe, Scott (2006) "How to find and Use a Vocational Expert to Support Wage Loss" *Trial Lawyer, Oregon Trial Lawyer's Association*, Winter 2006.

-Stipe, Scott (1998) Use of the Vocational Expert in Motor Vehicle Accident Cases. *Trial Lawyer* (OTLA), Winter 1998.

REFERENCES

Available upon request

Joseph Shaub is an attorney and marriage and family therapist. His Bellevue, Washington, practice concentrates in emotionally focused couples therapy, individual counseling (particularly for attorneys and individuals experiencing divorce), divorce mediation and collaborative divorce coaching. He is a graduate of the University of California, Berkeley and the University of Southern California Law School. He was admitted to the California Bar in 1974 and the Washington Bar in 1995. Joe received his Masters Degree in Marriage and Family Therapy in 1991 from the California Family Study Center. For 12 years, he was an instructor at the University of Washington Law School in *Interviewing and Counseling* and *Negotiation* and he was a co- developer with Dr. Andy Benjamin of the law school seminar *Practical and Ethical Issues in Solo and Small Firm Practice.* Joe has been a bi-monthly columnist on the personal aspects and challenges of lawyering in the King County Bar Bulletin and a columnist for the Washington Association of Marriage and Family Therapists Quarterly Newsletter. He has been approved to provide numerous continuing education workshops for both attorneys and therapists. His book: *Divorce (or Not): A Guide* was published in August, 2015 and is available on Amazon. You may learn more about Joe and his practice by visiting his website: josephshaub.com.

STACEY D. SMITH

Spinner Law Group
747 Blair Blvd.
Eugene, OR 97402
(541) 683-9150
Stacey@spinonlaw.com

Bar Admission

Oregon (1998)

Education

University of Oregon School of Law (J.D. 1998)

- Completed Estate Planning Program
- Admitted to Oregon State Bar 1998

University of California, Irvine (B.A. History - cum laude)

- Humanities Honors Program
- Academic Advisor – UC Irvine School of Humanities (1994 – 1995)
- UC Irvine Humanities Executive Committee (1994 – 1995)

Practice Areas

- (Q)DROs relating to division / assignment of retirement benefits (2002 – present)
- Divorce / Custody matters (1998 – present)
- Estate Planning (1998 – present)
- Independent Adoptions (2000 – present)
- Appellate practice – family law (1999 – present)

Professional Development

- Associate Attorney with Spinner & Schrank (1998 – 2015)
- Associate Attorney with Spinner Law Group (2015 – present)
- Eugene Estate Planning Council (1999 – 2004)
- CLE presenter – various topics (2008 – present)
- Mentor - law students and lawyers
- Lane Co. Court Appointed Special Advocate for Children (1996 – 1999)

Personal Interests

- Family & dogs
- Swimming, skiing and hiking
- Enjoying and supporting national and state parks and wilderness areas
- Reducing carbon footprint
- Personal integrity and inspiring that in others

B. KEVIN BURGESS

WATKINSON LAIRD RUBENSTEIN, P.C.

EDUCATION

- St. Johns College, Bachelor of Arts Degree, 1978

- University of Oregon School of Law, J.D., 1988; Order of the Coif, Moot Court Board; *Oregon Law Review*

PROFESSIONAL

- Watkinson Laird Rubenstein, P.C.
  - Areas of emphasis include drafting QDROs and retirement plans.
  - Frequent speaker on benefit issues.
  - Currently serves as the firm's managing shareholder.

- Martindale-Hubbell BV rated attorney

Amy Margolis completed her Juris Doctorate at the University of Oregon School of Law and Lewis and Clark School of Law with an emphasis in criminal defense. Before law school, Amy studied English Literature and Comparative History of Ideas at the University of Washington. Amy is a member of the American Bar Association, the Federal Bar, and the Oregon State Bar. Before entering practice on her own, Amy worked as a public defender from 2002-2006, as a lobbyist for the Partnership for Safety and Justice, and a lobbyist for the Oregon Criminal Defense Lawyers Association. Along with Amy's successful law practice, her involvement in the Dispensary Rules Advisory Board, the Better People panel on the state of medical marijuana, and her volunteerism with Law School Democrats, the Classroom Law Project, and the Bus Project have earned her the honor of being one of the Oregonian Top Young Attorneys in 2011, 2012, 2013 and 2014.

Amy has been representing people charged with marijuana related offenses for 13 years. She is also a practicing criminal defense attorney in both State and Federal court. Since 2009 Amy has expanded her practice to represent clients in all aspects of the cannabis industry. Amy is particularly interested in the potential pitfalls for marijuana related businesses as we slowly progress to legalization.

In addition to representing cannabis clients, she also founded the Growers PAC and Oregon Growers Association

Amber A. Hollister

Amber Hollister is the Oregon State Bar's deputy general counsel. In her role, she regularly provides prospective ethics guidance to lawyers and serves as in-house counsel for the Bar.

Prior to working for the Oregon State Bar, Ms. Hollister served as deputy general counsel to Governor Ted Kulongoski, and was in private practice at Perkins Coie LLP. She clerked for U.S. District Court Judge Robert H. Whaley.

Ms. Hollister earned her B.A. in Political Science from Reed College and her J.D. from the University of Washington School of Law.

Ms. Hollister currently serves on the Boards of Directors of Oregon Women Lawyers and the Multnomah Bar Association, and as a liaison to the Multnomah Bar Foundation.

Ellen Klem, Director of Consumer Outreach & Education

Email: Ellen.Klem@doj.state.or.us, Phone: (503) 378-6002

Ellen Klem is the Director of Consumer Education and Outreach for the Oregon Department of Justice. Her mission is simple - prevent financial harm to Oregonians, especially older adults, Oregonians whose first language is not English, and students who have incurred significant education related debt. Before joining the Oregon Department of Justice, Ellen worked at the American Bar Association Commission on Law and Aging in Washington, D.C., where she was responsible for research, policy development, advocacy, education, and training. Ellen received her bachelor's degree from James Madison College at Michigan State University and a J.D. from Case Western Reserve University School of Law.

I am a skilled attorney with 11 years of experience in corporate and elder law.

I spent the first 6 years of my career working to strengthen the legal rights of older Americans in Washington, DC. I authored more than 70 publications, including 50 publications for a division of the U.S. Department of Health and Human Services and gave nearly a dozen presentations all across the country to lawyers, judges, academics, legislators, and advocates. I also served as the principal investigator and co-author of "The American Bar Association Legal Guide for Americans Over 50" published by Random House and the "Legal Guide for the Seriously Ill" published by the National Hospice and Palliative Care Organization.

In 2011, I was recruited by a growing software company to become the company's first in-house attorney. I independently negotiated a wide variety of contracts, including mutual non-disclosure agreements, referral and partnership agreements, leasing and rental agreements, independent contractor agreements, consulting agreements, and more than two-hundred and seventy-five software-as-a-service agreements. I also: (a) created and implemented policies, including a competitive intelligence policy, a collections policy, and a technology use policy, and (b) successfully settled two copyright infringement claims made by a large stock photo agency.

In 2012, I worked as a contractor for a software company and an attorney engaged in private practice.

I am currently working for the Oregon Department of Justice in the Office of the Attorney General.

I am also volunteering my time to help establish a 501(c)(3) dedicated to monitoring the guardianship and conservatorship services provided to incapacitated persons in Multnomah County. The charitable organization is based - in part - on the guide I co-authored in 2011 titled, "Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community".

Matthew A. Levin
Shareholder

Markowitz Herbold PC
3000 Pacwest Center, 1211 SW Fifth Avenue
Portland, OR 97204

P: 503-295-3085
F: 503-323-9105

E-mail: MattLevin@MarkowitzHerbold.com

Biography

With more than 20 years of experience litigating in state and federal courts across the country, Matt Levin is a battle-tested trial lawyer who offers a rare combination of strategic vision, courtroom skill, and business acumen. Clients appreciate Matt's proven ability to navigate complex legal disputes in challenging circumstances, while maintaining unparalleled client service and a commitment to excellence.

Matt has represented a wide variety of clients in business litigation, from individuals and local startups to Fortune 500 corporations. Within his general commercial litigation practice, which focuses on contract disputes, employment matters, accounting malpractice and real estate disputes, Matt has also developed a successful sports litigation practice. He has represented Andre Agassi and Shaquille O'Neal in sports business and endorsement matters and global apparel and footwear company, adidas Group, handling its complex litigation needs in the U.S. and internationally.

Balancing plaintiff and defense work, Matt has achieved multimillion dollar awards and settlements for his clients, and has effectively defended against claims of similar size. His success in the courtroom has been recognized by his peers. He is one of Oregon's top 50 attorneys according to *Oregon Super Lawyers* magazine, and has been recognized since 2011 in *The Best Lawyers in America* for commercial litigation. He is a frequent lecturer and author.

Matt is also a leader in his community. Matt has served as the president of the St. Andrew Legal Clinic, which provides domestic relations legal services to low-income families, and helped raise over a million dollars for the clinic as the chair of its fabulous wine auction, the "Taste for Justice." Matt teaches constitutional law and mock trial at Lakeridge High School and sports law at Lewis & Clark Law School.

He has served as a member of the Business Advisory Team to the Oregon Department of Education, an organization comprised of business leaders from across the state helping to create a vision and strategic

plan to improve public education in Oregon. He has also served on advisory committees for the last two Lake Oswego school district superintendents. He has served as president of the First Tee of Portland, which impacts the lives of young people by teaching life skills, character development, family values and personal growth through the game of golf. Matt has been recognized by the Multnomah Bar Association as its "Mentor of the Year."

Experience and Affiliations

- Top 50 Oregon Lawyers, *Oregon Super Lawyers* magazine, 2013 - present
- Best Lawyers in America, 2010 - present
- Mentor of the Year, Multnomah Bar Association, 2010
- Treasurer, Lake Oswego Corporation, 2012 – present
- President, St. Andrew Legal Clinic, 2004 – 2012
- Member, Gus J. Solomon American Inn of Court, 1995 - 2007
- Board member, Federal Bar Association, Oregon Chapter, 2007 - 2008

Education

- University of Michigan Law School — J.D., cum laude, 1994
- University of Michigan — B.S., 1991

Admitted to Practice

- Oregon (2000)
- Washington (2001)
- Michigan (1995)

Christopher N. Coyle
Attorney
Vanden Bos & Chapman, LLP
319 SW Washington St., Suite 520
Portland, OR 97204
503-241-4869
chris@vbcattorneys.com

CURRICULUM VITAE

BIOGRAPHICAL DATA

Christopher N. Coyle, JD
Attorney, Vanden Bos & Chapman, LLP. 2008-Present.

ADMISSIONS

State of Oregon, 2007
United States District Court for the District of Oregon, 2007
United States Tax Court, 2007
State of Washington, 2014
United States District Court for the Western District of Washington, 2014

EDUCATIONAL BACKGROUND

Northwestern School of Law at Lewis and Clark College - JD - 2007
Certificate in Environmental and Natural Resources Law
Managing Editor, Environmental Law Review

University of South Carolina -- B.A. (Journalism and Mass Communication -- 2004)
With Honors from the South Carolina Honors College
Thesis -- Subcultural Ideology

PRESENTATIONS

"Paralegals and Legal Staff: Ensuring Professional Competence, Bankruptcy Basics – What is a Chapter 7/Chapter 13?" Oregon Law Institute CLE Paralegals and Legal Staff: Ensuring Professional Competence, June 12, 2015.

"Bankruptcy?! What Trial Lawyers Should Know." Oregon Trial Lawyers Association, Employment Section Meeting, May 5, 2014.

“Ammunition: Your Arsenal in “Bankruptcy Land” with Justin Leonard. Oregon Law Institute CLE Presentation “Armor, Ammunition, & Ambushes: Bankruptcy and Other Battles in a Struggling Economy,” April 4, 2014.

“Successfully Navigating Bankruptcy: Bankruptcy Basics.” Circuit Court Judges Association, Family Law Committee, October 21, 2013.

“Dealing with Distressed Customers and Supplies: A Bankruptcy Primer for the Non-Bankruptcy Lawyer.” Oregon Law Institute CLE Presentation “Family and Closely Held Businesses”, March 1, 2013.

"Chapter 13: Chapter 13 Potpourri" with Jordan Hantman. Oregon State Bar CLE Presentation "Bankruptcy Basics: The ABCs of Filing Chapter 13", June 15, 2012 (scheduled).

"Loan Modifications, Short Sales, Deed In Lieu, Tax Issues", "Bankruptcy Issues" and "Ethical Considers". Law Review CLE Presentation "The Essentials of Foreclosure Defense", November 15, 2011.

"Judicial Foreclosures - Pleading & Practice", "Loan Modifications, Short Sales, Deed In Lieu, Tax Issues", "Bankruptcy Issues" and "Ethical Considers". Law Review CLE Presentation "The Essentials of Foreclosure Defense", July 21, 2011.

"Successfully Navigating Bankruptcy: Bankruptcy Basics for Real Estate Professionals. First American Title Real Estate Continuing Education Presentation, May 25, 2011.

PUBLICATIONS

“Selected Rule & Form Changes” Debtor-Creditor Section Newsletter, Winter 2015.

“Family Law Seminar Series: Bankruptcy & Tax Issues” with Ann K. Chapman. Multnomah Bar Association CLE Presentation June 2014.

“Ambushes: Malpractice Traps, Difficult Clients” with Ann K. Chapman. Oregon Law Institute CLE Presentation “Armor, Ammunition, & Ambushes: Bankruptcy and Other Battles in a Struggling Economy,” April 4, 2014.

“Reconciling the Irreconcilable: What Debtors-Creditors Attorneys Need to Know About Family Law” with Ann K. Chapman. Oregon State Bar CLE Presentation “Taxes, Exes, and Axes to Grind: 2013 Debtor-Creditor Section CLE and Annual Meeting”, September 27-28, 2013.

“Dealing with Distressed Customers and Supplies: A Bankruptcy Primer for the Non-Bankruptcy Lawyer.” Oregon Law Institute CLE Presentation “Family and Closely Held

Businesses", March 1, 2013.

"Who Beats Who? Competing Garnishments" Oregon Debtor-Creditor Newsletter, Winter 2013.

"Bankruptcy's Impact on Collecting on Your Claim: Just When You Thought You Had 'Em!" Oregon Law Insitute CLE Presention "Judgments and Collecting Judgments in Oregon: Avoiding the Pitfalls", November 9, 2012.

"Chapter 13: Chapter 13 Potpourri" with Jordan Hantman. Oregon State Bar CLE Presentation "Bankruptcy Basics: The ABCs of Filing Chapter 13", June 15, 2012 (forthcoming).

"Chapter 13: Confirmation to Completion" with Ann K. Chapman. Oregon State Bar CLE Presentation "Bankruptcy Basics: The ABCs of Filing Chapter 13", June 15, 2012 (forthcoming).

"Chapter 13: Drafting a Chapter 13 Plan, From Theory to Practice, Dealing with Typical Scenarios" with Ann K. Chapman. Oregon State Bar CLE Presentation "Bankruptcy Basics: The ABCs of Filing Chapter 13", June 15, 2012 (forthcoming).

"Chapter 13: Case Objectives & Applicable Law" with Ann K. Chapman. Oregon State Bar CLE Presentation "Bankruptcy Basics: The ABCs of Filing Chapter 13", June 15, 2012 (forthcoming).

"Chapter 13 for Individuals and Small Businesses -- To Retain Assets and Repay Creidotrs -- The Flexibile Bankruptcy" with Ann K. Chapman and Wayne Godare. Oregon State Bar CLE Presentation "Fundamentals of Bankruptcy", August 12, 2011.

"Successfully Navigating Bankruptcy: Bankruptcy Basics for Real Estate Professionals. First American Title Real Estate Continueing Education Presentation, May 25, 2011.

"Chapter 7/11/12/13 Triage" with Ann K. Chapman and Richard J. Parker. Oregon Law Institute CLE Presentation "Advanced Bankruptcy Issues for Individuals", May 20, 2011.

"Bankruptcy and Family Law: Bouncing Along the Economic Bottom" with Ann K. Chapman. Oregon Law Institute CLE Presentation "The Extended Economic Downturn: Legal Issues and Solutions", May 20, 2011.

"The Economic Tsunami: Bankruptcy and Mortgage Foreclosures" with Ann K. Chapman. Oregon Law Institute CLE Presentation "The Economic Tsunami: Dealing with the Tidal Wave of Mortgage Foreclosures", May 7, 2010.

"Just When You Thought You Had 'Em! Bankruptcy's Impact on Collecting on Your Claim" with Ann K. Chapman. Oregon Law Institute CLE Presentation "Effective

Collection of Judgments", November 12, 2010

“Oregon Statutory Time Limits” (Contributor). Professional Liability Fund, July 2010. (Updated sections regarding statutory liens, attachment, dishonored bank instruments, garnishment, judgments and debtor-creditor law)

PUBLIC SERVICE AND VOLUNTEER WORK

Chair, Local Bankruptcy Rules and Forms Committee (present)
Volunteer Judge, Philip C. Jessup International Law Moot Court Competition (2012-present)
Volunteer Coach, Lewis & Clark College Law School International Law Moot Court Team (2012-present)
Volunteer, Multnomah County Search and Rescue Unit (2013-present)
Member, Local Bankruptcy Rules and Forms Committee (2009-2014)
Member, Multnomah County Search and Rescue Unit (2010-2012)
Member, Debtor-Creditor Section Executive Committee (2010-2012)

AWARDS

Pro Bono Award, Debtor-Creditor Section Bankruptcy Clinic (2008, 2009, 2010, 2011, 2012, 2013, 2014)
Letter of Commendation, Multnomah County Sheriff’s Office, November 9, 2011 (Individual award for actions to save property during maritime incident)
Sheriff’s Award, Multnomah County Sheriff’s Office, May 25, 2011 (Unit award for Search and Rescue Team)
CARE Volunteer, Debtor-Creditor Section (2007-2008)

JESSICA L. MCCONNELL
Associate
jessica.mcconnell@greenemarkley.com

PRACTICE EMPHASIS

Jessica (Shoup) McConnell concentrates her practice in federal, state and local tax controversies, including tax audits, offers in compromise and tax collection matters. Since joining Greene & Markley in 2004, she has helped dozens of businesses and individuals efficiently resolve major tax and financial problems.

Well-versed in all areas of tax controversy, Mrs. McConnell excels at complex audits, offers in compromise, employment tax liabilities, and protecting her clients against unwanted and unexpected collection efforts. She also handles a variety of bankruptcy cases, a majority of which involve tax dischargeability issues.

In the 2010 through 2012 issues of Oregon Super Lawyers, Mrs. McConnell was recognized as a Rising Star in the area of tax law. The annual Rising Stars list identifies the best attorneys who are 40 or under, or who have been practicing for ten or fewer years. No more than 2.5 percent of attorneys in the state receive the honor.

Ms. McConnell holds leadership roles in the Oregon State Bar, where she plans and presents educational seminars, serves on legislative workgroups, and authors articles about developments in the law. She volunteers at the Oregon State Bar's bankruptcy clinic, and provides free legal assistance through other pro bono cases.

HONORS & MEMBERSHIPS

Rising Star, Oregon Super Lawyers, 2010 – 2012
Up & Coming Lawyer Honoree, *The Daily Journal of Commerce*, 2011
Oregon State Bar Debtor-Creditor Section
    Pro-bono Bankruptcy Clinic
Oregon State Bar Taxation Section
    Laws Committee
    New Tax Lawyers Committee (founding member and former vice-chair)
    2011 Broadbrush Taxation CLE Planning Committee
Oregon State Bar Business Law Section

Oregon State Bar House of Delegates 2010-2011
Multnomah Bar Association
American Bar Association
Oregon Women Lawyers

EDUCATION & PROFESSIONAL QUALIFICATIONS

B.S., University of Oregon, 2004
J.D., Northwestern School of Law of Lewis and Clark College, 2008
Northwestern School of Law of Lewis and Clark College Certificate of Federal Tax Law, 2008

Admitted to Practice in Oregon; U.S. District Court, District of Oregon; U.S. Tax Court

PRESENTATIONS & PUBLICATIONS

"Introduction to Bankruptcy," *Oregon State Bar New Lawyers Super Saturday CLE Seminar,* October 2011 and October 2012
"An Overview of Bankruptcy and Tax," *Oregon State Bar Broadbrush Taxation CLE Seminar,* 2011
"Case Note Summaries," *Oregon State Bar Debtor/Creditor Section Annual Meeting,* 2010
"Tax Controversy Basics," *Oregon State Bar Taxation Section, New Tax Lawyer Seminar,* 2010
"Bankruptcy Court Case Notes," *Oregon State Bar Debtor-Creditor Newsletter*, Spring through Winter 2010 Issues
"Supreme Court Case Notes," *Oregon State Bar Debtor-Creditor Newsletter*, Spring and Fall 2010 Issues
"State Court Case Notes," *Oregon State Bar Debtor-Creditor Newsletter*, Winter 2009 through Spring 2010 and Winter 2011 Issues
"Resolving Tax Liabilities in an Age of Aggressive Collecting," *Portland Business Journal,* 2010

DONALD H. GRIM
Partner
donald.grim@greenemarkley.com

PRACTICE EMPHASIS

Mr. Grim has been an attorney at Greene & Markley, PC, a debtor/creditor law firm, since 2006. He concentrates his practice on bankruptcy, tax determination, tax collection controversies, commercial litigation and estate planning. He has practiced before the 9th Circuit Bankruptcy Appellate Panel, Federal District Court, United States Bankruptcy Court, United States Tax Court, Oregon State Circuit Court, Oregon State Tax Court and Oregon State Supreme Court. He is very active in bankruptcy matters and has represented debtors, creditors, and chapter 7 trustees.

EDUCATION & PROFESSIONAL QUALIFICATIONS

B.A., Oregon State University, 1974
J.D., University of Oregon School of Law, 2006. Overall class ranking: Top 16%. For the 2004-2005 academic year, he was number 1 in his class with a 3.96 G.P.A.
Admitted to Practice in Oregon; U.S. District Court, District of Oregon, and U.S. Tax Court.

MEMBERSHIPS & HONORS

Member:
Oregon State Bar Association
Debtor/Creditor Section
Taxation Section
Estate Planning Section
Multnomah County Bar Association
American Bar Association
American Bankruptcy Institute

PRESENTATIONS & PUBLICATIONS

- "Exceptions to Discharge of Specific Debts," *Debtor-Creditor Section CLE and Annual Meeting,* October 2012
- "Just How Do You Define an 'Employee'?," *Coast River Business Journal,* December 2011
- "Independent Contractor vs. Employee," *Coast River Business Journal*, November 2011
- Broadbrush Taxation "Bankruptcy and Tax," *Oregon State Bar CLE,* October 2011
- "Surviving Hard Times: Critical Steps for Small Businesses," *Coast River Business Journal,* September 2011
- "Bankruptcy Basics - An Introduction to Chapter 7 and Chapter 13," *National Business Institute CLE,* 2010
- "Dealing with Bankruptcy's 180 Day Dragnet," *Oregon Debtor-Creditor Newsletter,* 2010
- "Retirement Plans at Risk of Seizure," *Oregon Debtor-Creditor Newsletter,* 2009
- "Homestead Exemption at Risk," *Oregon Debtor-Creditor Newsletter*

PRIOR WORK EXPERIENCE

Mr. Grim's legal experience is built upon 28 years experience in private business. He served as Vice President of Grim Logging Co. Inc., a family owned Oregon wood products corporation, from 1974 through 2002. Grim Logging purchased, harvested, and marketed state and federal timber sales in six Western states. Harvest methods included environmentally sensitive systems such as "long-span skyline" systems and heavy lift helicopters, all owned and operated by Grim Logging. Mr. Grim's duties included general administration, sale appraisals, contract administration, and marketing. Grim Logging supported up to 65 employees and 25 to 35 employees of subcontractors. Gross sales were $5,000,000 to $7,000,000 annually.

Two additional related businesses were also in existence during a part of that same time. Real Estate 100, a real estate sales company in Salem, Oregon with up to 25 real estate agents working as independent contractors. Mr. Grim served as President from 1997 to 2003 with general administrative oversight. He also was a partner in Three G's, a Salem, Oregon based residential subdivision development company that worked closely with Real Estate 100.

Attorneys
Mark Kramer
Mary Tollefson
Alex Baldino

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BIO INFORMATION - MARK KRAMER

Mark Kramer, an attorney since 1981, is a principal in the Portland law firm of Kramer and Associates, where his practice concentrates on family law and civil rights with cases ranging from representation of children endangered by their public custodians to contested custody matters, grandparent and psychological parent rights. He holds his B.A. degree, with distinction, from Cornell University (1978) and his J.D. degree from Northeastern University School of Law (198l). Mark is a member of the Oregon State Bar Family Law Section, the Oregon Trial Lawyers Association, the Oregon Academy of Family Law Practitioners and is a co-founder of the Multnomah County Family Law Group. Mark has served as a pro-tem judge in the Multnomah County Circuit Court.

In 1987, Mark was co-counsel to the Oregon Senate Judiciary Committee and assisted in the revision of ORS 109.119 to allow visitation rights to persons with an "ongoing personal relationship." Since then Mark has regularly contributed to the ongoing modification of laws regarding grandparent and psychological parent rights. In 2001, he was a member of the work group that crafted legislation, (HB 2427, Chapter 873, Oregon Laws 2001) the "Troxel fix" that substantially revised ORS 109.119. Mark has prevailed before the Oregon Supreme Court in *Epler v Graunitz* and in the Court of Appeals in three post-Troxel cases (*Harrington v. Daum*, and *Wilson and Wilson*, where he represented birth parents and *Wurtele v. Blevins*, where he represented grandparents.

Mark is a frequent speaker on grandparent and psychological parent rights and has written a number of published articles in the area.

Mark is active in the National Lawyers Guild where he represents disadvantaged and/or oppressed clients and organizations. He is currently representing the houseless advocacy group, Right to Dream Too in Portland.

JOHN L. BARLOW

EDUCATION

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

Stanford Law School, J.D., 1981.

PROFESSIONAL EXPERIENCE

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

Associate attorney - Fenner, Barnhisel, Willis, Corvallis, Oregon, November 1, 1983-December 31, 1984.

Attorney and partner - Fenner, Barnhisel, Willis & Barlow, Corvallis, Oregon, January 1, 1985-2001. Barnhisel, Willis, Barlow & Stephens, 2001--2013. Barnhisel, Willis, Barlow Stephens & Costa, 2013–present.

Pro Tem Circuit Court Judge, State of Oregon since April, 2010. Court-Appointed Arbitrator in Benton and Linn County Courts since 1995.

BAR ASSOCIATION ACTIVITIES

Oregon State Bar Disciplinary Board Trial Panel, 2004-present; State Professional Responsibility Board, 1994-1997. Oregon State Board of Bar Examiners, 1988-1991 (Chairman, 1990-91).

REPRESENTATIVE FAMILY LAW CASES

Lind and Lind 139 P. 3d 1032, 207 Or. App. 56 (2006)

Boyd and Boyd 203 P. 3d 312, 226 Or. App. 292 (2009)

Hixson and Hixson 230 P. 3d 946, 235 Or. App. 217 (2010)

Gay and Gay 250 Or App 31, 269 P. 3d 265 (2012)

Wolfe and Wolfe 273 P. 3d 915, 248 Or. App. 582 (2012) rev. den. 352 Or 266 (2012)

Instructor Biography

Paula Brownhill
Clatsop County Circuit Court Judge

Judge Brownhill has been a Circuit Court judge in Astoria, Oregon since November 1, 1994. She graduated from the University of Oregon School of Law in 1981 and practiced family and juvenile law before her appointment to the bench.

She has served on the Statewide Family Law Advisory Committee since 1998, and she has been chair since 2003. She edits the Family Law Benchbook for Oregon judges, and she chairs the Juvenile Engagement and Leadership Institute's Model Forms workgroup. She is past president of the Oregon Circuit Court Judges Association. She chairs the Clatsop County Juvenile Dependency Team and serves on the Clatsop County Domestic Violence Council. Chief Justice Thomas Balmer recently awarded her the Juvenile Court Champion lifetime achievement award for her work in juvenile dependency cases.

Judge Brownhill is married to Astoria lawyer Blair Henningsgaard.

Adam Furchner, Ph. D.

1525 NE Weidler
Portland, OR 97232
503-284-2899
AdamFurchner@comcast.net

Educational Background

The California School of Professional Psychology – Alameda — **August, 1998**
Ph.D., Clinical Psychology — Alameda, CA

Connecticut College — **June, 1990**
BA, Honors Psychology — New London, CT

Licensure

Licensed Psychologist, State of Oregon, #1530 — **2002-Present**

Areas of Expertise

Evaluation and treatment of children, adolescents and adults
Mediation of Parenting Plans
Parent Coordination with divorced adults

Professional Work Experience

Private Practice, Clinical Psychology — **2002-Present**
Portland, OR

Oregon State Department of Corrections — **2002 –2007**
Contract Psychologist — Wilsonville, OR

Pacific University – School of Professional Psychology — **2002 – 2012**
Adjunct Faculty — Portland, OR

Mt. Hood Counseling and Assessment — **1999 –2002**
Mental Health Specialist — Portland, OR

BHC Walnut Creek Hospital — **1996 –1999**
Therapist, Outpatient Services — Walnut Creek, CA

Presentations

Washington County Bar — **2012**
Parent Coordination

Multnomah County Bar — **2011**
Assessing children's complaints in parenting time disputes

Multnomah County Collaborative Law Group — **2010**
Working with character disordered clients

Special Appointments

Oregon Statewide Family Law Advisory Committee — **2014-Present**

The Parental Involvement Workgroup, — **2010-2011**
A subcommittee of the Family Law Advisory Committee

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*, Oregon State Bar, Family Law Section, Legislative Subcommittee (2012-present; Co-Chair 2010-12)
- *Member*, Oregon State Bar, OSB/OJD Task Force on Oregon eCourt Implementation (2013-present)
- *Member*, Oregon State Bar, Senate Bill 799 Task Force (2013-14)
- *Judges Panel*, American Bar Assn., Law Student Div. Region 10 Negotiation Competition (2010)
- *President*, Board of Directors, Historic Elsinore Theatre (2014-present; Member 2012-present)
- *Board Member*, Rotary Club of South Salem (2011-15)

Awards

- Rising Star, Super Lawyers Magazine (2012-15)
- Top 10 Family Law Attorneys Under 40 - Oregon, Nat'l Academy of Family Law Attorneys (2014)
- New Lawyer of the Year, Marion-Polk County Legal Aid (2010)

Publications

- *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)*

- *Legislative Update*, Oregon Law Institute (2015)
- *Advanced Child Support: Rebuttals*, Oregon State Bar, Family Law Section CLE (2014)
- *2013 Oregon Legislation Highlights*, 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)
- *Family Law Practice Panel*, Willamette University College of Law (2011-14)
- *2011 Oregon Legislation Highlights*, Oregon State Bar, Family Law Section CLE (2011)

The Honorable James C. Egan

The Honorable James C. Egan was elected to the Court of Appeals on November 7th, 2012. He took office on January 7th 2013. Before joining the Court of Appeals, he served as a circuit court judge for Linn County where he presided over many civil and criminal trials. He also served as the chief judge in the juvenile court, probate court, and civil court in Linn County.

Judge Egan has actively served the Linn County Bar Association, the Oregon State Bar Association, the Plaintiff's bar, and the Military bar as:

President of the Linn County Bar Association (1989-1990);
President of the Oregon Workers' Compensation Lawyers (1996-1998);
Oregon State Bar Association House of Delegates (2002-2005);
President of the Oregon Trial Lawyers Association (2005-2006);
Deputy Command Judge Advocate, ASG Kuwait (2008-2009);
Command Judge Advocate, 104th Division (reserve) (2010-2013).
Member of the Oregon State Bar Associations Affirmative Action Committee (1990-1991);
Treasurer of the Workers' Compensation Section of the Oregon State Bar Association (1996-97);

Judge Egan graduated West Albany High School (1974). He earned a Bachelor of Science degree at Willamette University (1979) and a Doctorate of Jurisprudence at the University Of Oregon School of Law (1985). After law school, he returned to his home in Linn County where he practiced civil litigation at the firm of Emmons, Kyle, Kropp, Kryger & Alexander (later Kryger, Alexander, Egan, Elmer & Carlson) for 25 years (1985- 2010).

The Honorable Richard C. Baldwin

The Honorable Richard C. Baldwin began his current term of office in January 2013. He formerly served as a Multnomah County Circuit Court Judge from 2001 to 2012. During his trial court tenure, his assignments included presiding over drug treatment courts and Multnomah County's first Mental Health Court. His prior legal experience also includes:

Law clerk to the Honorable Robert Foley, Oregon Court of Appeals (1975)
Staff Attorney, Multnomah County Legal Aid (1976 - 1980)
Trial Attorney, Baldwin & Brischetto (1983 - 1991)
Director of Litigation, Multnomah County Legal Aid (1991 - 1995)
Executive Director, Oregon Law Center (1996 - 2000)

Judge Baldwin has worked extensively with community nonprofits and civil rights organizations, including the Fair Housing Council of Oregon, the Oregon Coalition Against Domestic Violence, and Uniting to Understand Racism during his legal career. He served on the Oregon State Bar Board of Governors (1996 - 2000; Vice President, 2000), and the Oregon Judicial Department's Access to Justice for All Committee (1998 - 2002; Chair, 2002).

Judge Baldwin grew up in San Jose, California, and graduated from San Jose State University (B.A., Philosophy, 1970). He received his Juris Doctorate from Northwestern School of Law at Lewis and Clark College (1975).

Paul J. DeBast
DeBast, McFarland & Richardson, LLP
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Portland, OR 97225
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email: debast@dmr-law.com
website: dmr-law.com

Paul is one of Oregon's most experienced family law attorneys. He is a member of American Academy of Matrimonial Lawyers and is one of the founders of the Oregon Academy of Family Law Practitioners (OAFLP). Paul currently serves as a pro tem judge in Washington County. He has served as a director and officer of the Oregon State Bar Family Law Section and is a past President of the Washington County Bar Association. He is a frequent speaker on family law issues.

Honors and Awards

- Oregon SuperLawyer designation since its inception in 2006
- Martindale Hubbell AV rating
- AVVO "superb - 10" rating

Education

- Willamette University College of Law, Salem, Oregon J.D. - 1972
- University of Washington, Seattle, Washington B.A. - 1969

Author: 2012 OSB Family Law Chapter: "*Business Valuation Issues in Marital Dissolution Cases"*

Classes/Seminars

- Business Valuation and Divorce, American Academy of Matrimonial Lawyers, 2012
- Estate Planning and Dissolution Law - Lessons for Lawyers in Both Fields, Oregon State Bar, 2009
- Using Life Insurance to Secure Support Obligations, Oregon State Bar Conference: Crossroads of Estate Planning & Dissolution Law, 2009

- Accessing Retirement Benefits After Divorce, Oregon Academy of Family Law Practitioners, 2008
- Bucking the Trend in Spousal Support, Lewis and Clark Law School, 2006
- Spousal Support Myths and Realities, Oregon Academy of Family Law Practitioners, 2005
- Business Value & Divorce, An Analysis of Oregon Appellate Cases, Oregon State Bar, 2005
- Avoiding Life Insurance Malpractice in Divorce Cases, Oregon State Bar, 2004
- Avoiding Malpractice in Oregon Divorces, Clackamas County Bar Association, 2004
- What Every Good Divorce Lawyer Needs to Know About Life Insurance, American Academy of Matrimonial Lawyers, 2004
- Innovative Tax Solutions for Divorce Cases, Washington County Bar Association, 2004
- Tips & Tricks to Obtain the Best Settlement, American Academy of Family Law Practitioners, 2003
- Webber vs. Olsen and the Problem with Stipulated Judgments, Oregon Academy of Family Law Practitioners, 2000
- Retirement Accounts in Dissolution Cases, Washington County Bar Association, 1990
- Handling Retirement Benefits in Dissolution Cases, Oregon State Bar, 1985

Pro Bono Activities

- Washington County Circuit Court Pro Tem Judge, 2009 - Present
- President, Metropolitan Public Defender's Office, 2003 – 2006
- Director, Metropolitan Public Defender's Office, 1991 - 2006
- Director, Beaverton Area Chamber of Commerce, 1994 - 1996
- Member, West Side Light Rail Citizen's Advisory Committee, 1990 - 1995
- Chairman, Central Beaverton Advisory Committee, 1989 - 1993
- Member, Beaverton Sister Cities Foundation, 1986 - 1992
- President, Beaverton Sister Cities Foundation, 1990
- Director of Tualatin Valley Mental Health Center, 1981 - 1989
- President, Director of Tualatin Valley Mental Health Center, 1981 - 1989
- Member, Beaverton Citizens Advisory Task Force on Public Safety Building, 1984
- City of Beaverton Charter Review Committee, 1977
- Chairman of the Board of Directors Washington County Legal Aid, 1974 - 1979
- Former Chairman, Oregon State Bar Committee on Economics of Law Practice

VOCATIONAL ASSESSMENT

DISCUSSION OF STANDARD TRAINING, CREDENTIALING AND METHODS

SCOTT T. STIPE MA,CRC, LPC, DABVE
CAREER DIRECTIONS NORTHWEST
Scott Stipe & Associates, Inc.

BRIEF HISTORY OF VOCATIONAL REHABILITATION

- Vocational Rehabilitation Counseling is a young profession brought about by Workers Compensation Legislation, the Counseling Profession in general (which grew out of vocational guidance), and rehabilitation legislation in 1914-20 relating to veterans and industrial workers

RISE OF THE FORENSIC VOCATIONAL EXPERT

- Vocational Rehabilitation Act of 1954- “professionalized “ practice, established funds for graduate training counselor education programs
- *Kerner v. Fleming (1960) led SSA to develop “criteria for vocational experts to be employed to offer direct testimony on the existence of appropriate jobs in the labor market”*
- 1960s saw dramatic increase in use of vocational experts

REVIEW OF TYPICAL VOCATIONAL EXPERT QUALIFICATIONS

- Development/Funding of Masters Programs in Rehabilitation Counseling by US Government led to such being seen as a typical qualification.
- Vocational Experts are not limited to only one discipline but those with backgrounds in rehabilitation counseling and vocational rehabilitation outnumber those in other disciplines (source: American Board of Vocational Experts)

DOES YOUR VOCATIONAL EXPERT HAVE TYPICAL TRAINING?

- The US Government contracts with over 1000 Vocational Experts (VE)
- Survey of selected characteristics of VEs performed in 2009 is largest study with >500 respondents. (source International Association of Rehabilitation Professionals 2009)

VE Education

- IARP Survey showed 94.6% of VEs possess a Masters or Doctorate. 5.4% possess Bachelor's Degree.

Major field of study for degrees were:

- Vocational Rehabilitation and Counseling 61.4%
- Counseling and Psychology 29.2%
- Other 3.4 %

VE Experience

- Mean Age of VE: 56.3 years
- Mean years of professional/clinical vocational experience : 32.8 years
- Age range 25-87
- Practice years range <1-40

Alphabet Soup

- While any individual can provide expert testimony if seen as an expert by trier of fact most VEs have National Credentials/Certifications
- Certified Rehabilitation Counselor (CRC) 81.5% is the predominant certification in profession. Such is a “Board Certification”
- 93% have two or more board certifications or licenses

Alphabet Soup (cont.)

- Prior published IARP survey indicates other common national board certifications include:
- Certified Disability Management Specialist (CDMS)
- American Board of Vocational Experts (ABVE/D or F (Diplomate or Fellow)
- Certified Case Manager (CCM)
- Certified Vocational Evaluator (CVE) in decline

Licenses

- No state license specific to Vocational Expert (but most possess above certifications)
- Some are Licensed Professional Counselors (LPC)
- Some possess certification as a vocational counselor with state Worker's Comp Division which requires less training than national credentials
- Some outliers possess no certification or license and are particularly vulnerable in cross.

Importance of Standard Training and Credentials

- If almost 95% of VEs have Masters or above and your expert lacks such will their testimony be given the same weight?
- If 97% of have degrees in rehabilitation counseling, counseling or closely related fields will your expert's degree in another field be seen as odd/substandard?
- If 81.5% of VEs out there are CRCs and there are thousands of them why is an attorney not using one.
- If 93% of VEs have two or more National board certifications why does yours have none?

Potential motivations for some attorneys to utilize experts without standard training/certification

- Standard Method: Experts without such have no ethical standard of practice or scope of practice to adhere to. If standard method is ignored outcomes and opinions have no foundation. Some shop outliers for desired outcomes
- Ignorance of the standards: Many attorneys naturally assume all VEs have the same education and licenses since such is the norm for other professions

Is Standard Method Being Used?

- Does your or opposing expert have sufficient vocationally relevant information?
- Has an interview taken place?
- Has the expert been given a copy of deposition or other description of work history, education, etc. if interview has not taken place?
- If there is limited work history or individual has been out of the labor market many years has vocational testing been considered?

Is Standard Method Being Used? (cont.)

- Has a Transferable Skills Analysis been performed?
- Has expert only used published wage/employment data or also used employer sampling (where more specific information is required (problems with data aggregation)
- Has typical educational background for an occupation been considered
- Has outlook in occupation been addressed?

Is Standard Method Being Used? (cont.)

- Special issues: Over 1/3 of family law cases have contention of physical or mental barrier to employment. Such is routinely very poorly addressed by family lawyers compared to those in PI and WC
- A diagnosis does not equal a work limitation
- Has a physical capacities form been completed by MD?
- Has a psychological limitation form been completed by psychologist or counselor? Who is not “depressed” going through divorce

Is Standard Method Being Used? (cont.)

- Special Issues: Age discrimination. Review of data sources, mythologies.
- Special Issues: Diligence of Work Search. Review of Data/mythologies.
- Special Issues: Duration of Work Search. Data review
- Special Issues: Enhancement of Earning Capacity. Educational plans, traditional and OJT
- Special Issues: " I hate/am not good at/ and won't do sales, clerical work, financial stuff….etc." Evaluation, vocational testing

Cost/Timeline

- Apples/Oranges: Flat fees assure mediocrity
- Typical Hourly fees $200/hour less for less experienced/credentialed experts
- Like your cases there is a broad range of complexity.
- Like with your cases the stakes and variables vary and may justify more intensive work
- Most highly qualified VEs have minimums for a basic assessment to be retained
- Range of hours based upon complexity 10-50

THE SYSTEMS PERSPECTIVE

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AN ESSENTIAL TOOL FOR THE DISPUTE RESOLUTION PROFESSONAL

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A SYSTEMS PERSPECTIVE OF DISPUTE RESOLUTION

Whether we act in the role of advocate and representative or as dispute resolution professional, our legal training can often blind us to the forces which bind *and* repel our clients. From our first exposure to *legal causation* and the vexations of proximate cause and *Palsgraf,* we naturally view causation as unidirectional. Further, we consistently dive into a pool of conflicting allegations to pick out that shiny penny of *fact* lying on the bottom which will establish our case. Our attention is turned to the content of our clients' disputes. This focus on content distracts us from the *process* occurring before our eyes. There is so much information which is held in this process – such abundant opportunity for solution, that it is, indeed, a shame that we miss this illuminating perspective. Be our role that of an advocate or mediator, a *systems perspective* will provide an invaluable tool to help us help our clients.

When we sit in a room with disputing parties (individuals or organizations) they are not alone. Outside the walls of our conference room or office are the large number of webs and connections in which they are embedded. Each individual is a part of an often dizzying number of systems (and subsystems) and these relationships tug on our disputants with unseen, but tenacious, threads. Another set of connections – not immediately apparent to us – binds the parties before us to each other.

Developing the facility to think in terms of the systems in which our parties are embedded will make the invisible visible to us. Forces that keep people locked into their roles with one another, despite the frustration and pain this may produce, will become clearer to us. We will be able to work with these unseen hands, rather than have them block our best efforts.

THE SYSTEM

What is a "system?" Ludwig Von Bertalanffy is generally credited with developing General Systems Theory. His definition is deceptively simple yet goes to the core concept. A system is a set of elements *standing in interaction*. Put another way, a system is something that is put together in such a way that whatever affects one part of it affects other parts. A metaphor that is oft-used, and quite helpful, is that of a spider web. Touch one part and the rest shimmers and vibrates. It is impossible to touch only one part of a spider web and not affect the other

sections. A change in the behavior of one part of a human interactive system will invariably affect the behavior of other individuals within that system.

The human body is a very elegant system. If I wasn't a committed Darwinian and saw this intricate system as a jewel of evolution, I'd have to think of intelligent design because nothing but the highest intelligence of natural selection or God could have created such a thing. Our bodies are quintessential systems. Nothing operates independently from any other part. We may be digesting our food happily until a threat arises – then our blood rushes immediately from our torso to our limbs leaving our sandwich ignored. The complex internal chemistry of hormone stimulation is a product of countless (literally) interactions, on both a cellular and gross level.

Everything in a system stands in *relationship* to every other part – and these parts create a separate organism. This *organism* may be a human body, or a marital (or divorcing) couple, a nuclear family, an extended family, a business, a social or service club, a union, a law firm – obviously the list goes on and on. The critical point, here, is that each system has similar attributes. Each has constituent parts which assume various functions or roles within the whole. Each has its own set of rules which binds these parts together. Each has a trajectory over time. Each has a common set of strategies for maintaining its integrity – forestalling dissolution or change which cannot be managed.

Thus, every client who sits before us not only is part of a system which includes the other disputant, but also others outside the room. Our role in any particular subsystem brings its accompanying rules and self-concept. A husband is also a father, a son, a brother, an employee, a boss, a fraternity brother, etc. Sometimes these roles and expectations can be in conflict. Thus, for example, a newly married husband may struggle with his role as a spouse and the conflicting expectations set by his mother in his role as a son. We will turn our attention, here, to the rules of systems as they impact spouses and their movement through the dissolution of their marriage.

RULES OF SYSTEMS

Homeostasis. This is, perhaps, the most important rule affecting the operation of a system. This rule posits that every system has a steady state to which it will seek to return. The most commonly employed metaphor is that of a thermostat. While a system can, indeed, change, the force directing such change needs to overcome the incessant pull of homeostasis. A therapist tells the following illustrative story: "I was working with a couple once in which the wife was

quite obese. She felt terrible about this and her husband complained perpetually about her weight. There was so much, he'd spit out, that he couldn't do because she was so heavy and had no energy. She finally resolved to change her eating and exercise habits and finally, she was able to lose a great deal of weight. When she reached her goal, her husband wanted to give her a gift to let her know he appreciated her efforts. What did he give her? A big box of chocolates, because (he said) he knew how much she enjoyed these."

There are scores of dynamics which, once in place, become exceedingly difficult to dislodge. The cycle of volatile conflict between spouses is often experienced as the only way they can feel connected. When the heat begins to ease, one or both will feel the anxiety of a shift that somehow means to them that they are becoming detached. Thus one or both will move to reignite the conflict in order to return to the old, and more comfortable, level of interaction. The "underfuntioning" spouse, who gives the corresponding overfunctioner a role of superior caretaker, will face surprising resistance if he or she tries to modify their behavior and increase their competence. The child who still lives at home in his twenties fill parents with dread at prospect of turning him out to fend for himself. Often this has been attempted with failures or terrible judgment drawing him back to the fold. His failures at launching another example of homeostasis. Needless to say, the decision to end a marriage is a dramatic rupture of a homeostatic process and will likely result in an explosive response. The insight this process brings is that we should never be surprised (or overly judgmental) at the very natural *process* of those seeking to return a particular system (of which they are an integral part) to its prior level and pattern of functioning.

The Individual Symptom Carrier for the Whole. When the organization or family is experiencing systemic stress, oftentimes an individual element of will take on this stress. In family therapy this is known as the "identified patient." (Note that my background is in family systems, so this is the perspective I bring to this discussion. In light of this experience and training, conceptualizing these principles within the context of the family is much easier for me. Those who have been training in organizational systems thinking will naturally turn to the business or other such system for examples of these principles. I have, however, attempted to make some reference to non-family system applications when I am able.) The identified patient is often a child who the parents bring in to therapy because he/she is acting out in some disturbing way. Almost without exception, there are painful dynamics occurring within the

family and the child becomes the "symptom bearer" for the whole. It is generally accepted (and actualized in practice) that if the stresses on the family system are addressed and alleviated, the symptoms of the I.P. will abate. For example, if there are unaddressed and unresolved marital stress, a child may take on this pain by failing school, engaging in drug or alcohol use, inappropriate and/or dangerous sexual behavior, oppositional attitudes, depression, etc. It is often in the interests of the parents to focus the attention on the problems with the kid because this will allow them and their own painful interaction to avoid scrutiny. In the context of high conflict divorce, the child may demonstrate a more intense level of symptomatology. Family therapist offices are overflowing with families who initially arrive with complaints and concerns about a child, only to have the therapist decide to treat the entire family system. Almost invariably, there is pain and conflict between the parents and when that begins to ease, the child's problematic behavior (like magic!) will abate.

The tendency of any system under stress to isolate one of its members (or a subsystem) should be borne in mind when a conflict involves the isolated member. Law firms are an excellent example of this principle, since, in truth, lawyers tend to eschew attention to messy interpersonal dynamics. Law firms undergo a variety of stressors – some of the most impactful being the merger with another firm or the shedding of an important lawyer or department which sets up shop on its own. There may also be a change in the compensation package or a precipitous drop (or rise) in business. Whatever the trigger, the impact will reverberate throughout the organization like the concentric rings emanating from the stone dropped into the water (or the tendrils of the spider web). The anxiety (think of anxiety as discordant, uncomfortable energy which infects the system) will spread to each member. The organism as a whole will often respond to this stress by unconsciously selecting a member and scapegoating that member. This is the way a system often copes with the stress of change. This member is often selected wisely, as he/she (or they) maintain personal characteristics which allow them to be identified as a problem. What is striking upon close observation is the energy with which the scapegoated member will embrace their role – ramping up their behavior to fit the role of the problem in the system. This is precisely where attention to "process" vs. "content" of a dispute is so vital a perspective.

Since the reasons the system isolates and judges the problem member are usually quite defensible, it is seductive to become minutely focused on the content of the problem – working with the disputants to fashion a compromise or behavioral prescriptions for each side to lessen the intensity of the dispute. None of this may matter, ultimately, if the real dynamic resides elsewhere – in the evolution or challenges faced by the greater system. Therefore, it may be useful when facilitating the resolution of a dispute to assess what kind of system these disputants are embedded within and then explore what stressors are impacting the system. Oftentimes, helping disputants think in these terms may assist each to disengage from their focus on the content of their dispute. Another problem with over-emphasis on content is the need for each person to assess blame. Usually, no effort could be less helpful, because causation in disputes is commonly circular.

A Word About "Anxiety": We hear this word "anxiety" a lot. To understand how it operates within a relationship system, let's not think of it as some hand-wringing weakness. Rather, let's understand anxiety as a universal form of basic, visceral discomfort or un-ease which exists in us, all the way down to the cellular level.

Anxiety is a natural reaction to a potential threat. Whenever we experience some discomfort or conflict with someone close to us, we will *always* experience anxiety. We may well not have conventional "anxiety" symptoms like sweating, shaking, dry mouth and difficulty thinking clearly (then again, we may), but we will not be at ease and completely comfortable in our own skin. Here's the thing about anxiety, it will almost always be accompanied by automatic reactivity to our partner.

Because anxiety is uncomfortable and our intimate partner can trigger it so easily, we are always vulnerable to reacting emotionally. That's not "acting" emotionally, it is "reacting" emotionally. The more intense our anxiety, the less we are able to think through our actions and the more liable we are to automatic reactions. Murray Bowen, one of the true giants of family therapy said,

> *As anxiety increases, people experience a greater need for emotional contact and closeness and, in reaction to similar pressure from others, a greater need for distance and emotional insulation. The more people respond based on anxiety, the less tolerant they are of one another and the more they are irritated by differences. They are less able to permit each other to be what they are. Anxiety*

often increases feelings of being overloaded, overwhelmed, and isolated, feelings that are accompanied by the wish for someone to lean on, to be taken care of, to have responsibility lifted.

Circular Causation: Certainly in the context of interpersonal disputes within families (or between intimate partners) the notion of circular causality is essential. This is different for those of us who have been raised in a western culture in which Aristotelian notions of cause and effect are basic in our thinking. This is *particularly* true among those of us who have been trained in the law. Some very fine minds – no less than Dean William Prosser – have dissected the notion of legal causation. To be sure, *legal* liability can only be grounded upon a finding that A caused B. Was A the legal cause of B? (But for A, would B have occurred?) Was A the proximate cause of B? (Were there intervening events which attenuate the connection between A and B to a breaking point?) In the world of interpersonal disputes, however, it is *circular* causality which best reflects the reality of the conflict. Each person believes that the problem started with the other and they are just, rightfully, reacting to what the other did or said. Consider the oft-used example of the couple in which the wife complains to the husband, "I feel so alone. You are never around. You are always out with your friends leaving me sitting here at home to do all the work. All you do is think of yourself" – to which he responds, "Of course I'm not around. All you do is nag. If you eased up sometime I'd spend more time at home, but as it is now all I get is your complaining and nagging." She, of course replies, "If you were home more often, I wouldn't nag." His retort, "If you nagged less, I'd be home more."

People who are locked in the roles assigned them by the exigencies of the system which is going through its own stress, will often create their own, idiosyncratic, rounds of circular conflict. The underperforming employee who feels unmotivated because of the harsh approach of the supervisor dances with the frustrated supervisor who can't seem to bring this slack employee around. One partner who is highly organized taking care of the lion's share of the tasks for both of them, complaining all the way, while the other recedes further into ineffectiveness. One sees the other as lazy or incompetent. The other responds by labeling the first a control freak or obsessive-compulsive. Whatever the interaction, what is almost certain to occur over time is that the partners in this dance will become more extreme in their positions, being pushed to greater polarization by their perceptions of the other. All the while, each

believes that they are just reacting normally to the behavior of the other. The universal whine, "*They* started it!" can come from the mouth of the 8 year old or the 58 year old. As professionals in dispute resolution, we can become utterly lost if we agree to dissect the conflict for its root cause.

The great gift afforded us as advocates or neutrals by a firm grasp of circular causality is that it protect us from being hooked into the parties' dispute. Supported by this perspective, we can see that *both people are right.* This perspective allows us to stay out of the blame game, which our disputants so want us to join. As advocates, we can actually be in their corner without having to vilify the other. As neutrals, if we become adept at understanding on a deep level the discomfort experienced by each individual, and projecting that understanding to each one, we can actually bond with every side of a dispute without alienating any other side. There is a systems dynamic which impacts groups of three or more when there is conflict between/among them which is extremely automatic and needs to be grasped (particularly as its magnetic force seeks to draw the neutral into the dispute). This is the dynamic of the emotional triangle.

The Triangle: Dr. Murray Bowen, the prominent family systems theorists noted that every two-person system is inherently unstable. In times of calm they may do quite well together. However no relationship between two people that has any importance to either will remain forever calm. There will inevitably be stress which will be injected into the relationship. This stress may not be especially great….or it may be significant. Whatever its intensity, there will be anxiety which will infect the individuals involved. Again, anxiety in this view may be seen as an energy which causes discomfiture within one or both people. (This is not anxiety which causes the shakes or makes you run to the nearest shrink – rather it is best seen as an uncomfortable state affecting the entire internal system of an individual.)

When anxiety enters a system, there is a natural inclination to reach out and bring in a third party – to "triangle" in that person (or institution, as we shall shortly see). The most common triangling process is for one of the two disputants to reach out to the third for support. Say, A is in conflict with B. The anxiety which exists between the two of them (and within each) will cause B, automatically, to reach out to C. B may go to coffee with C and complain about A and her difficulties with that intransigent, unreasonable, obnoxious soul. The triangle is set when C takes B's side in the dispute. If this occurs, B is able to drain off some of the intensity of the energy she is experiencing through her conflict with A and with this transfer of

energy, things may seem to calm down (for the moment) between A and B, while now there is some discordant energy between A and C. If A and C don't have any real dealings with one another, then in the short term, B has managed to dissipate some of the discomfiting energy between he and A. However, if C has any contact with A (which will often be the case) then the dispute will not dissipate, but transfer to another pair (often with a separate set of issues).

This is often seen in people working in a representative capacity. If A and B have lawyers C and D, these advocates will often feel it is their ethical obligation to become triangle into their clients' disputes. Thus, rather than helping to resolve the problem, the involvement of these representatives will actually serve to exacerbate the difficulty. The principle of the emotional triangle is one strong argument in favor of utilizing neutral dispute resolution professionals and why the conventional legal adversarial method of dispute resolution is often so poor in resolving these disagreements. (Note that the adversarial approach may eventually *end* the dispute, but it will not likely *resolve* the dispute.)

How does the neutral deal with the triangle? The process was cogently described by Murray Bowen in this way:

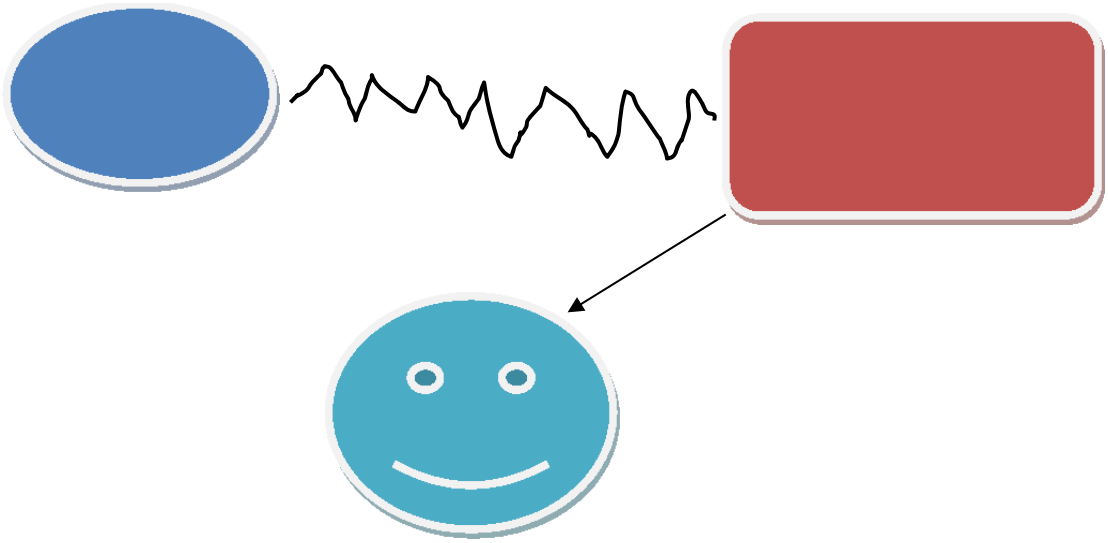
> *A basic tenet of systems … is that the tension in a two-person relationship will resolve automatically when contained within a three-person system, one of whom is emotionally detached. In other words, despite togetherness urges to the contrary, a problem between two people can be resolved without the "well intentioned" efforts of a third person to "fix" it. It only requires that the third person be in adequate emotional contact with the other two and able to remain emotionally separate from them.…*

Bowen also noted that the intensity of the anxiety in any individual two-person system may be so intense that, in order to be fully contained, it will spread through the greater system like water crystallizing to ice across a lake. Again, he notes,

> *Anxiety in the central triangle may have been diminished initially by its diffusion into the system of interlocking triangles, but when this anxiety spreads into the larger system (the mental health center, service agencies, and the courts), it is*

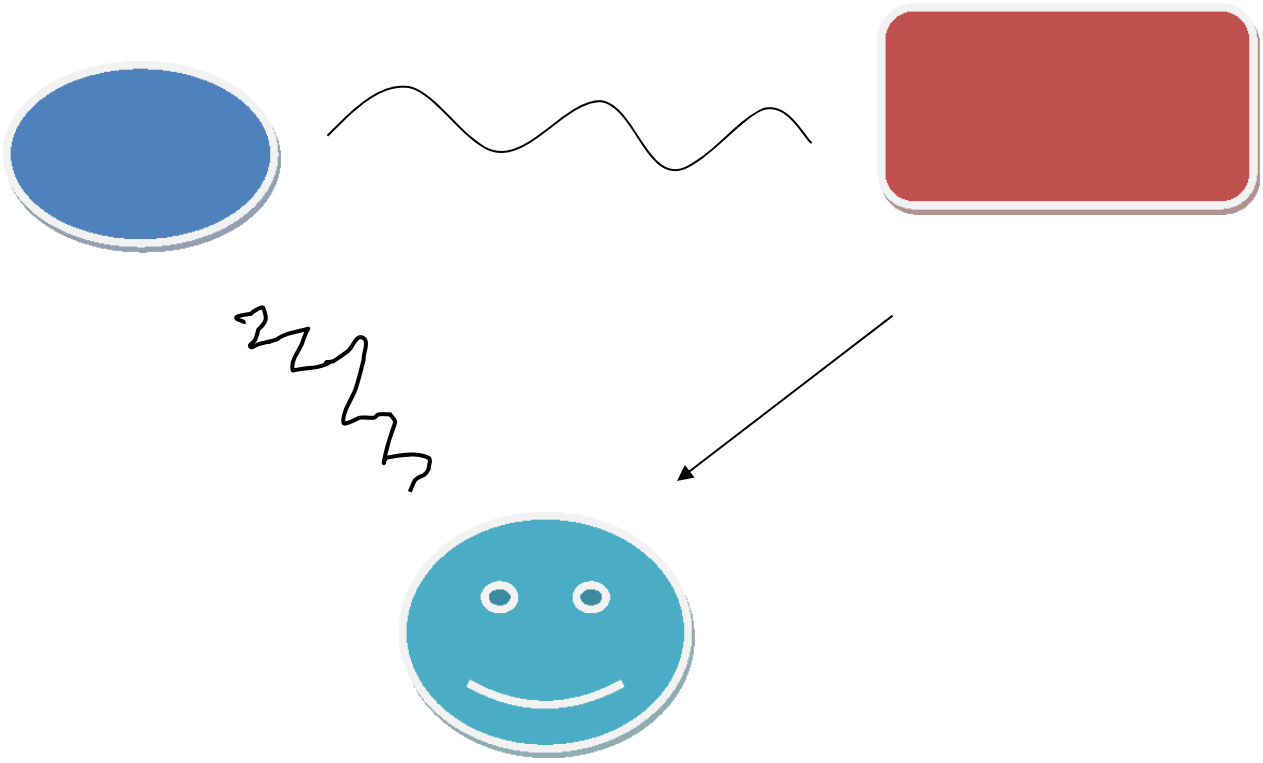
often amplified (via the emotional reactivity of the helping professionals) and focused back on the family. This anxiety in the "helpers" can increase symptoms in the family. In most situations, helpers are primarily helpful; their involvement reduces anxiety and symptoms. There are these instances, however, when the anxiety-induced loss of differentiation and the process of triangling result in the helpers' becoming a major component of the family's problem.

Two parties experiencing stress in their relationship
will result in one reaching out to a third party for support,
creating the emotional triangle



Which will result in a smoothing of the conflict between the original parties and

A transfer of the stress to a different relationship



SUBSYSTEMS

Virtually every system is composed of subsystems – and we are each members of both the greater system and its component subsystems. Each subsystem will have its rules for inclusion and exclusion (there are certain things you do and don't do to be in a particular subsystem). Secure membership in subsystems is essential for wellbeing. However, people are often faced with the challenge of being forced into a subsystem into which they do not belong. This is particularly true in a family context and particularly true in divorce, as one of the most common problems faced by young people when their parents are divorce is elevation to the role of "parentified child." Such a person is boosted up into the role of a friend or confidante of a parent – an extraordinarily confusing experience for a child. At times the child will even be expected to be the caretaker of their parent. Many a dollar has been spent by adults in psychotherapy, untangling the internal confusion fostered by such an elevation.

One way of assessing any larger system (family or business organization) is determining the clarity of different subsystems and rules for inclusion. In addition, each subsystem must

interact in some form with the others. The stability of the larger system may be determined, in part, by the boundaries that exist between the various subsystems. If the boundaries are overly rigid, then there is very little interaction between the subsystems. If they are too diffuse, there is insufficient differentiation between the subsystems. Law firms serve as a good example of these principles. A structure in which there is minimal interaction between the managing echelon and the associates (a rigid boundary) will cause a good deal of distress and resentment. If the communication goes in only one direction (top down) or if assignments are allocated without sufficient mentoring or feedback opportunities, that organization will lose any semblance of identification with or loyalty to the greater organization from the associate class. Overly diffuse boundaries can be a problem when there is insufficient differentiation between the information which is shared within and among the various subsystems.

THE SYSTEM AS A AN ENTITY MOVING THROUGH TIME

Perhaps easiest to conceptualize in this manner is the family system, which has a particular trajectory over time. Many families will move through the stages of marriage (or commitment), first child, entry of child(ren) into school (thus bringing the family closer to interaction with the larger social system), children moving into adolescence, grandparents' aging issues, launching of children and moving into late middle age and later years. Each of these phases will have a natural "horizontal" stressor caused by the challenges brought by each developmental phase. Of course, there can be any number of additional stressors imposed on the system over time – job or money problems, illness, promotion. Such stressors will impact individuals who are the component parts of the greater system, and as such, will impact the entire system, as all component parts adjust to the changes of the single member. Such change will certainly contribute to the stress resulting in greater probability for conflict.

The same principle applies to members of a business organization – as this organization, too, undergoes stages from formation to possible dissolution. As with a family, movement of the organization into and through various stages will exact a stress on individuals which will often result in conflict and scapegoating within the organization – as symptoms of the stress experienced by the system.

CONCLUDING THOUGHTS

One of the greatest services the dispute resolution professional can provide is an entirely different perspective for people locked into conflict, who can only see the subject of their conflict. This is particularly true with intimate partners enduring the rupture of their relationship. These poor distressed souls are so hyper-focused on the subject(s) of their dispute, they are shorn of the tools that would allow them to escape from their terrible, painful dance.

Each person may bring their own army of supporters to underscore the rightness of their position, as they are embedded in any number of subsystems in their own lives – their families of origin, their girl or boyfriends, the subsystem within these groups of the ones who have gotten divorced. All tug on the individuals before you, giving advice, vilifying the other person. Careful inquiry into the existence, composition and messages of these subsystems will help untangle these strands of the web and allow the individuals a clearer, cleaner approach to the task at hand.

The reactivity which plagues intimate partners in disputes is particularly intense because almost always, there are very deep, very old personal themes that are activated (usually outside the awareness of each person). Brent Atkinson in his excellent *Emotional Intelligence in Couples Therapy* identifies four discrete themes which bring couples into gridlock (and which, if not addressed, will carry through to dissolution). Atkinson describes these as different and legitimate ways by which individuals can experience emotional stability. It is important to identify these different styles, because almost invariably each partner tends to pathologize the other – so that both are expending enormous energy in defending themselves – energy that could be put to use at understanding the other and finding avenues for moving on. Instead they become locked into their dance. The different styles identified by Atkinson are: *Independence First vs. Togetherness First* (in which one person's basic need is for a sense of space or freedom while the other needs to have a sense of emotional connection); *Invest in the Future vs. Live for the Moment* (in which one person feels like all responsibilities need to be handled before they can relax and the other is petrified the life will pass them by while they are doing all the things they "have to" do); *Predictability First vs. Spontaneity First* (in which on person needs a minimum of chaos for stability and the other wants nothing more than a fellow traveler to explore the adventures of life); *Problem Solving First vs. Understanding First* (aka, lawyers and their

spouses). The key to these and other differences are that they represent completely understandable (and polar opposite) methods for achieving emotional stability and it is painfully easy for anyone of feel completely misunderstood and judged by the other. Any reader struggling with one of the above challenges in their intimate relationship will not have difficulty coming up with the judgments they throw at the other and the different judgments they have, in turn, thrown at them. People in the grip of these gridlocked conflicts feel profoundly misunderstood and dismissed by their partners – causing enormous defensiveness and reactivity.

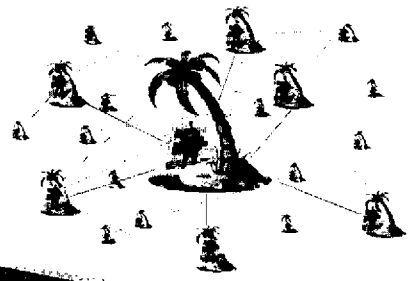
It is vitally important that any dispute resolution professional dealing with issues such as these be mindful of their own struggles along these lines. As noted by Atkinson, these attitudes represent the efforts of individuals to establish a sense of emotional stability for themselves. As such, it is likely that each attitude represents a response to early, meaningful life experiences. Oftentimes these experiences as quite early in our life and, therefore, beyond our immediate conscious awareness. As this is true for our clients, it will also be true for us. Therefore, we will need to be particularly vigilant to avoid automatic alliance with the individual who happens to share our own (unconscious) style. We will, of course, be easy marks for those who share our predilection and who want to triangle us in.

If we are able to maintain our awareness of process over content and the systemic vs. the individual context for understanding interpersonal stresses and disputes, we may well be able to pull many rabbits out of hats that our clients didn't even know existed. That's why a systems perspective can be an invaluable inclusion in any dispute professionals tool kit.

Systems Thinking

A Primer for the Family Law Professional

The John Donne Rule



Our Goal

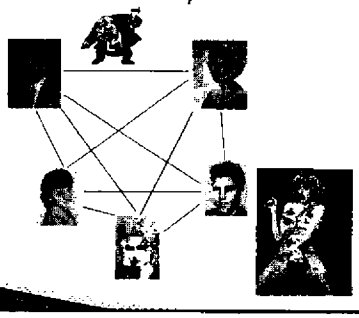
To Develop a ***Process Perspective***

...which will support and strengthen our ability to support our clients while not becoming hooked into their conflict

Principle 1

- Impacting one part of the sy[redacted] will impact the others
- No part of a system exists in isolation

In the Family Context



Principle 2

- People within a system will seek to return to their previous state of functioning and interaction
- The Principle of Homeostasis

Homeostasis

Examples of Homeostasis

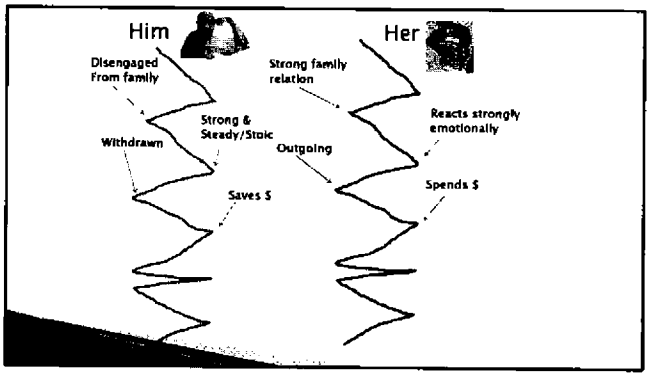
Others?.....

Principle 3

- People in relationship will tend to function in a complementary fashion
- "You're looking lovely tonight" "Why THANK YOU!"

Complementary - Its more about *FIT*

- Overfunctioner vs. *Underfunctioner*
- Emotionally Expressive vs. *Controlled*
- Organized vs. *Disorganized*
- Spontaneous vs. *Planned*
- Live for the Present vs. *Delay Gratification*
- Reason vs. *Emotion*
- Sociability vs. *Solitude*
- Spend vs. *Save*



Principle 4

- In interpersonal relations.....

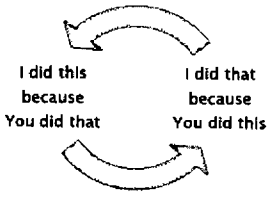
Causation is Circular

Aristotelian, Western
Lega/Causality

A → B

A caused B

Circular Causality



The Dance of the Pursuer and Distancer

H W

Michelle Wiener Davis' "Walk-Away Wife"

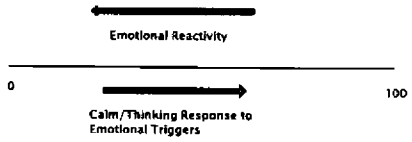
Principle 3

- Interpersonal conflict raises anxiety
- Anxiety causes people to be reactive
- People who are reactive, respond in predictable ways

Stress Responses

- We all have our own idiosyncratic reactions to stress, like:
  - Depression
  - Anger
  - Substance use

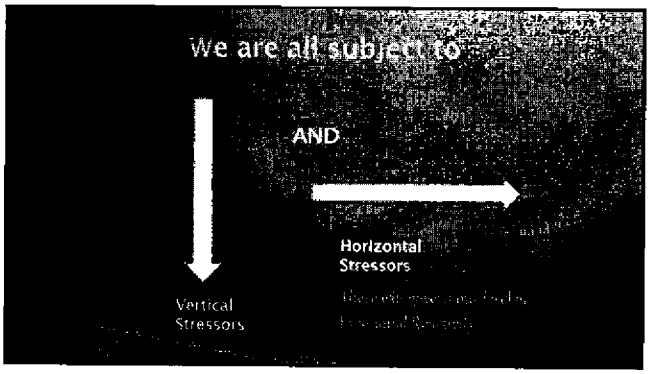
  And.....?



Murray Bowen's Concept

Principle 6

- A system is an entity functioning over time, with developmental stressors, just like individuals



Holmes and Rahe's "Social Readjustment Scale"

In what order would place these life events?

Marriage	Major illness
Divorce	Bankruptcy
Christmas	Death of spouse/child
Marital Separation	
Detention in jail/prison	

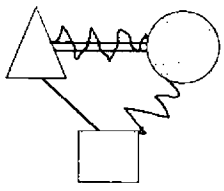
More Stressful Events

- Retirement 45
- Pregnancy 40
- Sexual problems 39
- Bankruptcy 39
- Close friend death 37
- Take out mortgage 30
- Kid leaves home 29
- In-law trouble 29
- End schooling 26
- Habit change 24
- Boss trouble 23
- Residence change 20
- Eating change 13

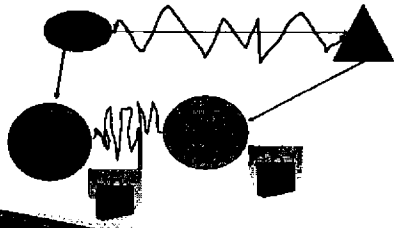
Principle 7

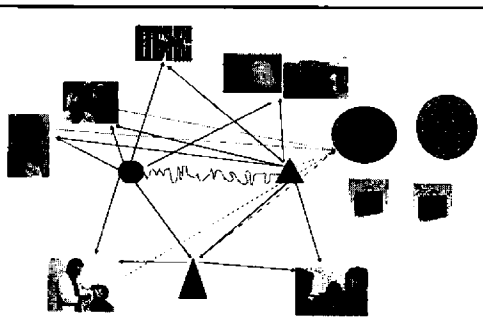
- People in conflict will experience anxiety
- They will attempt to quell the anxiety through the interpersonal triangle

The Emotional Triangle



Lawyers, ***Beware*** The Emotional Triangles





Thank You!

QDROphenia:

The WHO, What, When, Where & How of QDROs/DROs Indispensable Basics for Divorce Practitioners – Case Inception to General Judgment

Oregon State Bar Family Law Section Annual Conference – October 2015

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Quadrophenia was The Who's 1973 rock opera double-album. The name blends the Quadrophonic sound schemes then being introduced, with the term 'schizophrenia', and is said to have been a criticism of popular misapplication of the term 'schizophrenia' to describe multiple personality disorders; it also alluded to four distinct personas of the opera's protagonist. Domestic Relations Orders (DROs) have multiple personalities / personas as well, and divorce practitioners and judges epidemically misapply DRO terminology and concepts. This is QDROphenia! This unfortunate phenomenon stems from misconceptions about the nature and characteristics of retirement assets in the case. These mistakes aren't innocent because they often result in inadequate negotiations, ineffective or inequitable awards, 'surprise' post-divorce attorney fees, post-dissolution litigation (motions to set aside or reopen cases, motions to enforce) and all the related and resulting losses to the people that we serve.

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PART 1: OVERVIEW OF RETIREMENT ASSETS

A. Retirement Assets; Generally.

Retirement assets are frequently and increasingly the most valuable marital asset. The goal of this presentation is to assist general divorce practitioners to (a) identify retirement asset issues, (b) tap into available resources during discovery and (c) give marital retirement assets fair treatment in the pre-General Judgment and General Judgment drafting stages, so that the DRO phase of the case goes smoothly, without further substantive negotiations and unnecessary attorney fees.

Just when the parties thought the case was finished, 'QDRO' issues rear their ugly heads. Simple and clear agreements or retirement provisions in the Marital Settlement Agreement (MSA) and General Judgment (GJ) are frequently followed by a whole array of snags, disagreements and further negotiations or litigation that arise in context of preparing the order(s) that assign the retirement benefit(s). These "loose ends" can cost your client a small fortune to resolve because they compel many hours of attention by you and/or the DRO attorney. Clients are devastated when they continue to incur legal fees many months after the divorce because the attorneys are still dealing with the so-called 'QDRO.'

All retirement plans are different and there is no one-size-fits-all language for the MSA/GJ when it comes to the disposition of retirement assets. The parties and their attorneys often do not recognize whether they are dealing with a defined contribution plan (DCP), defined benefit plan (DBP), cash balance plan (CBP) or some other type of non-qualified plan. They are almost never aware in advance when their retirement plans cannot be divided by QDRO/DRO.

It is imperative that you know what retirement assets can be transferred in connection with the divorce, and how the transfer must be accomplished. If the MSA / GJ fails to address even one substantive issue, by way of example, whether the non-employee spouse will receive a surviving spouse benefit, then this lack of specificity can lead to post-divorce litigation. Divorce lawyers must grasp the basics of retirement plans so they can properly represent their clients throughout the discovery, negotiation, trial prep/trial stages, and in the process of drafting or approving the MSA/GJ. The solution is to secure information about the parties' retirement benefits during the initial stages of the divorce. A little preparation on the front end can save your client a lot of money and grief at the tail end of the case and in the DRO process.

A retirement plan is a financial arrangement designed to replace employment income upon retirement. These plans (including IRAs) are (a) governed by specific statutes, rules and regulations, and (b) established by employers, insurance companies, trade unions, government entities or other organized financial institutions.

Retirement investment income is deferred compensation and will be treated as regular income to the recipient at the time of distribution. The transfer / assignment of retirement benefits from a retirement plan participant to his or her spouse or former spouse under a proper DRO is **not** considered a "distribution" or a taxable event under the tax code. ORS 107.105(3) and a whole slew of federal and state laws permit the transfer of retirement benefits through assignment upon divorce to the participant's former spouse (or upon legal separation to the participant's spouse), if the assignment is made pursuant to a qualifying court order. That's the DRO/QDRO.

PRACTICE TIP: *Is the Plan governed by ERISA? If so, refer to the court order that will ultimately govern the assignment of plan benefits as a "QDRO". If the Plan is not an ERISA plan, then refer to the assignment order as "DRO".*

B. **What is a QDRO**? A "qualified domestic relation order" (QDRO) is a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and that includes certain information and meets certain other requirements; it must relate to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of the plan participant; and it must be entered pursuant to a State domestic relations law. This presentation focuses on QDROs/DROs that relate to the division of marital property rights.[1]

A State authority (generally, a court) must actually issue an order or formally approve an MSA before it can be deemed a domestic relations order. A property settlement signed by a participant and the participant's former spouse or a draft order to which both parties consent is not a domestic relations order until the State authority (court) has adopted it as an order or formally approved it and made it part of the domestic relations proceeding.

Further References:

- *ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)*
- *QDRO FAQs from U.S. Department of Labor (DOL):* http://www.dol.gov/ebsa/faqs/faq_qdro.html
- *Division of Retirement Benefits Through QDROs (from DOL):* *http://www.dol.gov/ebsa/publications/qdros.html*
- *Discussion of QDRO Requirements and Related Issues (from DOL):* http://www.dol.gov/ebsa/Publications/qdros_appD.html

C. **What is a DRO**? A domestic relations order is a judgment, decree, or order (including the approval of a property settlement) that is made pursuant to state domestic relations law (including community property law) and that relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve an MSA before it can be a deemed a domestic relations order under ERISA. The mere fact that an MSA is signed by the parties will not, of itself, transform the MSA into a DRO. Moreover, there is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve a QDRO / DRO. When they do, however, it generally makes the entire QDRO / DRO process much simpler.

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[1] For general information about support arrearage QDROs, see: Support and Maintenance Arrearage QDROs in Illinois – The First Tool to Consider for Support Enforcement, by Gunnar J. Gitlin http://www.gitlinlawfirm.com/documents/QDROstoEnforceSupportandMaintenanceinIllinois_000.pdf and Pension Benefit Guarantee Corporation's QDROs & PBGC, page 32, for a model child support QDRO: http://www.pbgc.gov/Documents/QDRO.pdf

In addition to the federal or state laws that govern the creation / formation of retirement plans, there are many such laws that govern the process of **assigning** plan benefits to the participant's spouse or former spouse; the DRO attorney ensures that the actual DRO/QDRO complies with those laws, so that the plan administrator can carve out the AP's assigned interest and administer that interest for the benefit of the AP.

Retirement plans are neither permitted nor required to follow an order that purports to assign retirement benefits unless it is a QDRO or other form of DRO that the plan deems acceptable for processing/administration. Reference: ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7); IRC § 414(p)(1)(B); http://www.dol.gov/ebsa/faqs/faq_qdro.html

PART 2: DISCOVERY

A. *THE WHO*: KNOW THE PLAYERS

Attorneys. Consult with a DRO attorney **early in the case**. Some will provide pre-retainer consultations free of charge or at negotiated rates. In that context you can gain a wealth of knowledge and resources about the retirement benefits your case. From the client's perspective, this is a solid investment because it can make an enormous financial difference in the outcome of his case. The DRO attorney can work very easily with parties, courts and attorneys situated outside of the county where the DRO attorney maintains his or her practice. We file DROs statewide and e-filing has made that process even simpler. As long as it's an Oregon case, we can assist you and your clients with finalizing the division of retirement assets by preparing and filing the appropriate DROs. We often never meet our DRO clients face-to-face but instead conduct all business by phone and through email and (less frequently) mail. Attached as **Appendix-1** is a list of Oregon attorneys who can assist you and your clients in the DRO/QDRO context.

Retirement Plan Administrators and their Agents. Plan Administrator(s) and their agents will provide you with (or further direct you to) resources from which you or the DRO attorney can identify and understand the retirement plan. Posing the right general questions to the plan's administrative team frequently results in the discovery of valuable, general information concerning not only the retirement plan itself, but oftentimes leads to the discovery of *additional,* related retirement plans, sponsored by the same employer or trade union. In addition to the plan administrator, other resources include account custodians (Fidelity, Vanguard, John Hancock ...), the human resources or employee benefits department within a party's current and former employer(s), trade union benefit representatives, insurance companies, or government entities (such as PERS, OPM, etc). You can always inquire *generally* about employee retirement benefits, or retirement plan QDRO procedures, but without an authorization/release or a subpoena, you must not inquire about a particular party's association or benefits.

B. IDENTIFY & UNDERSTAND ALL RETIREMENT PLANS IN YOUR CASE *BEFORE* YOU NEGOTIATE OR PREPARE FOR TRIAL

Launch early discovery efforts. Identify each Plan by its registered name and understand what type of Plan it is and for what type(s) of benefits it provides. You cannot properly negotiate about an asset, make the court understand what it can *and cannot* do with that asset, or articulate a

disposition-upon-divorce for that asset, until you identify the asset by name and characteristics. Retirement interests are no exception!

PRACTICE TIP: Determine the names of each spouse's current and former employers (and trade unions), the approximate dates of employment, and the general locations of all employers (and trade unions). This information will lead you or the DRO attorney to the sources for discovering what retirement plans are available through association with these past and present employers and unions, and you can then tailor your discovery requests and investigation efforts accordingly.

PRACTICE TIP: It's not due diligence to rely upon a standard 'form' discovery request for production (RFP), because in most cases you won't get the information you need in time, if at all; this is a classic set up for missing a retirement asset and/or failing to identify or understand it.

Retirement assets can be broken down into several categories, about which more is said below. What type or classification of retirement plan(s) are you dealing with? Under what laws, rules or regs is the retirement plan formed? Is it a plan created under IRC Section 401(a)/(k)? 403(b)? 457? Is it a government or other non-ERISA plan? Military? IRA? If it is an IRA, what kind of IRA: Roth, Rollover, Traditional, Beneficiary, SEP? The DRO attorney can lend valuable, targeted assistance in this process.

If you fail to name a retirement asset in your GJ, then you have done your client a disservice and quite possibly committed malpractice. That client will likely find her/himself back in the lawyer's office seeking a corrected GJ, sometimes years, even decades down the line; this can take the form of having to respond to a post-dissolution procedure initiated by the former spouse, or seeking help from a DRO lawyer when the plan administrator denies an application for retirement benefits because there is no court order that addresses the specific plan. Oftentimes a general catch-all statement in the MSA/GJ that '*husband is awarded, free and clear of any claim by wife, all of his financial and retirement accounts not specifically and expressly awarded to wife below*' is **not** sufficient to enable a plan to release to the participant what it presumes to be the former spouse's equity interest.

We see many GJ's that award 'Wife one-half of Husband's Weyerhaeuser Retirement Plan" or "retirement Plan through Weyerhaeuser." We are left guessing at the effective date of division, the method of division, which Weyerhaeuser plan (there are more than one), the form of benefit, and **so much more!** The DRO attorney knows (or learns upon contacting the employer or Plan) that the employer or trade union actually sponsors 2 or more plans (perhaps a 401(k), a defined benefit plan and a non-qualified, indivisible plan). In such scenario, negotiations must commence and, if not successful, litigation or loss will ensue.

PRACTICE TIP: Once you identify the existence of a Defined Contribution Plan (DCP) or Defined Benefit Plan (DBP) or any other retirement plan, you should contact the Plan Administrator or the employee/member benefits representative (often one in the same) and ask whether participants in such plan also participate in any other, related plans.

Once you know the name of the retirement plan, you can identify the Plan Administrator and its contact information; alternatively, once you know the name of the Plan Administrator (or custodian) you can identify the retirement plan(s). Most retirement plans have plan custodians or record-keeping agents for the purpose of administering the financial and investment aspects of the plan. You will want to identify these custodians / record-keepers as well and sometimes they will be your first (and last) point of contact with the Plan, and the means by which you identify the Plan(s) and the Plan Administrator(s).

Your best tools in the retirement asset discovery context are:

(a) Client interviews/questionnaires;
(b) Phone interviews with employer (or union) employee benefits agents (without a release, you may only ask general questions about employee/member retirement benefit options)
(c) Requests for Production and thorough review of retirement benefit statements, account summary statements, pay stubs, employer materials, employment contracts.
(d) Internet searches frequently yield information about employers, trade unions and their retirement benefit options for employees/members. Oftentimes, this type of search leads to the discovery of collateral retirement plan(s) and benefits, as well as contact information for Plan administrators and custodians.
(e) Summary Plan Descriptions. Plan documents and (Q)DRO procedures
(f) Authorizations to release information to third parties with accompanying records requests. Have a solid template in your forms arsenal. Example at **Appendix 2**.
(g) Conference calls with the plan participant and the plan administrator (or custodian) are incredibly useful. When you represent the participant, it's a cinch. If the participant is not your client, you can still arrange for a conference call with a willing opposing party; you should always clarify before the conference call what questions you will ask and what information you will solicit. This is a good place to bring a DRO attorney into the conversation because he or she will know whom to contact (or how to figure out whom to contact), what information to solicit, how to make sense of it to enable you to use the information about the retirement asset to enhance your negotiation or trial preparation strategies.
(h) Depositions
(i) Subpoenas for records. See Appendix 3.

***PRACTICE TIP:** Consider freezing the participant's access to plan benefits, requesting that the Plan Administrator flag the participant's file / account to prevent distributions (including roll overs) or loans without a court order or the written consent of the non-participant spouse, or otherwise notifying the Plan Administrator(s) that dissolution is pending and that the non-participant spouse has asserted a claim against the retirement benefits. Such steps can prevent participants from taking early distributions from or loans against their account balances. If the participant rolls the funds into another qualified plan or IRA, the non-participant spouse can still be assigned a benefit under a DRO; but if he takes a taxable distribution and it's no longer traceable then it will be difficult to satisfy the court's intent to divide this asset. Some plans won't accept anything but a court order (restraining order or DRO) to enable them to place administrative holds or restrictions on a plan participant's account. Find out what the plan administrator requires.*

C. KEY PLAN DOCUMENTS

The Plan administrator must provide prospective APs with certain information: the Summary Plan Description (SPD); a copy of the Plan document and QDRO procedures; and certain information regarding the participant's benefit. The Plan Administrator may condition disclosure of other information specific to the participant on its receipt of an authorization signed by the participant or some reasonable information establishing that the request is made in connection with a divorce proceeding. Indeed, sometimes getting your hands on the detailed information you need requires issuance of a subpoena.

Obtain and review the SPD early to really understand the particular plan(s). But beware of the Plan's model QDRO provisions, which are not comprehensive and are frequently designed to favor participants and plans (frozen covertures, failure to award benefit adjustments, disclaimers, etc.). The Plan's model or suggested QDRO provisions can help you spot some of the issues as you develop your case but the entitlements and assignment methods set forth in the model provisions are neither exhaustive nor all-inclusive.

CAVEAT: Plans and their administrators may hike the administrative fees when parties fail to use the Plan's (or its agent's) established administrative procedures in the QDRO administration context (Fidelity Investments is one example - $300 administrative fee if you use the 'QDRO Center' online to prepare a computer-program-generated QDRO vs. $1,200 if you don't).

PART 3: TYPES OF PLANS

What type of plan(s) are you dealing with: Defined Contribution Plan? Defined Benefit Plan? Cash balance plan? 'Hybrid' plans? IRA? Is the Plan a Qualified Plan or a Non-qualified Plan? Understanding the differences between plans is key. For a comprehensive listing and summary of types of retirement plans and further discussion about each type, see this publication from IRS: http://www.irs.gov/Retirement-Plans/Plan-Sponsor/Types-of-Retirement-Plans-1

In property settlement negotiations, the attorneys and the parties often refer to the "retirement plan(s)" but fail to investigate, identify and understand the type of plan(s) that are on the table. A party who participates in a DCP or has IRAs normally receives periodic account statements showing the account balance at regular intervals. Dividing DCPs and IRAs in divorce is fairly simple because the precise value of the account is easy to identify and the transfer mechanism is straightforward. It is significantly more complicated to divide DBP interests because the value of the benefit can only be determined based on actuarial calculations and (if before retirement eligibility) assumptions regarding when the participant will retire or terminate employment and what her salary will be at that time.

The distinction between various types of retirement plans is critical to understanding what you are really dividing; it could be the portion of an account consisting of an identifiable balance, or the right to receive a monthly payment stream (defined benefit) in the future, or a portion of an account with an identifiable balance that fluctuates over time. The relevance of key issues such as earnings and losses, loan balances, pre-retirement and post-retirement surviving spouse benefits, and cost-of-living increases (COLAs), all depends on the type of plan being divided and the plan's contractual provisions.

PRACTIC TIP: In your MSA or GJ, don't merely use the word 'account' to describe the retirement interest to be transferred, unless you are certain that the interest consists of a DCP or IRA. If you are dealing with a DBP or hybrid/cash balance plan, then using the term 'account' or 'account balance' will be ineffective, or worse.

We frequently encounter MSAs and GJs containing such statements as "Wife shall receive 50% of Husband's Pension Plan as of the date of the divorce, plus or minus earnings and losses from that date until the date the account is divided." This is ineffective and indecipherable by the DRO attorney. The concept of "earnings and losses" does not apply to DBPs: payments under DBPs *do not* fluctuate with the market, and thus there are no "earnings and losses." Drafting MSAs and GJs that contain language that is inapplicable to the type of Plan being divided will likely have significant, adverse consequences for one or both parties.

A. DEFINED CONTRIBUTION PLANS (DCPs)

You will encounter DCPs more frequently than Defined Benefit Plans (DBPs). DCPs include 401(k) plans, 403(b) plans, 457 plans, profit sharing plans and ESOPs, and retirement annuity contracts under TIAA-CREF. The contributions (that the employee / participant makes and that the employer may match) are defined, and are deposited into a **participant's individual account** under the Plan. The end result is *not* defined and the account balance at retirement is unknown because the account balance is subject to ongoing, undeterminable market fluctuations. DCP benefits offer more flexibility, generally allowing rollovers (into other DCPs or IRAs) upon termination from employment. DCP participants have more rights if they predecease their entitlement under the plan and their beneficiary(ies) can be anyone they choose, not just spouses, former spouses or dependent children. Additionally the MSA/GJ can provide that AP will receive the DCP funds awarded to her regardless of when Participant dies ("the death of Husband shall have no impact on Wife's right to receive her portion of Husband's ABC 401(k) Plan").

See Appendix 4 for a Condensed list of Considerations in drafting DCP QDROs.

If the non-participant spouse (referred to as the alternate payee [AP]) intends to liquidate some or all of his DCP award to pay debts or purchase a home, then know whether the plan will permit an immediate, lump sum distribution. The DCP may require establishment of a separate account for AP, while some plans won't allow establishment of a separate account for AP and will instead require immediate lump-sum distribution, which AP can roll over into another qualified plan or IRA. Determine if the DCP requires a triggering event occur for an AP to get a lump sum distribution. QDRO rules require that the AP award must be expressed as a dollar amount or a percentage; but the MSA/GJ may set forth a formula or mechanism by which to determine that sum or percentage.

1. VALUATION DATE

The MSA/GJ must expressly state the date on which the AP's award will be determined (the "valuation date"). If a percentage is awarded and the intent is to cut the AP off from further employee / employer contributions after a certain date, then specify that certain date as the valuation date ("$100,000 as of 1 April 2015"). If the parties cannot agree, the general rule in Oregon is to value the interest as of the date of dissolution. This is less of an issue if a specific dollar amount is awarded.

Plans are valued daily, monthly, quarterly or annually. Profit sharing plans tend to have year-end valuations. If the Plan doesn't make its annual contributions until the end of year, and the parties' divorce occurs toward the end of the year, then the question is whether the non-participant spouse is entitled to the contributions made after the divorce. If a dollar amount is awarded, this is not a valuation date issue as much as it is an issue about whether interest will accrue on the award between the valuation date and the account segregation date, more about which is discussed below. Your job is to find out, or have the DRO attorney find out, the valuation date policies under the plan and to address those as needed prior to entry of the MSA/GJ. In general, to the extent that DCP contributions made after the valuation date satisfy funding / contribution obligations for dates prior to the valuation date, or represent accrued interest on the AP's share, they should be awarded and assigned to the AP.

If the MSA/GJ is silent on the 'valuation date' issue, then the QDRO attorney may opt to insert a valuation date (perhaps the date of divorce or property settlement agreement, or perhaps the date on the account statements that the parties were using in their negotiations; the opposing party may agree or object to the date, but the DRO cannot be administered by a retirement plan if does not assert a valuation date. The parties would need to re-negotiate or seek judicial relief to resolve this. This is a problem that can and should be resolved before filing the MSA/GJ.

2. ADMINISTRATIVE FEES

Who will pay the administrative fees, if any, assessed by the Plan (or its agent) for its review and administration of the QDRO/DROs? Such fees generally come off the top before benefits are paid. The GJ/MSA should address whether such administrative fees will be shared equally, on a pro rata basis, or by one party.

3. VESTED vs NON-VESTED ACCOUNT BALANCES

When awarding the AP a percentage interest in a DCP, use the term "total account balance under the Plan" rather than "vested account balance." Using the term "vested" could significantly reduce the amount assigned to the AP. Moreover, the Oregon Supreme Court in Richardson and Richardson, 307 OR 370, 769 P2d 179 (1989) held that "even though [participant's] rights had not vested when the parties separated, he had a property interest in the pension at that time...to the extent that it is attributable to [participant's] pre-separation employment, the present value of the pension is a jointly acquired marital asset." The Richardson Court noted that "the portion of the present value of participant's pension attributable to his post-separation employment was an individually-acquired asset with respect to which the statutory presumption of equal contribution was rebutted because that portion of his pension was earned *solely by his efforts when the parties were no longer living as a marital unit*." That reasoning is not entirely applicable to already-accumulated but unvested portions of date-of-divorce DCP account balances, even if vesting of unvested portions depends upon participant fulfilling additional, post-divorce employment time.

Though Richardson involved a hybrid DCP/DBP plan (PERS), the reasoning is arguably applicable to a DCP account balance, and the AP will want to avoid the term "vested" when possible. If the Plan won't qualify an order that omits the term "vested" then then so be it; contact the Plan or have the DRO attorney do so, to find out whether the participant is vested and whether this is actually an issue in your case.

4. OUTSTANDING LOANS

Determine whether there are loans for which the DCP account balance serves as collateral. If so, then what is the net value (after reduction for the outstanding loan balance) comprises the sum that is available for transfer and assignment to the AP. If the judgment awards the AP a sum certain from the DCP, then it does not need to address loan balances, but make sure that the amount is not more than the net equity in the account. Loan balance information generally appears on the DCP account statement. If participant argues that it is not equitable to award AP any interest in the pre-marital DCP account balance (more on that topic, below), then AP's lawyer should determine whether there was a loan balance owed at the date of marriage and whether / to what extent it was repaid during the marriage. If AP can argue that it was paid off with marital assets, then AP can seek an adjustment so that AP captures a portion of the increased 'marital equity' in the account.

It is Participant's responsibility to repay the loans and that responsibility cannot be assigned to an AP. Under applicable law, Participant, not AP, is liable to the plan for repayment of the entire loan. DROs/QDROs cannot assign a loan liability to a former spouse. This is why plans won't transfer a sum greater than the net account balance to AP. Thus, if you want to make the parties equally liable for the loan, then award AP a percentage (usually 50%) of the account balance that is net of the loan. Be very careful with semantics around this issue.

Know what you are saying when you use words like "**including**" and "**excluding**" in referring to DCP loans. Some plans consider loans to be part of the plan that is divisible; other plans consider loans to be temporarily out of physical reach of the division. If you say 'AP is awarded 50% of the ABC 401(k) Plan ***including*** loan balances,' then you are saying that AP will receive 50% of the total account balance without any adjustment for the loan balance; as a result, AP would get more than half of the DCP account balance. If you say '[AP] is awarded 50% of the ABC 401(k) Plan ***excluding*** loan balances,' then you are saying that AP receives 50% of the total account balance *net* of the loan and, as a result, the parties equally divide the DCP 'equity' and participant pays the loan, but in theory keeps the balance of the DCP that serves as collateral for the loan. See a useful illustration by Larry Gorin, of 'loan inclusion vs. exclusion' at **Appendix 5**.

5. OFFSETTING

If you are thinking of trading a DCP interest for post-tax martial property (like real or tangible personal property), then you may need to retain a valuation expert. Generally, you will not want to trade DCP interests for DBP interests, but if you must, then you will need a valuation of the Plans involved in the offset calculation.

6. PRE-TAX ASSETS, BUT ONLY GENERALLY SPEAKING

DCP accounts are generally funded with employee and/or employer contributions of **pre-tax dollars** on behalf of the participant. Some 401k plans and IRA accounts permit after-tax "Roth" contributions, so be sure you know what you're dealing with and whether the AP will receive a pro-rata share of such after-tax contributions. The AP needs to understand that eventual distributions are subject to taxation. If determine the AP's award of retirement benefits based on an offset with other, post-tax assets (house, yacht, gold bars) then consider an appropriate reduction / adjustment to the DCP account balance. You may need to involve a CPA or tax-preparer in this context.

7. PRE-MARITAL ACCOUNT BALANCES & PASSIVE INCREASES

Determine the date of marriage (DOM) account balance and the date of divorce (DOD) or property settlement account balance. Is it just and proper to award the AP a portion of the premarital balance in the DCP? Sometimes it is: pre-DOM domestic partnership; pre-DOM birth of the parties' children; or perhaps the non-participant spouse cashed out his IRA during the marriage in order to fund the home remodel or pay for a child's education.

If participant has premarital service time under the Plan, then unless the parties are in full agreement on a settlement without full disclosure / discovery, you will need to discover the DOM balance. If the DCP account has no premarital component, then don't use term 'marital portion' in your judgment. If you are unsure, then it can be appropriate to use the term 'marital portion' but understand and make sure your client understands that you have left loose ends for the DRO attorney. Make sure there is an agreement or formula for determining the so-called 'martial portion' (Wife is awarded 50% of difference between the ABC 401(k) [total account balance or total, vested account balance] as of the date of marriage and the [total account balance or total, vested account balance] as of the date of dissolution of marriage).

If there is or may be a premarital portion, then determine early on whether the Plan record keeper even has records going that far back; oftentimes they don't because plan administration changes hands over the years. Sometimes it is virtually impossible to determine the DOM balance unless the parties saved old records.

The post-date-of-marriage increase in value under a DCP is subject to the statutory presumption of equal contribution. In Oregon, the increase in the DCP account balance between the date of marriage and the DOD is the 'marital asset' portion and subject to the rebuttable presumption of equal contribution; in other states participants are awarded the DCP account balance as of the DOM, as well as the increase on that share that is attributable to passive earnings (gains and losses), and the AP receives half of the marital contributions plus passive earnings on that portion; in such scenario, passive earnings on the non-marital portion are excluded from the 'marital pot' and one would need to hire an expert to conduct a passive market value assessment, to analyze for the rate of return during that period. The only way to make an accurate assessment of this is to have every single account statement that was generated during the marriage; the final number will be flawed if we have to make any guesses.

8. SPECIAL TAX CONSIDERATIONS

Distributions to APs from certain DCP's are exempt from the early withdrawal penalty rules under the IRC. If you are advising your client about this, make sure you know the rules. If not, then refer them to a CPA for further advice. For more information on this topic, see: http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics---Tax-on-Early-Distributions Timing and logistics are critical if the alternate-payee spouse wishes to take a distribution and avoid the 10% early withdrawal penalty.

B. INDIVIDUAL RETIREMENT ACCOUNTS (*IRA*s).

IRAs are **not** employer-sponsored qualified retirement plans and despite popular misconception, **cannot** be divided by QDRO. IRAs are not subject to IRC 414(p), nor are they covered by ERISA section 206. IRA custodians often advise that they need a "QDRO" to authorize the division and transfer of IRA assets from one spouse to another. This is a prime example of common misuse of the term 'QDRO.' But arguing with plan custodians over semantics is never worth it. Just know that ERISA does not apply to IRA transfers, and therefore the transfer order is not properly designated as a QDRO. DRO is the appropriate designation of an order assigning IRA assets in the post-divorce (or legal separation) setting.

The only divorce-related exception /special treatment for IRAs is that a transfer of assets from an IRA owner's IRA to his spouse or former spouse under a divorce or separation instrument (see 26 U.S.C.A. / IRC § 408(d)(6) and ORS 107.105(3)), is a non-taxable transfer. Such transfer must be accomplished by: (1) changing the name on the IRA from the transferor spouse to the transferee spouse (such as if transferring the entire interest in the IRA), or (2) trustee-to-trustee transfer (custodian-to-custodian transfer) from the transferor's IRA to the transferee's IRA.

CAVEAT: An 'indirect rollover' doesn't qualify as a transfer to your former spouse even if the distributed amount is deposited into your former spouse's IRA within 60-days. http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-IRAs-Distributions-(Withdrawals)

While the MSA/GJ can contain IRA transfer (DRO) language, if is frequently better to prepare a separate Supplemental Judgment (DRO). The DRO language should be drafted to enable the IRA custodian to administer the required transfer without further submissions by the parties. The language is very technical but if done correctly, the assignment / transfer process can be simple and expedient. The DRO attorney can assist you in this process and even provide you with the DRO language to insert into your MSA or General Judgment; alternatively, h/she can provide you with a DRO to submit along with the General Judgment. The IRA DRO must include, among other things, the precise name of the IRA ('Vanguard Rollover IRA fbo Juan Gutierrez, account number 098*****689'), the percentage or precise dollar amount to be transferred, and a recitation that the award will be valued as of the date of transfer. The court should retain jurisdiction to correct or amend the order, or to enter further orders, to effectuate the court's and / or the parties' intent as set forth in the order.

Unlike DCP splits under QDROs/DROs, the IRA account custodian cannot award a sum or a portion of an IRA as of a past date, or make any pro rata adjustment for investment earnings or losses that accrue prior to the date of transfer.

Transfers between spouse's IRAs should be made to a comparable IRA established in the name of the recipient spouse, and the DRO can specify the receiving IRA account if it is known.

IRA custodians require a court-certified copy of the DRO (whether it's included in the General Judgment or a separate supplemental judgment). IRA custodians may also require a duly-executed administrative transfer instruction to the custodian and an acceptance of transfer

instruction signed by the receiving party, as a prerequisite to executing the assignment. With increasing frequency, IRA custodians are requiring the transferor and the transferee to complete the custodian's own administrative forms (often called 'transfer instructions' or "divorce transfer forms'). Frequently, such forms can be found on the custodian's website. These completed forms are then furnished to the custodian as a prerequisite to the transfer; they are submitted either with the DRO or afterward, at the subsequent request of the custodian. Make sure your client understands that there are costs associated with involving an attorney or a CPA in the administrative transfer process, but that it may be necessary if the client is not grasping the nature of the financial transaction.

Clients often have a difficult time in the IRA transfer / roll over process and may seek help from you or your staff. Be careful here. The safest course for your client (and thus you), if he is the transferee, is for the DRO to order a direct roll over to the transferee's receiving IRA. In any event, the transferee may require assistance with the administrative forms and process, and should be counselled on the income tax aspects of the transfer. If you are unsure, consult with a DRO attorney or a CPA. The process can pose tax-traps for the unwary. Clients who have a financial advisor and work them in the IRA transfer/roll-over context may fare better than those who do not.

When transfer is made from one spouse's IRA to the receiving spouse's IRA, the monies are still categorized as IRA funds and still subject to Internal Revenue Code (IRC) rules regarding early distribution penalties *if* the recipient spouse elects a distribution before attaining the age of 59 ½. The transferee spouse's uninformed decision to withdraw the transferred IRA funds before age 59 ½ [*whether by foregoing a rollover and instead electing a lump-sum distribution check from the custodian* **or** *through a complete or partial withdrawal following the rollover*] will result in taxable income **and** a 10% early withdrawal penalty.

A transfer instruction and a court-certified copy of the General Judgment, MSA and/or DRO should suffice to transfer funds from an IRA in a divorce case, provided that these instruments contain the 'magic words,' which vary from case to case and from custodian to custodian. In most situations, it is simplest and most expedient to prepare a separate court order, similar to a QDRO but much simpler, which directs the transfer of IRA funds in connection with the divorce.

C. DEFINED BENEFIT PLANS (DBPs)

1. INTRODUCTION

DBPs provide a fixed, pre-established benefit for employees at retirement. DBPs do not maintain a separate account for a particular plan participant/employee. Instead, the DBP participant accumulates creditable (employment) service time (generally expressed in months or years of service) under the DBP, which translates to the accumulation of credits toward the ultimate retirement benefit. The DBP guarantees a fixed monthly benefit that's predetermined by a formula factoring in the participant's earnings history, length of creditable service under the plan, and age. The ultimate benefit is not based on any individual investment return on an account.

Traditional pension plans are the most common type of DBP. The participant should understand generally that if he works long enough for the sponsoring employer (or trade union),

then upon retirement eligibility he will receive a monthly benefit (called an annuity) of a certain dollar amount for the rest of his life following retirement. The monthly **benefit amount is defined** (unlike in a DCP, wherein the contribution is defined). After accumulating sufficient, creditable service time to vest in the plan, the participant is guaranteed a monthly benefit payment that's based on length of service and salary at the time of retirement.

PRACTICE TIP: Be proactive in ascertaining whether a party has an interest in a DBP. DBPs (along with non-qualified plans) are the most elusive in the discovery context and frequently the subject of omitted asset disputes. The omissions are both intentional and unintentional by the participant. DBPs don't send their participants the same kind of periodic financial statements that we see for IRAs and DCPs.

To strategize and negotiate about DBPs, closely consider the facts of your case. Is the participant a retiree under the DBP? If so, division options are much more limited and generally require assignment to the AP of a 'shared interest award' rather than a 'separate interest award' (described in detail, below), because the retiree is generally locked in to the form of benefit that he elected upon retirement.

Is this a long-term or short-term marriage? What is the estimated benefit at the time of the divorce? Can you now discover the estimated benefit if the participant continues to work for the sponsoring employer until retirement? Have you had, or should you have, the DBP interest valued? If the estimated benefit at the time of the dissolution is extremely low, perhaps it's best to simply proceed with an equal division-type of award and provision for entry a subsequent QDRO. How close to retirement is the participant? Is it unlikely that the AP will ever accumulate retirement of his/her own after the divorce? If so, is that because of age or disability or because of long-term child rearing responsibilities that will impact investment / retirement asset accumulation? These factors, among many others, have to inform our advice to our clients about how to proceed with respect to the DBP interests and "what's fair" in terms of a '***just and proper***' distribution of that interest (or any other retirement interest).

Make sure that you and your client (and if trying the case, then the court) know what form and type of benefit the client seeks. If you are dividing a DBP interest, the first issue is whether to present-value the participant's interest in the DBP and use an offset of some other asset (the house, a DCP, etc.), or to divide the DBP interest between the parties. AP's ultimate benefit will be a separate or shared interest in a monthly benefit ***or*** a lump-sum payment upon retirement eligibility; or, if the participant dies before retirement, a qualified pre-retirement survivor annuity (QPRSA) (or a portion thereof). QDROs for these plans generally create a separate interest for the AP at the time the benefit goes into pay status (more on this, below).

PRACTICE TIP: If you are dealing with a DBP <u>do not</u> use the term 'account' in your MSA/GJ award language. And if you are dealing with a hybrid plan/DBP that is tied to a contributions account, do not simply award a portion of the 'account' because it fails to award the AP any portion of the defined benefit. Such errors have repeatedly resulted in inadequate awards and loss to the AP, even when the parties turned the dispute over to the court for interpretation and relief.

A provision in a MSA/GJ providing that the AP gets "50% of the participant's monthly retirement benefit" is too vague and insufficient to allow the Plan, the QDRO attorney or even the Court to determine the intent of the parties. You need to determine the following: **(a) whether the benefit will be (or can be) paid in the form of a separate interest award or a shared interest award; (b) whether restrictions are placed on the participant's ability to elect a form of benefit of his/her choosing; (c) whether AP will receive pre-retirement and/or post-retirement death benefits and if so, in what proportion; (d) whether AP's interest will revert to participant if AP predeceases participant *before* retirement; and, (e) whether AP's interest will revert to participant if AP predeceases participant *after* retirement.**

See Appendix 6 for a Condensed list of Considerations in drafting DBP QDROs.

2. FORM OF BENEFIT ELECTED (OR COMPELLED) UPON RETIREMENT

DBP participants must generally elect from the following retirement options:

- A single lump-sum payment upon retirement (unusual, unless benefit is very small);
- A monthly benefit in the form of a single life annuity payment (based actuarially on participant's life and terminable upon his death); *or*
- A monthly benefit in the form of a 'joint and survivor annuity' payment that is paid until the death of the last survivor as between the participant and her spouse or former spouse [AP] (and / or in some cases, as between the participant and some individual other than her spouse or former spouse).

Family law attorneys epidemically fail to explicitly address ***either or both*** the pre- and post-retirement surviving spouse coverage in the MSA/GJ. Surviving spouse benefits easily present the most complex area of QDRO practice. Under DBPs, the surviving spouse benefit is greatly impacted by whether the participant dies before or after retirement. In your MSA/GJ, at least address the following: (1) whether the AP will be treated as surviving spouse with respect to some or all of the pre-retirement survivor benefit if the participant dies before the QDRO transfer is complete; (2) whether the AP will be treated as surviving spouse with respect to some or all of the pre-retirement survivor benefit if the participant dies after the QDRO is entered but before either party begins receiving benefits under the plan (that time frame can be very long depending upon the participant's proximity to retirement age/eligibility); and (3) if the Plan will not allow a separate interest award, whether/ to what extent to require the participant to elect a particular form of benefit under which the AP will continue to receive a benefit if the participant predeceases the AP after retirement

If it is proper to require a participant to elect a joint and survivor annuity, then what form of survivor benefit will be required? Should the survivor benefit equal 50% of the participant's lifetime benefit? 100%? Or some other portion? If a survivor benefit is required, what is the resulting % or dollar amount reduction in the monthly benefit? What joint and survivor options are even available under the particular plan? Each plan varies in terms of available options. Ask the Plan Administrator to send you a Summary Plan Description (SPD) and read it (or skim it 'til you find what you are looking for). A smaller reduction in the monthly benefit payment upon the participant's death (eg., the amount available for payment to the surviving spouse or former spouse), or no reduction at all, results in a greater reduction in the overall monthly benefit that will be paid during the parties' joint lives. **Appendix 7 illustrates this phenomenon.**

PRACTICE TIP: *If you are seeking to require the participant to elect a joint and survivor benefit, then be clear about which form of survivor benefit he must elect, and state that the AP award will be a shared interest award. As demonstrated in the above table, there is a cost (reduction in monthly benefit) to electing a joint and survivor benefit and parties may want to consider how or whether to allocate that cost.*

3. TYPE OF AWARD: SEPARATE vs. SHARED INTEREST

Separate interest awards are simplest and they advance the public policy goal of disentangling the parties, financially and otherwise. ***Separate interest awards*** also free the participant up to elect the form of benefit of his/her choosing. Most, but not all DBPs allow separate interest awards to APs under a QDRO. Under separate interest awards, participant's post-retirement death will not affect APs benefit and therefore participant need not be required to elect a joint and survivor benefit and designate AP as surviving spouse in order to protect the AP benefit. Also, AP can begin receiving a separate benefit before participant elects to receive participant's benefit (but not sooner than participant's earliest retirement eligibility date under the Plan).

Yet if the Plan does not allow an assignment of a separate interest to the AP, then it is generally crucial that the participant be required to elect a joint and survivor benefit and designate the AP as the surviving spouse for the appropriate portion of the post-retirement survivor benefit. Recognition that the survivorship benefit has a present value all-its-own further complicates the analysis about 'what's a "*just and proper*" apportionment of the benefit.

Attorneys should determine in advance whether the benefit can or will be paid as a separate interest and, if not, then alternatively (a) what form of benefit the participant must elect, and (b) how the AP's shared interest award in the post-retirement survivor benefit (often called "Qualified Joint and Survivor Annuity" or "QJSA") should be defined in MSA/GJ. Good compromise language would award the AP "such amount of any post-retirement survivor benefit as is necessary to ensure that the participant's death following commencement of benefits does not result in the reduction of the AP's benefit."

A *separate interest award* results in a benefit that is (a) payable to the AP over the lifetime of the AP, and (b) actuarially adjusted / calculated based upon the AP's life. Neither the death of the participant, nor the participant's decision to defer retirement for whatever reason, will have any impact on the AP's ability to receive her separate interest when the participant becomes eligible to retire. As long as the participant survives to his earliest retirement eligibility date, the AP can receive her benefit at that time regardless of whether the participant retires or not.

A few words about retirement eligibility: Generally , participants who have sufficient creditable service time under a DBP will become eligible to receive a monthly benefit at age 65-67 (sometimes age 62).

If the AP is awarded a *separate interest* in the DBP, then you generally only need to determine what fraction or percentage to award the AP, and how to articulate the award (see more on coverture fractions, below).

With a *separate interest award*, the AP is generally free to elect a single life annuity and some plans allow the AP to receive a lump sum distribution at such time as the participant becomes eligible to apply for benefits plan. Retirement 'eligibility' is determined by the DBP and governing pension statutes and regulations. But if the parties bargained for (and / or the judgment requires) a *shared interest award*, then the AP is not free to elect either a single life annuity or a lump sum distribution form of benefit; instead, she will receive a designated percentage or set dollar amount from the participant's monthly benefit.

If the AP will receive a *shared interest award* from a single life annuity (this is rare), then the award will end upon the death of either party. This could be a spousal support scenario as opposed to a marital property award.

Under a *shared interest award*, the AP is not permitted to receive benefits before the participant's benefits actually go into pay status; but this may not matter to the AP is she is receiving a spousal support award that will terminate or reduce upon the AP's access to the retirement benefit.

Under *shared interest awards*, the AP does not have the right to elect what form of benefit she receives; she is stuck with the form of benefit the participant elects, whether he elects it by choice or because the QDRO compels a certain form of benefit.

If the AP will receive a *shared interest award* from a joint and survivor benefit (which is usually the case), then express the award as a percentage of the monthly benefit, a coverture fraction, or (less commonly) a dollar amount. State what happens to the AP's benefit if the participant predeceases AP after retirement (after all, the realization of such a scenario is probably why the court ordered a shared interest in a joint and survivor annuity in the first place). The issues here are: (a) what portion of the monthly benefit will the AP receive during the participant's and the AP's joint lives? and, (b) what portion of the post-retirement monthly survivor benefit will the AP receive following the participant's death? The AP can receive ***all*** or some lesser portion of that benefit.

If this is a long-term marriage and / or other equitable factors exist, it may be just and proper to give the AP 100% of the post-retirement survivor benefit; if it is a short-term marriage or retirement eligibility is far in the future, then perhaps the AP (if she survives participant) should share the post-retirement survivor benefit with the participant's new spouse (if any). If the latter, then the apportionment formula generally relates to the percentage or coverture fraction that serves as the basis for determining the AP's initial award.

If the participant is already receiving retirement benefits under the plan, then the AP award must generally be in the form of a *shared interest*. Under most DBPs, the participant's election of a joint and survivor benefit upon retirement is irrevocable, even upon divorce and regardless of whether the GJ or QDRO provides otherwise. Shared interest award payments under a QDRO in the post-retirement setting are essentially "check splitters." The form and the amount of the participant's benefit has already been determined and is being paid-out, and all the parties or the court can do in most circumstances is to "split the check" by paying a portion of each monthly payment to the AP.

4. DETERMINING & ARTICULATING AP'S PORTION OF BENEFIT

The AP award needs to be defined in the MSA/GJ; if it is not, then there will be trouble. A coverture-based formula is the most common approach for determining the marital portion of a DBP. The amount of the benefit that is ultimately distributed to the AP depends on how we determine the amount of the benefit that accrued during the marriage.

The two most common ways to determine the marital portion are both 'coverture-based' formulae. They are: (1) an immediate offset fraction that divides the benefit at the time of divorce (aka 'frozen coverture' or 'accrued coverture') and (2) the deferred interest fraction that divides the benefit at the time it goes to pay status (aka 'true coverture' or prospective coverture'). The true coverture method generally favors the AP. The frozen coverture generally favors the participant. Because of this important distinction, simply saying that the AP gets "50% of the marital portion of the participant's retirement benefit" is insufficient and will probably necessitate post-dissolution negotiations or further litigation. Frozen vs. true coverture formulae are distinguishable by the denominator of the coverture fraction ***and*** the benefit being divided. **In either event, to achieve an arguably equitable division, the denominator must coincide with (match) the benefit by which the fraction is multiplied (with reference to the determination date or event tied to the benefit accrual).**

The summary below is derived from an illustration prepared by Oregon attorney Lawrence Gorin and depicts the difference between the '*immediate offset'* (aka '*frozen coverture*') fraction and the 'deferred interest' (aka 'true coverture') fraction method of dividing the DBP:

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QDROs - Defined Benefit Plans
TWO WAYS TO SLICE THE PIE

LARGER SHARE OF A SMALLER PIE
('Frozen Coverture' – favors Participant)
Mahaffey and Mahaffey, 96 Or App 617, 773 P2d 806 (1989)
http://scholar.google.com/scholar_case?case=2705939252971843771
1. Division and award. Alternate payee is assigned and awarded as her sole and separate property an amount equal to the actuarial equivalent of FIFTY PERCENT (50%) of the marital portion (as specified herein) of Participant's accrued (vested) benefit under the Plan as of the date of dissolution of marriage. The marital portion of Participant's accrued benefit under the Plan shall be determined by multiplying Participant's accrued benefit entitlement amount as of the parties' marriage termination date by a fraction the numerator of which is the total number of months of the parties' marriage coinciding with Participant's creditable service under the plan, and the denominator of which is Participant's total number of months of creditable service under the Plan **as of the date of termination of the parties' marriage.** This formula is illustrated as follows:

Dollar amount of P's accrued benefit @ date of divorce x	# of months of marriage coinciding w/ P's creditable service under Plan _____ Total # of months of P's creditable service under Plan as of date of divorce	x 50%

SMALLER SHARE OF A LARGER PIE
('True Coverture' – favors Alternate Payee – preferred method under Oregon law)
Kiser and Kiser, 176 Or App 627, 32 P3d 244 (2001)
http://scholar.google.com/scholar_case?case=8034781313195949375
1. **Division and award.** Alternate payee is hereby assigned and awarded as her sole and separate property FIFTY PERCENT (50%) of the marital portion (as specified herein) of Participant's accrued, vested benefit under the plan. The marital portion of Participant's accrued benefits and benefit rights under the Plan shall be determined by multiplying Participant's benefit entitlement amount as of Participant's benefit commencement date or the Alternate Payee's benefit commencement date, if earlier, by a fraction the numerator of which is the total number of months of the parties' marriage coinciding with Participant's creditable service under the plan, and the denominator of which is Participant's total number of months of creditable service under the Plan **as of Participant's benefit commencement date or Alternate Payee's benefit commencement date**, if earlier. This formula is illustrated as follows:

Dollar amount of P's accrued benefit @ P's benefit commencement date x	# of months of marriage coinciding w/ P's creditable service under Plan _____ Total # of months of P's creditable service under Plan as of P's benefit commencement date or, if earlier, AP's bene commencement date	x 50%

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In deciding which brand of coverture fraction to use, the issue is whether participant's service after the date of divorce should be a factor in calculating the AP's benefit. The AP will want to capture post-dissolution benefit accrual on her share. If, as of the date of divorce, the entire pension benefit was accrued during the marriage and the pension won't be payable until some future date, then failure to use the true coverture fraction will **freeze** the AP's benefit at the amount it was estimated to be as if the date of divorce. If the asset was a DCP benefit, the AP award would presumptively accrue earnings through the time of total distribution. Moreover, a DBP benefit is based on the plan formula in effect on the date of retirement, not the date of divorce.

5. **OWENS v. OWENS-KOENIG,** 195 Or App 734 (2004) http://www.publications.ojd

This case lends further support to the proposition that Oregon prefers the 'true coverture' over the 'frozen coverture' when dividing DBPs. The Court noted that "the 'coverture' or 'time rule' is typically used to calculate the 'marital portion' of benefits under a defined benefit retirement plan. The marital portion is determined by multiplying the benefit to be divided by a fraction, the numerator of which is the years (or months) of service during which the couple were married and the denominator [of which] is the *total years (or months) of employment*" – presumably at the time of retirement as opposed to the time of the divorce. Citing *Kiser and Kiser*, 176 Or App 627, 632 n 1, 32 P3d 244 (2001).

6. **TOUGH v. TOUGH,** 259 Or App 265, 313 P3d 326 (2013) http://law.justia.com/cases/oregon/court-of-appeals/2013/a150941.html

The holding in Tough is fairly narrow, but quite useful when determining just how much a QDRO may deviate from the Judgment language. Simply, whether or not the division in the Judgment tracks the division methodology preferred by Oregon courts, unambiguous language in the Judgment dictates the rights and interests of the parties with respect to the retirement plan benefits at issue...and the QDRO may not deviate from or otherwise modify those rights and interests. Tough does not tell us what should happen if the Judgment language is ambiguous, or if an important issue is simply not addressed (but see Kiser v. Kiser, below).

7. **ANCILLARY BENEFITS.**

The MSA/GJ needs to address ancillary benefits and should generally provide that the AP will receive a pro rata/proportionate share (referring to the coverture formula used to divide the normal retirement benefit) of any early retirement supplement, early retirement subsidy, 13th-month payments, and cost-of-living adjustment (COLA) paid by the Plan on behalf of the participant. COLAs and other ancillary benefits are integral to the DBP and if the MSA/GJ or DRO fails to assign the AP one-half of the marital portion of such benefits, then the AP has not received her equitable share of those benefits.

If a participant challenges the award of COLAs, or any other ancillary benefit, then determine whether and to what extent the Plan actually provides for them and, if so, how commonly they are paid out. If it's a government Plan the COLAs are likely a major feature of the Plan and the AP should wage the battle for her pro rata share. If the Plan provides for early retirement subsidies and/or supplemental retirement benefits, then the AP needs to insist on a pro rata award thereof. Early retirement subsidies refer to 'golden handshake' situations. Failure to provide for the AP's interest in ancillary benefits can result in substantial financial loss to an AP and huge corresponding windfalls to a participant.

8. **DEATH OF PARTICIPANT, ALTERNATE PAYEE**

The rights of a spouse or former spouse to *pre-retirement* and *post-retirement survivor benefits* are an integral component of the defined benefit and the MSA/GJ must address the AP's right (or lack thereof) to such benefits.

i. Pre-retirement period:

If AP dies before benefits commence to either party, will the AP's interest revert to participant, or will AP be permitted to designate a remainder beneficiary (if permitted under the plan)?

Some DBPs do not permit an AP to designate a beneficiary for their assigned award. When a contingent AP award is authorized, the contingent AP must generally be the children of the marriage, and often must be joint children under the age of 18 years.

If AP dies before commencement of benefits under the DBP and there's no contingent AP, more often than not AP's award reverts to Participant. Some Cash Balance Plans in particular allow the AP's benefit to be paid to the AP's estate or designated beneficiary.

If the participant dies before benefits commence to either party, the AP generally should be entitled to receive some or all of any qualified pre-retirement survivor annuity (QPRSA) benefit. The QPRSA benefit usually equals 50% of the single life annuity that would have been paid to the participant, had the participant retired at that time rather than died. Under the overwhelming majority of DBPs, the AP will receive no benefit if the participant dies before payments begin, *unless* the AP has been specifically designated as the surviving spouse for purposes of the QPRSA. You may want to propose language providing that the AP shall receive "*that portion of the QPRSA necessary to ensure that the AP benefit is not reduced as a result of the participant's death prior to the commencement of benefits*."

If the AP award is a separate interest award, most plans will allow the separate interest to be maintained regardless of the participant's survival. In true coverture arrangements, the DRO/QDRO will need to provide for QPRSA coverage during the pre-retirement phase, to protect AP's assigned interest until AP's benefits commence under the plan. This should not be necessary, however, if a frozen coverture arrangement is ordered.

If the AP is awarded a shared interest, then QPRSA coverage is necessary to protect the AP's right to receive her benefit if participant dies prior to commencement of her benefits. Most plans provide 50% QPRSA benefit that is assignable to the former spouse. 50% is the base but frequently it is appropriate to base the AP's QPRSA award on the AP's awarded share of the retirement benefit. If the AP's QPRSA award is to be based on the proportion of her awarded share of the retirement benefit, then be careful how you articulate the award of the QPRSA benefit. Keep in mind that the QPRSA award reflects 50% of the participant's retirement benefit, so you may want to award the AP either 100% of the QPRSA, or a fraction of the QPRSA equal to the coverture fraction. Note that sometimes the parties want the AP to receive the same percentage of the QPRSA benefit as of the annuity benefit; in that case, if participant dies, AP will receive only one-half of the amount that AP would have received had the participant retired rather than died.

ii. <u>Post-retirement period</u>:

Under a separate interest award, this is generally not an issue since the death of participant subsequent to commencement of AP's benefits will have no impact on AP's benefit and the form of benefit elected by AP will dictate what happens to her benefit after she dies.

If, however, the AP is receiving her benefit under a shared interest award, then you will want to secure a survivor benefit (qualified joint and survivor annuity – QJSA discussed above) to protect that award in case the participant predeceases the AP.

If the participant is already retired at the time of divorce and has elected a QJSA that election is, most of the time, irrevocable, regardless of what the QDRO says. Some public plans allow a participant to convert a joint & survivor benefit to a single life annuity (with Oregon PERS Tier One/Two, a member who selected Option 2A or 3A can 'pop-up' to Option 1 [single life annuity] *unless* the DRO prohibits). Conversion to single-life annuity would result in an increase in participant's benefits and perhaps the parties have some reason to want a greater monthly payment so that more income is available for spousal support purposes.

PRACTICE TIP: In post-retirement situations you must consider how to handle post-divorce, ongoing payments pending plan approval and implementation of the DRO/QDRO. Unfortunately, it's not unusual for an AP to wait 12 or more months before they see the first payment from the Plan. You must decide whether and how AP will get their share of the benefit during this period—which usually requires accounting for the tax burden on participant. Address this issue in the MSA/GJ so that you and your client don't have to wait for the QDRO to be prepared, filed and administered before the issue is fully addressed.

D. CASH BALANCE PLANS (CBPs)

One type of DBP requires special discussion. CBPs are DBPs in which the benefit amount payable at retirement is calculated in a manner that looks like an account-based plan benefit. CBPs have become increasingly popular with some larger employers in recent years. The participant's benefit in a CBP is usually expressed in statements as a "cash balance" – that is, they look a lot like DCP statements because they show a precise dollar amount in an "account" for a particular employee. They also usually provide for "interest" accruals on the stated benefit, and include fixed, additional annual contributions. Many divorce practitioners treat CBPs just like DCPs for settlement purposes, only to find that CBPs can't be divided as DCPs. Likewise, many CBP participants don't realize that their CBP benefits aren't like those in a traditional 401(k) Plan.

Perhaps the most important thing to keep in mind is that, like most DBPs, most CBPs provide for benefit payments only after participant reaches his earliest retirement age and only in the form of an annuity. An award of some portion or dollar amount from the employee 'account' (credited each year with some form of 'pay credit') may not result in the desired division, and may leave numerous important items unaddressed.

When confronted with a CBP benefit, be sure to review the Plan SPD thoroughly, as you'll likely find some surprises that should then affect the way you divide the benefit. For more information on CBPs, see the *U.S. Dept. of Labor's FAQs about CBPs* at: http://www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html

See Appendix 6 for a Condensed list of Considerations in drafting CBP QDROs.

E. NON-DIVISIBLE, NON-QUALIFIED PLANS

Some retirement benefits are simply not divisible, yet courts may consider their value in determining a just and proper division of marital property. Investigate this issue early in the discovery phase of your case, to determine whether a party has an interest in such a plan and, if so, the plan's options and limitations for dividing benefits in the divorce context. Non-divisible plans frequently show up in the context of highly compensated employees, and such plans allow employers to provide employees with retirement benefits that exceed the limitations under ERISA and the tax Code. Here is a summary from Morgan Stanley about this type of plan, which they refer to as a *Nonqualified Deferred Compensation Plan*: http://www.morganstanleyfa.com/public/facilityfiles/sb090226100041/9c815787-cbbc-440d-9957-9118b7e6e8e2.pdf

Non-qualified plans usually have key terms in their names such as:

SERP
Non-qualified Deferred Compensation
Phantom Stock
Excess Benefit
409(a)
Management Incentive

Such plans are not 'qualified' and often won't accept a QDRO/DRO or permit assignment of benefits. The divorce attorney must determine whether one of these plans can be divided **before** settlement negotiations are completed or the case is tried. A nightmare situation erupts when the parties discover, sometimes many years after the GJ that a retirement interest that they agreed to divide is indivisible or un-assignable. If you discover that a nonqualified plan is non-divisible, then a recital should be made in the MSA or GJ that no portion of the benefit can be assigned to the non-participant spouse.

If the non-divisible plan is the only major asset, then you could have the participant spouse secure an insurance policy for the non-participant spouse's benefit or increase spousal support payments (presently or in the future, upon retirement). Any solution will have some drawbacks, but creative, alternative approaches may be less complicated and more appealing than obligating the participant to make payments to the other spouse every time he receives payments from the plan in the future. Possible approaches include: awarding the non-employee spouse an immediate offset using an asset of comparable value, if one exists and value of the nonqualified plan can be determined; deferred payment arrangement/mechanism pain-stakingly set forth under an MSA/court order that requires participant spouse to send non-participant spouse a portion of each future payment he/she receives; this is the least desirable approach because it fails to disentangle the parties, relies on long-term, mutual cooperation, and good faith adherence to notification duties, etc.

The issue of surviving spouse benefits adds additional complications. Under many circumstances, it is reasonable for the MSA / GJ to require that the non-employee spouse be named as the sole surviving spouse and beneficiary of the non-divisible plan. If such an option is not available under the plan, or is not equitable for whatever reason, the non-employee spouse could pursue an arrangement whereby the employee spouse designates the non-employee spouse as beneficiary for some or all of the death benefit under a life insurance policy or other, qualified retirement plan.

If you absolutely must conclude the case before you can determine whether the non-qualified plan benefit can be divided by DRO, then you will either want the court to expressly reserve jurisdiction to enter a corrected judgment or include a provision in the MSA/GJ allowing for an alternate award such as "In the event that it is determined that Husband's ABC Non-qualified Management Incentive Plan cannot be divided by DRO or any other method of division and assignment acceptable under the Plan, then in lieu of the interest awarded to Wife under the terms of this section, Wife shall receive" and then set forth the alternative (perhaps some dollar amount as of a specified date from Husband's DCP (adjusted, of course, for interest and earnings from that date forward).

PART 4: GOVERNMENTAL & OTHER NON-ERISA PLANS.

Many government retirement plans exist, and they are generally 'largely exempt' from ERISA and IRC 414(p). This means that they are not subject to QDRO rules and terms, but are instead subject to the United States Code of Federal Regulations, and state and other regulatory law. The discussion that follows treats only the main Federal and Oregon retirement plans. The following concepts apply in some other government retirement plans that you may encounter, but you must investigate each plan individually and should consult a DRO attorney to assist you.

PRACTICE TIP: Many typical QDRO terms and provisions are frequently unacceptable to these Plans. Craft your language carefully.

A. FEDERAL RETIREMENT PLANS (Non-Military Federal Employees).

The Federal government's three main retirement plans are: Thrift Savings Plan **(TSP)** (a DCP); Federal Employees Retirement System **(FERS);** and Civil Service Retirement System **(CSRS).** FERS & CSRS are DBPs with associated contribution accounts**.** Current or former federal employees **(FE)** general participate in TSP and in one of the DBPs.

1. FERS & CSRS:

The United States Office of Personnel Management ('OPM') administers FERS and CSRS and will accept a Court Order Acceptable for Processing ('COAP') to divide the plan benefits. Before you begin negotiations concerning FERS or CSRS, review the applicable definitions in the CFR. **They are printed for you at Appendix 8.**

The FE's interest in these plans is assignable to a spouse or former spouse ('FS') under a COAP (*not* "QDRO"). The procedure for assigning FERS or CSRS benefits to a FS is heavily regulated under the U.S. Code of Federal Regulations. Specialized terminology is necessary to express the FS's award, and a basic understanding of the plans' characteristics is necessary to protect your client's interests, regardless of whether you represent the FE or the FS. OPM has published useful guidelines and summaries about FERS & CSRS:
http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR986/MR986.appa.pdf

A court order may affect any (or all) of three types of retirement benefits paid by OPM under FERS & CSRS: the employee annuity, refunds of employee contributions, and survivor annuities. The benefits themselves are related and provisions made for one may affect another. **For example, awarding a former spouse survivor annuity or permitting a refund of employee contributions can result in a reduction to the employee annuity.** Federal regulations govern each type of benefit and can be found at: http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=5:2.0.1.1.18

PRACTICE TIP: Attorneys are strongly advised to familiarize themselves with governing regulations before attempting to negotiate FERS & CSRS benefits.

For a comprehensive summary of FERS & CSRS treatment in the divorce and separation context, see the following OPM publications:

- ***Handbook for Attorneys on Court-ordered Retirement Benefits (CSRS & FERS)***
https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf
- ***Court-ordered Benefits for Former Spouses***
https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf

CSRS & SSI: If the FE participates in CSRS and was hired **before** 1984, the governmental employer does not contribute to Social Security on FE's behalf. The issues here are (a) the CSRS member's retirement benefits under CSRS won't be supplemented by SSI; (b) the CSRS member's benefit is beefed-up in lieu of access to SSI; (c) had the member worked in the private sector, only his pension, and not SSI, would be subject to division; (d) have both spouses worked during the marriage?; (e) does AP have her own SSI benefits? And if not, will she not receive a (former) spouse's share of the CSRS member's SSI because the member isn't getting any?

If, however, the FE was hired **after** 1983, then he/she participates in FERS; some FE's hired before 1983 transferred to FERS from CSRS. FERS consists of 3 components: the Basic Plan, TSP and Social Security.

Three Primary Components of FERS and CSRS:

(1) **THE ANNUITY**: A Court Order Acceptable for Processing (COAP) can divide a federal employee's (FE's) monthly pension benefit and pay a portion to the employee's former spouse (FS) if and when the benefit is payable to FE. FS must wait until FE retires before FS can receive FS's portion of FE's retirement benefit, as there is no option for the FS to receive benefits at FE's earliest retirement eligibility date if FE does not commence retirement benefits at that time. **The award cannot be a separate interest award** and therefore FS cannot elect to receive FS's benefit in any form. FS's award is based entirely upon FE's life and will continue only during FE's life *unless* FE elects (or is ordered) to elect a **former spouse survivor annuity ('FSSA')** for the benefit of FS. Assignment of benefits to FS is treated more like a garnishment than a separate property award, and the award can be expressed as a dollar, percentage or formulaic amount of FE's annuity.

If FS wants a pro rata share of COLAs, then the MSA/GJ should specify this in order to preserve FS's right to receive them under the COAP. If FS award is expressed as a dollar figure, then FS will not receive COLAs unless the COAP expressly provides for an award of COLAs. If FS award is expressed as a percentage of FE's benefit, or by use of a formula, then FS's award will be automatically adjusted on a pro rata basis when COLAs are made. Percentage and formulaic assignments are more common than dollar amounts.

Like with other DBPs, when drafting MSA/GJ provisions that concern FERS/CSRS, you need to consider the coverture language and principles discussed in the general section on DBPs, above. Do you want to exclude or include benefits attributable to service earned before and after the marriage? If you award '50% as of the date of divorce', then OPM will automatically exclude any benefits based on service earned after marriage, including those

attributable to salary increases after the date of divorce. This approach does not provide any inflationary protection for the AP. Spell out the numerator and denominator.

Use of the term 'gross benefit' or 'gross annuity' will be interpreted as meaning the FE's self-only annuity *after* being reduced for the cost of any FSSA (survivor benefit), and will result in both parties sharing in the cost to insure the FSSA on a proportionate basis. The COAP can also require the FS to bear the full cost of securing the FSSA (the amount of the difference between the FE's self-only annuity and the FE's gross annuity). So whatever percentage or dollar award you express, be clear as to whether it is to be assessed against the FE's gross benefit or to the FE's self-only annuity.

(2) **REFUNDS OF EMPLOYEE CONTRIBUTIONS.** FE has the right to withdraw his contributions account to his pension prior to retirement. Such a refund is only of employee contributions and not the value of the DBP plan and not the full value of the retirement annuity. Employee contributions are generally recovered in the first 3-4 years following retirement. If the employee contributions account is $50,000, then the present value of the annuity is probably closer to $200,000. Although the FE has the right to cash out the contributions account, under normal circumstances he would not wish to do so because a total cash out would eliminate the right to the more valuable annuity benefit.

The MSA/GJ needs to address the 'refund of employee contribution account' issue. Generally the AP will want to prohibit refunds of employee contributions except with express consent of the AP. In cases where a refund is permitted, the order should provide that FS will receive a pro rata share of such refund. Just be sure that FS understands that in such a scenario the FS would get only her share of the refund, but nothing else, since a total cash-out would eliminate any annuity payment.

In sum, taking away the FE's right to refunds locks her in to the annuity benefit scenario and thus preserves the FS's right to receive his share of such benefit and the survivor benefit if awarded.

(3) **SURVIVORSHIP**.

Pre-retirement 'Basic Employee Death Benefit'. If FE dies with at least 18 months of creditable service, then the Basic Employee Death Benefit (or a portion thereof) may be payable to the FS if a COAP provides for such an award, the FS was married to the FE for a total of at least 9 months, and the FS did not remarry before reaching the age of 55 years.

Former Federal Employee & 'Former Spouse Survivor Annuity (FSSA).' Provided that the right is properly secured under a COAP that is on file with OPM, the FS who survives the former FE can receive a FSSA or a portion thereof. The FS must have been married to FE for at least 9 months and must not have remarried before reaching the age of 55 years (unless she was married to the FE for 30 or more years). If the FS remarried prior to age 55, then she would not be entitled to receive FSSA coverage or payments.

Under the FSSA, CSRS pays up to 50% of the total pension benefit. If concerns exist about the FS's continuation of / access to Federal healthcare benefits, then talk with a DRO attorney; in order to preserve the FS's right to continue access to Federal Employee Healthcare Benefits (at her own cost and per her election), the COAP would need to assign the FS something, even $1, from the surviving spouse annuity.

As explained above, there is a cost associated with securing FSSA coverage under CSRS or FERS. The cost varies and it isn't cheap. Parties will want to explore whether they want to have this coverage, and if so, who is responsible to pay; if the order does not say who is responsible to pay for it, it will be shared equally between the parties.

How much will the monthly annuity be reduced as a result of providing joint and survivor coverage? If the FE elects (or the COAP requires) an insurable interest survivor annuity for FS equal to 55% of participant's *reduced annuity*, then the amount of reduction in participant's *self-only annuity* will depend upon the difference between participant's age and the age of AP/survivor annuitant, as described in the following table:

Age of AP in relation to age of Participant	Reduction in Self-only Annuity
Older, same age, or less than 5-years younger	10%
5 but less than 10 yrs younger	15%
10 but less than 15 yrs younger	20
15 but less than 20 yrs younger	25%
20 but less than 25 yrs younger	30%
25 but less than 30 yrs younger	35%
30 or more yrs younger	40%

A 'COAP' that assigns FSSA coverage must be enforced by OPM. For more information on Former Spouse Survivor Benefits under CSRS & FERS, see:

Handbook for Attorneys on Court-ordered Retirement Benefits (CSRS & FERS)
https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf

OPM's Former Spouse Survivor Benefits Chapter 74

https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c074.pdf

DISPOSITION OF FS's INTEREST UPON DEATH OF FS. Annuity payments that are assigned to a FS under a COAP are payable during the FE's and FS's joint lifetime. If the FS predeceases the FE, then if the COAP is silent on the issue, the FS's assigned interest will revert to the FE. The COAP can also expressly state that the assigned benefit reverts to the FE in the event that the FS predeceases the FE. Alternatively, the COAP can provide that if the FS predeceases the FE either before or after the benefit goes into pay status, then FS's share can be paid to the parties' joint children, or to the FS's estate. Another option under FERS & CSRS is to direct that the FS's share be paid to the clerk of the court.

***PRACTICE TIP:** Among family law and DRO practitioners, OPM has a reputation for being inaccessible, unresponsive and generally difficult to communicate with. If you have a case in which you must communicate with OPM, bear in mind that they are slow and difficult and pace yourself / plan accordingly. DRO attorneys have experience dealing with OPM and time-saving strategies that should save your client time and money.*

The Case of Kiser and Kiser: ***Kiser and Kiser***, 176 Or App 627, 32 P3d 244 (2001). The Kisers ended their 30-year marriage and stipulated at trial that husband's federal retirement benefits would be equally divided. Husband was a non-retired member under CSRS & TSP and planned to work another 10-11 years for the federal government. The GJ awarded wife "*50% of husband's CSRS benefits and TSP benefits as of the date of entry of this decree*" and the court retained jurisdiction to implement division of "retirement accounts" in accordance with applicable federal law and regulations. At the time of appeal, it appeared that neither party had prepared or filed the necessary domestic relations orders.

Wife argued on appeal that the GJ's retirement benefit provision was "**defective**" in 4 respects and sought clarification and instructions regarding division of such benefits. She argued:

(1) **The GJ failed to specify (a) when her 50% of the TSP could be distributed and (b) whether her share would include earnings that accrued on her portion between the date of divorce and of distribution.** The Court compared the TSP benefit to a 401(k) Plan benefit and expressly found that the GJ language "**mean[t]**" wife was entitled to 50% of the total account balance accumulated under the plan as of date of dissolution, interest on her portion from the valuation date/date of divorce, payment as soon as administratively feasible under the plan, and that this was the "appropriate method of dividing defined contribution retirement plans." Kiser, 32 P3d at 246.

(2) **The GJ failed to specify how wife's CSRS interest would be calculated and distributed.** The Court of Appeals agreed that the GJ's award of '*50% of husband's CSRS benefits as of the date of divorce*' did not adequately explain how the benefit was to be calculated or distributed, and it held that the proper method of dividing the defined benefit was to "*determine the actuarial present value [which] is by definition that amount of money presently needed to purchase an annuity that would pay a particular monthly amount for the life expectancy of the retired employee. To calculate the present value of this kind of marital asset * * * the 'time rule' is used. That rule requires multiplying the present value by a fraction, the numerator of which is the years or months of service during which the spouses lived together as a marital unit [and] the denominator of which is the total years of service required to receive the retirement benefit.*" Wife argued that an award to her of a portion of the actuarial present value of the benefit was not feasible or appropriate in the case because: (a) she could receive a portion of husband's monthly CSRS benefit when it moves into pay status, thereby providing her with a steady income source through her retirement; (b) there was no evidence in the record of the Plan's actuarial, present value; and, (c) the trial court made no attempt to offset the value of the CSRS benefit against other marital property. Husband argued that (a) wife should receive 50% of the monthly benefit he would have received at the date of divorce (frozen coverture) and (b) inequity would result if wife's interest was calculated on the basis of his benefit-at-retirement, since that amount would be based in-part upon potential post-divorce salary increases. The Court determined that husband's reasoning "ignored the straight-line appreciation of benefits under a defined benefit plan" noting that it had "repeatedly emphasized that when retirement benefits have not matured and are thus not presently liquid, it is equitable to look to the value of the benefit at retirement because it is not proper to assume, for purposes of determining the "value of these rights, that husband would immediately leave public service and * * * ignore the vested pension benefits."

(3) **The "trial court erred" in failing to include a requirement that husband elect a *former spouse survivor annuity* that would insure that wife continue receiving CSRS benefits for her lifetime, in the event that husband predeceased her.** Husband did not contest the equity of the award, but argued that wife, not husband, should pay for that benefit since he would "never receive any of its benefits." Yet the Court acknowledged wife's 30-year contributions as wife, mother and homemaker, during which time the benefits that would be subject to the survivor annuity had accrued, and concluded that she was entitled to the maximum CSRS former spouse survivor benefit. The Court required the parties to equally divide the cost to insure the survivor benefit.

(4) **The "trial court erred" in failing to require that "the parties jointly purchase" husband's military credits.** Husband could draw a greater benefit at retirement by purchasing credits for the 3 years & 11 months that he served in the military during the early years of the marriage. The Court of Appeals equated the option to purchase such credits to a marital asset despite the fact that they had not yet been purchased, and stated that it was within the Court's equitable powers to order husband to exercise the buy-back option as to the military service credits that he had earned during the marriage, despite the fact that the GJ did not contain such order. The Court noted that the record contained a stipulation that the parties would split the cost of the military credit buy-back.

2. THRIFT SAVINGS PLAN (TSP):

TSP is a defined contribution plan (DCP) for Federal employees. It closely resembles a 401(k) Plan and is relatively easy to 'divide'. There are two types: civilian and military. If a party has both, then you may need two DROs. For most civilian FEs hired after 1983, TSP is one of a 3-part retirement system that also includes Social Security retirement income and FERS basic annuity. For civilian FEs hired before 1984 who did not switch to FERS, the TSP supplements the FE's CSRS annuity. Special rules exist regarding Uniformed Services Accounts under TSP. For an excellent summary of TSP, visit the *Summary of the Thrift Savings Plan*, published by the Federal Retirement Thrift Investment Board at: https://www.tsp.gov/PDF/formspubs/tspbk08.pdf

A DRO concerning TSP can be issued at any stage of divorce, annulment or legal separation. TSP calls such DROs "retirement benefits court order" but we will stick to DRO. There are four main issues that the MSA/GJ needs to address in the TSP context; they are:

a. Identify the asset by precise name: "Thrift Savings Plan" (TSP).

b. State that FS is entitled to "[specific dollar amount or fraction or percentage] from FE's TSP account(s) as of [specified past or current date (valuation date)]."

c. State the valuation date expressly.

d. State whether earnings will be paid on the amount of the FS's entitlement from the valuation date through the time that payment is made to the FS. Generally, the answer is yes, but the MSA/GJ must be clear on this in order to bind the parties, guide the DRO attorney, and prevent post-MSA/GJ disputes.

If there are any TSP loan balances outstanding, then you need to address that somehow in the MSA/GJ. When a percentage is awarded and a loan balance exists and the court order is silent about loan treatment (inclusion vs exclusion), then TSP will determine the FS's share based upon the *loan inclusion method* (discussed above in the section devoted to DCPs). The FS cannot maintain her funds within TSP. TSP basically transfers the FS's interest 30 days after it approves

the court order. **The FS has only 60 days in which to apply for a rollover; if the FS does not so apply, then TSP will issue her a check. They waste no time.**

Only a court order can freeze a TSP member's account during divorce proceedings; if you are concerned that the FE will withdraw, then obtain a court order directed at TSP and prohibiting the FE from obtaining a TSP loan or withdrawal until further court order. Present a court certified copy of the 'freeze' order to TSP's legal processing unit; this will prevent further loans and withdrawals but will not prevent the FE from engaging in other TSP account activity, such as investment decisions and payments on existing loans.

The TSP member's spouse and his/her attorney may obtain account balance and TSP transaction history by submitting a written request that includes: the name and relationship of the requesting party to the FE; the FE's name and TSP account number (or SSN); a description of the information needed; and the purpose for which the information is being requested. Requests for TSP account information must be in writing and directed at:

> TSP Legal Processing Unit
> Regular mail: PO Box 4570, Fairfax, VA 22038
> Overnight mail: 12210 Fairfax Town Center, Unit 906, Fairfax, VA 22033
> Or by fax: 1-866-817-5023

For an excellent summary about TSP in the divorce context, see the Federal publication *Court Orders and Powers of Attorney* at:
https://www.tsp.gov/PDF/formspubs/tspbk11.pdf

B. STATE & LOCAL GOVERNMENT RETIREMENT PLANS

State and local government retirement systems are specifically exempt from ERISA. Some state and local government plan are non-divisible. See section E of Part 3, above at p. 25, for general principles regarding **non-divisible plans.**

1. DIVISIBLE PLANS, GENERALLY

Oregon state and local government agencies/employers participate in various retirement plans, including DCPs, DBPs, and hybrid plans. The state or government employee's participation is any given plan is based on the capacity in which the employee works and his/her elections in the employment benefit selection process. Also relevant is when the employee began working for the government employer because, over time, the available selection of retirement plans has changed; for example, Oregon PERS Tier One/Tier Two no longer accepts new members.

State and local government employees generally participate in non-ERISA DCPs (including but certainly not limited to 403(b) and 457(b) plans). Many **TIAA CREF** contracts contain these types of plans and thus fall into this category. Federal law has been interpreted to allow division by 'QDRO' of Section 403(b) and 457(b) plans for employees of certain tax-exempt organizations and for governmental and certain non-governmental employers in the U.S. These divisible, government DCPs closely resemble 401(k) plans and your approach to these plans should closely mirror your approach to 401(k) Plans.

403(b) plans: These are **'tax-sheltered annuity'** retirement plans for certain public school employees, certain ministers, and employees of certain IRC Section 501(c)(3) tax-exempt organizations. 403(b) plans allow employees to contribute some of their salary to the 403(b) plan.

457(b) plans: These are **'deferred compensation plans'** established by state or local government or tax exempt organizations under IRC 501(c). Participants are employees of such entities and they and/or the employer contribute, through salary reductions, up to the IRC 401(g) limit ($18,000 in 2015). Contributions and earnings on contributions are tax-deferred and may include Roth contributions.

2. OREGON PERS

Oregon state employees generally participate in the Oregon Public Employees Retirement System (**'PERS'**). PERS accepts Domestic Relations Orders that meet the requirements of ORS Chapters 238 and 238A and the correlating rules and regulations under the Oregon Administrative Rules chapter 459: http://arcweb.sos.state.or.us/pages/rules/oars_400/oar_459/459_tofc.html Approximately 95% of all public employees in Oregon participate in PERS. There are nearly 1,000 PERS employers, including: state agencies; universities and community colleges; all school districts; and. most city, county and local government agencies.

Generally speaking, PERS members participate in one of two plan 'packages':

1. **OPSRP** (Pension Program + Individual Account Program [IAP]); or,
2. **PERS Tier One / Tier Two + IAP**

For an excellent summary comparing PERS' Tier One, Tier Two, OPSRP and IAP plans, ***and*** an excellent summary comparing PERS Tier One/Two benefit *options*, **see Appendix 9.**

A few words about the switch from PERS Tier One/Two to OPSRP:
Beginning January 2004, already-established **'**Tier One / Tier Two' ('Tier') employees retained their existing Tier accounts and benefits, but as of 1/1/2004, no additional member contributions are being made to the accounts. Instead, ongoing member contributions consisting of 6% of the member's salary are deposited to the Tier member's **PERS IAP** account (which was newly-established as of late 2003/early 2004). Members' Tier One accounts continue, however, to earn the annual interest (8%), and Tier Two accounts continue to be credited with earnings or losses.

Effective 28 August 2003, **newly-hired, PERS eligible employees** do not participate in Tier One / Tier Two, but instead in the **OPSRP system**, which consists of the defined benefit plan (**OPSRP Pension Program**) and the **IAP** defined contribution plan (DCP).

Understanding the differences between these plans, including the available retirement options thereunder, will help you tremendously in negotiations, trial prep and the drafting of your MSA/GJ. To that end, here are a few critical resources to tap to get a solid, foundational understanding of the PERS plans that we routinely encounter as Oregon family law attorneys:

General Information on Divorce and PERS Benefits:
http://www.oregon.gov/pers/mem/docs/publications/divorce_info.pdf

OPSRP Pension Program and IAP Pre-Retirement Guide:
http://www.oregon.gov/pers/mem/docs/publications/opsrp_pre-retirement_guide.pdf

Tier One / Tier Two & IAP Pre-Retirement Guide:
http://www.oregon.gov/PERS/MEM/docs/publications/pre_retirement_guide.pdf

Tier One/Two & IAP Retirement Forms and Information:
http://www.oregon.gov/pers/mem/pages/section/form/tier_retire.aspx

'*PERS by the Numbers*' was published by PERS in April 2015 and is an excellent summary and comparison of PERS system benefits, demographics, funding, revenue and terms: http://www.oregon.gov/pers/docs/general_information/pers_by_the_numbers.pdf

(i) PERS INDIVIDUAL ACCOUNT PROGRAM (IAP)

This is a defined contribution plan available for all active Tier One/Tier Two and OPSRP members. In 2003, the Oregon legislature created the IAP to provide an individual-based retirement benefit for new employees hired after 28 August 2003, and for Tier One/Tier Two member active on or after 1 January 2004.

The IAP contribution is 6% of the Member's compensation. The IAP benefit is separate from and in addition to the member's interest in Tier One/Tier Two ***or*** OPSRP. IAP accounts exist within a pooled fund that is managed by ING (nka VOYA Financial). IAP accounts are credited with investment earnings and losses annually (during March, for the prior year), and have no guaranteed rate of return. Members and Alternate Payees (APs) can roll over IAP funds to traditional IRAs, eligible employer plans, 457(b) Plans, Oregon Savings Growth Plan or another qualified plan. Members retiring from IAP can receive their account balance as a lump-sum payment or in installments over a 5, 10, 15 or 20-year period. Members can designate a beneficiary of their choosing to receive any remainder balance following the member's death. DROs can require the member to designate the AP as beneficiary for some or all of the remainder.

(1) **Valuation Date**. Approach PERS IAP the same as you would a 401(k) but do not assume that you can divide the account as of the date of dissolution or 'any old date'. IAP division **must** be as of December 31st of a year prior to the date of divorce or separation. That said, in a case in which the parties were divorced in October 2014, PERS administered an order that provided for the account to be split as of 31 December 2014. Talk with PERS if you have questions or wish to use a future date for division.

(2) **Getting Around the Valuation Date Dilemma**. The challenge with IAP splits is figuring out how to capture a portion of the IAP account contributions (*not accrued interest*) that are made *after* 12/31 and *before* the date of divorce or property settlement. The best approach is to determine the current YTD amount of IAP contributions, up through the date of divorce or property settlement date. You can glean this information from the Member's pay stubs, or have the Member log into her online account and view and print primary documentation concerning IAP contributions.

PERS allocates earnings after the end of the calendar year and *after* they add that year's contributions. So you may look at the Member's YTD income on his/her pay stub and calculate 6% to determine the YTD IAP contribution. Add such contributions to the prior year's 12/31 account balance to yield the current account balance; then, express the AP's interest as a fixed dollar amount as of the end of the prior year. If the AP's IAP award is expressed in percentage language, then you cannot capture contributions made between the date of divorce and 12/31 of the prior year. You can express your percentage award as a whole number or up to two decimal points (such as 57.66%).

(3) Beneficiary Designations. Finally, your MSA/GJ should address whether the PERS IAP Member can change his/her pre-retirement beneficiary designation if the AP was previously named as beneficiary.

(4) AP's Distribution Options. The AP can elect an immediate distribution, maintain an AP IAP account, or roll the balance into an IRA, 457(b) or other qualified plan.

(ii) PERS TIER ONE / TIER TWO This is a hybrid plan – a defined benefit plan with a PERS Tier One / Tier Two member account component. Be very careful how you articulate the award under the MSA/GJ, as reference to the 'PERS member account' or 'PERS account' will not dispose of the defined benefit component. See section (5), below.

(1) Primary differences between Tier One & Tier Two. Members hired before 1996 have **Tier One**, while members hired between 1/01/1996 and 8/28/2003 have **Tier Two**. Members hired after 8/28/2003 have **OPSRP** (see below). The main differences between Tier One and Tier Two are as follows: (a) Tier One guarantees (as of January 2014) 7.75% (*formerly 8%)* annual earnings for regular member accounts, while Tier Two Tier Two accounts are credited with actual earnings or losses; (b) 'Normal retirement' age under Tier One is 58 years, while under Tier Two it's 60 years; and (c) Early retirement reduction for Tier One at age 55 equals 76% of the age 58 normal retirement benefit; while the early retirement reduction for Tier Two at age 55 equals 60% of the age 60 normal retirement benefit.

(2) Payment options under Tier One and Tier Two: The four web links, above, provide excellent charts and summaries concerning the form, manner and timing of the various Tier One/Two retirement options. They are, generally:

- Option 1 (single life annuity)
- Option 2 (joint & 100% survivor annuity w/ 15% reduction from Option 1
- Option 3 (joint & 50% survivor annuity w/ approx. 8% reduction from Option 1
- Option 2A or 3A – same as 2 & 3 but Member may convert to Option 1 as provided in ORS 238.305(1) **if** Member's beneficiary (a) dies or (b) is Member's spouse and marriage is terminated as provided by law;
- Refund Annuity (single life w/ account balance minimum)
- 15-year certain (single life w/ 15 year minimum payments.

(3) Retired Tier One / Tier Two Member. If the Member is a retiree, there are two unique rules (and correlating opportunities and traps) to consider:

- If Member elected Option 2A, 3A, L2A or L3A, then Member can "pop-up" to Option 1 upon divorce, unless the (MSA/GJ) DRO restricts Member's right to do so. If the DRO is silent about a pop-up, then PERS allows the pop-up at the Member's request. However, a pop-up would deprive the AP of the assurance of a PERS Tier benefit for life, because under Option 1, the benefit would terminate upon the death of the Member.

- If the retiree Member elected a joint and survivor retirement option and designated the non-employee spouse as the survivor beneficiary, ***and*** the non-employee spouse (AP) is awarded any interest in the member's PERS Tier One/Two benefit, then the DRO can award the Member the right to change his survivor annuity beneficiary. ORS 238.465(2)(d). PERS would then recalculate the benefit to reflect the life expectancy of the Member and her new survivor beneficiary. If the DRO is silent concerning the right to change the joint and survivor beneficiary, then PERS will not permit Member to change it. Make it clear in your MSA/GJ.

(4) Post-retirement Survivor Annuity. The PERS survivor annuity benefit may be valued as a separate asset in the divorce. Miller and Garren, 208 Or App 619 (2006). The other side of the coin is that if the AP predeceases the Member, then there could be an offset value issue. One would have to value each contingent survivor benefit separately based on life expectancy factors. The simpler approach that would obviate the need for a complicated valuation and analysis would be to allow each party to designate a beneficiary for his/her share upon the death of the first spouse. In any case, upon divorce, the survivor benefit can remain payable to the former spouse in full, *or* it can be split between the former spouse and another beneficiary.

(5) Non-Retired PERS Tier One / Tier Two. One of the most common fails by family law practitioners in this context is inserting language into the MSA/GJ providing for an award to the non-member spouse of a dollar amount or percentage of/from the member's "PERS Account." Use the word "benefit(s)" rather than 'account.' For example: "*Pursuant to a DRO to be prepared by a qualified professional to be retained by [Wife], Wife shall be awarded and assigned* ***the following-described interests in Husband's Oregon PERS Tier One benefits...***" This is a good opening to a description of the award. Misuse (or insufficient use) of the term '**account**' has been epidemic in MSA/GJs, and has failed to serve justice more times that we can count. Despite the parties' intentions at the time of negotiations and settlement, some parties in the post-dissolution / pre-DRO stage have taken advantage of situations created by unwitting drafters, wherein the term "account" was insufficiently used to describe the AP's award, by arguing that there was no award of the defined benefit aspects of the plan, or of any pre-retirement survivor benefit. And some courts have ruled in favor of the member in this context.

Upon retirement, PERS Tier One / Tier Two Members benefits are calculated under either the 'Full Formula' *or* 'Money Match' method. Before you negotiate or prepare your MSA/GJ, you should have a sense of which retirement formula the Member will

most likely receive. If you determine (generally through process of securing a professional valuation) that ***Full Formula*** would yield the highest benefit, then a shared interest award may best serve the AP's interests.

Tier One members hired in the mid-1980s or earlier, tend to retire under the Money Match formula calculation because its value tends to exceed the Full Formula approach; in such cases, the AP could pursue a separate interest award with matching employer dollars, or a 'Payment Reduction or Deduction Method' award (a *shared interest award*) using percentage, monthly dollar amount or coverture fraction ('Married time ratio, which by PERS default employs a 'true coverture' method calculation). For Tier One members hired in the mid-1980s to early 1990s, it is not as clear which approach will yield a greater benefit. For Tier Two members, the member is most likely to elect the Full Formula because in most cases it will yield a higher benefit.

The options available to an AP in the pre-retirement DRO context are (1) a separate interest award of a sum or percentage of the member's Tier One / Tier Two account, plus an award of *employer matching dollars*; *or* (2) compelling the member to elect a joint and survivor annuity and awarding the AP a shared interest award (referred to by PERS as the reduction or deduction method), which is like a garnishment of the member's monthly benefit and is expressed as a percentage, dollar amount or 'married time ratio' (true coverture).

Your MSA/GJ must articulate whether the AP will be awarded a separate interest or a shared interest in the member's benefits. If a separate interest, then state the date of division (must be December 31) ***and*** whether the award will include employer matching funds (in nearly all instances, matching funds should be awarded). **If the member is a retiree, then a separate interest award is not available.**

A separate interest award allows immediate disentanglement as to the PERS asset and allows the member to elect whichever form of benefit she chooses, and AP to elect a single life annuity under Option 1. Additionally, it allows AP to commence benefits upon member's earliest retirement eligibility date, even if member continues working.

An AP who is awarded a **shared interest** in a joint and survivor benefit must wait until the member retires to receive any payment of benefits; and under this scenario, the MSA/GJ and resulting DRO would compels the member to elect a survivorship option for the AP and then split the payments in some manner. It is also possible, though not common, to award the member all of the joint lifetime benefit, but award the AP (if she survives the member) all of the survivor benefit. You can get creative here.

The shared interest / joint and survivor benefit approach may be ideal for long-term marriages wherein the member has a shorter life expectancy than the AP; or where it is equitable for the AP to capture a share of the member's post-divorce service credit and related increases in the monthly benefit. **The concepts explored in the DBP section, above, concerning coverture fractions and '*slicing the pie*' also apply in the context of PERS Tier One/Two *and* OPSRP).**

The award as expressed in your MSA/GJ is the best (and if push comes to shove, may be the only) foundation for the subsequent DRO. Without the proper language, the AP may be short-changed to the tune of tens or hundreds of thousands of dollars as a result of the divorce lawyer's failure to addresses any aspect of the PERS benefit beyond the 'member account.' Simply using the term 'account' in relation to the PERS Tier program award, fails to establish any basis for an award/assignment of the defined benefit and employer matching dollars aspects of the PERS Tier interest. It also neglects numerous other aspects of the Tier program benefits: If you are going to award a separate interest, then be sure to address ***employer matching funds;*** if you are awarding a *shared interest*, then state the portion of the AP's assigned monthly benefit, which survivor annuity option the member must elect, whether the AP will receive a dollar amount, percentage (up to 100%) or fractional ratio of the survivor benefit when/if paid, *and* whether the AP will be treated as the surviving spouse for purposes of any pre-retirement survivor benefits.

(6) Death and Survivorship. Specify what happens to the AP award if the AP predeceases the Member **before** retirement: does the award revert to the Member or does it get paid to the AP's designated beneficiary. If the Member dies before the AP, does her interest go to the AP or to the Member's designated beneficiary? Your MSA/GJ should be clear about this and there are numerous, and complicated options, as under all defined benefit plans.

(7) PERS Administrative Fees. PERS imposes an administrative fee for reviewing/administering the DRO and regardless of how the MSA/GJ or DRO provide to allocate that fee between the parties, PERS will allocate it pro-rata – in proportion to the award. You can say it will be divided equally if permitted by PERS, and if not then assessed against each party in proportion to such party's award.

(8) Who Will Prepare the Order? In your MSA/GJ, state which party will retain counsel to prepare the DRO(s), and how the attorney fees will be handled.

(iii) OPSRP PENSION PROGRAM

The PERS Oregon Public Service Retirement Plan (OPSRP) Pension Program is a defined benefit plan (DBP) for eligible state employees who are hired after 8/28/2003. OPSRP Pension Program provides a life pension and is funded by employer contributions. It is designed to provide approximately 45% of the member's final, average salary at retirement for general service members with 30-year career or police/firefighter members with 25-year careers. Final average salary is generally the average of the highest three consecutive years or 1/3 of total salary in the last 36-months of employment.

Approach the OPSRP DBP using the concepts enumerated under the general **DBP section**, above.

A pre-retirement death benefit is now available through OPSRP even if the Member is not married at the time of the Member's death. SB 370 in 2015 amended ORS Chapter 238A to allow a Court order to protect the pre-retirement survivor annuity for former spouse if so provided in the judgment or court order. The Family Law Section of the Oregon State Bar sponsored this bill. Thus, the MSA/GJ and / or DRO can award all or a portion of such benefit to the AP or surviving children.

Upon general service retirement, OPSRP will calculate the member's monthly pension benefit using the following formula:

1.5 x years of service x final, average salary
Example:
Final average salary -- $45,000
Yrs of service – 30
30 (yrs) x 1.5 = 45(%)
45% x $3,750 (final, monthly avg. salary) = $1,687.50
Single life option (Opt. 1) monthly benefit = $1,687.50 ($20,250 / yr)

Upon police/firefighter service retirement, OPSRP calculates the member's monthly benefit using the formula as set forth above, but using 1.8 as the creditable service time multiplier: **1.8 x yrs of service x final, avg salary**

To further familiarize yourself with the lingo and the issues around PERS and divorce, you can view useful divorce forms and information packets:
http://www.oregon.gov/pers/mem/pages/section/form/divorce_forms.aspx

CAVEAT: Don't rely on PERS administrative divorce forms alone: they don't cover all scenarios or provide for all available alternatives. The DRO can have language that overrides the PERS administrative forms, provided that the language in the DRO does not violate governing law.

(iv.) OREGON SAVINGS GROWTH PLAN

In addition to OPSRP/IAP and Tier/IAP, all state and some local government employees may participate in the Oregon Savings Growth Plan (OSGP), which is an optional deferred comp plan (DCP) for all state and some local government employees.

C. MILITARY RETIREMENT – DIVIDING DISPOSABLE RETIRED PAY

Military retirement benefits are also extraordinarily complex and require specialized knowledge to be properly negotiated, presented to the Court and divided. Do not attempt to award or divide military benefits without sufficient knowledge or experience; seek expert assistance from a DRO attorney when unsure.

Dividing military retirement incident to divorce: What every spouse needs to know
by Oregon lawyer **Lawrence D. Gorin**
http://ldgorin.justia.net/article_57-1585931.html

Defense Finance & Accounting Service: Garnishments & Former Spouses' Protection Act – FAQs: http://www.dfas.mil/garnishment/usfspa/faqs.html

Address the following issues in your MSA/GJ (and remember that one size does not fit all):

- The Uniformed Services Former Spouses' Protection Act (USFSPA) 10 U.S.C. 1408 applies
- Is the marriage sufficiently long so that the non-member spouse qualifies for an assignment? (another words, is the plan divisible under the circumstances of the parties?)
- Will the former spouse receive an assignment of the member's disposable retired pay? If so, will the award be expressed as a fraction? What is the measuring stick for the number of retirement points that go into the numerator? What is the measuring stick for the number of retirement points that factor into the denominator?
- Will the non-employee spouse receive a proportionate share of COLAs?
- Will the order require the member to elect to continue former spouse's designation as Survivor Benefit Plan (SBP) beneficiary, so that she receives 100% of the maximum SBP survivor benefit if the member predeceases her?
- If permitted under the parties' circumstances (relating to length of the marriage and length of member's credible military service) will the non-member spouse be entitled to receive commissary, exchange, and healthcare benefits after the parties' divorce? If so, how will the related expenses be allocated?
- How will the legal and administrative expenses relating to the DRO be allocated?
- Which party will retain counsel to prepare the DRO?

PART 5: CRITICAL MISCELLANEOUS ISSUES

A. EQUALIZATION OF MULTIPLE PLANS

In cases that present several DCPs, it is often advisable and more affordable (in terms of attorney fees) to combine the values of all DCPs (and/or IRAs) and then transferring an equalizing amount from one Plan or IRA, rather than preparing a QDRO / DRO for each plan. But frequently, since the road to hell is paved with good intentions, attorneys implement this principle incorrectly and the parties wind up paying far more to fix it than they would have paid for the multiple QDROs.

First, if the parties have not yet determined the sum to be transferred as of the time of the signing of the MSA/GJ, then the MSA/GJ should require the parties to exchange account statements for each account/plan *as of a specified date* and by a specific date. Failure to select a date for valuation / equalization / computation purposes is often fatal because the account balances are always changing day to day, month to month. Second, specify the calculation formula. Generally, parties exchange the account information and total up all such accounts as of the specified date; from there, they divide the total by 2 to ascertain how much one party needs from the other to achieve equalization. Use an exemplary formula to illustrate the agreed upon calculation method.

The equalizing amount to be transferred should generally be adjusted for earnings and losses from the specified valuation date forward, but with IRA's that is not feasible and from the custodian's perspective is not administrable.

Bottom line on DBPs: don't attempt to equalize DBPs unless there is no other option and if you must do so, then you need to undertake a professional valuation of the DBP interest.

B. RESERVATION OF LIMITED JURISDICTION

Always reserve jurisdiction in the MSA/GJ to clarify, correct, modify or amend the order with respect to the division of retirement benefits. Whether the MSA/GJ contains the DRO, or a DRO/QDRO will be forthcoming, or there will be an offset concerning a non-retirement asset, or any combination of these approaches, reserving jurisdiction is the only prudent or secure approach when it comes to division of retirement assets. Just as the court retains jurisdiction over the parties and the subject matter when the sale of real estate will be pending after entry of the GJ, it should retain jurisdiction over the parties and the retirement assets until the retirement plans have received and approved the QDROs/DROs.

If you fail to reserve limited jurisdiction to address post-dissolution obstacles the retirement benefit assignment setting, then you cannot count on the ability of a party to seek judicial relief in the event that the parties encounter obstacles that are insurmountable without further court involvement, the MSA/GJ fails to resolve an aspect of the assignment of retirement benefits or omits a retirement asset, among countless other scenarios.

The rule in Oregon is that property division aspects of the GJ are not modifiable. The Court has power to issue contempt to enforce compliance with the property division, but lacks the power to modify the division. Drake and Drake, 36 Or App 53, 583 P2d 1165 (1978).

Here is some sample language for reserving jurisdiction in the MSA/GJ:

"*Supplemental Judgments / DROs as describe above shall be filed in the instant matter and presented to the appropriate retirement plan administrators as soon as is reasonably practicable following the entry of this judgment. The Court reserves jurisdiction over the parties and their retirement assets, to the extent necessary to carry out the terms, provisions and the intent of this section, to clarify or amend this judgment, or to enter such further orders as may be reasonably necessary to facilitate the equal distribution of the marital portion of the parties' retirement benefits.*"

"*The Court retains jurisdiction over the parties and their retirement interests until such time as all QDROs/DROs are filed in the instant matter and presented to and approved by the relevant plan administrators. The Court retains jurisdiction to enter such further orders as are necessary to enforce the terms and provisions of this judgment relating to the award and assignment of retirement benefits, and to amend, correct or clarify the terms of this order as such terms pertain to disposition and assignment of retirement assets.*"

C. A FINAL WORD ABOUT OMITTED ASSETS

Are you at risk for allowing entry of a General Judgment that has omitted a retirement asset altogether? Are catch-all awards effective for some plans and not others? Failure to identify a retirement plan is often oversight and most commonly involves defined benefit plans; but sometimes it's intentional on the part of a party. Outcomes in these situations tend to turn on the timing of the discovery of the omitted asset, or whether a retirement plan administrator will even allow the participant to retire from the plan without providing a divorce (or separation) judgment that contains identification and disposition language regarding the plan. Also critical are: (a) the timing of the DRO lawyer's involvement in the case (sometimes it's literally decades after the divorce judgment); (b) whether the General Judgment plainly states that it retains jurisdiction to divide all retirement assets of the parties; and, (c) the attitude, willingness and problem-solving capacity of the parties and their attorneys.

PRACTICE TIP: If an omitted retirement asset is discovered, then the discover-or should discuss this candidly and expediently with the client and, with the client's permission, opposing counsel (or opposing party in the case of pro se), for the purpose of attempting to reach an agreement that results in a corrected GJ, or a Supplemental Judgment (DRO). If your client will not authorize you to do so, then it is generally prudent to write a letter advising against such continued concealment, and then withdrawing from the case. Timing is important here as well (was the asset discovered shortly after the divorce? Or years, even decades afterward?).

D. WHICH PARTY PREPARES THE DRO/QDRO?

Which Party will retain counsel to prepare the DRO/QDRO? How, if at all, will that expense be allocated? Your MSA/GJ should answer these questions clearly.

E. FREE & CLEAR AWARDS OF RETIREMENT ASSETS.

Each and every retirement plan and retirement account should be specifically identified in the MSA / General Judgment, regardless of whether the participant is retaining the entire interest, or whether all or a portion will be assigned to the non-participant spouse.

PRACTICE TIP: If a spouse will retain all of his interest in a retirement plan, then make sure that the MSA/General Judgment provides that "Husband is awarded all of his current and future interests in the [ABC 401(k) Savings Plan], free and clear of any interest or claim by Wife."

F. ADMINISTRATIVE, POST-DRO SETTING

The biggest post-DRO issues are taxation of post-DRO distributions/withdrawals, establishing new survivor beneficiaries under the Plan, and each party's (in particular the AP's) responsibility to keep the Plan Administrator apprised of that party's current address / contact information. These are all issues about which you should advise your client. At the very least, let the client know that these are issues that he/she needs to address going forward. Assisting clients in post-DRO administrative process is cumbersome and can get really expensive. Frequently a reasonably financially-savvy client can manage this process on his/her own. Let your client know that these issues exist, and that he or she may be able to address them herself or through consultation with a retirement plan administrator or its agent, a CPA or tax-preparer, or even a trusted and competent family member.

PRACTICE TIP: If you want to start drafting QDROs / DROs, consult the following resources:

QDRO Handbook, Third Ed., by Gary A. Shulman (last updated 6/01/2015): http://www.aspenpublishers.com/Product.asp?catalog_name=Aspen&product_id=0735559767

PENSIONS AND QDROS 101: An Associates Guide to Drafting Defined Benefit and Defined Contribution Plan QDROS (by Illinois attorney Gunnan Gitlin).

* *

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- *Stacey D. Smith*

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Apologies if we left anyone out. These are the DRO attorneys known to the authors. Please feel free to add names, above, and to contact Stacey D. Smith with additional names for future placement on this resource list.

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TO: Oregon Public Employees Retirement System Administration
AUTHORIZATION TO RELEASE OF INFORMATION TO THIRD PARTY

I, John Doe, whose Oregon PERS number is 123456, whose address is 88 Park Place, Eugene, Oregon 97405, and whose date of birth is 1 January 1955, hereby authorize the Oregon Public Employees Retirement System and its employees and representatives to release to attorney, Stacey D. Smith, the following information concerning my Oregon PERS retirement benefits:

1. A summary or statement of my PERS benefits as of 31 December 2001;

2. A summary or statement of my PERS benefits as of 31 December 2014;

3. All applications for PERS benefits submitted by me between 31 December 2001 and the date of this Authorization to Release. 'Applications for PERS benefits' shall include service retirement applications, requests to withdraw, roll-over or transfer funds or benefits; and,

4. An estimation of my PERS Tier One benefits as of the date of this request, factoring in the disclosures contained in the attached PERS Estimate Request form.

This release shall remain in effect for 120 days following the date of its execution.

A copy of this release, certified as true by attorney Smith, shall be as effective as the original.

_____ _____

JOHN DOE Date

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

In the Matter of the Marriage of: Petitioner. and Respondent.	Case No. SUBPOENA DUCES TECUM (ORCP Rule 55)

TO: THE VANGUARD GROUP
ATTN: LEGAL DEPARTMENT
400 DEVON PARK
WAYNE, PA 19087

IN THE NAME OF THE STATE OF OREGON: you are hereby required to produce at the law offices Spinner & Schrank, 747 Blair Blvd, Eugene Oregon 97402, on or before the 29 day of March 2013, the documents described in the attached, fully incorporated EXHIBIT 1. This Subpoena is issued by the Petitioner pursuant to the Oregon Rules of Civil Procedure (ORCP), Rule 55B, C and D.

This Subpoena does not include a command to appear in person at a hearing or a deposition.

You may comply with this Subpoena by mailing the documents described in EXHIBIT 1 to the law firm address noted above: if you do, then you must attach those documents to the affidavit attached hereto as EXHIBIT 2, provided that an authorized agent of the Vanguard Group completes and signs the affidavit before a notary public.

//
/

SPINNER & SCHRANK
Attorneys at Law
747 Blair Blvd., Eugene, OR 97402
(541) 683-9150 FAX (541) 338-4652

DEFINITIONS

A. As used herein, "Participant" refers to the Respondent , who participates in various retirement benefit plans administered by the Weyerhaeuser Company and the Vanguard Group.

B. As used herein, "Weyerhaeuser" refers to the Weyerhaeuser Company.

C. As used herein, "Plan" or "Plans" refers to the following: the Weyerhaeuser Pension Plan (Legal Plan #002 - Vanguard Plan #020100); the Weyerhaeuser Pension Plan Title B (Salaried); the Weyerhaeuser Company 401(k) Plan; and, any other retirement benefit or pensions plan of any sort, which is being administered by the Vanguard Group, or for which the Vanguard Group serves as custodian or third-party administrator.

D. As used herein, "Document(s)" refers to the originals or copies of the following: papers, records, tapes, discs or other substance by which communications, data or information is recorded or stored, whether by manual, mechanical, photographic or electronic means; the definition includes all drafts or superseded revisions of each document.

E. "Document(s)" as construed under this Subpoena shall include, but not be limited to the following: correspondence, notices and letters; applications; submissions; administrative forms; memoranda; notes regarding communications with the Participant or with Weyerhaeuser concerning the Participant's benefits or eligibility for benefits; Plan summaries; Plan statements and estimations of benefits; receipts; invoices; checks; contracts; agreements; schedules; telegrams; emails and computer input and printouts; instructions; financial statements; and notices.

This Subpoena is issued pursuant to the provisions of ORCP Rule 55B, 55C, 55D(1), 55D(4), and 55F(3).

WITNESS my hand affixed at Eugene, Lane County, Oregon, on 8 March ~~February~~ 2013.

SPINNER & SCHRANK

STACEY D. SMITH, OSB 983481
Attorneys for Petitioner

STATE OF OREGON / County of Lane / ss.

I certify that the above Subpoena Duces Tecum is a true, correct and complete copy of the original thereof.

STACEY D. SMITH, OSB 983481
Attorneys for Petitioner

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

In the Matter of the Marriage of: , Petitioner. and . Respondent.	Case No. EXHIBIT 1 (Re: Subpoena Duces Tecum – Vanguard)

1. Documents showing the date on which the Participant began credible service under the Plans, or began participating in / accruing benefits under the Plans.

2. All Documents created, revised or updated between 31 December 2000 and the present date, which are maintained by the Vanguard Group or its agent(s), which concern the Participant's interests and benefits under the Plans, and which documents were sent by Vanguard to the Participant, or submitted by the Participant to Vanguard, to the Plans, or to Weyerhaeuser; such Documents shall include but shall not be limited to the following: correspondence; directions or instructions; requests; applications: designation of beneficiaries and changes to designations of beneficiaries; inquiries; service retirement applications; requests to withdraw, roll-over or transfer funds or benefits from or between Plans; retirement eligibility status information requests or updates; communication regarding election, commencement, receipt or deferment of distribution of benefits; statements, summaries and verifications concerning data, distributions, debits, credits, payments, transfers and investments, and including estimations of benefits.

3. Current materials delineating eligibility standards and requirements that pertain to the Participant concerning his status under the Plan(s) and eligibility to begin receiving or continue to receive distributions or other benefits from Plan(s).

** Please do not provide 'Plan Procedures Qualified Domestic Relations Order Determination Weyerhaeuser Company,' or Model [QDRO] Weyerhaeuser Company for Pension Plans,' as Petitioner is already in possession thereof.

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

In the Matter of the Marriage of: Petitioner, and Respondent.	Case No. AFFIDAVIT OF RECORD CUSTODIAN

STATE OF OREGON :
: ss.
County of Lane :

I, _____, having first been duly sworn on oath, depose and say as follows:

I am the authorized agent for The Vanguard Group, and have the authority to certify the attached records in connection with the Subpoena Duces Tecum, issued by Petitioner, and dated ___ February 2013 (hereinafter referred to as the "Subpoena").

The attached records are true copies of all the records described in the Subpoena over which The Vanguard Group maintains possession and control. The attached records were prepared or complied by the Vanguard Group in the ordinary course of its regularly-conducted business. These records were prepared or compiled at or near the time of the acts, events, conditions or opinions described therein, and were prepared or maintained by the Respondent-

SPINNER & SCHRANK
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747 Blair Blvd., Eugene, OR 97402
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EXHIBIT 2

Plan Participant, the Vanguard Group or Weyerhaeuser Company, with knowledge or from information transmitted to persons with knowledge of those acts, events, or conditions.

DATED this _____ day of _____, 2013.

_____ _____

Signature Printed Name

_____

Title

STATE OF _____ :

: ss.

County of _____ :

SUBSCRIBED AND SWORN to before me this ____ day of _____2013.

_____

Notary Public for _____

SPINNER & SCHRANK
Attorneys at Law
747 Blair Blvd., Eugene, OR 97402
(541) 683-9150 FAX (541) 338-4652

EXHIBIT 2

Condensed List of Considerations in Drafting QDROs for Account-based Plans (i.e., 401(k), 403(b), profit sharing, IRA)

- What is the date the amount is assigned (e.g., date of divorce)
- Specify whether award is adjusted for post-assignment date account performance (consider whether accounts are daily valued, quarterly valued, annually valued, as gains/losses will only be reflected as of the most recent valuation date)
- Consider whether AP receives a share of any employer contributions (profit sharing, matching) attributable to P's compensation in the current plan year, since employers often don't make these contributions—or even decide if they're going to make them—until well after the plan year end (8 months)
- Consider whether the participant's account has been credited with allocations of employer contributions attributable to P's compensation in the prior plan year
- Find out if the plan is required to make profit sharing or matching contributions for the current year (e.g., safe harbor contributions), and if so draft accordingly
- Are several tax deferred account-based retirement benefits being divided (e.g., list above plus IRA's, SEPs), and if so are the parties willing to aggregate all and divide a single one to equalize the total (if so, consider the next two bullets and how they may affect the equalization)
- If IRAs are being divided, find out if you'll need a QDRO (usually not), and keep in mind AP can't take penalty-free, pre-age 59.5 withdrawals from an IRA like AP can from other qualified retirement plans
- Could the account include Roth contributions, and, if so, does the AP share pro rata in them
- Could the account include a participant loan receivable, and if so is it included in determining any percentage division, and might it be so large it prevents the plan from transferring APs share to AP
- If AP dies before AP's account is created, and perhaps before the order is qualified, should the plan continue with the assignment
- Indicate if AP is treated as the death beneficiary for the amount of AP's award pending creation of AP's separate account
- If you have or can get an idea how long the plan(s) will take to fully process, qualify, and make distributions with respect to the QDRO, add about 2 months and let your client know—the process takes longer than most people think and realistic expectations can save a lot of grief
- If the plan pays benefits to the wrong person what happens

QDROs and PARTICIPANT LOANS

(Applicable to awards from defined contribution plans)

A well-drafted QDRO for a defined contribution retirement plan, such as a 401(k) plan (and the dissolution judgment that provides the basis for the QDRO), should address and resolve the issue of Participant loan balances outstanding (*i.e.*, unpaid) as of the specified account division date. Keep in mind that many defined contribution plans consider a Plan Participant's outstanding loan balance as a Plan asset, with the loan balance being included as part of the Participant's total account balance as shown on Plan records.

If there is an outstanding loan balance and the Alternate Payee is going to be awarded a *percentage* of the Participant's account (as distinguished from a specified dollar amount), it is important to specify whether the loan balance is to be *INCLUDED* or *EXCLUDED* when calculating the Participant's total account balance.

Example:

• Participant's non-loan account balance on valuation date:	$100,000.00
• Participant's loan balance on valuation date:	$ 10,000.00
Total account value (*if loan balance is included*):	$110,000.00
• Alternate Payee's award, if defined in QDRO as 50% of the Participant's vested account value *EXCLUDING* loan balance:	$ 50,000.00
• Alternate Payee's award, if defined in QDRO as 50% of the Participant's vested account value *INCLUDING* loan balance:	$ 55,000.00

NOTES:

1. If the determination of the Participant's account value *includes* outstanding loan balances, the actual award payable to the Alternate Payee will nonetheless be paid (funded) exclusively from the Participant's non-loan account assets.

2. Participant loan assets are not assignable to an Alternate Payee (even if a QDRO so directs.) Liability for any remaining loan balance at the time of segregation of the award will remain the liability of the Participant.

3. The Participant's non-loan account balance must be equal to or greater than the amount awarded to the Alternate Payee by the terms of the QDRO. If otherwise, the QDRO will either be rejected by the Plan as non-qualified or will be interpreted by the Plan as applying only to the non-loan assets in the Participant's account.

Prepared by: **LAWRENCE D. GORIN** *Attorney at Law* / (503) 716-8756 / LDGorin@pcez.com

Condensed List of Considerations in Drafting QDROs for Formula-based Plans (i.e., traditional defined benefit plan, cash balance plan)

- Is it worth obtaining a present value of P's benefit to permit assigning the entire benefit to P in exchange for an asset of equal value
- Does AP receive a segregated benefit based on AP's life (separate interest); or, alternatively, a share of P's benefit payments when and as made (based on P's life) plus assignment of a share of the pre- and post-retirement survivor annuity benefit (shared interest)
- If AP receives a shared interest, must P elect to receive P's benefit in the form of a 50% joint and survivor annuity
- If AP receives a shared interest, is P required to retire and commence benefits no later than a certain date
- If AP receives a separate interest, does AP receive a share of the frozen benefit as of a set date (e.g., date of divorce), or a share of the true benefit as of the date the benefit goes to pay status
- If AP receives a separate interest is the marital share determined using the "time rule" marital fraction, or some other agreed fractional share of P's benefit
- If AP receives a separate interest may AP take AP's share at any time permitted by the plan (generally age 55), subject to reductions for early retirement adjustments; and what if P later receives an enhanced benefit (e.g., early retirement benefit)
- Is P required to make reasonable efforts to qualify for enhanced benefits under special plan rules (e.g., rule of 65/72/80/85; 70/80 eligibility)
- Does the plan provide a secondary death benefit in addition to the pre-and/or post-retirement survivor annuity benefit, and if so does AP get any part of it
- Does AP receive a proportionate share of any benefit enhancement (e.g., early retirement, thirteenth month checks)
- Does AP receive a proportionate share of any COLA or COLA-like benefit increase
- If AP dies before either party initiates benefits does APs share get paid to contingent beneficiaries (if permitted by the plan), does it revert to P, or does it get absorbed by the plan
- If AP's benefit is protected by assignment of the pre-retirement survivor annuity prior to benefit commencement—and it generally should be, does AP receive some or all of the benefit (or does AP's share depend on whether P is married at the time of death)
- If AP's share of the pre-retirement survivor annuity is limited to the "marital share" is the marital share equal to or double the marital "time-rule" fraction
- Consider how the AP's failure to waive the pre-retirement survivor annuity, and how protection of AP's interest with a pre-and/or post survivor annuity benefit affect the value of P's benefit, and who should pick up the "cost" of these AP benefits and how
- Has AP irrevocably waived AP's right to the pre-retirement survivor annuity
- If AP predeceases P, and P dies before benefits commence, do death benefits get paid to P's beneficiary or AP's contingent beneficiaries
- If AP dies before AP's separate interest is established, and perhaps before the order is qualified, should the plan continue processing the division
- If the plan pays benefits to the wrong person what happens

DRS
WASHINGTON STATE
Department of
Retirement Systems

Public Employees' Retirement System (PERS) Plan 2
Benefit Estimate Worksheet

As a member of PERS Plan 2, you can use this worksheet to estimate the benefit you will receive at retirement as a member of PERS Plan 2. To assist you in completing the worksheet, the right-hand column shows a sample of information that you would enter. Please keep in mind that this is an estimate only and is based on projected salary and service credit. Your actual benefit at retirement may differ. (See page 4 for general information about your retirement plan.)

PERS Plan 2 Benefit Estimate Worksheet	You	Sample
Step 1: Determine the age at which you plan to retire. 1. Your age at retirement:		65
Step 2: Determine your total service credit at retirement. 2a. Your current balance of service credit years: 2b. The number of years until your retirement: 2c. Your projected service credit years at retirement (2a + 2b):		22 + 8 30
Step 3: Estimate your Average Final Compensation (AFC). See page 4 for an explanation of AFC. If your retirement date is many years in the future, your future AFC may differ from its current level. You may wish to estimate your future salary, then figure an AFC based on those figures. 3. Your estimated AFC:		$3,340 per month
Step 4: Compute your Option 1 (Single Life) benefit. The Option 1 (Single Life) benefit provides you with the highest monthly benefit. However, payments stop upon your death and do not continue to a survivor. The formula for your Option 1 monthly benefit is: 2% x Service Credit Years x AFC 4. Your Option 1 benefit amount:		2% x 30 x $3,340 = $2,004 per mo.
Complete the next step only if you will provide for a survivor. There are three survivor options available. Under each of these options, your Option 1 benefit is reduced in order to provide a continuing payment to a survivor after your death. If you choose one of the survivor options and your designated survivor dies before you, your benefit will be adjusted to the higher Option 1 payment level. Be sure to notify DRS to initiate this adjustment. The administrative factors used in these examples are for illustrative purposes only. See the Administrative Factors page for the most current numbers.		
Step 5. Adjust your benefit for a survivor option. Determine the age difference between you (the member) and your survivor (rounded to the nearest year). Then find the survivor option factors that apply to your age difference. 5a. The age difference between you and your survivor:		Your age is 65; your survivor's age is 63. You are 2 years older
Option 2 (Joint and 100% Survivor) – When you die your survivor receives a benefit equal to 100% of your benefit. 5b. Your Option 2 benefit amount:		$2,004 x 0.783 = $1,569 per mo. (survivor gets $1,569)

PERS Plan 2 Benefit Estimate Worksheet	You	Sample
Option 3 (Joint and 50% Survivor) – When you die your survivor receives a benefit equal to 50% of your benefit 5c. Your Option 3 benefit amount:		$2,004 x 0.878 = $1,760 per mo. (survivor gets $880)
Option 4 (Joint and 66.67% Survivor) – When you die your survivor receives a benefit equal to 66.67% of your benefit. 5d. Your Option 4 benefit amount:		$2,004 x 0.844 = $1,691 per mo. (survivor gets $1,127)
Complete the next step only if you will retire before normal retirement at age 65. When you retire early, your benefit is reduced to reflect that you will receive it over a longer period of time. The amount of the impact depends on your service credit, the date you retire, your age and the early retirement factor used. The administrative factors used in these examples are for illustrative purposes only. See the Administrative Factors page for the most current numbers.		
Step 6: Adjust your benefit for early retirement. If your age at retirement in Step 1 is less than 65, multiply the benefit amount as determined in Step 4 or Step 5 by the factor for your age. Note: If you are retiring with at least 30 years of service credit and are at least age 55, see the table on page 3 for your ERF. 6. Your adjusted benefit amount:		Assume you retire at age 60 with 25 years of service and your Option 1 benefit is $1,500. $1,500 x 0.588 = $882 per mo.

§ 838.103 Definitions.

In this part (except subpart J)—

Child abuse creditor means an individual who applies for benefits under CSRS or FERS based on a child abuse judgment enforcement order.

Child abuse judgment enforcement order means a court or administrative order requiring OPM to pay a portion of an employee annuity or a refund of employee contributions to a child abuse creditor as a means of collection of a "judgment rendered for physically, sexually, or emotionally abusing a child" as defined in sections 8345(j)(3)(B) and 8467(c)(2) of title 5, United States Code.

Civil Service Retirement System or *CSRS* means the retirement system for Federal employees described in subchapter III of chapter 83 of title 5, United States Code.

Court order means any judgment or property settlement issued by or approved by any court of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, The Northern Mariana Islands, or the Virgin Islands, or any Indian court in connection with, or incident to, the divorce, annulment of marriage, or legal separation of a Federal employee or retiree.

Court order acceptable for processing means a court order as defined in this section that meets the requirements of subpart C of this part to affect an employee annuity, subpart E of this part to affect a refund of employee contributions, or subpart H of this part to award a former spouse survivor annuity.

Employee means an employee or Member covered by CSRS or FERS.

Employee annuity means the recurring payments under CSRS or FERS made to a retiree. *Employee annuity* does not include payments of accrued and unpaid annuity after the death of a retiree under section 8342(g) or section 8424(h) of title 5, United States Code.

ERISA means the Employees Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*

Federal Employees Retirement System or *FERS* means the retirement system for Federal employees described in chapter 84 of title 5, United States Code.

Former spouse means (1) in connection with a court order affecting an employee annuity or a refund of employee contributions, a living person whose marriage to an employee has been subject to a divorce, annulment of marriage, or legal separation resulting in a court order, or (2) in connection with a court order awarding a former spouse survivor annuity, a living person who was married for at least 9 months to an employee or retiree who performed at least 18 months of civilian service covered by CSRS or who performed at least 18 months of civilian service creditable under FERS, and whose marriage to the employee of retiree was terminated prior to the death of the employee or retiree.

Former spouse survivor annuity means a recurring benefit under CSRS or FERS, or the basic employee death benefit under FERS as described in part 843 of this chapter, that is payable to a former spouse after the employee's or retiree's death.

Gross annuity means the amount of monthly annuity payable after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction. Unless the court order expressly provides otherwise, *gross annuity* also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Member means a Member of Congress covered by CSRS or FERS.

Net annuity means the amount of monthly annuity payable after deducting from the gross annuity any amounts that are—

(1) Owed by the retiree to the United States;

(2) Deducted for health benefits premiums under section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this chapter;

(3) Deducted for life insurance premiums under section 8714a(d) of title 5, United States Code;

(4) Deducted for Medicare premiums;

(5) Properly withheld for Federal income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled;

(6) Properly withheld for State income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled; or

(7) Already payable to another person based on a court order acceptable for processing or a child abuse judgment enforcement order.

Unless the court order expressly provides otherwise, *net annuity* also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Reduction to provide survivor benefits means the reduction required by section 8339(j)(4) or section 8419(a) of title 5, United States Code.

Refund of employee contributions means a payment of the lump-sum credit to a separated employee under section 8342(a) or section 8424(a) of title 5, United States Code. *Refund of employee contributions* does not include lump-sum payments made under section 8342(c) through (f) or section 8424(d) through (g) of title 5, United States Code.

Retiree means a former employee or Member who is receiving recurring payments under CSRS or FERS based on his or her service as an employee. *Retiree* does not include a person receiving an annuity only as a current spouse, former spouse, child, or person with an insurable interest. Self-only annuity means the recurring payments to a retiree who has elected not to provide a survivor annuity to anyone. Unless the court order expressly provides otherwise, self-only annuity also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

Self-only annuity means the recurring unreduced payments under CSRS or FERS to a retiree with no survivor annuity payable to anyone.

Separated employee means a former employee or Member who has separated from a position in the Federal Government covered by CSRS and FERS under subpart B of part 831 of this chapter or subpart A of part 842 of this chapter, respectively, and is not currently employed in such a position, and who is not a retiree.

[57 FR 33574, July 29, 1992, as amended at 58 FR 3202, Jan. 8, 1993; 59 FR 66637, Dec. 28, 1994]

STATUTORY LIMIT ON COURT'S AUTHORITY

§ 838.111 Exemption from legal process except as authorized by Federal law.

(a) Employees, retirees, and State courts may not assign CSRS and FERS benefits except as provided in this part.

(b) CSRS and FERS benefits are not subject to execution, levy, attachment, garnishment or other legal process except as expressly provided by Federal law.

DIVISION OF RESPONSIBILITIES

§ 838.121 OPM's responsibilities.

OPM is responsible for authorizing payments in accordance with clear, specific and express provisions of court orders acceptable for processing.

§ 838.122 State courts' responsibilities.

State courts are responsible for—

(a) Providing due process to the employee or retiree;

(b) Issuing clear, specific, and express instructions consistent with the statutory provisions authorizing OPM to provide benefits to former spouses or child abuse creditors and the requirements of this part for awarding such benefits;

(c) Using the terminology defined in this part only when it intends to use the meaning given to that terminology by this part;

(d) Determining when court orders are invalid; and

(e) Settling all disputes between the employee or retiree and the former spouse or child abuse creditor.

[57 FR 33574, July 29, 1992, as amended at 59 FR 66638, Dec. 28, 1994]

§ 838.123 Claimants' responsibilities.

Claimants are responsible for—

(a) Filing a certified copy of court orders and all other required supporting information with OPM;

(b) Keeping OPM advised of their current mailing addresses;

PERS benefit component comparisons

The primary components and differences among the PERS Tier One and Tier Two programs, the Oregon Public Service Retirement Plan (OPSRP) Pension Program, and the Individual Account Program (IAP) are shown below. Tier One covers members hired before January 1, 1996; Tier Two covers members hired between January 1, 1996 and August 28, 2003; and OPSRP covers members hired on or after August 29, 2003. The IAP contains all member contributions (6% of covered salary) made on and after January 1, 2004.

	Tier One	Tier Two	OPSRP Pension	IAP
Normal retirement age	58 (or 30 yrs) P&F: age 55 or 50 w/25 yrs	60 (or 30 yrs) P&F: age 55 or 50 w/25 yrs	65 (58 w/30 yrs) P&F: age 60 or 53 w/25 yrs	Members retire from IAP when they retire from Tier One, Tier Two, or OPSRP
Early retirement	55 (50 for P&F)	55 (50 for P&F)	55, if vested (50 w/ 5 years of continuous service in a P&F position immediately preceding effective retirement date)	Members retire from IAP when they retire from Tier One, Tier Two, or OPSRP
Regular account earnings	Guaranteed assumed rate annually (currently 7.75%)	No guarantee; market returns	N/A; no member account	No guarantee; market returns
Variable account earnings	Market returns on 100% global equity portfolio	Market returns on 100% global equity portfolio	N/A; no member account	N/A
Retirement calculation methods	Money Match, Full Formula, or Formula + Annuity (if eligible)	Money Match or Full Formula	Formula	Various account pay-outs or rollover
Full Formula benefit factor	1.67% general; 2.00% P&F	1.67% general; 2.00% P&F	1.50% general; 1.80% P&F	N/A
Formula + Annuity benefit factor	1.00% general; 1.35% P&F	N/A	N/A	N/A
Oregon state income tax remedy	If eligible, higher of 9.89% on service time before Oct. 1, 1991 or 4% or less based on total service time. Not payable to benefit recipients that do not pay Oregon state income tax because they do not reside in Oregon	No tax remedy provided	No tax remedy provided	No tax remedy provided
Lump-sum vacation payout				
Included in covered salary (6%)	Yes	Yes	No	Yes for Tier One and Tier Two; no for OPSRP
Included in FAS	Yes	No	No	N/A
Unused sick leave included in FAS	Yes, if employer participates in the sick leave program	Yes, if employer participates in the sick leave program	No	N/A
6% "pickup" included in FAS	Yes	Yes	No	N/A
Vesting	Active member in each of 5 calendar years	Active member in each of 5 calendar years	5 calendar years w/ at least 600 hours qualifying service or normal retirement age	Immediate
COLA (after retirement)	1.25% on the first $60,000 of an annual benefit with 0.15% on all amounts over $60,000			N/A; no COLA provided

P&F = police and firefighters; FAS = final average salary; COLA = cost-of-living adjustment; N/A = not applicable

Note: PERS uses three methods to calculate Tier One and Tier Two retirement benefits: Full Formula, Formula + Annuity (for members who made contributions before August 21, 1981), and Money Match. PERS uses the method (for which a member is eligible) that produces the highest benefit amount. OPSRP Pension Program benefits are based only on a formula method.

Benefits at a Glance: Benefit Options Comparison Table

Option	Do monthly payments continue while I am alive?	Do monthly payments continue after I die?	What kind of payment is due my beneficiary after I die?	Can my beneficiary be an estate, trustee, or charity?	Can I change my beneficiary after I retire and 60 days have passed?
Refund Annuity	Yes	No	The balance (if any) of your account in a total distribution	Yes	Yes
Option 1 or Lump-Sum Option 1*	Yes	No*	None*	N/A	Yes*
Option 2 or Lump- Sum Option 2*	Yes	Yes	Monthly* (same amount as member)	No	No
Option 2A or Lump-Sum Option 2A*	Yes	Yes	Monthly* (same amount as member)	No	No, but you can change to Option 1 (see note below)
Option 3 or Lump- Sum Option 3*	Yes	Yes	Monthly** (1/2 member's amount)	No	No
Option 3A or Lump-Sum Option 3A*	Yes	Yes	Monthly* (1/2 member's amount)	No	No, but you can change to Option 1 (see note below)
15-Year Certain	Yes	If 180 payments haven't been made to member and if beneficiary is a person**	Monthly*** (the remainder of the monthly payment)	Yes*	Yes
Total (double) Lump-Sum *	No	No*	One payment of the balance of both accounts (Member and employer)	Yes	Yes

Note: If you select Option 2A or 3A or LS Option 2A or 3A, you can change your monthly benefit to Option 1 if your beneficiary dies or you and your beneficiary are later divorced. A change to Option 1 can be effected only after PERS is notified in writing.

* Remaining LS, if any, to be paid to beneficiary of record.

** If beneficiary is a person, any remaining payments will be made on a monthly basis; if beneficiary is an estate, remaining monthly benefits can be paid in a lump sum based on actuarial present value.

*** If beneficiary is a person, that person can designate a beneficiary.

Recreational Marijuana In Oregon

Presentation by Amy Margolis
EMERGE LAW GROUP
Recreational Marijuana in Oregon
October 9, 2015

General Themes of Measure 91

- **Minimize the illegal market and prevent revenue from going to criminal enterprises**
  - **Incentivize private businesses to enter into the regulated market**
  - **Incentivize adult consumers to purchase from licensed retailers**
- **Regulate in a manner substantially similar to beer and wine**
  - **Oregon Liquor Control Commission as regulatory agency**
  - **Parallel the Oregon Liquor Act as much as possible**
- **Enforcement priorities specified in the Cole Memo**

US Department of Justice Cole Memo (August 29, 2013)

- **Federal enforcement priorities**
  - **Prevent distribution to minors**
  - **Prevent revenue from going to criminal enterprises**
  - **Prevent diversion of marijuana to other states**
  - **Prevent trafficking of other illegal drugs**
  - **Prevent violence**
  - **Prevent drugged driving and other adverse public health consequences**
  - **Prevent growing of marijuana on public lands**
  - **Prevent possession and use of marijuana on federal property**
- **"In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. *Indeed, a robust system may affirmatively address those priorities*."**

NOTE: A SUBSTANTIAL PORTION OF THE CONTENT ON THE FOLLOWING SLIDES IS LIKELY TO BE SUPERSEDED BY OREGON HOUSE BILL 3400

Measure 91 Implementation

- **OLCC**
  - **Broad rulemaking authority** (7)
  - **Licensing, tax collection, and enforcement** (18, 21)
  - **Substantially similar to the regulation of beer and wine**
- **Assistance from other agencies**
  - **Oregon Health Authority** (7(3), 8)
  - **State Department of Agriculture** (7(3), 9)

Marijuana Licenses

- **OLCC**
  - **Prescribes application forms** (7(3))
  - **Processes applications** (28-29)
  - **Conducts background checks** (29(2)(b))
  - **Issues licenses** (18)
- **Licensees are private businesses** (5(10), 5(24), 7(5))
- **Types of commercial licenses**
  - **Production** (19)
  - **Processor** (20)
  - **Wholesale** (21)
  - **Retail** (22)

Marijuana Taxes

- **Goals** (5)
  - Minimize the illegal market
  - Maximize revenues for public services
  - Discourage use by minors
- **Tax rates** (33(1))
  - $35 per ounce on marijuana flowers
  - $10 per ounce on marijuana leaves
  - $5 per immature marijuana plant
- **Indexed to inflation** (33(4))
- **Paid by marijuana producers** (33-35)

Tax Revenues

- **Oregon Marijuana Account (separate from General Fund)** (43-44)
- **OLCC reimbursed expenditures** (43)
- **Revenues** (44)
  - 40% Common School Fund
  - 20% Mental Health Alcoholism and Drug Services
  - 5% Oregon Health Authority for drug abuse prevention
  - 15% State Police
  - 10% Cities for law enforcement
  - 10% Counties for law enforcement
- **No supplanting moneys from other sources** (44)(3))

Enforcement

- **Criminal laws**
  - **No use or possession by persons under 21** (79)
  - **No delivery to persons under 21** (14; 78)
  - **No person under 21 on licensed premises** (52)
  - **No manufacture or delivery within 1,000 feet of schools** (ORS 475.858; ORS 475.862)
  - **No use in public place** (54)
  - **Possession limits for adults** (79)
  - **DUI** (ORS 813.010)
  - **No importing or exporting** (45)

Enforcement

- **Commercial regulations**
  - **Product testing and standards** (7(2)(a); 50; 51(2))
  - **Packaging and labeling requirements** (7)(2)(a); 51(1))
  - **Advertising restrictions** (7)(2)(g))
- **City and county regulations**
  - **Reasonable time, place, and manner regulations** (59)
  - **Zoning regulations by local jurisdictions** (59)

Local Jurisdictions

- **Measure 91 preempts local laws**
  - **No inconsistent charters or ordinances (58)**
  - **State has exclusive right to tax (42)**
- **Local jurisdictions may opt out (60)**
  - **City or county initiative petition**
  - **Majority vote**
  - **Elections held at time of statewide general election**
- **Loss of tax revenues (44(2)(d-e))**

OLCC's Continued Interaction With Legislature

- **Tax rates** (33)(5))
  - Ongoing regular reviews by OLCC
  - Recommendations to legislature regarding adjustments
- **Oregon Vehicle Code** (7(4))
  - OLCC presents DUI research to legislature
  - Recommendations regarding amendments to Oregon Vehicle Code

What Measure 91 Does Not Do

- **Reduce criminal penalties for**
  - **Manufacture or possession by persons under 21** (77, 79)
  - **Delivery by or to persons under 21** (78)
  - **Manufacture or delivery within 1,000 feet of school** (ORS 475.858; ORS 475.862)
- **Amend or affect**
  - **DUI laws** (ORS 813.010)
  - **Laws pertaining to employment matters** (4)(1))
  - **Laws pertaining to landlord-tenant matters** (4)(2))
  - **Oregon Medical Marijuana Act** (4)(7))

Timeline

- **November 4, 2014 through June 30, 2015**
  - **No changes as Act does not yet become effective (82(1))**
  - **OLCC may begin the process of adopting rules and prescribing application forms (82(2))**
- **July 1, 2015 – Act becomes effective (82)(1))**
- **January 1, 2016 – Deadline for OLCC to adopt rules and prescribe application forms (7(3))**
- **January 4, 2016 – Deadline for OLCC to begin receiving license applications (18)**
- **First half of 2016 – First licenses issued and first taxes paid**

Free Market Attributes

- Low application and license fees
- Vertical integration permitted
- No residency requirements for business ownership
- No limit on number of licenses held by a licensee
- No limit on aggregate number of licenses issued by OLCC
- No production limits
- No restrictions on location (other than 1,000 feet from school)

Free Market Attributes

- **Taxation**
  - **Relatively low excise tax**
  - **280E disregarded for Oregon personal and corporate income taxes**
- **State law preemption**
  - **State has exclusive right to tax and impose fees**
  - **Inconsistent local charters and ordinances repealed**
- **Local jurisdiction opt out**
  - **Local ballot initiative in general election year**
  - **Loss of tax revenue**

2015 and 2016 Issues

- Oregon
  - Oregon legislature
  - OLCC rulemaking
  - Local jurisdictions
- Measure 91 interaction with OMMA
- Production or license limits
- Opt outs
- Local taxes
- Zoning

2015 and 2016 Issues

- Federal government
  - Cole memo
  - 280E
  - Banking
- State of Washington's reaction
- Next states to legalize?
  - California
  - Arizona
  - Nevada
  - Maine
  - Massachusetts

Oregon Lawyers' Mandatory Duty to Report Elder Abuse

AMBER A. HOLLISTER, DEPUTY GENERAL COUNSEL,
OREGON STATE BAR

ELLEN M. KLEM, DIRECTOR OF CONSUMER OUTREACH
OREGON DEPARTMENT OF JUSTICE

New Reporting Duty

- As of January 1, 2015, all attorneys are mandatory reporters of elder abuse. *See* HB 2205 (2013).
- Attorneys remain mandatory reporters of
  - Child abuse, ORS 419B.005(3)(m);
  - Abuse of adults with mental illness or developmental disabilities, ORS 430.735(12)(i); and
  - Abuse of long-term care resident, *if representing the resident*, ORS 441.630(6)(i).

Changing Demographics

- In 2013, an estimated 15 percent of Oregonians were 65 or older.
- In 2030, an estimated 20 percent of Oregonians will be 65 or older.
- CDC estimates Oregonians have 15 expected “healthy” years beyond age 65.
- Average Oregonian’s life expectancy is 84.3 years.

Legislative Purpose

- "The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons."

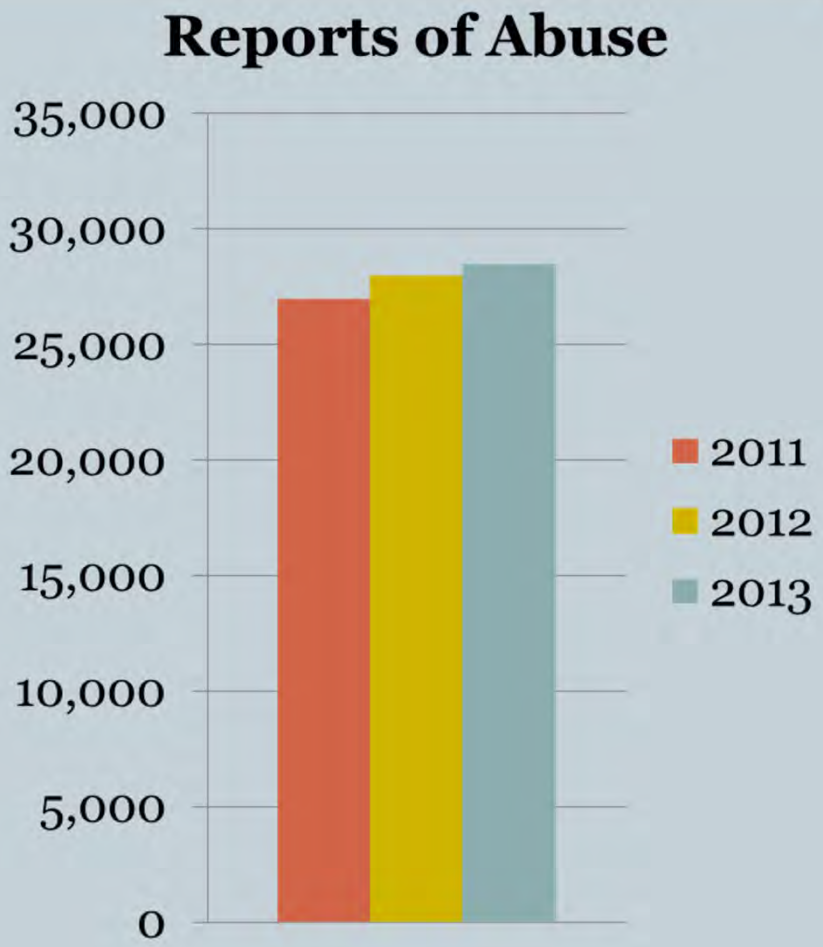
ORS 124.055

Meet the Players

- Department of Human Services (DHS)
  - Adult Protective Services (APS)
  - Aging and Persons with Disabilities (APD)
  - Licensing & Regulatory Oversight
  - Office of Adult Abuse Prevention and Investigations (OAAPI)
  - State Unit on Aging
- Oregon Elder Abuse Legislative Workgroup

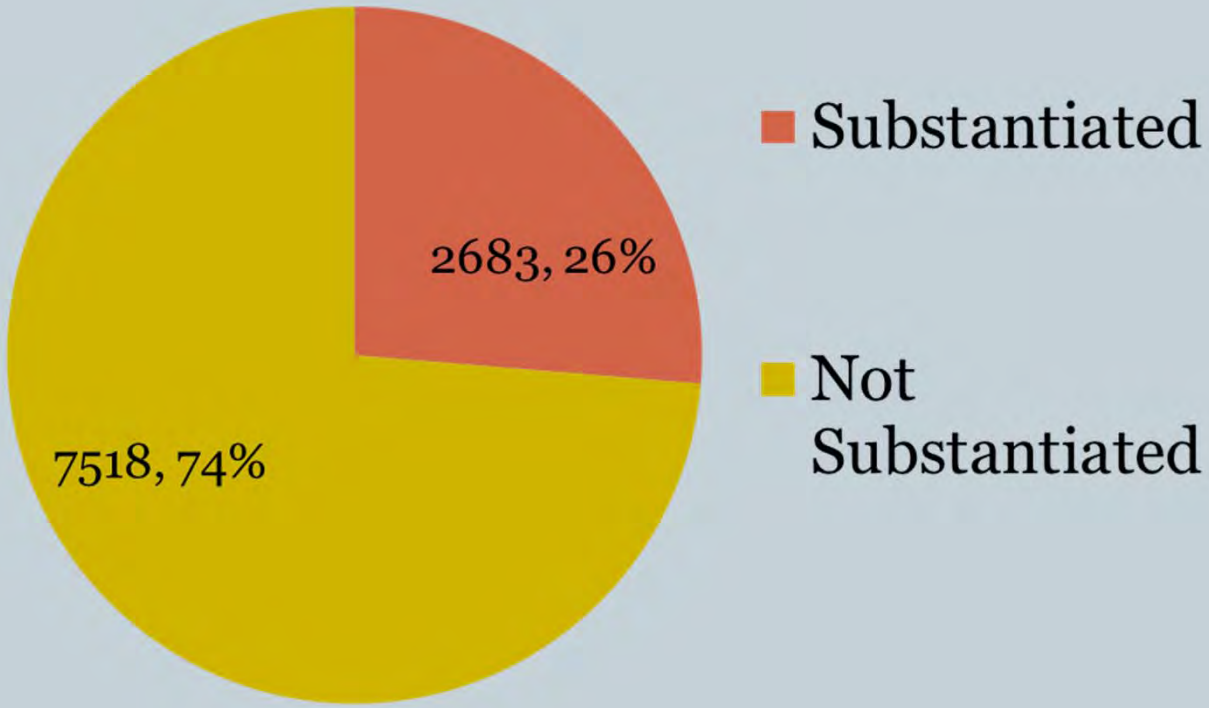
Photo by M.O. Stevens

Adult Abuse in Oregon



- 28,449 reports of potential abuse in 2013
- 14,250 allegations of abuse were investigated
- 4,221 substantiated findings of abuse and self-neglect

2012 Adult Protective Services Complaint Conclusions



Where does abuse occur?

- 66% of abuse occurred in own homes
- 34% of abuse occurred in licensed care settings

2013 Complaint Outcomes in the **Community**

Outcomes	Incidence
Risk reduced	673
Victim declined intervention	442
Issue resolved	429
Referred to District Attorney	369
Accepted services	235
Entered care setting	223
Guardian / Conservator appointed	112
Victim deceased	56
Moved out of the area	42
Services not available	35

Your Elder Abuse Reporting Duty

If you have:

1. Reasonable Cause to Believe;
2. Elder* Abuse Has Occurred; and
3. Contact with Elder or Abuser

*Person 65 or older

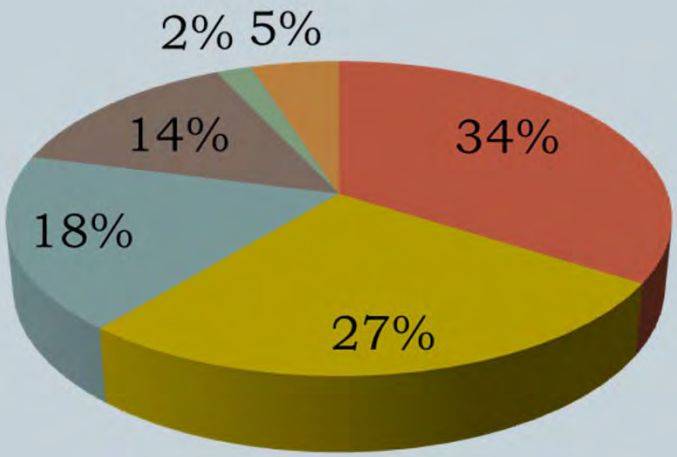
Then You MUST Report
UNLESS an Exception Applies.

ORS 124.060

Oregon State Bar

Abuse Has Occurred

Types of Abuse Reported



Note: 66% of Abuse Occurs in **Home** Settings *vs.* 34% in **Licensed Care** Settings

2013

Financial Exploitation

- Financial Exploitation
  - **Wrongfully taking** the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability. (See OAR 400. 020-0002(1)(e))
  - **Failing to use income or assets effectively** for support and maintenance of person.
  - **Misappropriating, misusing or transferring** without authorization any money from any account
  - **Alarming** an elderly person or a person with a disability by conveying a threat the person would reasonably believe.

ORS 124.050(4)

Neglect

"Failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person." ORS 124.050(7)

"...assumed responsibility or a legal or contractual agreement..." OAR 411-020-0002 (1)(b)(A)(iii)

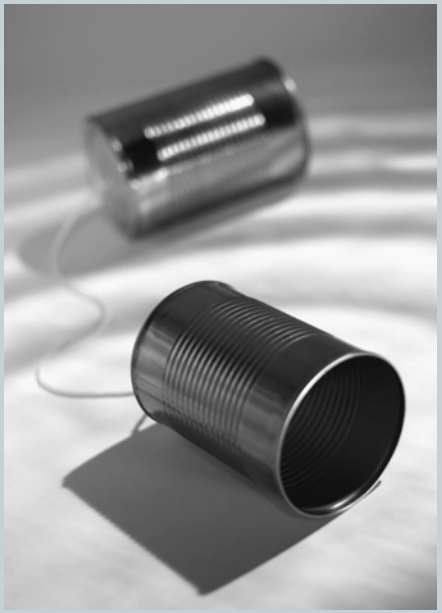
Religious exception, ORS 124.095

Verbal Abuse

- Verbal Abuse, ORS 124.050(13)

  ... to threaten significant physical or emotional harm to an elderly person or a person with a disability through the use of

  - Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or



  - Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.

Physical Abuse & Abandonment

- Physical injury or pain
  - "Any physical injury to an elderly person caused by **other than accidental means**, or which appears to be **at variance** with the explanation given of the injury." ORS 124.050(1)(a).
  - Willful infliction of physical pain or injury upon an elderly person. ORS 124.050(1)(d)
- Abandonment
  - " ... including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person." ORS 124.050(1)(c).

Sexual Abuse

- **Sexual Abuse,** ORS 124.050 (11)(a), (1)(h)
  - Nonconsensual sexual contact
  - Rape, sodomy, unlawful sexual penetration, public indecency, private indecency, incest.
  - Verbal or physical harassment of a sexual nature or sexual exploitation.
  - Sexual contact between employee or paid caregiver and elderly person served.
  - Any sexual contact achieved through force, trickery, threat or coercion.
  - **Exception** for consensual sexual contact with paid caregiver. ORS 124.050 (11)(b).

Seclusion & Restraint

- Wrongful use of a physical or chemical restraint
  - "excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order." ORS 124.050(1)(j)
- Involuntary seclusion
  - "...for the convenience of a caregiver or to discipline the person." ORS 124.050 (1)(i)

Warning Signs of Abuse

- Any unexplained injury that doesn't fit with the given explanation of the injury.
- The elder is not given the opportunity to speak for themselves without the presence of the caregiver.
- Being extremely withdrawn and non communicative or non responsive.
- Unpaid bills, overdue rent, utility shut-off notices.

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Reasonable Cause to Believe

What is Reasonable Cause?

- DHS advice is to report any "reasonable suspicion of abuse."
- Reasonable suspicion is more than a hunch – ability to point to articulable facts based on totality of the circumstances.
- Court may look to "whether the evidence creates a reasonable suspicion of child abuse, not whether abuse in fact occurred or even probably occurred." *Berger v. SOSCF*, 195 Or App 587 (2004) (interpreting analogous child abuse reporting provision).

Oregon State Bar

Contact with Elder or Abuser

What is Contact?

- Contact need not be to be linked to abuse
- Can have contact before or after learning of abuse
- Direct vs. Indirect Contact?
  - Oregon Attorney General interpreted "contact" element of child abuse reporting requirement to require more than board members' receipt of information about abuse through board because acquisition of information was too indirect. AG Op. No. 5543
  - Email or phone?
- No statutory definition or case law interpreting

Oregon State Bar

Then, Must Report If No Exception Applies

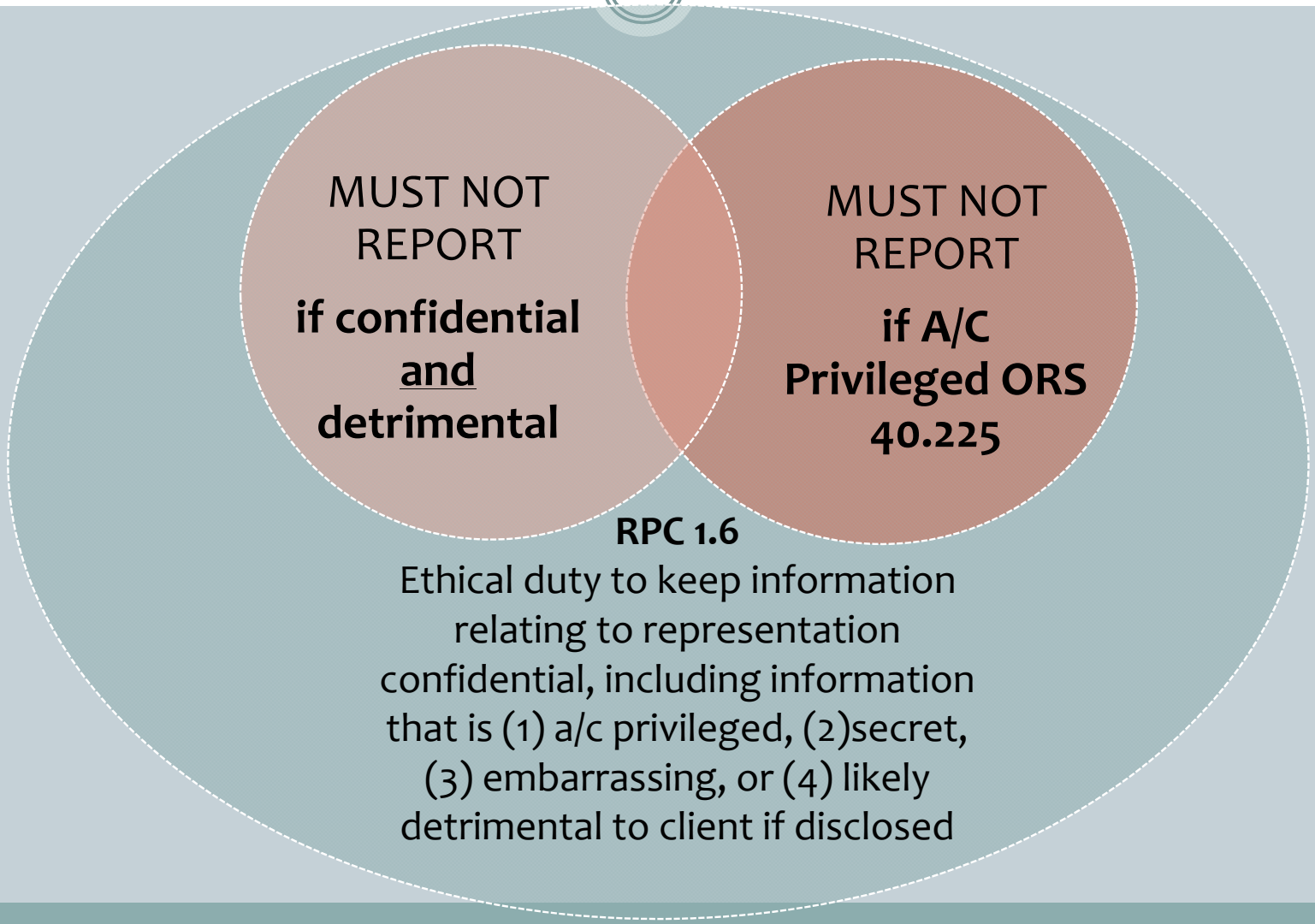
Exception
Certain Client Confidences

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503) **AND/OR**
- **Information communicated during representation that is detrimental to client** if disclosed (reconciles RPC 1.6 duty)

Your Ethical Duty

RPC 1.6(A) REQUIRES LAWYERS TO PRESERVE CONFIDENCES	RPC 1.6(A),(B) ALLOW LAWYERS TO REVEAL CONFIDENCES IF
✓ Attorney-client privileged information AND ✓ Other information gained during course of representation IF ✓ Client requests to keep secret; ✓ Embarrassing if disclosed; or ✓ Likely detrimental to client if disclosed.	✓ Client consents; ✓ Required by law (including ORS 419B.010 et seq.); ✓ Client intends to commit future crime; or ✓ Necessary to prevent reasonably certain death or substantial body harm.

Elder Abuse Reporting Exceptions vs. RPC 1.6



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To Report or Not to Report?

MUST REPORT	MUST NOT REPORT	MAY REPORT
If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser **AND** the information on which you would base your report is (1) not attorney-client privileged *or* (2) if confidential under RPC 1.6, would not be detrimental to client if disclosed.	If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser **BUT** the information on which you would base your report is *either* (1) attorney-client privileged (ORS 40.225), or (2) is confidential and would be detrimental to your client if disclosed.	If you have reasonable grounds to believe that elder abuse has occurred, you report in good faith, **AND** the information is confidential under RPC 1.6 **BUT** your client consents, *or* reporting is necessary to prevent reasonably certain death or substantial bodily harm or future crime.

Nuts & Bolts of Reporting

- **Immediately = without delay** to DHS or law enforcement
  - Oral report required
  - Give as much as information as possible
  - Explain allegation of abuse

Reporting Hotline:
1-855-503-SAFE

Or DHS Branch Offices:
http://www.oregon.gov/dhs/spwpd/pages/offices.aspx

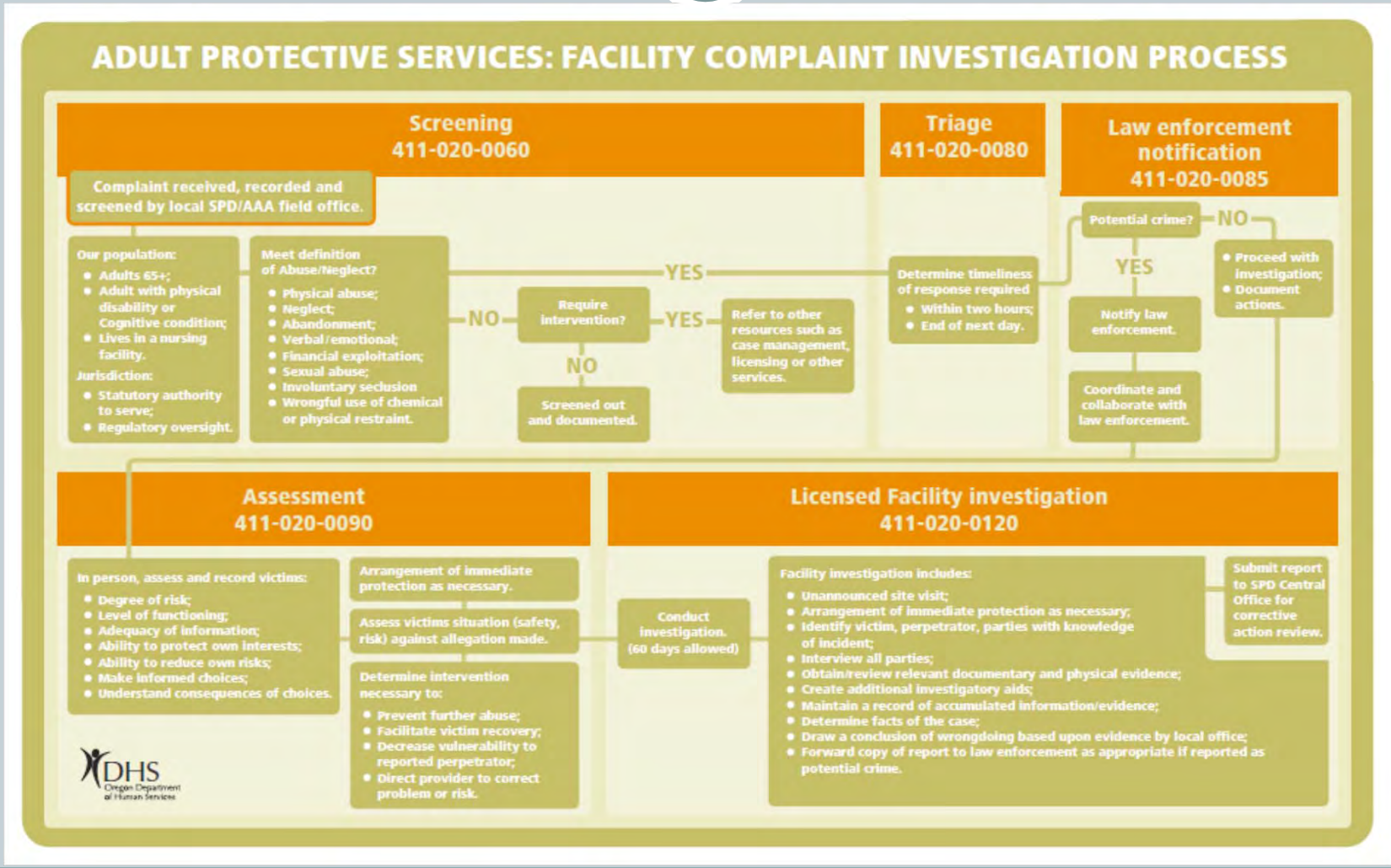
Report Should Include ...

- Names and addresses of the elderly person and any persons responsible for the care of the elderly person.
- Nature and the extent of the abuse (including any evidence of previous abuse).
- Explanation given for the abuse.
- Any other information which the person you think might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

ORS 124.065(1)

Oregon State Bar

Complaint Process



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Behind the Scenes

- DHS
  - Screening
  - Investigation and Evaluation (Substantiated, Unsubstantiated, Inconclusive)
  - Follow-up with Reporter
- Possible Law Enforcement Involvement

Immunity & Anonymity

- Civil immunity if
  - Report made in good faith and
  - Reasonable grounds for report
- Anonymity of Reporter

  ORS 124.075, 124.085, 124.090

Consequences

- Class A violation (fine)
- Failure to perform duties of office
- Tort liability
  - Failure to protect from foreseeable harm? Negligence per se?
  - ORS 124.110?
- Ethics violation – not in most cases

Your Elder Abuse Reporting Duty

If you have:

1. Reasonable Cause to Believe;
2. Elder* Abuse Has Occurred; and
3. Contact with Elder or Abuser

*Person 65 or older

Then You MUST Report
UNLESS an Exception Applies.

ORS 124.060

Hypothetical No. 1

Max, who just turned 89, comes to you for legal advice. He has been married to his wife Sandy, who is 79, for 30 years. Recently, Sandy was diagnosed with Alzheimer's disease, and she moved into a memory care facility. Shortly thereafter, Sandy's daughter from her first marriage appeared and removed Sandy from care facility to a facility in New Mexico, where she lives. Now Sandy has filed for divorce. Sandy's attorney has moved the court for the appointment of a GAL.

Hypothetical No. 1 Cont.

Max suspects that his step-daughter is orchestrating the divorce in order to increase her share of her mother's estate upon death. Max shows you a copy of Sandy's estate plan which shows that her daughter will inherit twice as much from Sandy if she is not married at the time of her death. Max admits his marriage with Sandy was on the rocks before she moved into the care facility, but claims that was due to her health issues. Max is distraught and misses Sandy. Do you have a duty to report elder abuse?

Hypothetical No. 2

Janice has been served with a divorce petition. During your initial consultation, Janice tells you that she is concerned that her husband Alex has been "living off" his ailing mother, who she describes as being "in her 70s." Janice explains that Alex has not had a job for twenty years, and that for the past ten years they have lived with Alex's mom and she has paid for all of their household expenses. Do you have a duty to report elder abuse?

Hypothetical No. 3

You are representing Pat, a 69 year old woman, in a dissolution. When you review copies of Pat's banking records you notice that there are large withdrawals coming out of her savings account. When you ask Pat about the withdrawals, she explains that her niece Jane has been taking care of her for the past year, and that she writes Jane regular checks to help pay for groceries. You do some math, and realize that Jane has received $30,000 over the past year.

Hypothetical No. 3 Cont.

You share this information with Pat and she is shocked that the number is so high, saying, "I can't believe I've given Jane that much money. She didn't spend it on groceries, that's for sure." You know that Pat has been experiencing some mild dementia and is under the care of a doctor. When you bring up the idea that Jane may be taking advantage of her, Pat is adamant that she loves Jane and doesn't want to do anything about it. Do you have a duty to report elder abuse?

Questions?

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ORS CHAPTER 124

REPORTING OF ABUSE

***

124.050. As used in ORS 124.050 to 124.095:

(1) “Abuse” means one or more of the following:

(a) Any physical injury to an elderly person caused by other than accidental means, or which appears to be at variance with the explanation given of the injury.

(b) Neglect.

(c) Abandonment, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.

(d) Willful infliction of physical pain or injury upon an elderly person.

(e) An act that constitutes a crime under ORS 163.375, 163.405, 163.411, 163.415, 163.425, 163.427, 163.465 or 163.467.

(f) Verbal abuse.

(g) Financial exploitation.

(h) Sexual abuse.

(i) Involuntary seclusion of an elderly person for the convenience of a caregiver or to discipline the person.

(j) A wrongful use of a physical or chemical restraint of an elderly person, excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.

(2) “Elderly person” means any person 65 years of age or older who is not subject to the provisions of ORS 441.640 to 441.665.

(3) “Facility” means:

(a) A long term care facility as that term is defined in ORS 442.015.

(b) A residential facility as that term is defined in ORS 443.400, including but not limited to an assisted living facility.

(c) An adult foster home as that term is defined in ORS 443.705.

(4) “Financial exploitation” means:

(a) Wrongfully taking the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability.

(b) Alarming an elderly person or a person with a disability by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out.

(c) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elderly person or a person with a disability.

(d) Failing to use the income or assets of an elderly person or a person with a disability effectively for the support and maintenance of the person.

(5) “Intimidation” means compelling or deterring conduct by threat.

(6) “Law enforcement agency” means:

(a) Any city or municipal police department.

(b) Any county sheriff's office.

(c) The Oregon State Police.

(d) Any district attorney.

(e) A police department established by a university under ORS 352.383 or 353.125.

(7) "Neglect" means:

(a) Failure to provide the care, supervision or services necessary to maintain the physical and mental health of an elderly person that may result in physical harm or significant emotional harm to the elderly person; or

(b) The failure of a caregiver to make a reasonable effort to protect an elderly person from abuse.

(8) "Person with a disability" means a person described in:

(a) ORS 410.040 (7); or

(b) ORS 410.715.

(9) "Public or private official" means:

(a) Physician or physician assistant licensed under ORS chapter 677, naturopathic physician or chiropractor, including any intern or resident.

(b) Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.

(c) Employee of the Department of Human Services or community developmental disabilities program.

(d) Employee of the Oregon Health Authority, county health department or community mental health program.

(e) Peace officer.

(f) Member of the clergy.

(g) Regulated social worker.

(h) Physical, speech or occupational therapist.

(i) Senior center employee.

(j) Information and referral or outreach worker.

(k) Licensed professional counselor or licensed marriage and family therapist.

(L) Member of the Legislative Assembly.

(m) Firefighter or emergency medical services provider.

(n) Psychologist.

(o) Provider of adult foster care or an employee of the provider.

(p) Audiologist.

(q) Speech-language pathologist.

(r) Attorney.

(s) Dentist.

(t) Optometrist.

(u) Chiropractor.

(10) "Services" includes but is not limited to the provision of food, clothing, medicine, housing, medical services, assistance with bathing or personal hygiene or any other service essential to the well-being of an elderly person.

(11)(a) "Sexual abuse" means:

(A) Sexual contact with an elderly person who does not consent or is considered incapable of consenting to a sexual act under ORS 163.315;

(B) Sexual harassment, sexual exploitation or inappropriate exposure to sexually explicit material or language;

(C) Any sexual contact between an employee of a facility or paid caregiver and an elderly person served by the facility or caregiver;

(D) Any sexual contact between an elderly person and a relative of the elderly person other than a spouse; or

(E) Any sexual contact that is achieved through force, trickery, threat or coercion.

(b) "Sexual abuse" does not mean consensual sexual contact between an elderly person and a paid caregiver who is the spouse of the elderly person.

(12) "Sexual contact" has the meaning given that term in ORS 163.305.

(13) "Verbal abuse" means to threaten significant physical or emotional harm to an elderly person or a person with a disability through the use of:

(a) Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or

(b) Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.

124.055 Policy. The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons. [Formerly 410.620]

124.060. Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065. Nothing contained in ORS 40.225 to 40.295 affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

124.065 Method of reporting; content; notice to law enforcement agency and to department. (1) When a report is required under ORS 124.060, an oral report shall be made immediately by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact. If known, such reports shall contain the names and addresses of the elderly person and any persons responsible for the care of the elderly person, the nature and the extent of the abuse (including any evidence of previous abuse), the explanation given for the abuse and any other information which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

(2) When a report of a possible crime is received by the department under ORS 124.060, the department or the designee of the department shall notify the law enforcement agency having jurisdiction within the county where the report was made. If the department or the designee of the department is unable to gain access to the allegedly abused elderly person, the department or

the designee of the department may contact the law enforcement agency for assistance and the agency shall provide assistance.

(3) If the department or the designee of the department determines that there is reason to believe a crime has been committed, the department or the designee of the department shall immediately notify the law enforcement agency having jurisdiction within the county where the report was made. The law enforcement agency shall confirm to the department or the designee of the department its receipt of the notification within two business days.

(4) When a report is received by a law enforcement agency, the agency shall immediately notify the law enforcement agency having jurisdiction if the receiving agency does not. The receiving agency shall also immediately notify the local office of the department in the county where the report was made. [Formerly 410.640; 2009 c.837 §10]

Note: *The amendments to 124.065 by section 11, chapter 837, Oregon Laws 2009, become operative July 1, 2015. See section 41, chapter 837, Oregon Laws 2009. The text that is operative on and after July 1, 2015, is set forth for the user's convenience.*

124.065. *(1) When a report is required under ORS 124.060, an oral report shall be made immediately by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact. If known, such reports shall contain the names and addresses of the elderly person and any persons responsible for the care of the elderly person, the nature and the extent of the abuse (including any evidence of previous abuse), the explanation given for the abuse and any other information which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.*

(2) When a report of a possible crime is received by the department under ORS 124.060, the department or the designee of the department shall notify the law enforcement agency having jurisdiction within the county where the report was made. If the department or the designee of the department is unable to gain access to the allegedly abused elderly person, the department or the designee of the department may contact the law enforcement agency for assistance and the agency shall provide assistance.

(3) If the department or the designee of the department determines that there is reason to believe a crime has been committed, the department or the designee of the department shall immediately notify the law enforcement agency having jurisdiction within the county where the report was made. The law enforcement agency shall confirm to the department or the designee of the department its receipt of the notification.

(4) When a report is received by a law enforcement agency, the agency shall immediately notify the law enforcement agency having jurisdiction if the receiving agency does not. The receiving agency shall also immediately notify the local office of the department in the county where the report was made.

124.070 Duty to investigate; notice to law enforcement agency and department; written findings; review by district attorney. (1) Upon receipt of the report required under ORS 124.060, the Department of Human Services or the law enforcement agency shall cause an investigation to be commenced promptly to determine the nature and cause of the abuse. The investigation shall include a visit to the named elderly person and communication with those individuals having knowledge of the facts of the particular case. If the alleged abuse occurs in a

residential facility, the department shall conduct an investigation regardless of whether the suspected abuser continues to be employed by the facility.

(2) If the department finds reasonable cause to believe that a crime has occurred, the department shall notify in writing the appropriate law enforcement agency. If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the agency shall notify the department in writing. Upon completion of the evaluation of each case, the department shall prepare written findings that include recommended action and a determination of whether protective services are needed.

(3) Within three business days of receiving notification from the department that there is reasonable cause to believe that a crime has occurred, a law enforcement agency shall notify the department:

(a) That there will be no criminal investigation, including an explanation of why there will be no criminal investigation;

(b) That the investigative findings have been given to the district attorney for review; or

(c) That a criminal investigation will take place.

(4) If a law enforcement agency gives the findings of the department to the district attorney for review, within five business days the district attorney shall notify the department that the district attorney has received the findings and shall inform the department whether the findings have been received for review or for filing charges. A district attorney shall make the determination of whether to file charges within six months of receiving the findings of the department.

(5) If a district attorney files charges stemming from the findings of the department and the district attorney makes a determination not to proceed to trial, the district attorney shall notify the department of the determination within five business days and shall include information explaining the basis for the determination. [Formerly 410.650; 2009 c.837 §12]

Note: *The amendments to 124.070 by section 13, chapter 837, Oregon Laws 2009, become operative July 1, 2015. See section 41, chapter 837, Oregon Laws 2009. The text that is operative on and after July 1, 2015, is set forth for the user's convenience.*

124.070. *(1) Upon receipt of the report required under ORS 124.060, the Department of Human Services or the law enforcement agency shall cause an investigation to be commenced promptly to determine the nature and cause of the abuse. The investigation shall include a visit to the named elderly person and communication with those individuals having knowledge of the facts of the particular case. If the alleged abuse occurs in a residential facility, the department shall conduct an investigation regardless of whether the suspected abuser continues to be employed by the facility.*

(2) If the department finds reasonable cause to believe that a crime has occurred, the department shall notify in writing the appropriate law enforcement agency. If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the agency shall notify the department in writing. Upon completion of the evaluation of each case, the department shall prepare written findings that include recommended action and a determination of whether protective services are needed.

(3) After receiving notification from the department that there is reasonable cause to believe that a crime has occurred, a law enforcement agency shall notify the department:

(a) That there will be no criminal investigation, including an explanation of why there will be no criminal investigation;

(b) That the investigative findings have been given to the district attorney for review; or

(c) That a criminal investigation will take place.

(4) If a law enforcement agency gives the findings of the department to the district attorney for review, the district attorney shall notify the department that the district attorney has received the findings and shall inform the department whether the findings have been received for review or for filing charges. A district attorney shall make the determination of whether to file charges within six months of receiving the findings of the department.

(5) If a district attorney files charges stemming from the findings of the department and the district attorney makes a determination not to proceed to trial, the district attorney shall notify the department of the determination and shall include information explaining the basis for the determination.

124.072 Required disclosure of protected health information to law enforcement agency; liability for disclosure. (1) Upon notice by a law enforcement agency that an investigation into abuse is being conducted under ORS 124.070, and without the consent of the named elderly person or of the named elderly person's caretaker, fiduciary or other legal representative, a health care provider must:

(a) Permit the law enforcement agency to inspect and copy, or otherwise obtain, protected health information of the named elderly person; and

(b) Upon request of the law enforcement agency, consult with the agency about the protected health information.

(2) A health care provider who in good faith discloses protected health information under this section is not civilly or criminally liable under state law for the disclosure.

(3) For purposes of this section:

(a) "Health care provider" has the meaning given that term in ORS 192.556.

(b) "Protected health information" has the meaning given that term in ORS 192.556. [2012 c.70 §6]

124.073 Training for abuse investigators. (1) The Department of Human Services shall:

(a) Using new or existing materials, develop and implement a training and continuing education curriculum for persons other than law enforcement officers required by law to investigate allegations of abuse under ORS 124.070 or 441.650. The curriculum shall address the areas of training and education necessary to facilitate the skills required to investigate reports of abuse, including, but not limited to, risk assessment, investigatory technique, evidence gathering and report writing.

(b) Using new or existing materials, develop and implement training for persons that provide care to vulnerable persons to facilitate awareness of the dynamics of abuse, abuse prevention strategies and early detection of abuse.

(2) For purposes of this section, "vulnerable person" means a person 65 years of age or older. [2012 c.70 §21]

Note: 124.073 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 124 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

124.075 Immunity of person making report in good faith; identity confidential. (1) Anyone participating in good faith in the making of a report of elder abuse and who has reasonable grounds for making the report shall have immunity from any civil liability that might otherwise be incurred or imposed with respect to the making or content of such report. Any such participant shall have the same immunity with respect to participating in any judicial proceeding resulting from such report.

(2) The identity of the person making the report shall be treated as confidential information and shall be disclosed only with the consent of that person or by judicial process, or as required to perform the functions under ORS 124.070. [Formerly 410.660; 2005 c.671 §5]

***

124.085 Catalog of abuse records; confidentiality. A proper record of complaints made under ORS 124.060 and 124.065 shall be maintained by the Department of Human Services. The department shall prepare reports in writing when investigation has shown that the condition of the elderly person was the result of abuse even if the cause remains unknown. The complaints and investigative reports shall be cataloged under the name of the victim but shall be treated as confidential information subject to ORS 124.090, and shall be disclosed only with the consent of that person or by judicial process. [Formerly 410.680; 2012 c.70 §11]

124.090 Confidentiality of records; exceptions. (1) Notwithstanding the provisions of ORS 192.410 to 192.505, the names of the public or private official or any other person who made the complaint, the witnesses and the elderly persons, and the reports and records compiled under the provisions of ORS 124.050 to 124.095, are confidential and are not accessible for public inspection.

(2) Notwithstanding subsection (1) of this section, the Department of Human Services or the department's designee may, if appropriate, make the names of the witnesses and the elderly persons, and the reports and records compiled under ORS 124.050 to 124.095, available to:

(a) A law enforcement agency;

(b) A public agency that licenses or certifies residential facilities or licenses or certifies the persons practicing in the facilities;

(c) A public agency or private nonprofit agency or organization providing protective services for the elderly person;

(d) The Long Term Care Ombudsman;

(e) A public agency that licenses or certifies a person that has abused or is alleged to have abused an elderly person;

(f) A court pursuant to a court order or as provided in ORS 125.012; and

(g) An administrative law judge in an administrative proceeding when necessary to provide protective services as defined in ORS 410.040 to an elderly person, when in the best interests of the elderly person or when necessary to investigate, prevent or treat abuse of an elderly person.

(3) Information made available under subsection (2) of this section, and the recipient of the information, are otherwise subject to the confidentiality provisions of ORS 124.050 to 124.095. [Formerly 410.690; 2001 c.900 §21; 2012 c.70 §12]

124.095 Spiritual treatment not abuse. An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and

practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for this reason alone, not be considered subjected to abuse by reason of neglect under ORS 124.050 to 124.095. [Formerly 410.700]

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PENALTIES

124.990 Criminal penalty. A person who violates ORS 124.060 commits a Class A violation. [Formerly 410.990]

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Changes Due to Normal Aging and Potential for Abuse/Neglect

Aging Process Changes	Normal Aging Outcomes	Implications For Potential Abuse
Skin:		
Loss of skin thickness Atrophy of sweat glands and decreased blood flow Increased wrinkles and laxity of skin	Skin becomes paper thin Decreased sweating, loss of skin water, dry skin	Immobilization and neglect may cause bedsores, skin infection, bruises, skin laceration (potential for physical abuse)
Lung:		
Decreased lung tissue elasticity Decreased respiratory muscle strength	Reduced overall efficiency of gases exchanged Reduced ability to handle secretions and foreign particles	Immobilization and neglect may cause lung infection Decreased stamina may result in dependence and isolation
Heart changes:		
Heart valves thicken Increased fatty deposits in artery wall Increased hardening, stiffening of blood vessels Decreased sensitivity to change in blood pressure	Decreased blood flow Decreased responsiveness to stress, confusion, and disorientation Prone to loss of balance	Potential for falls/injuries, physical and psychological abuse
Gastric and intestinal:		
Atrophy and decreased number of taste buds Decreased gastric secretion Decreased gastric muscle tone	Altered ability to taste sweet, sour, salt and bitter Possible delay in vitamin and drug absorption Altered motility Decreased peristalsis Decreased hunger sensations and emptying time	Mal/under nutrition Fecal impaction (potential physical abuse) Change in how medications are absorbed, resulting in possible over-medicating, resulting in falls, confusion, etc.

National Clearinghouse on Abuse in Later Life (NCALL)
A Project of Wisconsin Coalition Against Domestic Violence
307 S. Paterson St., Suite 1, Madison, Wisconsin 53703-3517
Phone: 608-255-0539 • Fax/TTY: 608-255-3560 • www.ncall.us • www.wcadv.org

Aging Process Changes	Normal Aging Outcomes	Implications For Potential Abuse
Bladder:		
Decreased bladder muscle tone and bladder capacity	Increased residual urine Sensation of urge to urinate may not occur until bladder is full Increased risk of infection, stress incontinence Urination at night may increase Enlarged prostate gland in male	Incontinence along with immobilization and neglect may cause skin breakdown and/or bedsores Potential for falls and injuries when having to get up more at night Incontinence is the single most predictive factor for abuse
Muscles, joint, and bone:		
Decreased muscle mass Deterioration of joint cartilage Decreased bone mass Decreased processing speed and vibration sense Decreased nerve fibers	Decreased muscle strength and increased muscle clamping Greater risk of fractures; limitation of movement; Potential for pain	Immobilization and neglect may cause contracture deformities (potential for physical and psychological abuse) Increased potential for falls More likely to fracture under less impact than a bone of a younger person Less strength resulting in increased isolation and dependence on caregiver
Sensory:		
Changes in sleep-wake cycle Slower stimulus identification and registration Decreased visual acuity Slower light and dark adaptation Difficulty in adapting to lighting changes Distorted depth perception Impaired color vision Changes in lens Diminished tear secretion Decreased tone discrimination Decreased sensitivity to odors Reduced tactile sensation	Increased or decreased time spent sleeping Increased nighttime awakenings Delayed reaction time Prone to falls Increased possibility of disorientation Glare may pose an environmental hazard Incorrect assessment of height of curbs and steps Presbyopia (diminished ability to focus on near objects) Presbycusis (high frequency sounds lost) Less able to differentiate lower color tones e.g. blues, greens Dullness and dryness of the eyes Decreased ability to sense pressure, pain, temperature	Neglect and social isolation (potential for financial abuse) Falls, fractures, and injuries (potential for physical *and* psychological abuse)
Immune system:		
Decline in secretion of hormones Impaired temperature regulation Impaired immune reactivity Decreased basal metabolic rate	Decreased resistance to certain stresses (burns, surgery, etc.) Increased susceptibility and incidence of infection Increased incidence of obesity	Bedsores Infections Fractures Isolation Dependence

Aging Process Changes	Normal Aging Outcomes	Implications For Potential Abuse
Mental and cognitive:		
Some cognitive and mental functions decline Some cognitive skills including judgment, creativity, common sense, and breadth of knowledge and experience, are maintained or improved. Some cognitive skills, including abstraction, calculation, word frequency, verbal comprehension, and inductive reasoning, show slight or gradual decline.	Short-term memory declines but long-term recall is usually maintained Difficulty understanding abstract content. Learning abilities change—older adults are more cautious in their responses; are capable of learning new things but their speed of processing information is slower.	Potential for financial abuse and exploitation Increased risk for self-neglect

Source: California State University, Los Angeles, School of Social (2003). Adult Protective Services Worker Training for the California State University Department of Social Services

Lawyers' New Mandatory Abuse Reporting Requirement

Elder Abuse

By Amber Hollister

iStock

Protecting and advocating for vulnerable older Oregonians is a critical part of the work many lawyers do — day in and day out. Expanding the list of mandatory reporters to include our profession is one more important way to help ensure these people are safe from harm.

—Attorney General Ellen Rosenblum

Lawyers across Oregon are talking about elder abuse reporting. On Jan. 1, 2015, legislation took effect making all Oregon lawyers mandatory reporters of elder abuse. HB 2205 (2013). As with any new law, there are still many questions about how the new requirements will apply and impact lawyers' day-to-day practice. This month's bar counsel column outlines the basics of the requirement.

The new reporting requirement was enacted at the recommendation of the Oregon Elder Abuse Prevention Work Group, which was tasked with studying how to better protect older Oregonians. As state Rep. Val Hoyle notes, "For four years, the work group has focused on protecting some of Oregon's most vulnerable citizens. Integrating lawyers into Oregon's elder abuse safety net as mandatory reporters will provide our state with over 19,000 additional advocates."

While the elder abuse reporting requirement is new, lawyers have long been mandatory reporters of child abuse, abuse of developmentally disabled adults and abuse of long-term care residents. *See* ORS 419B.005(5)(m); ORS 430.735(12)(i); ORS 441.630(6)(i). These existing reporting obligations remain intact.

Part of the reason for the increased focus on elder abuse is that Oregon is in the midst of a demographic shift — as baby boomers age, our population as a whole is aging. The Oregon Office of Economic Analysis forecasts that between 2010 and 2020, the number of Oregonians aged 65 to 74 will grow by 36 percent. The median age of Oregon's population was 30.3 in 1980, but is forecast to rise to 39.7 by 2020. [1]And elder abuse is a significant problem in Oregon. In 2013, the state investigated and substantiated over 4,000 instances of elder abuse.[2]

The Legislature has high hopes that the new attorney reporting obligation will provide additional protection to elders. "The addition of Oregon lawyers as mandatory reporters of elder abuse will shine a bright new light on abuse in our communities," explains Rep. Vic Gilliam. "Lawyers who receive elder abuse prevention training will be even further equipped to recognize warning signs and report their concerns to appropriate authorities."

The Basics

So what exactly is the elder abuse reporting requirement? In its most condensed form, the new law requires a lawyer to report elder abuse when he or she has reasonable cause to believe elder abuse has occurred, and the lawyer has had contact with the elder or the alleged abuser. *See* ORS 124.060.The requirement applies to lawyers 24 hours a day, seven days a week. The law includes exceptions to protect attorney-client privileged information and information learned during the course of representing a client that would be detrimental to the client if disclosed.

Much of the law's complexity stems from the way in which the terms *elder*, *reasonable cause* and *abuse* are defined. First, lawyers should note that the law defines elders broadly to include all people aged 65 or older who are not currently residents of a long-term care facility. ORS 124.050(2). An elder need not be vulnerable or lacking in capacity to be covered by the law.

Reasonable cause is not defined by the law, but has been interpreted by Oregon courts in an analogous child abuse reporting context to mean reasonable suspicion.[3] A lawyer has reasonable suspicion to believe elder abuse has occurred if the

Ongoing Conversation

The elder abuse reporting requirement is part of an ongoing conversation in Salem about how to best prevent elder abuse. The Oregon Elder Abuse Prevention Work Group welcomes comments from attorneys about the new requirements. The work group's meetings are open to the public. Oregon bar members interested in attending should contact OSB Public Affairs Director Susan Grabe at (503) 431-6380 for more information.

lawyer can articulate facts, based on the totality of the circumstances, that would lead a reasonable person to believe that the abuse occurred. This means that the evidentiary standard for reporting elder abuse is relatively low. Because probable cause is not required, a lawyer need not believe it is more likely than not that abuse occurred to trigger reporting.

The definition of abuse is the most intricate piece of the reporting scheme. Elder abuse is defined to encompass a myriad of circumstances including physical abuse, neglect, financial exploitation, verbal abuse and sexual abuse. *See* ORS 124.050(1) *et seq*. For lawyers who are accustomed to analyzing their obligation to report child abuse, it is important to note there are some substantial differences in the definitions of elder abuse and child abuse.

Some of the definitions of elder abuse, including the definitions of physical abuse and neglect, are fairly straightforward. Physical abuse is elder abuse. Any willful infliction of physical pain or injury to an elder is considered abuse, as is the wrongful use of a physical or chemical restraint on an elder. More broadly, elder abuse is defined to include any nonaccidental physical injury to an elder, and any physical injury that appears to be at variance with the explanation given of the injury.

Neglect is also elder abuse. Neglecting an elder by withholding the basic care or services the elder needs to maintain health and safety is deemed elder abuse. Depending on the specific circumstances and capacity of the elder, what is considered a basic care or service may change. Abandonment of an elder is defined as abuse, particularly where a caregiver or other person is neglecting duties and obligations that are owed to an elder. Involuntary seclusion of an elderly person as a measure of discipline or for the caregiver's convenience is also abuse.

Sexual abuse and sexual exploitation are elder abuse. Any nonconsensual sexual contact between an elder and caregiver is included in the definition.

Certain categories of verbal threats are also considered elder abuse. Specifically, threatening an elder with significant physical or emotional harm by using "derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule" or "[h]arassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments" is deemed abuse. ORS 124.050(13).

Financial Exploitation

The type of elder abuse that has generated the most discussion in the legal community to date is financial exploitation. Financial exploitation is defined in ORS 124.050(4) as:

a) Wrongfully taking the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability;

b) Alarming an elderly person or a person with a disability by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out;

c) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elderly person or a person with a disability; or

d) Failing to use the income or assets of an elderly person or a person with a disability effectively for the support and maintenance of the person.

Certainly, individuals who abuse their powers as an elder's attorney-in-fact, guardian or conservator to improperly enrich themselves would be engaged in financial exploitation. Similarly, individuals who threaten to harm an elderly person or an elder's loved ones in order to reap a financial benefit would be engaged in abuse. Refusing to use an elder's income or assets to pay for basics such as food, housing or medical care would also likely fall within the definition of abuse.

Lawyers who regularly represent elders in transactions or business deals have expressed a desire for more clarity in the definition of financial exploitation. In response, the work group is discussing possible amendments to the definition of financial exploitation and the phrase "wrongful taking."[4] Open questions remain about how the new elder abuse reporting requirement will interact with existing civil financial elder abuse protections. *See* ORS 124.110.

Some Warning Signs of Abuse

- Any unexplained injury that doesn't fit with the given explanation of the injury.
- The elder is not given the opportunity to speak for him or herself without the presence of the caregiver.
- The elder has become extremely withdrawn and noncommunicative or nonresponsive.
- Unpaid bills, overdue rent, utility shutoff notices.

Source: *Adult Abuse Investigations and Protective Services, DHS webpage. For a more extensive list of warning signs visit* www.oregon.gov/dhs *and search for "adult abuse warning signs."*

Contact

Before the duty to report elder abuse is triggered, an attorney must have contact with an elder or alleged abuser. Although *contact* is not defined by the statute, contact is commonly defined as a coming together. Being in the room with a person or communicating with a person by phone or email is likely enough to meet the contact element. On the other hand, merely hearing news reports or reading pleadings about an incident of abuse will not be enough to trigger the duty to report.

Client Confidentiality

Even if a lawyer has reasonable cause to believe elder abuse has occurred, and has had contact with the elder or abuser, the lawyer still must examine whether the exceptions to reporting for client confidentiality apply. Lawyers do not have an obligation to report elder abuse if doing so would reveal attorney-client privileged information or would reveal information learned while representing a client that would be detrimental to the client if disclosed. ORS 124.060. If a client consents to the lawyer reporting the abuse, the lawyer could of course make a report. RPC 1.6(a).[5]

How to Report

To report elder abuse, lawyers should make an immediate verbal report to law enforcement or the Department of Human Services. Lawyers can call (855) 503-SAFE to report elder or child abuse any time of day or night. If harm is imminent, lawyers should call 911. Lawyers who have reasonable grounds to report elder abuse and report in good faith are entitled to civil immunity. ORS 124.075(1).

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Ethics opinions are published and updated on the bar's website, www.osbar.org/ethics/toc.html.

An archive of Bar Counsel articles is available at www.osbar.org/ethics/bulletinbarcounsel.html.

Endnotes

1. *www.oregon.gov/DAS/OEA/docs/demographic/OR_pop_trend2013.pdf*
2. Office of Adult Abuse Prevention and Investigations, *2013 Annual Report* (August 2014).
3. In *Berger v. State Office for Services to Children and Families,* 195 Or App 587, 590 (2004), the court noted that the agency's determination of whether child abuse charges are founded is limited only to "whether there is evidence that creates a reasonable suspicion of child abuse; [the agency] does not decide whether child abuse in fact occurred or even probably occurred."
4. Although "wrongfully taking" is not defined by the statute, the Oregon Court of Appeals in *Church v. Woods,* 190 Or App 112 (2003), explored the meaning of "wrongful taking" in the separate context of meeting the standard for obtaining a temporary restraining order against financial elder abuse. *See* ORS 124.110 *et seq.* In *Church,* the court held that obtaining a joint interest in real property from an incapacitated elder was a "taking" of property, for purposes of establishing a statutory claim for financial abuse. The court also held that the taking was "wrongful" based both on the defendant's motives and the means by which property was taken. It is unclear whether a court would use this same definition when interpreting "wrongful taking" as used in the reporting statute, ORS 124.050(4)(a).
5. Similarly, if a lawyer reasonably believes that reporting elder abuse is necessary to prevent reasonably certain substantial bodily harm or death or to prevent a client's commission of a *future* crime, reporting is allowed. RPC 1.6(b)(1)-(2). These exceptions to RPC 1.6 have been narrowly construed.

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DHS
Oregon Department of Human Services

This document can be provided upon request in alternate formats for individuals with disabilities or in a language other than English for people with limited English skills. To request this brochure in another format or language, email spd.web@state.or.us, or call 1-800-282-8096 (voice or TTY).

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"The ADRC located a contractor who allowed me to make financial arrangements. So now I have a ramp and can come and go independently with either my scooter or wheelchair."

— ADRC consumer

SOCIAL MEDIA: HIT THE "LIKE" BUTTON FOR USE OF SOCIAL MEDIA IN YOUR CASES

By Matthew A. Levin and Steffan Alexander,
Markowitz Herbold PC

INTRODUCTION

Social Media is defined as "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)."[1]

In family law cases, social media evidence is often requested as proof of a party's character or fault in a matter, including evidence of extramarital affairs and engagement in activities that would adversely affect the best interests of a child.[2]

WHERE TO LOOK FOR SOCIAL MEDIA

There are over 800 social media sites used in the US and around the globe. These sites are used for sharing your life, photos, chatting, business, dating, group activities, blogs, and many more. The 15 most popular social media sites as ranked in order by eBizMBA, include: (1) Facebook, (2) Twitter, (3) LinkedIn, (4) Pinterest, (5) Google Plus+, (6) Tumblr, (7) Instagram, (8) VK, (9) Flickr, (10) Vine, (11) Meetup, (12) Tagged, (13) Ask.fm, (14) MeetMe, and (15) ClassMates.[3] Social Media sites are constantly evolving. One of the newest sites is Pheed, which is a multimedia site for photos, video, and music. It enables users to create, inspire, and share text, photos, videos, audio tracks, voice-notes, and live broadcasts.

Social media mobile chatting is also becoming more prevalent. For example, Kik is a chat application used by kids to chat with their friends as an alternative to texting. It uses a username rather than a phone number to connect with friends. Whatsapp is an instant messaging application used on mobile devices that is gaining popularity. In addition, Snapchat is a private messaging application used for photos and short videos that automatically delete unless the user specifically saves the messages.

PRE-LITIGATION SOCIAL MEDIA CONSIDERATIONS

In the early stages of litigation, social media could be a factor in (1) the parties' obligation to preserve and collect relevant evidence as part of a litigation hold, (2) the pre-litigation investigation of potential adverse witnesses and opposing counsel, and (3) the parties' ability to locate and serve adverse parties.[4]

I. Social media preservation.

The duty to preserve potentially relevant evidence arises when a party reasonably anticipates litigation.[5] This duty applies equally to social media content.[6] A user sued in an individual capacity has a duty to preserve relevant social media content that the individual can obtain on demand.[7]

A. Litigation holds.

Attorneys drafting a litigation hold should consider specifically referencing social media platforms, including any associated and collectable metadata.[8] Attorneys sending a

demand letter to an adversary requesting preservation of relevant ESI should consider identifying social media platforms as potential sources of relevant information.[9]

B. Data collection.

Printouts, screenshots, or web crawlers used to gather static images may be inconsistent with the format sought in a request for production or subpoena, and may be insufficient for authentication.[10] Attorneys should consider engaging an e-discovery vendor for collection of social media content and associated metadata.[11]

In addition, use of e-discovery software may help establish authenticity by generating hash values (unique document identifiers) for collected social media items and automatically creating collections logs.[12]

C. Spoliation of social media content.

Attorneys should collect and preserve social media content early in litigation because social media sites can terminate an account or membership and delete content.[13] Attorneys should specifically instruct clients to not destroy or alter social media content where it may be relevant to anticipated or ongoing litigation.[14]

1. Spoliation – standard of proof.

For a court to impose sanctions, the moving party must show: (1) the content was in the alleged spoliator's control, (2) the alleged spoliator had an obligation to preserve the content (or could reasonably foresee that the content would be discoverable), (3) the content was destroyed or significantly altered with a culpable state of mind (some courts require only negligence), and (4) the content was relevant to claims or defenses.[15]

2. Spoliation – remedies.

Remedies for spoliation of social media content are often based on the spoliating party's state of mind in destroying or altering the content and the level of prejudice to the opposing party.[16] Remedies may include (1) an adverse inference jury instruction that the deleted or altered social media content was harmful to the spoliating party's case, (2) evidence preclusion, and (3) dismissal of claims or a judgment in favor of the prejudiced party.[17] Sanctions may also include fines or attorney fees.[18]

II. Investigation of other parties and witnesses.

A lawyer should conduct internet and social media research on: the subject matter of the case; potential parties; opposing counsel, and potential witnesses.[19]

III. Service of process.

Courts typically deny requests to serve process through social media sites. Some reasons include (1) the uncertainty surrounding authentication, given the potential for duplicate or false accounts, and (2) a lack of confidence that a message posted on social media is highly likely to reach the defendants or satisfy due process requirements.[20] However, at least one court recently allowed international service of process via social media.[21] The court allowed service of process to the defendant (allegedly located in Turkey) through email, Facebook, and LinkedIn.[22] The court granted the motion, holding that these methods were likely to provide the defendant with notice of the litigation because an individual identifying himself as the defendant had responded to email from an account

associated with the social media platforms.[23] In addition, the defendant appeared to have recently accessed and updated both his Facebook and LinkedIn accounts.[24]

In another case, the court allowed service of motions and other post-summons documents on the defendants (allegedly located in India) through Facebook, where Facebook served as a secondary or backstop means of service, in addition to email.[25]

IV. Pre-litigation social media investigation – ethical considerations.

Attorneys must keep the rules of professional conduct in mind when conducting pre-litigation investigation using social media.[26]

ORPC 4.2 requires that a lawyer will not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject, unless the lawyer has the prior consent of a lawyer representing such other person.

ORPC 4.1 mandates that a lawyer shall not knowingly make a false statement of material fact or law to a third person.

It may be a violation of the rules of professional conduct for a lawyer to request greater access to a user's account under pretext, without being forthright about the request and fully disclosing the purpose of the request.[27]

Others have commented that, in general, a lawyer investigating a case using social media:

1. may access the public portions of a party's or witness's social media account, regardless of whether or not the party or witness is represented;

2. may not access private or non-public portions of a represented party's or witness's social media account if the lawyer is required to "friend" or "follow" the account or account user; and

3. may "friend" or "follow" an unrepresented party or witness on social media if the lawyer does not engage in "deceptive behavior."[28]

Interpretation of "deceptive behavior" differs across jurisdictions.[29] In some jurisdictions, a lawyer can join a social network and "friend" an unrepresented individual without disclosing the reasons for the request, as long as it does not involve any type of trickery.[30] In other words, the lawyer must use his or her full name and have an accurate profile.[31] Other states require that a lawyer affirmatively disclose his or her role in the dispute or litigation, and identify the client matter.[32] The reasoning is that failure to do so may be an omission of material fact, and thereby amounts to deceptive conduct.[33] Other state bar associations provide that a lawyer must inform the social media account holder of the intended use of the information, whether generally for litigation or specifically to impeach a witness.[34]

V. Pre-litigation investigation – social media privacy settings.

Attorneys should try to protect a client's social media content from an adversary by maximizing the client's privacy settings.[35] Conversely, attorneys should seek out as much relevant public social media content as possible. Such content can support the basis for disclosure of non-public information.[36]

Attorneys should also be aware of their own privacy settings.[37] LinkedIn users will receive a notification that their account was viewed.[38] An adversary or witness will be alerted to the lawyer's investigative efforts.[39] To avoid such notifications, privacy options should be selected that make the lawyer anonymous.[40]

SOCIAL MEDIA DISCOVERY

I. Possession, custody, and control.[41]

An individual social media user typically has "control" of his or her own social media content (to the extent he or she can still access it) because the user usually has the legal right, authority, or practical ability to obtain the materials sought.[42]

A corporation that has the ultimate authority to control, to add, to delete, or modify a website stored on its own servers has possession, custody, or control of the content.[43]

II. Subpoenas to non-party media providers.

Some social media providers indicate on their websites or in other official documents that they may produce only limited user or account data or public content, but not private content, pursuant to a valid federal or state subpoena.[44]

These restrictions are driven by providers' concerns of running afoul of the Stored Communications Act ("SCA"). The SCA prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service . . . ."[45] "'Electronic communications service' means any service which provides to users thereof the ability to send or receive wire or electronic communications . . . ."[46]

The SCA protections apply only to private communications and not those readily accessible to the general public.[47] The SCA has been interpreted to encompass social media content, such as, wall posts on a restricted-access Facebook account, comments on a restricted-access Myspace account, private messages on Facebook and Myspace, and YouTube videos.[48] In other words, social media sites, such as, Facebook and Myspace are electronic communications services with respect to wall posts and comments, and the SCA will apply to prohibit social media services from divulging the content of such wall posts and comments.[49] In one case, Facebook objected to a third-party subpoena that sought production of the plaintiff's social media content due to concerns regarding the SCA.[50] Facebook suggested that the plaintiff download the entire content of his account using the site's "Download Your Information" tool as an alternative method for producing the information.[51]

The SCA does not have an exception for civil subpoenas.[52] Courts have held that users of the services have standing to quash subpoenas directed to third-party service providers when those subpoenas seek the users' electronic information.[53]

The SCA also bars third parties from improperly accessing electronic communication maintained by an electronic communication service provider.[54] It prescribes criminal penalties and a private right of action against anyone who: intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.[55]

This prohibition can apply to attorneys.[56] The Ninth Circuit stated that the attorneys who issued subpoenas to an adverse parties' ISP seeking the adverse parties' email "transparently and egregiously" violated the Federal Rules, and acted in bad faith and with gross negligence in drafting and deploying the subpoena.[57] The underlying trial court sanctioned the attorneys.[58] Accordingly, the Court of Appeals held that the victims could maintain civil claims against the attorneys for violating the SCA because the ISP actually responded to the subpoena by providing some emails for the attorneys to review.[59]

Rather than risk violation of the SCA, an attorney may seek social media communications directly from the user.[60] If voluntary consent is not provided then the attorney may have to seek a court order compelling the user to provide the necessary consent.[61] In that case, the attorney should place the service provider on notice that the attorney is seeking voluntary or compelled consent.[62] The attorney should also request that the service provider preserve or backup the social media information, and offer to pay the reasonable costs associated with such preservation.[63] The general rule is that there is no duty to preserve possible evidence for a party to aid another party in some future legal action against a third party, absent some special relationship, contractual or statutory duty, or other special circumstance.[64]

III. Document requests.

Attorneys can craft document requests to reach social media content and related metadata by specifying that the definition of "document" and "ESI" include social media content.[65] For example, defining the term "document" to include all information published at any time on any site or mobile application, including but not limited to all social networking or social media sites such as Facebook, LinkedIn, Twitter, Instagram, YouTube or other social media providers.[66]

Lawyers can also include a separate document request that specifically seeks social media content.[67] For example, all social media postings, comments, messages or other content relating to the allegations in the Complaint, including but not limited to content from Facebook, LinkedIn, Twitter, Instagram, YouTube, or other social media providers.[68]

In addition, lawyers may specify in the instructions that documents and ESI must be produced with all available metadata.[69] For example, provide an instruction that "Electronically Stored Information (ESI), including but not limited to social media content, must be produced and continue to be preserved in its original native format with all relevant metadata, including but not limited to any author, creation date and time, modified date and time, native file path, native file name, and file type.[70]

IV. Interrogatories.

In federal court, interrogatories may be used to identify (1) social media platforms or accounts established, used or maintained by the responding party, and (2) email accounts or addresses and networks that are related to or associated with the responding party's social media accounts.[71] Interrogatories can also be used to learn all names, usernames, or pseudonyms, commonly referred to as "handles," associated with the responding party's social media accounts.[72]

V. Responding to discovery requests for social media.

Courts are generally dismissive of privacy claims over non-public social media content because the non-public content is available to select third parties who may do with it what they wish.[73]

The typical objections to production of social media are relevance, and undue burden.[74]

VI. Relevance of discovery requests.

Various courts have already found that social media content that is relevant to the litigation is discoverable.[75] However, discovery requests that seek the entire content of a person's social media site without any date or subject-matter restriction can be akin to asking for every photo album that a person has access to, or asking for copies of every letter that the person has ever sent or received.[76] Courts will routinely deny requests for unfettered access to all social media messages, postings, and history.[77] Therefore, just like discovery request for other types of information, discovery requests seeking social media content should be narrowly tailored to seek only relevant information.[78]

VII. Resolving social media disputes.

Federal courts have adopted varied approaches to resolving disputes involving requests for social media.[79] Some federal courts require an initial demonstration that the public portion of someone's social media contains relevant evidence that justifies disclosure of the private portions.[80] Other federal courts have allowed broad disclosure of social media information with the only restriction being the relevant time frame at issue in the lawsuit.[81] Some federal courts take the middle ground by permitting limited disclosure with set parameters on what a party must disclose.[82] Another approach that federal courts have taken is to conduct an *in camera* review of a party's social media postings and determine what is discoverable.[83] Courts have also narrowed the scope of proposed discovery by ordering a party's counsel, and not the party, to review the social media content and determine the relevance of postings.[84] Other courts, have instructed the requesting party's counsel to review all social media content, and inform opposing counsel of relevant information that was not produced where the discovery record suggested that the producing party may have withheld information relevant to the litigation.[85]

ADMISSIBILITY OF SOCIAL MEDIA

For electronically stored information to be admissible, it must be (1) relevant, (2) authentic, (3) not hearsay or admissible under an exception to rule barring hearsay evidence, (4) original, duplicate or admissible as secondary evidence to prove its contents, and (5) probative value must outweigh its prejudicial effect.[86]

I. Relevance.

Under Oregon law, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. OEC 401. As previously mentioned, several cases have found that social media evidence is relevant. *See eg*. 121 Am. Jur. Proof of Facts 3d 1 § 10, citing *Melissa G v. North Babylon Union Free School Dist*., 6 N.Y.S.3d 445, 2015 WL 1727598 (Sup 2015) (concluding that private information sought from student's social media account was relevant to school district's defense of student's claim for damages for loss of enjoyment of life).

II. Authentication.

Under Oregon law, OEC 901(1) requires that the authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

OEC 901(2) provides non-exclusive examples of authentication or identification conforming with the requirements of subsection OEC 901 (1):

> "(a) Testimony by a witness with knowledge that a matter is what it is claimed to be.
>
> (b) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (c) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
>
> (d) Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.[87]
>
> (e) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (f) Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:
>
> (A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or
>
> (B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
>
> (g) Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
>
> (h) Evidence that a document or data compilation, in any form:
>
> (A) Is in such condition as to create no suspicion concerning its authenticity;
>
> (B) Was in a place where it, if authentic, would likely be; and
>
> (C) Has been in existence 20 years or more at the time it is offered.
>
> (i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
>
> (j) Any method of authentication or identification otherwise provided by law or by other rules prescribed by the Supreme Court. [1981 c.892 §68]"

OEC 901(a), (c), (d), (g), and (i) are the most likely means for authenticating social media in Oregon state courts.[88] Federal courts have recognized analogous federal rules of evidence as being particularly appropriate for authenticating digital evidence.[89] Some federal courts have relied on other rules to authenticate and admit evidence taken from

social media.[90] One United States District Court admitted Facebook posts under the residual hearsay exception in FRE 807 based on credible evidence that the posts were authentic.[91] The Fourth Circuit Court of Appeals held that screenshots of Facebook pages and YouTube videos retrieved from a Google server were self-authenticating business records under FRE 902(11) where they were accompanied by certification from Facebook and YouTube records custodians.[92]

OEC 104(1) authorizes the court to make a preliminary determination about the admissibility of evidence. Authenticity is one of those preliminary determinations.[93] OEC 104(2) (sometimes referred to as the "conditional relevance rule") may come into play when there is a genuine dispute of fact regarding whether an exhibit is authentic, such as, when the proponent of the evidence offers facts to establish authenticity that would be sufficient to persuade a reasonable jury by a preponderance of the evidence that the exhibit is authentic, but at the same time, the party seeking to exclude the evidence offers other evidence that could persuade a reasonable jury that the exhibit is not authentic.[94] OEC 104(2) instructs that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. When a conditional relevance issue arises, the proper action for the trial judge to take is to conditionally admit the evidence and instruct the jurors that if they agree with the proponent, they may consider the evidence, giving it the weight they think it deserves.[95] If the jurors side with the opponent, however, they should not consider the evidence.[96] If the judge finds that the evidence is clearly authentic, or clearly inauthentic, and determines that a reasonable jury could not find to the contrary, "the judge withdraws the matter from [the jury's] consideration."[97] However, if the judge determines that a jury could reasonably find the evidence to be authentic, the evidence goes to the jury to "'ultimately resolve[] whether evidence admitted . . . is that which the proponent claims."[98] When there is plausible evidence of both authenticity and inauthenticity, the trial judge should not exclude the evidence.[99] But some cases have taken a different approach by not admitting social media evidence unless the court definitively determines that the evidence is authentic.[100]

III. Hearsay.

The use of social media as a party admission is frequently the easiest and most direct method to offer the information into evidence, and overcome a hearsay objection.[101] In Oregon, a statement is not hearsay if the statement is offered against a party and is that party's own statement. OEC 801 (4)(b)(A). A second common way that social media may be admitted into evidence over hearsay objections is through the impeachment of a witness.[102] A third way to introduce social media is through any of the applicable exceptions to the hearsay rule, such as excited utterance, present sense impression, and the state of mind exceptions.[103]

IV. Best evidence rule.

Although social media is typically obtained from a mirror image of a hard drive or a screen shot of a web page, such copies of the original are admissible in courts.[104]

In Oregon, a duplicate of a writing or photograph is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original. OEC 1003(1).

I. Probative value must outweigh unfair prejudice.

Under Oregon law, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. OEC 403. Accordingly, the probative value of social media evidence must be weighed against its potential prejudice before being admitted in evidence. *See also* Josh Gilliland, *The Admissibility of Social Media Evidence*, *in* American Bar Association, 39 Litigation Journal 1 (Winter 2013) (noting that the court stuck allegations of a complaint related to a screenshot of a MySpace page because it was prejudicial considering there was no evidence linking the defendant to the profile page in *Rice v. Reliastar Life Ins. Co.*, No., 2011 WL 1168520, at *4 (M.D. La. Mar. 29, 2011)).

SOCIAL MEDIA ETHICAL CONSIDERATIONS

I. Lawyers.

Some potential ethical pitfalls for attorneys to avoid when using social media include unintentionally creating an attorney-client relationship or violating the rules of professional conduct regarding solicitation or advertising.[105] Attorneys should also be aware that posting their own discussions about cases or others in the adversarial process on social media could cause ethical issues.[106] In addition, attorneys should avoid making misrepresentations, for example, by requesting a continuance based on a reason that is contrary to social media posts.[107]

Under ORPC 1.1, a lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. ORPC 1.1. This may require keeping up with the latest social media trends and capabilities, such as geotagging, which permits someone to know where a phone was active or where a picture was taken.[108] And recognizing that metadata associated with social media content should be requested because it could be important to determining the actual author or poster to a social media site.[109]

Under ORPC 1.6, a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. Some attorneys may want to specify that videotaped depositions are "confidential" or "attorney's eyes only," and may not be posted on YouTube.[110]

A lawyer also has a duty to notify the sender of any inadvertently disclosed confidential or privileged information.[111] *See also* ORPC 404(b). If a client improperly gains access to an opposing party's social media content or accounts, the attorney's remedies may be advising client that the materials cannot be used or withdrawing from representation.[112]

II. Jury selection.

Lawyers can learn important information about prospective jurors by examining their educational and professional backgrounds on sites such as LinkedIn, or "likes" and "dislikes" on sites such as Facebook.[113] The America Bar Association issued an opinion that restricted lawyers to searching only the public content of prospective jurors' social media accounts.[114] It also prohibited lawyers from connecting with or following a juror or potential juror under any circumstances.[115] Lawyers should be aware that some social media sites, such as LinkedIn, will alert a user when his or her profile and public content have been viewed, which may also be considered inappropriate or unethical contact when researching a potential jury pool or sitting juror.[116]

III. Jurors.

Jurors' unauthorized use of social media has jeopardized cases and can result in a mistrial.[117] For example, jurors have used social media to comment about pending trials.[118] Jurors have also used social media to investigate the litigants and discover information about the case.[119]

Given the potentially severe consequences, lawyers should monitor jurors' use of social media throughout the trial and deliberations.[120] What if the lawyer becomes aware of a juror's improper use of social media by a juror who favors the lawyer's client?[121] The ABA requires a lawyer who observes a juror's misconduct in public social media posts to report it to the court.[122]

CONCLUSION

"The relevance and uses to which social media postings, friend lists, or chat room subjects and the like must be considered by every litigator in any kind of civil or criminal case are limited only by one's imagination and creativity."[123]

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[1] Merriam-Webster, http://www.merriam-webster.com/dictionary/social%20media (last visted Sept, 10, 2015).
[2] *See* Lindsay M. Gladysz, *Status Update: When Social Media Enters the Courtroom*, 7 I/S: J.L. & Pol'y for Info. Soc'y 691, 704-05 (2012) citing *Dexter, II v. Dexter*, 2007 WL 1532084, at *7 (Ohio Ct. App. 2007); *B.M. v. D.M.*, 927 N.Y.S.2d 814, at *5 (N.Y. Sup. Ct. 2011) (where the court allowed evidence from the wife's blog and Facebook about her belly dancing in a divorce proceeding); and *In re T.T.*, 228 S.W.3d 312, 322-23 (Tex. App. 2007) (where the court allowed evidence from MySpace in a case involving termination of parental rights).
[3] The e Biz, *Top 15 Most Popular Social Networking Sites, September 2015*, http://www.ebizmba.com/articles/social-networking-websites
[4] Norman C. Simon, et al., *Social Media: What Every Litigator Needs to Know*.
[5] *Id*.
[6] *Id*., citing *Howell v. Buckeye Ranch, Inc*., 2012 WL 5265170, at *2 (SD Ohio Oct. 1, 2012).
[7] The Sedona Conference, *The Sedona Conference Primer on Social Media, in* Sedona Conference Journal (Fall 2013) [hereinafter Sedona Primer], 12 Sedona Conf. J. 191.
[8] Simon, supra note 4.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] H. Christopher Boehning & Daniel J. Toal, *Authenticating Social Media Evidence, in* New York Law Journal, (Oct. 2, 2012), available at http://www.paulweiss.com/media/1211973/4oct12tt.pdf.
[12] 121 Am. Jur. Proof of Facts 3d 1 § 9.
[13] Sedona Primer, supra note 7.
[14] Simon, supra note 4.
[15] *Id*.
[16] *Id*.
[17] *Id*., citing *Allied Concrete Co. v. Lester*, 736 SE2d 699, 702-703 (Va. 2013); *Gatto v. United Air Lines, Inc*., 2013 WL 1285285, at 3-4 (DNJ Mar 25, 2013); *Torres v. Lexington Ins. Co*., 237 FRD 533, 534 (DPR 2006); *Painter v. Atwood*, 2014 WL 1089694, at *7-8 (D. Nev. Mar. 18, 2014) (acknowledging that dismissal may be a remedy for social media spoliation, but declining to impose that harsh remedy); and *Hawkins v. Coll. of Charleston*, 2013 WL 6050324, at *4-6 (D.S.C. Nov. 15, 2013).
[18] *Id*., citing *Katiroll Co. v. Kati Roll & Platters, Inc.*, 2011 WL 3583408, at *1 (D.N.J. Aug. 3, 2011); *Allied Concrete Co. v. Lester*, 285 Va. 295, 303, 736 S.E.2d 699, 702 (2013).
[19] *Id*.
[20] *Id*., citing *Fortunato v. Chase Bank USA, N*.A., 2012 WL 2086950, at *2-3 (SDNY June 7, 2012); *FTC v. Pecon Software Ltd*., 2013 WL 4016272, at *8 (SDNY Aug 7, 2013).
[21] *Id*., citing *WhosHere, Inc. v. Orun*, 2014 WL 670817 (ED Va Feb. 20, 2014).
[22] *Id*.

[23] *Id*.
[24] *Id*.
[25] *Id*., citing *FTC v. PCCARE247*, Inc., 2013 WL 841037, at *5 (Mar. 7, 2013).
[26] *Id*.
[27] Sedona Primer, supra note 7.
[28] Simon, supra note 4.
[29] *Id*.
[30] *Id*.
[31] *Id*., citing NYSBA Guidelines, No. 3.B; New York city Bar Ass'n (NYCBA) Committee on Professional Ethics Formal Op. 2010-2, Obtaining Evidence from Social Networking Websites.)
[32] *Id*., citing N.H. Bar Ass'n Ethics Committee Advisory Op. No. 2012-13/05 BA, Social Media Contact with Witnesses in the Course of Litigation; San Diego County Bar Ass'n Legal Ethics Op. 2011-1
[33] *Id*.
[34] *Id*., citing Philadelphia Bar Ass'n Professional Guidance Committee, Op. 2009-02 (Mar. 2009), at 3
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] Sedona Primer, supra note 7.
[42] *Id*.
[43] *Id*.
[44] Simon, supra note 4.
[45] Sedona Primer, supra note7, citing 18 USC § 2702(a)(1).
[46] *Id*., citing 18 USC § 2510(15).
[47] *Id*., citing 18 USC § 2511(2)(g).
[48] *Id*., citing *Crispin v. Christian Audigier, Inc*., 717 F.Supp.2d 965 (C.D. Cal. 2010); *Konop v. Hawaiian Airlines, Inc*., 302 F3d 868 (9th Cir. 2002); *Viacom International Inc. v. YouTube Inc*., 253 F.R.D. 256, 264-65 (S.D.N.Y. 2008).
[49] *Id*.
[50] Simon, supra note 4, citing *Gatto v. United Air Lines, Inc.*, 2013 WL 1285285, at *2 (D.N.J. Mar. 25, 2013).
[51] *Id*.
[52] Sedona Primer, supra note 7, citing *Chasten v. Franklin*, 2010 WL 4065606 *2 (N.D. Cal. Oct. 14, 2010); *Crispin v. Christian Audigier, Inc*., 717 F.Supp.2d 965 (C.D. Cal. 2010); *Viacom International Inc. v. YouTube Inc*., 253 F.R.D. 256, 264-65 (S.D.N.Y. 2008); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp.2d 606, 611 (E.D. Va. 2008).
[53] *Id*., citing Mancuso v. Florida Metropolitan University, Inc., 2011 WL 310726 (S.D. Fla. Jan. 28, 2011); *Chasten v. Franklin*, 2010 WL 4065606 *2 (N.D. Cal. Oct. 14, 2010); *Crispin v. Christian Audigier, Inc*., 717 F.Supp.2d 965 (C.D. Cal. 2010); *J.T. Shannon Lumber Co. v. Gilco Limber, Inc.*, 2008 WL 3833216, (N.D. Miss. Aug. 14, 2008).
[54] *Id*.
[55] *Id*., citing 18 USC § 2701(a); 18 USC § 2701(b); and 18 USC § 2707(a).
[56] *Id*.
[57] *Id*.
[58] *Id*., citing *Theofel v. Farey-Jones*, 359 F.3d 1066, 1074 (9th Cir. 2004).
[59] *Id*.
[60] *Id*.; *see* Simon, supra note 4, citing *In re White Tail Oilfield Servs*., 2012 WL 4857777, at *2-3 (E.D. La. Oct. 11, 2012).
[61] Sedona Primer, supra note 7, citing D*efendant Wal-Mart Stores, Inc.'s Motion to Compel Production of Content of Social Netwroking Sites*, 2009 WL 3061763 (D. Colo. May 26, 2009) (directing that plaintiff's execute consents allowing Social Networking Sites to produce the information sought in defendant's subpoenas).
[62] *Id*.

[63] *Id*.
[64] *Id*., citing *Koplin v. Rosel Well Perforators*, 241 Kan. 206, 208 (1987).
[65] Simon, supra note 4.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *Id*., citing *Nucci v. Target Corp*., 2015 WL 71726 at *6 (4th DCA Fla, Jan. 7, 2015); and *Romano v. Steelcase, Inc*., 907 NYS 2d 650, 656-57 (Sup. Ct. Suffolk Cnty. 2010).
[74] *Id*.
[75] Sedona Primer, supra note 7.
[76] *Id*.
[77] Simon, supra note 4, citing *Devries v. Morgan Stanley & Co., LLC*, 2015 WL 893611, at *1, *4 (S.D. Fla. Mar. 2, 2015); and *Giacchetto v. Patchogue-Medford Union Free Sch. Dist*., 293 FRD 112, 116 (EDNY 2013).
[78] Sedona Primer, supra note 7.
[79] *Social Media Discovery 101*, 57 No. 7 DRI For Def. 54.
[80] *Id*.; *see* Simon, supra note 4, citing *Doe v. Rutherford County, Tenn., Bd., of Educ.*, 2014 WL 4080159, at *3 (M.D. Tenn. Aug 18, 2014).
[81] *Social Media Discovery 101,* supra note 79; *see* Simon, supra note 4, citing *Caputi v. Topper Realty Corp.*, 2015 WL 893663, at *7-8 (E.D.N.Y. Feb. 25, 2015).
[82] *Social Media Discovery 101*, supra note 79; *see* Simon, supra note 4, citing EEOC v. Simply Storage Mgmt., LLC, 270 FRD 430, 436 (S.D. Ind. 2010); and Thompson v. Autoliv ASP, Inc., 2012 WL 2342928, at *4-5 (D. Nev. June 20, 2012).
[83] *Social Media Discovery 101,* supra note 79; *see* Simon, supra note 4, citing *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia*, 2012 WL 5430974, at *2-3 (D. Colo. Nov. 7, 2012); and *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371, at *1-2 (M.D. Pa. June 22, 2011).
[84] Simon, supra note 4, citing *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 116-17 (E.D.N.Y. 2013); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D. Ind. 2010)
[85] *Id*., citing *Thompson v. Autoliv ASP, Inc*., 2012 WL 2342928, at *5 (D. Nev. June 20, 2012).
[86] 121 Am. Jur. Proof of Facts 3d 1 § 9.
[87] Christopher E. Parker, Travis B. Swearingen, *"Tweet" Me Your Status: Social Media in Discovery and at Trial*, *in* 59 Fed. Law., at 37 (January/February 2012) (stating that if a Facebook account contains the contact information, name, date of birth, and other personal information about a particular witness, that information itself may be used to authenticate the ownership of the account as well as the individual using the site, and citing *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000)); *see* 121 Am. Jur. Proof of Facts 3d 1 § 13, citing *Burgess v. State*, 742 S.E.2d 464 (Ga. 2013) (there was sufficient circumstantial evidence to authenticate printout of screen shot from social networking website which allegedly belonged to defendant, who was 19 years of age, and originally from New York, where the profile page belonged to a person who went by defendant's nickname, was 19 years of age, was originally from New York, and the images on the profile page were of defendant).
[88] *See* Honorable Paul W. Grimm et. al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 461 (2013), citing *Lorraine v. Markel Am. Ins. Co*., 241 F.R.D. 534, 544-49 (D. Md. 2007).
[89] *Id*.
[90] Simon, supra note 4.
[91] *Id*., citing *Ministries & Missionaries Benefit Bd. V. Estate of Clark Flesher*, 2014 WL 1116846, at *6 (SDNY Mar. 18, 2014)
[92] *Id*., citing *United States v. Hassan*, 742 F3d 104, 132-34 (4th Cir. 2014).
[93] Honorable Paul W. Grimm, supra note 88 (describing the interplay among analogous federal rule of evidence 901 and 104).
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.

[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *See* John Flannery, *The Discoverability and Admissibility of Social Media In NY Civil Litigation*, 2013 WL 2137253, at *5 (June 2013); *See* Josh Gilliland, *The Admissibility of Social Media Evidence, in* American Bar Association, 39 Litigation Journal 1 (Winter 2013), citing *People v. Oyerinde*, 2011 WL 5964613, at *10 (Mich. Ct. App. Nov. 29, 2011) (finding the trial court properly determined that defendant's Facebook messages were admissible as non-hearsay party admissions), available at http://www.americanbar.org/publications/litigation_journal/2012_13/winter/the_admissibility_social_media_evidence.html.
[102] Flannery, supra note 101; *see* OEC 613 (explaining the foundational requirements for impeachment of a witness with a prior inconsistent statement).
[103] *See* OEC 803; *see* 121 Am. Jur. Proof of Facts 3d 1 §11; *see also* Flannery, supra note 101.
[104] *See* Gilliland, supra note 101, citing *United States v. Nobrega*, 2011 WL 2116991, at *8 (D. Me. May 23, 2011) (concluding that a printout of an instant message chat was admissible as a duplicate under federal rule 1003).
[105] Sedona Primer, supra note 7.
[106] *Id*. (stating that a Florida attorney was disciplined (with a reprimand and fine) for "numerous derogatory remarks about a judge on a public Internet website").
[107] *Id*.; *see* ORPC 8.4 (stating that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law).
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] Simon, supra note 4.
[114] *Id*.
[115] *Id*.
[116] *Id*., citing NYCBA Committee on Professional Ethics Formal Op. 2012-2, Jury Research and Social Media; *see also* ABA Model Rule of Professional Conduct 3.5.
[117] Sedona Primer, supra note 7, citing *United States v. Villalobos*, 2015 WL 544898, at *1-5 (5th Cir. Feb 11, 2015); and *US v. Juror Number One*, 866 F. Supp. 2d 442, 452 n.14 (E.D. Pa. 2011).
[118] *Id*.
[119] *Id*.
[120] Simon, supra note 4.
[121] *Id*.
[122] *Id*., citing *ABA Standing Committee on Ethics & Professional Responsibility*, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014).
[123] David I. Schoen, *The Authentication of Social Media Postings, in* Litigation Section of American Bar Association (May 17, 2011), available at https://apps.americanbar.org/litigation/committees/trialevidence/articles/051711-authentication-social-media.html.

2015 Annual Family Law Conference

Making "Them" Pay: Enforcing Judgments and Collecting on Fee Agreements

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I. Introduction

For many parties (and for some lawyers), obtaining a favorable result at trial and the judgment in their favor is the objective and goal, the end of a long, sometimes bitter race. A better metaphor, however, may be that the favorable result and judgment are the summit of a mountain. It is the culmination of a tremendous amount of time and effort, but, as Ed Viesturs is fond of remarking, the summit is only the halfway mark of a successful mountain ascent. Enforcement options and collection potential should have been assessed and reviewed as part of the underlying dispute, potentially even before any lawsuit was filed; at the same time, your clients should fully understand their financial responsibility. In a perfect world, judgment-debtors would quickly tender full payment of the judgment entered against them and clients pay each invoice, in full and on time. However, many judgment-debtors and clients are unable or unwilling to make payment of the outstanding obligations. Once the judgment-debtor or client has failed to pay, it is time to begin the descent.

II. Collecting Your Clients' Claims

A. Establishing Your Clients' Claims

In the Bankruptcy Code, a "claim" is a right to payment or equitable remedy from the debtor. It encompasses the simplest debts ("money had and received") to the most complex (a corporation's obligation to fund clean-up activities for environmental damage) and includes the right to an equitable remedy. This expansive definition, along with the legislative history, demonstrates that "claim" encompasses many different forms of obligations. See, e.g., *In re Energy Corp*., 944 F.2d 589, 595 (9th Cir. 1991).

Likewise, your client's claims include all the obligations owed to the client, whether it be the obligation to share family photos for duplication, the obligation to transfers real property, or the obligation to pay an equalizing judgment. The judgment should clearly specify what your client is receiving with respect to each and every claim.

1. Division of Property vs. Money Award

a. Transfer of Ownership

There is an important distinction between the court's exercise of its power to provide for the "division or other disposition between the parties of the real or personal property" (under ORS 107.105) and its awarding of a money award against a party. It may be a distinction without a difference in many situations, but it can truly matter. As discussed below, to the extent that the judgment provides for the transfer or conveyance of ownership, the judgment is self-executing. "A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period

therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto." ORCP 78A.

For example, if a spouse was determined to be entitled to one-quarter of the other spouse's single-member limited liability company valued at $100,000, the division of this property could be accomplished by either a money award (for $25,000) or transfer of one-quarter of the limited liability company. If the spouse held a money award, the spouse could pursue collection against any of the spouses' assets (including the limited liability company), but would have no additional rights vis-à-vis the limited liability company; if the spouse was awarded the interest in the entity, the spouse would be a one-quarter owner and subject to the whims of the majority owner, the former spouse, but would have minority rights in the company as an owner (rather than a creditor of the debtor-spouse).

In most cases, it is necessary to take further actions to effectuate the transfer. For example, if the judgment creditor is awarded fee simple ownership of Blackacre, the simplest method to effectuate the transfer is for the judgment debtor to execute a simple quitclaim deed and have the same recorded. If the judgment debtor is unwilling or unable to cooperate, however, the entire dissolution judgment may be recorded to make public the same transfer.

The judgment can only transfer what the judgment debtor possesses. If the judgment debtor's interest is subject to encumbrances, then the interest transferred is likewise subject to encumbrances. *Hoyt v. American Traders, Inc.*, 301 Ore. 599, 725 P.2d 336 (Or. 1986). This underscores the importance of recording a notice of pendency when the initial complaint is filed – the notice can be filed to preserve the judgment creditor's priority while the dissolution action proceeds. ORS 107.085(5). The Notice of Pendency should be recorded in county where the real property is located (rather than where the action is pending). ORS 93.740.

b. QDROs

For bankruptcy purposes, the right to obtain a Qualified Domestic Relations Order is functionally equivalent to the Qualified Domestic Relations Order for purposes of establishing an adverse interest in the pension plan: an "interest in the pension plans (or, at a minimum, her right to obtain a QDRO which would in turn give her an interest in the plans) was established under state law at the time of the divorce decree." *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815, 818 (9th Cir. 1997). This is consistent with the idea of the transfer having divested the other spouse of their interest. If the judgment-debtor is divested of an interest in an ERISA-qualified benefit plan, the judgment is self-executing and the judgment creditor has the right to obtain a QDRO to make public and confirm the transfer (e.g. with the Plan Administrator complying with the terms of the QDRO to show the judgment creditor as the payee or beneficiary).

It should be noted that *Gendreau* has not been affirmed or limited on the issue of whether the "interest in the pension plans" transferred is exemptible property. The general rule is that exemptions are broadly construed in favor of the debtor. *Mullen v. Hamlin (In re Hamlin)*, 465 B.R. 863, 869 (9th Cir. BAP 2012) ("Exemptions are to be liberally construed in favor of the debtor who claims the exemption." citing *Arrol v.*

Broach (In re Arrol), 170 F.3d 934, 937 (9th Cir.1999)). However, to qualify for the generous exemptions for retirement accounts, there is, at least, a question of whether the judgment creditor's interest in the plan qualifies the judgment creditor as a "Beneficiary" under ORS 18.358. For this reason, the general practice is to avoid the potential issue until the plan administrator has accepted the QDRO.

c. Money Awards and Security

The collection of a money award is subject to the exemptions provided under state law (and, in bankruptcy, federal law, if claimed). While practice has shifted from reliance on the judicial lien to secure the equalizing judgment after one spouse received the entire marital residence, it should be noted that the usual homestead exemption analysis (e.g. homestead exemption after consensual liens and before judicial liens) does not apply, at least in bankruptcy proceedings. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991). Faced with the scenario where Sanderfoot received the entire marital residence subject to a lien in favor of Farrey (who lost her interest in the property) and then sought to avoid Farrey's lien as impairing his homestead exemption, the Supreme Court looked at Section 522 to craft a way around this apparent inequity. The underlying rationale of *Sanderfoot* is that Farrey took the property subject to the lien and thus, the lien existed prior to the homestead exemption and could not impair it. Whether this same rationale would prevail under ORS 18.412 remains to be seen as there are no reported decisions regarding ORS 18.412 (nor its predecessor, ORS 23.280) as applied against a judicial lien to secure the equalizing judgment after one spouse received the entire marital residence.

Additional security for money awards is infinitely malleable. In a stipulated agreement, judgment creditor and judgment debtor can agree to any arrangement that is mutually agreeable and, if the parties are cooperating, may be able to obtain third-party participation to provide further assurances of payment. See, e.g*., In re Marriage of Waker and Waker*, 114 Ore. App. 255, 834 P.2d 522, (Or. Ct. App. 1992) (finding that court-ordered security against judgment debtor's interest in corporation did not compel guarantee by other shareholders where such guarantee would be obtained by shareholder sale agreement). Court-ordered security may be more limited, but is still driven by imagination of the judgment creditor and the willingness of the court.

In either scenario, however, the value of the security is best measured by its usefulness in collecting the underlying money award.

2. Domestic Support Obligation vs. Property Settlement

The choice of chapter along with the classification of a particular debt (either as a Domestic Support Obligation ("DSO"), a Property Settlement, or "other") determines its treatment in the bankruptcy. "As a matter of public policy, an agreement in advance of a bankruptcy case that a particular claim is not subject to discharge is not enforceable." *In re Jennings*, 306 B.R. 672, 675 (Bankr. D. Or. 2004) (citing In re Huang, 275 F.3d 1173, 1176 (9th Cir. 2002), *Hayhoe v. Cole*, 226 B.R. 647, 651-54 (BAP 9th Cir. 1988)). Among other reasons, this means that bare statements that debts are either non-

dischargeable or classified as a particular type of debt are generally non-binding on the bankruptcy court.

Broadly speaking, DSOs includes debts that are in the nature of alimony, maintenance, or support and, generally, includes attorney fees awarded that were directly related to these obligations. A DSO is now defined as a debt that is:

> 1. "[O]wed to or recoverable by — . . . a spouse, former spouse, or child of debtor or such child's parent, legal guardian, or responsible relative . . . or a governmental unit";
>
> 2. "[I]n the nature of alimony, maintenance or support . . . of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated"; and
>
> 3. "[E]stablished . . . by reason of applicable provisions of — . . . a separation agreement, divorce decree, or property settlement agreement; . . . an order of a court of record"; or an administrative determination.

11 U.S.C. § 101(14A)(A)–(C). Attempts to label property settlements as alimony (to avoid discharge in bankruptcy) and alimony as property settlements (to avoid taxation by the recipient) may or may not be effective. The bankruptcy court is generally willing to look at the actual purpose of the award and discern whether it is in the nature of support or maintenance or is actually property settlement; "the court must look beyond the language of the decree to the intent of the parties and substance of the obligation." Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984). Three recent cases from the bankruptcy court have each held the mere statement in a stipulated divorce decree that an obligation is "support" is not enough to make the obligation a priority "domestic support obligation" in bankruptcy. *In re Nelson*, 451 B.R. 918 (Bankr. D. Or. 2011); *In re Thorud,* 2011 Bankr. LEXIS 4119, 2011 WL 5079506 (Bankr. D. Or. Oct. 26, 2011); *In re Morgan*, 2011 Bankr. LEXIS 1519, 2011 WL 1598065 (Bankr. D. Or. Apr. 26, 2011). The appropriate standard for determination of whether an obligation is a Domestic Support Obligation is a consideration of multiple factors:

Factors to be considered in determining the intent of the parties include "whether the recipient spouse actually needed spousal support at the time of the divorce[,]" which requires looking at whether there was an "imbalance in the relative income of the parties" at the time of the divorce. Other considerations are whether the obligation terminates on the death or remarriage of the recipient spouse, and whether payments are made directly to the spouse in installments over a substantial period of time. The labels the parties used for the payments may also provide evidence of the parties' intent. *In re Nelson*, 451 B.R. at 921-22 (internal citations omitted) (citing to *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) and *Shaver v. Shaver*, 736 F.2d 1314, 1316-17 (9th Cir. 1984)). *Nelson* should be contrasted with *In re Maitlen*, wherein the 7th Circuit determined the obligation of a debtor to pay a mortgage on the ex-spouse's home was in the nature of support because the payment was designed to provide support for the ex-spouse. *Maitlen*, 658 F.2d 466 (7th Cir. 1981).

If a debt to a spouse, former spouse, or child is not of the kind described as a DSO, then it may be of the type referred to in Section 523(a)(15) (generally referred to as a "property settlement"). These debts are owed a spouse, former spouse, or child, not of the kind described as a DSO and incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order. 11 U.S.C. § 523(a)(15). This definition encompasses the classic property settlement where one party receives property of the marital estate in exchange for a payment of a sum of money to the other spouse.

If the obligation is neither a DSO nor a property settlement (i.e. an agreement to pay a joint debt), the debt is generally going to be a general unsecured obligation and likely dischargeable.

DSOs are never dischargeable in bankruptcy. In Chapter 7, DSOs are entitled to priority over nearly all creditors to receive non-exempt property of the estate. In Chapter 13, DSO arrears must be paid in full during the duration of the plan, current payments must be maintained during Chapter 13, and any post-petition arrears are grounds for dismissal of the Chapter 13 case.

Property settlements, however, are treated quite differently. The balancing test (basically, which party was poorer) previously used under Section 523(a)(15) to determine if some obligations not related to alimony, maintenance, or support were dischargeable in Chapter 7 has been eliminated. 11 U.S.C. § 523(a)(15). Obligations under 523(a)(15) are nondischargeable in Chapter 7 and in a Chapter 13 "hardship" discharge under Section 1328(b). Such debts are dischargeable in a Chapter 13 in which a debtor receives a normal discharge under Section 1328(a). As a result, a client who accepts a larger property settlement instead of a domestic support obligation can be significantly disadvantaged if the former spouse files a Chapter 13 bankruptcy, confirms their plan, completes their proposed plan (which will treat the property settlement as a general unsecured obligation), and receives their discharge.

Finally, a debt may be owed to a spouse, former spouse, or child which is neither a DSO nor a property settlement (as defined above). For example, John and Jane are a married couple; both are liable to Bank on an unsecured line of credit. If, prior to a dissolution, John were to file a Chapter 7 bankruptcy, he would be able to discharge his obligation to Bank and his obligation to Jane (for contribution). Then, going into a dissolution, Jane would be the only party liable on the unsecured line of credit. If John and Jane had first been through a dissolution, the divorce decree could assign liability to either party (or both). Assume John was to indemnify Jane, then, going into a bankruptcy, while John could discharge his obligation to the Bank, the obligation to Jane would be nondischargeable in his Chapter 7 as a property settlement under Section 523(a)(15) (but would be dischargeable if John had instead filed under Chapter 13 (11 U.S.C. § 1328(a)). For John, the change in timing of the Chapter 7 bankruptcy filing eliminates some or all of the benefit of a bankruptcy as to the Bank obligation (i.e. the Bank can pursue collection against Jane who can then collect from John).

If a property settlement has not been entered at the time of case filing, it cannot be discharged in bankruptcy. To be a pre-petition obligation, the property settlement must arise before the filing of the bankruptcy case. See, e.g., *Arleaux v. Arleaux*, 210

B.R. 148 (8th Cir. 1997); *In re Miller*, 246 B.R. 559 (E.D. Tenn. 2000); *In re Berlingeri*, 246 B.R. 196 (N.J. 2000); *In re Gomez*, 206 B.R. 663 (E.D.N.Y. 1997) (cases in a dissolution proceeding was filed and, prior to a property settlement judgment, a bankruptcy was filed).

If the property settlement is entered prior to the bankruptcy being filed (and regardless of whether the dissolution proceeding has completed), in some jurisdictions it may be considered to be a pre-petition debt and may be dischargeable (in Chapter 13 only). See, e.g., *In re Rudy*, 2005 Bankr. LEXIS 2834 (E.D.Va. 2005) (a property settlement entered in a dissolution, which was still on-going as to other issues, was dischargeable in bankruptcy filed after settlement entered). Finally, a property settlement stipulation which was read into the record but not yet entered into a judgment was held to be dischargeable. *In re Anjum*, 288 B.R. 72 (S.D.N.Y. 2003).

What about obligations that arise post-bankruptcy but pre-plan confirmation in Chapter 13? Unlike the discharge in Chapter 7, which discharges "all debts that arose before the date of the order for relief," Chapter 13 discharges "all debts provided for by the plan." 11 U.S.C. §§ 727, 1328. A debtor may not provide for a post-petition debt that is not the subject of a properly filed and allowed post-petition proof of claim absent creditor consent. E.g. *In re Laymon*, 360 B.R. 902 (E.D. Ark. 2007). Narrow exceptions are found in Section 1305 for some post-petition taxes and specific consumer debts. Those consumer debts are limited to those necessary for debtor's performance under the plan and for which prior approval could not be sought. In addition, a post-petition claim must be voluntarily filed by the entity holding the claim. *In re Cleveland*, 349 B.R. 522 (E.D. Tenn. 2006) (citing 8 COLLIER ON BANKRUPTCY 1322.10 (5th Ed. Rev. 2005)). Since a property settlement would not fit within either category of Section 1305 claims, it would not be possible for a bankruptcy plan to provide for a post-petition obligation that arises under a divorce decree.

The distinctions between types of claims and each's treatment in bankruptcy can be significantly affected by many factors, including the timing of a bankruptcy. Determining the timing of a bankruptcy in relationship to a dissolution is generally fact specific and must be determined in light of the client's overall objectives.

B. Enforcing Your Clients' Money Award(s)

Once the favorable result at trial has been obtained, it is now time to engage in the collections process to satisfy that result. In a perfect world, your judgment-debtors will quickly tender full payment of the judgment entered against them. However, many judgment-debtors are unable or unwilling to make payment of the outstanding obligation. Once judgment has been entered and the judgment-debtor has failed to pay, it is time to begin this next phase.

In doing so, however, practitioners should not forget that judgment enforcement is just another step in the dispute between the parties – judgment enforcement should be undertaken in light of the client’s objectives. Broadly speaking, there are two philosophical approaches: enforcement as a collection mechanism and enforcement as inducement to payment.

Viewing judgment enforcement as a collection mechanism starts with the premise that the purpose of the collection mechanisms is to collect on the judgment. It generally relies on the assumption that the judgment-debtor is able but unwilling to pay the underlying obligation. A judgment debtor may be unwilling to pay for many reasons: a bona fide dispute with the judgment, continued animosity against the judgment creditor, or simply indignation that the debtor is being required to pay the creditor. As a result, the various options available to the judgment creditor are employed to seize payment from the judgment debtor. Such involuntary collection rarely reduces animosity or indignation and can lead to further disputes and, even where there is not non-compliance with the terms of a judgment, rigid compliance and enforcement, with allegations and complaints stemming from variations which should be ignored by both parties. On the other hand, such enforcement may be the only option available to a judgment creditor.

Viewing judgment enforcement as an inducement to payment may be a subtle shift in perspective, but, ultimately, it may be more effective. While the judgment creditor may use the same tools, the ultimate goal is not to extract the maximum repayment from each use, but is to convince the judgment debtor that a mutually agreeable payment arrangement is in everyone's interest. Even if collection is slower, the reduction in tensions along with the regularity of payment (and the reduction in time and effort required to obtain it) may make this philosophy more appropriate in some situations. That said, some judgment debtors are chronically unable to meet their obligations.

The taxing authorities, the Oregon Department of Revenue and the Internal Revenue Services, have each chosen one of these philosophies. The Oregon Department of Revenue's collection cycle proceeds quickly from a demand to garnishment of wages and accounts. Once a garnishment is established, ODR generally does not release the garnishment until the underlying liability has been satisfied (or the garnishment expires). In several cases, ODR's unwillingness to release a garnishment or work with a client has been the final inducement for a client to file a bankruptcy and eliminate (or restructure) that payment obligation. The Internal Revenue Service, on the other hand, issues a series of increasingly urgent notices and provides information about the alternatives to involuntary collection. If the IRS issues a levy on wages (their equivalent of wage garnishment), it is draconian: IRS levies take all funds except for a minimum amount each pay period. However, the IRS will enter into payment arrangements substantially reducing the payments and release the levy. In many cases, the levy will be released pending the establishment of an installment agreement. While the taxing authorities have less flexibility to change their approach for individual debtors, choosing the most appropriate method for collection is a choice that should be made deliberately.

1. What You Already Have

Once the judgment has been entered (and is not subject to a stay pending appeal), the judgment creditor's position is immediately improved. Before starting out into collections, the judgment creditor may wish to review what has already been gained.

First, the judgment is immediately enforceable unless there has been a stay of proceedings to enforce the judgment: “Execution or other proceeding to enforce a judgment may issue immediately upon the entry of the judgment, unless the court ... otherwise directs.” ORCP 72A.

Second, some aspects of the judgment may be self-executing: “A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.” ORCP 78A. While completing this transfer may require additional actions (e.g. recording the judgment to effect a transfer of real property or further court orders to direct third parties), the self-executing nature of the transfer underscores the distinction between the award of ownership of a thing and a money award for its value.

Third, so long as the judgment contains a money award, the judgment creates a judicial lien attaching to all real property of the judgment debtor in the county (both presently owned and afterwards acquired). ORS 18.150(2).

As a result, immediately after the entry of judgment, judgment creditors have all of the enforced collection options at their disposal, the automatic transfer of property, and a lien on all real property interests of the judgment debtor located in the county. The money award also begins to accrue interest at nine percent (9%). ORS 82.010(2). The judgment creditor with either an excellent collateral basis or a strong collection potential may choose to consider the money award as an appreciating asset, albeit one subject to risk.

2. Making Demand

Demand for payment of a judgment is not required (except for prior to scheduling a Judgment Debtor Examination (described below)). Whether demand should be made is a strategic decision. If the goal is to induce compliance, a demand for payment (perhaps coupled with options for payment over time) can be a starting point for an amicable payment arrangement and schedule. It can also be the starting point for the friendly disclosure of financial information. Alternatively, if the goal is collection, a demand for payment can warn the judgment debtor to drain bank accounts, shelter or transfer assets, and otherwise make collection difficult.

3. Obtaining Information about Assets

In order to effectively collect on a judgment, information is required. Much of that information may already be in the judgment creditor’s possession (or their attorney). During the process of the dissolution, the same documentation that was used to demonstrate the appropriate division of marital property and to determine the appropriate amounts, if any, of any domestic support obligations can be used to assess the collection potential of the resulting judgment. Likewise, the judgment debtor should know that the judgment creditor is already in possession of all of this information.

As time passes, however, that information becomes increasingly stale. In addition, a judgment debtor may change their financial habits and arrangements in ways that make collection more difficult.

a. Judgment Debtor Examination / Financial Statements

After judgment, the judgment creditor's ability to obtain information from the debtor is substantially increased.

First, the judgment creditor against the ability to serve the judgment debtor with written interrogatories concerning assets and financial affairs. Once served on the judgment debtor, the debtor must answer questions, under oath, within 20 days and return the original interrogatories. ORS 18.270. If the judgment debtor fails to comply, the debtor may be held in contempt if the judgment creditor goes forward with a motion for an order to show cause. The various Circuit Courts have different policies with respect to the consequences of contempt, especially with respect to civil judgment collection. There is a practicality to written interrogatories: they do not require the time and travel of a judgment debtor examination and, as the judgment debtor has a greater period of time to answer the question, the judgment debtor may provide more accurate information. Unfortunately, judgment debtors frequently fail to provide the full and complete disclosure desired and the format does not provide a good method to follow up on incomplete responses (requiring either further interrogatories or supplemental proceedings).

Second, the judgment creditor may conduct a Judgment Debtor Examination ("JDE") by obtaining an order requiring the appearance of the judgment debtor to "answer under oath questions concerning any property or interest in property that the judgment debtor may have or claim." ORS 18.265. To obtain a JDE, the judgment creditor must demonstrate some prior effort to collect the judgment: (1) proof of service of a notice of demand to pay the judgment within 10 days, (2) a return of a writ of execution that does not fully satisfy the judgment, or (3) a garnishee response that does not fully satisfy the judgment. Id. Importantly, as part of the JDE order, the court may also restrain the debtor from "selling, transferring or in any manner disposing of any property of the judgment debtor that is subject to execution pending an examination under this section." ORS 18.265(7). In addition, the JDE order can also require the debtor to bring relevant documents.

With the JDE having been scheduled, the judgment creditor is permitted to prepare for that examination through use of discovery and subpoenas, including obtaining information from third-parties (discussed below). In some cases, the scheduled JDE is ancillary to gaining the ability to obtain third-party documentation.

Once a JDE is sought and scheduled, if the primary purpose is the examination of the debtor, it is common for it to be rescheduled or even cancelled.

First, while the JDE is usually scheduled to occur at a courthouse, it is not uncommon for the time and place of the JDE to be rescheduled to counsel's offices or another location. While the judgment creditor may lose the ability to immediately obtain an order for the debtor to turn over property, the properly counseled judgment debtor will not have such property in their possession.

Second, in some cases, the judgment debtor has been without counsel since the completion of the litigation and may have been less than diligent in responding to prior

requests and demands for information. Having a scheduled court appearance convinces many judgment debtors to obtain counsel to address the new proceeding. If the judgment creditor is seeking information, the judgment debtor may be able to avoid the JDE by providing a financial statement (or completing the judgment creditor's form financial statement). In this model, the JDE provides the incentive to provide timely information and avoid further delays and costs.

If the JDE is going forward, the judgment debtor may seek a protective order to change the time and place of the JDE. ORS 18.265(6). The judgment debtor may also seek protective orders as to the extent of the JDE; for example, in a long-running dispute, the judgment debtor may obtain a protective order limiting the ability of the judgment creditor to re-hash previously covered topics. For example, in a case where the judgment debtor produced approximately 2,000 pages of records and was deposed for five hours, a subsequent JDE sought the following year was limited in scope to developments in the judgment debtor's financial affairs since the prior examination.

At the JDE, the use of a court reporter is optional. The use of a court reporter will increase the costs of the examination, but will create a transcript which could be used later. It may also affect the conduct of the parties and their counsel. Alternatively, "unofficial" recording may be more appropriate, but may not available in the courthouse and may be only used with consent or court order outside of it. ORCP 39C(4).

b. Third Party Sources

Just as for trial, third-party information can be the most reliable information – who better to tell you the judgment debtor's banking details than the bank? Obtaining that information, however, can be difficult without utilizing formal discovery processes.

Non-discovery methods can be used to ascertain what assets may be available for collection:

(1) Secretary of State – Business Division: Searches can reveal interests in companies, corporations, and partnerships.

(2) Secretary of State – UCC Division: Searches can reveal both the judgment debtor as the secured party (e.g. they are owed money) or as the debtor (e.g. they hold potentially valuable collateral).

(3) Vehicle Registries: Searches can reveal ownership of cars, boats, and planes.

(4) Real Property Records: Searches can reveal ownership interests in real property.

Once a JDE has been scheduled (see above), the judgment creditor is not limited to pursuing discovery against the judgment debtor; third party sources can subpoenaed to either appear at the JDE to give testimony or to produce documentation. Utilizing both garnishment and subpoena powers, the judgment creditor can seize/freeze what is held by the third party (via garnishment) and obtain documentation regarding what had been held by the third party and its disposition (via subpoena). For example, a garnishment and subpoena for production of documents seeking the last year of

relevant records served simultaneously on a financial situation could seize the current balance and alert the judgment creditor that amounts were deposited into the account from a source and/or amounts were transferred from the account to another financial institution.

4. Execution Against Assets

Once the judgment-debtor has failed to respond to the demand(s) for payment and you've obtained information about the financial affairs of the judgment-debtor, the next step is embarking on one or more forms of involuntary collection activities (e.g. wage garnishment, account garnishment, seizure and sale of assets, and foreclosure of real property).

a. Financial Accounts and Wages: Garnishment

Garnishment is the form of execution used against property of a debtor not in their possession. ORS 18.602 ("[G]arnishment is the procedure by which a creditor invokes the authority of a circuit court, justice court or municipal court to acquire garnishable property of a debtor that is in the possession, control or custody of a person other than the debtor.") Garnishment is the most common form of involuntary collection tool and is routinely used by various creditors. Given its broad reach and frequent usage, the garnishment procedures and forms are statutory in nature.

To serve a garnishment, the judgment creditor ("garnishor") delivers the writ of garnishment (form provided by ORS 18.830), garnishee response (form provided by ORS 18.835), instructions-to-garnishee (form provided by ORS 18.838), wage exemption calculation (form provided by ORS 18.840), and, if applicable, the search fee to the third party ("garnishee"). After delivery of the above to the garnishee, the garnishor must deliver a copy of the writ of garnishment, an original debt calculation (form provided by ORS 18.832), a challenge-to-garnishment form (form provided by ORS 18.845, and a notice-of-exemptions form (form provided by 18.850) to the judgment debtor.

For all property other than wages, the writ of garnishment garnishes "all property of the debtor possessed by the garnishee, all property of the debtor over which the garnishee has control and all property of the debtor that is in the custody of the garnishee" at the time the writ is delivered. ORS 18.615, 18.625. This "one-shot" garnishment seizes property in the garnishee's possession at the instant of delivery; if the debtor's bank account is empty on the Tuesday the writ is received, that is all the garnishor is able to seize, even if the following day, exorbitant sums of money are transferred into the account.

For wages, the writ of garnishment grabs both wages owed at the time of delivery and all wages owed in the following 90 days (unless the writ of garnishment is satisfied or released). ORS 18.625. Garnished wages are paid to the garnishor concurrently with the garnishee's payment of the exempt wages to the debtor.

b. Real Property: Liens and Foreclosure

From entry, the judgment creates a judicial lien attaching to all real property of the judgment debtor in the county (both presently owned and afterwards acquired). ORS 18.150(2). If the debtor owns real property in another county, it is necessary to record the judgment lien on that property by recording a certified copy of the judgment (or a lien record abstract) in the County Clerk Lien Record for the county where the property is located. ORS 18.152. If that real property is located in another state, it will need to be registered in the foreign state; while most states have adopted the Uniform Enforcement of Foreign Judgments Acts, not all states have done so uniformly and several status (most relevantly, California) have not adopted it at all.

Recording or registering a judgment is simple matter which secured the judgment against real property. Even if no other action is taken, the existence of the judgment lien will require the judgment debtor to address the outstanding judgment in order to sell or refinance the real property.

Foreclosing on this judgment is a more complicated procedure. If the real property is “residential real property” (defined in ORS 18.904 to include real property with four or fewer dwellings, a condominium unit not held as inventory for sale or lease, a manufactured dwelling not held as inventory for sale or lease, or a floating home not held for sale or release), foreclosure of the judgment lien will require a court order.

c. Tangible Personal Property: Seizure and Sale

Generally, a judgment does not create a lien on personal property until a writ of execution has been issued and the sheriff has levied on the personal property; however, the exception is that a judgment for unpaid child or spousal support creates a lien on the judgment debtor’s personal property. ORS 25.670. Utilizing similar procedures to a judicial foreclosure, the judgment creditor can also have the sheriff seize or secure personal property and conduct a sale of that property. Since the sheriff will need to either store or secure the personal property, an additional deposit will generally be required for towing, storage and other necessary expenses. It’s generally advisable to consult with the sheriff’s office regarding the necessary deposit(s) prior to issuance of the writ of execution.

d. Intangible Personal Property: Seizure and Sale (Partnership and LLC Interests)

The sale of partnership and limited liability company interests may differ from the sale of other personal property. For partnerships and certain LLC interests, the applicable entity Acts may limit the remedies of the judgment creditor to seize or execute upon the judgment debtors interests.

For partnerships, the law is most clear cut: the sole remedy for a judgment creditor against a debtor’s partnership interest is a charging order. ORS 67.205(5). This means that the judgment creditor cannot obtain the judgment debtor’s interest in the partnership; generally, this limitation is driven by the concerns for the judgment debtor’s partners, who did not choose to enter into a partnership with the judgment creditor. Instead of obtaining the judgment debtor’s partnership interest, the Oregon Revised Partnership Act ("ORPA") provides that "[o]n application by a judgment creditor

of a partner or of a partner's transferee, a court having jurisdiction may charge the transferable interest of the judgment debtor to satisfy the judgment." ORS 67.205(1). A partner's transferable interests consist of the partner's right to receive distributions and the partner's share of the profit or losses of the partnership. ORS 67.195. In *Hellman v. Anderson*, the Court of Appeal of California held that only the judgment-debtor partner's share of profits and surplus, and not the right to management or rights in partnership property, is subject to the claim of a judgment creditor of one of the partners. 233 Cal. App. 3d 840, 852, 284 Cal Rptr. 830 (1991). California's statute on charging orders is nearly identical to provisions in the ORPA. *Compare* Cal. Corp. Code § 16504 with ORS 67.205.

For limited liability companies, the law is murkier. Under the Oregon Limited Liability Company Act ("OLLCA"), a judgment creditor may obtain a charging order to acquire "only the rights of an assignee of the membership interest." ORS 63.259. The assignee of a membership interest holds "right to receive and retain, to the extent assigned, the distributions, as and when made, and allocations of profits and losses to which the assignor would be entitled." ORS 63.249(3). However, an assignee "shall not exercise any other rights of a member, including without limitation the right to vote or otherwise participate in the management and affairs of the limited liability company." Id. Thus far, collection against a limited liability company is much the same as for a partnership; however, unlike ORS 67.205 (allowing charging orders against partnership interests), ORS 63.259 does not contain a provision that makes a charging order the "exclusive remedy" available to a judgment creditor. Courts have made inconsistent rulings with no overall philosophy.

For the multimember LLC interest (and absent other factors), treatment akin to a partnership would appear to be the better decision. In order to exercise all of rights attendant to a membership interest in a limited liability company ("LLC"), an assignee must be made a member of the LLC. When the LLC is a multi-member LLC, as opposed to a single member LLC, an assignee must have the consent of a majority of the LLC members, other than the assignor. ORS 63.245(b), (c). The purpose of these restrictions is to ensure that LLCs have a defined existence as a single entity while providing protection from individual member's creditors and partnership tax treatment. See generally SYMPOSIUM ON OREGON'S LIMITED LIABILITY COMPANY ACT: FINANCIAL ASPECTS OF OREGON LIMITED LIABILITY COMPANIES, 73 Or. L. Rev. 55, 82-5 (Spring 1994) (explaining the impact of transfers of LLC membership interests and the impact of free transferability for tax purposes). As explained by the court in *In re Albright*, the charging order "exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager." 291 B.R. 538, 541 (Bankr. D. Colo. 2003).

For the single-member LLC (and absent other factors), treatment as a personal asset would appear to be the better decision. The policy concerns regarding involuntarily sharing governance are no present in a single-member LLC.

Ultimately, the balance will depend on the judgment debtor's presentation in the objection to the sale of the LLC membership interest -- to the extent that the sale of the

LLC interest would force other members of the LLC to involuntarily share governance, a charging order may be more appropriate. The individual structure and operating agreement of the LLC become highly relevant – for example, a member-managed LLC is more likely to have involuntary governance concerns than an LLC more closely operated like a corporation.

C. Bankruptcy "Short Course"

1. The Automatic Stay

Immediately upon filing of any bankruptcy petition, whether voluntary or involuntary, an automatic injunction goes into effect, which prevents most creditor actions against the debtor and the property of the estate. See 11 U.S.C. § 362. The list of actions barred by the automatic stay is extensive:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
>
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who

> is an individual for a taxable period ending before the date of the order for relief under this title.

11 U.S.C. § 362(a). The automatic stay is broad in scope and covers virtually all acts to collect pre-petition claims and all actions which would affect property of the estate.

The purpose of the automatic stay is two-fold. First, it provides the debtor with relief from the pressure of collection efforts by their creditors and protects the debtor's property. Second, it promotes bankruptcy's goals of equality of distribution; instead of a race to obtain the debtor's non-exempt property, the automatic stay halts creditor collection efforts to allow the bankruptcy trustee to marshal the non-exempt assets and disburse them in accordance with the Bankruptcy Code. Actions taken in violation of the automatic stay have no effect. "[A]ctions taken in violation of the automatic stay are void." *Gruntz v. Los Angeles (In re Gruntz)*, 202 F.3d 1074, (9th Cir. 2000). For example, a judgment obtained in violation of the automatic stay is void. Even if a matter is mid-trial, the automatic stay halts all the proceedings. "Judicial proceedings in violation of th[e] automatic stay are void." *Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 125 (9th Cir. 1989).

The bankruptcy debtor provides a list of creditors, each of whom receives a Notice of Case Filing by mail. The automatic stay of 11 U.S.C. § 362(a) nearly always protects the debtor no matter what type of bankruptcy is filed, except in certain specific instances. In addition, Chapter 13 also includes a co-debtor stay. 11 U.S.C. § 1301. Under the co-debtor stay, a person who is co-obligated with a debtor on a consumer obligation is also protected from creditor action. Where the automatic stay is the "breathing room" for the debtor, the discharge is the relief ultimately sought by the debtor. When the debtor obtains their discharge, the automatic stay is replaced by a permanent injunction which prohibits creditors from those same actions with respect to discharged debts.

Practice Tip: The U.S. Party/Case Index is a national index for U.S. district, bankruptcy, and appellate courts' CM/ECF (Case Management / Electronic Case Files) information. A small subset of information from each case is transferred to the U.S. Party/Case Index server each night located in San Antonio, Texas at the PACER (Public Access to Court Electronic Records) Service Center. The system serves as a locator index for PACER. You may conduct nationwide searches to determine whether or not a party is involved in federal litigation. If you are unsure a debtor has filed for bankruptcy, you can use the U.S. Party/Case Index to determine whether or a petition has been filed.

a. Exceptions to the Automatic Stay

While the automatic stay gives the debtor a respite from many creditors, there are a few exceptions to the automatic stay. 11 U.S.C. § 362(b). Just as the scope of the automatic stay is expansive, exceptions to the automatic stay are read narrowly. *Treasurer of Snohomish Co. v. Seattle First Nat. Bank (In re Glasply Marine Industries, Inc.)*, 971 F.2d 391, 394 95 (9th Cir. 1992). Creditors should carefully evaluate whether their particular situation falls within one of the Section 362(b) exceptions; since the penalties for violation of the automatic stay can be quite severe, caution is advised.

Some of the more common exceptions are for the commencement or continuation of criminal actions, some family law actions, collection of domestic support obligations, and (new from the changes in BAPCPA) some eviction proceedings. 11 U.S.C. § 362(b)(1), (2), (22)-(23). While family law practitioners have several applicable exceptions, commercial and consumer creditors have far fewer. Obviously, these narrow exceptions are designed to address narrow financial and policy concerns. Typically, the most applicable exceptions to the automatic stay are the enforcement of liens against abusive bankruptcy filers barred or ineligible from bankruptcy protection and the enforcement of eviction proceedings against evicted and imminently dangerous tenants. With the exception of unavoidable transfers (a narrow category discussed below), there are no exceptions for routine enforcement of debt obligations, self-help or foreclosure against collateral, or the regular tools used for debt collection.

Domestic relations practitioners enjoy substantively greater exceptions to the automatic stay. The automatic stay does not prevent the commencement or continuation of civil actions to establish paternity, establishment or modification of domestic support obligations, concerning child custody or visitation, for dissolution of a marriage (except for property settlements), and regarding domestic violence. 11 U.S.C. § 362(b)(2)(A). These exceptions also allow for a substantial range of collection methods to collect domestic support obligations. 11 U.S.C. § 362(b)(2)(B) (G). "Domestic support obligations" are a narrow class of obligations "in the nature of alimony, maintenance, or support" and do not include all debts owed to a spouse, former spouse, or child of the debtor. 11 U.S.C. § 101(14A).

In addition, the government also enjoys several exceptions to the automatic stay. Criminal proceedings are unaffected by a bankruptcy filing. 11 U.S.C. § 362(b)(1). Additional government exceptions include everything from proceedings under the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction to the licensing of educational institutions.

Practice Tip: Consult with bankruptcy counsel before engaging in any action against a debtor in bankruptcy because the consequences of (even technical) violations of the stay can be quite severe (and include attorney fee provisions). A few years back, the Bankruptcy Court for the Eastern District of Louisiana determined that a creditor had violated the automatic stay by misapplying post-petition payments as part of a course of conduct and imposed compensatory damages of $24,441.65, litigation costs of $292,673.84, and punitive damages of $3,171,154. *Jones v. Wells Fargo Home Mortg., Inc. (In re Jones)*, Case No. 06-1093, 2012 Bankr. LEXIS 1450 (E.D. La. April 5, 2012). While this case is an outlier, it serves as an example of how violations of the automatic stay may result in severe penalties.

Creditors seeking to engage in actions against the debtor may move the Bankruptcy Court for an Order granting Relief from the Automatic Stay. Typically, creditors seek relief either to obtain adequate protection from the debtor for their collateral (or possession of the collateral) or to continue the liquidation of their claims against a debtor in a proceeding pending before another court.

2. Filing Your Proof of Claim

The proof of claim is a creditor's statement to the court and trustee of the debt owed to the creditor. When preparing a proof of claim, complete all sections of the claim form and attach supporting documentation (subject to a five page limit). If you are or represent a secured creditor, attach a copy of the security instrument or agreement and proof that the security interest is properly perfected. You should file the original proof of claim with the bankruptcy court and mail a copy to the debtor or, if represented, the debtor's counsel. Do not wait until the last minute to file the proof of claim. The claim is deemed filed on the date it is received by the court, not the date of the postmark.

Creditors should be aware of Federal Rule of Bankruptcy Procedure 9037 which states that most documents may only contain the following: (1) the last four digits of the social security number and taxpayer identification number; (2) the year of the individual's birth; (3) the minor's initials; and/or (4) the last four digits of the financial account number. If an unredacted document is filed, after notice to the creditor, debtors may move to seal the document, require an amended document to be filed, and seek attorney fees incurred in enforcing this privacy protection.

For most creditors, the deadline for filing proofs of claim in Chapter 7 cases with assets is set forth in the Order Fixing Times for Proofs of Claims. All Chapter 7 cases originate as no-asset cases, and creditors are instructed not to file claims unless they receive a subsequent notice to do so. Once the §341 meeting is held, the trustee generally makes a determination as to whether there are assets. Most creditors do not attend this hearing. Deciding not to attend this hearing does not prejudice a creditor's right to file a claim or otherwise participate in the case. Once the trustee determines that there are assets to administer, he or she will direct the clerk to send out a notice instructing creditors to file claims and providing a proof of claim form for their use. The deadline is on the notice to file claims the creditor will receive.

A proof of claim must be filed for most creditors as a precondition to having an allowed claims which can share in the distribution of estate assets. For most creditors, the failure to file a proof of claim puts them out of the game; the non-filing creditor is effectively on the sideline.

There are several exceptions to this general rule. Secured creditors do not need to file a claim to protect their lien status; if they are undersecured, the failure to file a proof of claim will prevent them from sharing in the distribution for their unsecured portion. Creditors having a non-dischargeable debt (which does not require filing an adversary proceeding to establish) do not have their claims eliminated by failing to file a proof of claim; however, they do miss the opportunity to share in the distribution of estate assets.

3. Domestic Support Obligation

a. Priority Claim

In Chapter 7, DSOs are entitled to priority over nearly all creditors to receive non-exempt property of the estate. 11 U.S.C. § 507(a)(1). In Chapter 13, DSO arrears must be paid in full during the duration of the plan (with few exceptions), current payments must be maintained during Chapter 13, and any post-petition arrears are grounds for dismissal of the Chapter 13 case. 11 U.S.C. §§ 1322(a)(2), 1306(c).

b. Post-Petition Compliance Requirements

Ongoing compliance with the Domestic Support Obligation through the pendency of the Chapter 13 process is mandatory; non-compliance is generally ill-tolerated by the Bankruptcy Court. Section 1307(c)(11) allows the bankruptcy court to dismiss or convert a Chapter 13 case (whichever is in the best interests of creditors and the estate) on the "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." This provision only applies to payments which become due after the case is filed; the pre-petition amounts are dealt within the Chapter 13 plan. Absent extraordinary circumstances, the Bankruptcy Court will generally give the debtor an opportunity to cure the post-petition arrears, but this opportunity is generally of limited duration.

In addition, for the Chapter 13 debtor to complete their case and receive their discharge, the post-petition DSOs must be paid and a certification made to the Court. 11 U.S.C. § 1328(a).

DSO compliance can be used as a means for forcing the dismissal or conversion of a Chapter 13 debtor. For the creditor holding a property settlement claim (non-dischargeable in Chapter 7), conversion can mean the elimination of competing creditors, leaving the property settlement claims as the only outstanding claim.

4. Property Settlement Options and Dischargeability

For the property settlement claim(s), the choice of chapter matters: the same claims which are non-dischargeable in Chapter 7 are dischargeable in Chapter 13.

In a Chapter 7 case, the property settlement claim is automatically non-dischargeable. During the pendency of the case (petition through discharge), collection against the debtor is stayed by the automatic stay. Collection against property of the estate is also stayed until the Trustee completes administration of the estate. Creditors seeking to engage in actions against the debtor may move the Bankruptcy Court for an Order granting Relief from the Automatic Stay.

In the Chapter 13 case, the property settlement claims will be discharged if the debtor is able to successfully complete their Chapter 13 case. For this reason, it may be advisable to ensure that the debtor is actually required to comply with all aspects of their case and, to the extent that non-compliance is found, that dismissal or conversion is sought.

5. Preference / Fraudulent Conveyance Issues

a. Preferences

The fundamental policy underlying the Bankruptcy Code is that similarly situated creditors be treated the same way. Thus, unsecured creditors without priority will receive pro-rata distributions of all remaining assets. Such a distribution scheme can be thwarted by pre-petition transfers made by the debtor, whether the intention of the debtor was to favor a particular creditor or not. Section 547 of the Code is designed to avoid such preferences that frustrate the bankruptcy distribution scheme.

Section 547 states, in relevant part, that the trustee may avoid any transfer of an interest of the debtor in property (a) to or for the benefit of a creditor; (b) for or on account of an antecedent debt owed by the debtor before such transfer was made; (c) made while the debtor was insolvent; (d) made on or within 90 days before the date of the filing of the petition or, if the creditor was an insider, between 90 days and one year before the date of the filing of the petition; and (e) that enables such creditor to receive more than such creditor would receive if the case were a Chapter 7 case, the transfer had not been made, and the creditor received payment to the extent provided by the Bankruptcy Code.

Payments to general unsecured creditors are almost always preferences since generally they would receive less in a liquidation. This analysis may grow much more complicated with considerations of a division of marital assets: the division of assets may determine to whom the property belongs rather than end up a potential payment in satisfaction of an antecedent debt.

Payments to relatives made within one year of bankruptcy may also be preferential. Usually, transfers among relatives are difficult to defend since relatives do not normally document obligations. If a payment is large enough for a trustee in a Chapter 7 to pursue, Mom may find a letter from the trustee in her mailbox. The preference period for non-insider creditors may be extended to the one year period if the transfer benefitted an inside creditor. Thus, transfers to a bank or other creditor that benefitted an insider guarantor may also be voidable for the one-year period before a bankruptcy filing.

While most preference cases involve the transfer of money, the preference language is broadly written to encompass any transfer, including the transfer of a security interest. If an unsecured creditor takes security within 90 days of bankruptcy, thereby improving its position at the time of the bankruptcy, this transfer can likewise be avoided.

There are a number of exceptions and defenses to preferences; the most applicable in the family law area would be the exclusion of payments of DSOs. 11 U.S.C. § 547(c)(7).

The analysis of whether payments to creditors are avoidable preferences is further complicated when multiple people are liable on the same debt. What happens when payments are made on those debts?

First, spouses may be insiders of each other and, in most cases, will be considered to be insiders. For an individual, statutory insiders include relatives of the debtor with "relatives" including any "individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree." 11 U.S.C. §§ 101(31), (45). In dicta, the Bankruptcy Appellate Panel has stated that a spouse is related by affinity. *In re Schuman*, 81 B.R. 583, 585 (B.A.P. 9th Cir. 1987). However, under common law, affinity was the kinship relationship existing as a result of marriage, but did not cover the marital relationship of the parties to the marriage. 1 BL. COMM. 434; *Barnhill v. Vaudreuil (In re Busconi)*, 177 B.R. 153, 157 (Bankr. D. Mass. 1995) (holding that spouses are not

"relatives" under the Bankruptcy Code). That said, in most cases, a spouse will be an insider as the definition of "insider" is "open-ended because the term is not precise." *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139 (9th Cir. 2006). "Insider status may be based on a professional or business relationship with the debtor, in addition to the Code's per se classifications, where such relationship compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 70 (9th Cir. BAP 1991). In such a case, even if a spouse can avoid being a statutory insider, that spouse will be considered a non-statutory insider. Ex-spouses, for a variety of reasons, are generally not insiders. Schuman, 81 B.R. at 585.

Second, payment by one spouse of a mutual debt may be a transfer to a non-insider creditor (e.g. the credit card issuer) benefitting an insider creditor (e.g. the co-obligated spouse). In this scenario, the transfer is not avoidable with respect to the non-insider creditor but is avoidable with respect to the insider creditors to the extent of the benefit received. 11 U.S.C. § 547(i). This new section was added by BAPCPA to fully effectuate the Bankruptcy Reform Act of 1994's attempt to protect institutional creditors from the Deprizio Doctrine developed by the Seventh Circuit in *Levit v. Ingersoll Rand Financial Corp. (In re Deprizio Construction Co.)*, 874 F.2d 1186 (7th Cir. 1989), which previously allowed a bankruptcy trustee to recover the transfer from the non-insider creditor. As a result, where the debtor paid off a co-obligated debt within one year of filing, while the trustee cannot recover from the creditor, the trustee can seek recovery from the insider who benefitted from the payment. Thus, transfers to a bank or other creditor that benefitted an insider guarantor may be voidable for the one-year period before bankruptcy with respect to the insider guarantor.

These interactions truly come into play when evaluating payment of co-obligated debts. For example, Husband and Wife are jointly obligated on a $10,000 credit card. Husband has significant business debts for which Wife is not liable; as a result, Husband will need to file bankruptcy while Wife will not need to file. They are also planning to divorce. There are basically three different ways that Husband and Wife can try to reach the end goal of having the credit card paid; ironically, the "simplest" option (simply paying the debt) creates an avoidance preference.

Option 1: If Husband pays off the credit card prior to the divorce and then files bankruptcy after 90 days but within one year of payment, the trustee may be able to recover the $10,000 from Wife. Assuming that Wife was an insider, the trustee may avoid the preference only as to the insider creditor (Wife).

Option 2: If Husband pays off the credit card after the divorce and then files bankruptcy after 90 days but within one year of payment, the trustee will not be able to recover as the payment does not constitute an insider preference.

Option 3: If Husband divorces and is obligated to pay to Wife $10,000 as a property settlement so that she can pay off the credit card, the trustee will not be able to recover as the payment does not constitute a preference.

In all three of these scenarios, the same result is obtained (a paid-off credit card), but in one scenario, the transfer may be avoided and, worst of all, put liability on the Wife to the bankruptcy estate.

b. Fraudulent Conveyances

The trustee in bankruptcy may use Section 544 (the so-called "Strong-Arm Clause") to set aside fraudulent conveyances made by the debtor within one year of bankruptcy (Section 548) or using state law fraudulent conveyance statutes, via the Strong-Arm Clause (Sections 544(a) and (b)), within four years of bankruptcy (under Oregon law, ORS 95.200, et seq.).

Transfers that were made with actual intent to hinder, delay, or defraud any entity to which the debt was or became indebted may be set aside. Actual intent to hinder, delay, or defraud the creditor often must be shown by circumstantial evidence. Hinder, delay, and defraud all have separate meanings, and each one alone can be a basis for avoiding the transfer. The value given for a transfer can include a wide range of consideration, including the satisfaction or securing of a debt. However, the value must benefit the debtor and thus is more limited than the broad concept of consideration. *In re Nelsen*, 24 B.R. 701 (Bankr. D. Or. 1982).

If a bankruptcy case is filed after the dissolution is finalized, the trustee may examine whether transfers from the debtor to his former spouse were fraudulent in nature, i.e., transfers for less than fair value. 11 U.S.C. §§ 544, 548. Given the pre-petition planning opportunities present in a dissolution, especially if there is collusion between the spouses, the trustee will carefully examine the dissolution judgment. A scenario at one end of the spectrum, along with its predictable result is illustrated in *In re Beverly*, while another scenario, representing the opposite end of the spectrum, is illustrated in *In re Bledsoe*. *Beverly v. Wolkowitz*, 374 B.R. 221 (Cal. BAP 2007); *Bledsoe v. Bledsoe*, 569 F.3d 1106 (9th Cir. 2009).

In *Beverly*, the debtor, an attorney facing both a large malpractice judgment and a divorce, colluded with his spouse to divide their community property in such a way that, while both parties received approximately half of the assets, he received primarily exempt assets while she received non-exempt assets. While the Bankruptcy Court believed that this was merely an aggressive but acceptable exercise in pre-bankruptcy planning, the Bankruptcy Appellate Panel ("BAP") looked at the numerous badges of fraud, the extensive evidence of intent to hinder, delay, or defraud creditors, and their opinion of the likely outcome of a dissolution without the collusive settlement agreement. The BAP stated that "when a pig becomes a hog it is slaughtered," (citing the oft-quoted *Dolese v. U.S.*, 605 F.2d 1146, 1154 (10th Cir. 1979)) and described a series of letters detailing the arrangement to move home equity proceeds out of the grasp of creditors and leave the debtor with only a million-dollar (and wholly exempt) pension plan. The BAP presumed that a California court would divide exempt and non-exempt assets equally; as a result, to the extent that the settlement created a different result which deprived creditors of assets to satisfy their claims, the settlement was a fraudulent conveyance.

When *Beverly* was decided, it panicked many among both the bankruptcy and family law bars. Because of the discussion of the Uniform Fraudulent Transfer Act (UFTA) in the footnotes, one might conclude that Beverly stood for the proposition that any division of marital assets which was not an equal division of all non-exempt property, regardless of what happens to the exempt property of the marital estate, could be subject to collateral attack by a trustee as a fraudulent conveyance. Thankfully, that does not seem to be the case where there is no evidence of fraud.

In June 2009, the Ninth Circuit decided *Bledsoe v. Bledsoe* and addressed the same issues of fraudulent conveyance. *Bledsoe v. Bledsoe*, 569 F.3d 1106 (9th Cir. 2009). After eight years of marriage, Ryan Bledsoe filed for divorce from the debtor, Jennifer Bledsoe. While Jennifer initially entered an appearance, that appearance was struck after she failed to comply with discovery requirements and court orders in bad faith. Ryan was granted a default judgment; he was awarded items valued at $93,737 while Jennifer was only award items valued at $788. After Ryan took 99% of the alleged value, Jennifer filed for bankruptcy; the trustee in her case sought to recover from Ryan half of the combined value of the marital assets.

Like *Beverly*, the Bledsoe Court agreed that a trustee may attack a judgment, including a divorce judgment, as a fraudulent conveyance. However, in *Bledsoe*, the trustee plead only a constructive fraud case; under Oregon law, extrinsic fraud is required to attack a judgment. *Bledsoe*, 569 F.3d at 1109 (citing *Greeninger v. Cromwell*, 140 Ore. App. 241, 915 P.2d 479, 481-82 (Or. Ct. App. 1996)). The trustee also argued that Jennifer had received less than reasonable equivalent value; the Bledsoe court agreed with the Bankruptcy Court in finding that "a state court's dissolution judgment, following a regularly conducted contested proceeding, conclusively establishes 'reasonable equivalent value' for the purpose of § 548, in the absence of actual fraud." *Bledsoe*, 569 F.3d at 1111.

These two cases represent the less than typical way that dissolution cases are conducted. In *Beverly*, the spouses, while arguing about details, worked together in an actually fraudulent scheme to defraud the husband's creditors, while in *Bledsoe*, the spouses were unable to even make it through discovery without a judge signing a default judgment against one of the spouses. Most dissolution cases are negotiated to conclusion without litigation; the remainder are litigated with varying degrees of contentiousness. It appears that as long as there is no evidence of extrinsic fraud on creditors - and even where there is a "long half" provided to the non-filing spouse, *Bledsoe* should provide a measure of comfort to the domestic relations practitioner. While it may be important to have bankruptcy counsel in the loop to interpret the possible impact of a bankruptcy filing by a future ex-spouse, as long as there is no active scheme to defraud creditors, the dissolution judgment should stand.

III. Collecting Your Attorney Fees

A. Obtaining Funds from Your Clients

The easiest way to obtain funds from clients is for those clients to provide cash retainers, prior to services rendered, in an amount sufficient to cover all of the expenses incurred in the litigation. In a similar vein, the easiest way to win a lawsuit is to have your opponent concede (and hand over certified funds along with the stipulated

judgment). As a practical matter, even if the client had the ability to pay a cash retainer, they wouldn't – just as no one pays anyone 100% prior to services being rendered.

Retainer(s) throughout the case have two purposes: first, it provides a guarantee that the lawyer will be paid for their work and, second, it puts the client's "skin" into the equation. Retainers should be supplemented as much as necessary as a case develops – either with scheduled supplementation (e.g. $500 each month) or with replenishment requirements (e.g. a trust balance of at least $1,000 throughout the case and a $10,000 balance not later than 30 days prior to scheduled trial). Clients who have clear understanding of the costs of their dispute may be more reasonable, amicable, and resolution orientated.

If, after representation, the client has an outstanding balance, it is necessary to engage in collection with the client. General collection strategies can help get clients paying on outstanding bills: regular invoices, reminders of outstanding balances, telephone calls, and easy ways to pay (online payments, for example).

For clients who are happy with your services, but lack the ability to send the money at once will often do nothing. Many are embarrassed about their inability to pay and, in some cases, they have a "plan" to pay when some event happens … tax refund arrives, Aunt Muriel dies, or they get a bonus. Too often, however, when these events do occur, the funds have been "promised" to competing creditors or desires. Many of these clients will happily pay on a regular schedule or even set up an automatic monthly payment if they know that are "allowed" to do that. While receiving a slow trickle of money from a client is not optimal, once many clients are all making payments, it can create a positive revenue stream, even if current work slows. Even better, getting paid something on an account is better than nothing, especially if it requires little effort to get going.

For clients who are unhappy with your services, the lack of payment may signal their withholding of payment until it has been resolved (or their unilateral reduction). For these clients, the Oregon State Bar's Fee Arbitration and Fee Mediation program may be a way to reach an agreeable outcome. Fee mediation is a nonbinding process to reach a mutually agreeable outcome with a neutral third-party. Fee arbitration is a binding decision by an arbitrator (or panel) based on the information presented by the parties. Both processes are voluntary and both parties must agree.

For clients who just aren't going to pay, there's little that can be done.

In any scenario, once non-judicial collection methods have been exhausted, there is question of whether to pursue a lawsuit against the client. It would seem that, in general, litigation to collect outstanding fees is problematic. For those clients who can't pay the outstanding balance, the judgment will be more collectible than the balance. For those clients who refuse to pay, all of the difficulties of collection (see above) come into play. And, for those clients unhappy with your services (and those who simply don't want to pay), their defense to your suit for fees will be allegations of malpractice.

If brought within the two year statute of limitation, the malpractice claims will garner PLF coverage (as to the malpractice issues only) as the lawyer (and their

insurer) will be “on the hook.” If not brought in the two year statute of limitations, the malpractice claim will simply act as a recoupment defense against the outstanding balance. "'Recoupment' is an equitable remedy that reduces, mitigates, or abates damages alleged by the plaintiff." *State ex rel. Key West Retaining Systems, Inc. v. Holm II, Inc.*, 185 Or. App. 182, 190 (2002) (citations and internal quotations omitted), rev. den., 335 Or. 402 (2003). Since the outstanding fees and any malpractice claim arose from the same set of facts (the legal representation), recoupment allows malpractice to be argued in mitigation of fees. "Recoupment is confined to matters arising out of and connected with the transaction upon which the action is brought." *Rogue River Management Co. v. Shaw*, 243 Or. 54, 58 (1966). This is true even when the malpractice claim couldn’t be brought as it would otherwise be time-barred – it can be used to reduce or element damages even when the claim under which recoupment is sought would be barred by the statute of limitation if brought as a claim. See *Shannon v. Carter*, 282 Or. 449, 453-54 (1978), cert. den., 439 U.S. 1090 (1979); see also *Dixon v. Schoonover*, 226 Or. 443, 453-54 (1961) (stating recoupment can lie where an independent action would be barred by the statute of limitations).

B. Attorney Liens

Attorneys have both possessory and non-possessory liens for their outstanding fees. The possessory lien allows the attorney to retain papers, personal property, and money until the client’s obligation is paid. ORS 87.430. The non-possessory lien gives the attorney a lien on actions, suits, or proceedings (once they have been commenced) along with the proceeds (e.g. the judgment) until the client’s obligation is paid. ORS 87.445.

1. Ethical Issues

The use of the possessory attorney lien to collect attorney fees is ethically controversial. The entire purpose of the retaining lien is to permit the attorney hold the client’s wanted and desired property to coerce payment; this purpose must be exercised in the context of the attorney’s fiduciary duties to the client. At the same time, attorneys are expressly permitted to “retain papers, personal property and money of the client to the extent permitted by other law.” ORPC 1.16(d).

Under Formal Opinion 2005-90, this balancing is premised upon the client’s ability to pay: “If the lien is otherwise valid and if the client has sufficient resources to pay the lawyer what is due but chooses neither to make payment nor to file a bond, the lawyer may lawfully withhold the client’s materials. If, however, the client does not have sufficient resources to pay the lawyer in full and if surrender of the materials is necessary to avoid foreseeable prejudice to the client, the attorney lien must yield to the fiduciary duty that the lawyer owes to the client on payment of whatever amount the client can afford to pay.”

2. Mechanical Requirements

For the possessory attorney lien, the lawyer must retain possession of the papers, personal property and money. If delivery is sought by the client (under ORS

9.360), the court shall impose security, if appropriate, and determine the validity of the lien, as necessary. ORS 9.370.

For the non-possessory attorney lien, the statute itself "serves as notice to the world that an attorney's lien for fees arises when an action is commenced" and no further notice is required. *Potter v. Schlesser Co., Inc*. , 335 Ore. 209, 213 (Or. 2003). In Potter, the attorney's client and the defendant had agreed to a settlement, after commencement, and without the participation or knowledge of the attorney. The defendant paid the client the entire settlement; the attorney pursued the defendant for the payment of the attorney fees. The Oregon Supreme Court found the defendant liable for the attorney fees: "The lien is a charge on the action, and the parties to the action cannot extinguish or affect the attorney's lien by any means (such as settlement) other than by satisfying the underlying claim of the attorney for the fees incurred in connection with the action." *Potter*, 335 Ore. at 214. Settlement does not affect an attorney's lien: "... the lien created by ORS 87.445 is not affected by a settlement between the parties to the action, suit or proceeding before or after judgment, order or award." ORS 87.475(1). Under *Potter*, the attorney lien is properly perfected and arises at the commencement of an action. The attorney can also claim the lien by filing notice with the court that entered the judgment and providing the same to the client. ORS 87.450. Filing notice should be done as it will ensure the lien is effective against third-parties and that, if proceeds of the judgment are to be sold, the attorney’s lien can be identified and satisfied.

C. Securing Attorney Fees against Client Property

When a client does not have the current, liquid assets to pay either contemplated or outstanding attorney fees, it may be worth considering acquiring a security interest in the client's real or personal property. This security can either stand as the source of payment or as an enforcement mechanism for a repayment schedule.

1. Ethical Issues

The attorney's acquisition of a security interest in client property to secure earned or contemplated attorney fees will generally arise after the establishment of the attorney-client relationship. As a result, compliance with the Oregon Rules of Professional Conduct ("ORPC") is required as ORPC 1.8 specifically addresses the acquisition of a security interest adverse to the client:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

ORPC 1.8(a).

2. Mechanical Requirements

The first step in taking a security interest in client property is to comply with the Oregon Rules of Professional Conduct. This should be done through a specifically drafted letter to the client, a copy of which should be signed and returned by the client.

The underlying terms should be fair and reasonable to the client. Some fee agreements provide for interest/late charges for outstanding balances at 1.5% per month. If the outstanding obligation is going to be secured against real property, the attorney should consider whether a 19.5% APR loan against their client's real property is "fair and reasonable." While Formal Ethic Opinion 2005-97 concludes that "we do not believe that an 18% charge would be clearly excessive or unreasonable," it still holds out the possibility that the "the fee agreement taken as a whole could be said to be clearly excessive or unreasonable."

The terms must also be communicated to the client in a manner that can be reasonably understood by the client. While these types of transactions would not be generally governed by the Truth in Lending Act or Regulation Z, voluntary use of the ubiquitous "Disclosure Box" can help address the ethical requirement. Since the security documents are going to be written by lawyers/for lawyers, including a Disclosure Box in the informed consent letter or other documents evidencing the transaction can ensure that your client has received this information. Since this form would also be the same as other disclosures made to the client in common consumer transactions (e.g. credit cards, vehicle purchases, real property loans), it can avoid allegations that the client did not understand the transaction.

As part of the written documentation for the transaction, the client must be advised of the desirability of seeking independent counsel.

Finally, the attorney must obtain the client's written informed consent, the client's "agreement … 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." ORPC 1.0(g).

Second, the attorney must provide the appropriate security agreement to secure the obligation. The most common method to secure payment of attorney fees is to take a security interest in real property. In many cases, the work of the attorney was instrumental in acquiring the real property. In other cases, valuable personal property (tangible or intangible) is used as collateral. The purpose of the security may govern the collateral used – just as the lawyer should consider the overall strategy for collection against their client's debtor(s), the lawyer should consider their own willingness for collection in taking security. For the attorney who is unwilling to aggressively pursue collection against a client or former client, taking a security interest in real property

(even if partially unsecured) may be preferable to taking a security interest in account receivables – to be paid on the real property lien, the lawyer must simply wait until the property is sold or refinanced, while on the ARs, the lawyer must exercise the rights under the security interest to collect and enforce the accounts collateral.

If the lawyer is not generally familiar with drafting security agreements, the use of legal forms for generic transactions (e.g. trust deed against real property) may be sufficient. For more complex security agreements, the lawyer may wish to be represented.

Third, the security interest must be perfected by the appropriate means. For real property, this means recording with the County Recorder, for some personal property, this means a UCC filing with the Secretary of State, and for other personal property, this means notation, registration, or filing with the appropriate authority (e.g. a security interest in an aircraft requires recording with the Federal Aviation Administration).

D. Failure to Comply (Recoupment)

The failure to comply with the ethical requirements for obtaining an interest in client property is both a violation of the ethical rules (subjecting the attorney to potential discipline) and may constitute such a violation of the attorney's fiduciary duties as to merit an elimination of the outstanding fees (or even disgorgement). The disgorgement, reduction, or denial of fees to an attorney is appropriate when an attorney violates a fiduciary duty through a conflict of interest. *Kidney Ass'n of Or. Inc. v. Ferguson*, 315 Or. 135, 143-44 (1992); *Portland Gen. Elec. v. Duncan, Wienberg, Miller, & Pembroke, P.C.*, 162 Or.App. 265, 276-78 (1999). The reasoning behind the rule is: "[w]hen a court reduces or denies attorney fees as a consequence of a lawyer's breach of fiduciary duty, it is a reflection of the limited value that a client receives from the services of an unfaithful lawyer." *Kidney*, 315 Or. at 144 (citation omitted) (finding ultimately that no conflict of interest existed). Courts from other jurisdictions have held the same with even a few finding that a breach of the duty of loyalty per se gives rise to fee forfeiture. See *Jeffry v. Pounds*, 136 Cal.Rptr. 373, 377 (Cal. Ct. App. 1977) (stating that California courts have held that an attorney is not entitled to any compensation after a breach of the duty of loyalty, i.e., a conflict of interest, arises); *U.S. v. Jerry M. Lewis Truck Parts & Equipment*, 89 F.3d 574, 579-80 (9th Cir. 1996) (citing California cases for rule that "when the ethical violation in question is a conflict of interest between the attorney and the client (or between the attorney and a former client), the appropriate fee for the attorney is zero") (citations omitted).

E. Bankruptcy - Your Proof of Claim

If the particular client is simply unable to pay the outstanding balance, it is probable that the attorney is not the only creditor. Either the client will reach a financial equilibrium with the client's creditors or will end up in an insolvency proceeding.

At best, the attorney has an unavoidable, perfected security interest and a client who wants to see the attorney paid. Here, the attorney may find positive treatment in a plan of reorganization and may just need to submit a Proof of Claim to the Court to allow the Trustee to make full payment on the outstanding balance. At worst, the

attorney has a disgruntled client along with a security interest obtained without informed consent. Here, the attorney may find an objection to any payment to the attorney, claims of recoupment, and plead allegations which are brought to the attention of discipline counsel.

Most commonly, however, is that the attorney is simply another general unsecured creditor of the debtor, entitled to share in the distribution, if any, made to general unsecured creditors. As described in Section II.C.2, the attorney will need to prepare and file a Proof of Claim. Depending on the case, it may also make sense to be an active creditor; however, in many cases, the expected disbursement (a few cents on the dollar) may not justify any further action.

IV. Conclusion

Collections, whether from a judgment debtor or your own client, is both a science and an art. Knowing the options available to you to enforce these obligations, along with their advantages and disadvantages, can provide the raw tools for collection. This is then combined with your experience and feel for the particular debtor, letting you achieve maximum returns for the efforts expended.

Addressing Taxes Throughout a Dissolution Case

I. Overview.

The tax assessment, collection and resolution procedures of the Internal Revenue Service ("IRS") and the Oregon Department of Revenue ("ODR") typically run parallel to one another. Unless otherwise stated in the Oregon Revised Statutes, Oregon's taxation laws incorporate and mirror those in the Internal Revenue Code. While these materials will primarily focus on the IRS, the information is generally applicable to the ODR as well.

A. Assessment.

A tax assessment is the acknowledgment and recordation of a tax liability in the IRS's records. Each tax period results in a separate assessment. Assessment is the last step in the determination of a tax liability and a prerequisite to forced collection.

The most common assessment is self-assessment by filing an original or amended return showing the tax liability. If the taxpayer fails to file a tax return, the IRS may "file" a substituted return for the taxpayer using the income information received from third parties. The IRS provides the taxpayer with notice and an opportunity to respond prior to "filing" its own substituted return. The tax liability shown on a substituted return is greatly inflated because the IRS enters only the taxpayer's income but does not account for deductions. The taxpayer may file an "amended return" to correct and reduce the tax due under the substituted return.

The IRS may also assess a tax at the conclusion of an audit or after a civil penalty or third party liability investigation. In most cases the IRS must provide the taxpayer with notice of the proposed assessment and an opportunity to respond prior to making a formal assessment.

B. Joint and Several Liability.

If spouses file a joint tax return, the IRS holds each spouse jointly and severally liable for the full tax shown on the return, and for any amount arising from a subsequent audit. While each spouse is liable for the entire tax, the IRS may only collect the tax once. The IRS will credit each spouse's account with all payments received regardless of the source.

The IRS does not recognize allocation of any tax debt by spouses in a stipulated judgment or a divorce decree. In fact, the IRS will always ignore the allocation and collect against whichever party it can. It may also collect from both parties at the same time. The parties can then attempt to collect the "overpayment" from their former spouse.

Married couples filing joint returns are not the only taxpayers subject to joint and several liability. The IRS may assess multiple parties with the same tax in a host of different circumstances. Most commonly, the IRS will assess officers of a business with civil penalties if the business fails to pay certain tax such as withholding tax. Officers of the business, certain employees and the business itself may be jointly and severally liable on the same tax. The IRS may collect the entire tax from any one of the parties or it may collect different portions from different

parties based on their ability to pay. Again, it may only collect the total tax once. The IRS has no interest in equalizing the debt among those liable.

Practice Tip: Advise clients when joint and several tax liability exists. Make them aware that the IRS may collect against them regardless of what the divorce decree or judgment says. Include recourse language in the Judgment of Dissolution so that if the tax debt is not paid as allocated, attorney fees for tax representation and enforcement of the decree may be awarded.

C. Collection.

If the tax is not promptly paid after assessment, the IRS may begin forced collection actions. This begins with the mailing of collection notices. The IRS issues a series of five or six collection notices; each becomes progressively more threatening until, finally, the taxpayer receives either a "Final Notice of Intent to Levy and Your Right to a Hearing" or a "Notice of Federal Tax Lien Filing and Your Right to a Hearing". The "hearing" referred to is the taxpayer's collection due process appeal ("CDP Appeal"). The taxpayer is given the opportunity to formally appeal forced collections efforts or a lien filing only once and must file the CDP Appeal within 30 days from the date of the notice. Except in special circumstances, the IRS must refrain from forced collections, such as seizures of property, until the taxpayer's appeal rights expire. If the taxpayer fails to timely file a CDP Appeal, the taxpayer is exposed to levies and garnishments. The entire notice process takes anywhere from four to eight months.

It is extremely important that the taxpayer actually receive the IRS's notices. Notice is proper if the IRS sends the notice to the last known address provided by the taxpayer. Unfortunately, the last known address is often the address listed on the taxpayer's last filed return. This may be out of date for those that have not filed tax returns or for those that have moved due to a recent separation or divorce. The taxpayer must notify the IRS in writing by using IRS Form 8822 or by writing a letter that includes the taxpayer's full name, old and new address, social security number and signature. For joint filers, each spouse must sign. If the taxpayers have separated since filing a joint return, each spouse is required to notify the IRS of his or her new address.

Once collection starts, there are few limits on the IRS's power to collect. It may levy on bank accounts, accounts receivable or any funds due and owing to the taxpayer. It may garnish a taxpayer's wages without the 25% gross wage limitation of other creditors. The IRS has its own exemption calculations and they are far less than reasonable. For example, a single or married filing separate individual with no dependents may exempt a mere $858 from garnishment per month. A head of household with two children may exempt only $1,771 per month. The IRS may also lien and levy a taxpayer's retirement account and garnish social security payments. It can summon bank records and information from third parties, without commencing a lawsuit!

In contrast, the ODR behaves more like an ordinary creditor. It is subject to a 25% limitation on a taxpayer's wages and does not take priority over other creditors with garnishments already in place. Neither can the ODR seize retirement accounts. In addition, once the ODR commences garnishment, it admittedly refuses to release the garnishment until the tax is paid in

full. In contrast, the IRS will release a garnishment once the taxpayer enters into a formal installment agreement or other plan of resolution.

Practice Tip: Provide separated or divorced clients with Form 8822 and instructions, and advise them to send it into the IRS immediately. They should also consider entering into a payment plan with the ODR before garnishments begin and before applying for a payment plan with the IRS.

D. Statute of Limitations.

1. No Limitation.

There is no federal statute of limitations on assessment of unfiled or fraudulent returns. The ODR has no statute of limitations on tax collection period.

2. Three Years.

The normal statute of limitations for tax assessment is three years. The IRS may audit and assess any additional tax within three years from the due date of the return or the filing date, whichever is later. If the taxpayer is in the middle of an audit and the statute of limitations is about to run, the IRS will often ask the taxpayer to voluntarily extend the statute. This request can raise a myriad of issues.

Refund claims must be made within three years of the due date of the return or two years from the date of the payment, whichever is later.

3. Six Years.

The statute of limitations period for audit and assessment extends to six years if there is a substantial understatement of income. An understatement of 25% or more of total income is considered substantial.

4. Ten Years.

The IRS has ten years to collect a tax once assessed. Several actions will toll the collection statute. These include filing a bankruptcy, filing a CDP Appeal, submitting an offer in compromise and filing for innocent spouse relief. It is common for the statute to be tolled while each action is pending plus an amount of additional time to allow the IRS the opportunity to place the taxpayer's file back in collections.

II. **Tax Returns**.

A. Filing Status.

Taxpayers are considered married for the entire year for tax purposes if they have not obtained a final decree or entered a judgment before the last day of the tax year. For tax purposes, an interlocutory decree is not a final decree. Same sex marriages are recognized so long as the

couple was married in a state that lawfully allows same-sex marriages. Registered domestic partnerships and civil unions are not considered marriages for federal tax purposes. A married couple must generally file married filing jointly ("MFJ") or married filing separately ("MFS").

A physically separated spouse has the option to file as head of household if he or she meets the following criteria: (1) considered unmarried on the last day of the year; (2) paid more than half the cost of keeping up the home; and (3) had a qualified person living with them for more than half the year. The costs of keeping up the home include rent, mortgage, taxes, insurance, repairs, utilities, and the food eaten in the home. A taxpayer is considered unmarried if he or she meets the following criteria: (1) filed a separate return; (2) paid more than half the cost of keeping up the home; (3) did not live with a spouse during the last six months of the year; (4) the taxpayer's home was the main home of their child for more than half the year; and (5) he or she is able to claim an exemption for the child.

Taxpayers facing divorce often agree to file previously unfiled returns as MFS to get the lowest tax rate. However, there are important factors to consider before deciding on a filing status. The amount of savings from filing jointly increases as the taxable income increases. Taxable income is the net income after exemptions and deductions. A partial summary of the 2015 tax rates under the three status options are as follows:

Taxable Income	MFS Tax	MFJ Tax	HOH
$25,000	$3,289	$2,828	$3,103
$50,000	$8,294	$6,578	$6,913
$75,000	$14,544	$10,338	$13,163
$100,000	$21,526	$16,588	$19,413
$150,000	$37,265	$29,088	$32,586
$200,000	$53,765	$43,052	$46,586

If the taxpayers intend to pay the tax in full when the tax return is filed, MFJ may be advisable. If the taxpayers are unable to pay the tax in full, however, each spouse needs to consider whether he or she is willing to accept joint and several liability. Are they informed of the household finances including their spouse's income and expenses? Did they take aggressive positions on their tax issues? Are they certain the tax will be paid as agreed? If they are audited later, after divorce, they will be jointly and severally liable for any additional tax assessed on a MFJ return.

If they choose to file MFS or HOH, each spouse will report his or her individual income and be liable for only their own tax. MFS taxpayers will pay a higher tax rate and are not allowed certain deductions and credits. If one spouse is unwilling to file MFJ returns for fear the liability will not be paid or files MFS or HOH before the parties come to a consensus or contrary to the parties' agreement, the couple may convert to a joint filing for up to three years. The spouses must pay the MFJ tax due before the IRS will allow the election. The taxpayers may not, however, amend a MFJ return to a MFS or HOH.

Practice Tip: Consider whether your client should agree to or request MFJ status on unfiled tax returns. If your client is nervous about his or her spouse not paying the tax, offer the MFJ election as an option, but only after proof of payment. The MFJ election can be a win-win for both spouses if the tax is actually paid within three years.

B. Deduction, Credit and Payment Allocations.

There is a good deal of confusion over who can claim what when filing MFS during the marriage and separation. We will address a few of the most common issues. If one spouse itemizes deductions, the other spouse must itemize as well. Taxpayers may claim deductions for certain expenses paid separately or jointly with their spouses. If the expense is paid from separate funds of one spouse, only that spouse may deduct the expense. However, if an expense is paid from joint funds, the taxpayers may split the deduction. An exception to this is that if only one spouse is entitled to the deduction, only that spouse may take it regardless of whether it was paid with joint funds.

Itemized deductions on MFS returns are treated differently. For example, medical expenses paid from a joint account must be split between the spouses. Each spouse may deduct only the state income tax, property tax, and mortgage interest that he or she alone paid. Casualty losses on a jointly owned home must be split equally. Lastly, strange as it may sound, neither spouse may claim a deduction for student loan interest or the tuition and fees deduction.

MFS taxpayers may not take certain credits or must reduce them by half. Filing HOH instead of MFS, if allowed, will result in a lower tax rate and the ability to capture a few additional deductions and credits not available if filing MFS.

A taxpayer may claim an exemption only for a “qualifying child”. Typically a child is a qualifying child to the custodial parent. The custodial parent is the parent with whom the child lived the most. For federal tax purposes, a child may be treated as a qualifying child for the non-custodial parent if: (1) the parents are divorced or legally separated or lived apart at all times in last six months of the year; (2) the child received over half of its support from its parents and was in the custody of its parents for more than half the year; and (3) the custodial parent signs a written declaration that he or she will not claim the child as an exemption. The non-custodial parent attaches the statement to his or her return. The non-custodial parent must use IRS Form 8332 or a similar statement for his or her written declaration. IRS Form 8332 may be used to release the exemption for one year, a number of specified years or all future years. The election is revocable.

Lastly, taxpayers who made joint estimated tax deposits but then file separate returns may allocate the estimated tax payments as they see fit. If they cannot agree on an allocation, the IRS will do it for them.

Practice Tip: Advise your client to consult a tax professional during separation and immediately following the divorce. **All expenses related to the determination of a tax are deductible.

Practice Tip: Require the parties to fill out Form 8332 to reflect the parties' agreement as to claiming a child for tax exemption purposes. It is difficult to correct an incorrectly claimed child exemption.

C. Characterization.

1. Alimony.

Alimony is deductible to the payer and income to the recipient. It is the payment of cash to or for the benefit of a former spouse pursuant to a divorce decree or settlement agreement. The divorce decree or separation agreement may not designate the spousal support payment as child support. The taxpayers may not live in the same house at the time the payment is made and the payer must not be liable for any payment after the death of the recipient.

Alimony payments must be made in cash to or for the benefit of the former spouse. *Unless specifically identified* in the divorce decree, payments made directly to third parties, payments in kind, or purchases of specific items are not considered alimony. Use of the payer's property is not considered alimony. If the taxpayer continues to own the home and must pay the mortgage, insurance, taxes, etc., but allows the former spouse to live there rent free, the expenses related to the home are not deductible as alimony. If the home remains jointly owned, half of the expenses may qualify as alimony. On the other hand, life insurance premiums required under a divorce decree are considered alimony if the former spouse owns the policy.

Lastly, if any amount specified as alimony will be reduced on the happening of a contingency related to a child, such as reaching a specified age, marrying, dying, leaving or attending school, an amount equal to the reduction will be treated as child support and not alimony.

Practice Tip: Make sure a client paying alimony understands that payments in kind, purchases of items and payments made to any third party not listed in the divorce decree are not deductible as alimony.

2. Child Support.

Child support is not deductible to the payer and not taxable income to the recipient. Payments of child support must be designated as such in the divorce decree or stipulated judgment. If payments are lumped together as "family support", none of it will be considered child support for tax purposes.

III. Tax Liens.

A. Overview.

A statutory lien arises as a matter of law when the tax is assessed and goes unpaid. The federal tax lien attaches to all of the taxpayer's property and rights to property that belong to the taxpayer existing then or later acquired. The ODR's tax lien is more limited. It is afforded the same

rights as an ordinary judgment lien against real property and is subject to Oregon property exemptions. The federal tax lien suffers no such limitations.

The IRS files a Notice of Federal Lien with the Oregon Secretary of State to perfect its interest against personal property and in a county's recording office to perfect its interest against real property located in that county. A tax lien must be filed before it is entitled to priority over security interest holders, purchasers, mechanic's liens and judgment lien creditors. However, priority of filed and competing federal and state tax liens is determined by the date of assessment of the tax and not by filing date. The IRS lien need not be filed to be valid against most other interests arising after assessment. A few liens enjoy priority over federal tax liens regardless of when the lien came into existence, including attorney liens and property taxes.

B. Expiration and Renewal.

A federal tax lien is valid for ten years. Several circumstances extend this period, including the filing of a bankruptcy. In addition, the IRS may commence suit and reduce its liability to judgment. Reducing the liability to judgment gives the IRS the same collection rights as other judgment creditors, including the ability to renew the judgment for an additional ten years. In practice, the IRS rarely reduces a lien to judgment.

C. Subordination.

In certain circumstances, the IRS may subordinate its lien to other creditors. A taxpayer requests subordination by completing and submitting IRS Form 14134. If a taxpayer wants to refinance his or her home, the IRS will typically subordinate its lien to the new loan so long as it is not more than the original loan or the taxpayers agree to pay the IRS the difference. The IRS will also subordinate its lien to a taxpayer's essential creditors when the taxpayer relies on the creditor for continued business operation or the generation of income. Any subordination is discretionary.

D. Release, Withdrawal and Discharge.

Tax liens may be released, withdrawn, or discharged. Each is a different process and has different results.

A federal tax lien is released when the debt is paid full, when a taxpayer has satisfied the monetary obligations of an accepted offer in compromise, or when the collection statute has run. The IRS will file a certificate of release where the original lien was filed. The lien and release will continue to be public record and stays on the taxpayer's credit report for at least seven years.

The IRS may withdraw a notice of lien filing from public record if it made a procedural error, the taxpayer has entered into an installment agreement and certain conditions are met, or if the lien was filed during a bankruptcy proceeding. It may also withdraw its lien if doing so will help the taxpayer pay the tax or if it is in the taxpayer's and the IRS's best interest. The IRS will withdraw its lien if the taxpayer can show the filing of a tax lien will result in his or her inability to earn income and pay the tax. An example of this is an investment banker or stock broker whose employment contract states that he or she will be terminated if a tax lien is filed. If the withdrawal

is granted, the original filing and the withdrawal will not be public record and will not show on a credit report.

The IRS may also discharge a tax lien. A lien discharge removes the lien from specific property. A taxpayer or a party of interest may apply for a partial or complete lien discharge using IRS Form 14135. The IRS will generally grant a discharge if the IRS receives an amount not less than the value of its interest in the property or if its interest in the property has no value. This often occurs when a property is over-encumbered due to mortgages and judgment liens or when taxpayers are attempting to short sell their home.

Practice Tip: Encourage your client to refinance or demand the other spouse refinance jointly held property that will be awarded to one spouse or the other immediately following or during divorce, regardless of a lien filing.

IV. New Liabilities.

A. Property Settlement.

Generally, there is no gain or loss realized on the transfer of property between spouses incident to divorce. This includes all real and personal property. A property transfer is incident to divorce if the transfer occurs within one year after the date the marriage ends or is related to the end of the marriage. A property transfer is related to the end of the marriage if the transfer is pursuant to the divorce decree or separation agreement *and* occurs within six years of the date the marriage ended.

B. Asset Liquidation.

The sale or other disposition of a capital asset often generates taxable income or loss. A capital asset is defined in terms of what is not a capital asset. For purposes of this article, think of a capital asset as something owned for income or investment purposes (including a primary residence). Income from the sale of a capital asset is generally capital gain to the extent that the amount realized exceeds the taxpayer's basis. However, the disposition of a capital asset can generate income in unexpected ways.

The most common capital asset for a married couple is the couple's home. However, gain on the sale of a principal residence receives special treatment. The first $500,000 of capital gain is exempt from tax for a married couple ($250,000 for an individual) so long as certain requirements are met. In addition, through 2014, up to $2,000,000 in cancelled debt on a principal residence has been exempt from taxation as ordinary income. No one knows if this exclusion for cancelled debt of a principal residence will be renewed for 2015.

The determination of tax liabilities from the disposition of capital assets other than a principal residence, such as rental property, becomes more complicated. Capital gain is created to the extent the amount realized exceeds the taxpayer's basis. In addition, debt forgiven becomes cancelled indebtedness and is taxed as ordinary income (cancellation of indebtedness or COD income). But wait - there's more. The amount and character realized at disposition can change,

depending on whether the debt on the property is recourse or nonrecourse - and COD income is subject to certain exceptions, such as insolvency and bankruptcy.

Because this article is not intended to create tax attorneys, I will conclude this topic with the superficial discussion above. Practitioners should keep in mind that all capital assets carry a potential tax liability; a liability which can come from unexpected sources and can arrive years after a divorce.

Practice Tip: If a divorcing couple owns capital assets, the situation should be discussed with a CPA or tax attorney before the property settlement discussion proceeds too far.

C. Audit.

IRS audits can create or increase joint and several liability for previously filed income tax returns, even after a divorce. Audits can increase the tax due in a variety of ways, including finding undisclosed income and reducing or eliminating deductions. The IRS performs random and targeted audits. The scope of an audit can range from the taxpayer receiving a notice that an adjustment is being made to the taxpayers return because the IRS records do not match with the taxpayers, to an assigned revenue agent coming to the taxpayer's place of business and going through financial records. Taxpayers with rental property or other businesses are more likely to be flagged for audit than are wage earners.

The IRS attempts to audit returns promptly and so most audits occur within two years of filing. The IRS typically begins the audit by sending the taxpayer an introduction letter requesting an appointment and requesting documentation to support items in the tax return. The audit will start with one year and if the IRS concludes that adjustments are necessary, expand the scope of the audit to three years. By statute, the IRS can audit the past three years, measured from the later of the date the return was due or filed. The three year look-back, however, is doubled to six years if the IRS finds the income is understated by 25% or more.

The IRS and the ODR have a reciprocal reporting agreement in which each taxing authority reports its audit adjustments to the other. If the ODR receives notice of the audit from the IRS it will mirror the federal audit adjustments on the taxpayer's state return. The ODR has an additional two years from the date it receives notice of the federal adjustments to make an assessment. The IRS's statute of limitations is not extended when it receives notice of audit adjustments from the ODR. The ODR is slow to report its audit adjustments to the IRS and the IRS's statute of limitations on assessment often runs before it is able to make the adjustments on the federal returns.

Practice Tip: The scope of the audit will almost always expand and be worse than the taxpayer expects. If a MFJ return is audited during a separation or after divorce, each spouse should have separate tax representation.

V. **Dealing With Tax Collection**.

When a taxpayer owes more in tax than he or she can afford to pay, there are only four options. Each is discussed briefly in turn.

A. Do Nothing.

A few taxpayers can look the IRS in the eye, not blink, and get away with doing absolutely nothing to address an unpaid tax. However, these few folks are not necessarily to be envied. They are truly poor and otherwise collection proof. Taxpayers are collection proof as to the IRS only if they have no equity in assets and no income. This is not an enviable position - but at least they needn't worry about tax collection. This is especially so when one considers that the IRS is not deterred by ordinary bars to collection that frustrate most creditors. For example, the IRS is not prohibited from levying social security payments or seizing retirement accounts.

For taxpayers with regular income or equity in assets, doing nothing comes with grave consequences. Choosing to ignore the IRS will subject the taxpayer to forced collections including levies, wage garnishments and tax liens.

B. Installment Plans.

The IRS attempts to direct most taxpayers who can't pay their tax bill into installment plans. These are formal agreements between the taxpayer and the IRS under which the taxpayer makes regular monthly payments and the IRS foregoes other collection activities so long as the taxpayer makes each payment on time and stays in current tax compliance. Current tax compliance requires that all subsequent tax returns are filed on time. It also requires that all subsequent tax liabilities, including required estimated deposits, are paid in full when due. A taxpayer must also have filed all required returns before the IRS will agree to an installment plan.

Individual taxpayers with a total liability, including penalties and interest, of $50,000 or less may apply for an installment agreement online. This is referred to as a streamlined installment agreement and a financial statement is not required.

Taxpayers not qualifying for a streamlined installment agreement may apply for an agreement by submitting a financial statement (433-F or 433-A for individuals) along with a Form 9465 installment agreement request. It is also possible to contact the IRS by telephone and negotiate an installment plan. Be prepared, however, to fax the required documents.

Installment plans run until the tax liability is paid in full or until the collections period expires. The IRS can collect a tax for ten years from the date of assessment but certain activities can toll the collections period thereby lengthening the time period. In addition, a tax liability can be reduced to judgment which extends the collections period for an additional ten years.

Practice Tip: Divorcing spouses should enter into separate installment agreements. If one spouse defaults on a joint installment agreement, the IRS will respond with forced collection against both spouses.

C. Offers in Compromise.

As some radio and late night television commercials loudly proclaim, it is possible to settle tax debts for pennies on the dollar. This process, referred to by the IRS as an "offer in compromise", is a good alternative to those taxpayers that qualify.

When a taxpayer's reasonable collection potential is less than their full tax liability, the IRS may agree to a lesser payment. In doing so, the IRS considers a taxpayer's income, reasonable expenses (as determined by the IRS), and equity in assets. In essence there are two components, equity and income, which combine to make up the minimum amount the IRS will settle for. The initial calculations are made on IRS Form 433-A(OIC).

First, the IRS determines the value which it can recover if the taxpayer's property were seized and sold. The fair market value of most property is reduced by 20% to allow for the cost of seizure and sale. Allowances may be made for payment of income tax incurred on the sale of capital assets or investment and retirement accounts.

Second, the IRS calculates a taxpayer's disposable or net monthly income but the expenses used are generally the national standards, not the taxpayer's actual expenses (unless the taxpayer's expenses are less than national standards). Net monthly income is multiplied by 12 or 24 months depending on the type of offer submitted to arrive at the income side of the equation.

The offer itself is submitted on IRS Form 656. This form takes the minimum offer calculated on Form 433-A(OIC) and applies it to a proposal for what are confusingly termed a "lump sum payment" plan of five or fewer payments in less than one year or a "periodic payment" plan which may be more than five payments made in less than two years.

The taxpayer must be in current tax compliance before an offer is accepted for review. Once accepted, the IRS places the taxpayer in a collection hold until the offer is returned, rejected, or accepted. If the offer is returned, the taxpayer is placed back into collections after 30 days. If the offer is rejected, the same 30-day collection hold applies; however, within that time the rejection may be appealed.

An accepted offer places the IRS and the taxpayer into a five-year contract. If the taxpayer makes the agreed payments, the unpaid tax liability will be discharged - but only if the taxpayer meets the remaining terms of the contract. One of the most important requirements is that the taxpayer stays in tax compliance for the five-year term. So long as the taxpayer does not default, at the end of the term the unpaid liability is discharged. As an added bonus, any recorded tax liens should be released within a short time after an offer is accepted.

D. Bankruptcy.

Income tax liabilities may be dischargeable in bankruptcy unless an exception to discharge applies - and there are many exceptions. Exceptions to discharge include the following:

(a) A tax for which a fraudulent return was filed;

(b) A tax for which a return was required but never filed;
(c) A tax which the taxpayer willfully attempted to evade or defeat;
(d) A tax for which a return was due, including extensions, within three years of the bankruptcy petition date;
(e) A tax for which the return was filed late and less than two years prior to filing the bankruptcy case;
(f) A Tax assessed within the 240 day period before the petition date; and
(g) An unassessed but assessable tax.

The discharge of tax may not come into play during a divorce proceeding but may become an issue later. Consider the situation where one spouse agrees to assume a joint and several tax liability as part of a property settlement - but later discharges the tax in a bankruptcy proceeding. This creates multiple issues. First, the IRS has no interest in the property settlement. As far as it is concerned, both spouses are fully liable for the tax regardless what the terms of a divorce decree state. So, after one spouse discharges the tax liability, the remaining spouse remains liable without regard to the property settlement.

If the tax is discharged in Chapter 7, the spouse in bankruptcy remains liable to the non-filing spouse under the terms of the property settlement. This is so because debts to a spouse or former spouse incurred in the course of a divorce or separation or in connection with a separation agreement are excepted from discharge, i.e., nondischargeable, in a Chapter 7. As a result, the debt to the IRS may have been discharged as to the filing spouse, but he or she remains liable under the divorce decree.

Chapter 13, however, presents a different situation. There, obligations resulting from a property settlement in a divorce are dischargeable. So if an income tax liability is discharged by one spouse in Chapter 13, that spouse's responsibility to pay the joint and several tax liability per the property settlement provision is also discharged. In contrast, domestic support obligations remain nondischargeable in Chapter 13.

Practice Tip: An accepted offer in compromise or bankruptcy discharge for one spouse does not absolve the other spouse from a joint and several tax liability. The IRS will continue its efforts to collect the entire tax liability (less the amount paid through the offer or bankruptcy) from the other spouse. Separated or divorced taxpayers need to individually resolve their tax liability.

E. Uncollectable Status.

The IRS sometimes agrees to place certain taxpayers in uncollectable status, referred to as "currently not collectible" or "CNC". To qualify, taxpayers must have little in the way of assets that the IRS could or would seize, and earn income at or below the amount required to meet their necessary living expenses (as determined by the IRS). These folks may avoid or defer collections by completing and providing to the IRS a simplified financial statement referred to as a Form 433-F. If the 433-F shows that the taxpayers cannot currently pay any portion of their tax liability while meeting their necessary living expenses, the IRS will generally place them in CNC status. This status can last up to two years, at which time the IRS will require the taxpayers submit new financials.

VI. **Relief From Joint and Several Income Tax Liability**.

A. Generally.

Married couples who file a joint income tax return are jointly and severally liable for any tax due on the return. This is true even if only one spouse earned most or all of the income and remains so even after a divorce - regardless of any language in the judgment of dissolution. Under certain conditions, however, a spouse or former spouse may be relieved of a joint and several tax liability. Four separate types of relief are possible: (1) innocent spouse relief; (2) separation of liability relief; (3) equitable relief; and injured spouse allocation. The first three types of relief are explained by IRS Publication 971 and may be applied for on IRS Form 8857. Injured spouse allocation is applied for on IRS Form 8379 and explained to some extent in the instructions.

B. Innocent Spouse Relief.

The IRS may release one spouse from a tax liability created primarily by the other spouse under certain circumstances. If innocent spouse relief is granted, the qualifying spouse is relieved of all tax, interest, and penalties associated with the other spouse for the tax years at issue. Although the IRS has discretion to grant this relief, it is often reluctant to do so. Regardless, there are four conditions, each of which must be met to qualify for innocent spouse relief, as follows:

1. Joint Return. The spouses must have filed a joint return.

2. Understated Tax. The return must have shown an understated tax due to an "erroneous item" of the spouse or former spouse of the taxpayer applying for relief. There is an understated tax if the IRS determines that the actual tax is greater than the amount shown on the return. Erroneous items can be unreported income or a deduction, credit, or basis that the IRS disallows.

3. Knowledge. The taxpayer must prove that, when he or she signed the joint return, he or she "did not know and had no reason to know" of the existence or amount of the understated tax. Knowledge means actual knowledge or if a reasonable person in a similar circumstance would have known of the understated tax. The IRS considers all of the facts and circumstances in determining whether a taxpayer had "reason to know" of an understatement.

4. Unfairness. Taking into account all of the facts and circumstances, it would be unfair to hold the taxpayer liable for the understated tax. The IRS considers all of the facts and circumstances in determining whether it is unfair to hold a taxpayer liable for an understated tax. Items considered include: (a) whether the taxpayer received a significant benefit from the understated tax; (b) whether the spouse or former spouse deserted the taxpayer applying for relief; and (c) whether the taxpayers are divorced or separated.

If the spouse applying for relief meets these criteria and timely files the request for relief on IRS Form 8857, the IRS will consider the request. However, be aware that the IRS is required to contact the non-requesting spouse for information.

Other circumstances that may be important to the IRS's consideration are beyond the scope of this presentation but further information may be found in IRS Publication 971.

C. Separation of Liability Relief.

If separation of liability relief is granted, the understated tax is allocated between spouses based on the amount each would be liable for separately. This type of relief is predicated on actual "knowledge" of the erroneous item and does not include a "reason to know" element. This can be important to gaining relief, as the IRS nearly always believes that anyone signing a tax return has a "reason to know" everything stated on the return.

Although the "actual knowledge" element is less onerous, additional conditions are added. First, the spouse applying for relief must be divorced, legally separated, or not a member of the same household as the non-requesting spouse for any time during the prior 12 month period. Second, relief will not be granted if the taxpayers fraudulently transferred assets in an attempt to avoid paying the tax or a debt owed to a third party. Fortunately, transfers made according to a divorce decree and transfers not intended to avoid the tax payment do not violate these conditions.

If granted, separation of liability relief allocates to each spouse the tax that each would have been responsible for had they filed separately. The relief, if granted, extends to penalties and interest.

D. Equitable Relief.

Taxpayers not qualifying for innocent spouse relief or separation of liability relief may nonetheless qualify for "equitable relief" from a joint and several liability. Equitable relief is not often granted and can be considered something of a last resort. First, the taxpayer applying for relief must meet initial threshold requirements:

(1) Not eligible for innocent spouse or separation of liability relief;
(2) Filed a joint return;
(3) Timely filed for relief;
(4) Did not transfer assets as part of a fraudulent scheme or with the primary purpose of avoiding payment of the tax;
(5) Did not knowingly file a fraudulent joint tax return; and
(6) The tax liability is attributable to the taxpayer's spouse or former spouse.

If these initial threshold requirements are met, the IRS then considers a non-exclusive list of factors to determine whether relief should be granted, including the following:

(1) Marital Status. Is the taxpayer divorced, legally separated, a surviving spouse, or not a member of the same household for the preceding 12 months as the other spouse?

(2) Economic Hardship. Will the taxpayer suffer economic hardship if relief is not granted? Economic hardship exists if paying the tax will render the taxpayer unable to meet his or her "reasonable" basic living expenses. Fair warning, the IRS may have a different view of

what your reasonable basic living expenses should be. These expenses are generally referred to as "National Collection Standards" which are posted on the IRS's website, irs.gov.

(3) Knowledge. If the taxpayer did not know or have a reason to know of the erroneous item, this factor will weigh in favor of relief. If one spouse maintained control of finances and restricted access of the other spouse to financial information, relief is more likely.

(4) Unpaid Tax. Did the taxpayer reasonably believe when signing a properly reported but unpaid tax that the other spouse would pay the liability within a reasonable time? This factor weighs against relief if the taxpayer should have known the tax would not be paid.

(5) Reason to Know. The IRS looks at a wide variety of items in determining whether a taxpayer had reason to know of the understated tax, including the following:

(a) What is the taxpayer's level of education?
(b) Was the spouse or former spouse deceptive or evasive regarding the couple's financial matters?
(c) To what degree was the taxpayer involved in the item creating the liability?
(d) To what degree was the taxpayer involved in business or household financial matters?
(e) What is the taxpayer's business and financial education or experience?
(f) To what extend did the couple engage in lavish or unusual spending, especially compared to other years?
(g) Was the taxpayer abused by his or her spouse, whether physical, psychological, sexual, or emotional?
(h) Did one spouse have a legal obligation to pay the liability, such as pursuant to a divorce decree?
(i) Did the taxpayer receive a significant financial benefit resulting from the unpaid liability (such as by participating in a lavish lifestyle)?
(j) Did the taxpayer make a good faith effort to comply with tax laws in other years?
(k) Was or is the taxpayer in poor mental or physical health?

If granted, equitable relief will provide the same relief as innocent spouse relief.

E. Injured Spouse Allocation.

In addition to relief from joint and several liability relating to a jointly filed tax return, there is an additional form of relief when a refund from a jointly filed income tax return is kept by the IRS to pay or offset a past tax liability of only one spouse. Under "injured spouse allocation" a taxpayer can request that the portion of the refund allocable to his or her income and tax attributes be returned rather than be retained by the IRS. There are two requirements. First, the tax liability must belong to only one of the spouses. Second, the non-liable spouse is entitled to only that portion of the refund which is properly allocable to his or her income and tax attributes.

Injured spouse allocation relief is explained and may be applied for on IRS Form 8379.

Practice Tip: Clients with potential innocent spouse claims should speak with a tax attorney as early in the divorce proceeding as possible.

109.119 Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention. (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.

(4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child’s primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child’s primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)(a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be charged against funds appropriated for public defense services.

(7) In a proceeding under this section, the court may:

(a) 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 the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child's country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(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.

(b) "Circumstances detrimental to the child" includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c) "Grandparent" means the legal parent of the child's legal parent.

(d) "Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality. [1985 c.516 §2; 1987 c.810 §1; 1993 c.372 §1; 1997 c.92 §1; 1997 c.479 §1; 1997 c.873 §20; 1999 c.569 §6; 2001 c.873 §§1,1a,1e; 2003 c.143 §§1,2; 2003 c.231 §§4,5; 2003 c.576 §§138,139]

SELECTED/REDACTED OREGON GUARDIANSHIP STATUTES

125.010 Protective proceedings.

(1) Any person who is interested in the affairs or welfare of a respondent may file a petition for the appointment of a fiduciary or entry of other protective order.

(2) A protective proceeding is commenced by the filing of a petition in a court with jurisdiction over protective proceedings.

(3) The court may appoint any of the following fiduciaries in a protective proceeding:

(a) A guardian, with the powers and duties specified in this chapter.

(b) A conservator, with the powers and duties specified in this chapter.

(c) A temporary fiduciary, with the powers and duties specified in this chapter.

(d) Any other fiduciary necessary to implement a protective order under ORS 125.650.

(4) In addition to appointing a fiduciary, or in lieu of appointing a fiduciary, the court may enter any other protective order in a protective proceeding in the manner provided by ORS 125.650.

125.025 Authority of the court in protective proceedings.

(1) Subject to ORS 125.800 to 125.852 for adults as defined in ORS 125.802, a court having jurisdiction over a protective proceeding shall exercise continuing authority over the proceeding. Subject to the provisions of ORS 125.800 to 125.852 and this chapter, the court may act upon the petition or motion of any person or upon its own authority at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person and to inquire into the proper performance of the duties of a fiduciary appointed under the provisions of this chapter.

(2) A court having jurisdiction over a protective proceeding in which the respondent or protected person is a minor shall consider and apply all relevant provisions of the Indian Child Welfare Act codified at 25 U.S.C. sections 1901 et seq.

(3) A court having jurisdiction over a protective proceeding may:

(a) Compel the attendance of any person, including respondents, protected persons, fiduciaries and any other person who may have knowledge about the person or estate of a

respondent or protected person. The court may require those persons to respond to inquiries and produce documents that are subject to discovery under ORCP 36.

(b) Appoint counsel for a respondent or protected person.

(c) Appoint investigators, visitors and experts to aid the court in the court's investigation.

(h) Remove a fiduciary whenever that removal is in the best interests of the protected person.

(i) Appoint a successor fiduciary when a fiduciary has died, resigned or been removed.

(k) Make provisions for parenting time or visitation or order support for any minor who is a respondent or protected person in a protective proceeding.

(L) Impose any conditions and limitations upon the fiduciary that the court considers appropriate, including limitations on the duration of the appointment. Any conditions or limitations imposed on the fiduciary must be reflected in the letters of appointment.

(4) When a person files a petition or motion for a support order under subsection (3)(k) of this section:

(a) The person shall state in the petition or motion, to the extent known:

(A) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the minor, including a proceeding brought under ORS 25.287, 107.085, 107.135, 107.431, 108.110, 109.100, 109.103, 109.165, 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 110.303, involving the minor.

(b) The person shall include with the petition or motion a certificate regarding any pending support proceeding and any existing support order. The person shall use a certificate that is in a form established by court rule and include information required by court rule and paragraph (a) of this subsection.

(5) When the court acts upon its own authority to order support under subsection (3)(k) of this section, at least 21 days before the hearing the court shall notify the Administrator of the Division of Child Support of the Department of Justice, or the branch office providing support services to the county where the hearing will be held, of the hearing. Before the hearing the administrator shall inform the court, to the extent known:

(a) Whether there is pending in this state or any other jurisdiction any type of support proceeding involving the minor, including a proceeding brought under ORS 25.287, 107.085, 107.135, 107.431, 108.110, 109.100, 109.103, 109.165, 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 110.303, involving the minor.

(6) The Judicial Department and the Department of Justice may enter into an agreement regarding how the courts give the notice required under subsection (5) of this section to the Department of Justice and how the Department of Justice gives the information described in subsection (5)(a) and (b) to the courts.

(7) If the court finds that a conservator should be appointed, the court may exercise all the powers over the estate and affairs of the protected person that the protected person could exercise if present and not under disability, except the power to make a will. The court shall exercise those powers for the benefit of the protected person and members of the household of the protected person.

(8) The powers of the court in protective proceedings may be exercised by the court directly or through a fiduciary. [1995 c.664 §5; 1997 c.707 §27; 2003 c.116 §11; 2009 c.179 §24]

125.030 Use of limited judgment in protective proceedings.

(1) The appointment of a fiduciary in a protective proceeding shall be made by limited judgment.

(2) The court in a protective proceeding may enter a limited judgment only for the following decisions of the court:

(b) A decision on placement of a protected person.

(e) Such decisions of the court as may be specified by rules or orders of the Chief Justice of the Supreme Court under ORS 18.028.

(3) A court may enter a limited judgment under subsection (2) of this section only if the court determines that there is no just reason for delay. The judgment document need not reflect the court's determination that there is no just reason for delay. [2005 c.568 §36; 2009 c.50 §2]

125.080 Hearing.

(1) The court may require that a hearing be held on any petition or motion in a protective proceeding.

(2) A hearing must be held on a petition or motion if an objection is filed to the petition or motion and the objection is not withdrawn before the time scheduled for the hearing.

(3) The respondent or protected person may appear at a hearing in person or by counsel.

(4) If the court requires that a hearing be held on a petition, or a hearing is otherwise required under this section, the court may appoint counsel for the respondent unless the respondent is already represented by counsel. [1995 c.664 §12; 1999 c.775 §1; 2003 c.227 §4]

125.150 Appointment of visitors.

(1) The court shall appoint a visitor upon the filing of a petition in a protective proceeding that seeks the appointment of a guardian for an adult respondent or temporary fiduciary who will exercise the powers of a guardian for an adult respondent. The court may appoint a visitor in any other protective proceeding or in a proceeding under ORS 109.329.

125.155 Visitor's report.

(1) A visitor shall file a report in writing with the court within 15 days after the visitor is appointed. The court may grant additional time for filing the visitor's report upon a showing of necessity and good cause.

(2) The report of the visitor appointed at the time a petition is filed requesting the appointment of a fiduciary must include the following:

(a) A statement of information gathered by the visitor relating to the correctness of the allegations contained in the petition, whether the appointment of a fiduciary is necessary and whether the nominated fiduciary is qualified and willing to serve.

125.200 Preferences in appointing fiduciary.

The court shall appoint the most suitable person who is willing to serve as fiduciary after giving consideration to the specific circumstances of the respondent, any stated desire of the respondent, the relationship by blood or marriage of the person nominated to be fiduciary to the respondent, any preference expressed by a parent of the respondent, the estate of the respondent and any impact on ease of administration that may result from the appointment. [1995 c.664 §19]

125.225 Removal of fiduciary.

(1) A court shall remove a fiduciary whenever that removal is in the best interests of the protected person.

125.305 Order of appointment.

(1) After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by clear and convincing evidence that:

(a) The respondent is a minor in need of a guardian or the respondent is incapacitated;

(b) The appointment is necessary as a means of providing continuing care and supervision of the respondent; and

(c) The nominated person is both qualified and suitable, and is willing to serve.

125.315 General powers and duties of guardian.

(1) A guardian has the following powers and duties:

(a) Except to the extent of any limitation under the order of appointment, the guardian has custody of the protected person and may establish the protected person's place of abode within or without this state.

(b) The guardian shall provide for the care, comfort and maintenance of the protected person and, whenever appropriate, shall arrange for training and education of the protected person. Without regard to custodial rights of the protected person, the guardian shall take reasonable care of the person's clothing, furniture and other personal effects unless a conservator has been appointed for the protected person.

(c) Subject to the provisions of ORS 127.505 to 127.660 and subsection (3) of this section, the guardian may consent, refuse consent or withhold or withdraw consent to health care, as defined in ORS 127.505, for the protected person. A guardian is not liable solely by reason of consent under this paragraph for any injury to the protected person resulting from the negligence or acts of third persons.

(e) The guardian of a minor has the powers and responsibilities of a parent who has legal custody of a child, except that the guardian has no obligation to support the minor beyond the support that can be provided from the estate of the minor, and the guardian is not liable for the torts of the minor. The guardian may consent to the marriage or adoption of a protected person who is a minor.

TEMPORARY FIDUCIARIES

125.600 In general. (1) A temporary fiduciary who will exercise the powers of a guardian may be appointed by the court **if the court makes a specific finding by clear and convincing evidence that the respondent is incapacitated or a minor, that there is an immediate and serious danger to the life or health of the respondent, and that the welfare of the respondent requires immediate action.**

(3) A temporary fiduciary may be appointed only for a specific purpose and only for a specific period of time. The period of time may not exceed 30 days. The court may extend the period of the temporary fiduciary's authority for an additional period not to exceed 30 days upon motion and good cause shown. The court may terminate the authority of a temporary fiduciary at any time.

(4) Except as otherwise provided in this section and ORS 125.605 and 125.610, a temporary fiduciary is subject to all provisions of this chapter. [1995 c.664 §63]

125.605 Procedure for appointment of temporary fiduciary.

(1) In addition to the requirements of ORS 125.055, a petition for the appointment of a temporary fiduciary must contain allegations of the conditions required under ORS 125.600.

(2) Notice of a petition for the appointment of a temporary fiduciary must be given to the persons specified in ORS 125.060 (2) in the manner provided by ORS 125.065 at least two days before the appointment of a temporary fiduciary. The court may waive the requirement that notice be given before appointment if the court finds that the immediate and serious danger requires an immediate appointment. In no event may the notice required by ORS 125.060 be given more than two days after the appointment is made.

(3) Notice of a motion for the extension of a temporary fiduciary's authority beyond 30 days under ORS 125.600 (3) must be given to the persons specified in ORS 125.060 (2) in the manner provided by ORS 125.065 at least two days before the entry of an order granting the extension.

(4) The court shall appoint a visitor if the petition seeks appointment of a temporary guardian. A visitor may be appointed by the court if a petition seeks appointment of a temporary conservator. Within three days after the appointment of the temporary fiduciary, the visitor shall conduct an interview of the respondent. The visitor shall report to the court within five days after the appointment of a temporary fiduciary is made. The report of the visitor shall be limited to the conditions alleged to support the appointment of a temporary fiduciary.

(5) If objections are made to the appointment of a temporary fiduciary or to the extension of a temporary fiduciary's authority under ORS 125.600 (3), the court shall hear the objections within two judicial days after the date on which the objections are filed. Notwithstanding ORS 21.170, no fee shall be charged to any person filing an objection to the appointment of a temporary fiduciary or to the extension of a temporary fiduciary's authority under ORS 125.600 (3). [1995 c.664 §64; 1997 c.717 §9; 2011 c.595 §130]

COMPARISON - GUARDIANSHIP VS. PSYCHOLOGICAL PARENT STATUTES

ISSUE	GUARDIANSHIP	PSYCHOLOGICAL PARENT	NOTES
Can you seek Custody?	Yes ORS 125.315	Yes ORS 109.119(3)(a)	
Relatives Preferred?	Yes ORS 125.200	No (Except in Juvenile Court)	
Can you seek Visitation/Contact?	Maybe ORS 125.315	Yes ORS 109.119(3)(b)	Court has authority as an incident of guardianship
Prior Custody or Relationship Status Required?	No	Yes ORS 109.119(1)	*Troxel* presumption and ORS 109.119 rebuttal factors apply if a legal parent object to a guardianship - See *Burk v. Hall*, 35 Or App 113 (2003)
Ex Parte Status Quo Order Possible?	No (But see temporary custody below)	Maybe ORS109.119(3)(a), ORS 109.119(3)(b), ORS 107.097	
Temporary Custody Possible?	Yes ORS 125.600	Yes ORS 109.119(3)(a)	Guardianship temporary fiduciary requires proof that is an immediate and serious danger to the life or health of the child.
Can Custody Evaluation Be Ordered?	Maybe*	Yes ORS 109.119(7)(a)	Guardianship Court can order a visitor, but it is not clear that the court's authority extends to ordering a custody evaluation.

Can Child Support Be Ordered?	Yes ORS 125.025(3)(k)	No statutory authorization, but see ORS 109.010	Custodian/Guardian Can Seek to be Representative Payee of Social Security Benefits For Child
Can Attorney Fees Be Awarded?	No	Yes ORS 109.119(7)(b)	
Standard of Proof Required	Clear and Convincing ORS 125.305	Preponderance ORS 109.119(3)(a)	
Can Order Be Modified/Terminated?	Yes ORS 125.225	Yes ORS 107.135(a) Also see ORS 109.119(2)(c)	Change of Circumstances likely required for modifications of ORS 109.119 Custody Judgments; Only Best Interests required for termination of Guardianship
Post Judgment Obligations	Annual Report Required ORS 125.325; Mult. Co. SLR 9.075(4)	None	

was obviated when the officers detected the odor of marijuana coming from defendant's house. At that point, the issue was no longer one of consent but, instead, of probable cause. The search warrant was adequately supported by an affidavit reciting evidence—the power records and the odor of marijuana—that was obtained only after an extended investigation carried out was over a period of days.

On a spectrum of causation, if there is more than a mere "but for" factual or logical connection between the unlawful 1998 trap and trace order and the discovery of the marijuana growing operation in defendant's residence, there is not much more. It is true that the police focused on defendant as a result of the unlawful order and that that focus did not abate during the ensuing investigation. However, as described above, the police did not seek a search warrant until they had pursued the investigation sufficiently to obtain probable cause independently—except for that focus—of the trap and trace records. Here, as in *Smith*, the unlawful conduct furnished the authorities with a lead, nothing more. In fact, if anything, the lead was less inculpatory than in *Smith*, where the intercepted message actually identified the defendant as the probable perpetrator of a crime. Under the circumstances, the taint of the unlawful order was purged by the intervening police investigation and suppression is not an appropriate remedy for a violation, if any, of defendant's constitutionally protected privacy interests.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Guardianship of
Katharine Elizabeth Goodwin.

Harriet BURK,
Appellant,

v.

Christopher HALL,
Dana Hall, and Katharine Elizabeth Goodwin,
Respondents.

00C-13904; A112154

Appeal from Circuit Court, Marion County.

Claudia M. Burton, Judge pro tempore.

Argued and submitted November 13, 2002.

W. Brad Coleman argued the cause and filed the briefs for appellant.

Tahra Sinks argued the cause and filed the brief for respondents Christopher Hall and Dana Hall.

Dennis Sarriugarte argued the cause and filed the brief for respondent Katharine Elizabeth Goodwin.

Before Landau, Presiding Judge, and Armstrong and Brewer, Judges.

BREWER, J.

Reversed.

BREWER, J.

Harriet Burk appeals from an order appointing Christopher and Dana Hall as the permanent legal co-guardians of Burk's minor daughter, Katharine Goodwin. Burk asserts that the trial court erred in determining that Katharine was "in need of a guardian" under ORS 125.305(1)(a), and she also asserts that the order violated her constitutional rights as a fit parent to have custodial authority over her child. Because we conclude that the Halls were not entitled to appointment as co-guardians, we reverse.

Katharine resided with Burk until January 12, 2000, when, at age 13, she ran away from home. During the next four months, Katharine stayed at a runaway shelter, at the home of her school principal, and with the parents of a friend. On May 5, 2000, the Halls filed a petition in Marion County Circuit Court seeking appointment as co-guardians of Katharine. Dana Hall is Katharine's half-sister, and Christopher Hall is Dana's spouse. The petition alleged that a guardianship was necessary because Burk had physically abused Katharine and had not been adequately meeting her needs. The petition also alleged that, since January 18, 2000, Katharine had been staying with friends and at the shelter.

In May 2000, the trial court entered an *ex parte* order appointing the Halls as Katharine's temporary co-guardians. On May 24, the court held an evidentiary hearing to determine whether the temporary guardianship should be extended. Burk participated at the hearing, objected to the petition, and presented evidence. Nevertheless, the court extended the guardianship and authorized the Halls to move Katharine to New Jersey to reside with them. On August 14, 2000, the trial court held a further hearing to determine whether or not to appoint the Halls as permanent co-guardians. Once again, Burk participated in the hearing, presented evidence, and objected to the appointment. On October 3, 2000, the court entered an order granting permanent co-guardianship of Katharine to the Halls. Burk appeals from that order.

At trial and on appeal, the parties have shared two sets of assumptions that have guided their arguments. First,

they have assumed that this action is governed solely by ORS 125.305(1) and other general guardianship statutes found in ORS chapter 125.[1] Second, they agree that, because this case involves a dispute between a legal parent and opposing contestants concerning the care, custody, and control of a minor child, the governing statutes must be construed in light of the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). *See Wilson and Wilson*, 184 Or App 212, 217-19, 55 P3d 1106 (2002) (discussing *Troxel*); *Harrington v. Daum*, 172 Or App 188, 197-98, 18 P3d 456 (2001) (same).

In litigating the case based on the foregoing assumptions, the parties have paid only passing attention to another statute, ORS 109.119.[2] That statute provides, in part:

> "(1) 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, *guardianship* or wardship 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.

[1] ORS 125.305(1) provides:

"After determining that conditions for the appointment of a guardian have been established, the court may appoint a guardian as requested if the court determines by clear and convincing evidence that:

"(a) The respondent is a minor in need of a guardian or the respondent is incapacitated;

"(b) The appointment is necessary as a means of providing continuing care and supervision of the respondent; and

"(c) The nominated person is both qualified and suitable, and is willing to serve."

[2] This action was filed while ORS 109.119 (1999) was in effect. Because subsections (1), (3), and (8) of the 2001 version are, in all pertinent respects, identical to the comparable subsections of the 1999 version, we apply the 2001 version of ORS 109.119.

> "* * * * *
>
> "(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.
>
> "* * * * *
>
> "(8) 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."

(Emphasis added.)

In their brief on appeal, the Halls argue that the constitutional standards adopted in cases construing ORS 109.119 for the purpose of resolving disputes between legal parents and third parties should apply by analogy to this case. That assertion appears to flow from the assumption of both parties that ORS 125.305, not ORS 109.119, is the controlling statute. In her reply brief, Burk asserts:

> "[The Halls] attempt to apply some of the standards of ORS 109.119 to this case, however it is questionable whether or not [that] statute does in fact, apply. ORS 109.119, first requires that the persons seeking custody, must have a 'child-parent relationship' (ORS 109.119(3)(a), 1999 version)[.] It is clear in this case that [the Halls] did not have such a relationship at the time the Court's order was entered."

The quoted argument was not preserved in the trial court. However, if ORS 109.119 applies to this action, the parties may not prevent the court from noticing and invoking that statute merely because they have failed to assert its applicability. *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309 n 3, 951 P2d 720 (1998); *State v. Smith*, 184 Or App 118, 122, 55 P3d 553 (2002).

If ORS 109.119 applies to this action, it is readily apparent that the Halls were not entitled to be appointed as Katharine's co-guardians. Only a person with a "child-parent relationship" with the would-be protected person can bring an action to establish a guardianship under ORS 109.119. *See* ORS 109.119(3)(a). Subsection (8)(a), in turn, restricts child-parent relationships to those in which the petitioner either had physical custody of, resided in the same household with, or provided day-to-day resources for the child "within the six months preceding the filing of an action under this section." It is undisputed that Katharine was not in the Halls' physical custody, did not reside with them, and did not receive relevant day-to-day resources from them before this action was filed. Although the Halls may or may not have had an "ongoing personal relationship" with Katharine within the meaning of subsection (8)(b) before they filed this action, that status would have entitled them only to bring an action for "visitation or contact rights," not for guardianship. *See* ORS 109.119(3)(b). Therefore, if ORS 109.119 applies to this action, the Halls were not entitled to appointment, and the trial court's order must be reversed.

The question, then, is whether this action is subject to the requirements of ORS 109.119. The problem is one of statutory construction, involving both ORS 109.119 and ORS 125.305, which we resolve under the methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We examine first the text of the statutes in context to determine whether the legislature's intended meaning has been expressed unambiguously. If either statute is ambiguous, then we resort to legislative history and other aids to construction. *Id.* at 611-12. At first blush, it is easy to understand why the parties have not focused on ORS 109.119. After all, ORS chapter 125 establishes what appears to be a comprehensive framework, both substantive and procedural, of statutory law governing guardianship proceedings. However, an examination of the text and context of both statutes reveals that ORS 125.305(1) must be construed in light of the requirements of ORS 109.119.

ORS 125.305(1) makes clear that it does not specify all of the requirements for establishing a guardianship of a minor. Subsection (1)(a) provides that the court may appoint a guardian for a minor who "needs" one, but that power is subject to the preliminary determination, prescribed by the preface to subsection (1), that "conditions for the appointment of a guardian have been established." ORS 125.305(1). Moreover, subsection (1)(c) further restricts the court's authority to the appointment of a guardian who is "both qualified and suitable." ORS 125.305 does not further specify the criteria for establishing the qualifications and suitability of prospective guardians. Thus, it is apparent from the text of the statute that it cannot be interpreted in a vacuum that disregards other statutes, like ORS 109.119, that prescribe qualifications for guardians of children.[3]

[3] ORS 125.200 establishes preferences in appointing fiduciaries, including a requirement that the court consider "any preference expressed by a parent of the

ORS 109.119, in turn, is quite clear and specific in scope. It provides substantive requirements for actions in which a nonparent seeks custody or guardianship of a minor child over the objection of a legal parent. Nothing contained either in the text or context of that statute suggests that the legislature intended for persons who cannot satisfy those requirements to bypass them by proceeding solely under ORS 125.305(1). It makes no sense to assume that the legislature intended to create such a loophole. To the contrary, it makes sense only to conclude that ORS 109.119 is, within the meaning of ORS 125.305(1), a separate source of "conditions for the appointment of a guardian" and of criteria for determining whether the nominated person "is both qualified and suitable." Accordingly, the two statutes can be harmonized in such a way as to give full effect to both. *See* ORS 174.010.

However, even if we were to determine that the statutes are in conflict, we would conclude that this action is subject to the requirements of ORS 109.119. The courts have held that when "one statute deals with a subject in general terms and another deals with the same subject in a more minute and definite way," the specific statute controls over the general if the two statutes cannot be read together. *State v. Guzek*, 322 Or 245, 268, 906 P2d 272 (1995); *see* ORS 174.020(2). That maxim is applicable at the first level of statutory construction analysis. *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 374, 50 P3d 1163 (2002). As pertinent here, although ORS 125.305(1) does address guardianships for minors, it does not specifically address the type of contested guardianship proceeding at issue here, where a third party seeks guardianship of a child over the objection of the child's legal parent. That specific circumstance is provided for by ORS 109.119(1) and (3)(a). It follows that ORS 109.119, the more specific statute, would control in the case of a conflict.

In *Kelley v. Gibson*, 184 Or App 343, 349-50, 56 P3d 925 (2002), we held that ORS 125.305 does not apply to guardianships established pursuant to a court's juvenile dependency jurisdiction because ORS 419B.365 provides the only statutory procedure for the establishment of a permanent guardianship for a child within juvenile court jurisdiction. In so holding, we noted but did not reach the issue raised here. We said:

> "[I]t is arguable whether ORS 125.305 would apply were this not a dependency case. ORS 109.119 appears to address guardianships with respect to children who have a living legal parent and contains various presumptions and procedures to protect that parent's rights as enunciated by the United States Supreme Court in [*Troxel*]. However, we need not decide that issue here."

Kelley, 184 Or App at 350 n 4 (citations omitted). We now decide that issue. We conclude that guardianship actions involving a child who is not subject to a court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of a guardian are—in addition to the requirements of ORS 125.305—subject to the requirements of ORS 109.119.[4] Because the Halls were not entitled to appointment as Katharine's co-guardians under ORS 109.119(3)(a), the trial court did not have the authority to enter the order so appointing them. Accordingly, we reverse.[5]

Reversed.

respondent." In addition, ORS 125.205 and ORS 125.210 establish certain qualifications for fiduciaries. However, none of those statutes in any way limits or impairs the applicability of the additional requirements of ORS 109.119 to this action.

[4] We are not called upon to decide whether ORS 109.119 has any application to guardianship actions where a minor protected person does not have a living legal parent or the minor's legal parent does not object to the appointment as guardian of a person who lacks a child-parent relationship with the minor. Of course, the legislature, in its policy judgment, is free to address that and any other issue of concern that is raised by our decision here.

[5] Because the Halls do not have a child-parent relationship with Katharine for purposes of ORS 109.119, we do not address the statutory presumption in favor of a legal parent in the 2001 version of the statute nor the relationship between the current version of the statute and *Troxel*.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Marriage of
John Paul EPLER,
Respondent on Review,
and
Andrea Michelle EPLER,
nka Andrea Michelle Walker,
Petitioner on Review.
(CC 04C33678; CA A148643; SC S061818)

En Banc

On review from the Court of Appeals.*

Argued and submitted June 23, 2014.

Richard F. Alway, Salem, argued the cause and filed the briefs for petitioner on review. With him on the briefs was Philip F. Schuster, II, Portland.

Mark Kramer, Kramer and Associates, Portland, argued the cause and filed the brief for respondent on review. With him on the brief were Pete Meyers and Graham C. Parks, Certified Law Student.

Katelyn B. Randall, Portland, and Robin J. Selig, Portland, filed the brief on behalf of *amici curiae* Legal Aid Services of Oregon and Oregon Law Center.

BALDWIN, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court to rule on mother's request to modify parenting time and child support.

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* On appeal from Marion County Circuit Court, Dennis J. Graves, Judge. 258 Or App 464, 309 P3d 1133 (2013).

BALDWIN, J.

The issues presented in this case are (1) whether the legal presumption described in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000) (plurality opinion), that a fit parent acts in the best interests of her child, applies to a modification proceeding in which petitioner (mother) seeks to modify a stipulated dissolution judgment that granted legal custody to respondent (grandmother); and (2) whether mother must demonstrate a substantial change in circumstances to modify the dissolution judgment. The trial court denied mother's motion to modify the judgment and grant custody to her based on the change-in-circumstances rule and the best interest of the child, and the Court of Appeals affirmed. *Epler and Epler*, 258 Or App 464, 466, 309 P3d 1133 (2013).

For the reasons that follow, we affirm the decision of the Court of Appeals, but base our decision on different reasoning. We conclude that (1) mother is not entitled to the *Troxel* presumption that her custody preference is in the child's best interest and (2) mother was not prejudiced when she was held to the substantial change-in-circumstances rule. Ultimately, we affirm the trial court's determination that a modification of the custody provisions of the judgment is not in the best interest of the child.

Mother requests that we exercise our discretion to review this case *de novo*. Assuming *arguendo* that we have discretion to consider the matter *de novo* even though the Court of Appeals did not, *see* ORS 19.415(4), we do not find it necessary to do so: The facts are essentially undisputed. Accordingly, we limit our review to questions of law. We take the following facts from the Court of Appeals opinion and from additional undisputed facts in the record.

Daughter, who was approximately seven years old at the time of the hearing on mother's motion, has lived with her paternal grandmother for her entire life. Mother and father lived with grandmother in Oregon when daughter was born in 2003. When daughter was approximately six months old, mother and father separated, father left Oregon, and mother and daughter continued to live with grandmother. Three months after the separation, mother

moved out of grandmother's residence and left daughter in grandmother's sole care. In the months that followed, mother struggled with depression, started drinking alcohol heavily, and was unable to maintain steady employment. Mother then decided to move to Virginia. Before mother moved, father and grandmother engaged legal counsel, who prepared a marital settlement agreement.

The marital settlement agreement provided:

> "Husband a[n]d Wife acknowledge that Paternal Grandmother *** has been the primary custodian of [daughter] since [daughter]'s birth in 2003. Through this agreement, it is the intention of the parties to formalize Grandmother's custody, and provide for both Husband and Wife to pay child support to Grandmother for [daughter]'s benefit.
>
> "*****
>
> "Husband and Wife desire that paternal grandmother *** be awarded sole legal and physical custody of their minor child, *** subject to the joint right of both Husband and Wife to equally share the parenting time provided in Marion County SLR 8.075 ***, and with the understanding that Husband's parenting time will include Grandmother."

Mother and father signed the marital settlement agreement in December 2004, and the trial court entered a stipulated dissolution judgment based on that agreement in March 2005.

Mother first filed a motion to modify custody in 2006 but voluntarily dismissed that motion. Two years later, in 2008, she filed a second motion to modify custody and, in the alternative, to modify parenting time and child support. That 2008 motion is the filing at issue in this case. In her motion to modify custody, mother argued that she was entitled to a legal presumption that she acted in the best interests of her child. Mother cited ORS 109.119(2)(a) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution to support her motion. After a hearing, the trial court denied mother's motion in a letter opinion. The court found that (1) mother had failed to prove that a substantial change in circumstances had occurred since the stipulated dissolution judgment and (2) modification of the dissolution judgment would not be in daughter's

best interest. The court did not address mother's requests to modify parenting time or child support.

Mother appealed, and the Court of Appeals affirmed the trial court's custody ruling and remanded for the trial court to rule on mother's request to modify parenting time and child support. *Epler*, 258 Or App at 466. The Court of Appeals first concluded that the trial court did not err in determining that mother had failed to carry her burden of showing a substantial change in circumstances or in determining that modifying the judgment would not be in daughter's best interest. *Id.* at 475-77. The court further concluded that ORS 109.119 did not apply to this modification proceeding and that "[n]either ORS 109.119(2)(c) nor any other provision of ORS 109.119 makes the presumption in favor of parents in ORS 109.119(2)(a) applicable to mother's motion to modify the stipulated dissolution judgment in this case." *Id.* at 477-78.

The Court of Appeals also rejected mother's contention that the trial court was required, under *Troxel*, to presume that a modification of the custody provision was in daughter's best interest. *Id.* at 478-84. In the court's view, the point at which the state "inject[ed] itself into the private realm of the family," for *Troxel* purposes, was when the trial court entered the parties' stipulated dissolution judgment. *Id.* at 481 (internal quotation marks omitted). At that point, the Court of Appeals reasoned, the trial court gave mother's custodial preference the requisite special weight, thereby satisfying the requirements of due process. *Id.* ("That is all that *Troxel* requires in this case.").

Judge Duncan wrote a concurring opinion, in which she expressed her view that

> "(1) mother was required to establish a substantial change in circumstances in order to have the custody judgment modified, (2) the trial court did not err in concluding that mother had failed to establish such a change, and (3) because mother had failed to establish the requirement for the modification that she requested, we need not decide whether the trial court was required to presume that mother's requested modification was in child's best interests."

Id. at 488 (Duncan, J., concurring).

Judge Egan wrote a dissenting opinion, expressing his view that "the trial court erred by failing to give special weight to mother's determination of daughter's best interests as required by the Fourteenth Amendment to the United States Constitution." *Id.* at 492 (Egan, J., dissenting). The dissent disagreed with the majority's determination that the *Troxel* presumption was applied in mother's favor when the parties entered the stipulated dissolution judgment. The dissent argued that the court should not conclude that mother was not entitled to the parental presumption because she had voluntarily relinquished custody of daughter: "To say, under those circumstances, as the lead opinion does, that that decision permanently rendered mother an unfit parent—*i.e.*, one who is not entitled to the *Troxel* presumption—penalizes mother for a decision that mother deemed to be in the daughter's best interests." *Id.* at 500.

On review, mother reprises her basic argument that she is entitled to a *Troxel* presumption that her custody preference is in daughter's best interest. She also argues that requiring her to demonstrate a substantial change in circumstances to regain custody of daughter violates her due process rights under *Troxel*. Grandmother, for her part, contends that *Troxel* does not apply in this case, because mother is seeking modification of a judgment with a custody provision in grandmother's favor after mother stipulated to that judgment.

We first address mother's argument that ORS 109.119 governs this action. Mother concedes that she filed her motion under ORS 107.135(1)(a), seeking to modify the custody, parenting time, and child support portions of the stipulated dissolution judgment. However, she argues that ORS 109.119 governs all child custody modification proceedings between a parent and a nonparent and therefore applies to this case. Mother contends that she is entitled to the benefit of the *Troxel* presumption as codified in that third-party statute:

> "In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child."

ORS 109.119(2)(a). We disagree with mother's contention that ORS 109.119 governs this action.

Under ORS 109.119(1), a nonparent who has established emotional ties creating a child-parent relationship with a child "may petition or file a motion for intervention" seeking custody of the child.[1] By its terms, ORS 109.119 applies to actions in which a *nonparent* initiates or intervenes in proceedings seeking custody. *See* *Burk v. Hall*, 186 Or App 113, 120, 62 P3d 394, *rev den*, 336 Or 16 (2003) (noting that ORS 109.119 "provides substantive requirements for actions in which a nonparent seeks custody or guardianship of a minor child over the objection of a legal parent"). The relief available to a nonparent who initiates an action under ORS 109.119(1) is a grant of custody to or a determination of other rights of that nonparent. *See* ORS 109.119(3)(a).[2] In this case, grandmother did not "petition or file a motion for intervention" seeking custody of daughter. Rather, the court initially granted custody to grandmother in a dissolution judgment based on the parties' stipulated agreement. It is mother who initiated this modification action under ORS 107.135, seeking to regain custody from grandmother. Thus, ORS 109.119, by its terms, does not apply to this action.

We next examine mother's contention that her custody preference is nevertheless entitled to "special weight" under *Troxel* even if ORS 109.119 does not govern this action. The United States Supreme Court has long recognized that parents have a fundamental liberty interest, under the Due

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[1] ORS 109.119(1) provides:

"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[.]"

[2] ORS 109.119(3)(a) provides:

"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."

Process Clause of the Fourteenth Amendment, in the care, custody, and control of their children. *See, e.g.*, *Washington v. Glucksberg*, 521 US 702, 720, 117 S Ct 2258, 138 L Ed 2d 772 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights *** to direct the education and upbringing of one's children[.]"); *Santosky v. Kramer*, 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Prince v. Massachusetts*, 321 US 158, 166, 64 S Ct 438, 88 L Ed 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The Court elaborated on the due process rights of parents in the plurality opinion of *Troxel*, 530 US 57. In *Troxel*, the grandparents of two children had successfully petitioned, over the objection of the children's mother, for visitation rights under a Washington statute providing that any person could petition the court for visitation rights. *Id.* at 61. The statute allowed the state trial court to order visitation rights in favor of the petitioning party without giving the mother's preference any special consideration if it found that visitation would serve the best interest of the child. *Id.*[3] Characterizing the statute as "breathtakingly broad," the plurality held the statute unconstitutional as applied to the mother in that case. *Id.* at 67. The plurality recognized that fit parents enjoy a presumption that they act in the best interests of their children. *Id.* at 68. It did not define "the precise scope of the parental due process right in the visitation context." *Id.* at 73. Rather, the plurality held only that, when a court reviews a fit parent's decision with respect to the care, custody, or control of his or her child, the court is

[3] The statute at issue provided:

> "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."

Wash Rev Code § 26.10.160(3) (1994).

required to give at least "some special weight" to the parent's decision.[4] *Id.* at 70.

In *O'Donnell-Lamont and Lamont*, 337 Or 86, 91 P3d 721 (2004), *cert den*, 543 US 1050 (2005), this court "allowed review of [a] child custody proceeding to consider the appropriate application of changes that the legislature made to [Oregon's] third-party custody statute in 2001, following the United States Supreme Court's decision in *Troxel*." *Id.* at 89.[5] The grandparents of two children had obtained a custody award under ORS 109.119, over the objection of the children's father. *O'Donnell-Lamont*, 337 Or at 91-95. On review, this court analyzed the Supreme Court's decision in *Troxel*, noting that the Court had not precisely "identif[ied] the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child." *Id.* at 100. Significantly, this court stated that the parental presumption recognized in *Troxel* is "important, but limited." *Id.* at 120. The court concluded that the father had been afforded his due process rights under *Troxel* as codified under ORS 109.119, and affirmed the judgment of the trial court. *Id.* at 120-21.

However, as previously explained, ORS 109.119 is a third-party statute applicable to actions in which a nonparent initiates or intervenes in a proceeding to establish a

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[4] Here, the trial court did not make an express or implied finding that mother is unfit, and grandmother has not taken the position that mother is unfit.

[5] This court described the relationship between *Troxel* and the statutory amendments:

> "The Supreme Court's decision in *Troxel* led directly to the 2001 amendments to Oregon's statute regulating third-party custody and visitation claims. As previously discussed, ORS 109.119(3)(a) (1999) allowed a court to award custody to a psychological parent if the court determined that custody 'was appropriate in the case' and was 'in the best interest of the child.' That statute was less 'open-ended' than the Washington statute at issue in *Troxel*, because it limited the class of third parties who could seek custody or visitation and also because of cases interpreting the statute to impose a presumption in favor of the legal parent. The statute nevertheless appeared likely to draw a constitutional challenge under *Troxel* because it failed to assign any special weight or deference to the legal parent's interest in the custody and control of a child. For that reason, the legislature undertook to amend the statute."

337 Or at 101.

legal relationship with a child. That statute, and the parental presumption embodied in ORS 109.119(2)(a), do not apply to this proceeding under ORS 107.135(1)(a) where mother seeks to modify a previous dissolution judgment granting custody to grandmother. The question, then, is whether *Troxel* requires us to give special weight or deference to mother's custody preference under the circumstances of this case. We hold that it does not.

In *Troxel*, the court recognized a parental presumption where a "breathtakingly broad" visitation statute permitted a state court to order visitation rights to a nonparent if it found that visitation would serve the best interests of a child, without any special consideration of the parent's decision about the child's best interest. 530 US at 67. The plurality explained that

> "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

Id. at 68-69. Thus, the presumption recognized in *Troxel* was viewed as a protection against the state's ability to arbitrarily intrude upon the parent-child relationship by ordering visitation rights without giving special weight or deference to a fit parent's objection to the visitation.

This is not a case where a nonparent has sought to establish a parent-child relationship or the state has arbitrarily intruded upon such a relationship. Here, mother and father requested and received court approval of a marital settlement agreement acknowledging that grandmother "has been the primary custodian of [daughter] since [her] birth" and expressing the parents' desire that grandmother "be awarded sole legal and physical custody of their minor child." The state did not—by way of a third-party statute or otherwise—inject itself into the private realm of the family to question that parental decision. The parties abided by the terms of the stipulated dissolution judgment until mother initiated this modification proceeding three years later. By that time, grandmother had been the primary caretaker of daughter for nearly five years of her life. From the time

mother moved to Virginia—when daughter was one year old—until the hearing on mother's motion, mother had had visitation with daughter on only five occasions. No visitation had occurred in Virginia, and mother had not visited with daughter during the year preceding the hearing. Thus, mother had fostered a limited parental relationship with daughter. In addition, a parent's due process rights are not static and may vary in extent and degree depending on their exercise. *See Lehr v. Robertson*, 463 US 248, 259-60, 103 S Ct 2985, 77 L Ed 2d 614 (1983) (noting distinction between "a mere biological relationship and an actual relationship of parental responsibility" for due process purposes). Under the facts of this case, we conclude that mother is not entitled to the presumption that her current decision that daughter should return to her custody is in daughter's best interest.

That does not resolve all of the issues presented in this case, however. Mother also contends that the trial court violated her due process rights by requiring her to demonstrate a substantial change in circumstances to regain custody of her daughter. Mother's argument is that *Troxel* prohibits applying the change-in-circumstances rule here because its application would impose an undue burden on her as a parent in seeking to regain custody of her child from a nonparent.

When a court initially makes a grant of child custody in a dissolution judgment, ORS 107.135 governs any modification of that custody provision. As relevant here, ORS 107.135 provides:

> "(1) The court may at any time after a judgment of *** dissolution of marriage *** is granted, upon the motion of either party ***:
>
> "(a) Set aside, alter or modify any portion of the judgment that provides for *** the custody, parenting time, visitation, support and welfare of the minor children ***."

Generally, a parent seeking modification under ORS 107.135 must show that (1) circumstances relevant to the capacity of the moving party or the legal custodian to take care of the child have changed substantially since the original judgment or the last custody order, and (2) it would be in the child's best interest to change custody from the legal custodian to

the moving party. *Boldt and Boldt*, 344 Or 1, 9, 176 P3d 388, *cert den*, 555 US 814 (2008); *State ex rel Johnson v. Bail*, 325 Or 392, 397, 938 P2d 209 (1997) (tracing origin of change-in-circumstances rule to this court's decision in *Merges v. Merges*, 94 Or 246, 257-58, 186 P 36 (1919)).[6]

ORS 107.135 contemplates a mechanism for resolving disputes between two parents relating to their minor children, providing that a court may modify the custody portion of a dissolution judgment upon the motion of either party to the dissolution. ORS 107.135(1)(a). In the typical situation, one party to the dissolution—a parent—moves to modify rights *vis-à-vis* the other party—a parent. Up to this point, the cases in which Oregon appellate courts have applied the change-in-circumstances rule under ORS 107.135 have all involved disputes between two parents. *See, e.g.*, *Boldt*, 344 Or at 9-10 (applying change-in-circumstances rule in custody modification action between mother and father); *Bail*, 325 Or at 399-400 (same); *Henrickson v. Henrickson*, 225 Or 398, 402-05, 358 P2d 507 (1961) (same). The rationale for the judicially created rule is that, unless the parent seeking a custody change establishes that the facts that formed the basis for the prior custody determination have changed substantially, the prior custody determination "is preclusive with respect to the issue of the best interests of the child under the extant facts." *Bail*, 325 Or at 398. The main purposes of the rule are "to avoid repeated litigation over custody and to provide a stable environment for children." *Ortiz and Ortiz*, 310 Or 644, 649, 801 P2d 767 (1990).

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[6] In determining whether a custody modification would be in a child's best interests, a court is required to consider the following factors:

"(a) The emotional ties between the child and other family members;

"(b) The interest of the parties in and attitude toward the child;

"(c) The desirability of continuing an existing relationship;

"(d) The abuse of one parent by the other;

"(e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and

"(f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child."

ORS 107.137(1).

Thus, the change-in-circumstances rule is not a statutory requirement, but rather a judicially created one. ORS 107.135 does not mandate the application of that rule. *See Bail*, 325 Or at 397 (observing that this court first announced the rule in *Merges*, 94 Or 246). Because the change-in-circumstances rule is judicially created, this court has the authority to determine on prudential grounds whether to create an exception to the change-in-circumstances rule in fact situations similar to those presented in this case.

We need not decide in this case, however, whether the trial court should have applied the change-in-circumstances rule to mother. In this case, the trial court did not base its decision to deny mother's motion for modification solely on her failure to demonstrate a change in circumstances. After a hearing on the merits, the trial court considered whether a change in custody was in the child's best interest. Indeed, the trial court clearly considered grandmother's evidence compelling in reaching its decision regarding the best interests of the child. Thus, mother was not prejudiced by the trial court's determination that she had not demonstrated a substantial change in circumstances. We therefore do not find it necessary to address mother's constitutional challenge to the application of the rule.

Finally, we review the trial court's determination that the child's best interests would not be served by a change in custody. The standard of review of a trial court's best interest determination in a custody modification proceeding is for abuse of discretion. *Godfrey v. Godfrey*, 228 Or 228, 236, 364 P2d 620 (1961), *overruled on other grounds by Hawkins v. Hawkins*, 264 Or 221, 504 P2d 709 (1972). Here, the trial court found that daughter had lived with grandmother "for the past seven formative years" of her life. As noted, at the time of hearing, mother had visited daughter a total of five times. The court found that daughter was well-settled in her school, and that she had a support network of friends and members of father's family in Oregon. The court also found that daughter is "strongly bonded" to grandmother and that mother's plan to move daughter to Virginia would "uproot [daughter] from the only home (Oregon) she has ever known."

In ruling on mother's motion, the trial court carefully considered the factors listed in ORS 107.137(1), including the emotional ties between daughter and other family members, the interest of the parties in and attitude toward the child, the desirability of continuing an existing relationship, and the preference for daughter's primary caregiver. *See* ORS 107.137(1) (listing the factors for courts to consider to determine the best interests of the child when granting custody). The court concluded that mother's motion to modify the dissolution judgment was not in the best interest of the child, and we affirm that determination.[7] *Godfrey*, 228 Or at 236; *see also Bail*, 325 Or at 401 (evidence sufficient to support trial court conclusion that custody modification decision in child's best interest). We therefore affirm the decision of the Court of Appeals as to the custody portion of mother's motion to modify the dissolution judgment. We remand to the trial court for further proceedings regarding mother's motion to modify that judgment with respect to parenting time and child support.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court to rule on mother's request to modify parenting time and child support.

[7] In its letter opinion, the trial court encouraged mother to reintegrate herself into daughter's life and build her relationship with daughter:

> "Mother works as a prison guard in Virginia and has held that job since March 2008. There is no doubt that Mother wants to begin parenting [daughter], but on her own terms. If she relocated, found a job and reintegrated herself into [daughter]'s life, her chances for modification of the Judgment would be greatly enhanced."

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GRANDPARENTS AND PSYCHOLOGICAL PARENTS RIGHTS AND REMEDIES© (Rev. January 2015)

IMPORTANT LEGAL DEVELOPMENTS

DATE	LEGAL CHANGES AFFECTING GRANDPARENT AND THIRD PARTY VISITATION RIGHTS
June 2000	The United States Supreme Court issues *Troxel v. Granville.*
July 31, 2001	Oregon Laws Regarding Grandparent and Psychological Parent Rights were fundamentally modified by the 2001 Legislature. This legislation, amending ORS 109.119, which became law on July 31, 2001, was intended to make Oregon's law consistent with the US Supreme Court's decision in 2000, *Troxel v. Granville* and applies to all cases, including those filed or decided before the effective date of the new law.

June 10, 2004	TROXEL APPLIED IN OREGON – THE NEW STANDARD In *O'Donnell-Lamont and Lamont*, 337 Or 86 (2004), the Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. The Supreme Court's decision brings some much needed clarity to the application of *Troxel* as well as the post-*Troxel* version of ORS 109.119. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the statutory factors. "**The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the nonexclusive factors identified in ORS 109.119 (4)(b).**" *Id.* at 108.

1. The Presumption that a Legal Parent Acts in the Best Interest of the Child/Rebutting the Presumption.

Oregon law now establishes a presumption that a legal parent acts in the best interest of a child in cases where a third party seeks custody or visitation rights. The presumption may be rebutted by a number of factors, including:

i. If the petitioning person is or recently has been the child's primary caretaker;

ii. The legal parent is unwilling or unable to care adequately for the child;

iii. If the child would be psychologically, emotionally or physically harmed if no custody or visitation relief was ordered;

iv. The legal parent fostered, encouraged or consented to the relationship between the child and the third party;

v. Granting the requested relief would not substantially interfere with the custodial relationship between the legal parent and the child; and

vi. The legal parent unreasonably denied or limited contact between the child and the third party.

Upon the request of the legal parent or the third party, the court may order that a custody or visitation study be performed at the expense of either the legal parent, the third party or both. A attorney may be appointed for a children at the request of the child (mandatory appointment) or at the request of one of the parties (discretionary appointment).

2. Psychological Parents' Rights--Visitation.

a. Authority. ORS 109.119.

b. Eligibility.

Any person (not necessarily a blood relative) who has maintained "an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." The person must show a substantial degree of contact with the child for a period of at least a year. The person does not have to show that he or she had physical custody, only a relationship and substantial contact with the child. This statute applies to blood relatives and non-blood relatives, including grandparents, step-grandparents, stepparents and persons whose children have not established paternity. There is no longer a separate law that governs rights of grandparents. Grandparents must meet the same standards as other third parties. A petition may be filed in a new legal proceeding or through an existing guardianship or domestic relations proceeding. For interventions in juvenile court proceedings, see section 4B.

c. Relief Available.

The petitioning party must rebut the presumption that the legal parent acts in the best interest of the child. If the court finds "from clear and convincing evidence" that the presumption has been rebutted, the court may order reasonable visitation or contact rights if it is in the best interest of the child. "Clear and convincing evidence" is a higher legal standard than is normally required. It means substantially more than a preponderance of the evidence (more than 51 percent), but not as high a standard as that used in a criminal case--"beyond a reasonable doubt." The presumption may be rebutted by a number of factors. Attorney fees are available to the prevailing party.

3. **Psychological Parents' Rights--Custody.**

a. Authority. ORS 109.119.

b. Eligibility.

A person petitioning for custody under this statute must show a "child-parent relationship." The statute defines "child-parent relationship" as follows:

> "...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 foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months."

In other words, a person requesting custody must show that they had exclusive or shared physical custody of the child within six months before the petition. It does not include foster parents unless the relationship extended for a period of 12 months or more.

c. Relief Available.

If the required relationship is shown, and if the presumption that a legal parent acts in the best interest of the child is rebutted (see Section 1 above) the court may award custody to the third party or appropriate visitation rights if it is in the best interests of the child. Upon filing the petition, the court may also award temporary custody, pending a final hearing.

4. Intervention by Psychological Parents and Grandparents – ORS 109.119; ORS 419B.116; and ORS 419B.875.

Unless a person is allowed to "intervene" or granted rights of "limited participation", they are not parties, are not given formal notice of legal proceedings, and are not entitled to formally address the Court. Both grandparents, psychological parents and third parties may seek to intervene in family law proceedings affecting a child. Such persons may also seek to intervene in Juvenile Court proceedings.

a. Intervention in Circuit Court. ORS 109.119.

To intervene in circuit court, a person must allege that they have either a child-parent relationship or an ongoing personal relationship, as well as alleging facts that the intervention is in the best interest of the child. If allowed, Intervention will provide the intervener with formal notice of legal proceedings and the right to present evidence to the court. It does not, however, guarantee any substantiative relief in the form of custody, visitation or contact rights. To obtain such rights, the party must overcome the presumption of a legal parent (*see* Sections 1-3 above).

b. Intervention in Juvenile Court Proceedings. ORS 419B.116.

In order to intervene in a juvenile court proceeding, a person must allege and prove that he/she has had a "care giver relationship". The care giver relationship must have existed during the year preceding the initiation of the juvenile court proceeding, for at least 6 months during the juvenile court proceeding, or for at least one-half of the child's life if the child is less than 6 months of age. In order to demonstrate the care giver relationship, the person must also show physical custody or shared residence with the child, and that the person has provided the child on a daily basis with the love, nurturing and other necessities required to meet the child's psychological and physical needs. An intervener in a juvenile court proceeding will be given notice of court proceedings, the opportunity to present evidence and the opportunity to be considered as a visitation or placement resource for the child.*

c. Rights of Limited Participation In Juvenile Court. ORS 419B.875.

Persons who do not meet the care giver standards for full intervention may nevertheless qualify for rights of limited participation. The person must file a motion and affidavit with the juvenile court at least two weeks before a proceeding in the case in which participation is sought.* If the petition is granted, the court will determine what rights are given to the person, but rights will generally include at least notice of hearings and the right to present evidence.

** Persons seeking intervention or rights of limited participation in juvenile court must also prove to the court that the other participants (e.g., parents, child's attorney, Department of Human Services) cannot adequately present the case.*

5. Modification of Psychological Parents/Grandparent Visitation and Custody Orders.

a. Modification of Orders under Amended ORS 109.119.

Once a visitation or custody order is issued under ORS 109.119, there is no need to re-litigate the issue of the presumption of the natural parent. In visitation cases, the modification standard is the "best interest of the child." In custody cases, before the best interest standard is reached, a moving party will have to show that there has been a substantial and unanticipated change of circumstances.

b. Modification of Pre-*Troxel* Pre-Amended ORS 109.119 Orders.

In custody and visitation cases decided before *Troxel* and before Amended ORS 109.119, the modification standard is unclear. It may be necessary to litigate and demonstrate, in a modification proceeding, that the psychological parent or grandparent has overcome the constitutional presumption in favor of the natural parent.

6. Juvenile Court Proceedings.

a. Authority. ORS Chapter 419B (dependency); ORS Chapter 419C (delinquency, criminal--dispositional stage only).

b. How the State Obtains Custody of A Child.

The State of Oregon may obtain legal custody of a child if the child commits an act which would be a crime of they were adult, or if the child is subject to abuse, neglect, or abandonment by the parent or custodian. The state may also obtain custody of run-aways. When the state obtains custody, it almost always places the child with State Office for Services to Children and Families, now known as Department of Human Services (DHS), although it does have authority to place the child with a grandparent, blood relative or other appropriate person. DHS, by statute, must now take reasonable efforts to give notice to relatives and to favor relative placements over stranger placements. However, in the past this preference has often been ignored. Sometimes no contact is made with the extended family. Other times, DHS has a built-in prejudice against extended family because they fear the extended family will take the side of the former custodial parent and interfere with their efforts.

c. Rights of Third Parties in Juvenile Court.

Juvenile Court proceedings are usually open to the public, particularly in non-criminal matters. See Section 4 above for rights of intervention and limited participation by third parties. Apart from those rights, the court is not required to hear from an extended family member unless he or she is called as a witness by the state (through DHS) or a party (mother, father or the child--through their attorneys). However, if a legal grandparent of a child requests in writing and provides contact information to DHS, the agency must give the legal grandparent notice of a hearing concerning the child and give the legal grandparent an opportunity to be heard. This does not make the legal grandparent a party to the proceeding. Persons interested in obtaining or maintaining their relationship with a child in the custody of the state should consider hiring an attorney and filing for intervention or rights of limited participation (see discussion above) and stay in close contact with the following individuals:

i. DHS caseworker (consult phonebook for branch office nearest your home).

ii. Juvenile Court counselor (Multnomah County: **503.988.3460**; Washington County: **503.846.8861**; Clackamas County: **503.655.8342**).

iii. Court Appointed Special Advocate (CASA)--(In Multnomah County: **503.988.5115**; Washington County: **503.992.6728**; Clackamas County: **503.723.0521**) an advocate appointed by the court to look after the best interests of the child and report information to the court. Check with the Juvenile Court counselor for the name of the CASA, if one exists.

iv. Child's attorney -- a court may, but is not required to appoint an attorney for the child. Again, check with the court, through the Juvenile Court counselor, for the name of the attorney.

v. Attorneys for mother and father--again, check with the court to get in contact with mother or father's attorney.

vi. Citizens Review Boards (CRBs) – CRBs are volunteer panels established under state law assigned to review DHS cases approximately every six months. CRBs are volunteer citizens. While they do not participate directly in Juvenile Court proceedings, they prepare reports and make recommendations regarding whether DHS is on track in its placement and whether the child needs or is receiving appropriate representation from the CASA or attorney. (For general information about CRBs in Multnomah, Washington, or Clackamas Counties contact the Portland Regional office at 503.731.3007. Otherwise contact Rebecca Regello, Regional Field Manager for Multnomah and Washington Counties at 503.731.3206 or Dave Smith, Regional Field Manager for Clackamas County at 503.731.4356)

d. Rights of Grandparents in Juvenile Court Proceedings.

i. Notice and the Opportunity To Be Heard (ORS 419B.875(7))

DHS is required to make diligent efforts to identify and obtain contact information for the grandparents of a child or ward committed to the department's custody. 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. Therefore concerned grandparents should give written notice and their contact information to DHS so they will be notified of hearings. If a grandparent is present at a hearing concerning a child or ward, the court shall give the grandparent an opportunity to be heard. This does not make the legal grandparent a party to the proceeding.

ii. Court Ordered Visitation and Contact (ORS 419B.876)

At a hearing concerning a child in the legal custody of DHS, a court may order visitation and/or contact and communication rights to a grandparent of the child. A grandparent seeking such rights must notify DHS and the other parties to the case at least 30 days before the date of hearing. To qualify, such grandparent must show that there was a pre-existing ongoing relationship with the child prior to the establishment of the wardship and that court ordered visitation or contact will not negatively impact the court's permanent plan for the child.

e. Special Concerns.

i. If you do not believe the child's interests are being adequately represented, you may ask the court, through the Juvenile Court counselor, to appoint an attorney for the child.

ii. It is important in Juvenile Court that your primary goal be the best interests of the child. The court, and particularly DHS, are extremely wary where an extended family member strongly takes the position of the parent who has lost custody. In such a case, DHS may feel that the extended family member is interfering with their attempts to rehabilitate the parent, and DHS fears that the extended family member may not be able to protect the child. In some cases, it may be appropriate to strongly advocate the position of the parent who has lost custody. In other cases, it may be more appropriate to give emotional (and sometimes financial) support to the parent, without "taking their side."

iii. The state provides a foster care subsidy to children placed with strangers, but in many cases denies that subsidy to children placed with extended family members. An extended family member who receives physical custody of the child should make every effort to seek any foster care subsidy which may be available (TANF, Title IV(E); Non-Needy Relative Grant and/or the Oregon Health Plan).

7. Adoption.

a. Authority. ORS 109.305-109.410.

b. Eligibility.

Any person may seek to adopt a child. However, an adoption will not be granted unless the consent (or a waiver of the consent) is received from the child's birth parents. If the child's birth parents' rights have been terminated, then DHS must give its consent to the adoption. A birth parent's consent may be waived if paternity has never been established or if the birth parent willfully neglected or abandoned the child for at least one year prior to the adoption petition.

c. Relief Available.

If the adoption is granted, the person becomes the legal parent of the child. The effect of the adoption is to terminate the birth parents' rights.

d. Special Concern--Adoption and the Termination of Grandparents' Rights.

Since an adoption terminates the rights of the birth parents, it also has the effect of terminating the blood relationship of the grandparents. Therefore, it may be important to intervene in an adoption proceeding to protect your rights. Intervention has its own problems.

Notice to grandparents is required only in stepparent adoptions and then a motion for visitation rights must be filed within 30 days (see Section 6(e) below).

In non-stepparent adoptions. you may never find out about a pending adoption, because the law does not require notice to be given to extended family members--only to birth parents. Even if you do intervene, the court may permit the adoption to proceed and not award you any visitation with the child. Although it has not been conclusively determined, when a conflict exists between an extended family member and the new adoptive family, the court will give preference to the rights and concerns of the new adoptive family over the extended family member.

A grandparent or current caretaker who seeks but is denied a request to be the adoptive parent may seek a review by DHS of the denial and thereafter a limited

right to appeal to the Circuit Court for a review of the agency (DHS) decision.

See also Section 6(d) above (notice to grandparents of DHS hearings) and Section 8 below regarding guardianship options as alternatives to adoption.

e. Notice/Visitation Rights in Stepparent Adoptions. ORS 109.309; ORS 109.332.

In stepparent adoptions only, grandparents must be given notice of the proposed stepparent adoption by receiving a true copy of the adoption petition. Within 30 days of service of the petition, a grandparent may file a motion with the court seeking visitation rights after the adoption. Visitation rights will only be awarded if it can be established, by clear and convincing evidence, that visitation with the grandparent(s) is in the best interests of the child; that a substantial relationship existed prior to the adoption; and that establishing visitation rights will not interfere with the relationship between the child and the adoptive family. This law does not apply to independent or Department of Human Resources (DHS)-sponsored adoptions.

f. Open Adoption Agreements. ORS 109.305.

In both stepparent adoptions and non-stepparent adoptions (including independent and DHS cases), birth parents and adoptive parents may sign an "open adoption" agreement, allowing visitation with grandparents. This agreement is enforceable by the courts but does not otherwise affect the adoption.

8. Guardianship.

a. Authority. ORS 109.056, 125.055, ORS 419B.365, ORS 419B.366.

b. Types of Guardianship.

i. Juvenile Court Permanent Guardianship. The Juvenile Court may appoint a permanent guardian for a child *as an alternative to a formal termination of parental rights*. Although parental rights are not terminated, the parent could never have physical custody restored. The terms of contact between the child and the parent is determined by the Court and the guardian (ORS 419B.365).

ii. Juvenile Court Non Permanent Guardianship. The Juvenile Court may now also terminate DHS involvement and, maintain wardship but award a more traditional guardianship to a foster parent, relative or third-party. Unlike a permanent guardianship, this guardianship option provides for modification and a potential future termination and restoration of a natural parent's rights (ORS 419B.366).

iii. Civil Court Guardianship. Any person may apply to the court to become

a guardian of a minor under ORS 125.055. A person petitioning for a guardianship to the court must give appropriate notice to the child, the child's recent custodians, and the child's birth parents. In addition, the person must show a need for the guardianship, because the child's essential needs for physical health and safety are not being met. The court must find by clear and convincing evidence that the guardianship is necessary. The Court of Appeals has applied *Troxel v. Granville* to the guardianship context and therefore, to establish a guardianship, over the objection of a birth parent, it will be necessary to overcome the constitutional presumption in favor of the birth parent (see Section 1 above).

iv. Delegation of Parental Powers. Under another statute, ORS 109.056, a parent, through a "power of attorney," can delegate their parental powers to another for a period not exceeding six months. This does not need to be filed with a court, but the power of attorney should be properly drafted and signed before a notary.

v. Relative Caregiver Authority by Affidavit. ORS 109.575 authorizes a relative caregiver to consent to medical treatment and education for minors left in their care. The caregiver is require to complete a specific affidavit to utilize this authority and to attempt to give notice to the legal parent of his or her intent to exercise this authority.

c. Relief Available.

A guardian has the powers and responsibilities of a parent, except that the guardian is not responsible to provide his or her personal funds to support the child. A guardian may petition for appropriate public assistance or child support from one or both of the child's parents.

CAUTION: This information is a general guide to your rights. Specific rights and remedies will vary with each case. This guide is not a substitute for legal advice. You should consult with an attorney in any matter concerning your rights or the rights of your children or grandchildren. You may contact the Oregon State Bar Lawyer Referral Service for the name and number of an attorney who may be able to assist you. **Telephone: 503.684.3763 or toll-free in Oregon 1.800.452.7636.**

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GRANDPARENT AND PSYCHOLOGICAL PARENT RIGHTS IN OREGON AFTER *TROXEL*© - UPDATE (*Rev. January 2015)*

The Rise and Fall of the Best Interests Standard

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INTRODUCTION

Grandparents, foster parents, and other third-parties play an increasing role in the care of children, statewide and nationally. According to a Pew Research Center analysis of recent US Census Bureau data, almost 7 million U.S. children live in households with at least one grandparent. Of this total, 2.9 million (or 41%) were in households where a grandparent was the primary caregiver, an increase of 16% since 2000. According to the Census Bureau (19%) percent of these families (551,000 grandparents) fall below the poverty line. There are on average 8000 children in foster care on any given day in Oregon. The relationship between these third parties and natural or biological parents has resulted in a significant and evolving body of case law and statutory changes.

In the seminal case of *Troxel v. Granville,* 530 US 57, 120 S. Ct. 2054,147 L.Ed 2d 49 (2000), the United States Supreme Court held that awarding visitation to a non-parent, over the objections of a parent is subject to constitutional limitations. The court invalidated, as applied, a Washington statute authorizing "any person" to petition for visitation rights "at any time" and providing that the court may order such visitation if it serves the "best interest of the child," on the ground that the statute violates a natural parent's right to substantive due process. The court specifically recognized as a fundamental liberty interest, the "interest of parents in the care, custody and control of their children." The *Troxel* case has affected laws in virtually all of the states, and has significantly reduced previously recognized rights of grandparents, step-parents and psychological parents in favor of birth parents.

In 2001, Oregon's legislature responded to *Troxel* by radically restructuring Oregon's psychological parent law (ORS 109.119) and in so doing, eliminated ORS 109.121-123, which gave specific rights to grandparents.

Before discussing the implications of *Troxel* and amended ORS 109.119, it is important to understand Oregon's law before *Troxel*.

GRANDPARENT AND THIRD PARTY RIGHTS IN OREGON BEFORE *TROXEL*

Before *Troxel*, Oregon's jurisprudence evolved from a strict preference in favor of natural parents to a fairly straight-forward application of the best interests test. In *Hruby and Hruby*, 304 Or 500 (1987), the Oregon Supreme Court held that the best interest standard is not applicable in custody disputes between natural parents and other persons, and that in custody disputes, a natural parent would not be deprived of custody absent "some compelling threat to their present or future well-being." That standard remained in place until 1999 when in *Sleeper and Sleeper*, 328 Or 504 (1999), *Hruby* was effectively swept aside and the court ordered that the best interest standard be applied to psychological parent cases. In *Sleeper*, the stepfather, a primary caretaker, obtained custody over biological mother. (See also *Moore and Moore*, 328 Or 513 (1999)). Significantly, the court limited *Sleeper* holding, applying the best interests test under the statute, by making it limited by an undefined "supervening right" of a natural parent. Therefore, before *Troxel*, once a third party had met the test for being psychological parent (*de facto* custodian), the best interest standard was applied and the psychological parent competed on an equal footing with the natural parent, subject to the natural parent's "supervening right." This "supervening right" was defined and applied in the post *Troxel* cases.

TROXEL APPLIED – THE NEW STANDARD

In ***O'Donnell-Lamont and Lamont,*** 337 Or 86 (2004), the Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. The Supreme Court's decision brings some much needed clarity to the application of *Troxel* as well as the post-*Troxel* version of ORS 109.119. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the statutory factors. "The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the non-exclusive factors identified in ORS 109.119 (4)(b)." *Id*. at 108.

Notwithstanding this broad and encompassing standard, the more-recent case law demonstrates that two factors, parental fitness and harm to the child, are by far the most significant. See also discussion below on "*Demonstrating Harm to the Child - What Is Enough*?"

DIGEST OF POST-*TROXEL* CASES IN OREGON

1. ***Harrington v. Daum***, 172 Or App 188 (2001), CA A108024. Visitation awarded to deceased mother's boyfriend over objection of birth father, reversed. After *Troxel* v. *Granville*, application of ORS 109.119 requires that "significant weight" be given to a fit custodial parent's decision. The parent's constitutional right is a supervening right that affects the determination of whether visitation is appropriate and prevents the application of solely the best interest of the child standard.

2. ***Ring v. Jensen***, 172 Or App 624 (2001), CA A105865. Award of grandparent visitation, reversed. Grandmother's difficulty in obtaining the amount of visitation desired does not demonstrate the pattern of denials of reasonable opportunity for contact with the child as required by ORS 109.121.

3. ***Newton v. Thomas***, 177 Or App 670 (2001), CA A109008. Interpreting a prior version of ORS 109.119, the court reversed an award of custody to the grandparents in favor of the mother. Under ORS 109.119, a court may not grant custody to a person instead of a biological parent based solely on the court's determination of what is in the child's best interest. The court must give significant weight to the supervening fundamental right of biological parents to the care, custody and control of their children. In a footnote, the court declined to consider the impact of the amendments to ORS 109.119 enacted by the 2001 Legislature.

4. ***Williamson v. Hunt***, 183 Or App 339 (2002), CA A112192. Award of grandparent visitation reversed. The retroactive provisions of amended ORS 109.119 apply only to cases filed under the 1999 version of that statute and former ORS 109.121. Parental decisions regarding grandparent visitation are entitled to "special weight." Without evidence to overcome the presumption that a parent's decision to limit or ban grandparent visitation is not in the best interest of the child, the trial court errs in ordering such visitation (but see *Lamont*, Case Note 6).

5. ***Wilson and Wilson***, 184 Or App 212 (2002), CA A113524. Custody of stepchild awarded to stepfather, along with parties' joint child, reversed. Under *Troxel*, custody of the mother's natural child must be awarded to fit birth mother and because of the sibling relationship, custody of the parties' joint child must also be awarded to mother. [See Case Note 20 discussion below for Court of Appeals decision on remand from Supreme Court.]

6. ***O'Donnell-Lamont and Lamont***, 184 Or App 249 (2002), CA A112960. Custody of 2 children to maternal grandparents, reversed in favor of birth father (mother deceased). To overcome the presumption in favor of a biological parent under ORS 109.119(2)(a) (1997), the court must find by a preponderance of the evidence either that the parent cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody. A Petition for Certification of Appeal has been filed by birth father with the US Supreme Court and is pending at this time. [See discussion at Case Note 12 for *en banc* decision and discussion above, and Case Note 16 below for Supreme Court decision.]

7. ***Moran v. Weldon***, 184 Or App 269 (2002), CA A116453. *Troxel* applied to an adoption case. Adoption reversed where father's consent was waived exclusively based upon the incarceration provisions of ORS 109.322. *Troxel* requires that birth father's consent may not be waived without "proof of some additional statutory ground for terminating parental rights***."

8. ***State v. Wooden***, 184 Or App 537, 552 (2002), CA A111860. Oregon Court of Appeals, October 30, 2002. Custody of child to maternal grandparents, reversed in favor of father (mother murdered). A legal parent cannot avail himself of the "supervening right to a privileged position" in the decision to grant custody to grandparents merely because he is the child's biological father. Father may be entitled to assert parental rights if he grasps the opportunity and accepts some measure of responsibility for the child's future. To overcome presumption in favor of father, caregiver grandparents must establish by a preponderance of the evidence that father cannot or will not provide adequate love and care for the child or that moving child to father's custody would cause undue physical or psychological harm. Rather than order an immediate transfer, the court ordered that birth father be entitled to custody following a 6-month transition period. [See also Case Note 20, *Dennis,* for an example of another transition period ordered.]

9. ***Strome and Strome***, 185 Or App 525 (2003), *rev. allowed*, 337 Or 555 (2004), CA A111369. Custody of 3 children to paternal grandmother reversed in favor of birth father. The Court of Appeals ruled that where the biological father had physical custody for 10 months before trial, and had not been shown to be unfit during that time, Grandmother failed to prove by a preponderance of the evidence that father cannot or will not provide adequate love and care for the children or that placement in his custody will cause an undue risk of physical or psychological harm, in spite of father's past unfitness. [See discussion below Case Note 22 for Court of Appeals decision on remand from Supreme Court.]

10. ***Austin and Austin***,185 Or App 720 (2003), CA A113121. In the first case applying revised ORS 109.119 and, in the first case since *Troxel*, the Court of Appeals awarded custody to a third party (step-parent) over the objection of a birth parent (mother). The constitutionality of the revised statute was not raised before the court. The court found specific evidence to show that mother was unable to adequately care for her son. The case is extremely fact specific. Father had been awarded custody of three children, two of whom were joint children. The third child at issue in the case, was mother's son from a previous relationship. Therefore, sibling attachment as well as birth parent fitness were crucial to the court's decision. Petition for Review was filed in the Supreme Court and review was denied [337 Or 327 (2004)].

11. ***Burk v. Hall***, 186 Or App 113 (2003), CA A112154. Revised ORS 109.119 and *Troxel* applied in the guardianship context. In reversing a guardianship order the court held that: "***guardianship actions involving a child who is not subject to court's juvenile dependency jurisdiction and whose legal parent objects to the appointment of guardian are – in addition to the requirements of ORS 125.305 – subject to the requirements of ORS 109.119." The constitutionality of amended ORS 109.119 was not challenged and therefore not addressed by this court.

12. ***O'Donnell-Lamont and Lamont***, 187 Or App 14 (2003) (*en banc*), CA A112960. The *en banc* court allowed reconsideration and held that the amended psychological parent law [ORS 109.119 (2001)] was retroactively applicable to <u>all</u> petitions filed before the effective date of the statute. The decision reversing the custody award to grandparent and awarding custody to father was affirmed. Although 6 members of the court appeared to agree that the litigants were denied the "***fair opportunity to develop the record because the governing legal standards have changed***," a remand to the trial court to apply the new standard was denied by a 5 to 5 tie vote. [See discussion at Case Note 6 and Case Note 16 for Supreme Court decision.]

13. ***Winczewski and Winczewski***, 188 Or App 667 (2003), *rev. den*. 337 Or 327 (2004), CA A112079. [Please note that the *Winczewski* case was issued before the Supreme Court's decision in *Lamont*.] The *en banc* Court of Appeals split 5 to 5 and in doing so, affirmed the trial court's decision, awarding custody of two children to paternal grandparents over the objection of birth mother, and where birth father was deceased. For the first time, ORS 109.119 (2001) was deemed constitutional as applied by a majority of the members of the court, albeit with different rationales. Birth mother's Petition for Review was denied by the Supreme Court.

14. ***Sears v. Sears & Boswell***, 190 Or App 483 (2003), *rev. granted* on remand, 337 Or 555 (2004), CA A117631. The court reversed the trial court's order of custody to paternal grandparents and ordered custody to mother where the grandparents failed to rebut the statutory presumption that mother acted in the best interests of a 4-year old child. Mother prevailed over grandparents, notwithstanding the fact that grandparents were the child's primary caretakers since the child was 8 months old, and that mother had fostered and encouraged that relationship. *Sears* makes it clear that the birth parent's past history and conduct are not controlling. Rather, it is birth parent's present ability to parent which is the pre-dominate issue. [See Case Note 19 for decision on remand.]

15. ***Wurtele v. Blevins***, 192 Or App 131 (2004), *rev. den*., 337 Or 555 (2004), CA A115793. Trial court's custody order to maternal grandparents over birth father's objections. A custody evaluation recommended maternal grandparents over birth father. The court found compelling circumstances in that if birth father was granted custody, he would deny contact between the child and grandparents, causing her psychological harm, including threatening to relocate with the child out-of-state.

16. ***O'Donnell-Lamont and Lamont*****,** 337 Or 86, 91 P3d 721 (2004), *cert. den*., 199 OR App 90 (2005), 125 S Ct 867 (2005), CA A112960. The Oregon Supreme Court reversed the Court of Appeals and restored custody of the children to grandparents. Contrary to several prior Court of Appeals decisions, the Supreme Court held that it is not necessary that a third party overcome the *Troxel* birth parent presumption by demonstrating that the birth parent would harm the child or is unable to care for the child. Rather, the Supreme Court adhered to the legislative standard that "the presumption could be overcome by a showing, based on a preponderance of the evidence, that the parent does not act in the best interest of the child." *Id.* at 107. While a parent's unfitness or harm to a child can be strong evidence to overcome the *Troxel* (and ORS 109.119) birth parent presumption, that presumption may be rebutted by evidence of any of the enumerated factors as well as other evidence not specifically encompassed by one of the

statutory factors. “The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the non-exclusive factors identified in ORS 109.119(4)(b).”

17. ***Meader v. Meader***, 194 Or App 31 (2004), CA A120628. Grandparents had previously been awarded visitation of two overnight visits per month with three grandchildren and the trial court’s original decision appeared to be primarily based upon the best interests of the children and the original ruling was considered without application of the *Troxel* birth parent presumption. After the Judgment, birth parents relocated to Wyoming and grandparents sought to hold parents in contempt. Parents then moved to terminate grandparents’ visitation. At the modification hearing, before a different trial court judge, parents modification motion was denied on the basis that birth parents had demonstrated no “substantial change of circumstances.” *Id.* at 40.

The Court of Appeals reversed and terminated grandparents’ visitation rights. The court specifically found that in a modification proceeding no substantial change of circumstances was required. *Id.* at 45. Rather, the same standard applied a parent versus parent case [see *Ortiz and Ortiz*, 310 Or 644 (1990)] was applicable, that is the best interest of the child. The evidence before the modification court included unrebutted expert testimony that the child’s relationship with grandmother was “very toxic; that the child did not feel safe with grandmother; that the child’s visitation with grandmother was a threat to her relationship with Mother and that such dynamic caused the child to develop PTSD.” The court also found “persuasive evidence” that the three children were showing signs of distress related to the visitation.

18. ***Van Driesche and Van Driesche,*** 194 Or App 475 (2004), CA A118214. The trial court had awarded substantial parenting time to step-father over birth mother’s objections. The Court of Appeals reversed finding that the step-parent did not overcome the birth parent presumption. This was the first post - *Lamont* (Supreme Court) case. Although mother had encouraged the relationship with step-father while they were living together, and although such evidence constituted a rebuttal factor under ORS 109.119, this was not enough. The court found that such factor may be given “little weight” when the birth parent’s facilitation of the third-party’s contact was originally in the best interest of the child but was no longer in the best interest of the child after the parties’ separation. Step-father contended that the denial of visitation would harm the children but presented no expert testimony.

19. ***Sears v. Sears & Boswell***, 198 Or App 377 (2005), CA A117631. The Court of Appeals, after remand by the Supreme Court to consider the case in light of *Lamont* [Case Note 16], adheres to its original decision reversing the trial court’s order of custody to maternal grandparents and ordering custody to birth mother. Looking at each of the five rebuttal factors as well as under the “totality of the circumstances”, birth mother prevailed again. Grandparents’ strongest factor, that they had been the child’s primary caretaker for almost two years before the custody hearing, was insufficient. Specifically, grandparents did not show birth mother to be unfit at the time of trial, or to pose a serious present risk of harm to the child.

20. ***Dennis and Dennis***, 199 Or App 90 (2005), CA A121938. The trial court had awarded custody of father's two children to maternal grandmother. Based upon ORS 109.119 (2001) and *Lamont*, the Court of Appeals reversed, finding that grandmother did not rebut the statutory presumption that birth father acts in the best interest of the children. The case was unusual in that there was apparently no evidentiary hearing. Rather, the parties stipulated that the court would consider only the custody evaluator's written report (in favor of grandmother) and birth father's trial memorandum, in making its ruling on custody. Birth father prevailed notwithstanding the fact that he was a felon, committed domestic violence toward birth mother, and used illegal drugs. However, birth father rehabilitated himself and re-established his relationship with his children. Although grandmother had established a psychological parent relationship and had been the long-term primary caretaker of the children, she was not able to demonstrate that birth father's parenting at the time of trial was deficient or inadequate; nor was grandmother able to demonstrate that a transfer of custody to birth father would pose a present serious risk of harm to the children as grandmother's concerns focused of birth father's past behaviors. The case continued the Court of Appeals trend in looking at the present circumstances of the birth parent rather than extenuating the past deficiencies. The case is also significant in that rather than immediately transferring custody of the children to birth father, and because birth father did not request an immediate transfer, the case was remanded to the trial court to develop a transition plan and to determine appropriate parenting time for grandmother. Birth father's request for a "go slow" approach apparently made a significant positive impression with the court. [See also Case Note 8, *State v. Wooden*, for an example of another transition plan.]

21. ***Wilson and Wilson*** [see Case Note 5 above]. Birth father's Petition for Review was granted [337 Or 327 (2004)] and remanded to the Court of Appeals for reconsideration in light of *Lamont*. On remand [199 Or App 242 (2005)], the court upheld its original decision, which found both parties to be fit. Birth father failed to overcome the presumption that birth mother does not act in the best interest of birth mother's natural child/father's stepchild; therefore, for the same reasons as the original opinion, custody of the party's joint child must also be awarded to birth mother.

22. ***Strome and Strome***, 201 Or App 625 (2005). On remand from Supreme Court to reconsider earlier decision in light of *Lamont*, the court affirms its prior decision (reversing the trial court) and awarding custody of the 3 children to birth father, who the trial court had awarded to paternal grandmother. Although birth father had demonstrated a prior interference with the grandparent-child relationship, the rebuttal factors favored birth father. The court particularly focused on the 10 months before trial where birth father's parenting was "exemplary." Because the children had remained in the physical custody of grandmother for the many years of litigation, the case was remanded to the trial court to devise a plan to transition custody to father and retain "ample contact" for grandmother. [See Case Note 9 above.]

23. ***Poet v. Thompson*****,** 208 Or App 442 (2006), CA A129220. Rulings made resulting from a pre-trial hearing to address issues of temporary visitation or custody under ORS 109.119, are not binding on the trial judge as the "law of the case." A party who does not establish an "ongoing personal relationship" or "psychological parent relationship" in such a hearing may attempt to establish such relationships at trial notwithstanding their failure to do so at the pre-trial hearing. Note the procedures and burdens to establish temporary visitation or custody or a temporary protective order or restraint are not established by statute or case law.

24. ***Jensen v. Bevard and Jones***, 215 Or App 215 (2007), CA A129611. The trial court granted grandmother custody of a minor child based upon a "child-parent relationship" in which grandmother cared for the child on many, but not all, weekends when mother was working. The Court of Appeals reversed, finding that grandmother's relationship did not amount to a "child-parent" relationship under ORS 109.119 and therefore, was not entitled to custody of the child. Mother and grandmother did not reside in the same home.

Practice Note: *It is unclear in this case whether grandmother also sought visitation based upon an "ongoing personal relationship." [ORS 109.119(10)(e)]. If she had, she may have been entitled to visitation but would have had to prove her case by a clear and convincing standard. Where a third-party's "child-parent" relationship is not absolutely clear, it is best to alternatively plead for relief under the "ongoing personal relationship," which is limited to visitation and contact only.*

25. ***Muhlheim v. Armstrong***, 217 Or App 275 (2007), CA A129926 and A129927. The Court of Appeals reversed the trial court's award of custody of a child to maternal grandparents. The child had been in an unstable relationship with mother and the child was placed with grandparents by the Department of Human Services (DHS). Although father had only a marginal relationship with the child, the court nevertheless ruled that he was entitled to custody, because the grandparents had not sufficiently rebutted the parental presumption factors set forth in ORS 119.119(4)(b). Grandparents had only been primary caretakers for 5 months proceeding the trial. Father had a criminal substance abuse history but "not so extensive or egregious to suggest that he is currently unable to be an adequate parent." While stability with grandparents was important and an expert had testified that removal of the child would "cause significant disruption to her development," those factors did not amount to "a serious present risk of psychological, emotional, or physical harm to the child." As in *Strome* (Case Note 22 above), the court directed the trial court to establish a transition plan to transfer custody to father and preserve ample contact between the child and her relatives.

Practice Note: *This case follows the general trend of preferring the birth parent over the third-party, and the downplaying of issues related to a birth parent's prior history, lack of contact, and disruption to the stability of the child. It may have been important in this case that grandparents hired a psychologist to evaluate their relationship, but the psychologist never met with father, nor was a parent-child observation performed.*

26. ***Middleton v. Department of Human Services***, 219 Or App 458 (2008), CA A135488. This case arose out of a dispute over the placement of a child between his long-term foster family and his great aunt from North Dakota, who sought to adopt him. DHS recommended that the child be adopted by his foster parents. The relatives challenged the decision administratively and then to the trial court under the Oregon Administrative Procedures Act (APA) (ORS 183.484). The trial court set aside the DHS decision, preferring adoption by the relatives. On appeal, the case was reversed and DHS's original decision in favor of the foster parent adoption was upheld. The court emphasized that its ruling was based upon the limited authority granted to it under the Oregon APA, and this was not a "best interest" determination. Rather, DHS had followed its rules, the rules were not unconstitutional, and substantial evidence in the record supported the agency decision. Since substantial evidence supported placement with either party, under the Oregon APA the court was not authorized to substitute its judgment and set aside the DHS determination.

27. ***Nguyen and Nguyen***, 226 Or App 183 (2009), CA A138531. Following the trend in recent cases, an award of custody to maternal grandparents was reversed and custody was awarded to birth mother. Mother had been the primary caretaker of the minor child (age 7 at the time of trial) but became involved in a cycle of domestic violence between herself, the child's father, and others; residential instability, and drug use. Mother also had some mental health issues in the past. At trial, the custody evaluator testified that mother was not fit to be awarded custody at the time of trial, but could be fit if she could make "necessary changes and provide stability and consistency ***." As to parental fitness, the most important issue according to the court, was that mother's history did not make her ***presently*** unable to care adequately for the child. As to the harm to the child element, the court repeated its past admonition that the evidence must show a "serious present risk" of harm. It is insufficient to show "***that living with a legal parent ***may*** cause such harm." As in *Strome* (Case Note 22), the court directed the trial court to establish an appropriate transition plan because of the child's long-term history with grandparents.

28. ***Hanson-Parmer, aka West and Parmer***, 233 Or App 187 (2010), CA A133335. The trial court determined that husband was the psychological parent of her younger son, and is therefore entitled to visitation with him pursuant to ORS 109.119(3)(a). Husband is not biological father. On appeal, the dispositive legal issue was whether husband had a "child-parent relationship." ORS 109.119(10)(a) is a necessary statutory prerequisite to husband's right to visitation in this case. Held: Husband's two days of "parenting time" each week is insufficient to establish that husband "resid[ed] in the same household" with child "on a day-to-day basis" pursuant to ORS 109.119(10)(a). Reversed and remanded with instructions to enter judgment including a finding that husband is not the psychological parent of child and is not entitled to parenting time or visitation with child; otherwise affirmed. See *Jensen v. Bevard* (Case No. 24).

29. ***DHS v. Three Affiliated Tribes of Port Berthold Reservation,*** 236 Or App 535 (2010), CA A143921. In a custody dispute under the Indian Child Welfare Act (ICWA) between long-term foster parents and a relative family favored by the tribe of two Indian children, the Court of Appeals found good cause to affirm the trial court's maintaining the children's placement with foster parents. Although this was not an ORS 109.119 psychological parent case, it contains interesting parallels. Under the ICWA, applicable to Indian children, the preference of the tribe for placements outside the biological parent's home, is to be honored absent good cause.

Although the ICWA does not define the term "good cause", the trial court concluded that it "properly and necessarily includes circumstances in which an Indian child will suffer serious and irreparable injury as a result of the change in placement." The Court of Appeals agreed with the trial court that good cause existed based upon persuasive expert testimony that "the harm to [the children] will be serious and lasting, if they are moved from [foster parents'] home." This analysis has its parallel in the ORS 109.119 rebuttal factor which provides for custody to a third-party if a child would be "psychologically, emotionally, or physically harmed" if relief was not ordered. It also parallels the Supreme Court's analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose "a serious risk of psychological, emotional, or physical harm to the child." This case points to the necessity of expert testimony to support a third-party when they are seeking to obtain custody from a biological parent. See *Lamont* decision (Case Note 16).

30. ***Digby and Meshishnek***, 241 Or App 10 (2011), CA A139448. Former foster parent (FFP) sought third-party visitation from adoptive parents. FFP had last contact with children in July 2005 and filed an action under ORS 109.119 in June 2007, pleading only a "child-parent relationship" and not an "ongoing personal relationship." Trial court allowed FFP visitation rights. Court of Appeals reversed finding that FFP did not have a "child-parent relationship" within 6 months preceding the filing of the petition and because FFP did not plead or litigate an "ongoing personal relationship." *Lesson: Plead and prove the correct statutory relationship (or both if the facts demonstrate both).*

31. ***G.J.L. v. A.K.L.***, 244 Or App 523 (2011), CA A143417 (*Petition for Review Denied*). Grandparents were foster parents of grandson for most of his first 3 years of life. After DHS returned child to birth parents and wardship was terminated, parents cut off all contact with grandparents. Trial court found that grandparents had established a grandparent-child relationship and that continuing the relationship between them and child would be positive. Trial court denied Petition for Visitation because of the "*significant unhealthy relationship*" between grandparents and mother. No expert testimony was presented at trial. On appeal, the Court found that grandparents had prevailed on three statutory rebuttal factors (recent primary caretaker; prior encouragement by birth parents; and current denial of contact by parents). However, the Court of Appeals denied relief because grandparents failed to prove a "*serious present risk of harm*" to the child from losing his relationship with grandparents, and that grandparents' proposed visitation plan (49 days per year) "*would substantially interfere with the custodial relationship*." A Petition for Review was denied.

32. ***In the Matter of M.D., a Child, Dept. Of Human Services v. J.N.***, 253 Or App 494 (2012), CA A150405. (Juvenile Court) The court did not err in denying father's motion to dismiss jurisdiction given that the combination of child's particular needs created a likelihood of harm to child's welfare. However, the court erred by changing the permanency plan to guardianship because there was no evidence in the record to support the basis of that decision- that the child could not be reunified with father within a reasonable time because reunification would cause "severe mental and emotional harm" to child. The "severe mental and emotional harm" standard parallels to the Oregon Supreme Court's analysis of the ORS 109.119 harm standard, as requiring proof of circumstances that pose a "serious risk of psychological, emotional, or physical harm to the child." See *Lamont* decision [Case No. 16].

33. ***In the Matter of R.J.T., a Minor Child, Garner v. Taylor*****,** 254 Or App 635 (2013), CA A144896). Non-bio parent obtained an ORS 109.119 judgment by default against child's mother for visitation rights with child. Later mother sought to set aside the default which was denied. Non bio parent later filed an enforcement action and also sought to modify the judgment seeking custody. The trial court set aside the original judgment, finding that non bio parent did not originally have a "child-parent" or "ongoing personal" relationship to sustain the original judgment; if she did have such a relationship, she could not rebut the birth parent presumption; and finally, that even if the birth parent presumption was rebutted, that visitation between non bio parent and the child was not in the child's best interest. On appeal, the Court of Appeals reversed the trial court for setting aside the original judgment *sua sponte*, finding no extraordinary circumstances pursuant to ORCP 71C. The Court of Appeals bypassed the issue as to whether there was originally an ongoing personal relationship with the child and originally whether the birth parent presumption had been rebutted. Instead, it simply upheld the trial court, finding that visitation should be denied because it was not in the child's best interests. Since this was not a *de novo* review, the court did not explain why visitation was not in the best interests of the child, but it would appear that the continuing contentious relationship between the parties was a significant factor.

34. ***Underwood et al and Mallory, nka Scott***, 255 Or App 183 (2013), CA A144622. Grandparents obtained custody of child by default. Although certain ORS 109.119 rebuttal factors were alleged, the judgment granting custody to Grandparents was pursuant to ORS 109.103. Mother later filed a motion to modify the original judgment citing ORS 107.135 and ORS 109.103, but not ORS 109.119. In response, Grandparents contended that Mother did not satisfy the "substantial change of circumstances" test, governing ORS 107.135 modifications. The trial court and the Court of Appeals agreed. The Court of Appeals also noted with approval the trial court's finding that a change of custody would not be in the child's best interest, noting in particular that Grandparents had been the primary caretaker of the child for the past 10 years and facilitated (until recently) ongoing relationships between the child, his siblings, and mother. Because the case had originally been filed (apparently erroneously) under ORS 109.103, the Court of Appeals avoided "*the complex and difficult question *** as to whether the provision of ORS 109.119(2)(c) that removes the presumption from modification proceedings would be constitutional as applied to a circumstance where no determination as to parental unfitness was made at the time the court granted custody to grandparents*." Accordingly, where a custody or visitation judgment is obtained originally by default without a specific finding that the birth parent presumption had been overcome, it is unclear as to whether such presumption, under the United States Constitution, needs to be rebutted in modification or other subsequent proceedings.

35. ***Dept. of Human Services v. S.M.***, 256 Or App 15 (2013), CA A151376. This is a juvenile court case holding a trial court's order allowing children, as wards of the court, to be immunized pursuant to legal advice but over mother and father's religious objections. There is an insightful discussion of *Troxel v. Granville* at pp 25-31. The court found that the immunization order did not violate *Troxel* or the constitutional right of parents to "direct the upbringing of their children," but noted the possibility that certain state decisions might run afoul of constitutional rights. This case strongly suggests that legal parents may be fit in certain spheres of parenting, but unfit as to others. (Oregon Supreme Court review pending.)

36. ***Dept. Of Human Services v. L. F.*****,** 256 Or App 114 (2013), CA A152179. This is a fairly standard juvenile court case where the Court of Appeals upheld the trial court's finding of jurisdiction as to mother. As applied to ORS 109.119 litigation, the court's holding as follows may be relevant to the rebuttal factor relating to parental fitness and harm to the child. Noting that child, L.F., had "*** *severe impairments of expressive and receptive language*," the Court of Appeals agreed with the trial court that "*** *mother's inability or unwillingness to meet [child's] medical and developmental needs of [child] to a threat of harm or neglect. *** [Child's] development and welfare would be injured if mother were responsible for his care because she does not understand how to meet his special needs. Without the ability to understand and meet [child's] developmental and medical needs, it is reasonably likely that mother's care would hinder [child's] development and fall short of satisfying his medical needs*." *Id.* at 121-122.

37**.** **Kleinsasser v. Lopes**, 265 Or App 195, 333 P3d 1239 (2014). In a marked departure from recent trends, the Court of Appeals upheld the trial court's judgment awarding custody of a child to Stepmother over the objections of biological Mother, where Father had died. Child had resided with Father and Stepmother for the prior four years. Mother had been in and out of Oregon and had not been active in the child's life until after Father's death. In contrast to a more rigid focus on the "parental fitness" and "harm to child" factors in prior cases, and although this was not a de novo review case, the Court of Appeals assessed all of the ORS 109.119 rebuttal factors and agreed with the trial court's findings that Stepmother satisfied the rebuttal factors except one. As to the parental fitness factor, the Court of Appeals disagreed with the trial court finding as to mother's past absenteeism as it related to her parental fitness. Consistent with prior rulings, it is the birth parent's present state of fitness, as of the date of the trial, that is most important. The trial court noted Mother's attitudes and conduct toward the child-Stepmother relationship which reflected poorly on her understanding of the child's best interests.

38. ***Epler and Epler and Graunitz***, 258 Or App 464 (2013), (Court of Appeals); 356 Or 634 (2014) (Supreme Court). In the underlying divorce between Mother and Father, both parents stipulated that paternal Grandmother have custody of granddaughter. Grandmother had custody for most of the child's life, including the 5 years prior to Mother's modification motion. Mother filed to modify custody and argued that she was entitled to the Troxel /ORS 109.119 birth parent presumption. The trial court denied Mother's motion finding she had failed to prove a "change of circumstances" and that even if she had, the best interests of the child required that Grandmother retain custody. Mother appealed and the Court of Appeals upheld the trial court finding:

- When a biological parent stipulates to custody to a third-party in a ORS Chapter 107 proceeding and then seeks to modify such judgment, ORS 107.135 applies and such parent will be required to demonstrate a substantial change of circumstances. Such stipulation serves as a rebuttal to the *Troxel* presumption.
- ORS 107.135 does not expressly apply to modification proceedings in ORS 109.119 actions; rather ORCP 71C and the court's inherent authority applies. The *Troxel* presumption does not apply to ORS 109.119 modifications.
- The parental fitness standard in *Troxel* third-party cases is broader than the parental fitness standard in ORS Chapter 419B juvenile court termination cases (and presumably broader than such fitness standard in ORS Chapter 419B juvenile court dependency cases).

The Supreme Court affirmed the Court of Appeals, but for different reasons, finding:

- Because the custody to Grandmother was pursuant to a Chapter 107 dissolution proceeding that this case is not governed by the psychological parent statute ORS 109.119, but rather the modification statute, ORS 107.135.
- ”Mother is not entitled to the Troxel presumption that her custody preference is in the child’s best interest (at least as to the facts of this case) and
- Mother was not prejudiced when she was held to the substantial change-in-circumstances rule.”
- Because the trial court found properly that it was not in the child’s best interests that custody be changed, the Supreme Court did not address Mother’s argument that the application of the change of circumstances rule unduly burdened her due process rights under *Troxel.*

39. **Department of Human Services v. A.L.,** 268 Or App 391, 400 (2015). Parents successfully challenged the juvenile court’s jurisdiction where, among other things, they had placed their children with paternal grandparents. “Because parents have entrusted their children to paternal grandparents who pose no a current threat of harm, the court did not have a basis for asserting jurisdiction over the children.” A parent’s inability to parent independently does not amount to a condition “seriously detrimental to the child,” when such child is placed in a safe alternative placement. See also, **Matter of NB,** 271Or App 354 (2015) - another juvenile court case in which juvenile court jurisdiction of a child was based in part by the parents’ delegation/transfer of care to third parties (grandparents). Construing ORS 419B.100(2), the Court held that the fact of the delegation could indeed be a factor in determining whether juvenile court jurisdiction was appropriate, but the delegation *per se* was not sufficient. Rather the inquiry would have to be case specific and address particular facts, for example whether the child was exposed to risks of the parent(s) while in the third party’s care. In the **NB** case, DHS didn’t meet the burden to demonstrate such risks.

DEMONSTRATING HARM TO THE CHILD - WHAT IS ENOUGH?

Query: Is the court expecting empirical or objective evidence that a transfer to a birth parent’s full custody from a psychological parent would cause psychological harm to a child? How does one establish such evidence? Perhaps, some children may have to actually suffer psychological harm to form an empirical base. If a child is psychologically harmed as a result of the transition, does this constitute grounds for a modification? How long does one have to wait to assess whether psychological harm is being done - 6 months? One year? Some guidance is offered from the following cases.

Although Amended ORS 109.119 provides that the natural parent presumption may be rebutted if "circumstances detrimental to the child exists if relief is denied," summary evidence that a child would be harmed through a transition to the custodial parent will not be adequate. In *State v. Wooden* [Case Note 8], the testimony of noted child psychologist Tom Moran, that moving the child now "would be devastating and traumatic" was not sufficient. The court was critical as to the narrow scope of Dr. Moran's analysis - he did not perform a traditional custody evaluation "instead, he offered an opinion - - based solely on his limited contact with the child - - on the narrow issue of the probable effect of awarding custody 'right now'." Moran was also rebutted by Dr. Jean Furchner, who recommended that custody be awarded to father after a transition period of between 6 to 12 months.

In the *Strome* case [Case Note 9], the court majority discounted the testimony of Dr. Bolstad (who, in contrast to Dr. Moran in *Wooden*, did a comprehensive evaluation including mental health testing) that found the children to be "significantly at risk." The majority preferred the testimony of evaluator Mazza who evaluated Father and the children only, albeit in a more intensive fashion. *Strome* reversed the trial court and awarded custody to father drawing a dissent of 4 members of the court.

Five members of the *Winczewski* court [Case Note 13], agreed that the facts demonstrated that birth mother was unable to care adequately for the children and that the children would be harmed if grandparent's were denied custody. That decision relied in part on the opinion of custody evaluator Dr. Charlene Sabin, whose report contained extensive references to mother's inability to understand the needs of the children; her unwillingness to accept responsibility for the children's difficulties and her very limited ability to distinguish between helpful and harmful conduct for the children. Viewing the same evidence through a different prism, Judge Edmonds and 4 members of the court determined that such evidence was inadequate to meet the constitutional standard. Judge Schuman and Judge Armstrong would have required evidence "far, far more serious" than presented to deny mother custody.

In the Supreme Court's *Lamont* decision [Case Note 16], the court specifically interpreted the "harm to child" rebuttal factor, ORS 109.119(4)(a)(B). Although the statutory language appeared to include a "may cause harm" standard, the Supreme Court adopted a limiting construction finding that "circumstances detrimental to the child" (ORS 109.119(4)(a)(B) "***refers to circumstances that pose a **serious present risk** of psychological, emotional, or physical harm to the child." The use of the reference to "serious present risk" is significant. The court specifically rejected an interpretation that the birth parent presumption could be overcome merely by showing that custody to the legal parent "may" cause harm. *Id.* at 112-113. While helpful, this does not end the analysis. Although the harm may occur in the future, arguably an expert can testify that a transfer of custody to a birth parent presents a serious present risk of harm even though the actual harm may occur in the future. Regardless of how one articulates the standard, it is clear from *Lamont* and *Van Driesche* [Case Note 18] that expert testimony will be required to demonstrate harm to the child and likely be necessary in order to demonstrate deficits or incapacity of a parent.

The trend in recent cases is to focus on the current, not past, parenting strengths and weaknesses of the birth parent, particularly where the birth parent has made a substantial effort at rehabilitation or recovery. Recent cases also suggest that the importance of

preserving the stability achieved with a third-party and avoiding the trauma due to a change of custody may not be sufficient to meet the "serious present risk of harm" standard. This is particularly so where the third-party and birth parent are cooperating [*Dennis,* Case Note 20] and a reasonable transition plan can be developed. On the other hand, a third party may be given favorable consideration when he or she has acted as the primary caretaker for a substantial period of the child's life. [*Kleinsasser,* Case Note 37; *Eppler,* Case note 38].

DO CHILDREN HAVE CONSTITUTIONAL RIGHTS?

In the ongoing battles between birth parents and third parties, it seems that the rights of children have been largely ignored, except to the extent that the best interests standard is still considered on a secondary level. In *Troxel*, Justice Stevens in dissent found that children may have a constitutional liberty interest in preserving family or family-like bonds. In a challenge that does not appear to have been taken root in post-*Troxel* jurisprudence, Justice Stevens warned:

> "It seems clear to me that the due process clause of the 14th Amendment leaves room for states to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." 120 S. Ct. at 2074.

Contrast Justice Stevens' opinion with the recent case of *Herbst v. Swan* (Case No. B152450, October 3, 2002, Court of Appeals for the State of California, Second Appellate District), applying *Troxel* and reversing a decision awarding visitation to an adult sister with her half-brother (after their common father died). The statute was determined to be an unconstitutional infringement upon the mother's right to determine with whom the child could associate.

In *Winczewski* [Case Note 13], Judge Brewer, citing a number of cases from other states and literature from journals, noted: "In the wake of *Troxel*, courts are beginning to recognize that 'a child has an independent, constitutional guaranteed right to maintain contact with whom the child has developed a parent-like relationship.'" 188 Or App at 754. Judge Brewer recognized that "***it is now firmly established that children are persons within the meaning of the constitution and accordingly possess constitutional rights." 188 Or App at 752. But such rights are not absolute: "When the compelling rights of child and parent are pitted against each other, a balancing of interest is appropriate." 188 Or App at 750. In the final analysis, however, Judge Brewer did not articulate the parameters of a child's constitutional right and how that is to be applied, concluding only that a child's constitutional right "to the preservation and enjoyment of child-parent relationship with a non-biological parent is both

evolving and complex." 188 Or App at 756. It would appear that Judge Brewer would be content to consider a child's constitutional right as part of the best interest analysis, but only if the *Troxel* presumption has been rebutted. 188 Or App at 756. Commenting upon Judge Brewer's analysis, Judge Schuman and Judge Armstrong were sympathetic to "a more sensitive evaluation of the child's interest than *Troxel* appears to acknowledge," but refused to accord to a child a free-standing fundamental substantive due process right. Rather, Judge Schuman and Judge Armstrong would accord a child "an interest protected by the state as *parens patriae*" rather than as a right. 188 Or App at 761.

In the 2003 and 2005 legislative sessions, this author proposed legislation (SB 804 [2003], SB 966 [2005]) which would mandate the appointment of counsel for children in contested custody third party v. parent proceedings, unless good cause was shown. Counsel would be appointed at the expense of the litigants, but each court would be required to develop a panel list of attorneys willing to represent children at either modest means rates or pro bono. The legislation stalled in committee in 2003 and 2005 with opponents citing cost considerations to litigants and that the court's discretionary power was adequate.

For further information about the implications of *Troxel* on children and families, see: Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 33 Fam. L.Q. 105 (Spring 2002); *Family Court Review*, An Interdisciplinary Journal, Volume 41, Number 1, January 2003, Special Issue: *Troxel v. Granville and Its Implications for Families and Practice: A Multidisciplinary Symposium*; Victor, Daniel R. and Middleditch, Keri L., *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. Am. Acad. Matrimonial Lawyers 22, 391 (Dec. 2009); and Atkinson, Jeff, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 F.L.Q. 1, 34 (Spring 2013).

TIPS AND WARNINGS

- ORS 109.121-123 (former grandparent visitation statutes) were abolished. Now, grandparents are treated as any other third parties seeking visitation or custody. Therefore grandparent-child relationship which has languished for more than a year may result in the loss of any right to make a claim. (However Grandparents are given some special considering in juvenile court proceedings. ORS 419B.876)
- Although ORS 109.119 does not require the specific pleading of facts to support the rebuttal of the parental parent presumption, some trial courts have required this and have dismissed petitions without such allegations.
- ORS 109.119 requires findings of fact supporting the rebuttal of the parental parent presumption. Be prepared to offer written fact findings to the court.
- It may be appropriate to seek appointment of counsel for the children involved. ORS 107.425 applies to psychological parent cases. It mandates the appointment of counsel

if requested by the child and permits the appointment of counsel at the request of one of the parties. Expense for the appointment is charged to the parties.

- Custody and visitation evaluations are authorized upon motion at the parties' expense. This evidence is critical to the issue of the presumption as well as best interests of the child. An evaluator should be prepared to speak to issues of attachment (both to the birth parent and the third party); potential short and long term emotional harm if the child is placed with the birth parent or third party.
- The application of third party rights in the juvenile court has been substantially restructured. See ORS 419B.116; 419B.192; 419B.875; 419B.876 In 2003, the legislature created a new form of guardianship that would permit third parties to have custody of children under a court's wardship, but without the involvement of the Department of Human Services (DHS). (ORS 419B.366).

- Request findings of fact pursuant to ORCP 62 at the outset of your case and be prepared to draft the findings for the court. This will reduce the likelihood of remand if an appeal is successful.

- Whether representing a birth parent or a third-party, counsel should consider and present to the court a detailed transition plan to guide the court's decision in the event that a change of custody is ordered.

"Your Ethics Wake-Up Call"

FAMILY LAW CONFERENCE October 10, 2015

John L. Barlow
Barnhisel Willis Barlow Stephens & Costa, PC

Requesting Advisory Opinions

When in doubt, a good place to start—request an advisory opinion from the General Counsel's office.

> Individual lawyers may request opinions about their own conduct or proposed conduct. Keep in mind that inquiries are not a means to resolve misconduct that has already occurred. Do not include specific client information or information sufficient to reveal the client's identity because calls to General Counsel are not subject to the attorney-client privilege or otherwise confidential.
>
> Bar keeps notes of telephone inquiries from lawyers for five years.
>
> Good faith effort to comply with opinion is a basis for mitigation of sanction, in addition to any other defenses or evidence warranting mitigation, in disciplinary proceedings Rule of Professional Conduct (hereinafter RPC) 8.6(b).
>
> See H. Hierschbiel, "Ethics Advisory Opinions," *Oregon State Bar Bulletin*, August/September 2015; G. Reimer, "Written Ethics Advisory Opinions," *Oregon State Bar Bulletin*, June 2003.

Note: I have included a version of the following outline of the disciplinary process in the written materials each time I have made a presentation at the Family Law Conference. It follows the outline given to members of the Disciplinary Board during their orientation to the process. Each year, I have added information and commentary about case law developments and updates regarding procedures.

Although my presentation this year will not include a thorough discussion of the disciplinary process, I include this outline as a useful reference or guide for any practitioner who must respond to a Bar inquiry or complaint.

I also include relevant excerpts from the Oregon State Bar Statement of Professionalism in any presentation to lawyers. Those excerpts are listed at the conclusion of these materials,

and provides the ultimate "safe harbor" in any situation regarding appropriate and ethical conduct.

> "The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge properly their professional duties." American Bar Association, *Standards* Section 1.1
>
> "[Bar discipline] is not intended to be punitive but to deter wrongful conduct." *In re Stauffer*, 327 Or 44, 66 (1998)
>
> "Not every negligent or unprofessional act, no matter how misguided, boorish or rude, gives rise to an ethical violation." *In re Paulson*, 341 Or 13, 27 (2006)

A. Outline of the Disciplinary Process

1. First Level--Client Assistance Office--Initial Contact with Attorney

"Don't Panic"

1500 matters reviewed each year-- ~80--85% go no further, 15--20% are referred to Disciplinary Counsel.

Do I need a lawyer?

> Consider whether complaint is really about ethics. Fee disputes, litigation tactics, minor communication problems may be resolved at the Client Assistance Office level without Disciplinary Counsel involvement.

2. Second Level--Disciplinary Counsel Investigation

> **You need a lawyer.**

"It won't do to have truth and justice on his side; he must have law, and lawyers." Charles Dickens, *Bleak House*

Duty to Respond--Zero Tolerance for Failure

> Independent Basis for Discipline RPC 8.1(a)(2). Since November, 2013, Potential for Suspension Pending Investigation. Failure to Respond is an Aggravating Factor in Considering Appropriate Sanctions.

"[A] lawyer shall not...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority..." RPC 8.1(a)(2)--- (Exception for confidential matters under RPC 1.6)

Initial inquiry letter from Disciplinary Counsel will include highlighted reference to this rule.

Bar Rule 7.1 **Suspension for Failure to Respond--Effective November 1, 2013**

"(a) When an attorney fails without good cause to timely respond to a request from Disciplinary Counsel or the LPRC for information or records...Disciplinary Counsel may petition the Disciplinary Board for an order immediately suspending the attorney until such time as the attorney responds to the request or complies with the subpoena."

Note: Two years after its adoption, Disciplinary Counsel now routinely invoke this rule to motivate attorney responses to requests for information. If the threat of suspension results in a response, the attorney may be charged with a violation of RPC 8.1(a)(2) anyway—whether or not the attorney is charged with a violation based on the original complaint.

"(f) Suspension of an attorney under this rule is not discipline. Suspension or reinstatement under this rule shall not bar the SPRB from causing disciplinary charges to be filed against an attorney for violation of RPC 8.1(a)(2) arising from the failure to respond or comply as alleged in the petition for suspension filed under this rule."

"Remarkably, failing to respond to an ethics complaint is the most easily avoidable disciplinary violation, but continues to be one of the most common, year-in and year-out." "Enforcing the Rules," J. Sapiro, *Oregon State Bar Bulletin*, April 2013

Worst case example: *In re Hereford*, 306 Or 69, 756 P 2d 30 (1988)

Original Complaint: Neglect of a Legal Matter

a. "[T]he lawyer's responsibility to cooperate does *not* depend upon the way the substantive complaints as to his conduct are resolved."

b. The duty to respond fully and truthfully to inquiries from the Bar "is no less important than a lawyer's other responsibilities under the disciplinary rules."

c. Sanction: 90 day suspension, two-year probationary period.

3. Third Level--Local Professional Responsibility Committee (LPRC)

When the axe came into the forest many of the trees were heard to say, "At least the handle is one of us." Turkish proverb

a. Same duty to cooperate
b. Subpoena Power
c. Report to Disciplinary Counsel within 90 days

4. Fourth Level—State Professional Responsibility Board "Grand Jury" Proceedings

a. Dismiss cases lacking probable cause
b. Issue a letter of admonition
c. Refer back to LPRC or Disciplinary Counsel for further investigation
d. Authorize prosecution

5. Fifth Level--Trial Panel

"Now, what do you think the lawyer making the inquiries wants?"

"A job," says Mr. George.

"Nothing of the kind."

"Can't be a lawyer, then," says Mr. George, folding his arms with an air of confirmed resolution. Charles Dickens, *Bleak House*

Trial panel is composed of three members of the Disciplinary Board from the accused lawyer's region, including two lawyers and one public member. One of the lawyers chairs the trial panel.

a. Conducts trial-type hearing
b. Relaxed evidentiary standards ("evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs" is admissible)
c. Higher burden of proof ("Clear and convincing")
d. Subpoena power
e. Decision on each violation charged
f. Determination of appropriate sanction for each violation proven

Note: Disciplinary Counsel is moving away from using local, volunteer trial

counsel as prosecutors in addition to staff Disciplinary Counsel at the trial panel hearing. As many accused attorneys continue to self-represent at this hearing, this reduces the "two against one" feel of the hearing in such cases.

B. **Specific Rule Violations**

"Ignorantia juris non excusat."

1. Competence

RPC 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Note: Whenever "reasonable" or "reasonably" is used in relation to conduct by a lawyer, the term "denotes the conduct of a reasonably prudent and competent lawyer." RPC 1.0(k)

***In re McCarthy*, 354 Or 697 (2014)**

Lawyer was retained through a referral service to represent multiple plaintiffs whose properties were then subject to non-judicial foreclosure proceedings. He filed a lawsuit on behalf of the plaintiffs based on statutes he had not previously encountered. At the time he filed the complaint, he had no prior experience with Truth in Lending Act ("TILA") or "Real Estate Settlement Procedures Act ("RESPA") matters. He did not read the entire TILA or RESPA statutes or rules before filing the complaints. He relied primarily on sample pleadings he obtained from the referring organization. He also believed that the referring organization would provide backup legal counsel to him as needed as the lawsuit progressed. He did not associate a TILA specialist on the case and severed his relationship with the referring entity before he filed the complaint.

The lawyer did not know and did not inform his clients that by the lawsuits created the

risk that the lender could pursue a deficiency judgment against them. He also did not inform them that by including in the complaint a claim for relief based upon a federal statute (the TILA allegations) he created the possibility that the cases could be removed to federal court by any defendant. He also failed to get some of the defendants served timely under the applicable limitations periods. Some of the defense attorneys wrote to the attorney, pointing out deficiencies in his complaint and agreeing, prospectively, to waive service if he would amend and correct the complaint. The attorney's response was to miss deadlines and to cease effective communication with his clients.

These gaps in knowledge and performance opened up opportunities for the lawsuit defendants, who immediately sought removal to federal court and ultimately pursued deficiency judgments against the plaintiffs. The penultimate result was that the plaintiffs had to accept more onerous settlement terms.

The ultimate result was that the lawyer received a 90-day suspension.

In re Jagger, 357 Or 295 (2015)

Attorney represented a criminal defendant on matters including several contempt citations

for violating a FAPA restraining order. The criminal charges were based in part on the conduct that violated the restraining order.

While the defendant remained in jail, the lawyer called and invited the protected party to come to his office to discuss the matter and made an appointment for that meeting. It is likely that language and cultural barriers caused the protected party to misunderstand the lawyer's role in the proceedings.

In any event, the protected party came to the lawyer's office not on the day of the

appointment but on the very same day he first called her. When she arrived, the lawyer happened to be speaking on the telephone with the defendant, who was still in jail. The lawyer invited her to speak to the defendant about the restraining order on the telephone, while the lawyer left the room.

The defendant was convicted of contempt of court for violating the no-contact provision of the FAPA restraining order, based on this telephone conversation.

Not only did the trial panel and Oregon Supreme Court find the lawyer guilty of violating RPC 1.2(c), ("a lawyer shall not … assist a client in conduct that the lawyer knows is illegal") but further found him guilty of violating the competence rule, RPC 1.1. They concluded that the lawyer's advice to his client to talk to the protected person while the FAPA order was still in effect "could not have been the product of legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Jagger illustrates the strict application of RPC 1.1, even in the face of evidence that the lawyer had actual knowledge of the FAPA order and its terms, because his violation of the rule depended not on his ignorance of the law but his apparent failure to think through the consequences of his well-meaning advice. In other words, knowledge of the law is no more a defense than ignorance if the lawyer's advice or performance is contrary to that law.

Competency in the 21st Century—Metadata.

Metadata generally means "data about data." As used here, metadata means the embedded data in electronic files that may include information such as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.

Lawyer's Duty in Transmitting Metadata

Oregon RPC 1.1 requires a lawyer to provide competent representation to a client, which includes possessing the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Oregon RPC 1.6(a) requires a lawyer to "not reveal information relating to the representation of a client" except where the client has expressly or impliedly authorized the disclosure.

Information relating to the representation of a client may include metadata in a document. Taken together, the two rules indicate that a lawyer is responsible for acting competently to safeguard information relating to the representation of a client contained in communications with others. Competency in relation to metadata requires a lawyer utilizing electronic media for communication to maintain at least a basic understanding of the technology and the risks of revealing metadata or to obtain and utilize adequate technology support.

From ***Formal Opinion*** 2011-187, revised 2015.

2. Neglect.

RPC 1.3 Diligence

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Perennially, this is the one of the most frequently cited rules in Disciplinary Reporter volumes—14 of 33 trial panel cases reported in the 2014 volume implicated Rule 1.3

Lawyers who have run afoul of this rule have typically not taken advantage of resources available

through the Bar, Lawyer Assistance programs, and the Professional Liability Fund. Frequently

the deficiencies in performance have arisen because the lawyer is experiencing personal or family

problems, health crises, or office management difficulties. Keep in mind that a separate rule,

RPC 1.16(a)(2), requires an attorney to withdraw from representation when the attorney's

physical or mental condition materially impairs the lawyer's ability to represent the client.

Reliance on health problems to justify conduct that might otherwise violate the RPCs, or to

mitigate a sanction in the event a violation is found, could lead to a charge under this rule.

Recent examples of violations of this rule relevant to family law practice include failure

to file Uniform Support Declarations in temporary support proceedings, failure to appear at hearings when duly noticed, errors in child support calculations resulting in substantial over- or underpayments, and failures to communicate with clients before preparing critical hearing documents. Of course, violations of RPC 1.3 frequently implicate other rules, notably RPC 1.4(a) (failure to keep a client reasonably informed or respond to requests for information), RPC 1.4(b) (failure to adequately explain a matter to a client), and RPC 1.16(d) (failure, upon termination of representation, to take reasonable steps to protect client's interests).

C. **Hypotheticals.**

Lawyer A represents Client A in litigation. Lawyer B represents Client B in litigation.

Lawyer A is fired by Client A shortly before trial and is granted leave to withdraw as counsel of record. Lawyer B seeks leave to withdraw for nonpayment of fees, and leave is granted. Both Client A and Client B hire other counsel to protect their interests, and their respective cases continue.

Both Lawyer A and Lawyer B are owed substantial fees by their clients and both have in their possession documents and information of critical importance to their clients' cases, which the clients cannot practicably duplicate or replace.

Questions:

1. May Lawyer A retain client documents or information until all past-due fees are paid?

2. May Lawyer B retain client documents or information until all past-due fees are paid?

(Source—***Formal Opinion*** No. 2005-90).

Lawyer represents Client in a matter set for trial. One week before trial is scheduled to begin, Client files a Bar complaint, but does not discharge Lawyer. The complaint alleges Lawyer failed to interview key witnesses, and failed to return Client's phone calls to discuss trial strategy. Lawyer does not believe the witnesses identified by Client will be able to provide admissible testimony, but is willing to interview them in the time remaining before trial. Lawyer further believes that he or she has made reasonable efforts to respond to Client's inquiries and to keep Client informed.

Question:

Must Lawyer seek to withdraw from further representation once Client has filed a Bar complaint against Lawyer?

(Source—***Formal Opinion*** No. 2009-182).

Excerpts from Oregon State Bar Statement of Professionalism.

> **"We can be knowledgeable with other men's knowledge,**
> **but we cannot be wise with other men's wisdom."** Michel de Montaigne

a. I will promote the integrity of the profession and the legal system.

b. I will protect and improve the image of the legal profession in the eyes of the public.

c. I will work to achieve my client's goals, while at the same time maintain my ability to give independent legal advice to my client.

d. I will always advise my clients of the costs and potential benefits or risks of any considered legal opinion or course of action.

e. I will communicate fully and openly with my client, and use written fee agreements with my client.

f. I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.

g. I will always be prepared for any proceeding in which I am representing my client.

h. I will only pursue positions and litigation that have merit.

i. I will explore all legitimate methods and opportunities to resolve disputes at every stage in my representation of my client.

Parenting Plans for Young Children Ages Birth Through Three

Protecting Attachment & Strengthening Relationships for Young Children

Agenda

- Background
- Unpacking Attachment
- Exploring Challenges
- Creating Appropriate Parenting Plans
- Identifying Tools

"Birth Through Three" Defined

- "Birth Through Three" refers in the cited literature and this presentation to children under the age of four.
- *Chronological age* is not the only determinant of children's status and abilities.
- *Developmental age* is also a factor for consideration.

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Background: Two Research Tracks…

- 40 years of research supports:
  - phenomenon of infant attachment
  - protective factors associated with attachment
  - importance of early childhood development
- 40 years of research explores:
  - impact of divorce and separation on children
  - impact of divorce & separation on fathering
  - protective factors associated with fathering

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Background: Lingering Questions

- How does divorce/separation impact developing attachment in young children?
- How do parents/professionals balance the importance of attachment with parental involvement?

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Historical Tension Points

Attachment Theory		Parental Involvement Research
• Attachment forms hierarchically from a primary attachment to one person and to others later in life	⟷	• Multiple attachments form concurrently – there is no such thing as primary attachment
• Primary attachment is an overarching protective factor	⟷	• Involvement of both parents is an overarching protective factor
• Interfering with primary attachment is more harmful than disrupting the relationship with the other parent	⟷	• Interfering with parental involvement is more harmful than disrupting attachment to the primary parent
• Research conducted primarily on mothers is sufficient to understand attachment mechanisms and function	⟷	• Research focused primarily on fathers, which frequently excluded fathers with problems, is sufficient to generalize to overnights & other special circumstances

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Finding Balance

"Reliance on *either* attachment theory or joint parental involvement research, as if these two strands of development are not overlapping and inextricably related, has in our view, fostered polarizations in legal and academic thinking and practice, impeding thoughtful integration of the existing reliable knowledge bases."

Marsha Pruett, Jennifer McIntosh & Joan Kelly, Family Court Review April 2014

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Consensus 2014

AFCC Think Tank (2014)

SFLAC Parental Involvement & Outreach Subcommittee

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Materials for Practitioners

- AFCC 2014 Consensus Articles
- Charting Overnight Decisions for Infants and Toddlers (CODIT) Tool
- Birth Through Three Guide (updated 2014)
- Oregon Birth Through Tool for Judges & Family Law Practitioners

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Unpacking Attachment

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Defining Attachment

Attachment is the deep and abiding emotional relationship between an infant and her caregiver.

It is more than a bond, as it is characterized by the sensitive attunement of the caregiver to the infant's nonverbal cues, and the emotional satisfaction and safety experienced by the infant.

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Activity 1 Recalling an "Attachment Event"

Distinguishing Attachment

Bonding & Attachment are not equivalent

Qualities of Bonding	Qualities of Attachment
• Strength of adult's feeling of connection to the child	• Quality of child's emotional connection to caregiver
• Care giving is focused on completing the tasks of providing care to the child	• Care giving is focused on meeting the expressed needs of the child (attunement)
• Caregiver sets pace for interaction	• Child initiates interaction and adult responds (reciprocity)
• Child withholds distress response until contact with an attachment figure	• Child freely expresses distress, openly & without reservation
• Relationship is goal oriented (future focused)	• Relationship is interpersonally oriented (present focused)

http://www.helpguide.org/articles/secure-attachment/what-is-secure-attachment-and-bonding.htm

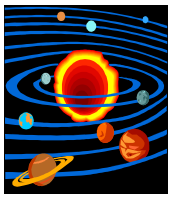
Aspects of Attachment

1. Attachment is ***created***

Consistent, warm, responsive care that is attuned to the physical and emotional signals of the child creates secure attachment.

Aspects of Attachment

2. Secure attachment creates a ***system*** for:



- Development of critical neural connections
- Managing internal states, i.e. ***emotional regulation***
- Developing self-awareness
- Building meaningful relationships with others
- Feeling secure enough to explore
- Caring about the feelings of others

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Emotional Regulation 101

- ***Emotional Regulation*** is the ability to identify, manage and recover from strong feelings.
- ***Repeat experiences of emotional regulation*** allow a child to understand and accept his own feelings, use healthy ways to handle them, and keep going even under stress.
- ***Chronic, unresolved emotional dysregulation*** exposes the infant/young child's brain to damaging stress hormones during critical developmental periods.

Emotional regulation in infancy is a critical component of ***healthy brain development***

Video

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Aspects of Attachment

3. Attachment is a ***process***, not a state

- Develops and changes over the lifespan
- Can be strengthened and reinforced through responsive care

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Aspects of Attachment

4. Attachment security = attachment ***resiliency***

- Secure attachment creates a base for developing other attachments
- Secure attachment allows for repair after disruption/breach of relationship
- Secure attachment increases adaptive capacities of child to deal with stress

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Key Concepts

- Secure Attachment to at Least One Caregiver
- Emotionally Regulated Infant
- Healthy Brain Development
- Healthy Adult Functioning

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Attachment and Separating Parents

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Supporting Attachment to Both Parents

The key to building and maintaining attachment is to focus on the child's experience and needs, as opposed to the parents' desire for fairness.

Encouraging Attachment

- **Provide responsive care**
  - Feeding
  - Comforting
  - Sleeping or napping
- **Reduce Parental Anxiety**
  - Primary Residential Parent
  - Other Parent
- Create opportunities to build attachment without chronically distressing the child

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Protective Factors Associated with Involved Fathers

On average, one-third of children whose parents have separated lose contact with a parent, usually a dad.

- Higher educational achievement across lifespan
- Better performance in mental skills
- Higher level of social/emotional functioning
- Fewer behavioral problems
- Greater financial security

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Caveats: Understanding the Co-Parenting Literature

- Studies of father involvement typically excluded fathers with histories of child abuse, mental illness, chemical dependency, and domestic violence
- Only about 20% of separating families take the case to court; about 5% have trials *(Johnston, 1994)*. Broadly applying co-parenting literature to higher conflict dyads is not always appropriate.

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Families are Changing

- More than 40% of parents are not married.
- 16% of all same sex couples in the US are raising children together.
- The rate of adoption by same sex couples has doubled since 2000.
- Multigenerational families in one household are increasing for the first time in decades.
- Nearly 10% more grandparents are raising children now than in 2000.

Same sex co-parenting relationships and an ever-increasing number of never married parents add dimension which cannot be encompassed within a traditional binary model.

Jane Parisi Mosher

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Co-Parenting & Domestic Violence…

Mutually Exclusive Paradigms

Coercive Worldview

- I am entitled to more respect than others.
- My needs are more important than others.
- I try to get what I need/want through violence, threats, or intimidation.
- There is one right way to solve a problem, my way.
- Children are an extension of the parent – their needs mirror mine & are otherwise less important.

Collaborative Worldview

- Others are entitled to equal respect.
- Other people's needs are equally important.
- I negotiate and problem-solve to try to get what I need.
- There are many ways to solve a problem.
- Children are unique individuals – their needs are separate from mine & of equal importance.

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Domestic Violence & Custody Disputes

Studies conducted by the National Center for State Courts (NCSC), looking solely at court records, have found *documented evidence of* domestic violence in 20-55% of contested custody cases.

(NCSC Publication Number R- 202)

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Principles of DV Screening

- Get appropriate training.
- Screen everyone & screen often.
- Always consult with experts.
- Understand lethality indicators *(Jacquie Campbell Danger Assessment):*
  - Presence of a weapon,
  - Recent attempts to leave,
  - Extreme jealousy/control,
  - Threats to kill/harm,
  - Chronic, long-term unemployment, and
  - Victim beliefs about danger.
- Include all forms of violence, e.g. emotional, verbal, economic, sexual, physical.

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Tools for Professionals

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The Issues

- Determining Safety
- Supporting existing attachment
- Building attachment
- Exploring the right frequency of contact
- Considering overnights

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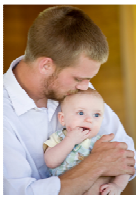
Pruett, McIntosh & Kelly, 2014

- The consensus of the authors regarding research on attachment:
  "Children form concurrent attachments to caregivers but still prefer proximity to one or the other at different ages."

- *Thus the goal of parenting plans for young children is:*
  "to foster both developmental security and the health of each parent-child relationship, now and into the future."



Making Decisions About Overnights

Pruett, McIntosh & Kelly developed a matrix for deciding when and how many overnights will work for a family.

Matrix for Overnights *McIntosh, Pruett & Kelly 2014 & 2015*

GATEWAY FACTORS

1. **Safety**
2. **Trust & Security w/Each Parent**

KEY FACTORS

3. **Parent Mental Health**
4. **Child Health & Development**
5. **Behavioral Adjustment**
6. **Co-Parent Relationship**
7. **Pragmatic Resources**

FURTHER CONSIDERATIONS

8. **Family Factors**

Activity 2 Scenario #1

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Overnight Consideration 1
Safety (*Gateway Factor*)

SAFETY	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Child is safe in the care of each parent **B** Parents are safe with each other	**A *or* B** absent	**A** established **B** Conflict is separation related, *non-threatening & non-endangering*	**A *and* B** are established

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Overnight Consideration 2
Child Trust & Security (*Gateway Factor*)

TRUST & SECURITY w/EACH PARENT	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Child is continuing an established (**6 mos.**) relationship with each parent **B** Child seeks comfort from & can be soothed by OP **C** Child is supported in exploration by OP	**A *or* B and C** are absent	**A** is established **B & C** are emerging	**A through C** are established

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Overnight Consideration 3
Parent Mental Health

PARENT MENTAL HEALTH	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Parent is sensitive in recognizing & meeting child's needs **B** Parent has no or well-managed drug & alcohol issues **C** Parent has no or well-managed mental health issues	**Any of A through C** are absent	**A through C** are emerging	**A through C** are established

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Overnight Consideration 4
Child Health & Development

CHILD HEALTH & DEVELOPMENT	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Child has significant developmental or medical needs **B** Such needs are well supported in the proposed arrangement **C** Infant is exclusively breastfeeding or will not take bottle	**A** exits **B** absent **C** exists	**A and/or C** absent **B** emerging	**A and C** absent OR **A** exists **and** **B** established

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Overnight Consideration 5
Child Behavioral Adjustment

BEHAVIORAL ADJUSTMENT	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Child persistently (for at least 3-4 weeks) demonstrates: frequent irritability w/o cause, excessive clinging, frequent crying or intense upset, aggressive/self harming behavior, regression, low persistence in play/learning **B** Any such regressions or difficulties are short-lived and readily resolved	**Any of A** exists **B** absent	**Any of A** *sometimes* exists **B** established	**A** rare **B** established

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Overnight Consideration 6
Co-parent Relationship

CO-PARENT RELATIONSHIP	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
The parents can: **A** Communicate civilly and plan together **B** Manage conflicts & use interventions when needed **C** Be consistent yet responsive with schedule **D** Value/accept child's relationship with OP **E** Put child's needs before their own **F** Ensure low stress during exchanges or transitions		**A** through **F** established or emerging	**A** through **F** established

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Overnight Consideration 7
Pragmatic Resources to Support Overnights

PRAGMATIC RESOURCES	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Parents can be the main caregiver during overnight and majority of scheduled day time (excluding work time) **B** Parents live within a manageable commute of each other **C** When a parent cannot personally care for the child overnight, care by the OP is prioritized	**A , B and C** absent	**A and B** established **C** emerging	**A through C** established

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Overnight Consideration 8
Family Factors

FAMILY FACTORS	Rare or no Overnights	Lower Frequency Overnights 1-4 per month	Higher Frequency Overnights 5 or more per month
A Older siblings share the same overnight schedule and are a source of security to the young child **B** Overnight arrangements enable maintenance of other relationships that are a source of security for the child (e.g. grandparents) and/or enable exposure to important elements of the parent's cultural or religious practices		**A** exists if applicable **B** is emerging	**A** exists if applicable **B** established

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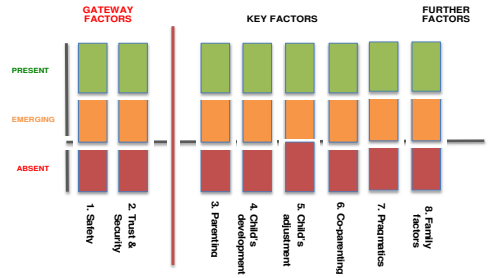
Charting Overnight Decisions for Infants & Toddlers (CODIT)

McIntosh, Pruett & Kelly, 2015



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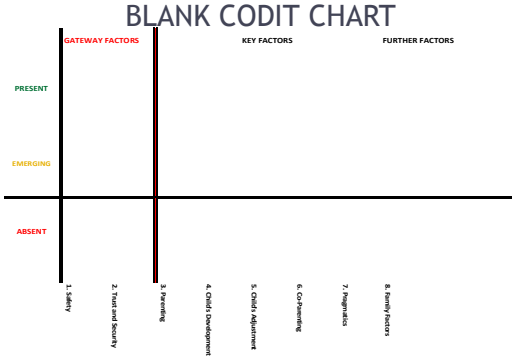

Overnight Considerations - Highlights

- An existing relationship of at least 6 months is a critical first level assumption for overnights.
- Children *and* parents must be safe (Gateway Factors).
- The presence of conflict in itself is not prohibitive – *frequency and intensity* of conflict are factors.
- "Step up" plans and activities to increase parental capacity make sense and should be supported where appropriate.
- Signs of distress can be normal, but significant and/or prolonged distress should be addressed *(See Birth Through Three, p.21).*

Overnight Considerations – Caveats

- *"Even when all parenting conditions are met, higher frequency overnights* are not generally indicated for infants 0-18 months"*

  McIntosh, Pruett & Kelly 2014
- When uncertain about the outcome for a child, do the least harm – conservative approach
- Generally, deference to parental discretion and joint decisions is recommended

* *More than one per week*

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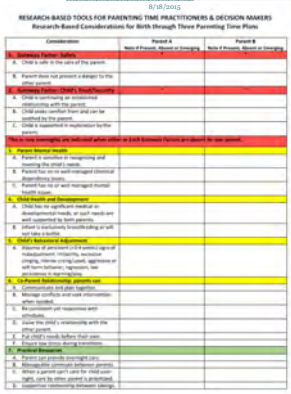
Oregon SFLAC Birth through Three Tool for Judges & Family Law Practitioners



RESEARCH-BASED TOOLS FOR PARENTING TIME PRACTITIONERS & DECISION-MAKERS
Research-Based Considerations for Birth through Three Parenting Time Plans

Considerations	Parent A	Parent B
1. Domestic Father Safety		
A. Child is safe in the care of the parent.		
B. Parent does not present a danger to the other parent.		
2. Domestic Father Child's Bond/Security		
A. Child is continuing an established relationship with the parent.		
B. Child seeks comfort from and can be soothed by the parent.		
C. Child is supported in exploration by the parent.		
This is not overnights are indicated when either or both Domestic Factors are absent to low (green).		
1. Parent Mental Health		
A. Parent is sensitive in recognizing and meeting the child's needs.		
B. Parent has no or well-managed chemical dependency issues.		
C. Parent has no or well-managed mental health issues.		
A. Child Health and Development		
A. Child has no significant medical or developmental needs, or such needs are well supported by both parents.		
B. Infant is exclusively breastfeeding or will not take a bottle.		
B. Child's Behavioral Adjustment		
A. Absence of persistent (>3-4 weeks) signs of maladjustment: irritability, excessive crying, intense crying/upset, aggressive or self-harm behaviors, regression, sex persistence in learning/play.		
A. Co-Parent Relationship: parents can		
A. Communicate and plan together.		
B. Manage conflicts and seek information when needed.		
C. Be consistent with responsive and schedules.		
D. Foster the child's relationship with the other parent.		
E. Put child's needs before their own.		
F. Ensure low stress during transitions.		
B. Practical Resources		
A. Parent can provide overnight care.		
B. Manage/de-eliminate behavior parents).		
C. When a parent can't care for child overnight, care by other parent is prioritized.		
D. Supervise relationship between siblings.		

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Helping Parents: Grounding Principles

Barring safety concerns, children do best when:

- Parents communicate, cooperate, and are flexible when needed
- Both parents are involved in many aspects of the child's life
- Children perceive that each parent supports the relationship with the other parent
- Parents' actions are consistent with their words

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Helping Parents: Shifting from Present to *Future Focus*

1. Do you know parents who are divorced or separated and co-parenting successfully now? What does that look like?
2. If your child could talk now, what would she say about how she wants you to co-parent and get along?
3. How would you like your co-parent relationship to look in five years?
4. How can I help you move from the dynamics of your romantic relationship into the healthy dynamics of your co-parent relationship?

BIRTH THROUGH THREE

A Guide for Parents Creating Parenting Plans For Young Children

Prepared by Multnomah County Family Court Services

In collaboration with the Parental Involvement & Outreach Subcommittee of the Oregon Statewide Family Law Advisory Committee

September 2014

https://multco.us/dcj/fcs/family-court-services-help

Activity 3
"Case" Scenarios

1. Read the Scenario for your group.
2. Use the tools on your table (*Overnight Considerations Matrix Bar Graph, Oregon Birth Through Three Bench Card, Helping Parents Handout*) to analyze and discuss recommendations for your "case."
3. Present your "case" to participants.

SFLAC Parental Involvement & Outreach Committee Members

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RESEARCH-BASED TOOLS FOR PARENTING TIME PRACTITIONERS & DECISION-MAKERS
Suggestions and Ideas for Birth through Three Parenting Time Plans

Concern	Suggested Parenting Time Provision
1. Safety	**CHILD WELFARE REPORT MAY BE REQUIRED Consider safety focused parenting plan.**
A. Abuse or neglect of the child	• Formal parenting time supervision with support program or private professional. • Informal supervision with impartial third party. • Parent to attend parenting classes or engage services of a parenting coach.
B. Domestic Violence	• Limit contact of parents during transitions. • Exchanges conducted through a neutral party. • Transition of child at a public or other safe location. • Transitions limited to daycare or curbside at homes. • Limit parent communications to email or text. • Require perpetrator to complete Batterer Intervention and comprehensive parenting classes. • Assess need for services for victim – Therapy support or classes.
C. Mental Health	• Assessment and recommendations from professionals. • Treatment as indicated. • Provide support, coaching, and education. • Status check by court or assigned professional. • Consider providing custodial parent some access to treatment records.
D. Drug and Alcohol	• Immediate and ongoing UA's or hair follicle testing. • Assessment and treatment as indicated. • No substance use 24 hours prior to or during parenting time. • Consider Interlock device on auto. • Consider giving custodial parent access to UA results.
2. Child's Trust and Security	**Graduated parenting time plan; consistent, regular, frequent contact.**
A. Child has little or no trusted relationship with the parent.	• Initial parenting time with trusted caregiver and possibly with therapist support.
B. Child does not seek comfort from and cannot be soothed by the parent.	• Parenting classes, coaching or parenting support professional may be indicated.
C. Child is not supported in exploration by the parent.	• Parenting classes, coaching or parenting support professional may be indicated.
3. Parent Mental Health	**(see #1 above)**

RESEARCH-BASED TOOLS FOR PARENTING TIME PRACTITIONERS & DECISION-MAKERS
Suggestions and Ideas for Birth through Three Parenting Time Plans

Concern	Suggested Parenting Time Provisions
4. Child Health and Development	**Assessment by neutral professional**
A. Child has significant developmental or medical needs.	• Non-custodial parent is ordered to adhere to healthcare provider recommendations. • Parent receives education on child's special needs and is made aware of medical appointments. • Custodial parent exchanges medical and appointment information. • Non-custodial parent is ordered to adhere to healthcare provider recommendations. • Parent receives education on child's special needs and is made aware of medical appointments. • Custodial parent exchanges medical and appointment information. • Assessment by Early Head Start.
5. Child is demonstrating maladjustment to current parenting time schedule.	
A. Child is demonstrating symptoms of maladjustment across situations.	• Bi-lateral education of parents with parenting class or consultant. • Trusted caregiver present in all or some portion of parenting time. • Consider changes to circumstances of transitions between parents. • Consider assessment or treatment with child specialist to adjust parenting time schedule.
6. Co-parent relationship issues exclusive of DV:	
A. Parents are unable to communicate, plan and support each other without conflict.	• Court offers communication guidelines for email and other communication. • Informal or formal parent coordination with assigned professional. • Use of parent notebook or other shared communication medium such as google calendar. • Neutral exchanges/third party that minimize exposure to conflict – daycare exchanges etc. • Parents Beyond Conflict Class/Co-parent counseling • Individual parent counseling or coaching.

Additional Notes:

- Even when all parenting conditions are met, higher frequency overnights (more than one per week) are not generally indicated for infants 0-18 months.
- If domestic violence is present, see additional resources, for example: safety provisions 1B (page 2); Oregon Judicial Department Safety Focused Parenting Plan, and Domestic Violence Bench Card.

RESEARCH-BASED TOOLS FOR PARENTING TIME PRACTITIONERS & DECISION-MAKERS
Suggestions and Ideas for Birth through Three Parenting Time Plans

In families where established concerns exist about parent safety, child safety, or the parent has no established caretaking relationship with the child:

General Suggestion:
Weekly, short period of time with possible provisions for supervision of parenting time, neutral/safe exchanges of the child, and/or review of provisions by Court if warranted.

For Example: Parent A shall be responsible for the care of the child at all times other than on **Sundays from 10:00 a.m. until 12:00 p.m. each week**. (Optional) For a period of _____weeks **Parent B's parenting time will be supervised** by_____. The exchanges for these parenting times shall occur in a public location. Parent A shall share all information regarding the child via e-mail only. This court shall hold a 30 minute status check hearing at the end of the _____ week period to determine when or if the parenting schedule shall be expanded.

For families where mental health or substance abuse concerns exist:
For families where there are attachment concerns, or the child is exhibiting persistent behavioral maladjustment:

General Suggestion:
Prioritize protection of the child's psycho-social and emotional development during the first three years of life. Ensure that at least one organized attachment relationship is supported between the child and Parent A even if that results in less parenting time with Parent B. Consider not only the number of overnights, but the spacing and frequency of transitions between homes, and the emotional difficulty to which the child will be exposed.

Anticipate changes in the parenting plan. Changes can be accommodated through a series of step-ups articulated in detail, to be implemented at a pace and level determined by the child's responses to each step, and each parent's ongoing ability to effectively enact the proposed plan individually and as a parenting team.

For Example: Parent A shall be responsible for the child's care at all times other than every Sunday from 10:00 a.m. until 4:00 p.m. and every Thursday from 12:00 p.m. to 6:00 p.m.

For parents working on improving attachment and parenting skills with Parent B:

General Suggestion:
Frequent consistent contact of several hours in length that allows for routine care to occur helps the child bond.

For Example: Parent A shall be responsible for the child's care at all times other than every Tuesday and Thursday from 4:00 p.m. until 7:00 p.m. and every Saturday from 10:00 a.m. to 2:00 p.m. when Parent B shall be responsible for the child's care.

Where concerns about coparenting exist or logistics dictate restricted parenting time:

General Suggestion:
Two periods of three to four hours and one 8 hour period spaced throughout each week**.**

For Example: Parent A shall be responsible for the child's care at all times other than every Monday and Wednesday from 3:00p.m until 6:00p.m and every Saturday from 12:00 p.m. to 6:00 p.m. when Parent B shall be responsible for the child's care.

For high functioning, cooperative, actively involved parents:

General Suggestion:
Frequent consistent contact of several hours in length and an overnight allows routine care to occur helps to maintain bonded relationships.

For Example: Parent A shall be responsible for the child's care at all times other than every other Monday and Wednesday from 4:00 p.m. to 7:00pm and every Friday overnight from 4:00 p.m. to 9:00 a.m. on Saturday.

Generally, deference to parental discretion and joint decisions is encouraged.

RESEARCH-BASED TOOLS FOR PARENTING TIME PRACTITIONERS & DECISION-MAKERS
Research-Based Considerations for Birth through Three Parenting Time Plans

Consideration	Parent A Note if Present, Absent or Emerging	Parent B Note if Present, Absent or Emerging
1. Gateway Factor: Safety	*	*
A. Child is safe in the care of the parent.		
B. Parent does not present a danger to the other parent.		
2. Gateway Factor: Child's Trust/Security	*	*
A. Child is continuing an established relationship with the parent.		
B. Child seeks comfort from and can be soothed by the parent.		
C. Child is supported in exploration by the parent.		
***No or rare overnights are indicated when either or both Gateway Factors are absent for one parent.**		
3. Parent Mental Health		
A. Parent is sensitive in recognizing and meeting the child's needs.		
B. Parent has no or well-managed chemical dependency issues.		
C. Parent has no or well managed mental health issues.		
4. Child Health and Development		
A. Child has no significant medical or developmental needs, or such needs are well supported by both parents.		
B. Infant is exclusively breastfeeding or will not take a bottle.		
5. Child's Behavioral Adjustment		
A. Absence of persistent (>3-4 weeks) signs of maladjustment: Irritability, excessive clinging, intense crying/upset, aggressive or self-harm behavior, regression, low persistence in learning/play.		
6. Co-Parent Relationship: parents can		
A. Communicate and plan together.		
B. Manage conflicts and seek intervention when needed.		
C. Be consistent yet responsive with schedules.		
D. Value the child's relationship with the other parent.		
E. Put child's needs before their own.		
F. Ensure low stress during transitions.		
7. Practical Resources		
A. Parent can provide overnight care.		
B. Manageable commute between parents.		
C. When a parent can't care for child over-night, care by other parent is prioritized.		
D. Supportive relationship between siblings.		

GATEWAY FACTORS
KEY FACTORS
FURTHER FACTORS
PRESENT
EMERGING
ABSENT
1. Safety
2. Trust and Security
3. Parenting
4. Child's Development
5. Child's Adjustment
6. Co-Parenting
7. Pragmatics
8. Family Factors

PARENTAL SEPARATION AND OVERNIGHT CARE OF YOUNG CHILDREN, PART I: CONSENSUS THROUGH THEORETICAL AND EMPIRICAL INTEGRATION

Marsha Kline Pruett, Jennifer E. McIntosh, and Joan B. Kelly

The AFCC Think Tank on Research, Policy, Practice, and Shared Parenting was convened in response to an identified need for a progression of thinking in the family law field, removed from the current polarizing debates surrounding the postseparation care of infants and very young children. We share this goal as our research and commentaries have been centrally implicated in the current controversies. Our collaboration over this empirical paper and its clinical counterpart endorses the need for higher-order thinking, away from dichotomous arguments, to more inclusive solutions grounded in an integrated psychodevelopmental perspective. We first critically appraise the theoretical and empirical origins of current controversies relevant to attachment and parental involvement research. We then describe how attachment and parental involvement contribute complementary perspectives that, taken together, provide a sound basis from which to understand the needs of very young children in separated families. As a companion piece, Part II offers a collective view of a way forward for decision making about overnights for infants and young children, toward the integration of theoretical and empirical with clinical wisdom.

Key Points for the Family Court Community:

- An integrative perspective suggests that the goals of attachment and early parental (typically paternal) involvement with very young children after separation are mutually attainable and mutually reinforcing rather than exclusive choices.
- An optimal goal for the family is a "triadic secure base" developed through a co-parenting environment that supports the child's secure attachment with each parent and the recognition by each parent of the other's importance to the child.
- Cautions against overnight care during the first three years are not supported. The limited available research substantiates some caution about higher frequency overnight schedules with young children, particularly when the child's relationship with a second parent has not been established and/or parents are in frequent conflict to which the child is exposed.

Keywords: *Attachment*; *Children*; *Divorce*; *Infants*; *Overnights*; *Parent Involvement*; *Parenting Plans*; *and Separation*.

Various narrative strands combine within the family law arena to form this decade's debates about overnight care for young children of separated parents. These deliberations occur against a backdrop of increasing legislative support for shared-time parenting following separation. Presumptions are being proposed in various states, provinces, and countries for both legal (decision making) and physical (parenting time) care of children, yet the merits of such presumptions remain unclear, especially for families with very young children. While developmental vulnerability unique to this stage of life is duly acknowledged by most who offer a view on the topic, the associated solutions offered when parents separate or live apart vary, sometimes quite markedly. Common to all arguments is an attempt to protect the infant and young child by ensuring that essential components of early development are not jeopardized by the postseparation parenting arrangement.

Proposals for the arrangements that could best provide this protection vary along differing theoretical and research lines. Two foci often posed in family law as "either-or" propositions are attachment theory, with its focus on continuity of caregiving for the young child and an historic emphasis on the role of mothers in this, and joint parental involvement, with its focus on the ongoing mutual parenting roles of both parents following separation, with particular emphasis on father involvement. Reliance on *either* attachment theory or joint parental involvement research, as if these two strands of development are not overlapping and inextricably related, has in our view, fostered polarizations in legal and academic thinking and practice, impeding thoughtful integration of the existing reliable knowledge bases.

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The need to achieve a coherent view is pressing, with the certain knowledge that every family law decision carries significant and potentially enduring consequences for young children and their parents. In this paper we begin by examining the sources of dichotomous perspectives at the heart of the current debate. While acknowledging that differences in professional opinion will remain, we concur that perspectives on parenting plans and judicial orders in separated families that focus simultaneously on the developing child and his/her significant relationships are not only theoretically possible but empirically supported. After examining the scant existing research in terms of what it does and does not tell us about overnight care, we identify points of consensus we share. We conclude with a summary that lays the foundation for our companion paper (Part II, this issue). Part II provides a set of assumptions about the individual and family conditions under which overnights are most likely to support the developmental needs of the very young child, and a chart of considerations for weighing these in the individual case.

EARLY CHILDHOOD DEFINITIONS

Terminology in itself can cause problems, such as, when parties think they are describing the same events or experiences but in fact are not. The definitions pertaining to early childhood are no exception. Although researchers in the early child mental health field (National Research Council and Institute of Medicine, 2000; Zeanah & Zeanah, 2009) recognize the formative years as spanning pre-birth through to the fifth year, a "0–3 years" definition is commonly used to connote the years of greatest vulnerability (*see* www.Zerotothree.org) in family law and mental health literature. Included in this definition is infancy, commonly referred to as the pre-verbal stage, which ends around the first year with the emergence of talking and locomotion. In line with the available research specific to separated parents and overnight care, we refer to early childhood as the period from birth to and including the year of being three (0–48 months). Given the significant and normative diversity of psycho-emotional and cognitive accomplishment among three year olds, ambiguity surrounds this age cutoff for overnights. At issue is whether the age of three is substantively different enough from 1–2 years old, regarding psychosocial and emotional development, to be included in the definition of "young child" and all it represents when making decisions about overnights, or whether it constitutes a significantly less vulnerable age. In this paper we adopt the view that the year between 3 and 4 belongs in this 0 to 3 period, while recognizing normative and significant variation in the age at which children manifest a range of vulnerabilities and consolidate new skills. We include the year of being three in our "young child" distinction as it affords the protective function some children of this age need.

Within the vast spectrum of developmental achievement from infancy through preschool, three broad eras within these years are generally evident and differentiated in our formulation: the first eighteen months of life, the second eighteen months of life (18–36 months), and the year of being three. As each era presents different challenges and possibilities for parents living apart, we occasionally make these distinctions within this paper, and when combining the eras, use the collective term "early childhood".

Synonymous with healthy social and emotional development, "infant mental health" refers to the young child's capacity to experience, begin to regulate and express emotions, form close and trusting relationships, explore the environment and learn (Greenough, Emde, Gunnar, Massinga,& Shonkoff, 2001; Zeanah, 2009). Given the sheer dependence of infants and young children on their caregivers, mental health in early childhood is best understood in a relational frame. There is general agreement about factors important in explaining both health and dysfunction in early psychosocial and emotional development. Chief among these stressors that affect development are poverty, neglect and abuse, heritable predispositions—including cognitive capacity and temperament, and the interactions of each of these with the early caregiving environment. Multiple factors determine the overall caregiving environment, chiefly parent mental health and associated parenting capacity (Clarke-Stewart, Vandell, McCartney, et al., 2000; Cummings, Keller, & Davies, 2005; Kaufman, Plotsky, Nemeroff & Charney, 2000; Keitner & Miller, 1990; Meadows, McLanahan, & Brooks-Gunn, 2007), parental reflective

functioning (Slade, 2005), caregiving sensitivity and response (Brown, Mangelsdorf, & Neff, 2012; George & Solomon, 2008), and the quality of the co-parental relationship in collaborative caregiving (Cowan & Cowan, 2010; Pruett & Pruett, 2009). The implicating factors for childhood outcomes most substantively in the purview of family law are parenting and co-parenting capacities. During the powerful transitions in the family initiated by separation it is the nurturing and teaching that parents and supportive co-parenting provide that safeguard healthy trajectories of psychosocial, emotional, and cognitive well-being throughout the first years of life.

Whether examining child development from the perspective of attachment (Zeanah, Boris, & Lieberman, 2000), neurobiology (Schore, 2012; Siegel, 1999), or broader psycho-emotional, social and family systems perspectives (Harris, 1995; Karney & Bradbury, 1995; Minuchin, 1988), there is wide consensus that the infant's success in meeting the emotional and behavioral goals of early childhood is profoundly influenced by the relationship foundations laid in infancy and sustained thereafter.

THEORETICAL FRAMEWORKS FOR UNDERSTANDING EARLY CHILDHOOD OVERNIGHTS DEBATE: ORIGINS OF THE CONTROVERSY

Of the many early childhood and family theoretical perspectives brought to bear on the dilemma of overnights, two main bodies of knowledge have been emphasized in family law deliberations over the past 25 years: attachment and parental involvement. Controversies about overnights for young children stem, in part, from adherence to either one or the other of these theoretical positions. The attachment and parental involvement arguments over the past decade are well documented (Kelly and Lamb, 2000; Lamb & Kelly, 2001, 2009; Solomon and Biringen, 2001; Pruett, 2005; McIntosh, 2011; Warshak, 2005), and we will not repeat them here. We do describe the core tenants of each position to identify the principles from which we are working.

ATTACHMENT THEORY AND ITS INTERFACE WITH THE OVERNIGHTS DEBATE

Attachment refers to a specific facet of the infant/parent relationship. Attachment is a biologically based behavioral system in all infants of all cultures that has the set goal of ensuring protection from disorganizing anxiety through proximity to attuned and responsive caregivers, who soothe in the face of distress and support exploration in the world. Attachment relationships are understood to support the infant's growing ability to express and regulate emotions (see Siegel & McIntosh, 2011 for overview), as well as to explore and learn with confidence (Gunnar, 2000; Sroufe, Egeland, Carlson & Collins, 2005). Studies in multiple contexts have demonstrated the developmental reach of attachment trauma (Sagi-Schwartz & Aviezer, 2005; Zeanah, Danis, Hirshberg et al., 1999), as well as the power of healthy attachments to buffer trauma (Sroufe et al., 2005).

Early attachment researchers in the Bowlby/Ainsworth tradition studied a culturally and socioeconomically diverse range of families (Carlson, Sroufe, & Egeland, 2004). However, these studies lacked gender diversity, with investigations predominantly focused on the development of infant-mother attachments, their antecedents and longer-term consequences. From this research emerged the concept of attachment primacy, referring to an infant's preference in the first two or so years of life for seeking comfort from one figure over others, this figure usually being the mother, and the stress that separation from this figure posed. Application of this research to family law provided a basis for decision-making, in which lengthy and frequent separations from primary caregivers were accepted as a risk factor for infant security. For several decades in many Western countries, overnights with fathers during infancy were widely discouraged. Bowlby and Ainsworth wrote about the importance of both parents, and over the past 30 years, empirical attention has slowly but increasingly been given to attachment interaction between father and infant, and the complementary roles of mother and father in fostering developmental security. Unfortunately, to date little attention has been paid to attachment dynamics with same sex parents.

Research on infant-father and other significant attachments confirm Ainsworth's early observation (1977) that infants are equipped to form concurrent attachments to emotionally available caregivers by approximately 7–8 months (Easterbrooks & Goldberg, 1987; Lamb, 1977 a, b). There is agreement across multiple studies that infants prefer proximity to one parent or the other at different ages and for different needs and experiences, particularly in their first 18 months (Fox, Kimmerly, & Schafer, 1991 van IJzendoorn & De Wolff, 1997). Attachment status to mother and father are generally independent, with each relationship influenced by the contingent response of each parent. While security with one parent does not reliably predict security with the other, attachments to co-habiting parents are mutually influenced (Main et al., 2011; Kochanska & Kim, 2013; Sroufe, 1985; van IJzendoorn & De Wolff, 1997).

Meta-analytic studies of infant attachments to both parents in non-clinical samples found a similar proportion of infants (67%) classified with secure attachments to father or to mother (van IJzendoorn & De Wolff, 1997). In a demographically varied sample of 101 families, Kochanska and Kim (2013) reported that 45% of infants had secure attachments concurrently to both their mothers and fathers, while 17% were insecurely attached to both. Insecure attachments to both parents pose a greater risk: "double-insecure" children at 15 months had greater behavioral difficulties at six years (teacher report) and eight years (self report) than those secure with at least one parent.

As first articulated by Bowlby, normative differences between mother and father caregiving behaviors have long been noted across cultures. Mothers' sensitive response to infants' stress states and fathers' sensitive and stimulating play and teaching behaviors are particularly salient (Ainsworth, 1967; Brown et al., 2012; Grossmann et al., 2002; van IJzendoorn & DeWolff, 1997). Each pattern of interaction can foster secure attachment. Theory posits and research provides evidence that a mother's sensitive response to stress enables the child to experience that the world is predictable, safe, and that the child can learn to manage his/her distress through the relationship. Similarly, a father's sensitive challenging facilitates the child's learning to monitor and control his/her excitement, promoting the goal of self-regulation.

Normative differences between trends in mothering and fathering are often exaggerated, with exciting play and teaching attributed as the exclusive domain of fathers and sensitive response as the main province of mothers. In contemporary family life and particularly when fathers are involved in direct child care, mothers and fathers respond far more similarly than differently in the ways they soothe, play and teach, and mother and father attachments reinforce each other's influence on the child's development (Grossmann, Grossmann, Kindler, & Zimmermann, 2008; Parke & Asher, 1983). The triadic nature of attachments is only beginning to be understood. The literature on same sex parents' attachment interactions with their young child is yet to be established, but there are no theoretical grounds to suggest that empirical evidence for the independence of an infant's attachment to each parent will not also be demonstrated in these relationships. The idea that babies have gender biases in attachment formation is not well supported. The more accurate assertion is that babies respond best to sensitive and predictable caregiving that facilitates internalized patterns of care; that is, babies learn to respond across situations as if they can expect such quality of care (Bazhenova, Stroganova, Doussard-Roosevelt et al., 2007; Carlson, Cicchetti, Barnett & Braunwald, 1989; Grossman, Johnson, Farroni, Csibra, 2007; Minagawa-Kawai, Matsuoka, Dan et al., 2009; Trevarthen, 2001).

THE JOINT PARENTAL INVOLVEMENT LITERATURE AND ITS INTERFACE WITH THE OVERNIGHTS DEBATES

There is little argument that, given the opportunity, forming two secure attachment relationships in early infancy is multiply beneficial, as is preserving them beyond infancy. Policy debates during the era of the "tender years" presumptions focused on preventing disruption in the primary attachment relationship, with solutions often giving preference to safeguarding the mother–child over father-child attachment. A new wave of commentary and research has emerged in the past two decades, focusing on joint parental involvement, and bringing equal weight to examining the critical

developmental role of fathers in early childhood (Cowan & Cowan, 1992; McHale, 2007; K. Pruett, 2000).

The concept of parental involvement is a broader one than attachment, encompassing behavioral and learning systems that support relational as well as cognitive, educative, socio-economic, moral, cultural, and spiritual developmental goals. Parental involvement literature focuses on the developmental advantages accrued to children when both parents are physically and emotionally accessible, participate in direct care taking tasks and decision making, and provide financial support (Collins, Maccoby, Steinberg, Hetherington, & Bornstein, 2000; Luster & Okagaki, 2006; Pleck, 2010).

A research focus on fathers has emerged, particularly in the separation and divorce literature, as a natural outgrowth of the knowledge imbalance about the role each parent plays in child development. Whereas a wealth of theory and research had already confirmed the salient influence of early mother-infant relationships on long-term outcomes, less was known with respect to father-infant relationships. A second major impetus for father-focused research came from several decades of custodial determinations and parenting plans that minimized the non-resident father's role and the time allotted to him to spend with his children (typically every other weekend or 14% of time). In response to the realization that a growing number of children were growing up with minimal, if any, involvement of their fathers, a concern developed across academia, policy and government about what effect "fatherless America" (Blankenhorn, 1996) was having on children's developmental trajectories in the U.S., with similar concerns expressed in other Western nations and more recently, in countries worldwide.

Studies on father involvement repeatedly showed that school aged children whose fathers were minimally present or absent from their lives had difficulties across behavioral, cognitive and academic achievement, social, moral, and emotional domains (Furstenberg, Morgan, & Allison, 1987; McLanahan, 1999; Wallerstein & Kelly, 1980). In contrast, significant benefits for children across domains are associated with higher levels of positive paternal involvement (for reviews, *see* Kelly, 2012, King, 2002, Cowan, Cowan, Cohen, Pruett & Pruett, 2008; Sandler et al., 2012). Like mothers, fathers' warmth, structure, and discipline benefit children. Studies find that fathers also make unique contributions to sibling, peer, behavioral and achievement outcomes, with many of the benefits manifested through middle childhood and into adolescence and adulthood (Flouri & Buchanan, 2004; Steele, Steele & Fonagy, 1996; Veríssimo et al., 2011; Verschueren & Marcoen, 1999). Still, the ideal bases for development of positive father-child relationships and benefits, like mother–child, are initiated in the earliest years of life (Boyce et al., 2006; Brown et al., 2012; Feinberg & Kan, 2008). The attachment literature added support to the father involvement literature on this very point. Researchers from both theoretical leanings established through their studies what children have always demonstrated clinically: the early years matter *and* young children desire and benefit from warm and positive involvement with both of the people who gave birth to and/or are invested in their well-being.

An important contribution of the father involvement research was the identification of demographic, personal, interpersonal, and institutional barriers that impede many separated fathers' ability to remain meaningfully involved with their children (Cowan, Cowan, Pruett, & Pruett, 2007; Kelly, 2007). Demographic variables associated with diminished father involvement include being unmarried at childbirth, unemployment, lower income, less education, and the younger age of the child (Amato & Dorius, 2010; Amato, Meyers, & Emery, 2009; Insabella, Williams, & Pruett, 2003). Fathers' personal barriers include prior marginal involvement with their children, inability to be consistent and in compliance with parenting plan schedules, mental illness, substance abuse, violence, anger and depression (Hetherington & Kelly, 2002; Johnston, 2006; Johnston et al., 2008; Kelly, 2007). Interpersonal barriers include highly conflicted co-parental relationships (Maccoby & Mnookin, 1992), and maternal gatekeeping when it unjustifiably discourages or limits contacts (Austin, Fieldstone, & Pruett, 2013; Pruett et al., 2012; Trinder, 2008). Cultural and institutional policies and practices often reflect a disproportionate lack of support for an active paternal parenting role after separation (Alio, Bond, Padilla, Heidelbaugh, Lu & Parker, 2011; Coakley, 2013; Cowan et al., 2008; Parkinson, 2010).

PARENTING TIME DISTRIBUTION AFTER SEPARATION: AT THE HEART OF THE DEBATE

The question of overnights for young children of separated parents is embedded in several questions concerning "what amount of time" with each parent optimizes adjustment to separation and ongoing general development. How much time is needed to ensure that separated parents each continue to invest in the early relationship with their young child and are able to consolidate a foundation for lifetime involvement? How much time with one parent is needed for a baby to become or to remain behaviorally secure in that attachment? How much time away from a parent, at what point in early childhood, and in what circumstances, is stressful and disruptive to that attachment and to related developmental goals? How should the amount of time spent with each parent be considered in the context of attachment with one or both parents who have seriously compromised mental health?

These questions must be asked for each infant–parent relationship. Yet they are often laced with an implicit assumption that one parent's gain is the other parent's loss, and that the baby either wins or loses, as well. An integrated perspective suggests that the goals of both attachment and parental involvement are mutually attainable, though achieving both goals becomes more complicated when parents separate. As with parents in dispute, the best interests of the child are likely to be met by the best care that each parent provides. We focus the remainder of the paper on a fundamental reconceptualization of the current debate, wherein attachment and parental involvement become nested concepts, and the place where they meet becomes the locus for crafting parenting arrangements for very young children.

REFRAMING THE QUESTIONS AND ISSUES TOWARD AN INTEGRATED SOLUTION

We start from a developmental perspective, and ask: "What is the developmental goal of a parent spending time with a baby?" For many attachment researchers, the answer is equipping the baby with "at least one caregiving relationship" that is constant and responsive enough for the baby to develop an organized strategy for finding protection, relief from anxiety, and delight in shared interaction (Main, Hesse, & Hesse, 2011). Organized strategies refer to secure and insecure ambivalent or insecure avoidant patterns. All three patterns represent adaptations made by the baby to the caregiver. Disorganized attachment refers to the young child who shows little consistency in behavior toward attachment figures at times when most would seek reassurance. Instead, the child appears fearful of the parent and unsure about what to expect in terms of the care that will be provided. Separation and divorce, like other major transitions, are associated with an increase in children's insecure behaviors. Separating parents may be preoccupied and stressed, responding to the child with less attentiveness, more anger, and less patience; moreover, the structure of the family unit has abruptly changed (Hamilton, 2000; Hetherington, Cox & Cox, 1985; Waters, Merrick, Treboux et al., 2000). It is expected that behaviors associated with a more aroused attachment system will be evident, though a constant arousal puts the baby at risk for disorganized attachment becoming stable. High levels of parent conflict and violence during marriage and after separation are similarly related to increased evidence of insecure behaviors and may challenge the consolidation of healthy attachment relationships that were forming (Cummings & Davies, 2010; Solomon & George, 1999).

Both attachment and parent involvement perspectives express concern about the impact of lengthy or extended separations on infant-parent attachments and stress levels. One problem has been the lack of concrete definitions for these terms. In separation/divorce research, father-child time has been most commonly measured by the frequency of contacts in a defined period of time. This imprecise measure fails to indicate the amount of actual time children and nonresident parents spend together or the pattern of that time. Recently, researchers have used the quantity of time spent between children and nonresident parents in a given period because it better indicates opportunities for parenting (Fabricius, Sokol, Diaz, & Braver, 2012), but this does not address the issue of time intervals between contacts (i.e., the length of the separation from either parent) or the frequency of transitions made by the child.

From the attachment perspective, "frequent" separation refers to repeated absences occurring regularly, and concern focuses on the impact of frequent change on the baby's security with main

caregivers. From the paternal attachment perspective, "frequent" contact was intended to avoid lengthy separations of the infant from the father which had previously characterized parenting plans for very young children. Here, the outcome of concern was nurturing or sustaining the infant-father attachment without stressing the infant. "Lengthy" separations address the number of continuous hours within a unit of contact, but there is no agreement as to whether "lengthy" means eight hours, 24 hours or three days. "Extended" separation refers to the continuing absence of a caregiver over many days or weeks, but this too is not well defined, and there is no consensus about what is "too long", or how this might differ by age and temperament.

Attachment theory is clear that a core determinant of stress in separation from an attachment figure is the presence or absence of another effective attachment figure. Profound distress arises when such a relationship is not available, leaving the infant's attachment state "switched on". When another effective attachment figure is available, the baby's anxieties can be assuaged and stress reduced. This attachment perspective on the years 0–3 provides this guidance: at least one organized attachment is essential for the young child, especially in the face of stress and adversity (Sroufe et al., 2005). When two positive relationships with parents have been established prior to separation, the facilitation of two organized attachments after separation will normally enhance developmental outcomes, and thus represent the young child's interests (van IJzendoorn et al., 1997). In this scenario, parenting time needs to allow for regular responsive interaction with infants.

Taking a longer view, we ask: how do we create a healthy start for life-long relationships that begin from a fragile basis, without jeopardizing early attachment organization? There is irony in the attempt to compartmentalize these developmental issues into "either-or" options. Whatever their theoretical persuasion, developmental experts regard the nucleus of early development as occurring in the context of caregiving relationships that exist within concentric family and community rings of influence (Bronfenbrenner, 1986; Sagi & Van Ijzendoorn, 1996; Tavecchio & van IJzendoorn, 1987). Just as each parent crafts his/her child's attachment security (Sroufe, 1985; van IJzendoorn & DeWolff, 1997), similarly, each parent contributes to the development of wider behavioral systems and psychosocial attainment. Just as neither parenting function covers the gamut of childhood developmental needs, "either-or" thinking about children's needs after separation is incomplete.

CURRENT RESEARCH FINDINGS: UNDERSTANDING THE DATA BEFORE MOVING TO A CONSENSUS PERSPECTIVE

In integrating disparate perspectives, we suggest that a consensus perspective of the available research on young children and parenting plans is also possible. Toward this end, we summarize the small pool of studies reporting data on the demography of pre-school overnight care arrangements, parent–child time data, and the developmental correlates of various parenting arrangements.

DEMOGRAPHY OF OVERNIGHT CARE ARRANGEMENTS

While representative studies show that rates of overnight parenting time across the world have climbed in school age and adolescent populations (Bjarnason et al., 2010; Carlsund, Eriksson, Lofstedt, & Sellstrom, 2012), relatively few families undertake high levels of overnights in early childhood. Current general population statistics in the United States and Australia indicate that in separated families, between 93–97% of children aged 0–3 years spend less than 35% of their nights with the non-resident parent (Kaspiew et al., 2009; McIntosh, Smyth, Kelaher, 2010; Tornello, Emery, Rowen, Potter, Ocker, & Xu, 2013). These data appear to reflect normative sociological differences in parenting roles during infancy. While active parenting by fathers is increasing in intact families, across many western countries (Casper & Bianchi, 2001; Pleck & Masciadrelli, 2004) the majority of hands-on caregiving during infancy is still undertaken by mothers (Baxter, Gray & Hayes, 2010). Furthermore, a significant amount of leisure time is spent by parents together with their young child.

Divorce and separation not only changes individual parenting time, but also clearly subtracts normative "together time" from the young child's caregiving equation.

Parents who share higher frequency overnight schedules tend to be socioeconomically advantaged relative to lower frequency or no contact groups (Smyth, Qu & Weston, 2004; McIntosh, Smyth & Kelaher, 2013). Differentiating factors include significantly higher incomes, educational attainment, marital status, prior co-habitation in a committed pre-separation relationship, and maintenance of a cooperative relationship postseparation. The clustering of these characteristics in family court populations, especially among parents who have never been married, is less frequent, suggesting that parental choices about overnights, and hence disputes, may play out differently across family structures.

DEVELOPMENTAL OUTCOMES IN EARLY CHILDHOOD ASSOCIATED WITH PARENTING TIME

Studies examining correlates of postseparation parenting plans for very young children are scant. Any new field of science begins with single studies that form an incomplete picture. Commonalities can be identified across studies as the research pool grows. Research in this area is still a long way off from forming a critical mass. Four of the five existing studies are recently and thoroughly reviewed elsewhere (Kuenhle & Drozd, 2012), and our attention to them here is in the service of integration. A brief review of the five studies is provided below (see McIntosh & Smyth, 2012; Pruett, Cowan, Cowan, & Diamond, 2012, for more extensive details on sampling, methodology, analytic strategy, and limitations). A summary of relevant sample similarities and differences is presented in Table 1.

Solomon and George (1999) conducted the first study in this area with a voluntary sample of 126 separated mothers and explored the course of attachment organization to the mother from ages one to three years. Most of the parents had not shared a live-in relationship prior to or after the child's birth. At follow-up, using a modified Strange Situation (Ainsworth, 1978) as the methodology of study, they found evidence of significantly more anxious, unsettled, and angry behavior in toddlers who as infants had weekly or more overnights with non-resident fathers (compared to a mixed group of non-overnighters and children in intact families—a confound in the study). High parental conflict, anxiety, and parents' inability or unwillingness to communicate with each other about their baby influenced the children's outcomes. Notably, 41% of children moved to an overnight plan in the intervening year before the follow-up. Some had not seen their fathers regularly in the intervening year, and a few had no prior contact.

Pruett et al. (2004) studied a working and middle class sample of 132 parents with children 0–6 years who averaged 4.9 years old a year and a half after the parents entered the study and when the overnights data were collected. The family court-involved parents agreed to be part of a randomized study that included a cooperative co-parenting intervention and a control condition; data were collected from both parents. Most (75%) of the children had one or more overnights per week. Parenting plans were reported in terms of overnights (yes/no), number of caregivers and consistent schedules week-to-week. Reports of children's cognitive, social and emotional difficulties according to each parent were studied. Similar to the Solomon & George and McIntosh et al. studies, parental conflict and parent–child relationships were more highly related to children's difficulties than were the parenting plan variables. Consistency of schedule and number of caregivers were more important than overnights in and of themselves. Girls were beneficiaries of overnights and multiple caregivers, but boys were not. Two characteristics of the data to note are: 1) These children were not infants, the majority were preschoolers. 2) Parents reported moderate or lower levels of conflict and high conflict parents were excluded or opted out of participation.

McIntosh et al. (2010, 2013) used a sample of parents living apart, drawn from a large randomized general population database[1]. Emotional regulation was examined for children in three age groups—infants under two years, 2–3 years, and 4–5 years. Different thresholds of overnight care were defined for infants under two years, and for 4–5 year olds, ranging from no overnights but regular day contact,

Table 1
Comparison of Samples in Overnights Studies

	Solomon & George	*Pruett et al.*	*McIntosh et al.*	*Altenhofen et al.*	*Tornello et al.*
Parents' prior relationship status	Married/Living together/Non-cohabitating	Married/Living together	Married/Living together/Non-cohabitating	Married	Predominantly Non-cohabiting
Primary Reporter	Mothers	Mothers and Fathers	0–2 years: Mothers; 2–5 years: 75% Mothers	Mothers	Mothers
Measures	Attachment observations at age 1 and 3 years	Child behavior surveys	Emotional regulation by parent and teacher report	Observed ratings of mother–child interaction	Attachment and childhood adjustment at 1,3 and 5 years
Child Age	1 year, then 3 years	2–7 years at time of study	3 groups at time of study: 0–24 mos., 2–3 yrs, 4–5 yrs	1–7 years At time of study	1, 3 and 5 years
Socioeconomic Status	Mixed	Mixed	Mixed	Middle	Low

to some overnights, and most frequent overnights (one per week or more for babies under two years, and 35–50% for 3–5 year olds). Emotional regulation outcomes were studied after accounting for parenting style, co-parenting relationship qualities, and socio-economic status, variables known to influence developmental outcomes.

Parents with higher levels of angry disagreement and parenting and lower education had children with poorer health, emotional functioning, and lower persistence. No differences were found in global health or other scores related to physical or other aspects of development in any of the three age groups.

While some variables studied showed no group effects, infants in the "most frequent" overnight group (1+ nights per week) were reported to be more irritable than the "less than weekly" overnight group, and kept watch of their parent significantly more often than the "daytime only" group. Children aged 2–3 years in the "most overnights" group (35% or more overnights between their parents) showed significantly lower persistence in play and learning than those in either of the lower contact groups, and more problematic behaviors. Overnights did not predict significant group differences in the 4–5 year old group on any outcomes. Limitations of this study include small sample sizes for the infant group and relatively small effects. Given that the analyses were conducted at one point in time, neither cause and effect between overnights and outcomes nor the clinical significance of such findings over time can be concluded.

Altenhofen, Sutherland & Biringen (2010) conducted a small study of child attachment in a sample of 24 divorcing mothers and children, ages 12 to 73 months, the majority of whom were 2–4 years old. Parents were white, educated, and infants averaged eight overnights per month with fathers. Waters' Attachment Q-Set (AQS) (Vaughn & Waters, 1990; Waters & Deane, 1985) and the Infancy/Early Childhood version of the Emotional Availability (EA) Scales (Biringen, Robinson, & Emde, 2000) provided the main assessment tools. In this sample, 54% of children showed an insecure attachment with the mother. Mothers' emotional availability was related to a less conflictual co-parenting relationship, and the children involving their mothers in play contributed to attachment outcomes. Neither age at which overnights started nor other relevant variables in the study explained differences in children's attachment security. Similar to Pruett et al., this study showed the most salient contributors to child difficulty or adjustment to be the quality of parenting and the co-parenting relationship. Limitations of the study include the small sample and lack of a control group or data from fathers.

Tornello, Emery, Rowen, Potter, Ocker & Xu (2013) utilized data from the Fragile Families and Child Well-being Study. These data are representative of the population of 20 major inner US cities, consisting of predominantly black, unmarried, low income mothers who typically had not lived together with the father at birth or follow-up. The study analyzed attachment and childhood adjustment data provided by mothers from a separated families sample of 1,023 one-year-olds and 1,547 three-year-olds who had contact with both parents. Consistent with Solomon and George (1999) and McIntosh et al. (2010), one year olds with more frequent overnights (1 or more per week) were more likely to show attachment insecurity or emotional dysregulation when those infants were three-years-old. Consistent with (Kline) Pruett et al., three-year-olds with more frequent overnights (at 35%+) did not show adjustment problems at either ages three or five years. One of 28 analyses showed that three year olds with more frequent overnights had more positive behavior at age five than those who had rare overnights or day only contact. As with the other studies, overnights were not related to a number of child outcomes when the child was age three. The socio-economically disadvantaged sample of inner-city parents, most of whom had never lived together, is applicable to families with similar characteristics seen in the family court, but is not generalizable to the whole spectrum of families seen in separating families with or without parenting disputes.

On many levels, the studies are difficult to summarize, and defy grouping. Each used different samples and different data sources, asked different questions about how outcomes are related to overnight time schedules for infants, and explored different schedules and amounts of overnight time. None of the studies can be said to provide a comprehensive coverage of the relevant developmental issues. The usual research caveats are applicable: data collected at one time point precludes interpretations that suggest cause and effect (this pertains to all of the studies except Tornello), and statistically significant findings may be small enough in absolute terms not to be clinically relevant (*see*

Pruett & DiFonzo, 2014, for an expanded explanation of the latter caveat). Moreover, the studies illustrate the importance of taking into account differences between and within samples of families with widely varying demographic characteristics. Multiple questions remain, such as which infants fare better with more frequent overnight arrangements, and what aspects of development—such as cognitive, language, and psychosocial outcomes—may be enhanced by including overnight care in parenting schedules from an early age as well as later ages. None have covered the range of families seen in family court and those who negotiated parenting plans with lawyers, mediators, or among themselves. This field of knowledge will advance and increasingly differentiate family and parenting circumstances based on the collective evidence of multiple studies that are yet to be conducted.

From the overlap across existing studies and an integration of the broader developmental and family literatures, we offer seven points of consensus that form the basis of subsequent clinical recommendations and policy considerations (see Part II of this issue). Bear in mind that the research utilizes group data, and we encourage a view that validates *both* group trends in these data *and* the importance of appreciating variation in each family's individual situation.

POINTS OF CONSENSUS ABOUT THE DEVELOPMENTAL NEEDS OF YOUNG CHILDREN IN FAMILIES LIVING APART

#1: Early childhood (0–3 years inclusive) is a period critical to subsequent psychosocial and emotional development and is deserving of special attention and planning in family law matters.

#2: Across all family structures, healthy development in the young child rests on the capacity of caregivers to protect the child from physical harm and undue stress by being a consistent, responsive presence.

#3: Similarly, healthy development rests on the capacity of caregivers to stimulate and support the child's independent exploration and learning and to handle the excitement and aggression that accompanies the process of discovery.

#4: Secure development in this phase requires multiple supports to create both continuity and an expanding caregiving environment for the young child that includes family, community, educational and cultural connections.

#5: A "both/and" perspective on early attachment formation and joint parental involvement is warranted. The young child needs early, organized caregiving from at least one, and most advantageously, more than one available caregiver. An optimal goal is a "triadic secure base" constituted by both parents and the child as a family system, where a healthy co-parenting environment supports the child's attachment relationships with each parent and vice versa.

#6: The small group of relevant studies to date substantiates caution about high frequency overnight time schedules in the 0–3 year period, particularly when the child's security with a parent is unformed, or parents cannot agree on how to share care of the child. Equally true, clinical and theoretical cautions against any overnight care during the first three years have not been supported.

#7: Critical variables in considering readiness for and the likely impact of overnight schedules include parents' psychological and social resources, the current nature of parental dynamics—particularly conflict, and the nature and quality of each parent–child relationship prior to separation.

CONCLUSIONS

As articulated throughout this article, and addressed elsewhere (Pruett & DiFonzo, 2014), little is yet known about the developmental impacts of overnight care. The field is practically devoid of longitudinal datasets or studies that follow children's adjustment through preschool and into school.

The roles of other family members (siblings, grandparents, etc.) and the potential influences of child care as additional forces that influence children's responses to separation and overnights remain unexplored terrain. The place of ethnic and cultural identities and practices raise questions that are virtually untouched. The relevance of parent gender will in time be explicated by research conducted with separating same-sex couples, and by studies of heterosexual fathers who were stay-at-home dads prior to the separation. Studies differentiating age, education level, and family values will enable us to better compare international trends. We eagerly anticipate the time in which answers to questions about infant overnight care evolve from methodologically sophisticated studies with diverse samples.

Until that time, we stand together as three authors whose viewpoints have been linked to differing attitudes and findings about overnights for young children, and have been used in court rooms and conference rooms as "proof of" evidence for which we declare there to be no proof. We present here, instead, an attempt at integrating foundational knowledge. Our synthesis of attachment and parental involvement perspectives points to the centrality of parent–child relationships for sound decision making. Even though we strongly encourage co-parenting, we also understand that some relationships and family contexts restrict how much and how well parents living separately can raise their child together at a given time. For children 0–3 years, parents' capacity to function as a supportive unit in the service of protecting the child's rapidly developing and highly vulnerable world may determine whether overnights support, are neutral, or are harmful to the child. In Part II of our parental separation and overnight care of young children series, we take the next step of building upon the consensus principles we have reached here by charting the facilitative and protective conditions under which the youngest children are likely to thrive in overnight care.

NOTE

1. This paper was collaboratively authored with seminal contributions from each of the authors. We wish to acknowledge Jan Johnston for her support and guidance in the final stages of completing these two companion papers. This study used unit record data from Growing Up in Australia, the Longitudinal Study of Australian Children. The study is conducted in partnership between the Department of Families, Housing, Community Services and Indigenous Affairs, the Australian Institute of Family Studies and the Australian Bureau of Statistics.

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PARENTAL SEPARATION AND OVERNIGHT CARE OF YOUNG CHILDREN, PART II: PUTTING THEORY INTO PRACTICE

Jennifer E. McIntosh, Marsha Kline Pruett, and Joan B. Kelly*

This article is a companion piece to the empirical and theoretical perspectives on infant overnight care arrangements offered in Part I. Grounded in an integrated psycho-developmental perspective, the paper provides a set of clinical assumptions and a related chart of practical considerations, to guide decision making about infant overnight care, both in the individual case and in broader policy contexts. At all levels of decision making, we endorse the need for developmentally sensitive resolutions that protect both the vulnerabilities of early childhood and support lifelong parent–child relationships, whenever possible.

Key Points for the Family Court Community:

- Parenting orders or plans for children 0–3 years of age should foster both developmental security and the health of each parent–child relationship, now and into the future.
- From a position of theoretical and empirical consensus, we provide an integrated set of assumptions and considerations to guide decision making about overnight parenting plans.
- These considerations apply equally to planning in the individual case and to policy level decisions.

Keywords: *Attachment*; *Children*; *Divorce*; *Infants*; *Overnights*; *Parent Involvement*; *Parenting Plans*; *and Separation*.

TOWARD DEVELOPMENTALLY RESPONSIVE PARENTING PLANS AND ORDERS

The consensus points outlined in Part I of this paper (Pruett, McIntosh, & Kelly, this issue) provide the foundation for the current article (Part II). We take the view that parenting orders or plans for the 0–3 year group have twin and mutually reinforcing responsibilities; the first to foster developmental well-being during the first three years, and the second to support the health of each parent–child relationship, now and into the future. Here, we bridge relevant bodies of developmental and divorce research into a set of assumptions and clinical considerations, in the hope of providing practical guidance for individualized planning about the postseparation care of young children.

Throughout these two companion papers, we resist the urge to prescribe fixed formulas about numbers of overnights or age of commencement, and encourage policy makers and practitioners to do likewise. Instead, we provide guidance about the key assumptions, principles and specific factors that, when weighed together in the individual case, will foster developmentally sound decisions.

THE UNDERPINNING ASSUMPTIONS

A set of core assumptions provides a critical context for the decision-making chart that follows. These assumptions prioritize both attachment organization and joint parental involvement whenever the conditions of safety and the minimization of stress are met. Under such conditions, a responsive parenting plan would allow the child to benefit from the ways that parent-child relationships in early childhood differ normatively, and enable access to the full complement of emotional, cognitive, family, social and economic resources each parent can offer. The clinical reasoning within the chart (see Table 1) rests on three levels of assumptions:

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Table 1
Considerations for determining postseparation overnight care of children aged 0–3 years

Bear in mind when using this chart, that. . .
1) The left column reflects conditions within the caregiving environment to be considered in determining the presence or absence, and frequency, of overnights.
2) Parents and other decision makers will need to weigh not only the number of overnights, but the spacing and frequency of transitions between homes, and the emotional ease of the exchanges for the child.
3) Even when all parenting conditions are met, higher frequency overnights (see right hand column) are not generally indicated for infants 0–18 months. For reasons of temperament or maturation, this will also apply to older infants/toddlers who demonstrate regulation difficulties or other signs that they are stressed by the arrangements.
4) When either lower or higher levels of overnights are not indicated initially, they may become so with the child's maturation, and/or with the assistance of educational and/or counseling support for parents, or mediation. An agreed "step-up" plan is helpful in progressing toward overnights.
5) This developmentally based guidance for children 0–3 (i.e. up to 48 months) *is not intended to override the discretion of parents who jointly elect to follow other schedules in the best interests of their child, and in the context of their own circumstances.*

Considerations (In order of importance)	*Rare/No overnights indicated*	*Lower frequency overnights indicated (1–4 per month)*	*Higher frequency overnights indicated (5+ per month)*
1. Safety A) The child is safe in the care of each parent B) Parents are safe with each other	A or B are absent	A is established. B: Conflict is separation-related & non-threatening or endangering	A and B are established
2. The child's trust and security with each parent The young child: A) is continuing an established, trusting relationship (of 6 months or more) with a parent When resident parent is not present, the young child: B) seeks comfort from and is soothed by the other parent C) finds support for exploration with the other parent	A or B & C absent	A is established, B & C are emerging.	A–C are established
3. Parent mental health The parent has: A) sensitivity in recognizing and meeting child's needs B) no or well-managed drug and alcohol issues C) no or well-managed mental health issues	Any of A–C are absent	A–C are emerging	A–C are established
4. Health and development The young child: A) has significant developmental or medical needs B) such needs are well supported in the proposed arrangement C) the infant is exclusively breast-feeding or will not yet accept a bottle	A exists but B is absent; C exists	A and/or C are absent; or A exists but B is emerging/ established	A and C are absent; A exists and B is established
5. Behavioral adjustment Relative to temperament and stage of development, the child shows any of the following *persistent behaviors (i.e., over 3–4 weeks)*: A) irritability, frequently unsettled, without medical cause B) excessive clinging on separation C) frequent crying or other intense upset D) aggressive behavior, including self-harming behavior E) regression in established behaviors, e.g. toileting, eating, sleeping F) low persistence in play and learning G) any regressions or difficulties in the above are short lived and readily resolved	Any of A–F exist; G is absent	Any of A–F sometimes exist but G is established	Any of A–F are rare; G is established
6. Co-parental relationship Parents are able to: A) communicate civilly about and plan for their young child together B) manage conflicts arising, using interventions as needed C) be consistent yet responsive with the schedule D) value or at least accept the child's relationship with the other parent E) put their child's needs before their own wishes for time/contact F) ensure low stress exchange of the child at transitions		A–F are established or emerging	A–F are established
7. Pragmatic resources to support sharing of overnights Parents: A) can be the main caregiver for the young child during scheduled overnight and majority of scheduled day time (excluding work time) B) live within a manageable commute of each other C) when a parent cannot personally care for the child overnight, care by the other parent is prioritized	A, B and C are absent	A and B are established, and C is emerging	A–C are established
8. Family Factors A) Arrangement reflects status quo and/or older siblings sharing the same overnight schedule are a source of security to the young child B) Overnight arrangements would enable maintenance of other relationships that are sources of security to the child, (e.g., grandparents) and/or enable exposure to important elements of each parents' cultural or religious practices.		A exists if applicable; The importance of B for the child is emerging or established	A exists if applicable; B is established

First level assumptions:
Parenting plans and orders made for children 0–3 years are developmentally supportive when they provide for a caregiving environment in which:

1.1) the young child is safe with, and can be comforted by, both parents; and
1.2) the young child is protected from harmful levels of stress.

Second level assumptions:
When level one assumptions are met, parenting plans:

2.1) Support the development of organized attachments to each parent/caregiver wherever parenting opportunities and capacities permit.
2.2) Encourage parenting interactions that support the development and maintenance of attachments with each parent. These interactions:
   a) provide regular opportunities for direct care from each parent, involving soothing and settling, teaching and playing, maintenance of important routines throughout the day and night, and support to explore the wider world outside of the home and the immediate family; and
   b) provide the young child with support to transition between parents, including comfort and reassurance as needed.
2.3) Anticipate changes in the parenting plan through a series of well articulated step-ups, to be implemented at a pace and level determined by the young child's responses to each step, and each parent's ongoing ability to effectively enact the proposed plan individually, and preferably, in concert.
2.4) Reflect practical considerations. The arrangements are adequately supported by individual and relationship resources, including realities of parents' proximity to each other, work-life schedules and flexibility, or lack of the same, and support networks.
2.5) Maximize the amount of time the young child is cared for by a parent, or when a parent is otherwise unavailable, a family member or other person trusted by both parents. Parents consider the child's other parent as a first port of call when child care is needed.
2.6) Encourage shared decisions about major child-related issues, with effective use of mediation, co-parenting counseling, and related programs as needed.

Third level assumptions:
When level one assumptions are *not* met:

3.1) The priority is to ensure that one organized attachment relationship is formed (with practical and therapeutic support as needed), even if that results in delaying time with the other parent.
3.2) Such circumstances may reflect characteristics or chronic behaviors of one or both parents (e.g., neglect, current violence, severe personality disorders, mental illness) or factors within the parental relationship (violence, high conflict, geographic distance) that render two organized attachment relationships difficult to foster or sustain.
3.3) Some infants and toddlers will have two parents with a history of psychiatric problems, substance abuse, poor parenting, and troubled relationships. Unaided, the infant may not be able to form an organized attachment with either parent within a timeframe that is developmentally useful to the child. Ongoing therapeutic support and parenting education in these cases are of critical importance.

CENTERPOINT: NATURE AND QUALITY OF THE PARENT–CHILD RELATIONSHIP

We suggest that both attachment and parental involvement perspectives point to a common centerpoint upon which decisions about overnights are best grounded: the nature and quality of the

parent-child relationship. It is here that most young children have their early psycho-emotional needs met, and where the young brain receives the developmental nourishment that sets a future course for healthy maturation. Attachment security, child mental health, resilient coping, and cohesive family environments hinge squarely on each parent's history of providing consistent, sensitive responses to the child's needs.

In all families, an essential condition for implementation of overnight care in the years 0–3 includes a pre-existing relationship with the nonresident parent, generally for at least six months, in which the infant has been safe and felt comforted. Hence, early overnights are more likely to occur with parents who have lived together through pregnancy and in the early months of the child's life, or by non-cohabiting parents who are cooperative and mutually invested in the child's relationship with both parents. In all contexts, it is important that parents monitor their child for signs of overload, and respond accordingly.

Within our suggested framework, individual infant needs and parents' circumstances may dictate the need for more or less daytime contacts, or overnights, and different starting points. The guidance provided should not prevent parents from adapting their arrangements to ensure more effective, responsive parenting. From the child's perspective, caregiving schedules are designed to minimize separation-induced distress and support routines in the child's day-to-day life. The schedule should not create lengthier separations from either parent than the child can manage. Symptoms in the child as described in the table above (see Point 5) may signal the need for changes in the schedule or in aspects of parenting, co-parenting, or the transition itself, to better accommodate the child. Patience will be needed while finding the right balance for the individual child.

Some parents have not established or consolidated a relationship with the child, or with each other, yet co-parenting has clear merit, and a plan to support its growth is needed. In this scenario, the duration of parenting time with an unknown or lesser known parent would initially be limited to a few hours on each occasion, and of sufficient frequency, until the parent-child relationship is on sure footing. This will encourage familiarity and growth within the infant of memories of trust and comfort (Main, Hesse, & Hesse, 2011). A focus on safety and security for the child means that in cases of chronic parental or interparental disturbance, manifested in abusive or neglectful parenting, apportioning parenting time to ensure the development of at least one organized attachment, with one person determining how day-to-day care will proceed for the child's sake, becomes a necessary priority.

MEANINGS FOR LEGISLATION AND POLICY

Understanding the confusion and anxiety that indeterminate legal standards can engender, family lawyers and advocates for mothers, fathers, and children have sought presumptive rules that can be applied to most or all families. We believe, however, that unqualified presumptive "for" or "against" rules regarding parenting plans will not adequately protect the best interests of very young children. We suggest that a hierarchy of priorities, such as that offered here, can guide both the decisions that parents and family court professionals make, as well as the expectations of parents in settlement and parenting time planning. Given the general developmental, divorce and separation-specific research about overnights described in Part I of our shared writing, we recommend a thoughtful approach. In general, when there are concerns about any key aspect of the child's development and/or the caregiving environment, parenting plans that are initially conservative about overnight frequency, and that have built in step-ups, are appropriate. Optimally, growth in the plan would be forecast in advance, and step-ups would occur within a specified timeframe, guided by the young child's adjustment to each change, and without the need to return to family court.

We support co-parenting as a general rule and principle. We also support the goals of developing parenting capacity and supporting the deepening of skills and knowledge within each parent and between parents, whenever possible. Availability of specialized parent-infant mental health interven-

tions, parent education programs designed for infancy through age 3, and programs for high conflict situations that help parents understand the destructive nature of their behaviors and implement positive change are important in this regard.

There are families within the court population for whom this co-parenting principle will not apply, and for whom these interventions will not be successful. For multiple reasons, some parents involved in postseparation disputes demonstrate significant impediments to collaborating over child rearing, including in decision-making. Increasingly, parents are entering the family court younger, with fewer social and socioeconomic resources (Kaspiew et al., 2009). Most important, many of these parents lack the foundation provided by having once had some relationship with each other of an affectionate and trusting nature before having a baby together. Others have had only sporadic contact with the infant since birth. Chronic mental health problems, drug or alcohol addictions, histories of engaging in high risk behaviors, ongoing threat and coercion, and personality disorders are some of the confounding dynamics that further inhibit development of a collaborative co-parenting alliance (Johnston, 2006; Kaspiew et al., 2009). One or both parents may lack the skills or intent to collaborate with the other, reject the importance of the other, and have no desire to co-parent toward the purpose of jointly protecting and enriching their child's development.

Conflict is not always perpetrated or maintained by both parents (Kelly, 2003). Conundrums exist when the parent caring for the child a majority of time is also the one to unreasonably reject or block the meaningful participation of the other parent. Severe borderline pathology and/or rage associated with the separation often underlie the unreasonable behavior and accompanying conflict. Especially in these situations, individualized planning becomes essential. From the perspectives of attachment and parental involvement, when a nonresident parent has been an involved parent prior to separation in ways beneficial to the parent and child, it may be important to implement a parenting plan involving that parent regularly in all aspects of the child's care, despite the lack of a parenting alliance. These are likely to be situations requiring careful mental health and parenting evaluation and intervention, and skilled parenting coordination (Kelly, 2014; Sullivan, 2013), monitoring and weighing multiple parent and family based conditions that will impact the child's current and future mental health.

Parents who did not have a trusting relationship with each other and/or the child before separating will need some assistance that helps each to appreciate the value of the other in the child's life, to become aware of their responsibilities and parental obligations, to parent effectively, to find ways to communicate with each other, and to co-parent despite potentially little knowledge of each other. Parenting courses or specialized infant-parent therapies can help parents transcend fragile beginnings, while mediation and parenting coordination can assist in determining if, and to what extent, parents are able to participate meaningfully in the child's care, including overnights.

CONCLUSIONS

Building on the theoretical, developmental, and empirical consensus established in Pruett, McIntosh, & Kelly, Part I (this issue), this paper takes the task of integration a step further, by detailing a practice framework for crafting developmentally supportive arrangements for children 0–3 years. This framework prioritizes *both* the early establishment of organized attachment *and* the early nurturance and maintenance of enduring relationships between each parent and their child. When infants enjoy trusting relationships with both parents, and when their parents can work together to implement plans that support these goals jointly, there is more opportunity to advance both goals concurrently. When conflict and other qualities of parent(s) or their interaction render it impossible to advance both goals simultaneously, it becomes necessary for the developmental goals to be staggered.

In normal development, new competencies and skills rarely come "online" simultaneously, or with equal efficacy. Staggered or uneven development naturally occurs in the 0–3 years, especially as the young child tackles a new or higher order developmental challenge. While working to gain competence in one area, such as speech, a pause or temporary lapse is often evident in a more physically determined skill, as the child pours their energy into the new challenge. We believe this scenario is a

metaphor for what happens with overnights, and provides a useful lens for parents and other decision makers to apply. Despite parents' best efforts, when a young child shows that they cannot concurrently master both attachment security and the developmental demands placed on her by overnights, delaying overnights may simply allow development to catch up with the challenge of the new situation. Often, this requires little more than a slower pace of progression in the parenting plan to afford the child time to grow or advance her ability to self-regulate and adjust. If supported to do so, the child will soon signal that she is able to manage, if not eager to assume the next step.

As one parent described in a letter to the therapist involved, recognizing and supporting the need for staggered progress can be key to ensuring the child's confident movement into higher levels of overnights[1]:

> *. . . Our son is nearly three. We separated shortly after he was born, and had court orders for increasing overnights, which would have led to 50/50 by the time he was two. He started to stay overnights with me when he turned one but was clearly distressed with the separations. I couldn't have him be distressed. I chose (despite friends believing otherwise) to work with his desires and wants. So we discontinued the overnights for awhile. He was always happy with me in the day including being put to bed for his day time sleep, and we kept that going, and brought the nights back slowly. Over time, through his own volition he became comfortable with staying overnight. Now, he will just state (for the record!) that he will be staying "all night" with me and that's it. Sometimes, after this declaration he might back track a little but by then I just reassure his doubts and we move on and he is happy, and sleeps soundly. He often now wants to stay on longer with me and transition times are joyfully undertaken. We are on a roll. So, needless to say I'm happy with the decision to allow him to come to this in his own time.*

A basis of trust between parents for working through overnight care issues supports a triadic base of security for early development, and beyond. The case of parents who have never lived together during the child's lifetime or never shared an intimate bond is clearly different. Here, support to forge a safe connection between parents is necessary for the very young child to forge a safe connection with each parent. Given the diversity in parenting circumstances endemic to the family-law field, we suggest that case-by-case planning for children 0–3 years is essential. This need not be a lengthy, arduous or specialist task. Using the assumptions and considerations mapped in this paper as a guide, a shared analysis by parents and family law practitioners of the pertinent qualities within the family triad is possible.

In time, we hope to better differentiate circumstances that allow young children to benefit from various overnight parenting plans, and to distinguish those that do not. Research will help advance the discussion from supposition to a nuanced understanding that accounts for the incredible diversity evident in developmental trajectories and family constellations. Our work here represents only a beginning in this task. As clinical experience in using this framework increases, we expect that patterns will emerge that are instructive to designing interventions and policies that support parents with the challenge of creating a developmentally supportive life for a young child, after separation.

Ultimately, informed policies and practices that both embrace the unique complexity of the first three years of life, and build strong relationship foundations for the coming years, will best protect the life-long developmental interests of the young child. We hope our shared interest in safeguarding children and families has provided a useful framework for parents and for professionals to thoughtfully resolve their own uncertainties about these issues, case by case.

NOTES

*The authors wish to thank Janet Johnston for her thoughtful guidance in the final stages of organizing these companion articles.

1. Printed with permission, with identifying details altered.

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2015 OREGON LEGISLATION HIGHLIGHTS

DOMESTIC RELATIONS LAW

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H.	HB 2340 (ch 197)	Protecting personal information contained in judgments
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J.	HB 2570 (ch 99)	Attorney fees in protective proceedings (*Derkatsch* fix)

I. INTRODUCTION

The 2015 legislative session mirrored prior sessions in that it resulted in significant statutory changes impacting the family law practice area. The Oregon Child Support Program has more flexibility to suspend enforcement of child support upon a change in physical custody. The process for entry of support order in cases with multiple orders was streamlined. The legislature created a step-by-step statutory framework for the process of re-adoption that was previously missing from statute. Adopted children were provided greater access to information about their biological parents and siblings. Oregon DHS was tasked with adopting rules for adoption proceedings that are designed to better reflect the dynamics of foster parents, potential adoptive families, and relatives. Victims of domestic violence were afforded greater access to stalking protective orders, they were provided an additional protection through the creation of an emergency protective order that is accessible 24/7 by a peace officer, and they can now rest assured that their confidential communications with their advocates will be protected from disclosure in court. A new state law was created to provide local law enforcement officers the ability to enforce firearm restrictions in cases involving restraining and stalking orders. The legislature took up the task of updating outdated statutes that failed to reflect the constitutionally protected right of same-sex couples to marry freely. Spouses now have additional options for changing their names after marriage or after entering into registered domestic partnerships. The court was provided authority to divide survivor benefits in additional types of pension plans. The legislature continued addressing the need to restrict access to parties' personal information contained in judgments as statewide implementation of e-Court continues.

All bills are effective January 1, 2016, unless stated otherwise.

II. ADMINISTRATIVE SUPPORT PROCEEDINGS

A. HB 3156A (ch 72) Temporary suspension of enforcement of child support upon change in physical custody

ORS Chapter 25 sets forth the framework for enforcement of child support obligations. Under current law, the Oregon Child Support Program (CSP) may suspend enforcement of child support obligations only when continued enforcement *will* result in a credit. HB 3156A provides authority to temporarily suspend enforcement regardless of whether continued enforcement will result in a credit balance, but only if all of the children are residing with the obligor and continued collection of support would impair the obligor's ability to provide direct support to the children. The CSP may only suspend enforcement if an action is currently pending to terminate, vacate, or set aside a support order, *or* to modify a support order because of a change in physical custody of the children.

The obligee may object within 14 days of receiving notice of the CSP's intent to suspend enforcement of the support order, but may only objection on the following limited grounds:

1. The child is not in the physical custody of the obligor;
2. The child is in the physical custody of the obligor, but *without* the consent of the obligee; ***or***
3. The basis for the suspension of enforcement is factually incorrect.

Suspension of collection efforts in cases where the children have moved from residing primarily with the obligee to the obligor enables for a streamlined process through which the new primary residential parent can divert money from the other parent and instead utilize those resources for the children's benefit.

B. HB 3158 (ch 73) Removes time limitation on judgments in cases involving multiple child support judgments

HB 2275 (2005 legislative session) dealt with cases involving multiple child support

judgments. That bill provided that the terms of a later-issued judgment control and the earlier judgment is automatically terminated, but only if several factors are met, including:

1. The court (or administrator) specifically ordered that the later-issued judgment would take precedence over the earlier issued judgment;

2. All parties had an opportunity to challenge the later-issued judgment;

3. The administrator was providing enforcement services.

3. The two child support judgments involved the same obligor, child, and time period; and

4. The later-issued child support judgment be entered before January 1, 2004.

HB 3158 removes the requirement that a later-issued child support judgment be entered before January 1, 2004, and changes the requirement that the administrator ***was*** providing services to a requirement that the administrator ***is*** providing services. These changes provide the Oregon Child Support Program with the ability to provide prompt enforcement of the most recent ordered entered involving the parties.

C. HB 3159 (ch 74) Permits state to recover from any person or entity that issues a dishonored check as payment for child support

HB 3159 amends ORS 25.125 to provide that the state may recover from any person or entity that issues a dishonored check for payment of child support. Under current law, the state is permitted to recover only from the obligor or the withholder who presented the check (i.e., obligor's employer). The bill clarifies that the state may recover from either the obligor or the issuer.

III. ADOPTIVE PROCEEDINGS

A. HB 2365 (ch 511) Creation of a re-adoption process

Prior to passage of HB 2365, Oregon law lacked a statutory process for re-adoptions. A re-

adoption occurs when adoptive parents travel to a different country and complete the adoption of their child in that country. Many parents wish to re-adopt their child upon their return to Oregon in order to obtain an Oregon birth certificate, change their child's name, or change their child's birth date. Federal law provides that a Federal Certificate of Citizenship for a child born outside of the United States shall reflect the child's name and date of birth as indicated on a state court order or state vital records document issued by the child's state of residence after the child has been adopted. The lack of a clear re-adoption process in Oregon presented difficulties for families attempting to clear this legal hurdle upon their return to Oregon with their newly adopted child.

Prior to passage of HB 2365, re-adoption processes informally adopted in Oregon by one county might differ from that found in other counties. HB 2365 amends ORS 109.385 to provide a specific step-by-step process for a re-adoption proceeding in Oregon that ensures a consistent statewide standard.

This bill became effective as of June 22, 2015.

B. HB 2366 (ch 512) Adoption filing fees

HB 2366 provides for an increase in the filing fee for a petition in an adoption proceeding from $252 to $255. Under current law, the petitioner must pay a $252 filing fee when filing the petition, but must then pay an additional $1 fee once the adoption is finalized for issuance of the Court Certificate of Adoption. HB 2366 combines those two fees in an effort to streamline the administrative process involved in the adoption process. The additional $2 increase in the fee reflects that the court may no longer charge for issuing certificates of adoption and must, in fact, issue "one or more" certificates once the adoption process is complete.

HB 2366 additionally imposes a filing fee (set forth in ORS 21.145, which is currently $105)

for a motion filed by the birth parent of an adult adoptee under Oregon's new open adoption records law, except in cases where DHS consented to the adoption.

C. HB 2414 (ch 200) Use and registry with voluntary adoption registries

HB 2414 permits parents or guardians of minor adoptees or minor genetic siblings of adoptees to use and register with voluntary adoption registries. Under existing law, minor siblings are restricted from utilizing the mandatory adoption search and registry program unless the minor child's birth parent has already registered with the program, the birth parent approves of the use and registry, and all adoptees and siblings have reached the age of 18. HB 2414 amends ORS Chapter 109 to provide that a minor child's adoptive parent may opt in to the search and registry program on the child's behalf in an effort to locate a sibling of the minor child, ***unless*** the other sibling presently resides with the birth parent. This change in the law provides an avenue for siblings separated by adoption to locate each other with the assistance of their adoptive parents without having to wait until reaching the age of majority.

HB 2414 additionally provides an avenue for children of a deceased adult adoptee to access the search and registry program. Under existing law, the child of an adult adoptee had no independent access to the program, which meant that if the adult adoptee (i.e., parent) died without having ever utilized the program, the child would be left with no readily available avenue to contact family members. HB 2414 permits a child of a deceased adult adoptee to utilize the program so as to promote access to previously unknown family members.

D. SB 741 (ch 795) Requires Oregon DHS to adopt administrative rules for adoption proceedings that require equal consideration be given to relatives and current caretakers as prospective adoptive parents

Under current law governing adoption proceedings there is no expressed placement

preference. Instead, adoption statutes recite the general "best interests of the child" standard as to where the child ought to be placed. SB 741 requires that the administrative rules governing home studies and placement reports to provide equal status and priority to relatives and current caretakers seeking to adopt as is provided other prospective adoptive parents with regard to factors having to do with the child's safety, attachment, and well-being. Additionally, SB 741 requires that with regard to suitability of placement, the rules include a preference for relatives and current caretakers over other individuals seeking to adopt.

This bill became effective as of July 27, 2015.

IV. DOMESTIC VIOLENCE ISSUES

A. HB 2628 (ch 89) Disallows fees in action for stalking protective order

Existing law provides that a petitioner seeking a Stalking Protective Order (SPO) without also seeking damages shall be exempted from filing fees, service fees, and hearing fees. HB 2628 extends the exemption of fees to all persons seeking SPOs, regardless of whether additional relief (i.e., monetary damages) is sought.

This bill became effective as of May 18, 2015.

B. HB 2776 (252) Application of emergency protective order by peace officer

ORS 107.700 through 107.735 provides the statutory framework for a Family Abuse Prevention Act (FAPA) restraining order. In order to receive an order of restraint, a victim of abuse must file a petition with the court and subsequently attend a hearing either by telephone or in person. This process presents possible barriers for individuals who may be in need of protective orders of restraint during a time the court is not in session (and may not be in session for a number of days).

HB 2776 authorizes a peace officer to request an emergency protective order on a victim’s

behalf that operates much like a traditional FAPA restraining order, albeit on a more restrictive basis. In order to request such an order, the peace officer must first obtain the victim's consent. The peace officer must then make a showing that probable cause exists that: (1) the peace officer has responded to an incident of domestic disturbance and the circumstances for mandatory arrest exist; ***or*** that a person is in immediate danger; ***and*** (2) an emergency protective order is necessary to prevent a person from suffering the occurrence or recurrence of abuse.

An emergency protective order entered pursuant to this new law is effective upon service of the respondent, but automatically expires seven calendar days from the date the court signs the order or upon further order of the court.

Note: *The presiding judge of the circuit court in each county shall designate at least one judge to be reasonably available to enter, in person or by electronic transmission, ex parte emergency protective orders at all times whether or not the court is in session.*

C. HB 3476 (ch 265) Establishes privilege for certain communications between victims of domestic violence and advocates

The privilege of confidentiality exists in a whole host of relationships involving positions of confidence (e.g., doctor-patient, psychologist-patient, lawyer-client, husband-wife, etc.). The rules for confidentiality are set forth in ORS 40.225 through 40.295 in the Oregon Evidence Code.

HB 3476 creates a new type of communications privilege protected under the Oregon Evidence Code. The bill provides that confidential communications between a victim of sexual assault, domestic violence, or stalking, and victim advocates or services programs are protected communications that are inadmissible in civil, criminal, administrative, and school proceedings. The victim holds the privilege, but consistent with other protected privileges, the communication may

be disclosed by the advocate or program without the victim's consent to the extent necessary for defense in any civil, criminal, or administrative action that is brought against the advocate or program by or on behalf of the victim.

This bill became effective as of June 4, 2015.

D. SB 525 (ch 497) Prohibits possession of firearm or ammunition by certain persons

SB makes it unlawful for a person to knowingly possess a firearm or ammunition if the person is the subject of a court order that was issued or continued ***after a hearing*** for which the person had actual notice and during which the person had an opportunity to be heard, and restrains the person from stalking, intimidating, molesting, or menacing an intimate partner, child of an intimate partner, or child of the person. Additionally, the order must make a finding that the person represents a credible threat to the physical safety of an intimate partner, a child of an intimate partner, or a child of the person, ***or*** the person has been convicted of a qualifying misdemeanor[1] and, at the time of the offense, the person was a family member of the victim of the offense.

SB 525 essentially creates a state crime that mirrors current federal crime prohibiting possession of a firearm or ammunition by adjudicated domestic violence offenders. Creation of a state crime provides local law enforcement officers the authority to take action. With federal law as the only barrier to firearm possession, local law enforcement officers were unable to readily act in these types of cases.

[1] A qualifying misdemeanor must have, as an element of the offense, the use or attempted use of physical force or the threatened use of a deadly weapon.

IV. OTHER DOMESTIC RELATIONS BILLS

A. HB 2478 (ch 629) Achieves gender neutrality in marriage statutes and related laws

U.S. District Court Judge Michael McShane ruled on May 19, 2014, that Oregon's constitutional ban on marriages between gay and lesbian couples was unconstitutional. In response to that ruling, HB 2478 amends a host of statutes to reflect that same-sex couples now have the freedom to marry by making statutory language referring to married couples more gender neutral.

B. HB 3015 (ch 425) Creates additional options for changing name after marriage or after entering into registered domestic partnership

ORS 106.220 provides authority for a party entering into marriage to make changes to that party's name. The statute specifies various naming options, including retaining a party's surname, changing a surname to the other party's surname or combining surnames with a hyphen. ORS 106.335 sets forth similar authority and rules in the context of registered domestic partnerships.

HB 3015 amends both ORS 106.220 and 106.335 to clarify that a party may take only *one* surname, or a combination of *multiple* surnames of either or both parties.

This bill became effective as of June 16, 2015.

C. SB 321 (ch 234) Decreases compulsory school age from seven to six years of age

SB 321 decreases the compulsory school age from seven to six years of age as of September 1 immediately preceding the beginning of the current school term.

This bill becomes effective as of July 1, 2016.

D. SB 370 (ch 506) Provides for division of certain death benefits in judgment of annulment, dissolution of marriage, or separation

ORS 238.465 provides for payment of PERS benefits to an alternate payee on divorce, annulment or unlimited separation. ORS 237.600 deals with payment of benefits from a member of

other state and local public retirement plans other than PERS. The aim of SB 370 was to protect survivor benefits for former spouses of members in a public retirement plan. Where the terms of the retirement plan provide that the spouse is entitled to survivor benefits if the member dies before retirement, then logic dictates that entitlement should not be deprived by the plan just because the parties become divorced. The plan should still be required to continue that survivor benefit to the former spouse to the extent provided in a court order. The plan is already committed to provide that benefit to the spouse while the parties are married. To be relieved of providing that benefit due to divorce of the parties creates a windfall to the plan and deprives a former spouse of an important protection.

This dynamic is exactly what happened in *Rose v. Board of Trustees for the Portland Fire & Police Disability and Retirement Fund*.[2] In the *Rose* case, Wife divorced Husband (a firefighter with the City of Portland) when he was age 46 and by Qualified Domestic Relations Order (QDRO) she was awarded a survivor benefit should he die before retirement. Husband then died of cancer at age 47, not having remarried, less than three years before his early retirement date at age 50. The City denied survivor benefits to Wife and she received nothing. After a long fight at the City and then through the Multnomah County Circuit Court, the Oregon Court of Appeals affirmed the City's position. The entire benefit earned by husband during his 20-year career reverted back to the City, save the partial benefit that was paid to the parties' minor child under the terms of the plan. The City's attorneys admitted that Wife would have received a survivor benefit if either: (1) the parties had not divorced; or (2) Husband had remarried someone else before he died at age 47 so that a survivor benefit was payable under the terms of the plan; or (3) he had survived to age 50 before he

[2] 215 Or App 138, 168 P3d 1204 (2007).

retired. However, because the parties divorced and Husband died single before age 50, Wife received nothing.

The Rose case turned on the specific language of ORS 237.600(1), which states in relevant part:

> " . . . *payment of any . . . death benefit . . . under any public employer retirement plan . . .* ***that would otherwise be made to a person entitled to benefits under the plan*** *shall be paid, in whole or in part, to an alternate payee if and to the extent expressly provided for in the terms of any court decree . . . .*" Emphasis added.

The plan argued, and the court held, that because there is no survivor benefit at all on the death of a single person under the City of Portland plan, then a survivor benefit cannot be paid to Wife in the *Rose* case. It did not matter that the parties had been married and that she was entitled to the survivor benefit while married. By virtue of the divorce, she automatically lost that benefit notwithstanding the terms of the dissolution judgment or the subsequently entered QDRO.

At each level in *Rose*, Wife argued that the statute should be read to mean " . . . that would otherwise be made but for the divorce . . ." as was the intent, but to no avail. Wife pointed to legislative history that demonstrated the intent of the statute was to make Oregon law co-extensive with federal law (i.e., ERISA) as it applies to private sector plans. ERISA provides plainly that a survivor benefit to which a spouse is entitled can be perpetuated after the divorce to the extent provided in a QDRO. Wife also pointed out that during the hearings for the bill enacting this very statute (Senate Bill 210) in 1993, the attorney for the City of Portland plan testified to the Legislature on this very issue, complaining that the bill would require the City of Portland plan to provide a benefit to a former spouse that it didn't then provide. Notwithstanding the City's complaints, the Legislature made no changes to the bill and passed it anyway. Wife in *Rose*, therefore, argued that,

implicitly at least, the Legislature intended the statute to require that survivor benefits be continued a former spouse if so ordered. Wife ultimately lost that argument, with the Court of Appeals ruling that legislative history was irrelevant because the statute was plain on its face.

This issue remained dead from 2007 when the Court of Appeals issues its ruling until only recently when Oregon PERS took the position that a divorced member of OPSRP (Oregon Public Service Retirement Plan, ORS Chapter 238A) who remains single cannot designate a former spouse to receive survivor benefits -- at all. Only if the member remarries a second spouse can the member be required to provide benefits to a first spouse.

By contrast, PERS Tier One and Tier Two allow survivor benefits to anyone - they are not restricted just to a spouse, much less a former spouse.

SB 370 amended Oregon law to require that the Oregon PERS OPSRP plan and other public employer retirement plans pay out a survivor benefit to a former spouse of the member as provided in a judgment or order.

This bill became effective as of June 19, 2015.

E. SB 604 (ch 298) Adoption of amendments to the Uniform Interstate Family Support Act

As part of the Preventing Sex Trafficking and Strengthening Families Act (Public Law 113-183), Congress required all states to enact any amendments to the Uniform Interstate Family Support Act (UIFSA). The amendments at issue were adopted by the National Conference of Commissioners on Uniform State Laws in 2008. SB 604 enacts all of the amendments to UIFSA, which will result in the following changes to the law in Oregon:

1. Improved enforcement of U.S. child support orders abroad and more assurance of children residing in the U.S. receiving support from parents living abroad.

2. Adoption of new guidelines and procedures for the registration, enforcement, and modification of foreign support order from countries that are parties to the Hague Convention.

3. Additional flexibility for the modification of orders when the state or country that issued the order cannot or will not process a modification.

F. SB 622 (ch 179) Abuse reporting requirement

SB 622 amends ORS 124.050 and other mandatory abuse reporting statutes to include personal support workers and home care workers.

G. SB 659 (ch 393) Requires Oregon DHS to assist noncustodial parents in obtaining home and community-based services for nonresident child

SB 659 creates new law that requires the Oregon Department of Human Services to assist in obtaining home and community-based services for a parent's child if:

1. The parent resides in Oregon;

2. The parent has a child who does not reside in Oregon but who visits the parent in Oregon for at least six weeks (need not be consecutive) each year; and

3. The child qualifies for home and community-based services via Medicaid in the child's state of residence.

Creation of this new law is an important layer of protection for Oregon non-custodial parents with children who live out of state and receive home and community-based services via Medicaid because it can be difficult to maintain those services without interruption for children who spend significant amounts of time out of their home states.

H. HB 2340 (ch 197) Protecting personal information contained in judgments

The continuing statewide implementation of e-Court has brought forth a variety of concerns regarding the public's growing access to court documents that contain sensitive personal information of litigants. HB 2340 operates to further the goal of protecting the personal information of litigants

by limiting the information that must be required in court documents by amending a number of statutory provisions that previously required the inclusion of complete Social Security Numbers, Taxpayer Identification Numbers, and driver license numbers.

HB 2340 targets four individual types of documents:

1. **Civil judgments (including judgments arising from dissolution and child support proceedings) containing a money award** must now only include the last four digits of a judgment debtor's Taxpayer Identification Number (TIN). Note that ORS 18.042 previously allowed for the exclusion of all but the last four digits of the debtor's Social Security Number (SSN), but the IRS defines TINs as including SSNs, which could lead to confusion. HB 2340 creates consistency in the type of information that ought to be excluded from judgments and protected from the public's view.

2. **Lien record abstracts** were subjected to a similar change and must now only included the last four digits of a judgment debtor's TIN (or SSN).

3. **Paternity and support judgments and orders** must now only include the final four digits of each party's SSN and driver license number.

4. **Criminal judgments relating to the payment of restitution and compensatory fines to victims of crime** must now exclude the victim's name and address.

This bill became effective as of June 2, 2015.

I. SB 788 (ch 399) Requires disclosure in petition for annulment, dissolution, or separation to disclose certain protective and restraining orders

SB 788 amends ORS 107.085 to provide that a petitioner in an action for marital annulment, dissolution, or separation must state whether there exists in Oregon or any jurisdiction a protective order between the parties or any other order that restrains one of the parties from contact with the other party or with the parties' minor children.

J. HB 2570 (ch 99) Attorney fees in protective proceedings (*Derkatsch* fix)

In 2013, the legislature enacted HB 2570 and modified ORS 125.095 to provide the court

specific authority to use the funds of a person subject to a protective proceeding to pay for attorney fees incurred prior to the court declaring the person protected. The bill also made clear that the procedures set forth in ORCP 68 do not apply to requests for approval and payment of attorney fees under ORS 125.095. Instead, HB 2570 created a list of ten distinct factors for the court to consider when determining whether to award fees, and an additional six factors to consider in determining the appropriate amount of fees to award. HB 2570 stated quite clearly that none of the factors set forth in ORS 125.095 should be controlling in the court's determination regarding attorney fees.

This 2013 legislation was in response to a ruling by the Oregon Court of Appeals that ORS 125.095 does not authorize the payment of attorney fees incurred before a protective order has been entered for services rendered in a financial abuse case brought on the protected person's behalf.[3] In other words, prior to the passage of HB 2570 in the 2013 session, attorneys were restricted from receiving payment for the pre-order work they undertook on a potential protected person's behalf (e.g., legal research, drafting petitions and other paperwork, court appearances, etc.), even if that person was subsequently deemed by the court to have been in need of protection.

Shortly after implementation of HB 2570 and the resulting amendments to ORS 125.095, practitioners recognized that the court should appropriate consider one factor above all the others – "[t]he benefit to the person subject to the protective proceeding by the party's actions in the proceeding." HB 2362 amends ORS 125.095 to provide courts the authority to elevate that singular factor above the rest in recognition of the fact that fees are often awarded out of the assets of the protected person. It can often be cost prohibitive for a protected person to bring an action before the court because of the possibility that fees might be paid to all affected parties. HB 2362 affords courts

[3] *In re Derkatsch*, 248 Or App 185, 273 P2d 204 (2012).

the opportunity to consider first and foremost the benefit to the person subject to the protective proceeding in determining whether an award of fees is appropriate at all.

Recent Significant Decisions in Family Law

Judge James C. "Jim" Egan
Oregon Court of Appeals Position 6

I would like to thank Gary Zimmer who summarized some of the material below in conjunction with his "recent significant decisions" published by the Multnomah Bar Association last spring. I would also like to thank Jordan New for material that he summarized this summer.

1. Child Custody

a. Modification of Custody Where a Grandparent is the Custodian.

Epler and Epler, 356 Or 624 (2014) was issued on December 26, 2014.

Richard Alway argued for Petitioner (mother) and Mark Kramer argued for Respondent (grandparents). Justice Baldwin delivered the opinion of the court.

Mother and Father were divorced in 2005 through a stipulated dissolution judgment which granted custody of their daughter to her grandmother. Mother sought to modify that agreement, arguing she was entitled to a legal presumption in her favor that she acted in her child's best interests. The trial court found that modification of the agreement would not be in the child's best interests, and that there had not been a substantial change in circumstances warranting modification. The Court of Appeals (full court) affirmed the trial court's denial of mother's motions. The Court held that mother was not entitled to a legal presumption because there were not concerns about due process as present in *Troxel v. Granville*. The Court found the trial court had not abused its discretion in finding a change of custody was not in the best interests of the child; as a result, mother was not harmed by being held to the standard which requires a change in circumstances to modify a dissolution agreement. Court of Appeals affirmed; trial court affirmed and reversed in part. Remanded to the circuit court to rule on mother's request to modify parenting time and child support.

b. Lifestyle Choices or a Parent: ORS 107.137(3).

Miller and Miller, 269 Or App 436 (2015) was issued on March 4, 2015.

Beth Eiva argued in reply and Sarah Peterson wrote the opening brief for Appellant (wife). James A. Palmer argued for Respondent (husband). Judge Armstrong delivered the opinion of the court.

The Court of Appeals reversed the custody award and remanded with instructions to enter a judgment awarding custody to mother. The trial court's conclusion that factor (f) favored father impermissibly considered mother's lifestyle choices. The court noted that ORS 107.137(3) permits consideration of such lifestyle factors *only if they will or may cause damage to the child.* The trial court did not make any findings that mother's lifestyle choices presented any risk of emotional or physical damage, nor could any such findings be inferred from the record. The Court noted that the trial judge's ruling was based on disapproval of mother's recent choices, particularly becoming pregnant by her boyfriend, and did not reflect an attempt to explain how those choices might damage the children. Mother's choices fell far short of the standard that ORS 107.137(3) imposes before the court may factor parental lifestyle choices into its custody award. Reversed and remanded.

c. Status as a Parent: ORS 109.243.

Madrone and Madrone, 271 Or App 116 (2015) was issued on May 13, 2015.

John C. Howry argued for Appellant (wife) and Thomas A. Bittner argued for Respondent (wife). Judge Hadlock delivered the opinion of the court.

In this case, the court considered how to determine whether an unmarried same-sex couple is similarly situated to a married opposite-sex couple for purposes of ORS 109.243 and, thus, entitled to the privilege granted by that statute. ORS 109.243 creates parentage in the husband of a woman who bears a child conceived by artificial insemination if the husband consented to that insemination. The statute's effect is automatic; it requires no judicial or administrative filings or proceedings. In *Shineovich and Kemp*, 229 Or App 670, *rev den*, 347 Or 365 (2009), the court held that the statute violated Article I, section 20, of the Oregon Constitution because it granted a privilege—parentage by operation of law—on the basis of sexual orientation, because it applied only to married couples and because, when the court decided *Shineovich*, same-sex couples were not permitted to marry in Oregon. To remedy the violation, the court extended the statute "so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id.* at 687. It was undisputed that the parties in *Shineovich* were similarly situated to a married opposite-sex couple, so the court did not consider to *which* same-sex couples the extension of ORS 109.243 applies.

This case raised that question. During the parties'relationship, respondent gave birth to a daughter, R, who was conceived by artificial insemination. Shortly thereafter, the Oregon Family Fairness Act took effect, allowing same-sex couples to register domestic partnerships, which petitioner and respondent then did. They later separated, and petitioner brought this action for dissolution of the domestic partnership. Among other claims, petitioner sought a declaration that she is R's legal parent by operation of ORS 109.243. The trial court granted summary

judgment for petitioner on that claim based on our analysis in *Shineovich*. Respondent appealed. The Court of Appeals concluded that ORS 109.243 applied to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them. The record in this case includes evidence creating a genuine dispute on the latter point. Accordingly, the trial court erred in entering summary judgment. Reversed.

As an interesting side note, the press widely reported this case as a loss to the LGBTQ community. From my perspective, it placed the question of the voluntary nature of artificial insemination in exactly the same posture as heterosexual couples.

2. Child Support.

a. Calculation.

Morgan and Morgan, 269 Or App 156 (2015) was issued on February 11, 2015.

George Kelly argued for Appellant (wife) and Russell Lipetzky argued for Respondent (wife). Judge Flynn delivered the opinion of the court.

Wife appealed a judgment of dissolution, challenging the trial court's division of the parties' property, spousal support award, and determination of child support. The Court of Appeals held that the trial court did not err in its property division or spousal support award. However, the trial court's calculation of the child support obligation failed to take into account its finding with regard to wife's disability at the time of the trial. As a result, the trial court erred as a matter of law in calculating wife's presumed income for child support purposes. Award of child support reversed and remanded for calculation. Otherwise, affirmed.

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State of Oregon v. Nguyen, 268 Or App 789 (2015) was decided on February 4, 2015.

George Kelly argued for Appellant (father) and Denise G. Fjordbeck waived appearance for Respondent (State of Oregon). Judge Hadlock delivered the opinion of the court.

Father, a Georgia chicken farmer, appealed a judgment requiring him to pay child support, contending that the trial court erred in determining the appropriate amount of support. The Court of Appeals concluded that the trial court erred (1) in finding that father's income was $1,500 per month and (2) in relying on factual findings that father lived with his ex-wife and that he had

access to money whenever he wanted. These findings were speculative and were not substantiated by any evidence. Reversed and remanded for redetermination of father's income and reconsideration of whether rebuttal is appropriate and, if so, the amount.

b. Contempt of Court.

Altenhofen and Vanden-Busch, 271 Or App 57 (2015) was issued on May 13, 2015.

Daniel C. Bennett, Senior Public Defender, argued for Appellant (husband) and Cecil A. Reniche-Smith, Senior Assistant Attorney General, argued for Respondent (State of Oregon). Judge Sercombe delivered the opinion of the court.

Defendant appealed the trial court's judgment finding him in contempt for failure to pay child support and imposing 60 months of bench probation. He contended that the trial court erred in finding him in contempt and that the court "plainly erred when it imposed a determinate term of probation on the basis of proceedings that were not conducted as provided in the punitive contempt statute." The Court of Appeals rejected defendant's contention that the trial court erred in holding him in contempt (remedial), but agreed that the court committed plain error in imposing a determinate term of probation (punative).

As an interesting side note, appellant received a $5,000 settlement and a $3,000 gift during this time and the court noted that he had not applied any of that money to his back child support and further noted that even that money would not have cured the problem. Accordingly, the court reversed and remanded the portion of the judgment that imposed a punitive contempt sanction, and otherwise affirmed.

3. Child Name Change – Minor.

Stoecklin and Crippen, 265 Or App 662 (2014) was issued on October 1, 2014.

Philip F. Schuster argued for Appellant (wife) and Mark Johnson Roberts argued for Respondent (husband). Judge Ortega delivered the opinion of the court.

Mother and father were separated but still married when their son was born and mother gave the child her maiden name, Crippen. After entry of a judgment that dissolved their marriage and awarded legal custody to mother, father petitioned the trial court to change the child's last name to Stoecklin. Husband had ultimately been convicted of felony assault. At the FAPA hearing on the assault, he questioned the child's paternity. The trial court concluded that mother had given the child her maiden name out of anger and shock and that changing the child's name would prevent the father from being disincorporated

and disenfranchised from the child. The Court of Appeals held that the trial court's findings and the evidence cited were either irrelevant or lacked any evidentiary support in the way of determining the best interests of the child. Reversed.

4. Spousal Support.

a. Maintenance v. Transitional.

DeAngeles and DeAngeles, 273 Or App 88 (2015) was issued on August 19, 2015.

Helen C. Tompkins argued for Appellant (husband) and George W. Kelly argued for Respondent (wife). Judge Nakamoto delivered the opinion of the court.

Husband and wife were married for 17 years. The trial court awarded husband transitional spousal support of $1,000 per month for two years. The limited period of support was based on evidence that wife's job would only last two more years. On appeal, husband argued that spousal support should have been higher and for a longer duration. The Court of Appeals remanded the case for reconsideration of the spousal support awarded because the trial court made no findings to support an award of transitional support.

There are two items of note in this opinion. First, the trial court likely intended to award *maintenance* spousal support instead of *transitional* spousal support. In its written opinion, the trial court specified that it was awarding maintenance support, but the Judgment that the court signed specified transitional spousal support. This was likely simply an error on the part of the parties who created the Judgment, but it highlights the importance of consistency between the Judgment language and the court's orders.

Second, the Court of Appeals suggested that the trial court on remand review the decision to award support that terminates after two years. The Court of Appeals expressed concern over the duration because it was based on a "speculative contingency." Specifically, that wife would no longer have a job in two years.

Justice v. Crum, 265 Or App 635 (2014) was issued on September 24, 2014.

Lorena Reynolds argued for Appellant (wife) and Neil Crum briefed *pro se*. Judge Schuman delivered the opinion of the court.

Wife appealed a dissolution judgment that awarded her maintenance support of $300 per month for 36 months and no transitional support. In denying wife's request for transitional support, the trial court asserted that to award transitional support, wife must present a "specific plan" so that the court can consider whether

transitional support is appropriate. Wife failed to present a "specific plan" and her request was denied.

On appeal, wife assigned error to the trial court's denial of her request for transitional support. She also argued that the maintenance support award was inadequate. The Court of Appeals rejected her argument regarding the maintenance support award without discussion but went on to find that the trial court failed to apply the statutory transitional support factors, which was an error of law. Remanded for Reconsideration of transitional support.

b. Spousal Support: Insurance.

Mitchell and Mitchell, 271 Or App 800 (2015) was issued on June 17, 2015.

Jeffery Potter argued for Appellant (husband) and Nathan J. Ratliff argued for Respondent (wife). Judge Tookey delivered the opinion of the court.

In *Mitchell and Mitchell*, 271 Or App 800 (2015), the trial court did not provide an explanation for why it chose to require Husband to maintain a $750,000 life insurance policy while he was paying support and then a $250,000 policy for the rest of his life. The Court of Appeals, which reversed the trial court's ruling regarding support amounts as well, requested that the trial court on remand to articulate its decision regarding life insurance.

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Moyer and Moyer, 271 Or App 853 (2015) was issued on June 17, 2015.

Kimberly A. Quach argued for Appellant (husband) and John Moore argued for Respondent (wife). This is a Per Curiam decision (probably written by Presiding Judge Ortega).

Moyer and Moyer is a reminder to the trial courts that details matter. Husband filed a motion to terminate or modify the spousal support he was previously ordered to pay, based on his retirement. The court modified the support award to be stepped down each year and terminate after three years. The life insurance policy requirements, however, were not modified. The Court of Appeals reversed and remanded the trial court's decision to modify husband's life insurance obligation, holding that the obligation "must be commensurate with the ordered spousal support."

c. Spousal Support: Work Life and Retirement.

Logan and Logan, 270 Or App 176 (2015) was issued on April 1, 2015.

Laura Graser argued for Appellant (husband) and Russell Lipetzky argued for Respondent (wife). Judge Duncan delivered the opinion of the court.

Husband appealed a dissolution judgment that, among other provisions, requires him to pay $4,000 a month in maintenance support to wife until 2027—by which time he will be nearly 79 years old. Husband, an oral surgeon, argued that the assumption underlying that award of spousal support – namely, that he would continue to work as a surgeon until age 79 – is not supported by any evidence in the record. He further argued that it is not just and equitable to essentially force him to work until that age to pay the obligation. The Court of Appeals opined that the evidence could be interpreted to read that husband would continue to work indefinitely and that he could modify if his circumstances changed. Affirmed.

5. **Property Division**.

a. Full Disclosure.

Pollock and Pollock, 357 Or 575 (2015) was issued on July 30, 2015.

William Valet argued for Petitioner (wife) and Helen C. Tompkins argued for Respondent (husband). Justice Brewer delivered the opinion of the court.

The issue in this case is whether discovery of the parties' assets must be provided in a marital dissolution action after the parties have entered into a settlement agreement but before the trial court has ruled on a contested motion to enforce the agreement. The Supreme Court concluded that the trial court in this case did not satisfy its duty under ORS 107.105(1)(f)(F) to ensure that the parties had fully disclosed their assets before it decided husband's motion to enforce a mediated agreement and entered a judgment of dissolution based on that decision. Accordingly, they reversed that portion of the decision by the Court of Appeals that upheld the trial court's discovery ruling, vacated the remainder of the Court of Appeals decision, and reversed the judgment of dissolution and remanded the case to the circuit court for further proceedings.

b. Calculation.

Fine and Fine, 272 Or App 307 (2015) was issued on July 15, 2015.

George W. Kelly argued for Appellant (husband) and Amanda R. Benjamin argued for Respondent (wife). Judge Tookey delivered the opinion of the court.

On July 15, 2015, the Court of Appeals published an opinion relating to the division of marital property. In *Fine and* Fine, 272 Or App 307 (2015), several pieces of real estate and one business were divided. The Court of Appeals found error in two facets of the trial court's division of assets.

First, the trial court failed to account for roughly $140,000 in withdrawals wife made from a joint account immediately before the parties separated and

about two years before trial. The trial court found that wife "did not account for her disposition of these funds," but noted that wife had been maintaining the marital residence during the separation. The mortgage, insurance, and taxes for the marital residence during the separation totaled about $49,000, but the remainder of the funds were unaccounted for. Husband asked that he be reimbursed for half of the funds withdrawn, but the trial court denied the request. The Court of Appeals sent the issue of the disposition of those funds back to the trial court, finding that there was no evidence to support the trial court's findings that all of the funds were used to maintain the marital residence.

In its second finding of error, the Court of Appeals examined $165,000 that was paid from a joint account during the marriage toward debts of wife's business, which was awarded to wife in the dissolution. Husband argued that he should be reimbursed for half of the joint funds used to pay the business debt. The trial court denied the request, but the Court of Appeals disagreed, remanding to the trial court for reconsideration of the award of the business to wife without any compensation to husband.

Cirina and Cirina, 271 Or App 161 (2015) was issued on May 13, 2015.

George Kelly argued for Appellant (husband) and Respondent made no appearance. Judge Lagesen delivered the opinion of the court.

In this property/debt division case, husband's father paid off the $130,000 mortgage on the parties' home during the marriage. Husband presented a promissory note to repay his father the $130,000, signed only by husband. The trial court held that husband was responsible for the entire debt, primarily because wife had not signed the promissory note. The Court of Appeals held that the trial court applied the wrong analysis to the debt, explaining that marital debts are presumptively divided evenly between the parties, even without one of the party's signature. The case was remanded to the trial court to determine whether the debt should be considered marital or personal.

Hostetler and Hostetler, 269 Or App 312 (2015) was issued on February 25, 2015.

Richard F. Always argued for Appellant and Russell Lipetzky argued for Respondent. Judge Duncan delivered the opinion of the court.

Husband appealed from a dissolution judgment, assigning error to the trial court's property division and its denial of his request for attorney fees. With respect to the property division, husband argued that the trial court erred by failing to give him one half of the marital asset portion of wife's retirement accounts and by assigning all of the marital debt to him. The Court of Appeals concluded that, contrary to husband's arguments, the trial court engaged in the

process contemplated by ORS 107.105(1)(f) (2008) and properly exercised its discretion in determining a just and proper division of the parties' assets and liabilities. With respect to the attorney fees, husband argued that the trial court erred by failing to explain its denial of his request for attorney fees. The court concluded that, because husband did not request, as required by ORCP 68 (C)(4)(g), that the trial court state its findings of fact and conclusions of law on the record, the court did not err in failing to do so. Affirmed.

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Davis and Davis, 268 Or App 679 (2015) was issued on January 28, 2015.

George W. Kelly argued for Appellant and Guy B. Greco argued for Respondent. Judge Tookey delivered the opinion of the court.

Husband appealed a general judgment of dissolution challenging the trial court's division of the parties' property. Husband argued that the trial court erred in determining that he did not rebut the presumption of equal contribution regarding money that he received from a personal injury settlement. The Court of Appeals held that the trial court's determination that husband failed to rebut the presumption of equal contribution was based on a misapplication of ORS 107.105(1)(f) and relevant case law. Specifically, the appellate court ruled that before deciding whether husband rebutted the presumption of equal contribution, the trial court must determine whether "wife had any part in the action or settlement or claimed any damages for loss of consortium." 268 Or App at 686. Property division vacated and remanded for reconsideration. Otherwise, affirmed.

6. Stipulated Agreements and Judgments.

a. Enforceability of Agreements.

Hoogendam and Hoogendam, 273 Or App 219 (2015) was issued on August 19, 2015.

Margaret H. Leek Leiberan argued for Appellant (wife) and Brent J. Goodfellow argued for Respondent (husband). Judge Tookey delivered the opinion of the court.

Wife appealed a judgment entitled "Stipulated General Judgment of Dissolution of Marriage," and argued that the court erred by entering that judgment because it was not signed or agreed to by both parties and it incorporated documents that included terms not agreed upon by the parties on the record. Wife argued that the trial court erred as a matter of law by entering the judgment, because it was inconsistent with the agreement placed on the record by the parties and their attorneys in court; it was not signed by wife or her attorney; and the court was aware that, in fact, wife did not agree to all of the provisions therein – contesting husband's proposed property division, parenting time, and

child support. Husband argued that the judgment "did not differ substantially from the agreement that was put on the record. The Court of Appeals agreed with wife and, accordingly, reversed and remanded the judgment of the trial court.

Practice tip: Get it in writing and get it signed.

b. Judgments Beyond the Stipulations.

Gram and Gram, 271 Or App 528 (2015) was issued on June 3, 2015.

Clayton Patrick argued for Appellant (husband) and Michael C. Petersen argued for Respondent (wife). Judge Garrett delivered the opinion of the court.

This case involves a dispute over the meaning of a judgment that terminated the parties' marriage and divided the marital assets (the house). Several years after the trial court entered that judgment, wife filed a motion to clarify the judgment on the basis that the judgment was ambiguous because it did not provide a remedy if husband did not sell the house in a timely fashion. After conducting a hearing, the trial court entered a supplemental judgment finding ambiguity. Husband appealed, arguing that the supplemental judgment modified the unambiguous property division in the original judgment, which the trial court lacked the authority to do. Husband also argued that the court erred when it (1) refused to admit certain exhibits offered by husband and (2) made findings that were unsupported by any facts on the record. The Court of Appeals agreed that the supplemental judgment impermissibly modified the property division in the original judgment. That conclusion obviated the need to address husband's other arguments. The supplemental judgment was reversed.